



FACULTY OF LAW

The influence of South Africa's model of devolution in Kenya, Zimbabwe and Zambia: Why and how did the model, concepts and texts migrate?

Thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws in the
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PLAGIARISM DECLARATION

I, Melissa Nyaradzo Sibongile Ziswa, declare that the dissertation entitled ‘The influence of South Africa’s model of devolution in Kenya, Zimbabwe and Zambia: Why and how did the model, concepts and texts migrate?’ is my original work. All the sources used were properly acknowledged by means of references. I certify further that this dissertation has not been submitted for another degree or to any other institution of higher learning.

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Date.....

DEDICATION

This PhD is dedicated to my dearest husband who has been my number one cheerleader. I could not have done this without your unwavering support. I love you my Always and Forever!

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ABSTRACT

The constitutional migration of models, concepts and texts is an old phenomenon. In Africa, developing countries are encouraged to learn from each other, especially since most African countries are in transitional stages of development. That is in line with the project of the African Renaissance, which advocates that Africans themselves seek solutions to African challenges and that any assistance from the outside should be tailored to uphold African ownership. The South African Constitution is revered in Africa and beyond as modern and progressive. It is thus not surprising that a number of its constitutional provisions, for example the Bill of Rights or the devolution model, migrated to other African countries.

The South African devolution model conspicuously migrated to Kenya, Zimbabwe and Zambia, as evidenced by the resemblances in devolution concepts and texts. However, there is little understanding of how such migration took place. Furthermore, the phenomenon of exporting and importing similar devolution models, concepts and texts has not been the subject of extensive research. Comparative federalism traditionally focuses on the analysis of written constitutions (mostly Western) and their similarities and differences, yet pays only limited attention to constitutional migration, transformation processes, and the import and export dynamics of constitutional migration in the African context. This is the void that this study seeks to fill.

The research question in this study examines the influence of South Africa's devolution model in Kenya, Zimbabwe and Zambia, considering why and how the model, concepts and texts migrated. The research consists of a desktop study of both primary and secondary sources, including systematic, qualitative and in-depth interviews with key actors who were involved in the constitution-making processes of South Africa, Kenya, Zimbabwe and Zambia.

The main findings are that the nature, content and intensity of the migrated devolution model varies across the constitutions adopted in the case studies and the constitutional drafts that preceded those constitutions. The homegrown demand for devolution was the main reason for the constitutional migration of the South African model. Additional reasons are the homegrown attractiveness of the model, time constraints, and high levels of knowledge of the South African model among local and external actors. Government officials, organised local government, academics, international and local experts, as well as politicians and constitutional drafters who were directly involved in the constitution-making process, were some of the main players who

influenced the export or import dynamics of the South African devolution model. However, local actors were the key players in transmitting knowledge of the copied or imitated model, concepts, and texts. Thus, the constitutional migration of the South African devolution was internally driven in Kenya, Zimbabwe and Zambia.

Keywords: Constitutions, constitutional migration or borrowing, constitutional texts and concepts, constitution-making or -drafting, constitutional drafters, constitution owners, devolution, decentralisation, federalism

ACRONYMS AND ABBREVIATIONS

AIPPA	Access to Information and Protection of Privacy Act
ANC	African National Congress
AU	African Union
AULA	African Union of Local Authorities
AVF	Afrikaner Volksfront
AZAPO	Azanian People's Organisation
BBC	British Broadcasting Corporation
BPF	Barotseland Patriotic Front
CC	Constitutional Commission
CCM	Chama Cha Mapinduzi
CCP	Chinese Communist Party
CEO	Chief executive officer
CKRC	Constitution of Kenya Review Commission
CODESA	Convention for a Democratic South Africa
CoE	Committee of Experts
COMESA	Common Market for Eastern and Southern Africa
COPAC	Constitutional Parliamentary Selection Committee
CP	Conservative Party
CP	Constitutional principle
CRC	Constitution Recommendation Commission
DRC	Democratic Republic of Congo
ESAP	Economic Structural Adjustment Programme
EPRDF	Ethiopian People's Revolutionary Democratic Front
EU	European Union
FES	Friedrich Ebert Stiftung
FFC	Financial and Fiscal Commission

FRELIMO	Frente de Libertação de Moçambique
GNU	Government of National Unity
GPA	Global Political Agreement
GPT	Graduated Personal Tax
IFP	Inkatha Freedom Party
IPPG	Inter-Parties Parliamentary Group
IMF	International Monetary Fund
IULA	International Union of Local Authorities
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KZN	KwaZulu-Natal
LGAZ	Local Government Association of Zambia
LGNF	Local Government Negotiating Forum
MDC-M	Movement for Democratic Change – Mutambara
MDC-N	Movement for Democratic Change – Ncube
MDC-T	Movement for Democratic Change – Tsvangirai
MPNP	Multi-Party Negotiation Process
MMD	Movement for Multi-Party Democracy
NANGO	National Association of Non-Governmental Organisations
NCA	National Constitutional Assembly
NCC	National Constitutional Conference
NCOP	National Council of Provinces
NGOs	Non-governmental organisations
NP	National Party
NSRs	National Statistics Reports
OAU	Organisation of African Union
PAC	Pan Africanist Congress of Azania

PCR	People's Republic of China
PF	Patriotic Front
PSC	Parliamentary Select Committee
SACP	South African Communist Party
SADC	South African Development Community
SALGA	South African Local Government Association
TANU	Tanganyika African National Union
TCDZC	Technical Committee on Drafting the Zambian Constitution
UCCLA	Uniao dos Ciudades y Capitaes Lusofono Africana
UCLGA	United Cities and Local Governments of Africa
UCAZ	Urban Councils of Zimbabwe
UDF	United Democratic Front
UN	United Nations
UNDP	United National Development Programme
UNICEF	United Nations Children's Fund
UNIP	United National Independence Party
UP	United Party
UPP	United Progressive Party
USA	United States of America
USAID	United States Agency for International Development
UVA	Union des Villes Africaines
WPE	Workers' Party of Ethiopia
WTO	World Trade Organisation
ZANC	Zambian African National Congress
ZANU-PF	Zimbabwe African National Union – Patriotic Front
ZCID	Zambian Centre for Inter-party Dialogue
ZCTU	Zimbabwe Congress of Trade Unions

ZEC

Zimbabwe Electoral Commission

ZLHR

Zimbabwe Lawyers for Human Rights

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Chapter 1:

Introduction

1.1 Problem statement

The constitutional migration of models, concepts and texts is an old phenomenon, dating back to 19th century Europe.¹ Gunter Frankenberg notes that

[t]he originality of the Belgian Constitution (1831), which is considered one of the lead[ing] constitutions of the 19th century influencing the Greek, Italian, Prussian and other Constitutions, [did] not withstand closer textual scrutiny. 40% of its provisions can be traced to the Dutch Constitution (1815), 35% to the French Charte Constitutionnelle (1814/1830), and 10% to the revolutionary French Constitution (1791) plus English constitutional law, leaving an ‘original’ balance of roughly 15%.²

Another example is the constitutional migration of rights to religious freedom from the 1937 Constitution of Ireland and the 1950 Constitution of India to the 1956 Constitution of Pakistan.³ Inspired by the constitutions of Ireland and India, the Constitution of Pakistan provides that each citizen is free to ‘profess, practice, and propagate his religion’ and each religious ‘denomination’ is free to ‘manage its own affairs’.⁴ Similarly, many constitutional provisions that form part of modern constitutions appear to circulate like marketable goods among the framers of constitutions.⁵ African countries are no exception to the importation of constitutional models, concepts and texts. For example, the 1996 Constitution of South Africa (South African Constitution) was subject to external influences.⁶

¹ Basnet G ‘A Critical Approach to the Study of Constitutional Migration’ (2008) *Cambridge Student Law Review* 40. See Osiatynski W ‘Paradoxes of Constitutional Borrowing’ (2003) 1 *International Journal of Constitutional Law* 244; Blitt R ‘The Bottom up Journey of “Defamation of Religion” from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas’ (2011) 56 *Special Issue Human Rights: New Possibilities/New Problems* 122.

² Frankenberg G ‘Constitutional Transfer: The IKEA Theory Revisited’ (2010) 8 *International Journal of Constitutional Law* 571.

³ Nelson M J ‘Constitutional Migration and the Meaning of Religious Freedom: From Ireland and India to the Islamic Republic of Pakistan’ (2020) 79 *The Journal of Asian Studies* 131.

⁴ Nelson (2020) 131.

⁵ Frankenberg (2010) 563. See Schauer F ‘On the Migration of Constitutional Ideas’ (2005) 37 *Connecticut Law Review* 909.

⁶ Constitution of the Republic of South Africa, 1996 (hereafter Constitution of South Africa). See also Steytler N ‘Theme Committee 2: Getting the Basic Governance Structures Right’ in *Celebrating 20 Years of the Constitution* (2018) 2.

Africans have been encouraged to learn from each other, and especially given that most African countries are in transitional stages of development, this has facilitated constitutional migration.⁷ This is in line with the project of the African Renaissance, which advocates that Africans themselves should seek solutions to African challenges and that any assistance from the outside should be tailored to uphold African ownership.⁸ The South African Constitution is revered in Africa and beyond as modern and progressive.⁹ It is no wonder that a number of its constitutional provisions have migrated to other African countries. For instance, the Tunisian¹⁰ and Zimbabwean bills of rights¹¹ appear to have been influenced by the South African Constitution.

In addition, the 1994 Interim Constitution of South Africa and South Africa's 1996 Constitution heralded new notions of devolution which included a strong and autonomous local government level of government.¹² One year after the Interim Constitution came into force, the Zambian Mwanakatwe Commission released its recommendations for a new constitution, and the report showed evidence of influence by the South African devolution model contained in the Interim Constitution.¹³ Similarly, when the 1996 Constitution was adopted, constitutional drafts in Kenya, Zimbabwe and Zambia in the late 1990s and early 2000s started showing obvious resemblances to the South African devolution model. The resemblances in devolution concepts and texts found their way into the constitutions that were finally adopted, namely the 2010 Kenyan Constitution,¹⁴ 2013 Zimbabwean Constitution¹⁵ and the 2016 Zambian Constitution.¹⁶ The resemblances are more significant in Kenya, Zimbabwe and Zambia than any other African constitutions drafted in that period. Therefore, the similarities in devolution

⁷ Okeke C 'African Law in Comparative Law: Does Comparativism Have Worth?' (2011) 16 *Roger Williams University Law Review* 13.

⁸ Preamble Constitutive Act of the African Union, 2000. See Preamble African Charter on Democracy, Elections and Governance, 2007; Preamble African Charter on the Values and Principles of Decentralisation, Local Governance and Local development, 2014; Moolakkattu J S 'The Role of the African Union in Continental Peace and Security Governance' (2010) 66(2) *India Quarterly* 152.

⁹ Roux T 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?' (2009) 20(2) *Stellenbosch Law Review* 267. See also Ghai Y 'South African and Kenyan Systems of devolution: A Comparison' in Steytler N & Ghai Y (Eds) *Kenyan-South African: Dialogue on Devolution* (2015) 10.

¹⁰ Constitution of Tunisia, 2014.

¹¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (hereafter Constitution of Zimbabwe).

¹² Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution came into force on 27 April 1994.

¹³ Mwanakatwe Commission Report, 1995 492.

¹⁴ Constitution of Kenya, 2010 (hereafter Constitution of Kenya).

¹⁵ Constitution of Zimbabwe.

¹⁶ Constitution of Zambia (Amendment) Act, 2016 (hereafter Constitution of Zambia).

concepts and texts suggest that the South African Constitution played an influential role in the drafting of the constitutions of Kenya, Zimbabwe, and Zambia.

There is little understanding of how such migration of models, concepts and texts migrated from South Africa to the three countries. Furthermore, the phenomenon of exporting and importing devolution models has not been the subject of extensive research. Comparative federalism traditionally focuses on the analysis of written constitutions (mostly Western) and their similarities and differences, while paying only limited attention to constitutional migration, transformation processes and the dynamics of constitutional migration in the African context.¹⁷

1.2 Research question

Why and how do constitutional models, concepts and text migrate? A question focuses particularly on why and how the South African devolution model migrated to Kenya, Zimbabwe and Zambia?

The study thus addresses the following questions:

- 1) What is the nature, content and intensity of the migrated devolution model and provisions?
- 2) Why and how did the migration of the devolution model and provisions take place?
- 3) Can a general theory be adduced from the constitutional migration of the South African model and provisions?

1.3 Argument

As regards the first question about the nature, content and intensity of the migrated devolution model and provisions, it will be shown that the migration varied considerably in the Kenyan, Zimbabwean and Zambian constitutions. Such variations were also evident in the constitution-making processes. In the case of Kenya, the devolution model in the earlier constitutional drafts, namely the Constitution of Kenya Review Commission (CKRC) Draft of 2002 and the Bomas Draft of 2004, bore significant resemblances to the South African model. However, the Proposed New Constitution Draft of 2005 (popularly known as Wako Draft) moved away from

¹⁷ Okeke (2011) 1.

the South African devolution model in that it centralised a number of powers and functions. The Committee of Experts (CoE) Harmonised Drafts of 2009 and 2010 then reintroduced a devolution model that showed significant influence by the South African Constitution. The devolution model reintroduced in the CoE Drafts carried through to the 2010 Constitution which was adopted.

In Zimbabwe, the nature, content and intensity of the migrated devolution model and provisions was strongest in the 2012 February and April Constitutional Parliamentary Selection Committee (COPAC) Drafts. However, the devolution model was watered down with each revised constitutional draft that came afterwards. The devolution model which is entrenched in the final constitution that Zimbabwe adopted in 2013 is a shell of the model that was proposed in the 2012 COPAC Drafts. In the Zambian case, the nature, content and intensity of the migrated devolution model and provisions fluctuated depending on the commission responsible for the constitution-making process.

As to the question of why the South African model, concepts and texts on devolution migrated to Kenya, Zimbabwe and Zambia, it is argued that the migration occurred for four reasons. First, the circumstances, such as the need to address regional disparities and financial inequalities, that motivated South Africa to entrench its devolution model were also present in Kenya, Zimbabwe and Zambia. Secondly, good knowledge of the South African Constitution drew the drafters to the South African devolution model. Thirdly, the drafters in Kenya, Zambia and Zimbabwe observed how well the South African devolution model was working in South Africa and the commendable results it produced. The drafters in turn modelled their devolution models after the South African model with the hope that their respective countries would yield the benefits of it. Lastly, time constraints contributed to the South African devolution model's migration to the case-study countries. The drafters were given limited timeframes in which to formulate devolution provisions; therefore, they resorted to importing the South African provisions instead.

To answer the question of how the migration of the devolution model and its provisions took place, the findings of this study are that the migration of the South African devolution model, concepts and provisions to Kenya, Zimbabwe and Zambia was driven largely by local actors in countries that were undergoing constitution-making processes. Among other factors, the importing countries gained knowledge of the South African model through various local actors

who underwent legal training in South Africa.¹⁸ It is argued that these scholars contributed to spreading the South African devolution model to their home countries after the completion of their studies in South Africa.

With regard to the third question, understanding these migration experiences contributes to a broader understanding of the migration of constitutional structures, values and principles. Merely looking at the final drafts does not uncover the processes and dynamics involved in the metamorphosis of the devolution model, concepts and provisions. The migration of models, concepts and texts is a complex process which flows with the contestation of devolution during the constitution making processes. This study will demonstrate via the case studies that the model and provisions with which the drafters began were often not what ended up in the final constitutions that were adopted.

1.4 Literature review

1.4.1 International literature

As noted above, the migration of constitutional provisions has become the practice in constitution-making processes across the world.¹⁹ Whether it has taken the form of acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas has been useful in stimulating intellectual activity.²⁰ The dissemination of knowledge has also been facilitated by interconnectedness and globalisation.²¹ This section discusses a few theories that scholars have proposed to explain why constitutional texts migrate from one country to the next. The section discusses constitutional migration in general without looking specifically at the migration of devolution concepts or provisions.

Frederick Schauer argues that constitutional concepts and texts migrate thanks to the influence of the conventions, seminars, workshops, conferences and study tours that some countries organise during constitution-making processes to educate actors and citizens on these

¹⁸ 'Address by the Minister of Home Affairs, Mr. Malusi Gigaba MP, at the International Students Conference in Cape Town' available at <http://www.gov.za/speeches/international-students-conferenc-27-aug-2016-0000> (accessed 11 July 2017). See MacGregor K 'Major Survey of International Students in South Africa' available at <http://www.universityworldnews.com/article.php?story=20140905134914811> (accessed 12 July 2017).

¹⁹ Frankenberg (2010) 567.

²⁰ Frankenberg (2010) 570.

²¹ Okeke (2011) 49.

processes.²² He maintains that exercises such as these have the capacity to sway participants into borrowing constitutional provisions from other countries, especially if those constitution-making processes are funded by donors or taught by experts who are pushing their own agendas.²³ Despite ulterior motives, the recipients of the information may gain ideas that later spark a degree of transnational harmonisation, thus furthering constitutional migration.²⁴

Schauer's theory aligns with Wiktor Osiatynski's argument that the role of foreign experts is one of the reasons for the migration of constitutional models, concepts and texts. Osiatynski attributes the Czechoslovakian Bill of Rights and freedom rights that were adopted in 1990 partly to the role of 25 experts from the United States of America (USA), Austria, Canada, France and Britain.²⁵ This group was invited by the Czechoslovakian people to share their expertise in human and freedom rights in Eastern Europe.²⁶ These foreign experts in turn introduced the concepts which they deemed crucial for the Czechoslovakian Constitution.

Gyan Basnet proposes that globalisation is one of the reasons for constitutional migration.²⁷ Globalisation is 'one of the defining terms of contemporary social consciousness' and has reinforced a similarity of expectation among citizens of countries around the world regardless of differences in culture, religion and so on.²⁸ This means that when there is a constitution-making process, citizens and local constitution drafters are drawn to the constitutional principles of another country, as they have learnt about them in the media, literature, or internet. People's everyday consciousness and identities are interconnected with other cultures, such that they are predisposed to wanting the same rights as those of people in other countries.²⁹

Basnet also opines that the migration of constitutional concepts could be due to their imposition by colonial powers. For instance, when former British colonies such as Ghana and Nigeria gained independence, they adopted the Westminster model. Similarly, the independence

²² Schauer (2005) 915.

²³ Schauer (2005) 915.

²⁴ Schauer (2005) 915.

²⁵ Osiatynski (2003) 256.

²⁶ Osiatynski (2003) 256.

²⁷ Basnet (2008) 46.

²⁸ Basnet (2008) 46.

²⁹ Murkens J 'Neither Parochial Nor Cosmopolitan: Appraising the Migration of Constitutional Ideas' (2008) 71(2) *The Modern Law review* 307.

constitution of the Ivory Coast, a former French colony, was modelled on the French form of government, particularly that of France's Fifth Republic.³⁰

Vlad Perju suggests that normative universalist motivations are some of the reasons behind the migration of liberal constitutional models and concepts such as the separation of powers, checks and balances, judicial independence, and Bills of Rights.³¹ Perju attributes the similarity of post-Communist Eastern Europe constitutions to universalist motivations.³² Almost all of the latter entrenched the recognition of a universal set of principles for organising political power in such a way that it protects individual freedoms.³³

Schauer observes that while there is always a chance that, once a constitution is adopted, it will be difficult to identify where the migrated models, concepts or texts originated from, one would probably still be able to identify the original source, given that migrated constitutional concepts tend to leave some sort of footprint.³⁴ Schauer uses the analogy of a buyer who purchases a Ford vehicle from a Ford dealer.³⁵ Even though the purchaser could modify or customise the vehicle, the car in which he or she drives away from the Ford dealership is far more a product of the Ford designers than of his or her own choices. The argument therefore is that, no matter how countries 'adapt' constitutional concepts, it is almost impossible for the drafters to pass off the migrated model or concept as original. Robert Blitt argues that in such a case, the importing country is 'adapting' constitutional concepts to fit its needs as opposed to merely 'adopting' concepts as is. In matters of migration, 'adapting' constitutional provisions is preferable to 'adoption'.³⁶

It is important to highlight that not all 'classic studies' on the topic of constitutional migration are of relevance to this literature review. For example, Michel Rosenfeld's article, *Constitutional Migration and the Bounds of Comparative Analysis*³⁷ does not discuss constitutional migration in the context of this research. The article refers to constitutional migration in as far as how courts may consider foreign law, particularly in constitutional

³⁰ Basnet (2008) 45.

³¹ Perju V 'Constitutional Transplants, Borrowing, and Migrations' in Rosenfeld M & Sajo A (Eds) *Oxford Handbook on Comparative Constitutional Law* (2012) 31.

³² Perju (2012) 32.

³³ Perju (2012) 32.

³⁴ Schauer (2005) 910.

³⁵ Schauer (2005) 910.

³⁶ Blitt (2011) 125.

³⁷ Rosenfeld M 'Constitutional Migration and the Bounds of Comparative Analysis' (2001) 58 *New York University Annual Survey of American Law* 67 -83.

interpretation and in the enforcement of foreign judgments. Another example is Sujit Choudry's book titled *The Migration of Constitutional Ideas*. The book analyses for example, how domestic legislation migrates from one country to the next.³⁸ Therefore, such academic material is not explored in this study.

1.4.2 Literature in Africa

There is little literature on constitutional migration in Africa, particularly on how the migration of devolution models and provisions takes place. There is also scant literature that seeks to explain how these experiences contribute to a broader understanding of the migration of constitutional structures, values and principles. This dearth in the literature highlights the importance of this study. There is, however, literature that makes some comparisons of the South African devolution model and the Kenyan, Zimbabwean and Zambian devolution models. It is key to emphasise nonetheless that in all such literature, no single study has ever comprehensively compared all four devolution models. This provides an opportunity for this thesis to provide an original work that makes a distinct contribution to knowledge and insight into the subject under investigation.

For instance, Yash Pal Ghai states that the objective of the book, *Kenyan-South Africa: Dialogue on Devolution*, is to compare the Kenyan and South African devolution models.³⁹ While the authors of the book do indeed compare the two models, they do not discuss how the South African devolution model migrated to Kenya or the dynamics surrounding the migration. Likewise, John Mutakha Kangu draws some comparisons between the Kenyan model and the South African one. He argues that 'since there are significant textual similarities between the Kenyan and South African constitutional provisions on devolution, comparative South African jurisprudence and scholarly commentaries provide instructive lessons'.⁴⁰ However, Kangu does not examine the dynamics of the way in which constitutional provisions on devolution moved to Kenya from South Africa.

³⁸ Roach K 'The Post-9/11 Migration of Britain's Terrorism Act 2000' in Choudhry S (Ed) *The Migration of Constitutional Ideas* (2006) 374 – 402.

³⁹ Ghai Y 'South African and Kenyan Systems of Devolution: A Comparison' in Steytler N & Ghai Y (Eds) *Kenyan-South African: Dialogue on Devolution* (2015) 1.

⁴⁰ Kangu J M *Constitutional Law of Kenya on Devolution* (2015) 6.

Tinashe Chigwata and Jaap De Visser refer to the resemblances between the South African and Zimbabwean devolution model.⁴¹ For instance, they compare the measures and instruments that the South African and Zimbabwean constitutions have in place to safeguard the existence of local governments.⁴² In addition to the fact that Chigwata and De Visser's research is only a comparison of two instead of the four devolution models analysed in this study, the authors do not discuss how the devolution model migrated from the South African Constitution.

There is also literature that analyses the resemblances between the South African and Zambian devolution models. Tembo Mukapa compares the powers and functions in the Zambian devolution model to those in the South African model.⁴³ Mukapa merely looks at the similarities of the powers and functions, while providing no in-depth analysis of how the migration actually occurred. Frank Kunda makes subtle comparisons of some of the devolution provisions in the South African, Kenyan and Zambian constitutions.⁴⁴ In both of these scholarly materials, the authors' objectives were not to conduct a comparative study. For instance, Kunda mentions that the Zambian Constitution does not provide for an independent body for the demarcation of municipal boundaries even while the South African and Kenyan devolution models do provide for it.⁴⁵ Kunda, like the other scholars noted above, does not go on to analyse the factors that explain why such devolution provisions migrated to Kenya and not to Zambia.

International literature mainly focuses on constitutional migration in the Western world; this research, by contrast, focuses on the constitutional migration of devolution models, concepts and texts in South Africa, Kenya, Zimbabwe, and Zambia – since the adoption of the South African, Kenyan, Zimbabwean and Zambian constitutions, no literature has been produced on the subject. In a world where international and national actors increasingly insist on the deep and complex interdependency of development and good governance and on the necessity of coherent approaches to international cooperation,⁴⁶ this thesis adds to the existing literature by providing a better understanding of import-and-export dynamics by investigating constitution-

⁴¹ Chigwata T C & De Visser J 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' (2018) 10(1) *Hague Journal on the Rule of Law* 158.

⁴² Chigwata & De Visser (2018) 158.

⁴³ Mukapa T 'Local Government Powers and Functions' in Chigwata T C, Steytler N, De Visser J, Kunda F (eds) *Local Government Reform in Zambia: The 2016 Constitution's Framework for Devolution* (2020) 68.

⁴⁴ Kunda F 'Local Democracy' in Chigwata T C, Steytler N, De Visser J, Kunda F (eds) *Local Government Reform in Zambia: The 2016 Constitution's Framework for Devolution* (2020) 45.

⁴⁵ Kunda (2020) 45.

⁴⁶ Fuglister K 'Where Does Learning Take Place? The Role of Intergovernmental Cooperation in Policy Diffusion' (2012) 51 *European Journal of Political Research* 317.

making policies and processes. Therefore, this study is significant because it contributes to a broader understanding of the migration of constitutional structures, values and principles.

1.5 Outline of chapters

This thesis is divided into seven chapters. Chapter 1 is an introductory chapter presenting the problem statement, argument, literature review, research methodology to be employed, and the definitions of key concepts. Chapters 2–6 are the substantive chapters. Chapter 2 is a general and global discussion of theories surrounding the dynamics of constitutional migration. Chapter 3 is a case study of the South African devolution model. Among other things, it discusses the main elements of the South African devolution model, in particular those concepts and texts that later became popular outside the country, as evidenced by their migration to Kenya, Zimbabwe and Zambia.

Literature and international practice indicate that multilevel or devolved systems of government have a number of core elements. These include the recognition of different levels of government, powers and functions of subnational governments, provisions resolving conflict of laws, subnational revenue-generating powers, sharing of revenue between levels of government, role of financial commissions, intergovernmental relations and intergovernmental supervision.⁴⁷ Chapters 3, 4, 5 and 6 will be structured in accordance with those core elements of a devolved system.

Chapters 4, 5 and 6 are case studies of Kenya, Zimbabwe and Zambia, respectively. The chapters are arranged chronologically in the order in which the constitutions were adopted. These chapters provide detailed discussions of the migration of the devolution model, concepts and texts. The substantive chapters, particularly chapters 4, 5 and 6, among other things, investigate the questions posed in section 1.2 above. In chapters 4, 5 and 6, the thesis focuses on those aspects of the texts of the Kenyan, Zimbabwean and Zambian constitutions that bear close resemblance to the South African constitutional text. These resemblances can be extreme (that is, verbatim reproductions) or otherwise.

Based on an understanding of the complex import or export dynamics at work in the case studies, Chapter 7 draws conclusions and explains why and how the South African devolution

⁴⁷ Steytler N & De Visser J *Local Government Law of South Africa* (2007) 1–10. See Litvack, Ahmed & Bird (1998).

model migrated to Kenya, Zimbabwe and Zambia. It also explains ideas around extrapolating a larger theory.

1.6 Research methodology

The aim of this study is to gain a better understanding of the dynamics at work in the adoption or adaptation of constitutional devolution models, concepts and texts. To this end, the research consists mostly of a desktop study of both primary and secondary sources. With regard to primary sources, legal research typically focuses on binding legal texts and their implementation through the courts, but this present study also investigates and analyses constitution-making policies and practices. The research is hence based on a thorough examination of strategy and policy papers, protocols, reports and evaluations, with the study extracting information from ‘soft-law’ and ‘non-law’ sources as well as other sources and actors associated with the dissemination of power-sharing models. Furthermore, the study consults country-specific and policy-specific planning documents and activity reports. The aim is to gather and analyse policy statements and information on policy developments, and policy trends on the role of devolution in building democracy, sustaining peace or fostering development. Included in the primary sources are judgments, constitutional drafts, constitutions (that were adopted) and legislation. The study also makes use of secondary data collected from sources such as journals, newspaper articles, and internet material.

The desktop analysis alone provides only limited insight into the migration of devolution models, concepts and texts. As such, the desktop analysis is complemented by qualitative information garnered through in-depth interviews with key actors who were involved in the constitution-making processes of Kenya, Zimbabwe and Zambia. The study did not conduct any interviews with key actors from South Africa because the scope of the research is not an in-depth analysis of where the South African devolution model migrated from, instead the focus is on where the South African model migrated to. The interviews were semi-structured to allow the researcher to define the parameters of the interview. This ensures the meaningful comparison of the somewhat similar in nature constitution making processes across the case studies, while leaving room for the interviewees to adequately express the individualistic nature of the processes.

The interview transcripts form part of the primary data, and are crucial for this study. The interviewees are, among others, government officials, representatives of organised local

government, academics, international and local experts, politicians, constitutional drafters, and other key informants who were directly involved in the export or import dynamics in question. The author obtained clearance from the Ethical Clearance Committee of the University of the Western Cape before interviews were conducted. Some interviews were conducted in person; others were conducted on online platforms due to the impact of the Covid-19 pandemic. All the parties interviewed agreed to have their names and the roles they played in the constitution-making processes noted in this thesis.

At the end of the Cold War, there was a wave of democratic change and constitutional renewal in Africa. To promote democracy, many African countries decentralised power, marking a departure from the heavily centralised systems of government that were inherited from the colonial era.⁴⁸ However, very few countries opted for federal arrangements and the recognition of local government in their constitutions. South Africa was a prominent example, and its constitutional model (including its textual expression) of devolution was most notable in the Kenyan, Zimbabwean and Zambian constitutions. Therefore, the Kenyan, Zimbabwean and Zambian constitutional processes were selected as case studies.⁴⁹

1.7 Terminology

Given that devolution, federalism, decentralisation and deconcentration are all ways in which states are organised vertically, there can easily be certain overlaps and misunderstandings in terminology. Thus, it is important to stipulate how this study defines these terms. This section also provides working definitions of concepts such as migration, exportation and importation; constitution owners vis-à-vis constitution drafters; and constitutional models, concepts and texts. Defining these concepts is necessary because this thesis uses them differently to how they are usually employed in other scholarships. Some of the concepts are discussed together as they intersect in various ways, which makes it difficult to explain the one without the other.

⁴⁸ Fombad C M 'Introduction to Decentralisation and Constitutionalism in Africa' in Fombad C M & Steytler N (eds) to *Decentralization and Constitutionalism in Africa* (2019) 1.

⁴⁹ Chigwata T Provincial and Local Government Reform in Zimbabwe. An Analysis of the Law, Policy and Practice (2018) 18. Ghai Y P 'Devolution in Kenya: Background and Objectives' in Steytler N & Ghai YP (eds) *Kenyan-South African Dialogue on Devolution* (2015) 74. Kunda F (2020) 45.

1.7.1 Devolution

While there is no set definition of the term ‘devolution’, it refers to a way of organising governance, which is often organised differently.⁵⁰ For instance, devolution in the United Kingdom refers to the statutory process of transferring power from the centre (Westminster) to the nations and regions of the United Kingdom.⁵¹ Therefore, the term ‘devolution’ in the United Kingdom refers to the relationship between the United Kingdom government and the regions of Northern Ireland, Scotland and Wales.⁵² Similarly, Kangu defines devolution as the constitutional assignment of powers and functions (including revenue-raising and sharing powers), and the representation and participation of subnational levels of government in the national legislature.⁵³ Aliku Asha et al. go a step further to note that, with devolution, the transfer of power to subnational bodies should only be to locally elected representatives.⁵⁴

In this study, devolution refers to the constitutional recognition of subnational levels of government as well as the constitutional assignment of powers and functions to the subnational units of government. It is important to highlight that while the South African Constitution refers to its constitutional assignment of powers and functions to provinces and local government as ‘decentralisation’ rather than ‘devolution’, this study refers to the South African model as one of devolution because the transfer of power to spheres of government is constitutionally entrenched.

1.7.2 Federalism

Nico Steytler describes federalism as the fullest form of apportioning power according to the notion of vertical division of powers within a state.⁵⁵ This form has been used in the past to thwart extreme centralised rule.⁵⁶ With regard to federalism, Chigwata notes that

⁵⁰ Kangu (2015) 9.

⁵¹ Torrance D ‘Introduction to Devolution in the United Kingdom: An Introduction to the Devolution Settlements in Scotland, Wales, Northern Ireland, London and parts of England’ 25 January 2022 available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8599/> (accessed 8 April 2022).

⁵² Ghai (2015) 6.

⁵³ Kangu (2015) 10.

⁵⁴ Asha A, Belete A & Moyo T ‘Analysing Decentralisation and Local Government’s Role’ (2013) 2.2 *The Journal of African & Asian Local Government Studies* 96.

⁵⁵ Steytler N ‘Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa’ (2003) 33 *Publius: The Journal of Federalism* 59.

⁵⁶ Steytler N & Mettler J ‘Federal Arrangements as a Peacemaking Device During South Africa’s Transition to Democracy’ (2001) 31 *Publius: The Journal of Federalism* 93.

[i]n a federal state, government authority resides not at a single ‘centre’ but at the ‘centre’ and the ‘circumference’. The government authority over some matters resides at the centre and over others at the circumference. Unlike in a decentralised system of government, the federal units stand equal to the federal government and enjoy exclusive governmental power over certain specified matters.⁵⁷

According to Kangu, federalism is a system of organising governance structures that combines self-governance at the local level with shared governance at the central or national level.⁵⁸ A key feature of federalism is the granting of ‘partial autonomy to the geographically defined subdivisions of the polity’,⁵⁹ with the result that the system of governance would ‘lie somewhere between a fully unitary state and an alliance of separate states working in a kind of a confederation’.⁶⁰ Ghai identifies the following as key features of federalism: the constitutional recognition of different levels of government; the separation of different levels of government; measures safeguarding the interests of the subnational units; jurisdiction of courts to decide intergovernmental disputes; division of powers and functions; and the division of revenue between different levels of government.⁶¹

In regard to the different key features associated with federalism, scholars such as John Kincaid argue that there are no identical federal systems: different countries adopt different federal models depending on their particular needs and circumstances.⁶² Ronald Watts goes on to point out that there are hybrid federal models that draw on both centralised as well as non-centralised systems.⁶³ This study concurs with Ghai’s interpretation of a federal system of government; therefore, Ghai’s definition is the working definition for this research.

1.7.3 Decentralisation

Jennie Litvack et al. explain decentralisation as a process that encompasses several institutional restructurings. Litvack et al. remark that several variants may operate at the same time within

⁵⁷ Chigwata T Provincial and Local Government Reform in Zimbabwe. An analysis of the Law, Policy and Practice (2018) 13.

⁵⁸ Kangu (2015) 10.

⁵⁹ Feely M M & Rubin E *Federalism: Political Identity and Tragic Compromise* (2008) 22.

⁶⁰ Kangu (2015) 11.

⁶¹ Ghai (2015) 7.

⁶² Kincaid J ‘Editor’s Introduction: Federalism as a Model of Governance’ in Kincaid J (ed) *Federalism* Vol 1 (2011) xxi.

⁶³ Watts R L ‘The Federal Idea and its Contemporary Relevance’ in Courchene T J, Allan J, Leuprecht C, Verrelli N (eds) *The Federal Idea: Essays in Honor of Ronald L Watts* (2011) 16.

a country, and even within a sector.⁶⁴ Kangu defines decentralisation as the ‘transfer of powers by a central government to subnational units which exercise those received powers under the control and supervision of the central government that is transferring powers to them’.⁶⁵ Often decentralisation is used to refer to the statutory transfer of power from the central government to government bodies such as regions, provinces, states or local levels.⁶⁶ What this entails is that the subnational units of government are subordinate to the central government and that, without any constitutional protection, the lower levels of government could easily be abolished and see their powers and functions recentralised or readjusted by the national government.⁶⁷ For the purposes of this study, ‘decentralisation’ refers to the statutory transfer of powers and functions to the lower levels of government by the central government.

1.7.4 Deconcentration

According to De Visser, deconcentration refers to ‘the distribution of powers and responsibilities among different units or levels within a central government’.⁶⁸ With deconcentration, the distribution of powers is achieved in a manner that ensures that the subnational units are accountable to the central government.⁶⁹ Thomas Stauffer and Nicole Topperwien opine that deconcentration is a system where the lower levels of government are merely administrative units that lack both self-rule and shared rule.⁷⁰ The assignment of the responsibilities occurs within a hierarchy in which the central government is superior and can direct, instruct and supervise the subnational units of government, which are the subordinates.⁷¹ The author agrees with the definition provided by the scholars discussed in this section; as such, ‘deconcentration’ in this thesis is understood in concurrence with the definitions above.

In the light of the definitions discussed above, ‘devolution’ is the preferred term to explain the system of governance as it migrated from the South African Constitution to the Kenyan, Zimbabwean and Zambian constitutions. This is the author’s position because, to varying

⁶⁴ Litvack, Ahmed & Bird (1998) 7.

⁶⁵ Kangu (2015) 12.

⁶⁶ Omari A, Kaburi S & Sewe T ‘Change Dilemma: A Case Study of Structural Adjustment Through Devolution in Kenya’ (2013) *Scientific Conference Proceedings* 492.

⁶⁷ Kangu (2015) 12.

⁶⁸ De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 14.

⁶⁹ Kangu (2015) 14.

⁷⁰ Stauffer T & Topperwien N ‘Balancing Self-rule and Shared Rule’ in Fleiner L R B & Feiner T (eds) *Federalism and Multiethnic States: The Case of Switzerland* 2ed (2003) 43.

⁷¹ Kangu (2015) 14.

degrees, the South African, Kenyan, Zimbabwean and Zambian constitutions all constitutionally protect the assignment of powers and functions to lower levels of government.

1.7.5 Migration, exportation and importation

The *Oxford English Dictionary* defines ‘migration’ as the movement of a person or people from one country, locality, place of residence, to settle elsewhere⁷² Basnet defines ‘constitutional migration’ as the process by which constitutional concepts spread and exert influence internationally.⁷³ Neil Walker’s definition of constitutional migration is more detailed. He states that constitutional migration

can refer to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or the receiver, accepted, rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or with some more abstract or intangible constitutional sensibility or ethos.⁷⁴

This thesis adopts Basnet’s definition as the working definition of constitutional migration. For the purpose of this research, migration is used to refer to the movement of the devolution constitutional model, concepts and texts from one country to the next. In the literature, the term ‘constitutional migration’ is used interchangeably with terms such as transplantation, transmitting, borrowing, exporting, importing, cross-fertilisation and constitutional copying.⁷⁵ However, the preferred terms in this thesis are ‘constitutional migration’, ‘transplantation’, ‘borrowing’, ‘exporting’ and ‘importing’ because they refer to a process of movement, and this thesis examines the movement of devolution models, concepts and texts. The other terms do not adequately convey the idea of the movement of the devolution model, concepts and provisions.

In the literature, the main actors in the migration of constitutional models, concepts or texts can be divided into two categories: the messengers and the recipients. Osiatynski refers to messengers as experts such as academics, diplomats, lawyers, personnel from international organisations, or human rights activists.⁷⁶ The role of the experts is to bring proposals and

⁷² ‘Migration’ available at https://www.oed.com/dictionary/migration_n?tl=true (accessed 30 October 2024).

⁷³ Basnet (2008) 40.

⁷⁴ Walker N ‘The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU’ (2005) at <http://www.iue.it/PUB/lawo5-04.pdf> (accessed 5 April 2022) 317.

⁷⁵ Murkens (2008) 303. See Basnet (2008) 41. See Blitt (2011) 122.

⁷⁶ Osiatynski (2003) 256.

solutions to the drafters. Conversely, Osiatynski refers to the local drafters as recipients. While this categorisation of actors into messengers and recipients explains the roles of constitutional migration actors in certain scenarios, it implies that local drafters are always passive recipients of products (constitutional models, concepts and texts) brought by messengers or foreigners. This is not always the case, as will be demonstrated in this thesis. Osiatynski's categorisation does not take into account instances where drafters initiate the migration process by bringing in or incorporating constitutional models, concepts and provisions from other countries.

Accordingly, this thesis moves away from Osiatynski's categorisation and categorises the migration actors as exporters and importers. Export is defined as a function of international trade in which goods produced in one country are shipped to another country for future sale or trade,⁷⁷ whilst imports are defined generally as goods or services brought into one country from another for future trade or sale.⁷⁸ The term 'export' in this study is used in much the same sense as above; however, instead of goods or services being shipped to another country, constitutional products are shipped to the next country. Exporters are foreign actors, such as academics, diplomats, lawyers or human rights activists, in the country from which the constitutional models, concepts and provisions emanate; the exporting country is the party taking the initiative to bring proposals and solutions to the local drafters. In turn, importers are local actors, such as the drafters, academics, diplomats, lawyers, personnel from international organisations, or human rights activists, who take the initiative to incorporate the constitutional models, concepts and provisions from another country. As such, with imports, constitutional provisions migrate into the country.

1.7.6 Constitutional drafters vis-à-vis constitution owners

In the literature, the term 'constitutional drafters' refers broadly to whomever is involved in the drafting process, be they domestic or external experts either contracted by the country undergoing constitutional reform or review, or external parties acting on their own volition.⁷⁹ This study distinguishes 'drafters' from 'constitution owners', which is not a distinction found in the literature. 'Constitution owners' are the people or countries undergoing the constitution

⁷⁷ 'Export' available at <http://www.investopedia.com/terms/e/export.asp> (accessed 28 April 2017).

⁷⁸ 'Import' available at <http://www.investopedia.com/terms/i/import.asp> (accessed 28 April 2017).

⁷⁹ Bastos F L 'An Overview of Judicial and Executive Relations in Lusophone Africa' in Fombad C M (ed) *Separation of Powers in African Constitutionalism* (2016) 162. See Malagodi M 'Minority Rights and Constitutional Borrowings in the Drafting of Nepal's 1990 Constitution (2010) 37 *The European Bulletin of Himalayan Research (EBHR)* 69.

reform or review process, whereas ‘constitutional drafters’ can either be the constitution owners themselves or external parties who draft the constitution. Constitution owners decide on the constitutional transfers; however, it is the drafters who prepare the text for later approval by the electorate through, for example, referendums and polls.

1.7.7 Constitutional models, concepts and texts

‘Constitutional models’ refers to the constitutional framework of a particular country. When a constitutional model migrates from one country to another, it is often not a full-scale adoption of that constitution but a migration merely of the framework or the structure of the constitution. The term ‘constitutional framework’ refers either to the overall structure of the constitution or an aspect thereof, for example, a bill of rights, or, for the purposes of this thesis, the devolution framework. ‘Constitutional concepts’ refers to particular ideas within the constitutional framework, for example judicial independence (in regard to the appointment of judges) or the equitable division of revenue. Lastly, ‘constitutional texts’ are the actual texts that give expression to constitutional concepts. The migration of constitutional texts is easy to identify because the wording is often similar or identical in both the constitution of origin and the constitution to which the text migrated. On the other hand, a model is identified by the presence of multiple concepts such as supervision, cooperative governance and division of revenue in the constitutional system.

Chapter 2:

Theoretical Perspectives on the Dynamics of the Migration of Constitutional Models, Concepts and Texts

2.1 Introduction

As noted in Chapter 1, considerable literature exists on the migration of constitutional models, concepts and texts. There is a wealth of literature on constitutional migration in areas such as bills of rights, independent institutions, and the judiciary. However, there is a dearth of literature that explains the dynamics of migration in the field of devolution in general and in the South African, Kenyan, Zimbabwean and Zambian contexts in particular. While subsequent chapters examine the migration of devolution, this chapter examines various theories that explain constitutional migration across the field of law.

The purpose of this chapter is to examine the theories proposed by scholars regarding constitutional migration and the motivations behind such movement. The theories which are analysed concern constitutional migration across the globe and not just in Africa. The literature contains three main theories that explain such migration: the theory of self-selection; the theory imposed or coerced migration; and the theory of migration through persuasion. The chapter commences in section 2.2 by analysing the self-selection theory. Section 2.3 examines the theory of imposition or coercion, and section 2.4, the persuasion theory. Lastly, section 2.5 discusses dissemination of information in regard to how knowledge of constitutional models, concepts and texts spreads. Understanding the dissemination of information is important because constitutional migration depends on knowledge of constitutional exports or imports.

It is important to note that, in certain instances, more than one theory explains the migration of particular constitutional models, concepts, and texts. What this means is that the migration theories may overlap. Put simply, more than one factor explains the migration.

2.2 Self-selection theory

The self-selection theory applies when constitution owners choose the constitutional models, concepts and texts they wish to incorporate in their constitution. Self-selection refers to a process in which a country's people or elite select, at their own initiative and of their own

volition, the constitutional provisions to which they will be subject. External influences are thus limited.

Self-selection manifests itself mainly in instances where the constitution owners' ideology aligns with that of another country or countries. Stefanoaia Mihai explains that countries are likely to import constitutional concepts from other countries if their doctrines on economic and political theories and policies are alike.⁸⁰ Vlad Perju has a similar argument; he observes that constitution owners are inclined to import constitutional models and concepts from the constitutions of countries that have similar ideologies to theirs.⁸¹ When there is a pre-existing ideological alignment, constitution owners are more receptive to constitutional imports from a country with a similar ideology because incorporating similar constitutional imports is likely to be seen as capable of addressing the needs of that country. Mihai regards pre-existing ideological alignment as the reason behind the migration of constitutional models and concepts, especially when constitutional change occurs in the context of great revolutions or significant historical shifts.⁸² Below is a demonstration of how the self-selection theory plays out in the cases of the post-World War II Soviet socialist ideology in China, socialist ideology in post-independence Africa, and the multiparty system and market-economy ideology in post-Cold War Africa.

2.2.1 Post-World War II Soviet socialist ideology in China

China had a successful homegrown communist revolution between 1921 and 1949.⁸³ When the revolution was complete, the Chinese Communist Party (CCP) as the ruling elite searched for a constitution that aligned with its socialist ideology. The CCP was ultimately drawn to the Soviet constitutional model. According to Fan Jizeng, when Mao Zedong was the chairperson of the 1954 Chinese constitution-drafting committee, he instructed committee members to make a close study of the 1936 Union of Soviet Socialist Republics (USSR) Constitution.⁸⁴

⁸⁰ Mihai S 'The Role of the Constitutional Court of Romania in the Constitutionalisation of Criminal Law' (2016) *Universul Juridic* 227.

⁸¹ Perju V 'Constitutional Transplants, Borrowing, and Migrations' in Rosenfeld M & Sajó A (eds) *Oxford Handbook on Comparative Constitutional Law* (2012) 31.

⁸² Mihai (2016) 227.

⁸³ Perry E 'Is the Chinese Communist Regime Legitimate' (2018) *The China Questions: Critical Insights Into a Rising Power* 13.

⁸⁴ Jizeng F 'Constitutional Transplant in PRC: The Communism Russian Legacy and Globalized era Challenge' (2014) *Federalismi.it Rivista Di Diritto Pubblico Italiano, Comparato, Europeo* 2.

Thus, it was not a matter of the Soviets proposing to the Chinese that they adopt their constitutional model; it was entirely a self-selection process.

Jizeng remarks that the shared ideology of the two countries was the main reason for the migration of the Soviet model to China.⁸⁵ This highlights the notion of receptivity: the Soviet model was attractive to the Chinese people because they were communists just like the USSR.⁸⁶ Marxist-Leninist ideology thus became a mainstream force that persuaded the CCP to adopt a constitutional model resembling that of the USSR.⁸⁷

2.2.2 Socialist ideology in post-independence Africa

There is also evidence that the Soviet model migrated to some African countries after independence due to socialist influences. Charles Fombad observes that the USSR was a superpower and that socialism held huge appeal in the Third World when African countries were being granted independence after armed struggle against colonial powers.⁸⁸ Newly independent African countries in the 1960s and 1970s sought to bring about economic and social progress by controlling and nationalising the economy.⁸⁹ African leaders such as Kwame Nkrumah, Julius Nyerere, Kenneth Kaunda and Leopold Sedar Senghor espoused their own brands of socialism.⁹⁰ Nkrumah's African socialism rejected democracy and the parliamentary system as the best ways of governing; it also rejected the idea that capitalism, free enterprise, and free competition were the only economic systems capable of promoting development.⁹¹ The main argument against the multiparty system was that it promoted division and tribalism, which culminated in a waste of national resources during a time when newly independent African countries, with limited resources and constituted of multi-ethnic and religious groups,

⁸⁵ Jizeng (2014) 6.

⁸⁶ Chen A H Y 'Constitutions and Constitutionalism: China' in Law D S (ed) *Constitutionalism in Context* (2022) 71.

⁸⁷ Jizeng (2014) 6.

⁸⁸ Fombad C M 'The Evolution of Modern African Constitutions' in Fombad C M (ed) *Separation of Powers in African Constitutionalism* (2016) 25.

⁸⁹ Steytler N 'Constitutionalism and the Economy: Concepts and Questions' in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 25.

⁹⁰ Nkrumah, Nyerere, Kaunda and Senghor were from Ghana, Tanzania, Zambia and Senegal respectively; Fombad C M 'Comparative Overview of Measures and Devices to Shape the Economy in some Modern African Constitutions' in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 103. See Nyerere J K *Ujamaa - The Basis of African Socialism* (1962) available at https://www.juliusnyerere.org/resources/view/ujamaa_-_the_basis_of_african_socialism_julius_k._nyerere (accessed 26 January 2023). See also Skurnik W 'Leopold Sedar Senghor and African Socialism' (1965) 3 *Journal of Modern African Studies* 349.

⁹¹ Fombad (2016) 103.

needed to focus on national unity, political stability and fast economic growth.⁹² Similarly, Nyerere and Kaunda instituted their own versions of socialism, called Ujamaa and ‘humanism’, respectively.⁹³ These variants of socialism sought to unshackle economies from a colonial history that had skewed market economies in favour of former colonial masters and convert them to a socialist model that entailed state ownership and control of land and natural resources.⁹⁴

However, Fombad suggests that the migration of the Soviet model to African constitutions was not purely due to African leaders’ authentic adherence to Marxism-Leninism; some ideological adherence was superficial.⁹⁵ Fombad remarks that a critical examination of the African socialist constitutions reveal ‘a confused, sometimes contradictory mix of economic approaches made up of ideas borrowed from liberalism and collectivism as well as western European and Soviet constitutionalism’.⁹⁶ Therefore, under this school of thought, support for the migration of socialist constitutional models and concepts had more to do with populism than adherence to orthodox socialist ideology.⁹⁷

The Soviet Union and China, as the main advocates of Marxist-Leninist ideologies, supported different independence movements across Africa, to the extent that Marxist-Leninist ideologies were almost synonymous with anti-colonial ideologies, especially in Portuguese colonies.⁹⁸ The Soviet Union and China offered financial and technical support to liberation groups. For example, by 1972, Mozambique’s Frente de Libertação de Moçambique (FRELIMO) was being supplied with weapons, technical support and advice by Moscow and Beijing.⁹⁹ Due to the relationship the USSR and China had with African countries, at the time of independence,

⁹² Ndulo M ‘One Nation, Multiple Identities’ in Ndulo M & Emeziem C (eds) *The Routledge Handbook of African Law* (2022) 162. See Fombad (2016) 19.

⁹³ Fombad (2016) 103. See Babeiya E ‘Internal Party Democracy in Tanzania: A Reflection on Three Decades of Multiparty Politics’ in Steytler N & Fombad C M (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 270.

⁹⁴ Steytler (2022) 25.

⁹⁵ Fombad (2022) 103.

⁹⁶ Fombad (2022) 103.

⁹⁷ Fombad (2022) 103.

⁹⁸ Fombad (2016) 25.

⁹⁹ McGregor A ‘Why Mozambique Is Outsourcing Counter-Insurgency to Russia: The Historical Relationship’ (2019) 16 *Eurasia Daily Monitor* 2 available at <https://jamestown.org/program/why-mozambique-is-outsourcing-counter-insurgency-to-russia-the-historical-relationship/> (accessed 26 January 2023).

or a few years after independence, many African countries adopted constitutions that were influenced by socialist ideology.¹⁰⁰

Algeria, Angola, Benin, Burkina Faso, Cape Verde, Comoros, Guinea Bissau, the Democratic Republic of Congo (DRC), Ethiopia, Mozambique and Madagascar are among the countries whose constitutions were influenced by Marxist-Leninist ideologies.¹⁰¹ The socialist ideological influences on African constitutions extended to the language, style and the formulation of the constitutions.¹⁰² For example, both the 1963 Constitution of Algeria and the 1975 Constitution of Cape Verde emphasise that constitutions were to be used as tools of transformation to guide the development of the country in accordance with socialist values in order to eliminate the exploitation of one citizen by another citizen and pave way for a communist classless society in the future.¹⁰³

Another example of socialist influence on African constitutions is, as Fombad states, the open declaration of governments as socialist states with one-party systems.¹⁰⁴ Article 35 of the DRC's Constitution¹⁰⁵ declared the Congolese Labour party a 'vanguard organisation ... created in order to lead the Congolese people to national liberation and to the construction of scientific socialism' Likewise, articles 23 and 27 of the Constitution of Algeria of 1963 declared the single party as the 'vanguard party' that would ensure stability and serve as the sole 'powerful organ of impulsion'.¹⁰⁶ Such provisions ensured that ruling parties controlled the executive and the government as a whole, a principle with roots in the 1936 Constitution of the USSR.¹⁰⁷

2.2.3 The multiparty system and market-economy ideology in post-Cold War Africa

The self-selection theory describes how, in some African countries, an alignment in ideology led to the reintroduction of the multiparty system and the market economy after the Cold

¹⁰⁰ Funada-Classen S *The Origins of War in Mozambique: A History of Unity and Division* (2012) 268. See Fombad (2016) 25.

¹⁰¹ Fombad (2016) 19.

¹⁰² Fombad (2016) 25.

¹⁰³ Fombad (2016) 27.

¹⁰⁴ Fombad (2016) 27.

¹⁰⁵ Constitution of the Democratic Republic of Congo, 1969.

¹⁰⁶ Fombad (2016) 27.

¹⁰⁷ Fombad (2016) 27.

War.¹⁰⁸ First, it is important to analyse the challenges raised by some of the constitutional models and concepts under the African socialist constitutions. Only then can one understand why the African countries changed their constitutions from socialism to ones reflecting multiparty and market-economy ideologies.

In this regard, Nico Steytler opines that the various Marxist or African socialist attempts to create egalitarian and communitarian societies ended in ‘dystopias of misrule, corruption, and military or civilian dictatorship’.¹⁰⁹ Fombad notes that the one-party system that African leaders extolled had failed to achieve its main goals, namely national unity and integration, political stability, and economic development.¹¹⁰ There was hardly any means to check against abuses of power or human right violations under weak and ineffective judiciaries and single-party parliaments.¹¹¹ African economies also collapsed under socialist constitutions due to poor economic policies, poor governance, the mismanagement of natural resources, rises in import prices, decline in export prices, and severe droughts.¹¹² The economic crisis saw rising poverty and unemployment, a widening gap between the ruling elites and ordinary people, and the collapse of health care and basic education.¹¹³ The economic hardships also resulted in most African countries becoming heavily indebted to the World Bank and International Monetary Fund (IMF), which then imposed structural adjustment programmes on them.¹¹⁴

The culmination of those dystopian results led to dissent and civil unrest among the general population,¹¹⁵ which demanded not only political rights but also economic freedom, prosperity and economic security. The general populace was calling for the (re)introduction of a multiparty system because the one-party state system had failed to deliver on its promises and

¹⁰⁸ This section discusses the migration of constitutional models and concepts only in post-Cold War Africa, in view of the fact that scholars such as Fombad, Steytler and Ayele have remarked that such migration was due to self-selection initiatives by the constitution owners. While there was also constitutional migration in Eastern Europe and Eurasia after the Cold War, that migration is not discussed in this section. It is discussed below in section 2.4.2, given that scholars such as Frankenberg, Bockenforde and Al-Ali observe that constitutional migration in those instances may be explained by the persuasion theory.

¹⁰⁹ Steytler N ‘Constitutionalising the Market Economy and the Quest for Constitutionalism’ in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 408.

¹¹⁰ Fombad (2016) 20.

¹¹¹ Fombad (2016) 20.

¹¹² Mabungu R E ‘Relationships between the Economy and Constitution in Sub-Saharan Africa’ in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 52.

¹¹³ Fombad (2022) 99.

¹¹⁴ Mabungu (2022) 50.

¹¹⁵ Steytler (2022) 408.

the associated economic policies had led to an economic crisis.¹¹⁶ Thousands of people died across the continent during violent, often bloody, campaigns for the return of political pluralism.¹¹⁷ For example, the Derg military junta, which had been in power in Ethiopia since 1974, eradicated all political groups.¹¹⁸ In 1989, the Derg formally established Ethiopia as a one-party state by promulgating a constitution which declared the Workers' Party of Ethiopia (WPE) as the only party in the country.¹¹⁹ The lack of democracy was unpopular among the masses. Zemelak Ayele observes that the lack of democratic government was one of the reasons for the many years of civil war in Ethiopia (September 1974 to May 1991).¹²⁰ Similarly, there were numerous political parties in Tanzania in the 1950s; however, they were all suspended in 1965 when the Tanganyika African National Union (TANU) introduced single-party rule.¹²¹ This led to revolt among the general population in Tanzania, which protested for the reintroduction of multiparty politics.¹²²

When the Berlin Wall fell, marking the end of the Cold War, the domestic pressure to reintroduce multiparty politics and change economic policies grew stronger because 'a new governance paradigm of democracy and constitutionalism came to the fore – and with it, the market economy'.¹²³ In addition to internal pressure, there was now external pressure on African governments by the World Bank, IMF and the West to reintroduce multiparty systems and redesign constitutions to incorporate constitutional concepts that reflected the ideals favoured by the triumphalist West.¹²⁴ The West switched its approach; previously the USA had supported or at least condoned dictatorship. For example, the USA gave Joseph-Désiré Mobutu's¹²⁵ regime military assistance even though it was a dictatorship.¹²⁶ However, after the Cold War, the USA pushed for universal liberal democracy as the ideal form of government.

¹¹⁶ Ayele Z M 'Constitutionalism and Electoral Authoritarianism in Ethiopia: From EPRDF to EPP' in Fombad C M & Steytler N (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 169. See also Fombad C M 'Democracy, Elections and Constitutionalism in Africa: Setting the Scene' in Fombad C M & Steytler N (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 23.

¹¹⁷ Fombad (2021) 25.

¹¹⁸ Ayele (2021) 169.

¹¹⁹ Article 6 of the Constitution of the People's Democratic Republic of Ethiopia, 1987.

¹²⁰ Ayele (2021) 169.

¹²¹ Babeiya (2021) 270.

¹²² Babeiya (2021) 288.

¹²³ Steytler (2022) 408.

¹²⁴ Cheeseman N 'How Could We Design Democracy to Make it Work in the African Context?' in Fombad C M & Steytler N (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 39.

¹²⁵ Commonly known as Mobutu Sese Seko.

¹²⁶ Powers E 'Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries' (2008) 84 *North Dakota Law Review* 384.

Yash Pal Ghai suggests that, in an effort to encourage the democratisation of all socialist regimes, the USA deprived any socialist government of the political and material support to continue its regime.¹²⁷ Due to the constitutional movement set in motion by both domestic and external pressure, there was a huge constitutional shift in Africa from socialist or one-party models to a multiparty system and market economy.¹²⁸

The Ethiopian civil war discussed above ended only when the Ethiopian People's Revolutionary Democratic Front (EPRDF) assumed power after having pledged to the general populace that it would introduce multiparty democracy.¹²⁹ Likewise, in 1992, multiparty politics was restored in Tanzania after almost three decades of single-party rule.¹³⁰ In both the Ethiopian and Tanzanian examples, the reintroduction of the multiparty system at the end of the Cold War was no coincidence: there was a causal link. When communism ended, a new system was needed to replace it. Multipartyism and the market economy were now regarded as the ideal systems for any country's development.¹³¹

Muna Ndulo and Robert Kent argue that Africa, like the rest of the world, followed news of the Cold War.¹³² When the Berlin Wall fell, some African countries that were one-party states or socialist countries demanded multiparty democracy and a market economy because they believed these had the potential to address the challenges experienced due to having had socialist constitutions.¹³³ The end of the Cold War was not the only catalyst of the constitutional change from one-party to multiparty politics, but it was the final straw that broke African governments' resistance to the constitutional change that the local populace had been asking for years.

African governments had no choice but to reintroduce multiparty democracy and a free-market economy as a consequence of the following reasons. First, the end of the Cold War marked the

¹²⁷ Ghai Y 'A Journey Around Constitutions: Reflections on Contemporary Constitutions' (2005) 122 *South African Law Journal* 814.

¹²⁸ Steytler N & Fombad C M 'Introduction: Democracy, Elections and Constitutionalism in Africa' in Fombad C M & Steytler N (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 1.

¹²⁹ Ayele (2021) 169.

¹³⁰ Babeiya (2021) 288.

¹³¹ Steytler N & Fombad C M 'Introduction' in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 10.

¹³² Ellis S 'Africa after the Cold War: New Patterns of Government and Politics' (1996) 27 *Development and Change* 6.

¹³³ Ndulo M B & Kent R B 'The Constitutions of Zambia' (1998) 1 *Zambia Law Journal* 5. See also Venter A & Olivier M 'Human Rights in Africa' (1993) 1 *International Journal on World Peace* 27.

demise of the Soviet command-economy model.¹³⁴ The USSR was disintegrating, leaving African socialist governments without an ally and backing. Secondly, the structural adjustment programmes of the World Bank and the IMF required the privatisation of key industries and the reduction of bloated civil services.¹³⁵ African governments were forced to comply with the programmes because most of them were heavily indebted to the World Bank and the IMF.¹³⁶ Both the World Bank and IMF were strong proponents of the market economy.¹³⁷ Therefore, if African countries wanted to continue receiving financial aid from the World Bank and IMF, they had to dance to their tune.

A new wave of constitutional reform in Africa ushered in not only multiparty democracy but also a free-market economy, both of which were extolled by the West.¹³⁸ After 1989, free and fair multiparty elections were now regarded the world over as the test of a government's legitimacy. The local populace and civil society in Africa wanted legitimate governments as well.¹³⁹ Pressure to incorporate liberal democracy in African constitutions came either directly from donor countries, as was the case in Zambia, for instance, or more subtly through academic reports and publications.¹⁴⁰ Stephen Ellis observes that there was a flood of literature both in academic and non-academic publications about multiparty democracy and governance in Africa.¹⁴¹ The position of the majority of Western literature was that liberal democracy would improve African economies. A high proportion of such research was either encouraged or financed, directly or indirectly, by the West.¹⁴² It is important to highlight that such external pressure overlaps with the persuasion theory because there are few instances where there was only self-selection without any persuasion by external parties. The self-selection theory applies only so far as there is internal pressure from the general populace. However, the overlap emerges when there was also external pressure to incorporate multiparty democracy and

¹³⁴ Steytler (2022) 25.

¹³⁵ Steytler (2022) 25.

¹³⁶ Steytler (2022) 408.

¹³⁷ Klug H 'The Political Economy of Post-Colonial Constitutionalism in Southern Africa' in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 204.

¹³⁸ Steytler (2022) 410.

¹³⁹ Ellis (1996) 4.

¹⁴⁰ Chinyere P R & Hamauswa S 'A Critique of the Constitutional History of Zambia' in Mukwena R & Sumaili F (eds) *Zambia at Fifty Years: What went Right, What went Wrong and Wither to? A Treatise of the Country's Socio-Economic and Political Developments since Independence* (2016) 34.

¹⁴¹ Ellis (1996) 4.

¹⁴² Ellis (1996) 4.

market-economy constitutional models and concepts. The theory of persuasion through external actors is discussed in detail in section 2.4 below.

With both internal and external pressures at play, the result was, on the one hand, a dramatic decline from 1990 onwards in dictatorships, military regimes, and one-party governments, and, on the other, a rise in multiparty democracy.¹⁴³ Most African countries succumbed to internal and external pressures to have liberal democracy and a market economy entrenched in their constitutions. Before 1989, only a handful of African countries, namely Botswana, Gambia and Mauritius, had constitutions that provided for multiparty democracy.¹⁴⁴ However, after the Cold War, countries such as Mozambique, Ethiopia, Zambia, Benin, Togo, Kenya, Burundi, Cameroon, Ghana, Namibia, Gabon, Cape Verde, Rwanda and Angola had undergone constitutional changes that incorporated liberal democratic provisions in their constitutions.¹⁴⁵ Among the key elements of multiparty reform were the recognition of political rights, political pluralism, regular elections, the separation of the political party and the state, and presidential term-limits for facilitating the alternation of power.¹⁴⁶

The entrenchment of multiparty democracy was accompanied by the constitutional protection of a market economy based on limited government interference in the economy. The Ghanaian Constitution of 1992 reflected the abandonment of socialist ideologies and the adoption of market-led economic principles. For example, the chapter on Directive Principles of State Policy declares:

The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include— . . . (b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy.¹⁴⁷

The provision assigns the private sector a role in the economy, a position that was not constitutionally protected under the previous socialist Constitution of Ghana.

¹⁴³ Steytler & Fombad (2021) 1.

¹⁴⁴ Ellis (1996) 6.

¹⁴⁵ Ellis (1996) 6. See Pinto T N 'Constitutionalism and Developmental Authoritarianism: Power, Law, and Legitimacy in Post-Genocide Rwanda' in Fombad C M & Steytler N *Democracy, Elections and Constitutionalism in Africa* (2021) 206.

¹⁴⁶ Fombad (2021) 23. See Ghai (2005) 814.

¹⁴⁷ Article 26(2) of the Constitution of Ghana, 1992.

African constitutions adopted after the end of the Cold War also highlighted the importance of the right to private property. This was supported by the freedom of contract as well as freedom of enterprise and competition, rights which were enforceable by an independent judiciary.¹⁴⁸ Since 1990, most of these elements have been included in bills of rights, albeit with varying degrees of enforceability. For example, both the constitutions of Ghana and Mozambique protect the right to property and prohibit the arbitrary deprivation of property, even though expropriation with compensation is permitted if it is in the public interest.¹⁴⁹ Article 82(2) of the Constitution of Mozambique stipulates that '[e]xpropriation may take place only for reasons of public necessity, utility, or interest, as defined in the terms of the law, and subject to payment of fair compensation'.¹⁵⁰ The protection of property rights lies at the core of a market-led economy; therefore, the inclusion of such rights in African constitutions is indicative of how constitutions after the Cold War moved away from the socialist command economy.

The constitutional incorporation of multiparty democracy, a market-led economy and the protection of private property, took place through democratically elected governments drawing up new constitutions¹⁵¹ or through the establishment of constitution-making commissions that were tasked with the formulation of the new constitutions.¹⁵² The constitution owners were responsible for spearheading the constitution-making processes, and this is the core of the self-selection process: the constitution owners themselves were at the forefront of the constitutional migration process.

In sum, when ideologies coincide, the tools for implementing that ideology may migrate between countries, hence the emergence of constitutional migration. The limitation of the self-selection theory is that its application is limited to a specific number of cases. It does not take into account instances where there is constitutional migration but, at the same time, conflict in the ideologies of the country of origin and the country to which the constitutional models and concepts are migrating.

¹⁴⁸ Steytler (2022) 411.

¹⁴⁹ Steytler (2022) 412.

¹⁵⁰ Constitution of Mozambique, 2007.

¹⁵¹ Kaya H O & Van Wyk D 'Multi-Party Democracy and the Political Party System in Africa: Cases from East and Southern Africa' (2001) *COLECCIÓN EDICIÓN ESPECIAL* 144 available at <https://repositorio.uca.edu.ar/bitstream/123456789/10180/1/multi-party-democracy-political.pdf> (accessed 22 March 2023).

¹⁵² Ndulo M B & Kent R B 'The Constitutions of Zambia' (1998) *Zambia Law Journal* 16.

2.3 Theory of coercive migration

The theory of coercive migration explains instances where external actors initiate the constitutional migration process and are actively involved throughout the process. This theory is referred to as the coercive migration theory because constitution owners have little or no say as to which constitutional model, concepts or texts are incorporated into their constitution. Rosiland Dixon and Eric Posner opine that constitutional migration can occur in instances where one country imposes certain constitutional models, concepts or texts on another country.¹⁵³ The imposition occurs when one country, or a group of constitutionally similar countries, dominates international affairs, has strong interests in the country which is drafting a constitution, and wishes to enforce the adoption of its own preferred constitutional models, concepts or texts.¹⁵⁴ Richard Albert et al. note that whenever there is an imbalance of power between the constitution owners and any other country involved in the constitution-making process, there is a high likelihood that the constitution owners will be coerced into incorporating the constitutional provisions put forward by the dominant country.¹⁵⁵ Kul Gautam contends that in instances where the country drafting a constitution is occupied by another country, it is difficult for the constitution owners to decide against importing the constitutional provisions proposed by the occupying country.¹⁵⁶

2.3.1 Theory of coercive migration by a dominant country

Justin Blount et al. concur with Dixon and Posner's coercion theory. They observe that the coercion theory is evident when constitutions are drafted under the watchful eyes of an occupying power.¹⁵⁷ Sharon Otterman asserts that constitution owners that draft constitutions under these circumstances will be susceptible to forcible constitutional migration from the occupier to the occupied.¹⁵⁸ For instance, constitutions drafted in the Eastern European bloc after World War II were drawn up under the occupation of the USSR, resulting in Marxist-

¹⁵³ Dixon R & Posner E A 'The Limits of Constitutional Convergence' (2011) *Chicago Journal of International Law* 403.

¹⁵⁴ Dixon & Posner (2011) 404.

¹⁵⁵ Albert R, Contiades X & Fotiadou A 'Imposition in Making and Changing Constitutions' in Albert R, Contiades X & Fotiadou A (eds) *The Law and Legitimacy of Imposed Constitutions* (2019) 4.

¹⁵⁶ Gautam (2015) 317.

¹⁵⁷ Blount J, Elkins Z and Ginsburg T 'Does the Process of Constitution-Making Matter?' in Ginsburg T (ed) *Comparative Constitutional Design* 2ed (2013) 49.

¹⁵⁸ Otterman S 'Q & A: Drafting Iraq's Constitution' *New York Times* 12 May 2005 available at http://www.nytimes.com/cfr/international/slot2_051205.html (accessed 14 November 2017).

Leninist ideology being imposed on constitution owners.¹⁵⁹ Yaniv Roznai contends that one example of a constitution developed under Soviet occupation was the 1949 Constitution of Hungary.¹⁶⁰ In World War II, after heavy pressure from Germany, Hungary joined forces with Germany to invade the Soviet Union in 1941.¹⁶¹ In March 1944, Hungary itself came under German occupation.¹⁶² The Nazis were driven out of Hungary by Allied forces in 1945 and the country placed under the control of the Allied Commission. The USSR, as part of the Allied Commission, had total command of Hungary.¹⁶³ A new constitution was then drafted and came into force in August 1949, at a time when Hungary was under the occupation of the USSR. The new constitution-imposed socialism and vanguard-party rule.

Similarly, the constitutions of countries such as Albania, Bulgaria, Czechoslovakia, East Germany, Poland and Romania were also based on the Soviet model because those countries too were occupied by the USSR. The constitution owners had no say in the migration of the Soviet model into their respective constitutions. The constitutions of the Eastern European bloc under Soviet occupation all maintained one-party socialist governmental systems that were ruled by communist elites appointed by, and closely tied to, the Soviet Union.¹⁶⁴ No popularly elected communist parties voluntarily joined the Soviet bloc.

Zaid Al-Ali contends that the US coerced Afghanistan to import American constitutional concepts and texts during the constitutional review process that commenced in the post-2001 period.¹⁶⁵ The US employed the services of the Centre on International Cooperation at New York University and the United States Institute of Peace, amongst others, to participate in the Afghan constitutional discussions.¹⁶⁶ The institutions provided technical support and their experts informed the Afghans of the constitutional concepts and texts the US wanted to have entrenched in the constitution. Their involvement was heavy-handed. Throughout the constitutional reform process, both institutions made a number of interventions in the Afghan Constitutional Commission, suggesting certain outcomes and mechanisms and, in some

¹⁵⁹ Jizeng F 'Constitutional Transplant in PRC: The Communism Russian Legacy and Globalized Era Challenge' (2014) *Federalismi.it Rivista Di Diritto Pubblico Italiano, Comparato, Europeo* 2.

¹⁶⁰ Roznai Y 'Constitutional Transformation: Hungary' in Law D S (ed) *Constitutionalism in Context* (2022) 141.

¹⁶¹ Roznai (2022) 141.

¹⁶² Roznai (2022) 141.

¹⁶³ Roznai (2022) 141.

¹⁶⁴ Hoptner J B 'Soviet Policy in Eastern Europe Since 1945' (1954) *Journal of International Affairs* 97.

¹⁶⁵ Al-Ali Z 'Constitutional Drafting and External Influence' in Dixon R & Ginsburg T (eds) *Comparative Constitutional Law* (2011) 81.

¹⁶⁶ Al-Ali (2011) 81.

instances, actual wording in relation to specific issues.¹⁶⁷ Al-Ali notes that the involvement of non-governmental organisations in Afghanistan, particularly in respect of the suggested outcomes and wording of specific constitutional texts, contributed to constitutional migration from the American constitutional model to the Afghanistan Constitution. Thus, the Afghans were not given much of a choice regarding the migrated concepts and texts.¹⁶⁸

Another example of US's coercion in constitutional review processes is the 2005 Iraq Constitution,¹⁶⁹ which was drafted under the occupation of the USA. The result was the migration of constitutional concepts from the USA. It is worth mentioning that, according to Al-Ali, the USA was pushing its own agenda in Iraq; it was motivated to impose certain constitutional concepts due to its desire to meet a certain number of benchmarks in Iraq, particularly with a view to portraying an image of progress for the purposes of domestic US politics.¹⁷⁰

According to Fredrick Schauer, American influence was particularly evident in the importation of stronger protection for women's rights, especially given that the Constitution prescribed that women had to constitute one-third of all electoral lists in the 2005 Iraqi elections.¹⁷¹ The increase in the protection of women's rights and representation across the world could also have contributed to the Iraqi people expecting the same rights to be afforded to Iraqi women.¹⁷² Blount et al. remark that even though some local women's groups and secular Iraqis advocated for women's rights, these rights migrated to Iraq in actuality because of the pressure imposed by the Americans, who had a stake in the outcome of the Iraqi constitution-making process.¹⁷³ Blount et al.'s argument is that without American involvement, Iraqi women, advocacy and secular groups would have campaigned for women's rights in vain because the ruling elites would have found ways to suppress these efforts.¹⁷⁴

Al-Ali opines that further evidence of the imposition of the USA constitutional model is found in the mid-August 2005 Iraqi constitutional drafts' list of exclusive federal powers, which significantly limited the central government's powers to generate revenue through the

¹⁶⁷ Al-Ali (2011) 81.

¹⁶⁸ Al-Ali (2011) 81.

¹⁶⁹ Otterman (2005) 2.

¹⁷⁰ Al-Ali (2011) 80.

¹⁷¹ Schauer F 'On the Migration of Constitutional Ideas' (2005) 37 *Connecticut Law Review* 915.

¹⁷² Schauer (2005) 915.

¹⁷³ Blount (2013) 48.

¹⁷⁴ Blount (2013) 49.

imposition of taxes.¹⁷⁵ It is further argued that the federal model imposed in the mid-August constitutional draft was controversial for several reasons. One of these was the fact that the draft contained federal concepts that had been incorporated only after the US embassy took over the administration of the drafting process.¹⁷⁶ The importation of the federal model went ahead despite objections from the majority of Iraqi political forces, which at that point had been excluded altogether from the constitution-drafting discussions.¹⁷⁷ The inclusion of the federal concepts only after the USA had taken over the administration of the drafting process is evidence of the power the USA wielded in the Iraqi constitution-drafting process. However, the USA did not wield absolute power in this process. Albert et al. observe that the entrenchment of Islam as the official religion is evidence that the US's influence was constrained.¹⁷⁸ They suggest that if the USA could have had its own way, it would not have entrenched such a provision because it goes against the liberal democracy that the USA firmly believes in.¹⁷⁹

2.3.2 Theory of coercive migration by colonial powers

The theory of coercive migration by colonial powers is similar to the previous theory in that colonial powers were also in effect occupying their colonies: colonial powers governed and had settlements in the colonies. During decolonisation, the independence constitutions of many African countries were crafted largely by departing colonial powers, with limited consultation undertaken with emerging African leaders.¹⁸⁰

In most anglophone independence constitutions, the colonial powers' coercion was subtle in that Britain's preconditions for granting independence were not as severe as those of the French (as discussed below). British coercion was more nuanced: African leaders were part of the conversation in deciding upon certain constitutional provisions, albeit that there were certain terms that Britain simply would not accept. During decolonisation, then, Britain had a huge say in the constitutional provisions that could be entrenched in the independence constitutions. For example, the draft of the independence Constitution of Ghana, 1957, included seven articles

¹⁷⁵ Al-Ali (2011) 79.

¹⁷⁶ Al-Ali (2011) 79.

¹⁷⁷ Al-Ali (2011) 79.

¹⁷⁸ Albert (2019) 5.

¹⁷⁹ Albert (2019) 5.

¹⁸⁰ Fombad (2016) 17.

that entrenched fundamental human rights.¹⁸¹ Fombad argues that the British rejected those provisions because at the time the English were sceptical of entrenching fundamental rights.¹⁸² The result was that the Constitution of Ghana had no bill of rights.

Nevertheless, Britain's position changed two years later. The independence constitutions that were then being drafted by Britain for its colonies contained bills of rights, starting with the 1959 Constitution of Nigeria.¹⁸³ Unlike the USA and the USSR discussed in section 2.3.1 above, Britain imposed constitutional concepts such as the bill of rights even though it itself has no bill of rights. This is the opposite of what the USA did in Iraq when it imposed its constitutional concepts (as discussed). Fombad observes that it is not unlikely that one of the reasons for this peculiarity was the hope by the British government that constitutional guarantees would protect British citizens who had settled in large numbers in African countries such as Kenya, Tanzania and Uganda.¹⁸⁴

The contents of the anglophone independence constitutions were negotiated between the constitution owners and Britain. However, there were some constitutional concepts that Britain imposed on its colonies. For instance, it was adamant that it was not going to pass an Act to provide for the Constitution of Kenya without the inclusion of provisions that protected the right to private property.¹⁸⁵ What this meant was that African constitution owners were forced to incorporate certain constitutional provisions so that Britain could grant them independence. This is coercion in that constitutions were forced on countries.

The Zimbabwean independence constitution is another example of a constitution that had constitutional concepts imposed by Britain. Although Zimbabwean leaders participated in the constitutional negotiations of 1979 (the Lancaster House negotiations), it was the British government that had the final say in the content of the constitutions. That was evidenced by the fact that Zimbabwean negotiators could not reverse the impact of colonialism on the ownership and control of land and address the economic exclusion of the previously disadvantaged population. The land question was at the centre of the liberation struggle. At

¹⁸¹ Fombad (2016) 16.

¹⁸² Fombad (2016) 16.

¹⁸³ Guobadia A 'Judicial-Executive Relations in Nigeria's Constitutional Development: Clear Patterns of Confusing Signals' in Fombad C M (ed) *Separation of Powers in African Constitutionalism* (2016) 240.

¹⁸⁴ British citizens or white settlers who were descendants of British citizens. See Fombad (2016) 16.

¹⁸⁵ Nunow A A 'Constitution Making and Legal Reform Process in Kenya' (2004) available at <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/6526/Constitution%20Making%20and%20Legal%20Reform%20Process%20in%20Kenya.pdf?sequence=1&isAllowed=y> (accessed 10 February 2021). See Maxon R M *Kenya's Independence Constitution: Constitution-Making and End of Empire* (2011) 107.

independence, ‘about 15 million hectares of predominantly good quality land [was] owned by about 6,100 families of European descent, and 16.4 million hectares of less fertile land [was] occupied by a little less than 800,000 indigenous families’.¹⁸⁶ It was in this context that the Zimbabwean leaders wanted a constitution that addressed the land-ownership imbalance, particularly given that most of the land had been forcibly taken from black people.

Britain was adamant that its interests in, for example, British-owned companies and settler properties were to be protected by the right to private property.¹⁸⁷ Lovemore Madhuku asserts that African leaders were essentially ignored and emasculated in the Lancaster negotiations.¹⁸⁸ He states that the leaders of the liberation movement

lacked the political muscle to ensure a different framework. Real political power at the Lancaster House Conference lay with the British government whose avowed aim was to preserve white settler privileges. The framework which eventually appeared in the constitution was derived, almost verbatim, from the proposals put forward by the British government.¹⁸⁹

The result was a constitution which entrenched a Declaration of Rights; protected existing property rights; and specified that the new government could expropriate land only for specific purposes and under stringent conditions.¹⁹⁰ The Constitution also provided that, except by the unanimous agreement of Parliament, there could be no amendment of the Declaration of Rights, and hence the property clause, for the first 10 years of independence.¹⁹¹ The British government went a step further to ensure that all rights in the Constitution were protected by entrenching a strong independent judiciary that would enforce the Constitution and by reserving a specific number of seats for white settlers in the new parliament until 1987.¹⁹² The latter ensured that as long as the white settlers were in Parliament, Members of Parliament (MPs) would not be able to reach a unanimous agreement to amend the Declaration of Rights.

Lastly, both the Kenyan and Zimbabwean independence constitutions were also referred to as Lancaster House constitutions because the negotiations of the constitution-making processes

¹⁸⁶ Makonese M ‘Land, Conflict, and the Economy: The Role of the Constitution in Addressing the Land Issue in Post-Independence Zimbabwe’ in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 223. See also Klug (2022) 208.

¹⁸⁷ Makonese (2022) 218.

¹⁸⁸ Madhuku L ‘Law, Politics and the Land Reform Process in Zimbabwe’ in Masiiwa M (ed) *Post-Independence Land Reform in Zimbabwe: Controversies and Impact on the Economy* (2004) 132.

¹⁸⁹ Madhuku L (2004) 133.

¹⁹⁰ Klug (2022) 208.

¹⁹¹ Klug (2022) 208.

¹⁹² Klug (2022) 208.

were held at Lancaster House in London.¹⁹³ Furthermore, the independence constitutions were passed as Acts of the British Parliament, not in the parliaments of the constitution owners.¹⁹⁴ This too is evidence of the power imbalance between Britain and its colonies, an imbalance that enabled Britain to impose certain constitutional concepts on the independence constitutions of Kenya and Zimbabwe.

There is also evidence of the French imposing the French Fifth Republic Constitution of 1958 (the Gaullist Constitution) on their African colonies. The Gaullist Constitution was imposed in francophone Africa with very few changes.¹⁹⁵ This was coercive in that France had previously stipulated that no African state would gain independence without accepting the Gaullist Constitution.¹⁹⁶ It is important to understand that France was reluctant to decolonise, fearing the loss of the economic, cultural and military benefits it derived from the colonies. This is why France abstained from voting in the United Nations General Assembly Declaration on Granting of Independence to Colonial Countries and Peoples.¹⁹⁷ The French government decolonised only in the face of external and internal pressure, but was determined to do so in a manner that allowed it to continue to benefit economically from francophone Africa.¹⁹⁸

It was clear that France was going to grant independence to its African colonies only on its own terms. France made it clear that it would sever all links with territories that disagreed with its terms for attaining independence.¹⁹⁹ Guinea was the sole country that refused the imposition

¹⁹³ Hursh J ‘Protecting the Land, Protecting the Resources: A Comparative Assessment of Constitutional Protections in Kenya, Sudan, and South Sudan’ in Fombad C M & Steytler N (eds) *Constitutionalism and the Economy in Africa* (2022) 158. See also Steytler & Fombad (2022) 16.

¹⁹⁴ The Southern Rhodesia Act 1979 had to be passed before the independence constitution of Zimbabwe could be drafted. See ‘Southern Rhodesia Act 1979’ available at <https://www.legislation.gov.uk/ukpga/1979/52#:~:text=An%20Act%20to%20provide%20for,with%20respect%20to%20Southern%20Rhodesia> (accessed 4 June 2023). See also ‘Southern Rhodesia the Zimbabwe Constitution Order 1979’ available at https://www.legislation.gov.uk/uksi/1979/1600/pdfs/uksi_19791600_en.pdf (accessed 4 June 2023). See also Hursh (2022) 158.

¹⁹⁵ Fombad (2016) 16.

¹⁹⁶ Fombad (2016) 16.

¹⁹⁷ ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’: available at <http://digitallibrary.un.org/record/662085> (accessed 8 July 2020).

¹⁹⁸ By imposing the Gaullist Constitution in francophone Africa, France laid the groundwork for the establishment of the Communauté Financière Africaine (CFA), a monetary union. Countries using CFA francs are required to store 50 per cent of their currency reserves with the Banque de France, and the currencies are pegged to the euro. What that entails is that France continues to exert significant influence over the economies of francophone African countries. See Hundeyin D ‘The “French Colonial Tax”: A Misleading Heuristic for Understanding Francafrrique’ *The African Report* 21 November 2019 available at <https://www.theafricareport.com/20326/the-french-colonial-tax-a-misleading-heuristic-for-understanding-francafrrique/> (accessed 22 March 2023).

¹⁹⁹ Fombad C M & Muhindo T M ‘The Struggle for Constitutional Identity in Francophone Africa’ in Fombad C M & Steytler N (eds) *Constitutional Identity and Constitutionalism in Africa* (2024) 93.

of the French Constitution, and for this it paid a heavy price.²⁰⁰ France pulled all 4,000 colonial servants out of Guinea, including administrators, technicians, teachers, doctors and judges.²⁰¹ The civil servants also burnt blueprints, archives and machinery manuals before leaving. France's response to not getting its way in respect of, among other things, the imposition of the French Constitution left Guinea nearly in ruins.²⁰² As in many countries, very few Africans prior to independence were actively involved in the civil service, so when France withdrew its civil servants, there was a major gap left to fill. It is understandable that when other French colonies saw how far France was willing to go, they realised that they did not have much of a choice.²⁰³ Hence, they just had to accept the migration of the French Constitution into their independence constitutions.

Overall, the theory of coercion is limited to explaining the constitutional migration that occurred in the period of African decolonisation (from the late 1950s to the early 1990s).

2.4. Theory of migration by persuasion

The theory of migration by persuasion explains instances where the political autonomy of constitution owners is affected by the persuasion and incentives of third parties. This theory differs from the coercive theory discussed in section 2.3 in that there is no single country that influences constitutional migration, but rather international organisations. In addition, there is no physical presence of another country, as in where there is occupation, and nor is there the dynamic of one country (the country of the constitution owners) being 'owned' by another, as was the case with decolonisation with regard to the role of the 'colonial master'.

Gunter Frankenberg refers to the external parties involved in constitution-making processes as merchants of transfer,²⁰⁴ whilst Xenophon Contiades and Alkmene Fotiadou describe the services of these parties as the 'constitutional marketing' of particular constitutional models, concepts or texts.²⁰⁵ Whether external parties act as merchants of transfer or constitutional

²⁰⁰ Fombad & Muhindo (2024) 93.

²⁰¹ MacDonald M S *The Challenge of Guinean Independence, 1958–1971* (unpublished PhD thesis, University of Toronto, 2010).

²⁰² MacDonald (2010) 52.

²⁰³ There was a realisation that, to achieve the objectives of economic development, maintain public order, regulate commerce, and ensure a proper functioning of the administrative and judicial services, they had to give into the demands of France and accept the French Constitution.

²⁰⁴ Frankenberg G *Comparative Constitutional Studies: Between Magic and Deceit* (2018) 20.

²⁰⁵ Contiades X & Fotiadou A 'Imposed Constitutions: Heteronomy and (Un)amendability' in Albert R, Contiades X & Fotiadou A (eds) *The Law and Legitimacy of Imposed Constitutions* (2019) 28.

marketers, the common denominator is that they exert a degree of influence in the constitution-making process.²⁰⁶ External actors can present themselves as international organisations. Al-Ali opines that the external actors mentioned above have the capacity to actively or passively influence constitutional migration to countries undergoing constitutional reform, especially when their persuasion is backed by financial aid, grants and technical support.²⁰⁷ These organisations include the United Nations (UN), World Bank, IMF,²⁰⁸ and Venice Commission. Al-Ali remarks that external actors are usually motivated by a desire to ensure the protection of fundamental rights and the adherence to international best practice in the constitution.²⁰⁹ John Ikenberry observes that external players are also involved in constitution-making exercises to ensure that there is economic reform and socio-economic stabilisation.²¹⁰ Below is a discussion of instances where the UN and the Venice Commission have played a persuasive role in constitution-making processes.

2.4.1 Influence of the United Nations

The UN in its various guises – such as the United Nations Development Programme (UNDP), or its political offices and special envoys – describes its role in constitution-making as one which is ‘committed to providing constitutional assistance in a manner that respects national sovereignty, promotes democratic values and the international norms for which the UN stands’.²¹¹

In seeking to influence drafting processes towards that outcome, the UN facilitates constitutional migration by encouraging the adoption of certain principles enshrined in the key UN documents such as the Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The UN exercises subtle levers of persuasion to ensure that it influences the constitution-

²⁰⁶ Bockenforde M ‘International Law and Constitution-Making: Sudan’ in Law D S (ed) *Constitutionalism in Context* (2022) 157.

²⁰⁷ Al-Ali (2011) 77.

²⁰⁸ The influence of the World Bank and the IMF in constitutional migration is not discussed in detail here, given that it was discussed in section 2.2.3 above.

²⁰⁹ Al-Ali (2011) 77. See also Amos M ‘Transplanting Human Rights Norms: The Case of the United Kingdom’s Human Rights Act’ (2013) 35 *Human Rights Quarterly* 395.

²¹⁰ Ikenberry G J ‘The Myth of Post-Cold War Chaos’ (1996) *Foreign Affairs* 75.

²¹¹ ‘Constitutional Assistance’ available at <https://peacemaker.un.org/constitutions-project> (accessed 23 March 2023). See also Malagodi M ‘Constitutional History and Constitutional Migration: Nepal’ in Law D S (ed) *Constitutionalism in Context* (2022) 115.

making processes. Some of the tools the UN uses to achieve this include offering technical support or financial aid and providing recognition.

There are a number of examples in the world where the UN's influence can be clearly identified. Roznai argues that the UN influenced constitutional migration in the Afghanistan Constitution of 2004.²¹² The UN offered technical support for the constitution-making process. Al-Ali explains that, in this role, it purportedly sought to leave a light footprint in respect of its suggestions of the constitutional concepts that had to be incorporated into the Afghanistan Constitution.²¹³ The UN advocated for the international community's interests and set out 'red lines' that indicated to the Afghan people that the international community would not accept a constitution that subjected women's rights to Islamic Sharia and disregarded international standards on fundamental human rights,²¹⁴ thus subtly informing the Afghan people that without those constitutional protections, any government formed under that constitution would not be recognised or supported. Inevitably, Afghanistan was persuaded to heed the UN's 'recommendations' because the UN is held in high regard globally. Furthermore, the UN can be persuasive with its funding initiatives through channels such as the United Nations Children's Fund (UNICEF) or UNDP. The result was that Afghanistan adopted a constitution that had quotas that ensured the representation of women and ethnic minorities.²¹⁵

Manon Bonnet observes that without the aid of the UN and other external parties, there is a high likelihood that women's rights would not have been constitutionally protected.²¹⁶ For example, while women were adequately represented in the constitutional *Loya Jorga* (the assembly of leaders that made constitutional decisions), the presence of warlords at debates undermined women's ability to express their opinions due to reasonable fear for their own safety or that of their families from the warlords.²¹⁷ The UN's position here would thus seem to have facilitated the migration of constitutional concepts rather than actual texts in that the organisation provided a framework or concepts that needed to be incorporated in the Afghanistan Constitution – rather than the actual text itself.

²¹² Roznai Y 'Internally Imposed Constitutions' in Albert R, Contiades X & Fotiadou A (eds) *The Law and Legitimacy of Imposed Constitutions* (2019) 63.

²¹³ Al-Ali (2011) 81.

²¹⁴ Al-Ali (2011) 81.

²¹⁵ Bonnet M 'The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building' in Albert R, Contiades X & Fotiadou A (eds) *The Law and Legitimacy of Imposed Constitutions* (2019) 222.

²¹⁶ Bonnet (2019) 222.

²¹⁷ Bonnet (2019) 223.

Gautam states that not all occasions where constitution owners invite the aid of the UN result in the migration of constitutional models, concepts or texts.²¹⁸ The 2015 Nepali constitution-drafting process is an example of such a situation. The UNDP, at the request of the Nepalese Ministry of Peace and Reconstruction, contracted foreign experts to ‘assess the knowledge gap in relation to federalism’.²¹⁹ The UN’s experts recommended that an identity-centric federal model be entrenched in Nepal’s Constitution – a model the constitution owners rejected.²²⁰ Instead, the federal model that was adopted in the Nepali Constitution was a federal model that, in addition to identity, factors in ‘capability or economic viability, using evidence-based analysis and measurable indices to reduce regional inequalities and to promote inclusive and sustainable development’.²²¹ It is not unusual, though, that Nepal could disregard the UN’s recommendations of a federal model: the constitutional provisions it rejected are not as cardinal as the international standards on fundamental human rights that were put to Afghanistan.

Mara Malagodi suggests that the UN does not have the absolute power to ensure that all the constitution-making exercises in which it participates comply with international standards on fundamental human rights, such as non-discrimination based on gender.²²² For example, the 2015 Constitution of Nepal reintroduced citizenship provisions that discriminate based on gender. Article 11(5) provides for unequal rights for Nepali men and women in conferring citizenship to their children.²²³ Thus, Nepal was able to entrench provisions that discriminate against women despite the UN’s involvement. By contrast, in the 2004 Afghan constitution-making process, the UN clearly informed Afghanistan that the international community would not accept constitutional provisions that disregarded international standards on fundamental rights – a standard to which Nepal was not held. It is important to note that the UN’s approach to constitution-making is non-prescriptive. There is a delicate balance: the UN is supposed to encourage constitution owners to adhere to the international standards on fundamental human rights, yet without creating the impression that the new constitution is foreign-imposed.²²⁴

²¹⁸ Gautam K *Lost in Transition; Rebuilding Nepal from Maoist Mayhem and Mega Earthquake* (2015) 317.

²¹⁹ Gautam (2015) 317.

²²⁰ Gautam (2015) 317.

²²¹ Gautam (2015) 385.

²²² Malagodi (2022) 132.

²²³ Children born to a Nepali father and a foreign-born mother are eligible for citizenship by descent, whilst children born to a Nepali mother and a foreign-born father can only be granted naturalised citizenship, which has less privileges. See Pradhan A ‘Nepal’s Unequal Citizenship Law: An International Policy Perspective on Gender-Based Discrimination in the Country’s Citizenship Law’ *Nepali Times* 19 December 2020 available at <https://www.nepalitimes.com/banner/nepal-waits-for-an-unequal-citizenship-law/> (accessed 30 January 2023).

²²⁴ Malagodi (2022) 115.

There is thus evidence that the UN facilitates constitutional migration mostly by bringing in constitutional law experts to assist in the constitution making processes. However, its involvement in any constitution-making process is persuasive rather than coercive. For example, in Nepal, the UN's recommendations were disregarded by the constitution owners.

2.4.2 Role of Commissions

Maartje De Visser notes that independent or constitutional commissions can influence constitutional migration. For example, the European Commission for Democracy through Law (Venice Commission), which were set up to cultivate respect for democracy and the rule of law, have influenced the migration of constitutional concepts.²²⁵ The Venice Commission was established at the end of the Cold War by the Council of Europe, which to this day funds the Commission.²²⁶ The Council of Europe is an international organisation founded in the wake of World War II to uphold human rights, democracy and the rule of law in Europe.²²⁷ The mandate of the Commission is to provide technical and legal assistance in constitutional reform to new or restored central and eastern European democracies.²²⁸

When the Cold War ended, the USSR disintegrated and countries such as Ukraine, Georgia, Belarus, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan and Uzbekistan became independent states.²²⁹ Slovenia, Croatia and Bosnia-Herzegovina were also recognised as new states, in this case ones arising from the disintegration of Yugoslavia.²³⁰ All these countries needed new constitutions,²³¹ in particular democratic constitutions that moved away from the authoritarian Soviet model.²³² The Commission compared different constitutions with the goal of designing constitutions that addressed the needs of a post-Cold War world. Liberal democracy was taken as the ideal because the Soviet model was

²²⁵ De Visser M 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 *The American Journal of Comparative Law* 966. See also 'For Democracy Through Law - The Venice Commission of the Council of Europe' available at http://www.venice.coe.int/WebForms/pages/?p=01_Presentation (accessed 9 July 2023).

²²⁶ De Visser M (2015) 966.

²²⁷ 'Who We Are' available at <https://www.coe.int/en/web/about-us/who-we-are> (accessed 9 July 2023).

²²⁸ Volpe V 'Drafting Counter-Majoritarian Democracy: The Venice Commission's Constitutional Assistance' (2016) 76 *Heidelberg Journal of International Law* 811.

²²⁹ Von Hippel K *Democracy by Force: US Military Intervention in the Post-Cold War World* (2004) 127.

²³⁰ Von Hippel (2004) 130.

²³¹ Gagnon V P 'Ethnic Nationalism and International Conflict: The Case of Serbia' (1994) 19 *International Security (Winter)* 130.

²³² Dixon R & Ginsburg T 'Introduction Comparative Constitutional Law: A Thumbnail History' in Dixon R & Ginsburg T (eds) *Comparative Constitutional Law* (2011) 3.

undemocratic and authoritarian. The entirety of the former USSR and its neighbouring regions entrenched the concept of liberal democracy thanks to the influence wielded by the Commission.²³³ For countries to be recognised and become member states of the Council of Europe or the Commission, they were required to have constitutions that reflected similar ideals.²³⁴ The benefits of becoming member states include financial grants, scholarships, and access to quality medicine and health care.²³⁵ Therefore, the Commission persuaded the former USSR and neighbouring regions to incorporate liberal democracy on the basis of the benefits that come with being member states.

The initial mandate of the Commission was to bring the countries of the former communist bloc and the new Council of Europe member countries in line with Western European standards of democracy, human rights and the rule of law. Nevertheless, this once exclusively European Commission is no longer solely a pan-European institution, as it is now considered as having international or transnational stature.²³⁶ Countries in Africa, the Americas, the Middle East and Asia have since joined it.²³⁷ In having gained a reputation as an authoritative consultative body on constitutionalism and democracy,²³⁸ the Commission has transformed the conglomerate of countries under its auspices into a global, transnational, constitutional forum.²³⁹ In the time since the post-Cold War constitution-making period, the Commission has also facilitated constitutional migration into Iceland, Tunisia, Belgium and Hungary.²⁴⁰ European countries were persuaded to entrench certain constitutional concepts thanks to the promise of becoming Council of Europe member states; however, outside of Europe, there were no such promises in regard to joining the Council. Non-European countries could become Venice Commission member states and enjoy the benefits that come with that membership, as mentioned above.²⁴¹

Valentina Volpe contends that the Commission's constitutional assistance operates as an instrument for promoting an archetypical model of European constitutionalism, in the process

²³³ Dixon & Ginsburg (2011) 3.

²³⁴ 'Values' available at <https://www.coe.int/en/web/about-us/values> (accessed 9 July 2023).

²³⁵ 'Achievements' available at <https://www.coe.int/en/web/about-us/achievements> (accessed 9 July 2023).

²³⁶ De Visser M (2015) 970.

²³⁷ De Visser M (2015) 969.

²³⁸ De Visser M (2015) 968.

²³⁹ Duranti F 'Constitution of Tunisia, Venice Commission and International Constitutionalism' in Dell'Aguzzo L and Diodato E (eds) *The State of Pivot States in South-Eastern Mediterranean: Turkey, Egypt, Israel, and Tunisia after the Arab Spring* (2016) 123.

²⁴⁰ De Visser, M (2015) 966. See also Roznai (2022) 144.

²⁴¹ 'Members of the Venice Commission' available at <https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN> (accessed 9 July 2023).

spreading that model to all of the countries to which the Commission gives assistance.²⁴² De Visser suggests that the Commission's role in multiple countries has resulted in the Commission importing the constitutional models and concepts used in one country and incorporating them in the next constitution.²⁴³ Frankenberg compares the Commission's role to exporting 'transnational products' which are formulated to fit any national setting.²⁴⁴ Thus, the Commission's influence undoubtedly leads to constitutional migration in all the countries in which it plays a role.

Unlike with the coercion or imposition theory discussed in section 2.3, the Commission's role in constitutional migration is persuasive. Volpe opines that the Commission 'cannot impose solutions, but it nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion'.²⁴⁵ What this entails is that there can be instances where the Commission recommends constitutional migration but where the constitution owners decide against incorporating the recommended provisions. For example, even though the Commission made recommendations on the 1993 Constitution of Albania relating to fundamental human rights, the constitution owners disregarded some of these, including the principle of equality.²⁴⁶ Similarly, when Albania reviewed its constitution in 1998, it rejected the Commission's recommendation to include a provision abolishing the death penalty.²⁴⁷

In sum, the Venice Commission is held in high regard when it comes to promoting constitutional democracy and the rule of law. Its role in constitutional migration is explained by the persuasion migration theory because its role is of a persuasive nature. The Commission can persuade countries undergoing constitutional reform with the incentives of membership, financial and technical aid, or access to quality medicine and health care, but it is the countries that ultimately decide whether to accept or reject the recommendations.

2.5 Dissemination of information

The self-selection, coercive and persuasion theories discussed above explain some of the reasons why there is constitutional migration. This section examines how knowledge of

²⁴² Volpe (2016) 812.

²⁴³ De Visser M (2015) 970.

²⁴⁴ Frankenberg (2018) 21.

²⁴⁵ Volpe (2016) 817.

²⁴⁶ Volpe (2016) 826.

²⁴⁷ Volpe (2016) 828.

constitutional models, concepts and texts spreads in practice. This is of particular relevance for the self-selection theory. In the case of coercive transfers, the occupier determines the extent of constitutional migration, whilst under the persuasion theory, international organisations transmit information. The question, then, is how information on constitutional provisions travels in the case of self-selection.

In general, there is not much literature on the dissemination of information with respect to constitutional migration. The limited literature available only provides surface-level discussion of the subject and is thus lacking in nuanced detail. Furthermore, there is a dearth in literature on comparative studies of the dissemination of information. The limited literature available barely discusses information dissemination on a case-by-case basis. In the literature, there appear to be at least four main ways by which to explain how knowledge of constitutional transfers is disseminated in constitutional reviews around the world. First, the dissemination occurs when there is general familiarity of well-known examples; secondly, familiarity is often due to colonial and linguistic links; thirdly, it occurs as a result of domestic expertise, and, lastly, through the invitation of foreign experts.

2.5.1 Familiarity of well-known examples

Tsegaye Regassa observes that constitution owners can be attracted to foreign constitutional transfers due to their general familiarity.²⁴⁸ Regassa points out that in the ‘age of hyper-technologized flow of information’, television and other media are some of the avenues through which constitution owners become familiar with constitutional models, concepts and texts. When constitution owners draft their own constitutions, they may then be drawn to foreign constitutional provisions with which they are familiar.²⁴⁹

The 1991 Nepali constitutional reform process offers one such example; here, the Nepali people gravitated to the Westminster model due to its familiarity.²⁵⁰ The Westminster model was attractive because it was a familiar constitutional model that could address Nepal’s need for democracy while maintaining a functional monarchy. Autocratic dynasties had ruled Nepal

²⁴⁸ Regassa T ‘Between Constitutional Design and Constitutional Practice: The Making and Legitimacy of the Ethiopian Constitution’ (2010) 1 *Mekelle University Law Journal* 36.

²⁴⁹ Regassa (2010) 36.

²⁵⁰ Regassa (2010) 36.

since as early as 750 BC.²⁵¹ Democracy was briefly introduced between 1951 and 1961, after which the monarchy instituted a partyless system of government known as the Panchayat system.²⁵² Girdhari Dahal describes this system as a great betrayal of the people of Nepal because, under it, all political parties were banned and human and political rights were highly curtailed.²⁵³ Furthermore, there was no significant development in the country. For three decades, political parties, civil society and ordinary Nepali people fought for the restoration of democracy.²⁵⁴ In 1990, underground political parties successfully launched a pro-democracy movement, which led to civil disorder.²⁵⁵ Michael Hutt argues that the movement no longer called only for democracy under a constitutional monarch – it now also demanded the abolition of the monarchy.²⁵⁶

The political crisis forced the monarchy to lift the ban on political parties and restore democracy.²⁵⁷ However, it was unwilling to relinquish any power, let alone be abolished. As such, it sought the compromise of a constitutional monarchy that would respect popular democracy.²⁵⁸ Moreover, civil unrest had created a constitutional vacuum that needed to be filled in order to ensure political stability.²⁵⁹ The Constitution Recommendation Commission (CRC) set up in 1990 was tasked to draw up a new constitution which was both democratic and a constitutional monarchy.²⁶⁰ The British constitutional model was considered the archetypal and most successful form of such a government.

Malagodi notes that it was inevitable that the British-style system of constitutional monarchy would migrate to the Constitution of Nepal.²⁶¹ For more than a century, Nepal had appreciated how well the British model operated.²⁶² Furthermore, the British monarchy had been

²⁵¹ Dahal G ‘Constitution of Nepal and Political Development: Adaption and Challenges of Implication’ (2017) 6 *Janapriya Journal of Interdisciplinary Studies* 149.

²⁵² Dahal (2017) 149.

²⁵³ Dahal (2017) 149.

²⁵⁴ Dahal G ‘Democratic Practice and Good Governance in Nepal’ (2017) 17 *Journal of Political Science* 19.

²⁵⁵ Malagodi (2022) 119.

²⁵⁶ Hutt M ‘Drafting the Nepal Constitution, 1990’ (1991) 31 *Asian Survey* 1021.

²⁵⁷ Hutt (1991) 1022. See also Contiades X & Fotiadou A ‘Comparative Constitutional Change: A New Academic Field’ in Contiades X & Fotiadou A (eds) *Routledge Handbook of Comparative Constitutional Change* (2021) 17.

²⁵⁸ Dahal (2017) 24.

²⁵⁹ Delledonne G ‘Crises, Emergencies and Constitutional Change’ in Contiades X & Fotiadou A (eds) *Routledge Handbook of Comparative Constitutional Change* (2021) 245.

²⁶⁰ Malagodi (2010) 66.

²⁶¹ Malagodi (2010) 66.

²⁶² Unlike the other countries in the region, Nepal was never formally colonised by Britain. The Anglo-Nepali War of 1884–1916 was Britain’s attempt at colonising Nepal. However, the two countries signed an accord which

romanticised worldwide in the media, and was arguably the most popular constitutional monarchy in the world. For example, Queen Elizabeth II's coronation was broadcast and, for the first time in history, people on mass scale watched a royal coronation or listened over the radio.²⁶³ The coronation was watched on television by millions of people around the world.²⁶⁴ Similarly, on 29 July 1981, more than 700 million people across the world watched then Prince Charles²⁶⁵ and Princess Diana's royal wedding on television.²⁶⁶ This is evidence of how accessible the idea of a constitutional monarchy was.

It is reported that King Birendra instructed the CRC to draft a liberal constitution following the Westminster model.²⁶⁷ In the same year, the Constitution of Nepal of 1990 was promulgated with provisions for multiparty democracy and a constitutional monarchy.²⁶⁸ Hutt opines that this British-style constitutional monarchy reflected a compromise between the three main political movements involved in the constitution-making process.²⁶⁹ The Nepalis selected the British model because they were familiar with the British monarchy, its history, and its modern expression.

2.5.2 Familiarity due to colonial and linguistic links

The dissemination of information to constitution owners can also occur because foreign constitutional models, concepts and texts are familiar due to colonial and linguistic linkages.²⁷⁰ When there is a shared colonial history and the language is similar, constitution owners may look for constitutional models, concepts and texts from the colonial power because constitutional owners may assume that if such constitutional provisions work there (in the

granted Britain access to the Himalayan trade routes and control of the country's foreign policy, among other things. In exchange, Britain recognised Nepal as an independent country. Different Nepalese monarchies were able to preserve Nepal's independence under the aegis of British imperial power. See Malagodi (2022) 118.

²⁶³ Berry-Waite L 'A Ground-breaking Ceremony: The Coronation of Elizabeth II' 1 June 2022 available at <https://blog.nationalarchives.gov.uk/a-ground-breaking-ceremony-the-coronation-of-elizabeth-ii/> (accessed 28 January 2023).

²⁶⁴ Berry-Waite (2022) 1.

²⁶⁵ Now King Charles III.

²⁶⁶ 'Princess Diana: Her Life and Legacy' available at <https://edition.cnn.com/2022/08/31/world/gallery/princess-diana-a-life-in-pictures-25-years-after-her-death/index.html> (accessed 28 January 2023).

²⁶⁷ Malagodi (2010) 66.

²⁶⁸ Constitution of the Kingdom of Nepal, 1990.

²⁶⁹ The constitutional monarchy kept King Birendra in power, but afforded the Nepali people the democracy of which they had been deprived. See Malagodi (2010) 66.

²⁷⁰ Neto A O & Lobo M C 'Between Constitutional Diffusion and Local Politics: Semi-Presidentialism in Portuguese-Speaking Countries' (2010) *APSA 2010 Annual Meeting Paper 5*.

colonial metropole), the constitutional imports will probably also work for the constitution owners. Furthermore, when the language is similar, this helps with accessibility.

A good example is that most current lusophone constitutions in Africa resemble the 1978 Portuguese Constitution. Several factors contributed to this migration. As noted above, not all lusophone countries adopted the Portuguese Constitution at independence. For example, the independence constitutions of Angola, Guinea Bissau, Mozambique and Cape Verde were modelled on the Soviet constitution in view of the socialist ideologies of the constitution owners.²⁷¹ After the Cold War, those four countries, like a number of others, wanted to adopt more liberal constitutions. Octavio Neto and Marina Lobo suggest that lusophone countries were drawn to the 1978 Portuguese Constitution because it was regarded as a progressive liberal constitution that had put an end to decades of dictatorship.²⁷² This was attractive because lusophone countries wanted to move away from authoritarian forms of government. The historical connection between the countries and the similarity in language were key to the spread of information regarding the merits of adopting constitutions modelled after the Portuguese Constitution.

Fernando Bastos argues, too, that constitutional migration from Portugal to lusophone African countries stems from the fact that the latter could easily access the 1878 Portuguese Constitution, had a solid understanding of it, and regarded it as progressive.²⁷³ A majority of lusophone legal practitioners were trained in African colleges in ways that were similar to those of Portuguese law schools and Portuguese institutions that train magistrates.²⁷⁴ The curricula followed at various law faculties also conforms to the Portuguese model. For example, it is recommended to law students that they study Portuguese legal literature. Likewise, the professors who are invited to teach master's and doctoral courses, or to join panels that evaluate master's and PhD students, are usually professors from Portugal.²⁷⁵

Furthermore, the influence of the Portuguese training model is evident in the large number of professors at law faculties in Portuguese-speaking African countries who obtained their postgraduate degrees at Portuguese universities.²⁷⁶ Colonial and linguistic links led to the

²⁷¹ Neto & Lobo (2010) 5.

²⁷² Neto & Lobo (2010) 7.

²⁷³ Bastos (2016) 162.

²⁷⁴ Bastos (2016) 162.

²⁷⁵ Bastos (2016) 162.

²⁷⁶ Bastos (2016) 162.

emergence of domestic experts from among those who had trained at either African law universities or Portuguese universities. When African lusophone countries modernised their constitutions, domestic experts in the legal fraternity and academia were drawn to the Portuguese Constitution because they were familiar with it. Furthermore, domestic experts who were exposed to Portuguese law in practice during their studies in Portugal understood how the constitutional provisions translated into the day-to-day lives of the Portuguese people. Therefore, when experts who had studied in Portugal were involved in constitution-making, it was inevitable that they would draw on the Portuguese Constitution.

Constitutional migration in lusophone countries is not limited to movement from Portugal to African countries. Legal cooperation, as well as personal and institutional relationships, between legal practitioners in Portuguese-speaking African states also facilitates the migration of Portuguese-inspired models, concepts or texts among African countries themselves.²⁷⁷ This is horizontal migration among countries, and takes place through seminars, conferences, workshops and university exchange programmes; it is the opposite of the vertical migration from Portugal down to its former colonies.

The Portuguese influence on lusophone legal systems is manifest in the many similarities in the wording of constitutional texts.²⁷⁸ For example, the provisions governing the judiciary in the constitutions of São Tomé and Príncipe, Guinea-Bissau and Angola all follow the Portuguese Constitution. The wording of article 202(1) of the Portuguese Constitution²⁷⁹ is also found in article 120(1) of the Constitution of São Tomé and Príncipe,²⁸⁰ article 119 of the Constitution of Guinea-Bissau,²⁸¹ and article 174(1) of the Constitution of Angola.²⁸² Another example is that article 202(2) of the Portuguese Constitution²⁸³ is replicated in the constitutions of São Tomé and Príncipe, Cape Verde and Angola.

André Thomashausen observes that the constitutional concepts designed to shield fundamental principles or provisions from amendment or abolition that are found in a number of lusophone

²⁷⁷ Bastos (2016) 180.

²⁷⁸ Bastos (2016) 161.

²⁷⁹ 'The courts are the sovereign bodies with competence to administer justice on behalf of the people'. See article 202(1) of the Constitution of Portugal, 1976.

²⁸⁰ Constitution of São Tomé and Príncipe, 1975.

²⁸¹ Constitution of Guinea-Bissau, 1984.

²⁸² Constitution of Angola, 2010.

²⁸³ '[In] the administration of justice, the courts should act in defence of the rights and legally protected interests of the citizens, punish breaches of democratic legality and to resolve conflicts of public and private interests.'

African countries originate in the Portuguese Constitution.²⁸⁴ These provisions, referred to as ‘eternity clauses’, appear almost verbatim in the constitutions of Angola, Cape Verde,²⁸⁵ Guinea-Bissau, Mozambique²⁸⁶ São Tomé and Príncipe.²⁸⁷ Table 1 overleaf highlights the resemblance between the eternity clauses in the constitutions of Portugal, Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe. Italics are used to indicate similarities in the text.

²⁸⁴ Thomashausen A ‘Eternalized Core Provisions in the Constitutions of the Lusophone Countries in Africa and their Uncertain Destinies’ unpublished paper, *Ninth Stellenbosch Annual Seminar on Constitutionalism in Africa (SASCA 2022)*, Conference, Stellenbosch, South Africa, 14 September 2022.

²⁸⁵ Constitution of Cape Verde, 1980.

²⁸⁶ Constitution of Mozambique, 2004.

²⁸⁷ Miranda J *Manual de Direito Constitucional* 2 ed (1983) 155.

Table 1: Eternity clauses entrenched in the constitutions of Portugal, Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe

Portugal	Angola	Cape Verde	Guinea-Bissau	Mozambique	São Tomé and Príncipe
<p>Article 288</p> <p>Constitutional revision laws shall respect:</p> <p>a. National independence and the unity of the state;</p> <p>b. The republican form of government;</p> <p>c. The separation between church and state;</p> <p>d. Citizens' rights, freedoms and guarantees;</p> <p>e. The rights of workers, workers' committees and trade unions;</p> <p>f. The coexistence of the public, private and cooperative and social sectors in</p>	<p>Article 236</p> <p>Amendments to the Constitution must safeguard the following:</p> <p>a) The dignity of the human person;</p> <p>b) National independence, territorial integrity and unity;</p> <p>c) The republican nature of government;</p> <p>d) The unitary nature of the State;</p> <p>e) The essential core of the rights, freedoms and guarantees;</p> <p>f) The rule of law and of pluralist democracy;</p> <p>g) The secular nature of the state and the principle of the</p>	<p>Article 290</p> <p>1. The following may not be the object of revision:</p> <p>a) The national independence, integrity of the national territory and unity of the State,</p> <p>b) The republican form of Government;</p> <p>c) The universal, direct, secret and periodic suffrage for the election of the holders of office in sovereign organs and local government;</p> <p>d) The separation and interdependence of the sovereign organs;</p> <p>e) The autonomy of the local government power;</p>	<p>Article 130</p> <p>No draft revision may affect:</p> <p>a) The unitary structure and the republican form of the State;</p> <p>b) The secular nature of the state;</p> <p>c) The integrity of the national territory;</p> <p>d) The national Symbols, the Flag and the National Anthem;</p> <p>e) The Rights, liberties and guarantees of citizens;</p> <p>f) The fundamental Rights of workers;</p> <p>g) The direct, equal, secret and regular universal suffrage for deciding the holders of</p>	<p>Article 300</p> <p>Restrictions as to Subject Matter</p> <p>1. Constitutional amendment laws shall safeguard:</p> <p>a) the independence, the sovereignty and the unity of the State;</p> <p>b) the republican form of Government;</p> <p>c) the separation between religious denominations and the State;</p> <p>d) the fundamental rights, freedoms and guarantees;</p> <p>e) universal, direct, secret, personal, equal and periodic suffrage for the appointment of</p>	<p>Article 154</p> <p>The following may not be subject of constitutional amendment:</p> <p>(a) the independence, integrity of the national territory and the unity of the State;</p> <p>(b) the secular status of the State;</p> <p>(c) The Republican form of Government;</p> <p>(d) the rights, freedoms and guarantees of citizens;</p> <p>(e) universal, direct, secret and periodic suffrage for the election of the holders of the organs of sovereignty and</p>

<p>relation to the ownership of the means of production;</p> <p>g. The requirement for economic plans, which shall exist within the framework of a mixed economy;</p> <p>h. The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and <i>periodic suffrage</i>; and the proportional representation system;</p> <p>i. <i>Plural expression and political organisation, including political parties, and the right to democratic opposition</i>;</p>	<p><i>separation of church and state</i>;</p> <p>h) <i>The universal, direct, secret and periodic suffrage for the election of officeholders of the organs of sovereign and local authority</i>;</p> <p>i) <i>The independence of the Courts</i>;</p> <p>j) <i>The separation and interdependence of the organs exercising sovereign authority</i>;</p> <p>k) <i>Local autonomy</i>.</p>	<p>f) <i>The independence of the courts</i>;</p> <p>g) <i>The pluralism of expression and of political organisation and the right of opposition</i>.</p> <p>2. The revision laws may also not restrain or limit the rights, liberties and guarantees established in the Constitution.</p>	<p><i>sovereign elected positions</i>;</p> <p>h) <i>Political pluralism and pluralism of expression, the political parties and the right to democratic opposition</i>;</p> <p>i) <i>The separation and interdependence of sovereign bodies</i>;</p> <p>j) <i>The independence of tribunals</i></p>	<p><i>elective sovereign public offices and elective offices of local administration</i>;</p> <p>f) <i>pluralism of expression and of political organisation, including political parties and the right of democratic opposition</i>;</p> <p>g) <i>the separation and interdependence of the sovereign public offices</i>;</p> <p>h) the scrutiny of constitutionality;</p> <p>i) <i>the independence of the judiciary</i>;</p> <p>j) <i>the autonomy of the organs of the decentralised government on provincial, district and local authority levels</i>;</p> <p>k) the rights of workers and trade unions;</p> <p>l) the rules governing nationality, which cannot be amended in</p>	<p><i>regional and local authorities</i>;</p> <p>f) <i>The separation and interdependence of the organs of sovereignty</i>;</p> <p>(g) <i>the autonomy of regional and local authorities</i>;</p> <p>(h) <i>the independence of the courts</i>;</p> <p>(i) <i>pluralism of expression and political organisation, including political parties and the right of democratic opposition</i>.</p>
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<p>j. <i>The separation and interdependence of the bodies that exercise sovereign power;</i> l. The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission; m. <i>The independence of the courts;</i> n. <i>The autonomy of local authorities;</i> o. The political and administrative autonomy of the Azores and Madeira archipelagos.</p>				<p>such a way as to restrict or remove rights of citizenship. 2. Amendments pertaining to the matters listed paragraph 1 must, obligatorily, be submitted to a referendum.</p>	
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It is clear that Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe all adopted the eternity clauses entrenched in the Portuguese Constitution. While not all eternity clauses are verbatim reproductions, there is close resemblance in the formulation of the text. For example, article 228(m) of the Portuguese Constitution refers to the independence of courts whilst articles 130(j) and 300(i) of the Guinea-Bissau and Mozambique constitutions refer to the independence of tribunals and the independence of the judiciary, respectively. Lastly, the order in which the provisions are listed is almost identical. It is no coincidence that all the provisions appear in the same order.

In a nutshell, the colonial and linguistic relationship between Portugal and various African countries, along with the relationship between the Portuguese-speaking African countries themselves, encourages constitutional migration. When constitution owners are familiar with other constitutional models, concepts and texts due to exposure thereto in institutions such as universities, it gives them a good understanding of the model. Secondly, constitution owners gravitate towards constitutions which are in languages they understand; under such circumstances, there would be no need to translate any material. It is ironic that lusophone countries were drawn to the Portuguese Constitution after the Cold War despite having moved away from Portuguese influence at independence. When the Cold War ended, lusophone Africa reverted to the Portuguese constitutional model due to colonial familiarity; it was a system that was tried and tested. Furthermore, as discussed above, lusophone Africa maintained strong ties with Portugal after independence in respect of law schools. Lusophone Africa continued to have access to the Portuguese constitutional model, making the importation of constitutional provisions from Portugal almost unavoidable.

2.5.3 Domestic expertise

Information may also be disseminated through domestic experts contracted by constitution owners. In an attempt to benefit from comparison, local experts can refer to foreign constitutions.²⁸⁸ There is some literature on the role of domestic experts in the dissemination of information in constitution-making processes.²⁸⁹ Most of this pertains to their role in ensuring that the constitution-making process is homegrown, as well as their role in consulting with the local populace in the public-participation aspect of the constitution-making process.

²⁸⁸ Regassa (2010) 27.

²⁸⁹ Regassa (2010) 27. See also Blount et al. (2013) 208; Tushnet M 'Constitution-Making: An Introduction' (2013) 91 *Texas Law Review* 1998.

Domestic experts may also play a crucial role in overcoming linguistic barriers. Experts who understand a foreign language may assist in the translation of foreign constitutional models, concepts and texts, thereby aiding ease of importation. For example, international students who study at foreign universities may learn the foreign languages spoken in the country where they are studying.²⁹⁰ In addition to attaining qualifications at foreign universities, these students return to their home countries not only as experts in their respective fields but as people with an understanding of the new language. The returning students then play a role in overcoming linguistic barriers. However, there is limited information on the actual dynamics behind the role of domestic experts in constitutional migration, especially in the African context.

Section 2.5.2 examines one of the limited African examples where constitution owners employed the services of domestic experts. Lusophone African scholars were well versed in the 1978 Portuguese Constitution and played a significant role in the dissemination of information. Another example is the role domestic experts played in the constitutional migration of the socialist model in the 1954 and 1982 Chinese constitutions (see section 2.2.1).

China wanted to adopt a socialist constitution, the most prominent one of which was the Russian. The dissemination of Russian socialist ideology in China followed the steps below. First, Russian materials, including constitutional texts and constitutional law books, were translated from Russian to Chinese to overcome the language barrier. Cam Liu notes that Chinese academia was tasked with the translation of Russian material, particularly the constitutional law books.²⁹¹ Legal journals and books published in China in that period consisted of translated works on the Soviet legal system.²⁹² That was an important step because it was difficult for the Chinese to understand Russian.²⁹³ Secondly, socialist ideology was taught at Chinese universities by both Chinese and Russian professors. For example, Russian professors were invited to teach constitutional law courses at Renmin University of China in Beijing. Domestic experts in the Russian socialist ideology were trained this way. In the third and final step, Chinese academia and locally trained experts participated in the 1954 and 1982

²⁹⁰ 'Learn French at the University' available at <https://www.univ-larochelle.fr/en/international/learn-french/learn-french-at-the-university/> (accessed 6 June 2023).

²⁹¹ Liu C 'The Effect of Soviet Union's Constitutional Theories on China's Constitutional Theories' (2012) 4 *North Law Journal* 37.

²⁹² Jizeng (2015) 57.

²⁹³ Liu (2012) 37.

Chinese constitution-making processes, resulting in the constitutional migration from the 1936 and 1977 USSR constitutions.²⁹⁴

Overall, domestic experts can facilitate constitutional migration either as internationally trained experts who bring knowledge learnt abroad to their home countries or as locally trained experts who use the expertise learnt locally in the constitution review processes. Domestic experts play a vital role because they are knowledgeable experts who can be involved in the constitutional migration process from the onset since they are the constitution owners and arguably have a better understanding than others of the needs to be addressed by a new constitution.

2.5.4 Foreign experts on invitation

Foreign experts who are invited by constitution owners also play a role in the dissemination of information.²⁹⁵ When constitution owners identify constitutional models, concepts or texts they want to incorporate in their constitution, they may invite foreign experts to assist them. Constitution owners invite specialists from countries with familiar legal systems, common history, or experts who have knowledge of the constitutional models, concepts or texts in which the constitution owners are interested.²⁹⁶ The role of foreign experts often results in constitutional migration from the countries where the experts are based or from constitutions in which they are experts.

Foreign experts play a similar role when acting on behalf of international organisations. The main difference is that when they are invited by the constitution owners, the scope of their function is limited by the constitution owners. Constitution owners can elect to either accept or reject the experts' recommendations because there is not that persuasive element presented by international organisations. While there is much literature on the role of foreign experts in African constitution-making processes (as discussed in section 2.4), most experts are involved at the request or involvement of international organisations. There is thus not much literature on the role of foreign experts who are invited by constitution owners.

²⁹⁴ Jizeng (2014) 2.

²⁹⁵ Blount et al. (2013) 209.

²⁹⁶ Malagodi (2010) 69.

The Nepali constitution-making process discussed in section 2.5.1 is an example of an instance where constitution owners invited foreign experts to assist with their new constitution.²⁹⁷ In 1990, the Nepal CRC invited some Indian lawyers to provide assistance in the CRC process.²⁹⁸ Malagodi observes that when she interviewed the CRC members, they indicated that they invited the Indian delegation because they were attracted to how India had redesigned its constitution on British models of government, institutions, and common law adapted to the Indian context.²⁹⁹ India and Nepal both share a British colonial history.³⁰⁰ The CRC wanted to learn from the Indian experts how they could redesign the 1990 Constitution in a manner that would allow them to benefit from the British model of government, institutions and common law. Blount et al. observe that it was expected that the experts would bring about constitutional migration from India into the Nepali Constitution because they were invited to share their knowledge on the Indian Constitution.³⁰¹ Ultimately, Nepal adopted the constitutional mechanisms that regulated executive accountability and constitutional supremacy as entrenched in the Indian Constitution.³⁰²

Wiktor Osiatynski observes that constitution owners can initiate conversations with international organisations and ask for assistance with the drafting process.³⁰³ One such example is when the Estonians, via Human Rights Watch, invited Herman Schwartz, an American professor, to assist in the 1992 constitution review.³⁰⁴ Schwartz explained that in the East European countries he was invited to assist, he often made suggestions and, in a few instances, pushed for specific constitutional concepts. In Estonia, for instance, he recommended that they consider importing from the ‘US constitutional heritage [of] the principles of judicial review and separation of powers’, but advised them ‘not to follow the American model of judicial review’.³⁰⁵ Schwartz’s recommendations as a foreign expert commissioned by Human Rights Watch is indicative of the fact that foreign experts have the

²⁹⁷ The ‘new constitution’ refers to the 1990 Constitution, which was the new constitution at the time. The 1990 Constitution was replaced by the 2015 Constitution, while the monarchy, whose provisions are discussed in this section, was abolished in 2008.

²⁹⁸ Malagodi (2010) 69.

²⁹⁹ Malagodi (2010) 66.

³⁰⁰ Malagodi (2010) 66.

³⁰¹ Blount (2013) 48.

³⁰² Malagodi (2022) 119.

³⁰³ Osiatynski W ‘Paradoxes of Constitutional Borrowing’ (2003) 1 *International Journal of Constitutional Law* 258.

³⁰⁴ Osiatynski (2003) 258.

³⁰⁵ Osiatynski (2003) 258.

capacity to influence constitutional migration whether they are invited by the constitution owners or international organisations.

2.6 Conclusion

The literature discussed in this chapter demonstrates that the dynamics behind global constitutional migration can be explained by three main theories, namely the self-selection, coercive and persuasion theories. The theories can be regarded on a spectrum. Self-selection theory is at one end, the coercive theory is at the opposite end, and the persuasion theory is in the middle. Self-selection theory explains the constitutional migration that occurs when constitution owners are searching for constitutional transfers that suit their needs. The owners drive the self-selection process and, in some instances, invite foreign experts to assist with the exercise. The coercive theory is the opposite of the self-selection process because constitutional transfers are imposed on the constitution owners. Under the coercive theory, constitution owners have little or no control of which constitutional transfers are adopted in the constitution. Persuasion theory is somewhere in between the self-selection and coercive theories. When international organisations recommend that constitution owners adopt particular constitutional transfers, the latter might feel obligated to do so in view of the stature of those organisations or the attractiveness of their financial aid and support.

There is, however, seldom one neat explanation of constitutional migration: it is possible for more than one theory to explain the migration of certain constitutional transfers. For example, the migration of the multiparty system and market-economy ideology in post-Cold War Africa was as a result of both the self-selection and persuasion theories. There were domestic calls for constitutional change, and external pressures from the World Bank and the IMF for a market economy. Other examples are the independence constitutions of anglophone Africa. The self-selection and coercive theories both played a part in the migration of constitutional transfers into these constitutions. For instance, with the Lancaster constitutions, the constitution owners selected certain constitutional concepts, while other concepts, such as the right to private property, were imposed by Britain.

This chapter provides a foundation for establishing whether the same theories in the literature could explain why and how the South African devolution model migrated to Kenya, Zimbabwe, and Zambia (as discussed in subsequent chapters), and whether the manner in which the migration took place in the case studies is the same as what is discussed in the literature. The

question then is whether the examination of the four case studies reflects, reinforces and advances the self-selection, coercive and persuasion theories discussed in this chapter.

Chapter 3:

The ‘Exported’ South African Devolution Model

3.1 Introduction

The focus of this thesis is on the constitutional migration of devolution models, concepts and texts from South Africa to other countries, notably Kenya, Zimbabwe and Zambia. The purpose of Chapter 3 is to set out the South African ‘export’ devolution model that influenced or migrated to the constitutions above. Accordingly, the chapter examines why and how this export model developed, as well as what the external influences or transfers were that shaped the South African model. The devolution model is described as a centralised federal system because it has both federal and unitary components. The chapter demonstrates why there is a mixture of the two. It commences in section 3.2 with an examination of the system of government in South Africa before 1993. Thereafter, section 3.3 discusses the constitutional negotiations leading up to the 1993 Constitution and the devolution model in the 1993 Constitution. Lastly, section 3.4 examines the constitutional engagements leading up to the 1996 Constitution and the devolution model in the 1996 Constitution.

3.2 The system of government before 1993

The devolution model analysed in this thesis was introduced in the Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution), and evolved in the Constitution of the Republic of South Africa of 1996. Prior to 1993, the apartheid regime had been in place as a system of governance based on segregation and racial dominance by the minority white population.³⁰⁶ Below is an analysis of that system, which commenced with the formation of South Africa and provincial government in 1910 and led to the homelands, the tricameral parliament, and local government in both homelands and non-homelands.

³⁰⁶ Steytler N ‘The Withering Away of Politically Salient Territorial Cleavages in South Africa and the Emergence of Watermark Ethnic Federalism’ in Anderson G & Choudhry S (eds) *Territory and Power in Constitutional Transitions* (2019) 219.

3.2.1 The 1910 bicameral parliament and provinces

The Cape, Natal, Transvaal and Orange River colonies unified to form the Union of South Africa in May 1910.³⁰⁷ A bicameral parliament was created, and consisted of the House of Assembly and Senate, whose members were elected from the country's white minority.³⁰⁸ Some members of the Senate were elected by provincial councils, while others were appointed by the Governor.³⁰⁹

The four colonies were amalgamated into four provinces designated for whites. Each colony's parliament was abolished and replaced with a provincial council.³¹⁰ The central government delegated some powers and functions to the provinces.³¹¹ Provincial councils were empowered to pass legislation governing local government in their respective provinces, subject to the assent of the Governor-General-in-Council.³¹² Provincial councils could, for instance, pass ordinances dealing with 'municipal institutions, divisional councils, and other local institutions of a similar nature'.³¹³ When South Africa became a republic in 1961, provinces retained their power over local government.³¹⁴ However, these powers did not qualify or limit the legislative power of the national government to legislate on any municipal matters, as there was an automatic override.³¹⁵ This is evidenced by the fact that Parliament adopted extensive legislation regulating local government matters, including African local government (as discussed in section 3.2.4). Lastly, any provincial legislation contrary to national legislation was invalid.³¹⁶ Thus, provincial councils were fairly weak.

³⁰⁷ Leacock S 'The Union of South Africa' (1910) 4 *The American Political Science Review* 498.

³⁰⁸ Leacock (1910) 503.

³⁰⁹ Leacock (1910) 504.

³¹⁰ Leacock (1910) 504.

³¹¹ *CDA Boerdery Bpk and v The Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) at para 33.

³¹² Union of South Africa Act 9 of 1909.

³¹³ S 85(vi) Union of South Africa Act.

³¹⁴ S 84(1)(f)(i) Republic of South Africa Constitution, Act 32 of 1961.

³¹⁵ Steytler N & De Visser J *Local Government Law of South Africa* (2007) 1–4.

³¹⁶ Steytler & De Visser (2007) 1–4.

3.2.2 ‘Independent’ homelands and self-governing territories

In 1913, Parliament passed the Native Lands Act which reserved 13 per cent of land for Africans and the remaining 87 per cent for white minority dominance.³¹⁷ Over the years, in terms of the policy of Grand Apartheid, these areas were to become ‘independent’ homelands and self-governing territories.³¹⁸ The goal was for each African ethnic group to transition into its own independent state, resulting in 10 ethnically self-governing territories known as bantustans.³¹⁹ The first ‘independent’ territory was Transkei in 1976, followed by Bophuthatswana and Venda in 1979, and Ciskei in 1981.³²⁰ However, none of these bantustans was ever internationally recognised as an independent state.³²¹ The remaining six bantustans never became independent.³²²

Both the ‘independent’ and self-governing territories had almost non-existent own-revenue sources to sustain their ‘governments’. For the most part, African workers sold their labour to white-owned mines and industries, living as temporary residents in white-dominated areas.³²³ Laura Evans opines that the establishment of the bantustans as self-governing territories was a ploy, a system of segregation designed to produce cheap labour by controlling the movement and urbanisation of the African populace.³²⁴ As such, the homelands and self-governing territories were weak institutions that lacked any substantive or fiscal powers.

3.2.3 The tricameral parliament

The 1983 Constitution entrenched the division between racial groups by establishing a tricameral parliament consisting of three houses, namely the House of Assembly for whites, the House of Representatives for coloureds, and the House of Delegates for Indians.³²⁵ African people were excluded from national government altogether. The central tenet of the new system

³¹⁷ The Native Land Act, 1913 limited African land ownership to 7 per cent (and later 13 per cent) through the Native Trust and Land Act of 1936.

³¹⁸ Steytler & De Visser (2007) 1–7.

³¹⁹ Steytler (2019) 220.

³²⁰ Steytler (2019) 220.

³²¹ Evans L ‘South Africa’s Bantustans and the Dynamics of ‘Decolonisation: Reflections on Writing Histories of the Homelands’ *South African Historical Journal* (2012) 64 119.

³²² Evans (2012) 120.

³²³ Steytler (2019) 220.

³²⁴ Evans (2012) 125.

³²⁵ Steytler & De Visser (2007) 1–7.

of government was the division between ‘own affairs’ and ‘general affairs’.³²⁶ The collective of the three houses decided on ‘general affairs’, with the President’s Council as the adjudicator in cases of disputes.³²⁷ Respective houses had the final say on ‘own affairs’, which were defined as ‘[m]atters which specially or differentially affect a population group in relation to maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs’.³²⁸ The tricameral legislative system did not allocate significant powers and functions to non-whites; the system was perfunctory at best.

3.2.4 Local government in urban areas

The first distinct form of local government in South Africa can be traced to 1836, when municipalities were established in the Cape Colony.³²⁹ For the greater part of the decades to follow, municipalities continued to serve primarily the white population.³³⁰ In urban areas, municipalities derived their powers from the national and provincial government, serving mostly as the latter’s administrative arm. Black Advisory Boards were established for African townships as late as 1923.³³¹ They were composed of locally elected or appointed residents whose mandate was to advise white municipal councils on the management of the black townships that fell in the white municipal jurisdiction.³³²

When the National Party (NP) came to power in 1948 representing Afrikaner interests, it entrenched apartheid policies with respect to Indian and coloured communities.³³³ In 1950, the Group Areas Act³³⁴ formalised separate areas for whites, coloureds, Indians and Africans, but these areas remained under the jurisdiction of white municipal councils.³³⁵ In 1961, the Black Urban Councils Act³³⁶ replaced the Black Advisory Boards with Black Urban Councils, which

³²⁶ Steytler & De Visser (2007) 1–7.

³²⁷ Steytler & De Visser (2007) 1–7.

³²⁸ Section 14(1) of the Constitution Act 110 of 1983.

³²⁹ Steytler & De Visser (2007) 1–3.

³³⁰ At first, coloureds and Indians were not excluded as voters in the Cape Province (or, to a lesser extent, in Natal); however, the *universitas* in the Transvaal and Orange Free State was exclusively white. See Steytler & De Visser (2007) 1–6.

³³¹ Native Urban Areas Act 21 of 1923.

³³² The Black (Urban Areas) Consolidation Act 25 of 1945 continued the legacy of Black Advisory Boards. See Steytler & De Visser (2007) 1–6.

³³³ Steytler (2019) 219.

³³⁴ Group Areas Act 41 of 1950.

³³⁵ Steytler & De Visser (2007) 1–6.

³³⁶ Black Urban Councils Act 79 of 1961.

had limited municipal powers.³³⁷ The only organs of state other than white local authorities that performed local functions were the administration boards created by the Black Affairs Administration Act,³³⁸ boards which consisted of persons appointed by the national government.³³⁹ In 1977, the Community Councils Act³⁴⁰ introduced elected community councils that replaced, and took over some of the functions of, the administration boards.³⁴¹ Community councils were later upgraded in 1982 when the Black Local Authorities Act³⁴² was passed. The Act granted local authorities similar powers to those of white municipal councils, but the authorities lacked legitimacy because African communities regarded the system as perpetuating gross inequalities.³⁴³

Amendments to the 1966 Group Areas Act established segregated local government for coloured and Indian communities.³⁴⁴ Management Committees were created in coloured areas with the prospect of becoming fully-fledged municipalities, while Local Affairs Committees were created in Indian areas in Natal.³⁴⁵ The 1983 tricameral Constitution empowered white, Indian and coloured houses of parliament to have authority of their respective local governments; local government was listed as a subject of 'general affairs'.³⁴⁶ Consequently, local government powers in urban areas were weak because they were prescribed by national legislation.

3.2.5 Local government in rural areas and homelands

Local government consisted of many fragmented institutions that were creatures of statute and organised along racial lines.³⁴⁷ In the homelands, the Bantu Authorities Act of 1951³⁴⁸ (subsequently renamed the Black Authorities Act) empowered traditional tribal leaders to administer local government activities. The powers and functions of tribal authorities under the

³³⁷ Steytler & De Visser (2007) 1–6.

³³⁸ Black Affairs Administration Act 45 of 1971.

³³⁹ Steytler & De Visser (2007) 1–6.

³⁴⁰ Community Councils Act 125 of 1977.

³⁴¹ The Community Councils Act was one of various attempts to deal with African political aspirations in the urban areas following the urban uprising of 1976. See Steytler & De Visser (2007) 1–6.

³⁴² Black Local Authorities Act 102 of 1982.

³⁴³ Steytler & De Visser (2007) 1–6.

³⁴⁴ Group Areas Act 36 of 1966.

³⁴⁵ Steytler & De Visser (2007) 1–7.

³⁴⁶ Item 6 of Schedule 1, Constitution of South Africa, 1983.

³⁴⁷ Steytler & De Visser (2007) 1–8.

³⁴⁸ Bantu Authorities Act 68 of 1951.

leadership of traditional leaders included public works, agriculture, making by-laws, levying taxes, and imposing fines.³⁴⁹ Traditional authorities lacked the autonomy to govern and could not financially sustain their own ‘governments’ because they had limited own revenue generating powers. Thus, they were heavily dependent on transfers from the central government. In some cases, they were forced or incentivised to act in their areas as representatives of the white government.³⁵⁰

Racially segregated local government structures over the centuries inevitably led to gross inequalities in service delivery and development. The Constitutional Court noted in the *Fedsure Life Assurance* case that

[t]hose in historically ‘White’ areas were characterised by developed infrastructure, thriving business districts and valuable rateable property. Those in so-called ‘Black’ [African], ‘Coloured’ and ‘Indian’ areas, by contrast, were plagued by underdevelopment, poor services and vastly inferior rates bases.³⁵¹

White areas were affluent, while all non-white areas were impoverished because white people were the primary beneficiaries of the government’s apartheid policies.

3.2.6 Rejection of the apartheid system

Apartheid policies were rejected by the majority of the African, coloured and Indian people from the outset.³⁵² The African National Congress (ANC), founded in 1912, became the major opposition force.³⁵³ It mostly used legal tactics of protest during its first four decades of existence, but became more militant in the early 1950s.³⁵⁴ Together with the ANC, the Pan Africanist Congress (PAC), founded in 1959, shifted to violent resistance to apartheid in the 1960s.³⁵⁵ Resistance intensified in the mid-1980s when the tricameral Parliament was

³⁴⁹ Jeffrey B, Rotberg R I & Adams J *The Black Homelands of South Africa: The Political and Economic Development of Bophuthatswana and Kwa-Zulu* (1977) 28.

³⁵⁰ Jeffrey, Rotberg & Adams (1977) 28.

³⁵¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) at para 2.

³⁵² Civil resistance against apartheid based on Gandhian ideas dates back to 1906. Kurtz L R ‘The Anti-Apartheid Struggle in South Africa (1912–1992)’ (2010) *International Center on Nonviolent Conflict* 1.

³⁵³ Kurtz (2010) 1.

³⁵⁴ Kurtz (2010) 1.

³⁵⁵ Kurtz (2010) 2.

established,³⁵⁶ with its opponents insisting on non-cooperation with the tricameral legislative system and dismissing it as tokenism.³⁵⁷ In addition, civil society organisations created alternative community-based institutions such as cooperatives, community clinics, legal resource centres, and other organisations that addressed problems such as sanitation, escalating rentals and rates charged for inadequate services.³⁵⁸ One aim of the community-based institutions was to make townships ungovernable.³⁵⁹ By the end of the 1980s, African authorities ceased to function because they lacked legitimacy and were wrecked by organised boycotts of rent and service charges.³⁶⁰ Ultimately, in 1990, the NP-led government succumbed to the resistance and began talks with the liberation movements in a bid to bridge the deep political rift.³⁶¹

3.3 The 1993 constitution-making process

On 2 February 1990, President F W de Klerk of the NP government announced the unbanning of the ANC and other liberation movements and the beginning of negotiations for a new South Africa.³⁶² Nineteen political parties, administrations, organisations and homeland governments reached an agreement to start negotiations for the drafting of a new constitution in December 1991 through a structure known as the Convention for a Democratic South Africa (CODESA).³⁶³ The political parties that were of importance in the discussion of a new structure of government were the NP, ANC, and Inkatha Freedom Party (IFP), as is discussed in detail below. The Ciskei, Bophuthatswana, Transkei and Venda homelands were also part of CODESA, representing the position of regions or provinces in respect of the new structure of

³⁵⁶ Eloff T 'The Importance of Process in the South African Peace and Constitutional Negotiations' Centre for Mediation in Africa University of Pretoria Practitioner's Notes No. 3 (2015) 3.

³⁵⁷ Eloff (2015) 3.

³⁵⁸ Kurtz (2010) 3.

³⁵⁹ Zunes S 'The Role of Non-Violent Action in the Downfall of Apartheid' (1999) 37 *The Journal of Modern African* 157.

³⁶⁰ Steytler & De Visser (2007) 1–7.

³⁶¹ Steytler (2019) 221.

³⁶² Steytler (2019) 221.

³⁶³ The signatories to CODESA were the Ciskei Government, Democratic Party, Dikwankwetla Party, Inkatha Freedom Party, ANC, Bophuthatswana Government, Inyandza National Movement, Intando Yesizwe Party, Labour Party of South Africa, Natal/Tvl Indian Congress, NP, National People's Party, Solidarity South African Communist Party, Transkei Government, United People's Front, Venda Government, and the Ximoko Progressive Party. Afrikaner nationalist groups were not part of CODESA, though they came to the discussions on the structure of government at a later stage. See CODESA Declaration of Intent available at https://peacemaker.un.org/sites/peacemaker.un.org/files/ZA_911229_CodesaDeclarationIntent.pdf (accessed 1 June 2022).

government.³⁶⁴ The homelands argued for greater autonomy for provinces. CODESA was unsuccessful in drawing up a new constitution because there was a deadlock in the negotiations, which was followed by the withdrawal of political parties such as the ANC from the constitutional talks.³⁶⁵ Among other reasons, CODESA was also unsuccessful because the parties distrusted each other and disagreed on a new system of government, particularly in regard to the powers of regions.

The constitutional talks resumed in September 1992 when the ANC and the NP had a bilateral Record of Understanding.³⁶⁶ There were significant political issues that had to be addressed when the negotiations resumed. The ANC wanted a unitary state and demanded that a democratically elected assembly draft the constitution.³⁶⁷ For their part, the NP and other minority parties feared that an elected assembly would negate the purpose of negotiations and result in majority rule without constitutional safeguards for minority interests.³⁶⁸ The parties compromised by agreeing to a two-stage constitution-making process, guided by Constitutional Principles (CPs) agreed upon by all the political parties.³⁶⁹ The first stage was a negotiated Interim Constitution that contained a set of CPs. The second stage was a final constitution drafted by a democratically elected assembly within a fixed period and within the framework of agreed-upon CPs.³⁷⁰

The Record of Understanding led to an all-party planning conference on 5 and 6 March 1993 at which 26 parties formed the Multi-Party Negotiation Process (MPNP).³⁷¹ The Negotiating Council was the main negotiating forum of the MPNP, constituted by two delegates and two advisors per party.³⁷² Among other issues, the MPNP's technical committees focused on the system of government and the powers of regions.³⁷³

³⁶⁴ CODESA Declaration (1991) 2.

³⁶⁵ Eloff (2015) 7.

³⁶⁶ Mamdani M 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' (2015) *MISR Working Paper* 12.

³⁶⁷ Dugard J 'Kaleidoscope: International Law and the South African Constitution' (1997) *European Journal of International Law* 78.

³⁶⁸ Barnes C & De Klerk E 'South Africa's Multi-Party Constitutional Negotiation Process' (2002) *Accord* 26.

³⁶⁹ Barnes & De Klerk (2002) 26.

³⁷⁰ Mamdani (2015) 12.

³⁷¹ SAHO 'Chapter 9 - Negotiating the transition' (2019) available at <https://www.sahistory.org.za/archive/chapter-9-negotiating-transition> (accessed 1 June 2022).

³⁷² Eloff (2015) 8.

³⁷³ SAHO (2019) 3.

While political parties negotiated on the structure of government at the national level, civil society and local authorities in towns and cities across the country negotiated local settlements to rent and service boycotts and the amalgamation of racial local authorities.³⁷⁴ This initiative resulted in the creation of the Local Government Negotiating Forum (LGNF) as a parallel negotiating structure for local actors, political organisations and civic organisations at the national negotiating table.³⁷⁵ The LGNF's main objective was to negotiate a new model for local government.³⁷⁶

The MPNP considered submissions from technical committees and reports from the different political parties.³⁷⁷ Below is the analysis of the submissions made by the main political parties in respect of the system of government for the 1993 Constitution. It is important to understand the different systems of governments proposed by the political parties and the reasons behind them, as these factors help explain how the South African devolution model developed. The main actors discussed below are the NP, IFP, Afrikaner nationalists, and the ANC.

3.3.1 Proposals by the NP

The NP's vision of the system of government evolved during negotiations. At one point, the NP argued for a race-based consociational model but soon found it to be unviable.³⁷⁸ Thereafter, it moved to a devolved system of government. The NP's history did not make it an obvious proponent of a devolved system of government because the party had instigated and defended the apartheid system, which did not devolve powers and functions to lower levels of government.³⁷⁹ The NP became an advocate of devolution because it was aware that it was inevitably going to be without political power at the national level after the 1994 elections.³⁸⁰

³⁷⁴ Powell D 'Imperfect Transition – Local Government Reform in South Africa 1994–2012' in Booysen S (ed) *Local Elections in South Africa: Parties, People, Politics* (2012) 13.

³⁷⁵ Kaywood L 'Exploring the History and Development of the Local Government System in South Africa' (2001) 12 *African Journal of Public Affairs* 46.

³⁷⁶ Chapter 5 'The Restructuring of Local Government in South Africa in the Pre-Interim and Interim Phases' 119 available at <https://repository.up.ac.za/bitstream/handle/2263/25724/05chapter5.pdf?sequence=6&isAllowed=y> (accessed 24 September 2023).

³⁷⁷ Barnes & De Klerk (2002) 30.

³⁷⁸ Steytler (2019) 219.

³⁷⁹ Erasmus G 'South Africa's Constitutional Contract: What are the Prospects for Federalism and Decentralisation' in Basta L R & Ibrahim J (eds) *Federalism and Decentralisation in Africa: The Multicultural Challenge* (1998) 139.

³⁸⁰ Erasmus (1998) 139.

It was thus important for the NP to protect the interests of minorities, especially from the centralised government-oriented ANC that was projected to win the elections.

During the constitution-making process, the NP was unequivocally in favour of strong regions.³⁸¹ The spokesperson of the NP alluded to how favourable the Swiss Canton system was in the South African context.³⁸² A cantonal system suited an urban environment, but it too did not gather much momentum because it was about preserving race-based privileges in the suburbs.³⁸³

There was also a period when the NP wanted a system of government with strong provinces but weaker local government.³⁸⁴ The NP argued that local government should become an exclusively provincial function.³⁸⁵ This was consistent with the NP's policy of maximum devolution of power to provinces, and would form part of the checks and balances of central government powers.³⁸⁶

Later, the NP advocated for the constitutional protection of local communities and the devolution of power to local government. According to a proposal made by the NP, it wanted local communities to be able to veto legislative action either directly at the national level or indirectly at the local level.³⁸⁷ The NP wanted the central government's interference with local government powers and functions to be minimal.³⁸⁸ Towards the end, the NP proposed federalism, which provided a few direct advantages to the NP because its support base was geographically concentrated in parts of South Africa.³⁸⁹ The NP hoped that it could claim regional majorities, for example in the Western Cape and the Northern Cape. Thus federalism, at best, could provide some checks on the centre.

³⁸¹ Mastenbroek R & Steytler N 'Local Government and Development: The New Constitutional Enterprise' (1997) 1 *Law, Democracy & Development* 238.

³⁸² Klug (1996) 25.

³⁸³ Steytler (2019) 219.

³⁸⁴ Klug (1996) 25.

³⁸⁵ Mastenbroek & Steytler (1997) 238.

³⁸⁶ Klug (1996) 25.

³⁸⁷ Klug (1996) 32.

³⁸⁸ Klug (1996) 32.

³⁸⁹ Steytler (2019) 217.

3.3.2 Proposals by the IFP

The IFP advocated for complete regional autonomy³⁹⁰ because of its close ties to the Zulu monarchy and the IFP's Zulu nationalist ideology.³⁹¹ Ronald Watts remarks that the IFP wanted a confederation similar to the European Union.³⁹² The IFP's position was a means to ensure the self-determination of the Zulu ethnic group, which shares a common cultural and language heritage.³⁹³ In the IFP's proposal, the powers of the national government were reduced significantly: the national constitution was to be subject to the constitutions of the individual states (provinces or regions) constituting the confederation.³⁹⁴ The IFP strongly advocated for, and was generally obstructionist in, its position on regional autonomy.³⁹⁵

3.3.3 Proposals by Afrikaner nationalists

Afrikaner nationalist groups, particularly the Afrikaner Weerstandsbeweging ('Afrikaner Resistance Movement'), argued for the Afrikaners' language (Afrikaans), identity and culture to be protected and for self-determination by minority groups.³⁹⁶ They also demanded the establishment of a *volkstaat* ('people's state'), namely an Afrikaner homeland or province that safeguarded the rights of this distinct cultural group.³⁹⁷ The Afrikaner right-wing pushed for the *volkstaat* to have considerable autonomy from the central government.³⁹⁸

3.3.4 Proposals by the ANC

The ANC was in favour of a strong central government. Its position emanated from its 1988 Constitutional Guidelines for a Democratic South Africa, which held that

[s]overeignty shall belong to the people as a whole and shall be exercised through one central legislature, executive, judiciary and administration. Provisions shall be made for the delegation of the powers of the central

³⁹⁰ Klug (1996) 32.

³⁹¹ Johnston A 'Zulu Dawn' (1994) 11 *Indicator South Africa* 23.

³⁹² Watts R L 'Comparing Forms of Federal Partnerships' in Karmis D & Norman W (eds) *Theories of Federalism: A Reader* (2005) 235.

³⁹³ Simeon (1998) 49.

³⁹⁴ Klug (1996) 32.

³⁹⁵ Blount J 'Participation in Constitutional Design' in Ginsburg T & Dixon R (eds) *Comparative Constitutional Law* (2011) 48.

³⁹⁶ Steytler (2019) 218.

³⁹⁷ Simeon (1998) 50.

³⁹⁸ Simeon (1998) 45.

authority to subordinate administrative units for the purposes of more efficient administration and democratic participation.³⁹⁹

Gerhard Erasmus observes that it was crucial to the ANC for South Africa to establish a strong and effective central government to reverse the apartheid legacy.⁴⁰⁰ The main reason that the ANC disapproved of federalism or strong regions was its fear that a strong federal or devolved system would prevent the radical transformation that was necessary to undo poverty and discrimination caused by apartheid.⁴⁰¹ It viewed federalism as a device for perpetuating ethnic homelands.⁴⁰²

The ANC also wanted a centralised government because it was confident that it could secure majority rule and ensure the transfer of resources necessary to undertake massive tasks such as providing schools, housing, and hospitals.⁴⁰³ Furthermore, it was submitted that only through the centralist government could the ANC contain the ‘potentially centrifugal tendencies of race and tribe’.⁴⁰⁴ However, the ANC compromised and agreed to the devolution of powers and functions to provinces.⁴⁰⁵ In November 1993, Joe Slovo, a key ANC negotiator, said that the compromise between the ANC and the NP was ‘remotely a federation ... we’ve managed to give them devolution without losing control’.⁴⁰⁶ That quote epitomised the ANC’s approach to the system of government: had it been entirely up to the ANC, it would have entrenched a centralised form of government without strong provinces.

The ANC favoured strong local government. The ANC wanted a strong local government that advanced policies to undo the legacy of apartheid.⁴⁰⁷ Strong municipalities were capable of integrating the society and could effectively redistribute municipal services from the wealthier, predominantly white, minority to the poor who were concentrated among the African population.⁴⁰⁸ Kimberly Lanegran opines that the ANC advocated for strong municipalities because it wanted the mass support of the civil movement, particularly the United Democratic

³⁹⁹ As quoted in Mastenbroek & Steytler (1997) 239.

⁴⁰⁰ Erasmus G (1998) 136.

⁴⁰¹ Murray C ‘Building Unity Through Transformation: Intergovernmental Fiscal Relations in South Africa’ in Bird R & Stauffer T (eds) *Intergovernmental Fiscal Relations in Fragmented Societies* (2001) 506.

⁴⁰² Steytler (2019) 216.

⁴⁰³ Simeon (1998) 45.

⁴⁰⁴ Simeon (1998) 45.

⁴⁰⁵ Mastenbroek & Steytler (1997) 238.

⁴⁰⁶ As quoted in Steytler (2019) 218.

⁴⁰⁷ Simeon (1998) 45.

⁴⁰⁸ Steytler & De Visser (2007) 1–10.

Front (UDF).⁴⁰⁹ She argues that the ANC and UDF had a hostile relationship between 1990 and 1993 as they regarded each other as encroaching on each other's power bases in the townships.⁴¹⁰ This was the time when the ANC had been unbanned and could freely operate in the country. In order to get the support of the civil movement and the people who appreciated the UDF's role, the ANC allied itself with the UDF and advocated for strong local government.⁴¹¹

The negotiations produced a compromised centralised federal model that dealt extensively with provinces and only superficially with local government. The local government provisions were only dealt with at a relatively later stage in the negotiations. A senior LGNF negotiator, Thozamile Botha, remarked that local government was not addressed in the earlier constitutional discussions.⁴¹² Furthermore, the Technical Committee reported as late as September 1993 that it had not consulted with the LGNF.⁴¹³ The Negotiating Council accepted the Interim Constitution produced by the MPNP in November 1993,⁴¹⁴ leaving little time for effective engagement with the LGNF. The Interim Constitution was adopted on 20 December 1993 by Parliament.⁴¹⁵

3.3.5 The devolution model of the 1993 Constitution

The following analysis of the devolution model in the Interim Constitution focuses on its key aspects, namely the recognition of three levels of government, division of powers and functions, and revenue sources.

⁴⁰⁹ Lanegran K 'South Africa's Civic Association Movement: ANC's Ally or Society's "Watchdog"? Shifting Social Movement-Political Party Relations' (1995) 38 *African Studies Review* 114.

⁴¹⁰ Lanegran (1995) 108.

⁴¹¹ Lanegran (1995) 113.

⁴¹² Chapter 5 'The Restructuring of Local Government in South Africa in the Pre-Interim and Interim Phases' 119 available at <https://repository.up.ac.za/bitstream/handle/2263/25724/05chapter5.pdf?sequence=6&isAllowed=y> (accessed 24 September 2023).

⁴¹³ Chapter 5 'The Restructuring of Local Government in South Africa in the Pre-Interim and Interim Phases' 119 available at <https://repository.up.ac.za/bitstream/handle/2263/25724/05chapter5.pdf?sequence=6&isAllowed=y> (accessed 24 September 2023).

⁴¹⁴ Barnes & De Klerk (2002) 31.

⁴¹⁵ Steytler (2019) 220.

3.3.5.1 Recognition of three levels of government

The Interim Constitution provided for three levels of government: national, provincial and local. The national legislature had a bicameral parliament that consisted of the National Assembly and the Senate.⁴¹⁶ The latter was composed of senators who represented provinces.⁴¹⁷ Section 125 provided for the establishment of provincial legislatures, whilst section 144 provided for the provincial executive. Provincial councils were democratically elected.⁴¹⁸ Section 174 provided for the establishment of local government, marking a departure from the pre-1993 period where local government was a creature of statute. Local councillors were also elected into office in accordance with the Local Government Transition Act.⁴¹⁹

3.3.5.2 Subnational powers and functions

a) Provinces

Section 126 empowered provincial legislatures to make laws with regard to matters specified in Schedule 6 of the Constitution. The functional areas listed in Schedule 6 included agriculture; casinos, racing, gambling and wagering; education at all levels, excluding university and technikon education; health services; housing; provincial public media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; and urban and rural development.⁴²⁰ Local government was also placed under the legislative competence of provinces.

Nico Steytler observes that the powers were little more than what the provinces exercised under the 1910 Union Constitution.⁴²¹ As can be observed, the functional areas were substantial, but provincial autonomy was limited since both the national and provincial governments had concurrent competence over these matters.⁴²² Extensive concurrent powers were advantageous to the national government because they enabled it to set the policy and framework, with

⁴¹⁶ Section 36 of the Interim Constitution.

⁴¹⁷ Section 48 of the Interim Constitution.

⁴¹⁸ Sections 127 and 145 of the Interim Constitution.

⁴¹⁹ Section 179 of the Interim Constitution. See Local Government Transition Act (LGTA) 209 of 1993.

⁴²⁰ Schedule 6 of the Interim Constitution.

⁴²¹ Steytler (2019) 234.

⁴²² Steytler (2019) 228.

provinces potentially reducible to mere implementers of national legislation,⁴²³ thus making for a system of centralised federalism.

The Constitution also empowered provincial legislatures to pass provincial constitutions by a resolution of a majority of at least two-thirds of all its membership.⁴²⁴ Section 160(3) stipulated that provincial constitutions could not be inconsistent with any provision of the Constitution and that provincial constitutions could not be inconsistent with the CPs set out in Schedule 4. To ensure the compliance of provincial constitutions with the Constitution, no provincial constitutions could be adopted without the Constitutional Court's first certifying that they conformed to section 160(3).⁴²⁵

b) Local government

Local government was described as autonomous, with the power to regulate its own affairs within the limits prescribed by or under law.⁴²⁶ However, it was placed on the list of shared provincial powers, thus putting it under the direct control of provinces.⁴²⁷ Municipalities under the Free State Municipal Association were displeased with that provision.⁴²⁸ The Association questioned how local government could perform effectively as an autonomous level of government yet also be a provincial power.

Section 175(1) made provision for the powers, functions and structures of local government to be determined by legislation passed by a competent authority. Therefore, all local government powers and functions were subject to national and provincial government. Local government could, to the extent determined by legislation,

make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy

⁴²³ Steytler N & De Visser J 'Fragile Federations and the Dynamics of Devolution' in Palermo F & Alber E (eds) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015) 88.

⁴²⁴ Section 160 of the Interim Constitution.

⁴²⁵ Section 160(4) of the Interim Constitution.

⁴²⁶ Section 174(3) of the Interim Constitution.

⁴²⁷ Schedule 6 of the Interim Constitution.

⁴²⁸ Chapter 5 'The Restructuring of Local Government in South Africa in the Pre-Interim and Interim Phases' 143 available at <https://repository.up.ac.za/bitstream/handle/2263/25724/05chapter5.pdf?sequence=6&isAllowed=y> (accessed 24 September 2023).

environment, provided that such services and amenities [could] be rendered in a sustainable manner and [was] financially and physically practicable.⁴²⁹

Local government was also empowered to make by-laws, but these could not contradict the Constitution or national or provincial legislation.⁴³⁰ Local government powers and functions did not change much from the apartheid period, except that they were constitutionally recognised and were in a single, uniform non-racial system of governance.⁴³¹

c) Assignment of additional powers

The Constitution also assigned additional powers to specific groups, namely KwaZulu-Natal province and the Afrikaner nationalist groups. The IFP threatened not to participate in the 1994 election if some of its demands were not met.⁴³² Therefore, further asymmetrical powers were assigned to KwaZulu-Natal in order to persuade the IFP to participate in the election. Section 160(3)(b) provided that if the province were to adopt a provincial constitution, it had to recognise the ‘institution, role, authority and status of a traditional monarch in the province’, as well as make such provisions for the Zulu monarchy.⁴³³ KwaZulu-Natal was the only province given this special status. The IFP was adamant that the provision be entrenched in the Constitution, as the recognition of the Zulu monarch in the provincial constitution made KwaZulu-Natal unmistakably Zulu in ethnic culture, language and identity.⁴³⁴ The IFP pushed for the recognition of the Zulu monarch as part of the IFP’s need to show the ethnic basis of KwaZulu-Natal.

Another example of the assignment of asymmetrical powers was the first amendment to the Constitution, which was amended on 3 March 1994.⁴³⁵ A month after the Constitution was adopted, the ANC brokered a deal with one of the Afrikaner nationalist groups, the Afrikaner Volksfront (AVF), to appease its demands.⁴³⁶ The deal entailed two crucial concessions: the recognition of the right to self-determination, and the possibility of expressing that right in a

⁴²⁹ Section 175(3) of the Interim Constitution.

⁴³⁰ Section 175(4) of the Interim Constitution.

⁴³¹ See powers and functions under the Black Affairs Administration Act, Black Local Authorities Act, Black Urban Councils Act and Community Councils Act.

⁴³² Steytler (2019) 228.

⁴³³ Section 160(3)(b) of the Interim Constitution.

⁴³⁴ Steytler (2019) 228.

⁴³⁵ Constitution of the Republic of South Africa Amendment Act 2 of 1994.

⁴³⁶ The ANC made the concession because it was fearful of the AVF’s ability to unleash violence and hinder the transition to democracy. See Steytler (2019) 226.

separate *volkstaat* territory in phase two of the constitution-making process, should there be sufficient support for it.⁴³⁷ The possibility of a right to a separate territory for the Afrikaner community was a potential exception to CP XX, which sought the establishment of non-ethnic levels of government.

d) Conflict of national and provincial legislation

Due to the extensive list of concurrent powers and functions, there was a need to provide for the management of conflicting national and provincial legislation. Section 126(3) stated:

A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as –

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

Section 126 provided for a relatively low-threshold ‘override’ clause, which applied in favour of the centre; national legislation prevailed, for example, on any matter that could not be regulated effectively by provincial legislation. There was a condition that national legislation prevailed over provincial legislation provided for in section 126 only if it (national legislation) applied uniformly in all parts of South Africa.⁴³⁸ Therefore, while section 126 appears to

⁴³⁷ Section 184 of the Interim Constitution.

⁴³⁸ Section 126(4) of the Interim Constitution.

qualify instances where national legislation could prevail over provincial legislation, the qualification is in favour of the central government.

3.3.5.3 Revenue sources

The Constitution, as with the powers and functions discussed above, centralised fiscal powers. Ronald Watts notes that in decentralised states, revenue powers are usually much less decentralised than the distribution of functional responsibilities⁴³⁹ and that the 1993 South African model was a good example of this. Steytler observes that when South Africa re-entered the international financial world after years of isolation under apartheid, there was a consensus that emphasised fiscal discipline and strict monetary policies.⁴⁴⁰ The impact of the consensus on the constitution-making process is unclear, but it may have influenced the centralised fiscal system.⁴⁴¹

The Constitution empowered provinces to raise taxes, levies and duties, other than income tax or value-added or other sales tax, and to impose surcharges on taxes, if national legislation authorised them to do so.⁴⁴² Provinces were also assigned exclusive competence to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on casinos, gambling, wagering and lotteries and betting, provided national legislation regulated the taxation powers.⁴⁴³ Section 156(2) stipulated that provinces could raise the said taxes, levies and duties only in a manner that did not detrimentally affect national economic policies, inter-provincial commerce or the national mobility of goods, services, capital and labour. Furthermore, any provincial legislation promulgated to facilitate the raising of taxes could be enacted only after the consideration of any recommendations made by the Financial and Fiscal Commission (FFC) concerning the criteria according to which such charges could be determined.⁴⁴⁴ Thus, provinces were not allocated original taxation powers, that is, constitutional taxation powers that could be exercised without national legislation

⁴³⁹ Watts R L 'The Dynamics of Decentralisation' in Bird R & Stauffer T (eds) *Intergovernmental Fiscal Relations in Fragmented Societies* (2001) 19.

⁴⁴⁰ Steytler N 'Republic of South Africa' in Kincaid J & Tarr G A (eds) *Constitutional Origins, Structure, and Change in Federal Countries* (2005) 328.

⁴⁴¹ Steytler (2005) 328.

⁴⁴² Section 156(1) of the Interim Constitution.

⁴⁴³ Section 156(1B) of the Interim Constitution.

⁴⁴⁴ Section 156(2)-(3) of the Interim Constitution.

authorisation. Rather, they were dependent on national legislation to allocate them taxation powers.

Like provinces, local government was also assigned taxation powers. Section 178(2) provided for local government to enjoy powers to levy and raise revenue from property rates, levies, fees, taxes and tariffs as was necessary to exercise its powers and functions. However, there was a condition that such taxation powers could only be exercised uniformly throughout the jurisdiction of the local government.⁴⁴⁵ Furthermore, the imposition of taxes was subject to conditions prescribed by national or provincial legislation and after taking into consideration any recommendations of the FFC.⁴⁴⁶ As a result, local government lacked the autonomy to exercise full taxation powers because it was under the legislative competence of provinces.

In addition to the taxation powers, provinces were empowered to take loans for bridging finances during a fiscal year.⁴⁴⁷ However, the borrowing powers were limited and strictly controlled by national legislation which was adopted after considering recommendations from the FFC.⁴⁴⁸ Provinces could not access guaranteed loans unless the FFC verified the need for a guarantee and recommended that it be given.⁴⁴⁹ The guarantee of provincial loans by the national government was also limited by national legislation and the FFC.⁴⁵⁰ The national government's ability to guarantee provincial loans was limited as a way to curb any potential subnational debt crisis. Local government was not allocated borrowing powers.

3.3.5.4 Fiscal transfers

a) Equitable share

In the absence of significant sources of own revenue, both provinces and local government relied on fiscal transfers, as provided in the Interim Constitution. The latter stipulated that nationally raised revenue had to be divided equitably between the two levels of government to enable them to provide services and exercise their powers and functions.⁴⁵¹ The provincial equitable share of revenue was a percentage determined by national legislation after factoring

⁴⁴⁵ Section 178(2) of the Interim Constitution.

⁴⁴⁶ Section 178(2) of the Interim Constitution.

⁴⁴⁷ Section 157(2) of the Interim Constitution.

⁴⁴⁸ Section 157(2) of the Interim Constitution.

⁴⁴⁹ Section 157(3) of the Interim Constitution.

⁴⁵⁰ Section 188 of the Interim Constitution.

⁴⁵¹ Section 155(1) of the Interim Constitution.

in income tax, value-added tax or other sales tax, national levies on the sale of fuel, and transfer duties collected nationally or on the transfer of any property situated within the province concerned.⁴⁵² Factors such as national interests, national debt, fiscal capacities, fiscal performance, efficiency of utilisation of revenue, economic disparities within and between provinces, developmental needs, administrative responsibilities, other legitimate interests of the provinces, and the recommendations of the FFC also had to be taken into account before the division of revenue.⁴⁵³

Richard Simeon observes that the concept of equitable sharing considered provincial disparities in order to build a form of interprovincial revenue equalisation, which is an important feature of German fiscal federalism.⁴⁵⁴ Similarly, local government was entitled to receive an equitable share of the relevant provincial government, and the FFC had the mandate to make recommendations regarding the criteria for such allocations.⁴⁵⁵

Although equalisation transfers were regarded as unconditional grants, the system as a whole constrained discretion. Steytler and De Visser contend that since the equalisation transfer was determined by the size of each subnational government, its population size and the services it had to perform, provinces had little choice as to what the allocated funds could be spent on.⁴⁵⁶ Consequently, provincial autonomy to spend equalisation transfers was somewhat limited.

b) Conditional and unconditional grants

In addition to the equitable share, provinces could receive conditional and unconditional grants from the national government to supplement revenue sources.⁴⁵⁷ The Constitution was unclear as to whether local government could receive conditional and unconditional grants. However, section 158 provided that financial allocations by the national government to provinces or local government could be made only in terms of an appropriation Act. In addition, financial allocations by the national government to local government were ordinarily made through the provincial government in which the local government was situated.⁴⁵⁸ Conditional grants are used to support compliance with national norms and standards and to ensure that national

⁴⁵² Section 155(2) of the Interim Constitution.

⁴⁵³ Section 155(3)-(4) of the Interim Constitution.

⁴⁵⁴ Simeon (1998) 62.

⁴⁵⁵ Section 178(2) of the Interim Constitution.

⁴⁵⁶ Steytler & De Visser (2015) 92.

⁴⁵⁷ Section 155(2)(e) of the Interim Constitution.

⁴⁵⁸ Section 158(b) of the Interim Constitution.

priorities are adequately provided for in provincial and local government budgets. Hence, the conditions of the grant set by the national government limited provincial and local governments' expenditure discretion.

c) Financial and Fiscal Commission

The political parties that participated in the constitutional negotiations distrusted each other, as noted previously. The minority parties, especially the NP and IFP, did not trust the ANC-led government to share revenue collected nationally effectively and equitably once it was elected into office.⁴⁵⁹ Therefore, the parties decided to entrench constitutional provisions for the establishment of an independent financial commission – the FFC – to make recommendations regarding the financial and fiscal requirements of the three levels of government and the equitable sharing of revenue.⁴⁶⁰ The FFC's contribution is not definitive but advisory. The aim of establishing the FFC was to limit the national government's powers in the distribution of nationally raised revenue. The establishment of the FFC addressed the concerns of minority parties because it was composed of representatives from all three levels; its composition ensured the independence of the FFC.⁴⁶¹

3.4 Towards the 1996 Constitution: The Constitutional Assembly drafting process

As noted in section 3.3 above, the 1993 Constitution was adopted as a transitional constitution (hence the term 'Interim Constitution') until the Constitutional Assembly drafted the final constitution. The first democratic elections were held on 27 April 1994, and the elected parliament served the dual role of a legislature and Constitutional Assembly.⁴⁶² Of the 490 seats of the Constitutional Assembly, the ANC had 312, the NP, 99, and the IFP, 48.⁴⁶³ Four other political parties were represented in the Constitutional Assembly, but the ANC, NP and IFP had the majority of seats and thus were the main actors.⁴⁶⁴ Therefore, only their roles in the negotiating process are evaluated in this section.

⁴⁵⁹ Eloff (2015) 8.

⁴⁶⁰ Sections 198–199 of the Interim Constitution.

⁴⁶¹ Section 200 of the Interim Constitution.

⁴⁶² Dugard (1997) 78.

⁴⁶³ Constitutional Assembly *Annual Report* (1996) 27–28.

⁴⁶⁴ *Annual Report* (1996) 28.

It is crucial to point out that, according to the Interim Constitution, if the Constitutional Assembly failed to pass the text by a two-thirds majority, the text approved by a simple majority was to be submitted to a referendum requiring only 60 per cent support.⁴⁶⁵ Based on the 1994 election results, the ANC had the strongest bargaining power, which explains why it was able to adopt most of the devolution provisions it wanted in the final Constitution. Nevertheless, the ANC had to compromise in some instances.

The Constitutional Assembly had a formidable mandate because the political parties disagreed on how the system of government ought to be.⁴⁶⁶ Nevertheless, all political parties had to comply with the CPs. As already discussed, the ANC was against strong provinces. However, it compromised in order to proceed with the constitution-making process. The ANC engaged with advisors who researched provincial models from other countries that could align with the ANC's vision, in particular its vision of a strong centre.⁴⁶⁷ The ANC advisors presented the German model as a suitable model because legislative powers were highly centralised and provinces mostly implemented national legislation.⁴⁶⁸

The National Council of Provinces (NCOP) is another example of where external influences are evident in the devolution model proposed by ANC advisors.⁴⁶⁹ While the Senate provided for in the Interim Constitution acted as a second house of parliament, it was proposed that the second house in the final constitution be controlled provincially, as in Germany.⁴⁷⁰ The German model also influenced South Africa's cooperative government provisions. The ANC emphasised that these provisions were suitable for South Africa because regions could participate fully in policy formulation; however, the final say remained with the national government.⁴⁷¹ The ANC was attracted to how the centre and the regions were in constant

⁴⁶⁵ Barnes & De Klerk (2002) 31.

⁴⁶⁶ Annual Report (1996) 14.

⁴⁶⁷ Wittneben M 'The Role of the National Council of Provinces within the Framework of Co-operative Government in South Africa: A Legal Analysis with Special Regard to the Role of the Bundesrat in Germany' (2002) *Übersee/Law and Politics in Africa, Asia and Latin America* 243.

⁴⁶⁸ Wittneben (2002) 243.

⁴⁶⁹ Haysom, a South African lawyer who was also the legal counsel to President Mandela, presented the idea of having a second house of Parliament with functions that resembled those of Germany. See Steytler N 'Theme Committee 2: Getting the Basic Governance Structures Right' in *Celebrating 20 Years of the Constitution* (2018) 2.

⁴⁷⁰ Steytler (2018) 2.

⁴⁷¹ Simeon (1998) 60.

negotiation in the German model, and believed this was a concept from which South Africa could benefit.⁴⁷²

The Constitutional Assembly incorporates devolution concepts not only from Germany but elsewhere. For example, Warren and Simeon observe that the FFC was modelled on the Australian Grants Commission.⁴⁷³ However, the provision of the FFC in the South African Constitution also arose from a domestic need by the constitution owners for an independent financial commission.

The devolution model advocated by the IFP, NP and Afrikaner nationalists prioritised the rights of minority communities over those of national majorities, whilst the ANC wanted a system of government that benefited all South Africans. Therefore, it was important to devolve powers and functions yet have the central government assert national over regional interests.⁴⁷⁴

In May 1996, the Constitutional Assembly approved a Draft Constitution by the required two-thirds majority vote and sent it to the Constitutional Court for certification.⁴⁷⁵ The Constitutional Court's role was to serve as the sole and final arbiter by verifying whether the Constitutional Assembly complied with the CPs.⁴⁷⁶ One of the reasons the Constitutional Court refused to certify the initial Draft was that the Constitutional Assembly had failed to comply with CP XVIII.2.⁴⁷⁷ The Court found that there was a substantial diminution of provincial powers as compared to the Interim Constitution.⁴⁷⁸ Three months later, the Court reviewed the amended draft and found that, while there was still diminution of provincial powers, it was no

⁴⁷² Simeon (1998) 60.

⁴⁷³ Warren N 'Reform of the Commonwealth Grants Commission: It's all in the Detail' *University of New South Wales Law Journal UNSWLJ* (2008) 31(2) 534. See also Simeon (1998) 63.

⁴⁷⁴ Simeon (1998) 48.

⁴⁷⁵ Murray C 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23 *UALR Law Review* 814.

⁴⁷⁶ Barnes & De Klerk (2002) 31.

⁴⁷⁷ Constitutional Principle XVIII.2 stated that the powers and functions of the provinces in the final constitution should not be substantially less than or substantially inferior to those in the Interim Constitution.

⁴⁷⁸ Among other reasons, there was a diminution of provincial powers and functions because, under the Interim Constitution, provinces were empowered to legislate directly in relation to all local government matters, subject to national legislative overrides. However, in the initial draft of the final constitution, that legislative competence fell away. The Court also referred to legislative (and hence executive) powers which were allocated exclusively to Parliament and instances where Parliament was designated to regulate or control the exercise of provincial powers regarding local government in sections 139, 155(1), 159, 160(3), 161, 163 and 164 of the draft constitution. The Court held that those provisions circumscribed the provincial legislative competences. *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 375, 380 and 481 (hereafter First Certification of the Constitution).

longer deemed substantial.⁴⁷⁹ The Constitutional Court thus certified the revised Draft Constitution.⁴⁸⁰ On 10 December 1996, the Constitution was signed into law and came into effect on 4 February 1997.⁴⁸¹

3.4.1 The devolution model of the 1996 Constitution

Part of the devolution model in the 1996 Constitution carried through from the Interim Constitution, and hence such provisions are not discussed below.

3.4.1.1 Recognition of three levels of government

CP XVI stipulated that the government should be structured at national, provincial and local levels.⁴⁸² Consequently, the 1996 Constitution provides for these three levels of government.⁴⁸³ Unlike the Interim Constitution, the three levels are referred to as spheres of government, which signifies an egalitarian relationship – a move away from the hierarchy in the 1993 Constitution. Furthermore, each sphere is described as ‘distinctive’,⁴⁸⁴ referring to the autonomy it enjoys.

The structure of the national government in the 1996 Constitution makes provision for a bicameral parliament consisting of the National Assembly and NCOP.⁴⁸⁵ The Interim Constitution had a second chamber of parliament, known as the Senate,⁴⁸⁶ but the Constitutional Assembly deemed it ‘a weak institution with limited powers, without a clear role, and with no linkages between the senators and the provinces’.⁴⁸⁷ Thus, the NCOP was created, following the American and Australian models of equal representation of states. Each province, irrespective of size, has 10 representatives in the NCOP.⁴⁸⁸ Furthermore, a maximum of 10 local government representatives may participate, when necessary, in the proceedings of

⁴⁷⁹ Dugard (1997) 78.

⁴⁸⁰ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997* (1) BCLR 1 (CC).

⁴⁸¹ ‘The Constitutional Assembly (1994–1997)’ 3 available at https://www.concourtrust.org.za/uploads/files/Background_to_the_Constitutional_Assembly.pdf (accessed 7 June 2022).

⁴⁸² Schedule 4 of the Interim Constitution.

⁴⁸³ Section 40(1) of the Constitution of South Africa (hereafter Constitution).

⁴⁸⁴ Section 40(1) of the Constitution.

⁴⁸⁵ Section 42 of the Constitution.

⁴⁸⁶ Section 48 of the Interim Constitution.

⁴⁸⁷ Steytler (2018) 2.

⁴⁸⁸ Steytler (2005) 326.

the NCOP.⁴⁸⁹ However, local government representatives have no voting rights. Therefore, the clear mandate of the NCOP is to represent provinces – it is not just a second house of parliament.

Local government evolved from the 1993 model in that it was elevated into a sphere of government alongside the national and provincial government. This followed the trend of modern federal constitutions of the time in recognising the autonomy of local government, as was the case, for example, with the constitutions of Spain (1978) and Brazil (1988) and the 1992 amendments to the Indian Constitution.⁴⁹⁰

3.4.1.2 *Division of powers and functions*

CPs XVIII, XIX, XX, and XXI required the 1996 Constitution to allocate appropriate and adequate powers and functions to all three levels of government.⁴⁹¹ The Constitution complied with the CPs by providing for the symmetrical allocation of powers through a list of functional areas in which subnational units exercise their authority.⁴⁹² The functional areas are enumerated in schedules 4 and 5 of the Constitution and are listed in the table below.

Table 2: National, provincial and local government concurrent and exclusive functional areas

Schedule 4 Functional areas of concurrent national and provincial legislative competence	Schedule 5 Functional areas of exclusive provincial legislative competence
Part A <ul style="list-style-type: none"> • Administration of indigenous forests • Agriculture • Airports other than international and national airports • Animal control and diseases • Casinos, racing, gambling and wagering, excluding lotteries and sports pools • Consumer protection • Cultural matters • Disaster management • Education at all levels, excluding tertiary education 	Part A <ul style="list-style-type: none"> • Abattoirs • Ambulance services • Archives other than national archives • Libraries other than national libraries • Liquor licences • Museums other than national museums • Provincial planning • Provincial cultural matters • Provincial recreation and amenities • Provincial sport • Provincial roads and traffic

⁴⁸⁹ Section 67 of the Constitution.

⁴⁹⁰ Steytler (2005) 319.

⁴⁹¹ Schedule 4 of the Interim Constitution.

⁴⁹² Schedule 4–5 of the Constitution.

<ul style="list-style-type: none"> • Environment • Health services • Housing • Indigenous law and customary law, subject to Chapter 12 of the Constitution • Industrial promotion • Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence • Media services directly controlled or provided by the provincial government, subject to section 192 • Nature conservation, excluding national parks, national botanical gardens and marine resources • Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence • Pollution control • Population development • Property transfer fees • Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5 • Public transport • Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law • Regional planning and development • Road traffic regulation • Soil conservation • Tourism • Trade • Traditional leadership, subject to Chapter 12 of the Constitution • Urban and rural development • Vehicle licensing • Welfare services 	<ul style="list-style-type: none"> • Veterinary services, excluding regulation of the profession
<p>Part B The following local government matters to the extent set out in section 155(6)(a) and (7):</p> <ul style="list-style-type: none"> • Air pollution • Building regulations • Child care facilities 	<p>Part B The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):</p> <ul style="list-style-type: none"> • Beaches and amusement facilities

<ul style="list-style-type: none"> • Electricity and gas reticulation • Firefighting services • Local tourism • Municipal airports • Municipal planning • Municipal health services • Municipal public transport • Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law • Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto • Stormwater management systems in built-up areas • Trading regulations • Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems 	<ul style="list-style-type: none"> • Billboards and the display of advertisements in public places • Cemeteries, funeral parlours and crematoria • Cleansing • Control of public nuisances • Control of undertakings that sell liquor to the public • Facilities for the accommodation, care and burial of animals • Fencing and fences • Licensing of dogs • Licensing and control of undertakings that sell food to the public • Local amenities • Local sport facilities • Markets • Municipal abattoirs • Municipal parks and recreation • Municipal roads • Noise pollution • Pounds • Public places • Refuse removal, refuse dumps and solid waste disposal • Street trading • Street lighting • Traffic and parking
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a) National government's exclusive powers

The national government is allocated the most extensive powers among the three levels.⁴⁹³ The Constitution does not provide an exclusive list of powers and functions for the national government, but residual powers vest in the centre and are extensive, given the very limited list of exclusive provincial powers (as discussed below).⁴⁹⁴

b) Provincial government's exclusive powers

CP XIX required that provinces be assigned exclusive powers.⁴⁹⁵ That was not the case under Schedule 6 of the Interim Constitution, given that all provincial powers and functions were

⁴⁹³ Steytler & De Visser (2015) 87.

⁴⁹⁴ Section 44(1)(ii) of the Constitution.

⁴⁹⁵ Schedule 4 of the Interim Constitution.

concurrent functions with the national government – an indicator of limited provincial autonomy. Therefore, Schedule 5, in compliance with CP XIX, assigns provinces exclusive powers in, for instance, matters regulating abattoirs, liquor licences, ambulances and provincial planning. Table 2 above enumerates the other functional areas of exclusive provincial legislative competence. In contrast to the significant national government powers and functions, provinces are allocated minimal exclusive powers in non-significant functional areas. The provincial exclusive list mostly contains peripheral matters, and has been characterised as ‘anorexic’.⁴⁹⁶The ANC insisted that significant powers and functions not be exclusively provincial functions – an example of the ANC’s anti-provincial stance.⁴⁹⁷ The ANC compromised to have provinces which resulted in weaker provinces.⁴⁹⁸

Provincial autonomy is constrained in respect of the exclusive functional area because section 44(2) empowers national legislation to override provincial legislation, stating as follows:

Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

Therefore, provinces are not allocated significant exclusive powers and functions. Furthermore, the assignment of provincial exclusive powers and functions is skewed in favour of the national government because the latter can override provincial legislation.

⁴⁹⁶ De Visser J & May A ‘The Functions and Powers of Devolved Units’ unpublished paper, *Kenya–South Africa Dialogue on Devolution, Conference*, Nairobi, Kenya, 14 August 2013.

⁴⁹⁷ Wittenberg M ‘Decentralisation in South Africa’ in Bardhan P & Mookherjee D (eds) *Governance in Developing Countries* (2006) 335.

⁴⁹⁸ Magi L & De Villiers B ‘Principles Underlying Demarcation: Implications for Provincial Boundaries’ in De Villiers B (ed) *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* (2008) 36.

c) Concurrent national and provincial powers

CP XIX provided for the allocation of concurrent powers as well as exclusive powers and functions. Schedule 4, as demonstrated in Table 2, contains a list of concurrent powers. Given the sparseness of provincial exclusive powers, Steytler and De Visser argue that Schedule 4 is a lengthy list of significant functional areas that serves as compensation for the provinces' 'anorexic' list.⁴⁹⁹ Nevertheless, the compensation is somewhat hollow because the extensive concurrent powers favour the centre. Under section 125, a provision drawn from the German Basic Law,⁵⁰⁰ the national government is empowered to set the policy and framework, reducing provinces to implementers of national legislation. Thus, very little remains of provincial legislative authority as regards concurrent national and provincial legislative competence.⁵⁰¹

d) Conflict of national and provincial legislation

The extensiveness of concurrent national and provincial powers poses the risk of conflict. As a result, the Constitution has provisions to regulate instances where there is conflicting national and provincial legislation. Section 146(1) stipulates that when there is a conflict between the national and provincial legislation falling within a functional area, the following applies:

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for—

(i) the maintenance of national security;

⁴⁹⁹ Steytler and De Visser (2015) 87.

⁵⁰⁰ Steytler (2005) 319.

⁵⁰¹ Wittenberg (2006) 335.

- (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—
- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - (b) impedes the implementation of national economic policy.

Section 146 expanded the conditions under which national legislation may override provincial laws. Section 126 of the Interim Constitution provided for a relatively low-threshold ‘override’ clause, whilst the threshold for the override clause in the 1996 Constitution is higher because the grounds on which national legislation prevails are limited. A close analysis of section 146 reveals that while the threshold for the override is higher, the provision continues to favour the centre because the national government is still able to overturn provincial legislation.

e) Local government powers

It is evident from Table 2 that local government was assigned significant powers and functions in the 1996 Constitution under Schedule 4B and 5B. The regulation of buildings, electricity, local tourism, municipal planning, municipal health services, municipal public transport, water and sanitation, and waste removal is among the functional areas of local government. Thus, the ANC’s demand for a strong constitutional entrenchment of local government was satisfied. The manner in which powers and functions are assigned to provinces and local government is such that Steytler refers to the allocation of power as South Africa’s ‘hour-glass federation’: provincial functions are thinly squeezed between a powerful local government at the bottom and a dominant national government at the top.⁵⁰²

⁵⁰² Steytler (2019) 14.

However, it is important to note that both the national and provincial governments can regulate the exercise of local government matters.⁵⁰³ By-laws that conflict with either national or provincial legislation are deemed invalid.⁵⁰⁴ Nevertheless, Schedule 4B matters are areas of concurrent national and provincial legislative competence to the extent set out in section 155(6)(a) and (7), whilst Schedule 5B matters are areas of exclusive provincial competence to the extent set out for provinces in section 155(6)(a) and (7). Section 155(6)(a) states:

Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

(a) provide for the monitoring and support of local government in the province.

In terms of section 155(7),

[t]he national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Therefore, Schedule 4B and Schedule 5B matters are constitutionally protected from national and provincial legislative intervention as determined by the limits set by section 155(6)(a) and (7) of the Constitution.

f) Assignment of additional powers

The Constitution provides for the possibility of allocating additional powers to provinces and local government.⁵⁰⁵ Section 44 states that the National Assembly may assign any legislative powers to provinces or local government.⁵⁰⁶ It does not guarantee the assignment of additional powers, but it appeases those who want more power. Subnational levels, especially provinces, which have limited powers, are at the mercy of the centre because the national government is in full control of whether it wants to assign additional power, when it wants to do so, and when it wants to rescind such powers. With the assignment of additional powers, what also arises is

⁵⁰³ Section 151(3) of the Constitution.

⁵⁰⁴ Section 156(3) of the Constitution.

⁵⁰⁵ The asymmetrical allocation of powers and functions to accommodate the Afrikaner nationalists and the IFP fell away. See Steytler (2019) 12–14.

⁵⁰⁶ The exception is the power to amend the Constitution.

the expectation that the province or local government will report to the national government – a benchmark indicator of limited autonomy. Likewise, section 104 empowers provinces to do the same with respect to municipal councils falling within their borders. However, given how limited provincial powers are, it is unlikely that provinces could assign additional powers to local government. In sum, the national government is at liberty to assign further powers on its own terms.

3.4.1.3 Own-revenue sources

CP XXV stipulated that provincial fiscal powers and functions were to be defined in the Constitution.⁵⁰⁷ Therefore, section 228(1) empowers provinces to impose taxes, levies, and duties, as well as flat-rate surcharges on any taxes, levies or duties, as provided for by national legislation. Provincial taxation powers are regulated by national legislation, which can be enacted only after any recommendations of the FFC have been considered.⁵⁰⁸ Therefore, as with the 1993 model, significant limitations are placed on provincial taxation powers because provinces cannot exercise taxation powers without national legislation.

In accordance with CP XXIV read together with XXV,⁵⁰⁹ local government may impose property rates and surcharges on fees for services it provides or those provided on its behalf.⁵¹⁰ However, it may not impose property rates and surcharges in a manner that would prejudice, among other things, national economic policies and economic activities across municipalities.⁵¹¹ In addition, national legislation can authorise local government to impose other taxes, levies and duties, except on income tax, value-added tax, general tax or customs duties.⁵¹² Therefore, unlike those of provinces, local government taxation powers are not dependent on legislation alone because local government taxation powers are entrenched in the Constitution too.

Subnational borrowing is strictly controlled by the national government.⁵¹³ Provinces may raise loans for capital or current expenditure; however, loans for current expenditure may be raised

⁵⁰⁷ Schedule 4 of the Interim Constitution.

⁵⁰⁸ Section 228(2) of the Constitution.

⁵⁰⁹ Schedule 4 of the Interim Constitution.

⁵¹⁰ Section 229(1) of the Constitution.

⁵¹¹ Section 229(2) of the Constitution.

⁵¹² Section 229(1)(b) of the Constitution.

⁵¹³ Section 218(1)-(2) of the Constitution.

only when necessary and for bridging purposes during a fiscal year.⁵¹⁴ Likewise, the borrowing powers of municipalities are constrained. Local government may raise loans for capital or current expenditure, but loans for current expenditure may be raised only for bridging purposes when necessary during a fiscal year.⁵¹⁵ The national, provincial or local government may only guarantee loans if the guarantee complies with any conditions set out in national legislation and if such legislation were enacted only after any recommendations by the FFC.⁵¹⁶ Furthermore, every government is mandated to publish reports on the guarantees it has granted.⁵¹⁷ The strictly centralised provisions are there to promote fiscal sustainability.⁵¹⁸

3.4.1.4 Fiscal transfers

a) Equitable share

Major taxes such as income tax, corporation tax, value-added tax, and customs tax are centralised, creating a high degree of vertical fiscal imbalance. Therefore, in the absence of significant sources of own revenue, provinces and local government are entitled to an equitable share of revenue. CP XXVI stipulated that provinces and local government have a constitutional right to the equitable share of revenue collected nationally to ensure that they are able to provide basic services and execute the functions allocated to them.⁵¹⁹ In compliance with CP XXVI, the 1996 Constitution provides for the equitable sharing of revenue raised nationally.⁵²⁰ The provisions did not change significantly from what was in the Interim Constitution. There were some minor changes in the phrasing of the concepts, but the core remains the same.

b) Conditional and unconditional grants

In addition to the equitable share of revenue shared nationally, the Constitution provides that provinces and local government may receive additional funding from the national government.

⁵¹⁴ Section 230(1) of the Constitution.

⁵¹⁵ Section 230A(1)(a) of the Constitution.

⁵¹⁶ Section 218(1)-(2) of the Constitution.

⁵¹⁷ Section 218(3) of the Constitution.

⁵¹⁸ Canuto O & Liu L 'Subnational Debt Finance and the Global Financial Crisis' *The World Bank Poverty Reduction and Economic Management Network (PREM) Economic Premise* May 2010 No. 13 5 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/10186/545070BRI0EP130Box349420B01PUBLI%20CL.pdf?sequence=1> (accessed 6 June 2022).

⁵¹⁹ Schedule 4 of the Interim Constitution.

⁵²⁰ Section 214 of the Constitution.

In the 1993 Constitution, there was no regulation pertaining to whether local government could get additional funding. Section 214(1)(c) stipulates that national legislation must provide for any other allocations to provinces and local government from the national government's share, allocations which may take the form of conditional or unconditional grants. Thus, the allocation of conditional and unconditional grants is centralised.

c) Financial and Fiscal Commission

CP XXVII required the 1996 Constitution to establish a FFC.⁵²¹ Section 220 provides for the establishment of the FFC as guided by CP XXVII. The FFC's role is to recommend equitable fiscal and financial allocations to the devolved governments from revenue collected nationally, after considering national interests; economic disparities between the provinces and population and developmental needs; administrative responsibilities; and other legitimate interests of provinces.⁵²² There are no significant differences between the FFC provisions in the 1993 and 1996 constitutions; as a result, the provisions are not discussed in this section.

3.4.1.5 Supervision powers

The 1996 Constitution introduced the element of supervision, one which was not entrenched in the Interim Constitution. 'Supervision' occurs when one sphere oversees the functions of another in an effort to ensure that the latter fulfils its mandate. Supervision can take four forms: regulation, monitoring, support or intervention.⁵²³ Supervision serves as a check and balance against abuses by the devolved levels.

Although both provincial and local government are guaranteed a degree of autonomy, there is still considerable regulation of both spheres by the national government and provinces in respect of local government supervision. De Visser defines 'regulation' as setting the framework within which the devolved government must exercise its autonomy.⁵²⁴ In terms of the Constitution, the national government can pass legislation providing a broad framework for provincial and local government structures and operating procedures. For example, section 228(2)(b) provides that the national government may pass legislation to regulate provincial taxation powers. Likewise, provinces are given specific powers to regulate certain aspects of

⁵²¹ Schedule 4 of the Interim Constitution.

⁵²² Schedule 4 of the Interim Constitution.

⁵²³ Steytler & De Visser (2007) 15–5.

⁵²⁴ De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 169.

local government.⁵²⁵ Both the national and provincial governments have the legislative and executive authority to regulate how municipalities exercise their executive authority in order to ensure that they perform their listed functions effectively.⁵²⁶

The supervision forms of monitoring and support often go hand in hand. The first step is monitoring, and then, if there is a need, offering support with regard to what was observed in the first step. In the first certification case, the Constitutional Court explained that ‘monitoring’ is limited to the power to observe a devolved government or keep it under review without controlling it.⁵²⁷ Accordingly, section 155(6) stipulates that provinces must ‘provide for the monitoring and support of the local government’ falling within their provinces. The supervising sphere must observe and promote development, as well as provide any support needed for functions to be performed effectively.⁵²⁸ Support can take the form of training and workshops.⁵²⁹ The supervising sphere can provide specific support – for instance, on budgeting, revenue sources, asset management, and human resources – or technical assistance.⁵³⁰ Support can also be in the form of financial aid. For instance, the national government can monitor the performance of provincial and local government, and if it observes that they are performing poorly due to financial constraints, it can support the spheres by allocating conditional or unconditional grants to them.⁵³¹

Heavy oversight can limit the flexibility and capacity of devolved governments.⁵³² Steytler and De Visser suggest that interventions are the most aggressive form of supervision; therefore, the Constitution provides detailed intervention procedures that are meant to protect municipalities from unwarranted intervention by provinces or provinces from the same by the national government.⁵³³ Section 100(1) stipulates that the national government may intervene in provinces if they cannot or do not fulfil their executive obligations. The intervention by the

⁵²⁵ Section 151(3) of the Constitution.

⁵²⁶ Section 155(7) of the Constitution.

⁵²⁷ *First Certification of the Constitution* at para 372.

⁵²⁸ Section 155(6)(b) of the Constitution.

⁵²⁹ Hamza L. ‘Local Government Accountability, Oversight, and the Intervention Mechanism in South Africa’ (2021) 3 available at <https://www.ipssa.org/sites/default/files/page/Awards/2021%20Francesco%20Kjellberg%20Award%20Local%20Government%20Accountability%2C%20Oversight%2C%20and%20the%20Intervention%20Mechanism%20in%20South%20Africa.pdf> (accessed 27 September 2023).

⁵³⁰ Hamza (2021) 11.

⁵³¹ Section 227(1)(b) of the Constitution.

⁵³² Steve Modlin, ‘Rationalizing the Local Government Decision-Making Process: A Model for State Oversight of Local Government Finances’ (2010) 33 *Public Performance & Management Review* 571.

⁵³³ Steytler & De Visser (2007) 15–18.

national government includes assuming responsibility for the provincial obligations to the extent which is necessary to

- (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
- (ii) maintain economic unity;
- (iii) maintain national security; or
- (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.⁵³⁴

Similarly, when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking steps to ensure that those obligations are fulfilled.⁵³⁵ The intervening province then assumes responsibility for the relevant obligations in that municipality to the extent necessary to

- (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
- (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
- (iii) maintain economic unity.⁵³⁶

Provincial government intervention powers with regard to local government are extensive. For example, a 2003 constitutional amendment empowers, and in some instances compels, provinces to intervene in municipal financial crises by taking steps that include the dismissal of the municipal council.⁵³⁷ Furthermore, they can dissolve a municipal council and appoint an administrator if exceptional circumstances warrant such an action.⁵³⁸ By contrast, the national government cannot dissolve a provincial legislature.

In sum, the essence of supervision powers as a whole is centralist. The less invasive supervision models, such as regulation, monitoring and support, limit the autonomy of provinces and local government because the subnational spheres have to adhere to policies and frameworks set by the national government. Furthermore, when the national government financially supports

⁵³⁴ Section 100(1)(b) of the Constitution.

⁵³⁵ Section 139(1) of the Constitution.

⁵³⁶ Section 139(1)(b) of the Constitution.

⁵³⁷ Section 139(4) of the Constitution.

⁵³⁸ Section 139(1)(c) of the Constitution.

provinces and local government, it expects the subnational spheres to report on how they spend their financial resources. Intervention empowers the national government to temporarily gain control of the administration of provinces or local government, thus usurping the administration that lies at the core of subnational autonomy.

3.4.1.6 Cooperative government and intergovernmental relations

CP XXI required there to be intergovernmental harmony to ensure that the three levels of government acted as a single entity.⁵³⁹ Chapter 3 of the Constitution is dedicated to the promotion of intergovernmental relations. Prior to the 1996 Constitution, intergovernmental relations were known by different terms in other constitutions; the South African Constitution was the first to use the term ‘cooperative government’.⁵⁴⁰ Section 40(1) describes the spheres of government as ‘interdependent and interrelated’. The spheres are ‘interdependent’ in the sense that they have to exercise their autonomy for the common good of the country by cooperating with other spheres;⁵⁴¹ they are ‘interrelated’ because they have to exercise their autonomy subject to supervision by other spheres.⁵⁴² The terms ‘interdependent’ and ‘interrelated’ thus epitomise the intergovernmental relations discussed in this section.

Section 41(1) lists the principles of cooperative government:

All spheres of government and all organs of state within each sphere must—

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;

⁵³⁹ Schedule 4 of the Interim Constitution.

⁵⁴⁰ This is of importance, particularly in subsequent chapters, because the term and concept ‘cooperative government’ later migrated to other constitutions.

⁵⁴¹ Steytler (2005) 318.

⁵⁴² Steytler (2005) 318.

- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith by—
- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.

In addition to those principles, the 1996 Constitution requires national legislation to provide structures, institutions, mechanisms and procedures to promote and facilitate intergovernmental relations.⁵⁴³ Furthermore, organs of state in intergovernmental disputes are mandated to exhaust all other remedies provided in legislation before approaching courts to resolve disputes.⁵⁴⁴ Courts may be approached only as a last resort: section 41(4) empowers courts to refer disputes back to organs of state if they are of the opinion that not all other remedies have been exhausted. The exhaustion of all remedies before approaching courts encourages levels of government to work together amicably given that, because of their adversarial nature, court proceedings have the potential to strain intergovernmental relations.

However, in practice there is the danger that cooperative government can result in the national government coercing devolved levels, especially where one political party dominates both the national and subnational government.⁵⁴⁵ Therefore, the promise of cooperative government, that of relations between co-equals, may remain but an aspiration.

3.5 Conclusion

The South African devolution model evolved over time since the 1910 system of government to accommodate the varying needs of people, organisations and political parties. Other

⁵⁴³ Section 41(2) of the Constitution.

⁵⁴⁴ Section 41(3) of the Constitution.

⁵⁴⁵ Steytler & De Visser (2015) 94.

countries also influenced the model. For example, the Australian model influenced the FFC, whilst German law and jurisprudence influenced the NCOP, interprovincial equalisation transfers, cooperative government, and the allocation of powers.

The model that emerged is a centralised federal model, meaning that it does not represent fully-fledged federalism. It recognises the national, provincial and local government as autonomous levels of government with assigned powers and functions, and local government is assigned significant powers. However, exclusive provincial powers are mostly insignificant, whilst notable functions are subject to the concurrent jurisdiction of the national government. Furthermore, the national government dominates the field of concurrent competences because it retains overall policy-making and coordinating functions.

Finances are also centralised. In the absence of any significant original taxation powers, devolved levels, especially provinces, are reliant on sharing nationally collected revenue that comes to them through national equalisation transfers, conditional and unconditional grants. Although provinces and local government have a share of the revenue raised nationally, the national government is in control of the treasury. The FFC limits the national government's control of finances. Supervision powers also allow the national government to be involved in the day-to-day administration of provinces and local government. Lastly, the concept of cooperative government between equals is vulnerable to becoming coercive cooperative government firmly directed from the centre.

On a cursory look, the model appears to devolve powers; however, a closer analysis reveals that the centre retains much of the power. The model thus promises the devolution of power without ever actually devolving power in any comprehensive way. It is centralised enough for centrists to effectively keep power at the national level, but devolved enough to bring minorities into the political fold. The question then arises of why this model appears to be so attractive to other countries. The next three chapters consider how this centralised federal model influenced the devolution models in Kenya, Zimbabwe and Zambia.

Chapter 4:

The Influence of the South African Devolution Model on the Kenyan Devolution Model

4.1 Introduction

The 2010 Constitution of Kenya⁵⁴⁶ (Kenyan Constitution) entrenches a devolution model that bears a remarkable resemblance to the centralised federal model embedded in the South African Constitution.⁵⁴⁷ It is argued that the South African Constitution considerably influenced the Kenyan devolution model, the evidence for which is the strong correlation between the devolution concepts and texts that make up the respective models. This chapter analyses the Kenyan constitution-making process and Constitution to establish the extent to which the South African Constitution influenced the design of the model. To ascertain the reasons for the South African influence, this chapter seeks to answer two questions. The first is: What is the nature, content and intensity of the migrated devolution model and provisions? Secondly, Why and how did the migration of the devolution model and provisions take place?

It is argued, as noted, that the South African devolution model significantly influenced the Kenyan Constitution. The South African model found its way to Kenya because of political contestation at the time. There was an internally driven call for a devolution model that would address the social, economic and political challenges Kenya was facing. The desire for devolution was not imposed; rather, it arose locally from the need to move away from a centralist form of government. The South African model was attractive because South Africa was breaking away from a centralised government and was moving towards a homegrown devolution model that was clearly expressed in the constitution. Furthermore, the Kenyan constitution owners were familiar with the South African model.

The chapter commences in section 4.2 with an account of the history of devolution in Kenya's Independence Constitution. Section 4.3 examines devolution models in the early constitutional efforts by the Constitutional Review Commission (CKRC) and in the Bomas and Proposed New Constitution (Wako) drafts. Section 4.4 discusses the Committee of Experts' constitutional process and devolution models. Thereafter, section 4.5 analyses the devolution

⁵⁴⁶ Constitution of Kenya, 2010.

⁵⁴⁷ Constitution of South Africa, 1996.

model entrenched in the 2010 Constitution. Lastly, section 4.6 examines the extent to which the South African constitution influenced the Kenyan model and the reasons for this.

4.2 The Kenyan Independence Constitution and federalism

A discussion of the federal model under the 1963 Kenya Independence Constitution⁵⁴⁸ and the amendments thereafter are relevant to this study because the Independence Constitution had federal elements that were later dismantled. It is crucial to grasp why the federal elements fell away because this historical context later influenced some resistance to devolution between 2001 and 2010.

Prior to independence, there were significant disputes between the two major liberation movements, the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU).⁵⁴⁹ The two movements disagreed on the system of government. KANU, which was supported by three of the largest tribes, stood as an orthodox nationalist party. It advocated for Pan-Africanism, socialism and a strong central government to implement substantial changes in education, health, land usage and industrialisation.⁵⁵⁰ On the other hand, KADU emphasised that before there could be improvement in health, education, land usage and so forth, there was a need for the interests of the various ethnic minorities to be recognised.⁵⁵¹ KADU's rhetoric centred on the domination of KANU by the larger tribes and their alleged intention to take over land belonging to the minority groups.⁵⁵² The difference in ideology was a major issue – a KANU victory would usher in politics based on a unitary system and nationalisation, whilst a KADU victory would result in the division of Kenya into strong regions. Nottingham and Sanger argue that an electoral stalemate could potentially create a dangerous revolutionary scenario.⁵⁵³

Given the stalemate between KANU and KADU, Britain overruled both parties at the Lancaster House independence talks and imposed regionalism in the 1963 Independence Constitution.⁵⁵⁴

⁵⁴⁸ Constitution of the Republic of Kenya, 1963 (Independence Constitution).

⁵⁴⁹ Nottingham J & Sanger C 'The Kenya General Election of 1963' (1964) 2 No 1 *The Journal of Modern African Studies* 3.

⁵⁵⁰ Nottingham & Sanger (1964) 3.

⁵⁵¹ Okoth-Ogendo HWO 'The Politics of Constitutional Change in Kenya since Independence, 1963–69' (1972) 71 *African Affairs* 13.

⁵⁵² Okoth-Ogendo (1972) 14.

⁵⁵³ Nottingham & Sanger (1964) 4.

⁵⁵⁴ Nottingham & Sanger (1964) 4.

The British government insisted that it would not grant Kenya independence without regionalism.⁵⁵⁵ In addition, Britain warned that if Kenya did not accept its terms, independence talks would reconvene at a later unspecified time.⁵⁵⁶ Therefore, the two major parties were forced to accept the Independence Constitution with the regionalism model so that independence would not be delayed. Regionalism was popularly known as *majimboism*, which referred to ethnic-based distribution of powers to regions and the centralisation of power in the executive president.⁵⁵⁷ Under *majimboism*, the greater the detail for the regional powers, the tighter there was control at the centre.⁵⁵⁸

The migration of *majimboism* into the Independence Constitution is explained by the theory of coercive migration driven by colonial powers (discussed in Chapter 2). Britain as a colonial power was in a position to force the migration of federal provisions into the Independence Constitution.⁵⁵⁹ Thus, the Independence Constitution was an imposed constitution and did not fully reflect the will of the Kenyan people. John Kangu suggests that KANU accepted the federal provisions only for the sake of attaining independence, but was opposed to the ethnic-based model and intended to immediately amend the provisions and recentralise power once it was elected into government.⁵⁶⁰

Inevitably, the KANU-led government amended the Independence Constitution.⁵⁶¹ Among the constitutional amendments were provisions that changed the configuration of the state at the vertical level.⁵⁶² These amendments, instituted between 1963 and 1965, resulted in the creation of a centralised system of government.⁵⁶³ Local government was strong at independence, and was responsible for the collection of Graduated Personal Tax (GPT) and other taxes and levies.⁵⁶⁴ In 1967, local taxation powers, including those in regard to GPT, were

⁵⁵⁵ Nunow A A 'Constitution Making and Legal Reform Process in Kenya' (2004) available at <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/6526/Constitution%20Making%20and%20Legal%20Reform%20Process%20in%20Kenya.pdf?sequence=1&isAllowed=y> (accessed 10 February 2021).

⁵⁵⁶ Kangu J M *Constitutional Law of Kenya on Devolution* (2015) 73.

⁵⁵⁷ Okoth-Ogendo (1972) 14.

⁵⁵⁸ Okoth-Ogendo (1972) 15.

⁵⁵⁹ Nunow (2004) 2.

⁵⁶⁰ Kangu (2015) 73.

⁵⁶¹ Nunow (2004) 4.

⁵⁶² Cottrell J & Ghai Y 'Constitution Making and Democratization in Kenya (2000–2005)' (2007) 14 *Democratization* 3.

⁵⁶³ Nunow (2004) 5.

⁵⁶⁴ Chitere P, Chweya L, Masya J et al. *Kenya Constitutional Documents: A Comparative Analysis* (2006) 12.

recentralised.⁵⁶⁵ Local government also provided services such as health, education, and road maintenance. However, in 1969, the Local Authority Services Transfer Act transferred services such as education and health to the central government.⁵⁶⁶ KANU did this to strengthen its power base as well as to give more powers to the President.⁵⁶⁷ Thus, the recentralisation of power was achieved through the abolition of regionalism and establishment of a de facto one-party state.⁵⁶⁸

The recentralisation of powers led to Kenyan people calling for constitutional reform. The agitation for constitutional reform arose in the 1980s and was spearheaded by Kenyan intellectuals and human rights activists, while internationally funded non-governmental organisations (NGOs) sensitised ordinary people on constitutional issues.⁵⁶⁹ From the late 1980s into the early 1990s, there was also domestic pressure against the one-party state.⁵⁷⁰ The call for constitutional reconstruction was motivated by the need to secure protection against abuse of power and the desire to establish conditions for stability and security in Kenya.⁵⁷¹ The outcome was advocacy for democracy, the protection of human rights, social justice, multiparty elections, presidential term limits, and, of importance to this research, devolution.⁵⁷²

Advocacy for constitutional reform intensified between 1990 and 1991 following the end of the Cold War, when there was pressure from the United States and the West generally for multiparty elections.⁵⁷³ With a new wave of constitutional democracy arising due to the collapse of the European Communist regimes, the West no longer saw the benefits of supporting dictatorial regimes – and the support of the West was crucial for President Moi’s survival.⁵⁷⁴ The international context was also favourable for constitutional reform, with other African countries, such as Uganda, Ethiopia and South Africa, having undergone constitutional

⁵⁶⁵ Chitere, Chweya, Masya et al. (2006) 12.

⁵⁶⁶ Local Authority Services Transfer Act, 1969.

⁵⁶⁷ Nunow (2004) 5.

⁵⁶⁸ Nunow (2004) 5.

⁵⁶⁹ Cottrell & Ghai (2007) 4.

⁵⁷⁰ The one-party system was criticised for problems such as corruption, preventative detention, police brutality, a compromised judicial system, and lack of respect for the separation of powers and the rule of law. See Cottrell & Ghai (2007) 3.

⁵⁷¹ Nunow (2004) 2.

⁵⁷² Bannon A L ‘Designing a Constitution-Drafting Process: Lessons from Kenya’ (2007) 116 *Yale Law Journal* 1830. See Cottrell & Ghai (2007) 3.

⁵⁷³ Bannon (2007) 1831.

⁵⁷⁴ Ghai Y P ‘Devolution in Kenya: Background and Objectives’ in Steytler N & Ghai YP (eds) *Kenyan-South African Dialogue on Devolution* (2015) 74.

reform in the 1990s.⁵⁷⁵ In 1992, the movement for constitutional reform also gained the support of trade unions, professional associations, civil society, religious groups, and opposition political parties.⁵⁷⁶ In the face of all these developments, President Moi was under pressure to engage in constitutional reform.

In an attempt at constitutional reform, he reintroduced multiparty elections in 1992, in which he prevailed.⁵⁷⁷ Liisa Laakso remarks that the 1992 elections were marred by voter intimidation and violence allegedly perpetrated by KANU.⁵⁷⁸ The constitutional reform efforts were short-lived because after the elections there was civil mass action, violence and the death of civilians.⁵⁷⁹ Opposition political parties, with the support of religious leaders, discarded its alliance with the civil society and came to an agreement with the ruling party, an agreement that resulted in the establishment of the Inter-Parties Parliamentary Group (IPPG) for constitutional discussions.⁵⁸⁰ The IPPG agreed, among other things, to a wide-ranging review of the Independence Constitution after the general elections, as provided for by the Constitution of Kenya Review Act (Review Act).⁵⁸¹

4.3 Early constitutional efforts towards a devolution model

The growing need for constitutional reform culminated in a series of constitution-making processes, namely the CKRC, Bomas and Proposed New Constitution (Wako) constitution making processes, which show the waxing and waning of South African influence.

4.3.1 The Constitution of Kenya Review process

The Review Act set the ground for the drafting of a new constitution, including providing direction on how constitutional reform was to take place.⁵⁸² Jill Cottrell and Yash Pal Ghai opine that, to control the constitution-making process, the government passed the Act without

⁵⁷⁵ Cottrell & Ghai (2007) 5.

⁵⁷⁶ Cottrell & Ghai (2007) 4.

⁵⁷⁷ Barkan J D 'Kenya: Lessons from a Flawed Election' (1993) 4 *Journal of Democracy* 85.

⁵⁷⁸ Laakso L 'Insights into Electoral Violence in Africa' in Basedau M, Erdmann G & Mehler A (eds) *Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa* (2007) 225.

⁵⁷⁹ Cottrell & Ghai (2007) 5.

⁵⁸⁰ Cottrell & Ghai (2007) 5.

⁵⁸¹ Constitution of Kenya Review Act, 1997. Ahead of the multiparty general elections of 1997, the IPPG also agreed to implement constitutional reforms such as ensuring the independence of the electoral commission and repealing a number of laws that restricted civil and political rights.

⁵⁸² Cottrell & Ghai (2007) 6. See also Bannon (2007) 1832; Murray C 'Kenya's 2010 Constitution' (2013) 16 *Neue Folge Band Jahrbuch des Offentlichen Rechts* 749.

adequate consultation with civil society and the opposition.⁵⁸³ Opposition leaders criticised the provisions which stipulated that Parliament was the only legitimate body to approve a new constitution.⁵⁸⁴ Between June and October 1998, various stakeholders entered into negotiations to come up with a more acceptable Review Act that involved more parties.⁵⁸⁵ The result was an amended Review Act.

The implementation of the amended Review Act ran into difficulties, as political parties disagreed on how to nominate members of the constitution review commission.⁵⁸⁶ These challenges forced civil groups to start a parallel constitution reform process in December 1999 under the leadership of major religious groups. Known as the Ufungamano Initiative,⁵⁸⁷ it worked on a mandate of facilitating the making of a constitution for Kenyans by themselves for about a year and a half. It was only after the intervention by the chairperson of the CKRC, Yash Pal Ghai, that in June 2001 the two initiatives, that is, the parliamentary group and the Ufungamano group, merged to form one commission.⁵⁸⁸

Despite the passage of the Review Act in 1997, Kenya's review process only began officially in late 2001.⁵⁸⁹ The CKRC intended to be an independent and expert body that reflected the diversity of the country.⁵⁹⁰ Its tasks included providing civic education to the public on constitutional issues and seeking the views of the people on reforms. The CKRC completed the first stage of information-gathering, public education, and initial drafting by mid-2002.⁵⁹¹ During the information-gathering process, Ghai, as part of the CKRC, observed that

[w]herever the CKRC went, it noted widespread feeling among the people of alienation from [the] central government because of the concentration of power in the national government, and to a remarkable extent, in the president. They felt marginalised and neglected, deprived of their resources; and victimised for their political or ethnic affiliations. They considered that

⁵⁸³ Cottrell & Ghai (2007) 5.

⁵⁸⁴ Murray C & Kirkby C 'Constitution-Making in Anglophone Africa' in Ndulo M & Gazibo M (eds) *Growing Democracy in Africa: Elections, Accountable Governance, and Political Economy* (2016) 16.

⁵⁸⁵ Cottrell & Ghai (2007) 5.

⁵⁸⁶ Cottrell & Ghai (2007) 5.

⁵⁸⁷ Cottrell & Ghai (2007) 5.

⁵⁸⁸ Maingi G 'The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights' (2015) 15 *Feminist Africa* 66. See also Oluoch F 'Parliament and Bomas Fight over Review' February 2004 available at http://africa.peacelink.org/newsfromafrica/articles/art_3271.html (accessed 24 November 2020).

⁵⁸⁹ Bannon (2007) 1834.

⁵⁹⁰ Cottrell & Ghai (2007) 5.

⁵⁹¹ Bannon (2007) 1834.

their problems arose from government policies over which they had no control. Decisions were made at places far away from them. These decisions did not reflect the reality under which they lived, the constraints and privations under which they suffered ... As their poverty deepened, they could see the affluence of others: politicians, senior civil servants, cronies of the regime. They felt that under both presidential regimes, certain ethnic groups had been favoured, and others discriminated against.⁵⁹²

In the light of those sentiments, the CKRC established that there was a need to produce a constitutional draft that entrenched a non-centralised system of government, particularly devolution, as it would afford Kenyan communities greater control of their own affairs.⁵⁹³

After public consultations, the CKRC employed the services of both local and foreign experts. Among the foreign experts were distinguished scholars and practitioners of federalism and decentralisation, such as Ronald Watts,⁵⁹⁴ Christina Murray⁵⁹⁵ and Phil Knight.⁵⁹⁶ Watts and Knight were Canadian, whilst Murray is South African. Phil Knight was invited in particular for the role he played in the South African constitution-making process as a plain-language expert. Kenyans invited the foreign experts to participate in the process. Therefore, the constitution owners had the final say on the content of the devolution model, concepts and texts, as explained in Chapter 2 under the section on dissemination of information. The foreign experts did not force any constitutional transfers; they merely shared their expertise. The experts' exact contributions are analysed below under the devolution provisions they proposed.

4.3.2 The devolution model of the CKRC Draft

The analysis of the devolution model proposed in the CKRC Draft focuses on major aspects of multilevel governance – such as the recognition of levels of government, division of powers and functions, own-revenue sources, fiscal transfers, supervision and cooperative government – which were identified in the literature and international practice (as discussed in Chapter 1).

⁵⁹² Ghai Y 'Devolution: Restructuring the Kenyan State' (2008) 2 *Journal of Eastern African Studies* 215.

⁵⁹³ Murray (2010) 36.

⁵⁹⁴ Ghai (2015) 77.

⁵⁹⁵ Steytler N & Ghai Y 'Devolution: What can Kenya Learn from South Africa' in Steytler N & Ghai YP (eds) *Kenyan-South African Dialogue on Devolution* (2015) 480.

⁵⁹⁶ Steytler N & Ghai (2015) 480.

4.3.2.1 Recognition of five levels of government

The CKRC Draft proposed five levels of government: village, location, district, provincial and national.⁵⁹⁷ The Democratic Party advocated for devolution in districts, whilst KANU and President Moi argued for regions to be the principal level of devolution.⁵⁹⁸ However, the Draft did not position or empower all those levels as such. For example, only the powers assigned at the district level were to be constitutionally protected. Furthermore, the district level was the only devolved unit empowered with taxation powers.⁵⁹⁹ For devolved units of government to be effective levels of government, the assignment of functions needs to be accompanied by resource-raising powers. Therefore, the lack of taxation powers for the village, location and provincial levels of government can be interpreted to mean that those three levels of government were not positioned as levels of government in the Draft. Abubakar Zein, who was a commissioner at the CKRC, explained that the village and location levels were designed to play an advisory role in regard to the district level, whilst the provincial level was to play a coordinating role.⁶⁰⁰

The five levels of government are certainly at variance with the South African model, which has only three levels. Moreover, although provinces have no original taxing powers, they have an important service function, and do not play a coordinating role for the municipalities in their jurisdiction. Lastly, the South African Constitution describes its levels of government as ‘distinctive, interdependent and interrelated’,⁶⁰¹ cementing the significance of each level; however, the CKRC Draft was silent in this regard.⁶⁰²

4.3.2.2 Subnational powers and functions

The seventh schedule of the Draft proposed a list of exclusive powers and functions for the district government, as well as a concurrent list of powers between the national and district

⁵⁹⁷ Clause 215 CKRC Draft.

⁵⁹⁸ Ghai (2008) 218.

⁵⁹⁹ Clause 224(2) of the CKRC Draft.

⁶⁰⁰ Interview with CKRC Commissioner, Abubakar Zein, via Zoom, 24 March 2021.

⁶⁰¹ Section 40(1) of the Constitution of South Africa.

⁶⁰² The South African model, like the CKRC Draft, did not assign original taxation powers to all three levels of government, with provincial taxation powers being dependent on national legislation. However, the absence of original provincial taxation powers does not exclude provinces as a level of government because section 40 identifies provinces as a sphere of government. See sections 228–229 of the Constitution of South Africa.

government.⁶⁰³ This is reminiscent of Schedule 4 and 5 of the South African Constitution, which list exclusive and concurrent powers and functions. Furthermore, clause 230(3)(a) of the Draft proposed that national legislation ‘shall provide for the division of legislative and executive powers between the National, Provincial, District, Location and Village Governments’. Therefore, clause 230 may be interpreted to mean that national legislation could assign additional powers to districts and that national legislation would determine the powers and functions of provincial, locational and village levels. This differs from the South African Constitution, which vests the legislative authority of provinces and municipalities in the devolved units themselves.⁶⁰⁴

To manage conflicting legislation that could arise from the concurrent list, the Draft, like the South African Constitution, had provisions that regulated how to proceed in these eventualities. Unlike the South African model, where the conflict resolution is provided in the Constitution,⁶⁰⁵ the Draft proposed placing the onus for resolving conflicting legislation in national legislation. The Draft proposed that national legislation should specify matters on which national laws prevailed over district laws and vice versa.⁶⁰⁶ Given that difference in approach, the conflict-of-laws provision in the Draft did not follow the South African example.

4.3.2.3 Own-revenue sources

The Draft proposed that the district government impose taxes under the authority of national legislation.⁶⁰⁷ This deviates from the South African model, which entrenches local government taxation powers and thus entails that local government taxation powers are not dependent on the national government.⁶⁰⁸ The Draft was silent about provincial, location and village taxation powers, as stated above. According to Abubakar Zein, who was a CKRC Commissioner, the reason for leaving this to Parliament stemmed from the drafters’ understanding of the *Magna Carta*’s principle of ‘no taxation without representation’.⁶⁰⁹ The drafters interpreted the principle to mean that only a democratically elected parliament had the power to determine

⁶⁰³ Seventh Schedule of the CKRC Draft.

⁶⁰⁴ Sections 104 and 156(2) of the Constitution of South Africa.

⁶⁰⁵ Sections 146 and 155 of the Constitution of South Africa.

⁶⁰⁶ Article 230(3) of the CKRC Draft.

⁶⁰⁷ Article 224(2) of the CKRC Draft.

⁶⁰⁸ Section 229 of the Constitution of South Africa.

⁶⁰⁹ Zein (2021).

which taxes could be afforded to the district level.⁶¹⁰ In an interview with Zein, it emerged that the decision not to have provincial, location and village taxation powers in the Draft was drawn from common law.⁶¹¹

4.3.2.4 Fiscal transfers

a) Equitable share

In the absence of significant taxation powers for subnational authorities, the Draft proposed equitable sharing of national and local resources between the national and subnational governments to enable them to provide basic services, with special provisions for marginalised areas.⁶¹² However, clause 243(d) excluded the village level from the equitable division of revenue. There was also particular emphasis on the district level of government's receiving a substantial share of revenue, while there was no mention of the other devolved units.⁶¹³

This comes as no surprise because, as discussed above, it was proposed that the district level be the only real devolved level of government given significant powers and functions. The concept of 'equitable share' was borrowed from the South African Constitution, as indicated in the table below by the italicised similarities between the provisions contained in the Draft and in the South African Constitution.

Table 3: Equitable share provisions in the CKRC Draft and South African Constitution

CKRC Draft	South African Constitution
Clause 243(d): Ensure <i>the equitable division of revenue raised nationally among national, provincial and district and local levels of government;</i>	Section 214(1): An Act of Parliament must provide for— (a) <i>the equitable division of revenue raised nationally among the national, provincial and local spheres of government;</i>

⁶¹⁰ Zein (2021).

⁶¹¹ Zein (2021).

⁶¹² Clauses 213(1)(f) – (2) and 243(d) of the CKRC Draft.

⁶¹³ Clause 226 of the CKRC Draft.

Clause 243 is a near-verbatim reproduction of section 214 of the South African Constitution. Not only was the concept of equalisation adopted, but the Draft also used the same language to express the concept. This is ample evidence of the influence of the South African model.

b) Commission on Local Government Finance

As the CKRC wanted to address financial inequality in Kenya and avoid the politicisation of revenue allocation, the establishment of a financial commission, known as the Commission on Local Government Finance, was proposed.⁶¹⁴ The role of the Commission included advising national and devolved governments on the distribution of grants to devolved levels.⁶¹⁵ It copied the South African Constitution, which provides for an independent FFC that, among other functions, advises on the division of revenue between the three spheres of government.⁶¹⁶ Thus, the Draft followed the South African example by establishing a similar commission to advise on revenue-sharing even though the composition of the two commissions is different.

4.3.2.5 Supervision powers

As noted previously, supervision occurs when one level of government oversees the functions of another in an effort to ensure that all levels of government fulfil their mandates. Steytler and De Visser state that supervision can take the form of regulation, monitoring, support, or intervention.⁶¹⁷ The Draft proposed limited forms of supervision. Clause 227 had the reference closest to supervision. It proposed that the national government suspend district governments in emergencies, war, for gross inefficiency, corrupt practices, or failure to comply with the Code of Conduct applicable to district authorities. This provision was a pale version of South Africa's extensive provisions on supervision.⁶¹⁸

4.3.2.6 Cooperative government and intergovernmental relations

The Draft proposed that there be cooperation between the national and devolved authorities,⁶¹⁹ as well as cooperation between the devolved authorities themselves, especially district

⁶¹⁴ Clause 225(1) of the CKRC Draft.

⁶¹⁵ Clause 225(1)-(2) of the CKRC Draft.

⁶¹⁶ Section 22 of the Constitution of South Africa. See also Clause 225(1) of the CKRC Draft.

⁶¹⁷ Steytler & De Visser (2007) 15–5.

⁶¹⁸ Sections 100, 139, 151(3), 155(6)-(7) and 228(2)(b) of the Constitution of South Africa.

⁶¹⁹ Clauses 213(1)(j) and 227 of the CKRC Draft.

councils.⁶²⁰ District councils could also set up joint committees or joint authorities in the performance of their tasks.⁶²¹ Lastly, the Draft proposed that intergovernmental disputes be resolved via mediation or negotiation.⁶²² That suggests that courts were a last resort since the Draft itself did not mention when courts could be approached. It is argued that the concept of cooperative government was modelled on the South African Constitution. Evidence of this is the similarity of the cooperative government principles and dispute resolution mechanisms, the similarity in the intergovernmental relations structures, and the use of the phrase ‘cooperative government’, which at the time that the Draft was formulated appears to have been entrenched only in the South African Constitution.⁶²³

In sum, we see the first indicators of the influence of the South African Constitution on the Draft. This influence is especially pronounced in the migration of the following concepts: equitable share, the role of the Commission on Local Government Finance, and cooperative government principles. Ghai’s role in the CKRC process explains why the South African Constitution influenced the Draft. Ghai was familiar with the South African Constitution because he was interested in the devolution model since its inception when he followed the South African constitution-making process. In a speech he made when the University of Pretoria awarded him an honorary degree, he explained that he learnt about the constitution-making process from South African politicians he had met.⁶²⁴ He also had knowledge of the South African devolution model from his writings prior to the CKRC process.⁶²⁵

In addition to the call for devolution being homegrown in nature (as discussed above in section 4.3.1), Jennie Litvack et al. argue that international monetary institutions such as the World Bank were influential in advocating for the constitutionalisation of devolution in developing countries.⁶²⁶ The World Bank argued that devolution fosters development in countries that are

⁶²⁰ Clause 229 of the CKRC Draft.

⁶²¹ Clause 229(1) of the CKRC Draft.

⁶²² Article 230(3) of the CKRC Draft.

⁶²³ Section 41 of the Constitution of South Africa.

⁶²⁴ See ‘Professor Yash Pal Ghai awarded an honorary degree by the University of Pretoria’ available at <https://katibainstitute.org/professor-yash-pal-ghai-awarded-an-honorary-degree-by-the-university-of-pretoria/> (accessed 27 December 2023).

⁶²⁵ Ghai’s writings on the South African constitution-making process or devolution model prior to the CKRC process include Ghai Y ‘The role of law in the transition of societies: The African experience’ (1991) 35 *Journal of African Law* 8–20; Ghai Y (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states* (2000); Ghai Y ‘Universalism and relativism: human rights as a framework for negotiating interethnic claims’ (1999) *Cardozo Law Review* 1021 – 1095; Ghai Y ‘Decentralization and the Accommodation of Ethnic Diversity’ in Young C. (Ed) *Ethnic Diversity and Public Policy* (1998).

⁶²⁶ Litvack J, Ahmad J & Bird R ‘Rethinking Decentralization in Developing Countries’ (1998) 4 available

struggling economically.⁶²⁷ The role of the World Bank is explained by the persuasion migration theory discussed in Chapter 2. The World Bank encouraged constitutional reform that entrenched devolution by promising continued financial aid to devolved countries. The Kenyan government, like most African governments, needed financial aid from international monetary institutions.⁶²⁸ Thus, the World Bank played a persuasive role in the entrenchment of the devolution model in the CKRC.

Therefore, two theories, namely the self-selection and persuasion theories, explain the migration of the South African devolution model into the CKRC Draft. The self-selection process explains the role played by the Kenyan populace in public outreach in identifying the need for devolution in Kenya and the CKRC's selection of the South African model.⁶²⁹ Similarly, the persuasion theory explains the role of the World Bank in incentivising the Kenyan government to devolve powers and functions.⁶³⁰

4.3.3 The Bomas Draft process

When the CKRC completed the CKRC Draft, it intended to start the second stage of the constitution-making process by sending the Draft to the National Conference for consultation in October 2002. The intention was to complete the process before December 2002 so that a new constitution would be ready in time for the December 2002 presidential and parliamentary elections.⁶³¹ However, the process was fundamentally delayed by the interference of President Moi, who dissolved Parliament in October 2002.⁶³² What this meant was that MPs could no longer participate in the National Constitutional Conference (NCC). Hence, the CKRC was forced to postpone the NCC until only after the elections, since convening the NCC without all of the MPs was contrary to the Review Act.⁶³³

at <http://www1.worldbank.org/publicsector/decentralization/Rethinking%20Decentralization.pdf> (accessed 1 December 2021).

⁶²⁷ Litvack, Ahmad & Bird (1998) 4.

⁶²⁸ Ghai (2015) 74.

⁶²⁹ Zein (2021).

⁶³⁰ Ghai Y P 'South African and Kenyan Systems of Devolution: A Comparison' in Steytler N & Ghai Y P (eds) *Kenyan-South African Dialogue on Devolution* (2015) 11.

⁶³¹ Bannon (2007) 1834.

⁶³² Bannon (2007) 1834.

⁶³³ Bannon (2007) 1834.

The National Rainbow Coalition (NARC), under the leadership of Mwai Kibaki, won the December 2002 elections.⁶³⁴ In his election campaign, Kibaki vowed to have a new constitution adopted within a hundred days of assuming power.⁶³⁵ Nevertheless, he reneged on this promise. In late December 2002, almost immediately after assuming power, he pushed his promise of a new constitution to June 2003 and the NCC began deliberations in April 2003.⁶³⁶

In early 2003, before the drafting process commenced, the drafters went to South Africa on a study tour to learn more about the South African devolution model.⁶³⁷ During this tour, they had discussions with the Department of Provincial and Local Government (now the Department of Cooperative Governance and Traditional Affairs, or COGTA) and the FFC. These discussions sold the idea of incorporating similar devolution concepts in the Bomas Draft (named after the Bomas of Kenya theatre facility where the NCC met).⁶³⁸ The drafters also went to Ethiopia, Nigeria, and Germany for study tours.⁶³⁹ In addition, they studied the German, Malawian, Ugandan, Swiss, Norwegian, and Swedish constitutions to understand how these had navigated the question of non-centralised governance.⁶⁴⁰

In late April 2003,⁶⁴¹ the NCC, consisting of politicians from the national and district levels and representatives of other interest groups, met to discuss, and if need be, make amendments and then have the CKRC revise the Draft.⁶⁴² Zein,⁶⁴³ a rapporteur for the NCC Technical Working Committee on Legislature, said in an interview that the NCC gave the technical working committee on devolution just three weeks to come up with devolution principles.⁶⁴⁴

⁶³⁴ NARC was a coalition of opposition political parties. As mentioned above, KANU had been the ruling party since independence under the presidency of Jomo Kenyatta (1964–1978) and Daniel Moi (1978–2002) See Bannon (2007) 1836.

⁶³⁵ Bannon (2007) 1835.

⁶³⁶ Bannon (2007) 1836. Hessenbon argues that the ‘allure of power was too much for Kibaki and his associates to selflessly change the existing constitution that gave them enormous powers for a new constitution that would have seriously constrained them’. See Hessenbon GT ‘The Fourth Constitution-Making Wave of Africa: Constitutions’ (2014) *International and Comparative Law Journal* 209. See also Cottrell & Ghai (2007) 13.

⁶³⁷ Interview with National Constitutional Conference (NCC), Technical Working Committee on Devolution Rapporteur, John Mutakha Kangu, via Zoom, 29 March 2021.

⁶³⁸ National Constitutional Conference Documents: The final report of technical working group ‘G’ on devolution of powers 6 (NCC Report).

⁶³⁹ Kangu (2021).

⁶⁴⁰ Kangu (2021). See NCC Report 6.

⁶⁴¹ Some reports suggest that the conference actually started in May 2003. See Murray (2010) 4.

⁶⁴² Bannon (2007) 1836. See also Murray C ‘Kenya’s 2010 Constitution’ (2013) 61 *Neue Folge Band Jahrbuch des öffentlichen Rechts* 749.

⁶⁴³ Abubakar Zein participated in both the CKRC and Bomas Drafts.

⁶⁴⁴ Interview with NCC, Technical Working Committee on Legislature Rapporteur, Abubakar Zein, via Zoom, 24 March 2021.

The period was insufficient to design a devolution model from scratch. With the limited time it had, the technical committee relied significantly on devolution provisions in constitutions from other countries. As discussed in detail below, the drafters relied on the South African Constitution together with what they had learnt from COGTA and the FFC during the study tour. Kangu confirmed this in an interview, mentioning that when the technical committee on devolution was assigned tasks, he as a rapporteur used the South African Constitution and ‘tr[ie]d to customise some of the provisions’ to suit the Kenyan context.⁶⁴⁵

The process of producing the Bomas Draft was so acrimonious that the Kibaki government and key NGOs⁶⁴⁶ withdrew from the negotiations; there were also lawsuits,⁶⁴⁷ injunctions⁶⁴⁸ and parliamentary bills to alter the Review Act.⁶⁴⁹ Three issues dominated the contention at the Bomas conference: the structure of the executive, Kadhis courts⁶⁵⁰ and devolution. The hostile nature of the constitution-making process was one of the main reasons that there were further drafts after the Bomas Draft.

4.3.4 The devolution model of the Bomas Draft

4.3.4.1 Recognition of four levels of government

The Bomas Draft proposed reducing the levels of government from the five in the CKRC Draft to four by dropping the village level.⁶⁵¹ Zein reported that the village level was removed because it was argued that five levels of government were too many and the village level could fall away since it played merely an advisory role.⁶⁵² The five levels were also not popular due to their financial implications and the complexity of having so many levels of government.⁶⁵³ The provincial level was renamed as the regional level because provinces under the Independence Constitution had a bad reputation due to their ethnic-based system. Furthermore,

⁶⁴⁵ Kangu (2021).

⁶⁴⁶ The Ufungamano Initiative, which had close ties with President Kibaki, withdrew from the conference and released its own parallel draft. See Bannon (2007) 1837–1838.

⁶⁴⁷ For instance, a decision of the Kenyan High Court, *Njoya and others v Attorney-General and others* [2004] LLR 4788 (HCK) p 17 held that the Kenyan Constitution could not be replaced without a referendum. This was later codified in the Kenya Review Act of 2008. See Murray (2010) 6.

⁶⁴⁸ Cottrell & Ghai (2007) 18.

⁶⁴⁹ Bannon (2007) 1836.

⁶⁵⁰ Whether Kenya should codify separate civil courts for Muslims. See Bannon (2007) 1836.

⁶⁵¹ Clause 6 of the Bomas Draft.

⁶⁵² Zein (2021).

⁶⁵³ Ghai (2015) 17.

public consultations revealed that people regarded provinces as an extension of the president's office and ripe for abuse of power by officials.⁶⁵⁴

The Draft proposed that the regional level be a new level of government clearly distinguishable from the previous administrations.⁶⁵⁵ The objectives and principles of devolution in the Draft supported the distinction: the levels of government at each level were described as '*distinct, interdependent*, consultative and negotiative'.⁶⁵⁶ The italicised text is an extract from the South African Constitution.⁶⁵⁷ In an interview, one of the Bomas drafters, Kangu, explained how the text shifted:

With these [texts], 'distinct and interdependent', I pushed for [them] because I knew that there were those who were looking at the subnational level as just the normal local government [as was the case in the Independence Constitution], and I was arguing that, no, these have to be distinctive levels of government. That is why I picked this from your [South African] Constitution. I told you that when scholars are participating in these things [constitution-making], sometimes the extent they go [to] depends on the level of their preparedness and understanding of the system that they are borrowing from. I will tell you that at that point I was still struggling with understanding the terminology of 'interrelated' levels of government in the South African Constitution. So, my argument was that I could understand 'distinct', and I could understand 'interdependent', but I said this one ['interrelated'] I cannot understand. I would rather replace it with emphasis on consultation and negotiation. So, I came in with the terminology of 'consultative and negotiative'.⁶⁵⁸

It can be inferred that Kangu's intention as a drafter was to position the levels of government as not mere subnational units that are at the mercy of the national government. He chose to incorporate the words 'distinctive and interdependent' due to his knowledge of the South African devolution model. Kangu's familiarity stemmed from the fact that he had completed his postgraduate legal studies in South Africa; he also attended some of the South African constitution-making meetings when he worked at the Kenyan High Commission in Pretoria.⁶⁵⁹ Consequently, he understood that the 'distinct, interdependent' provision was a potential solution to prevent the national government from undermining subnational units. Kangu also

⁶⁵⁴ Ghai (2008) 216.

⁶⁵⁵ Kangu (2021).

⁶⁵⁶ Clause 6(2) of the Bomas Draft (emphasis added).

⁶⁵⁷ Section 40(1) of the Constitution of South Africa.

⁶⁵⁸ Kangu (2021).

⁶⁵⁹ Kangu (2021).

chose ‘consultative and negotiative’ instead of ‘interrelated’ because he did not understand what ‘interrelated’ meant. He intended the phrase ‘consultative and negotiative’ to convey that the levels of government would interact to avoid disputes and manage them when they arose.⁶⁶⁰ Therefore, the adoption of the exact words is clear evidence of the South African Constitution’s influence on the Draft as far as the relationship between levels of government is concerned.

4.3.4.2 Division of powers and functions

Unlike the CKRC Draft which proposed the entrenchment of powers only at the district level, the Bomas Draft proposed the assignment of powers and functions to regional governments.⁶⁶¹ However, the powers and functions of regional governments mostly concerned coordinating, monitoring, facilitating, and formulating regional policies, as well as setting regional standards.⁶⁶² The incumbent government under the Kibaki presidency was opposed to strong regions, hence the limited nature of these powers and functions.⁶⁶³

However, Kibaki’s government compromised by proposing the assignment of greater powers and functions to the district level. The Draft equipped district governments with significant functions in agriculture, policing, and fire-fighting services, as well as in district health facilities and district transport.⁶⁶⁴ District levels could exercise these powers and functions instead of merely coordinating regional governments. In an interview, Atsango Chesoni, one of the Bomas delegates, stated that, according to the central government, ‘[it was easier] to control 70 small districts compared to 14 big regions’.⁶⁶⁵ This explains why the incumbent government proposed the assignment of significant powers to the district level: larger regions could more easily unite and challenge the national government than several small districts.⁶⁶⁶

The assignment of powers to regional and district governments is close to how the South African model assigns powers and functions to provinces, albeit that (as discussed in Chapter 3) more significant powers are allocated to local than provincial government. In Kenya, by contrast, the ‘locational’ government (known as local government in other countries) was

⁶⁶⁰ Kangu (2021).

⁶⁶¹ Clauses 212, 218 and 209(1) and Schedule 4 of the Bomas Draft.

⁶⁶² Fourth Schedule Part II of the Bomas Draft.

⁶⁶³ Zein (2021).

⁶⁶⁴ Fourth Schedule Part III of the Bomas Draft.

⁶⁶⁵ Interview with Bomas delegate, Atsango Chesoni via Zoom, 23 March 2021.

⁶⁶⁶ Steytler N & De Visser J ‘Fragile Federations and the Dynamics of Devolution’ in Palermo F & Alber E (eds) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (2015) 85.

assigned the least powers and functions.⁶⁶⁷ Among its other functions, local government was responsible for initiating, planning, implementing and coordinating local community projects; implementing projects planned at the district, regional or national levels; and implementing national, regional or district legislation. However, local government powers and functions were limited in that local government reported to the district level.⁶⁶⁸ As such, the Draft proposed that the district level was the only significant level because the regional level acted as a coordinating level, whilst the locational level was answerable to the district level.⁶⁶⁹

The position in the Draft differed from that in the CKRC Draft, which gave Parliament a blank slate to specify matters on which national legislation prevailed over the laws of district councils, and vice versa. The Draft proposed that, in case of conflict, national legislation prevailed over regional, and district legislation if it applied uniformly throughout Kenya and if any of the conditions specified in the Draft were satisfied. The table below is a comparison of the provisions in the Draft and section 146(2) of the South African Constitution that regulate conflicts between national legislation and legislation passed by the subnational levels.

Table 4: Provisions in the Bomas Draft and South African Constitution for conflicting legislation

Bomas Draft	South African Constitution
<p>Clause 210(2): National legislation prevails over regional and district legislation if –</p> <p>(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or</p> <p><i>(b) the national legislation is aimed at preventing unreasonable action by a region or district that –</i></p> <p><i>(i) is prejudicial to the economic health or security interests of another region or district or of Kenya as a whole; or</i></p> <p><i>(ii) impedes the implementation of national economic policy.</i></p> <p>(3) The conditions mentioned in clause (2)(a) are –</p>	<p>Section 146(2): National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:</p> <p>(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.</p> <p><i>(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—</i></p> <p><i>(i) norms and standards;</i></p> <p><i>(ii) frameworks; or</i></p> <p><i>(iii) national policies.</i></p>

⁶⁶⁷ Schedule 4 of the Bomas Draft.

⁶⁶⁸ Fourth Schedule Part IV of the Bomas Draft.

⁶⁶⁹ Kangu (2021).

<p>(a) the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the regions or districts individually;</p> <p><i>(b) the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing –</i></p> <p><i>(i) norms and standards;</i></p> <p><i>(ii) frameworks; or</i></p> <p><i>(iii) national policies; and</i></p> <p>(c) the national legislation is necessary for –</p> <p><i>(i) the maintenance of national security;</i></p> <p><i>(ii) the maintenance of economic unity;</i></p> <p><i>(iii) the protection of the common markets in respect of the mobility of goods, services capital and labour;</i></p> <p><i>(iv) the promotion of economic activities across regional or district boundaries;</i></p> <p><i>(v) the promotion of equal opportunity or equal access to government services; or</i></p> <p><i>(vi) the protection of the environment.</i></p> <p>(4) Regional or district legislation prevails over national legislation if the requirements of clause (2) are not satisfied.</p>	<p>(c) The national legislation is necessary for—</p> <p><i>(i) the maintenance of national security;</i></p> <p><i>(ii) the maintenance of economic unity;</i></p> <p><i>(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p> <p><i>(iv) the promotion of economic activities across provincial boundaries;</i></p> <p><i>(v) the promotion of equal opportunity or equal access to government services; or</i></p> <p><i>(vi) the protection of the environment.</i></p> <p>(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—</p> <p><i>(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or</i></p> <p><i>(b) impedes the implementation of national economic policy.</i></p> <p>(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.</p>
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As can be seen in the table above, the Draft borrowed the concept of conflicting laws from the South African Constitution. Furthermore, the text of the Draft was a verbatim reproduction of that in the South African Constitution. The extent of South Africa's influence on this provision was thus great.

4.3.4.3 Own-revenue sources

The Draft proposed the assignment of subnational taxation powers to district government since it was the only significant subnational level of government, as discussed above.⁶⁷⁰ Among the proposed taxes that districts could levy were land use fees, agricultural tax, and rates on

⁶⁷⁰ Clause 231(1) and Schedule 4 of the Bomas Draft.

property. While the South African Constitution affords taxation powers to both provinces and municipalities,⁶⁷¹ the taxation powers afforded to district government in the Draft were more extensive than either of these. The Draft also proposed that devolved units could raise loans for development or recurrent expenditure.⁶⁷² It proposed that national legislation regulating borrowing by devolved units could be enacted only after consideration of the recommendations of the Commission on Revenue Allocations. Furthermore, devolved units needed approval from their councils or assemblies before they could borrow funds.⁶⁷³ Strong traces of the South African provisions on borrowing are evident, given that South African spheres of government ‘may raise loans for capital or current expenditure’.⁶⁷⁴

The South African Constitution provides that the recommendations of the FFC have to be considered first before legislation regulating borrowing powers can be enacted.⁶⁷⁵ Thus, the Draft adopted the South African approach of consulting a financial commission before adopting legislation regulating the borrowing powers of devolved units. This was confirmed in an interview with Chesoni. She stated that the drafters looked at the South African model and adopted this concept because they wanted a borrowing provision for devolved units that deterred a subnational debt crisis.⁶⁷⁶ The South African borrowing provisions were attractive because South Africa had not experienced a subnational debt crisis partly due to that provision. Therefore, the South African model, as confirmed by Chesoni, influenced the subnational borrowing provisions in the Draft significantly.

4.3.4.4 Fiscal transfers

a) Equitable share

Kenya had a history of financially marginalising minority groups. Only regions where majority groups resided and had one of their own in the national government benefited from the country’s resources.⁶⁷⁷ Therefore, Kangu recommended that the equitable-sharing provisions in the Draft seek to address that challenge.⁶⁷⁸ He remarked that he was inspired by the South

⁶⁷¹ Sections 228–229 of the Constitution of South Africa.

⁶⁷² Clause 246 of the Bomas Draft.

⁶⁷³ Clause 246(3) of the Bomas Draft.

⁶⁷⁴ Section 230–230A of the Constitution of South Africa.

⁶⁷⁵ Section 230(2) and 230A(2) of the Constitution of South Africa.

⁶⁷⁶ Chesoni (2021).

⁶⁷⁷ Chesoni (2021).

⁶⁷⁸ Kangu (2021).

African model’s objective criteria. He had read the first FFC’s report and seen that KwaZulu-Natal in South Africa received a significant amount in grants despite being under the leadership of an opposition party.⁶⁷⁹ Kangu was particularly attracted by the way in which the devolution model in South Africa seeks to address challenges such as financial inequality between regions, poor service delivery, and lack of accountability to citizens – challenges which Kenya was experiencing under the Independence Constitution. Thus, the equitable-revenue-sharing provisions in the Draft are linked directly to those in the South African Constitution.

b) Commission on Revenue Allocation

The Draft renamed the financial commission in the CKRC Draft as the Commission on Revenue Allocation.⁶⁸⁰ Just as in the CKRC Draft, the role of the Commission on Revenue Allocation was to make recommendations to inform the division of revenue between levels of government.⁶⁸¹ A new provision introduced in the Bomas Draft was that, when making its recommendations, the Commission had to take into account the factors listed in the table below.

Table 5: Provisions in the Bomas Draft and South African Constitution on the role of a financial commission

Bomas Draft	South African Constitution
<p>Clause 259(6): In its recommendations concerning the distribution of national revenues, the Commission shall take into account –</p> <p><i>(a) the national interest;</i></p> <p><i>(b) any provision that must be made in respect of the national debt and other national obligations;</i></p> <p><i>(c) the needs and interests of the Government, determined by objective criteria;</i></p> <p><i>(d) the need to ensure that the regions and districts are able to provide basic services and perform functions allocated to them;</i></p> <p><i>(e) the fiscal capacity and efficiency of the regions and districts;</i></p>	<p>Section 214(2): The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—</p> <p><i>(a) the national interest;</i></p> <p><i>(b) any provision that must be made in respect of the national debt and other national obligations;</i></p> <p><i>(c) the needs and interests of the national government, determined by objective criteria;</i></p>

⁶⁷⁹ Kangu (2021).

⁶⁸⁰ Clause 259 of the Bomas Draft.

⁶⁸¹ Clause 259(4) of the Bomas Draft.

<p><i>(f) developmental and other needs of regions and districts;</i></p> <p><i>(g) economic disparities within and among the regions and the need for financial equalisation;</i></p> <p>(h) the need for affirmative action in respect of arid and semi-arid areas and other marginalized areas;</p> <p>(i) the need for economic optimisation of each region and district;</p> <p><i>(j) obligations of the regions and districts in terms of national legislation;</i></p> <p><i>(k) the desirability of stable and predictable allocations of revenue shares; and</i></p> <p><i>(l) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria</i></p>	<p><i>(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;</i></p> <p><i>(e) the fiscal capacity and efficiency of the provinces and municipalities;</i></p> <p><i>(f) developmental and other needs of provinces, local government and municipalities;</i></p> <p><i>(g) economic disparities within and among the provinces;</i></p> <p><i>(h) obligations of the provinces and municipalities in terms of national legislation;</i></p> <p><i>(i) the desirability of stable and predictable allocations of revenue shares; and</i></p> <p><i>(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria</i></p>
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As can be gleaned from the italicised text in the table above, almost all of the factors for consideration come verbatim from section 214(2) of the South African Constitution. South Africa's influence on the criteria for the division of revenue is glaringly conspicuous, meaning that the migration of the provisions between the two countries is indisputable.

4.3.4.5 Supervision powers

The Draft introduced supervision provisions that were not present in the CKRC Draft. It proposed that governments at every level should assist and support each other.⁶⁸² Regional governments also had the responsibility to supervise district governments 'in the course of their implementation of the national and regional policies and standards'.⁶⁸³ The South African supervision provisions are broader and relate to regulation, monitoring, support and intervention.⁶⁸⁴ In an interview, Kangu explained that he adopted the concept of supervision from the South African Constitution because he wanted Kenya's devolved units to be

⁶⁸² Clause 208(1) of the Bomas Draft.

⁶⁸³ Part II Fourth Schedule of the Bomas Draft.

⁶⁸⁴ Sections 100, 139 and 155(6) of the Constitution of South Africa.

reasonably supervised and, according to him, ‘the South African model had the right balance of supervision and local autonomy’.⁶⁸⁵ The supervision provisions, like several of the devolution provisions in the Draft, demonstrate the notable extent of South African influence. The introduction of provisions regulating how devolved units should assist and support each other mirrors the essence of the South African Constitution. Hence, South African influence is stronger on the Bomas Draft than the CKRC Draft.

4.3.4.6 Cooperative government and intergovernmental relations

For levels of government to work in harmony, it is useful to prescribe ways of promoting sound intergovernmental relations. As such, clause 208(1) was proposed, a provision which bears some resemblance to the South Africa provisions, as demonstrated in Table 6 below.

Table 6: Provisions in the Bomas Draft and South African Constitution on cooperative government

Bomas Draft	South African Constitution
<p>Article 208(1): Government at every level shall –</p> <p>(a) <i>exercise and perform its powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government at any other level</i> and shall respect the constitutional status, institutions and rights of government at all levels;</p> <p>(b) <i>assist, support</i>, and consult with other levels and shall, as appropriate, implement the laws of other levels; and</p> <p>(c) maintain liaison with government at each other level for the purpose of exchange of information, co-ordination of policies and administration and enhancement of capacity.</p>	<p>Section 41(1): All spheres of government and all organs of state within each sphere must—</p> <p>(g) <i>exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere</i>; and</p> <p>(h) co-operate with one another in mutual trust and good faith by—</p> <p>(i) fostering friendly relations;</p> <p>(ii) <i>assisting and supporting</i> one another;</p>

While the provisions in the table are not identical, the use of language strongly suggests that the South African Constitution is the source of the provisions in the Bomas Draft. The italicised

⁶⁸⁵ Kangu (2021).

phrases are essentially the same; Kangu noted that the Bomas drafters merely reformulated the structures and modified the provisions to suit Kenyan needs.⁶⁸⁶

Another sign of the influence of the South African Constitution is the Draft's intergovernmental relations clause 208(3) and (4):

(3) Governments involved in an inter-governmental dispute shall make every reasonable effort to *settle the dispute* by means of procedures provided by Act of Parliament for that purpose, and shall *exhaust all other remedies* before they approach a *court to resolve the dispute*.

(4) For the purposes of clause (3), an *Act of Parliament shall provide procedures for the settlement of inter-government disputes* by negotiation, mediation or arbitration.

This is almost a verbatim restatement of South Africa's section 41(2) and (3), which reads:

(2) An Act of Parliament must—

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must *exhaust all other remedies before it approaches a court to resolve the dispute*.

Thus, the Draft bore many similarities with the South African Constitution as far as provisions on cooperative government were concerned. The extent of the South African influence on these provisions is significant. In interviews with the Bomas rapporteurs Zein and Kangu, it emerged that the incumbent government was more receptive to the South African intergovernmental relations provisions than those of any other constitutions, including non-African ones.⁶⁸⁷ The reason was that the South African Constitution was a fellow African constitution, one which had emerged from apartheid and its history of centralised government.

⁶⁸⁶ Kangu (2021).

⁶⁸⁷ Zein (2021). See also Kangu (2021).

Overall, the intensity of the migrated devolution model and provisions in the Bomas Draft is greater than the CKRC Draft. This is attributable mainly to the involvement of actors with considerable knowledge of the South African Constitution.

4.3.5 Process of revising the Bomas Draft

When the Bomas conference was completed, the stakeholders disagreed on how to move forward. Kibaki's supporters wanted Parliament to amend the Draft instead of just accepting or rejecting it as it was.⁶⁸⁸ The sections of government who were unhappy with the Draft then devised amendments to the Review Act to empower Parliament to amend the Draft and provide for a mandatory referendum.⁶⁸⁹ A High Court judgment, *Timothy Njoya and Others v Attorney General and others*,⁶⁹⁰ held that Parliament could not enact a new constitution; instead it had to be adopted by the people in a referendum. To resolve the disagreements, Kibaki held retreats with MPs to amend contentious constitutional provisions in the Draft.⁶⁹¹ Critics, prominent leaders such as Odinga, and opposition parties such as the former ruling party, KANU, were opposed to this and refused to participate in the retreats; however, the process went ahead nevertheless.⁶⁹²

The Wako Draft is the name popularly given to the revised Bomas Draft because Kibaki's Attorney-General, Amos Wako, was the principal drafter.⁶⁹³ The official name was the Proposed New Constitution Draft. As noted, Kibaki and some MPs went ahead with the drafting despite objections and the refusal of certain stakeholders to participate in the process. The drafters changed the contents of the Draft significantly, as discussed below.⁶⁹⁴ Kibaki's government was unhappy with the devolution model in the Bomas Draft. As a result, the main impact of the Wako Draft was to cut back on the devolution principles in the Bomas Draft and, with that, the South African influence. The result was a Draft with more centralised provisions.

⁶⁸⁸ Bannon (2007) 1838.

⁶⁸⁹ Prior to that, legislation provided for an optional referendum to resolve issues that were in dispute. See Kangu (2015) 90.

⁶⁹⁰ *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004).

⁶⁹¹ Bannon (2007) 1839.

⁶⁹² Bannon (2007) 1839.

⁶⁹³ Ghai (2015) 74.

⁶⁹⁴ Murray (2013) 11.

4.3.6 The devolution model of the Wako Draft

4.3.6.1 Recognition of two levels of government

The Wako Draft proposed reducing the levels of government from four to just two, namely the national and district level.⁶⁹⁵ The Kibaki-led government was against strong regions for the reasons discussed above. Therefore, when it had a chance to make changes to the Bomas Draft, it removed the regions and kept the district level.⁶⁹⁶ Thus, the national government retained power.

The Draft described the national and district governments as '*distinct and interdependent*' levels of government that 'conduct their *mutual relations* on the basis of *consultation and cooperation*' (emphases added).⁶⁹⁷ Instead of using the word 'negotiative', the Bomas Draft used 'cooperation'. Chesoni indicated that the drafters replaced 'negotiative' with 'cooperation' because they were of the opinion that the word 'negotiative' meant that the two levels were mandated to negotiate and then agree on matters.⁶⁹⁸ By contrast, 'cooperation' meant that the national government could simply instruct the district level to carry out certain orders, without having to negotiate. Therefore, the shift from 'negotiative' to 'cooperation' reflects an attempt by the government to retain as much power as possible at the centre.

4.3.6.2 Powers and functions

As a result of the removal of the regional and local levels of government, clause 201(1) of the Draft proposed two lists of powers and functions, one for the national and another for the district government. District governments retained the powers and functions assigned to them in the Bomas Draft. Furthermore, they were assigned additional functions that had been assigned to regional governments in the Bomas Draft. For instance, district governments were responsible for the formulation, planning, coordination, management and facilitation of functions within their districts.⁶⁹⁹

⁶⁹⁵ Clause 6 of the Wako Draft.

⁶⁹⁶ Interview with Vice Chairperson, Committee of Experts on Constitutional Review, Atsango Chesoni via Zoom, 23 March 2021. Although Chesoni was not directly involved in the Wako drafting process, as a member of the Committee of Experts she obtained this information through interaction with Amos Wako, who was also an *ex officio* member of the COE.

⁶⁹⁷ Clause 6(2) of the Wako Draft.

⁶⁹⁸ Chesoni (2021).

⁶⁹⁹ Schedule 3 of the Wako Draft.

Due to the list of concurrent powers and functions, there was a need for provisions to manage conflicts between national and district legislation. Clauses 201(4) and 202 of the Draft recommended that when there was a conflict between legislation falling within the concurrent jurisdiction of the national and district government, national legislation would prevail over district legislation.⁷⁰⁰ What fell away was the conditional override provisions borrowed from South Africa. The provision stipulating that national legislation prevailed whenever there was a conflict was influenced by the ruling party's need to ensure that the national government remained much stronger than the district level.⁷⁰¹

4.3.6.3 Cooperative government and intergovernmental relations

The Wako Draft eradicated most of the intergovernmental relations principles of the Bomas Draft, and, thereby, the South African influence. This too was a move by the national government to have a centrist form of government in which decisions are made at the top without the need for consultation or cooperation with subnational governments.

In a nutshell, the discussion above indicates that the Wako Draft was largely out of alignment with the South African devolved system: indeed, the very point of the Wako Draft was to reverse devolution in the Bomas Draft. As a result, the Wako Draft was more centralised than all the previous constitutional drafts. This is evident in the rationale for having two levels of government, the change in wording from 'negotiative' to 'cooperation', and the provisions regulating concurrency in legislation. Overall, districts were weaker under the Wako Draft as, among other things, they had no guaranteed powers. Most of the devolution model was subject to national law, which could be changed easily.⁷⁰²

4.3.7 Rejection of the Wako Draft and its aftermath

The Wako Draft was finalised in July 2005 and put to a referendum in November 2005, where it was rejected by about 57 per cent of voters,⁷⁰³ thus keeping the Independence Constitution in force. When general elections were held in 2007, the failed constitution-making process was still fresh in the minds of the people.⁷⁰⁴ The referendum and the 2007 elections were contested,

⁷⁰⁰ Clause 202 of the Wako Draft.

⁷⁰¹ Kangu (2021).

⁷⁰² Kangu (2015) 90.

⁷⁰³ Bannon (2007) 1841.

⁷⁰⁴ Murray (2013) 5.

with political parties playing on the ethnic fears of voters.⁷⁰⁵ There was also controversy as to how the elections were conducted. As such, when the Electoral Commission of Kenya pronounced Kibaki the winner of the presidential election, violence immediately broke out.⁷⁰⁶

The international community and civil society called for peace negotiations. Kofi Annan,⁷⁰⁷ among other prominent Africans,⁷⁰⁸ brokered a peace accord that provided for a coalition government, with Kibaki the President and Odinga, Prime Minister.⁷⁰⁹ A constitutional review was listed among the terms of the coalition government.⁷¹⁰ The involvement of the international committee in the constitutional review process is best explained by the persuasion migration theory analysed in Chapter 2. The main political parties were persuaded to undertake another constitutional reform process; the difference this time was that the parties had to conclude the process and adopt a new constitution. Among other things, the constitution owners were persuaded by Kofi Annan's delegation because his team consisted of notable African leaders who were respected across the continent. It is not improbable that the Kenyan leaders wanted to be recognised by the delegation (and the rest of the world that was following the events) as this would boost their image as diplomatic, level-headed leaders who set aside their differences and worked for the common good of the country.

4.4 Towards the 2010 Constitution: The Harmonised Draft process

In 2008, the constitution-making process resumed with a new Review Act.⁷¹¹ The latter, like its 1997 predecessor, stipulated the aims and goals of the process, and provided a roadmap.⁷¹² In addition, it identified a committee of experts (CoE), a multiparty parliamentary committee, the National Assembly, and a referendum as the four organs of the constitution-making

⁷⁰⁵ Murray (2013) 5.

⁷⁰⁶ Human Rights Watch estimates that in a period of two months, more than a thousand people were killed and up to 500,000 internally displaced. See *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* 16 March 2008 available at <https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> (accessed 28 October 2019).

⁷⁰⁷ Kofi Annan was a Ghanaian diplomat who served as the 7th Secretary-General of the United Nations and was a co-recipient of the 2001 Nobel Peace Prize. See <https://www.kofiannanfoundation.org/kofi-annan/biography/> (accessed 24 January 2022).

⁷⁰⁸ Former Tanzanian President Benjamin Mkapa and former South Africa First Lady Graca Machel were among the people in Kofi Annan's team. See Ochieng J & Kairu P 'Kofi Annan Recalls his Role in Kenya 2008 Peace Accord' 28 June 2020 available at <https://nation.africa/kenya/news/kofi-annan-recalls-his-role-in-kenya-2008-peace-accord--367094> (accessed 7 July 2023).

⁷⁰⁹ Murray (2013) 5.

⁷¹⁰ Murray (2013) 6.

⁷¹¹ Constitution of Kenya Review Act, 2008.

⁷¹² Murray (2013) 6.

process.⁷¹³ The CoE, which was established in February 2009, comprised nine voting members and six Kenyans, as well as three foreigners,⁷¹⁴ who were selected by the Parliamentary Select Committee on Constitutional Review (PSC) for their expertise.⁷¹⁵

It was agreed that the CoE would discuss contentious matters and that matters which were not contested in the drafts would not to be discussed.⁷¹⁶ Devolution was among the contentious issues.⁷¹⁷ In the execution of its duties, the CoE examined the archives of the previous CKRC's public participation process, consulted representatives of civil society, and collected the views of the public.⁷¹⁸ This exercise eventuate in a constitutional draft that drew heavily on the Bomas Draft.⁷¹⁹ It also drew on the CKRC and Wako Drafts, with this aspect of the constitution-making process being aimed at 'harmonising' the previous constitutional drafts.⁷²⁰ Thus, the South African influences returned through the CKRC, Bomas and Wako provisions that made it into the CoE Harmonised Draft. Furthermore, new South African influences emerged in the CoE Harmonised Drafts due to the involvement of South African actors.

4.4.1 The devolution model of the Harmonised Draft

4.4.1.1 Recognition of three levels of government

The CoE Harmonised Draft reintroduced the regional government that had fallen away in the Wako Draft, resulting in the Draft having three levels of government, namely the national, regional, and county levels.⁷²¹ In an interview, Atsango Chesoni, Vice Chairperson of the CoE, said that regions were reintroduced to accommodate opposition parties, which wanted powers transferred to the regional level.⁷²² These same internal forces had advocated for the regional

⁷¹³ Murray (2013) 6.

⁷¹⁴ The three foreigners were Chaloka Beyani of Zambia, F E Ssepembwa of Uganda, and Christina Murray of South Africa. See 'The Committee of Experts on Constitutional Review' *Daily Sun* 26 October 2009 1–4.

⁷¹⁵ The CoE had two more members without voting rights. They were the Attorney-General, Amos Wako, and the Director of the Secretariat of the Committee. See Murray (2013) 754.

⁷¹⁶ The first step of the CoE was to list and close issues that were considered uncontentious, and thereafter work only on the contentious ones. See Murray (2013) 754.

⁷¹⁷ Sexual orientation, freedom of religion, Muslim courts, and the right to life and abortion were among the contentious issues. See Murray (2013) 7–11.

⁷¹⁸ Murray (2013) 7.

⁷¹⁹ Murray (2013) 7.

⁷²⁰ Murray (2013) 8.

⁷²¹ Clause 6(1) of the CoE Harmonised Draft.

⁷²² Interview with Vice Chairperson, Committee of Experts on Constitutional Review, Atsango Chesoni via Zoom, 23 March 2021.

level in the Bomas Draft. The regions were conceived as large units well placed to apply checks and balances to the exercise of power at national level.⁷²³ At first glance, one might be tempted to assume that the presence of a regional level of government in the CoE Draft was due to the South African model, which provides for a provincial level of government. However, there is no evidence to support this.⁷²⁴

4.4.1.2 Division of powers and functions

The CoE Harmonised Draft proposed a list of powers and functions in regard to which regional and county governments could legislate.⁷²⁵ The list was formulated in the same way as the list of powers and functions for provinces and municipalities in the South African Constitution. The list in the CoE Harmonised Draft was the same list as in the Bomas Draft: regional governments retained the same powers, whilst county governments assumed the powers of district governments.

The Draft brought back the Bomas Draft provisions managing conflicting laws or concurrency provisions omitted in the Wako Draft.⁷²⁶ As discussed above, the concurrency provisions in the Bomas Draft were influenced to a significant degree by the South African Constitution.

4.4.1.3 Own-revenue sources

Clause 246 of the CoE Harmonised Draft proposed the same subnational taxation powers as the Wako Draft. However, the borrowing provisions were different. The CoE Harmonised Draft removed the requirement for an Act regulating subnational borrowing to be enacted only after consideration of recommendations by a financial commission. In this instance, the drafters decided not to follow the Bomas Draft provisions, which had been inspired by the South African model.

Overall, the discussion above shows the significant influence of the South African Constitution on the Bomas Draft, an influence which carried through to the CoE Harmonised Draft. Chesoni remarked that the CoE incorporated more provisions from the Bomas Draft than the Wako

⁷²³ Steytler & De Visser (2015) 85.

⁷²⁴ Several countries have a middle level of government between the national and the lowest level of government to coordinate and facilitate the functions of the local government. Therefore, the idea of having a regional level of government could have come from any other country; it could also have originated from within.

⁷²⁵ Clause 228(1) Fourth Schedule of the CoE Harmonised Draft.

⁷²⁶ Clause 232 of the CoE Harmonised Draft.

Draft because the CoE aligned with the Bomas drafters' way of thinking.⁷²⁷ Furthermore, the CoE incorporated more of the Bomas provisions than those of the CKRC Draft because the former was an improvement on the latter: it was informed by a greater number of comments from other parties rather than primarily or solely by the input of the committee.

4.4.2 The devolution model of the Revised CoE Harmonised Draft

In November 2009, the CoE published the Harmonised Draft for public comments and received more than 26,000 submissions from the public.⁷²⁸ The CoE accordingly made changes to the Draft by addressing the concerns received.⁷²⁹ Afterwards, it submitted a Harmonised Draft with the incorporated public submissions to the PSC, which was the second organ of review in terms of the Review Act.⁷³⁰ The PSC was composed of senior members of the major political parties represented in Parliament.⁷³¹ The PSC debated the revised Harmonised Draft for a 21-day period before handing back the revised Harmonised Draft with the PSC's comments.⁷³²

4.4.2.1 Recognition of two levels of government

The number of levels of government in the Revised Harmonised Draft reverted to two,⁷³³ as in the Wako Draft.⁷³⁴ Foreign experts who were invited to participate in the Programme for Foreign Experts: 'Peer Review' of the Draft also recommended the dissolution of the middle level of government. For example, Nico Steytler, an expert on multilevel governance in South Africa and the region, advised that the county government should be the only devolved unit because having a provincial government was not only expensive but added unnecessary bureaucracy, which would make county governments inefficient.⁷³⁵ It is submitted that these recommendations stemmed from observations that provinces in South Africa were becoming

⁷²⁷ Chesoni (2021).

⁷²⁸ Murray (2013) 9.

⁷²⁹ Murray (2013) 9.

⁷³⁰ Murray (2013) 9.

⁷³¹ Murray (2013) 9.

⁷³² Murray (2013) 9.

⁷³³ Clause 6(1) of the CoE Revised Harmonised Draft.

⁷³⁴ Clause 6(1) of the Wako Draft.

⁷³⁵ Steytler N 'Notes from the Programme for Foreign Experts: "Peer Review" of the Harmonized Draft Constitution for Kenya, Holiday Inn, Nairobi, 11–15 December 2009'.

unpopular, with debates at the national level calling for the removal of provinces from the levels of government.⁷³⁶

Be that as it may, Steytler's recommendation was just that: a recommendation, rather than an imposed concept. If anything, it was a recommendation that supported a position already shared by some Kenyans. Consequently, the county government was designed in such a manner that it has both local and regional government elements as evidenced by the nature of counties discussed in this chapter; it is not a typical local government level.

4.4.2.2 Own-revenue sources

The Revised Harmonised Draft afforded county governments the powers to impose property rates and taxes, entertainment taxes, and any other taxes authorised by national legislation.⁷³⁷ This was a clear watering-down of the taxation powers contained in the earlier CoE Harmonised Draft. Murray surmises that Kibaki's government advocated for the centralisation of taxation powers to prevent overtaxing by the subnational levels through the many specific taxes.⁷³⁸ Furthermore, there was concern that counties would misuse taxing powers to extort people. Clause 191(5) of the Draft proposed taxation provisions that were verbatim reproductions of section 228(2)(a) of the South African Constitution. Clause 191(5) provided that

[t]he taxation and other revenue-raising powers of a county shall not be exercised in a way that *prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour*.

The italicised text is a verbatim repetition of the taxation provisions in the South African Constitution. Thus, the parallelism of the taxation provisions in the Draft can be directly linked to the South African Constitution.

This was the first time that the South African taxation provision appeared in the Kenyan constitutional drafts. Murray notes that the entire finance chapter of the first CoE Draft was substantially revised, particularly the taxation provisions, and the South African text was

⁷³⁶ Godi T 'Provinces and District Municipalities must be Scrapped' available at <https://www.parliament.gov.za/news/provinces-and-district-municipalities-must-be-scrapped-themba-godi> (accessed 1 February 2022).

⁷³⁷ Clause 191(3) of the CoE Revised Harmonised Draft.

⁷³⁸ Interview with Member, Committee of Experts on Constitutional Review, Christina Murray via email, 22 April 2021.

introduced then.⁷³⁹ That was due in part to input from public consultations but in the main to the fact that CoE members and the government believed that the taxation lists needed to be simplified.⁷⁴⁰ David Ndi, a Kenyan economist, assisted the CoE in simplifying the provisions since he was an expert in the field.⁷⁴¹

Another change that was reintroduced in the Draft related to the borrowing powers of county governments. The Draft proposed that county governments could raise loans if the national level guaranteed the loan and if the loan had the approval of a county government's assembly.⁷⁴² This resembles the concept in the South African Constitution of subnational borrowing.⁷⁴³ However, the extent of the South African influence on the borrowing provisions is minimal: it extends only to subnational borrowing being qualified. The details of the qualification are different.

4.4.2.3 Fiscal transfers

In the absence of significant sources of their own revenue, county governments had to rely on fiscal transfers. Clause 186 of the Revised Harmonised Draft proposed a criterion for determining the equitable share of revenue between levels of government. The provision was reintroduced from the Bomas Draft and is a verbatim reproduction of section 214(2) of the South African Constitution. That undoubtedly signifies the extent to which the South African model influenced the Draft as far as equitable share provisions are concerned.

Whereas the first CoE Harmonised Draft provided for a Commission on Revenue Allocation, the Revised Harmonised Draft did not. The PSC proposed that the national government be responsible for determining the sharing of revenue between the levels of government. Kangu said that giving an independent and objective financial commission such a responsibility meant that the national government would have less control of the devolved units.⁷⁴⁴ This explains why the PSC removed the Commission on Revenue Allocation: the PSC wanted the national government to retain the power it had under the Independence Constitution to determine revenue-sharing among different levels of government.

⁷³⁹ Murray (2021).

⁷⁴⁰ Chesoni (2021).

⁷⁴¹ Murray (2021).

⁷⁴² Clause 194 of the CoE Revised Harmonised Draft.

⁷⁴³ Section 230(1) and 230A(1) of the Constitution of South Africa.

⁷⁴⁴ Kangu (2021).

4.4.2.4 Supervision

Memoranda from many expert groups raised concerns that the CoE Harmonised Draft did not provide mechanisms by which the performance of devolved governments could be properly monitored and supervised.⁷⁴⁵ In an interview, Murray said the CoE members discussed the danger that counties could be set up to fail – taking into account the fact that there was much opposition to the transfer of powers to counties.⁷⁴⁶ As a result, the Revised Harmonised Draft introduced arrangements that required the national government to intervene in failing counties. Clause 162(2) of the Draft proposed that the national government could intervene in county governments where the latter

- (a) ... is **unable or unwilling** to carry out its functions; or
- (b) has failed to satisfactorily operate a system of financial management that complies with the regulations.

The supervision provisions in clause 162(2) are similar in spirit to those in section 139 of the South African Constitution. Furthermore, the wording of article 162(2) is similar to section 139(5). The fact that the provisions on supervision bear such close similarity to the South African provisions is evidence of how pronounced the South African influence was.

In sum, the Revised Harmonised Draft shows strong influences of the South African Constitution, as initially introduced in the CKRC and Bomas Drafts. This is evidenced by borrowing of concepts and wording that are nearly identical to those in the South African model, for instance in the fiscal provisions. The supervision principles in the Draft are further examples of South African influence. In the case of the supervision principles, the wording is not verbatim, but the crux is the same.

4.5 The devolution model of the 2010 Constitution

Upon receiving the Revised Harmonised Draft from the PSC, the CoE incorporated some of the comments and rejected others.⁷⁴⁷ Three weeks later, the CoE submitted to Parliament a draft which incorporated some of the PSC's concerns.⁷⁴⁸ The National Assembly had 30 days

⁷⁴⁵ Mpya K & Moja K *Committee of Experts on Constitutional Review* 14.

⁷⁴⁶ Murray (2021).

⁷⁴⁷ Murray (2013) 9.

⁷⁴⁸ Murray (2013) 10.

in which to debate the Draft submitted.⁷⁴⁹ More than 150 amendments were proposed but none passed because the National Assembly required the support of 65 per cent of all members.⁷⁵⁰ The proposed Constitution of Kenya was passed by Parliament in April 2010 and published by the Attorney-General in the following month.⁷⁵¹ In the August 2010 referendum, more than 67 per cent of voters approved the proposed Constitution.⁷⁵² Consequently, that Draft became the Constitution of Kenya 2010, one which, among other things, provides for devolution.

As can be seen in the discussion above, the devolution model entrenched in the 2010 Constitution of Kenya can be traced to the South African devolution model.⁷⁵³ The Constitution of Kenya is an accumulation of several South African influences, ranging from those in the CKRC, Bomas, Wako and CoE Harmonised Drafts. The devolution model in the Constitution recognises two levels of government, entrenches county powers and functions, recognises subnational own-revenue sources, and provides for fiscal transfers, as well as supervision and cooperative government.

4.5.1 Recognition of two levels of government

The Constitution of Kenya 2010 entrenches two levels of government: the national and county government.⁷⁵⁴ The two levels of government are described as '*distinct and interdependent*'; they must 'conduct their mutual relations on the basis of consultation and cooperation'.⁷⁵⁵ The South African devolution model likewise describes its spheres of government as '*distinctive, interdependent* and interrelated'.⁷⁵⁶ Kenya's incorporation of text which is almost a verbatim reproduction of that in the South African Constitution shows that Kenyan drafters borrowed constitutional provisions in respect of the relationship between the levels of government.

⁷⁴⁹ Murray (2013) 10.

⁷⁵⁰ Murray (2013) 10.

⁷⁵¹ Murray (2013) 11.

⁷⁵² Murray (2013) 11.

⁷⁵³ The language shifts to the present tense because the 2010 Constitution is in force at the time of writing. Conversely, the CKRC, Bomas, Wako and CoE drafts are referred to in the past tense because they precede the Constitution.

⁷⁵⁴ Article 6(1) of the Constitution of Kenya.

⁷⁵⁵ Article 6(2) of the Constitution of Kenya.

⁷⁵⁶ Section 40(1) of the Constitution of South Africa.

4.5.2 Division of powers and functions

a) County government powers

The Constitution of Kenya 2010 assigns exclusive and concurrent functions to the national and county government, as set out in the Fourth Schedule.⁷⁵⁷ However, the listed functional areas in the Fourth Schedule do not specify which powers are exclusive functions and which are concurrent powers. The functional areas overlap in a number of respects. For instance, both the national and county government appear to have similar functions in certain areas, with the difference between them indicated through the attachment of the prefix of ‘national’ or ‘county’.⁷⁵⁸ On the face of it, article 186(4) suggests that only the national level has exclusive powers and functions, whilst all county powers are concurrent.⁷⁵⁹ However, Kangu argues that counties have exclusive powers because article 1(3) and (4) expresses the constitution drafters’ intention to distribute powers and functions distinctly and have that power exercised at both the national and county level.⁷⁶⁰

Likewise, the South African Constitution provides a list of areas in which subnational units may exercise their authority in Schedule 4 and 5. However, this constitution clearly indicates what are exclusive and concurrent powers and functions. Table 7 below lists the powers and functions of subnational authorities as provided in both the Kenyan and the South African constitutions.

Table 7: County powers in the Constitution of Kenya and provincial and local government powers in the South African Constitution

County powers in the Constitution of Kenya (Fourth Schedule)	Concurrent national government (NG) and provincial government (PG), exclusive PG and local government (LG) powers in the Constitution of South Africa (Schedules 4 and 5)
<i>Agriculture</i> , including— crop and animal husbandry livestock sale yards fisheries	<i>Agriculture (concurrent NG and PG)</i>

⁷⁵⁷ Articles 185(2), 186(1), 187(2), Fourth Schedule of the Constitution of Kenya.

⁷⁵⁸ Kangu (2015) 184.

⁷⁵⁹ Kangu (2015) 189.

⁷⁶⁰ Kangu (2015) 189.

<i>County abattoirs</i>	<i>Abattoirs (exclusive PG)</i>
Plant and <i>animal disease control</i>	<i>Animal control and diseases (concurrent NG and PG)</i>
<i>County health services</i> , including, in particular— county health facilities and pharmacies promotion of primary health care	<i>Health services (concurrent NG and PG)</i> <i>Municipal health services (LG)</i>
<i>Ambulance services;</i>	<i>Ambulance services (exclusive PG)</i>
<i>Licensing and control of undertakings that sell food to the public</i>	<i>Licensing and control of undertakings that sell food to the public (LG)</i>
<i>Veterinary services (excluding regulation of the profession)</i>	<i>Veterinary services, excluding regulation of the profession (exclusive PG)</i>
<i>Cemeteries, funeral parlours and crematoria; and</i>	<i>Cemeteries, funeral parlours and crematoria (LG)</i>
<i>Refuse removal, refuse dumps and solid waste disposal</i>	<i>Refuse removal, refuse dumps and solid waste disposal (LG)</i>
<i>Control of air pollution, noise pollution, other public nuisances and outdoor advertising</i>	<i>Pollution control (exclusive PG)</i> <i>Air pollution (LG)</i> <i>Noise pollution (LG)</i> <i>Billboards and the display of advertisements in public places (LG)</i>
<i>Cultural activities, public entertainment and public amenities</i> , including— cinemas video shows and hiring	<i>Cultural matters (exclusive PG)</i>
<i>Betting, casinos and other forms of gambling</i> <i>racing</i>	<i>Casinos, racing, gambling and wagering, excluding lotteries and sports pools (concurrent NG and PG)</i>
<i>Liquor licensing</i>	<i>Liquor licences (exclusive PG)</i>
	<i>Control of undertakings that sell liquor to the public (LG)</i>

<i>Libraries</i>	<i>Libraries other than national libraries (exclusive PG)</i>
<i>Museums</i>	<i>Museums other than national museums (exclusive PG)</i>
<i>Sports and cultural activities and facilities</i>	<i>Provincial sport (exclusive PG)</i> <i>Local sport facilities (LG)</i>
<i>County parks, beaches and recreation facilities.</i>	<i>Municipal parks and recreation (LG)</i> <i>Provincial recreation and amenities (exclusive PG)</i> <i>Beaches and amusement facilities (LG)</i>
<i>County transport, including— county roads public road transport traffic and parking</i>	<i>Public transport (concurrent NG and PG)</i> <i>Provincial roads and traffic (exclusive PG)</i> <i>Municipal roads (LG)</i> <i>Road traffic regulation (concurrent NGL and PG)</i> <i>Traffic and parking (LG)</i>
<i>Street lighting</i>	<i>Street lighting (LG)</i>
<i>Ferries and harbours, excluding the regulation of international and national shipping and matters related thereto</i>	<i>Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto (LG)</i>
<i>Animal control and welfare, including— licensing of dogs; and facilities for the accommodation, care and burial of animals</i>	<i>Licensing of dogs (LG)</i> <i>Facilities for the accommodation, care and burial of animals (LG)</i>
<i>Trade development and regulation, including— markets trade licences (excluding regulation of professions) fair trading practices cooperative societies</i>	<i>Trade (concurrent NGL and PG)</i> <i>Trading regulations (LG)</i> <i>Markets (LG)</i>
<i>Local tourism</i>	<i>Tourism (concurrent NG and PG)</i> <i>Local Tourism (LG)</i>

<p><i>County planning</i> and development, including— statistics land survey and mapping <i>boundaries and fencing</i></p>	<p><i>Regional planning</i> and development (concurrent national and PG) <i>Provincial and municipal planning (PG and LG)</i> <i>Fencing and fences (LG)</i></p>
<p><i>Housing</i></p>	<p><i>Housing (concurrent national and PG)</i></p>
<p><i>Electricity and gas reticulation</i> and energy regulation</p>	<p><i>Electricity and gas reticulation (LG)</i></p>
<p>Pre-primary education, village polytechnics, homecraft centres and <i>child care facilities</i></p>	<p><i>Child care facilities (LG)</i></p>
<p>Implementation of specific national government policies on natural resources and environmental conservation, including— <i>soil</i> and water <i>conservation</i>; and forestry</p>	<p>Administration of indigenous forests (concurrent NG and PG) <i>Soil conservation</i> (concurrent NG and PG)</p>
<p><i>County public works</i> and services</p>	<p><i>Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law (concurrent NG and PG)</i> <i>Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law (LG)</i></p>
<p><i>Stormwater management systems in built-up areas</i></p>	<p><i>Stormwater management systems in built-up areas (LG)</i></p>
<p><i>Water and sanitation services</i></p>	<p><i>Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems (LG)</i></p>
<p><i>Firefighting services</i> and <i>disaster management</i></p>	<p><i>Firefighting services (LG)</i> <i>Disaster management (concurrent NG and PG)</i></p>

Control of drugs and pornography	
Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level	
	<i>Building regulations (LG)</i>
	<i>Airports other than international and national airports (concurrent NG and PG)</i> <i>Municipal airports (LG)</i>
	Property transfer fees (concurrent NG and PG)
	<i>Vehicle licensing (concurrent NG and PG)</i>
	<i>Archives other than national archives (exclusive PG)</i>
	<i>Cleansing (LG)</i>
	<i>Control of public nuisances (LG)</i>
	<i>Local amenities (LG)</i>
	<i>Pounds (LG)</i>
	<i>Public places (LG)</i>
	<i>Street trading (LG)</i>
	Consumer protection (concurrent NG and PG)
	Education at all levels, excluding tertiary education (concurrent NG and PG)
	Environment (concurrent NG and PG)

	Indigenous law and customary law, subject to Chapter 12 of the Constitution (concurrent NG and PG)
	Industrial promotion (concurrent NG and PG)
	Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence (concurrent NG and PG)
	Media services directly controlled or provided by the provincial government, subject to section 192 (concurrent NG and PG)
	Nature conservation, excluding national parks, national botanical gardens and marine resources (concurrent NG and PG)
	Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence (concurrent NG and PG)
	Population development (concurrent NG and PG)
	Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5 (concurrent NG and PG)
	Traditional leadership, subject to Chapter 12 of the Constitution (concurrent NG and PG)
	Urban and rural development (concurrent NG and PG)
	Welfare services (concurrent NG and PG)

The powers of county governments in the table above are a mixture of South African concurrent and exclusive provincial and local government powers. The italicised text shows the extent of constitutional transfers from South Africa as far as the assignment of powers and functions is concerned. Both constitutions assign largely similar powers and functions. The Kenyan Constitution provides a schedule of powers and functions just as the South African Constitution does. Not many devolved systems enumerate subnational powers and functions in their constitutions: that is often left out as a matter to be determined by national legislation.

b) Conflict of national and county legislation

The Kenyan Constitution copied provisions that regulate conflict of legislation from the South African Constitution, as evidenced by the fact that the text in both constitutions is nearly identical. Table 8 below presents the conflict-of-legislation provisions in the two constitutions.

Table 8: Conflict of legislation provisions in the Kenyan and South African constitutions

Constitution of Kenya	South African Constitution
<p>Article 191(1): This article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government.</p> <p>(2) National legislation prevails over county legislation if—</p> <p>(a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or</p> <p><i>(b) the national legislation is aimed at preventing unreasonable action by a county that—</i></p> <p><i>(i) is prejudicial to the economic, health or security interests of Kenya or another county; or</i></p> <p><i>(ii) impedes the implementation of national economic policy.</i></p> <p>(3) <i>The following are the conditions referred to in clause (2) (a)—</i></p> <p><i>(a) the national legislation provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties;</i></p>	<p>Section 146(1): This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.</p> <p>(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:</p> <p><i>(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.</i></p> <p><i>(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—</i></p> <p><i>(i) norms and standards;</i></p> <p><i>(ii) frameworks; or</i></p> <p><i>(iii) national policies.</i></p> <p><i>(c) The national legislation is necessary for—</i></p> <p><i>(i) the maintenance of national security;</i></p>

<p><i>(b) the national legislation provides for a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—</i></p> <p><i>(i) norms and standards; or</i></p> <p><i>(ii) national policies; or</i></p> <p><i>(c) the national legislation is necessary for—</i></p> <p><i>(i) the maintenance of national security;</i></p> <p><i>(ii) the maintenance of economic unity;</i></p> <p><i>(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p> <p><i>(iv) the promotion of economic activities across county boundaries;</i></p> <p><i>(v) the promotion of equal opportunity or equal access to government services; or</i></p> <p><i>(vi) the protection of the environment.</i></p> <p>(4) County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) apply.</p>	<p><i>(ii) the maintenance of economic unity;</i></p> <p><i>(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p> <p><i>(iv) the promotion of economic activities across provincial boundaries;</i></p> <p><i>(v) the promotion of equal opportunity or equal access to government services; or</i></p> <p><i>(vi) the protection of the environment.</i></p> <p><i>(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—</i></p> <p><i>(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or</i></p> <p><i>(b) impedes the implementation of national economic policy.</i></p>
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4.5.3 Fiscal transfers

a) Equitable share

As regards the sharing of revenue provisions between the national and county governments, that were adopted, the Kenyan Constitution has similar provisions to those of the South African Constitution, as shown by the italicised text in Table 9. Both of the constitutions recognise the concept of equitable revenue-sharing and have similar criteria that inform the equitable share.

Table 9: Equitable share provisions in the Kenyan and South African constitutions

Devolution principle	Constitution of Kenya	South African Constitution
Equitable sharing of revenue	Article 202(1): <i>Revenue raised nationally shall be shared equitably among the national and county governments.</i>	Section 214(1): An Act of Parliament must provide for— (a) <i>the equitable division of revenue raised nationally among the national,</i>

	<p>(2) County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.</p>	<p><i>provincial and local spheres of government;</i> (b) the determination of each province's equitable share of the provincial share of that revenue; and (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.</p>
<p>Criteria for the equitable sharing of revenue</p>	<p>Article 203(1) The following criteria shall be taken into account in determining the equitable shares provided for under Article 202 and in all national legislation concerning county government enacted in terms of this Chapter— <i>(a) the national interest;</i> <i>(b) any provision that must be made in respect of the public debt and other national obligations;</i> <i>(c) the needs of the national government, determined by objective criteria;</i> <i>(d) the need to ensure that county governments are able to perform the functions allocated to them;</i> <i>(e) the fiscal capacity and efficiency of county governments;</i> <i>(f) developmental and other needs of counties;</i> <i>(g) economic disparities within and among counties and the need to remedy them;</i> (h) the need for affirmative action in respect of disadvantaged areas and groups; (i) the need for economic optimisation of each county and to provide incentives for each county to optimise its capacity to raise revenue;</p>	<p>Section 214(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account— <i>(a) the national interest;</i> <i>(b) any provision that must be made in respect of the national debt and other national obligations;</i> <i>(c) the needs and interests of the national government, determined by objective criteria;</i> <i>(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;</i> <i>(e) the fiscal capacity and efficiency of the provinces and municipalities;</i> <i>(f) developmental and other needs of provinces, local government and municipalities;</i> <i>(g) economic disparities within and among the provinces;</i> (h) obligations of the provinces and municipalities in terms of national legislation;</p>

	<p><i>(j) the desirability of stable and predictable allocations of revenue; and</i></p> <p><i>(k) the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.</i></p> <p>(2) For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government.</p>	<p><i>(i) the desirability of stable and predictable allocations of revenue shares; and</i></p> <p><i>(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.</i></p>
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In the light of the italicised text in the table above, it is clear that the Kenyan Constitution adopted the South African concept of equitable sharing of revenue; it also adopted the same criteria for determining the equitable share. The Kenyan devolution model borrowed not only the concept but also the same wording.

b) Commission on Revenue Allocation

The Constitution of Kenya 2010 reintroduced the Commission on Revenue Allocation,⁷⁶¹ which had been removed previously in the CoE Revised Harmonised Draft. The CoE regarded the Commission on Revenue Allocation as an institution vital to Kenya’s devolution model. The Commission on Revenue Allocation, introduced in the Bomas Draft, plays a similar role to South Africa’s FFC, as already discussed.⁷⁶² Both the Commission on Revenue Allocation and the FFC have, inter alia, the responsibility to make recommendations concerning the equitable distribution of revenue between national and subnational units. The establishment of the Commission on Revenue Allocation is another example of how the Kenyan devolution model borrowed an institution found in the South African Constitution.

⁷⁶¹ Article 215 of the Constitution of Kenya.

⁷⁶² Section 220 of the Constitution of South Africa.

4.5.4 Supervision powers

The Kenyan devolution model provides for the supervision of counties by the national government. The provisions are similar to those in the South African Constitution, as shown in the table below via the use of italicised text.

Table 10: Supervision provisions in the Kenyan and South African constitutions

Constitution of Kenya	South African Constitution
<p>Articles 189-190: ‘Government at either level shall— (b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and ...</p> <p>... Parliament shall, by legislation, provide for <i>intervention</i> by the national government if a county government—</p> <p>(a) <i>is unable to perform its functions</i>; or</p> <p>(b) does not operate a financial management system that complies with the requirements prescribed by national legislation.</p> <p>(4) Legislation under clause (3) may, in particular, authorise the national government—</p> <p>(a) to <i>take appropriate steps to ensure that the county government’s functions are performed</i> and that it operates a financial management system that complies with the prescribed requirements; and</p> <p>(b) if necessary, <i>to assume responsibility for the relevant functions</i>.</p> <p>(5) The legislation under clause (3) shall—</p> <p>(a) <i>require notice to be given</i> to a county government of any measures that the national government intends to take;(b) permit the national government <i>to take only measures that are necessary</i>;</p> <p>(c) require the national government, when it intervenes, to take measures that will assist the county government to resume full responsibility for its functions; and</p>	<p>Section 139(1): When a <i>municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation</i>, the relevant provincial executive may <i>intervene</i> by taking any appropriate steps to ensure fulfilment of that obligation, including—</p> <p>(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating <i>any steps required to meet its obligations</i>;</p> <p>(b) <i>assuming responsibility for the relevant obligation in that municipality to the extent necessary to —</i></p> <p>(i) maintain essential national standards or meet established minimum standards for the rendering of a service;</p> <p>(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or</p> <p>(iii) maintain economic unity; or</p> <p>(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.</p> <p>(2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b)—</p> <p>(a) it <i>must submit a written notice of the intervention to—</i></p> <p>(i) the Cabinet member responsible for local government affairs; and</p>

<p>(d) <i>provide for a process by which the Senate may bring the intervention</i> by the national government to an end.’</p>	<p>(ii) <i>the relevant provincial legislature and the National Council of Provinces</i>, within 14 days after the intervention began; (b) the intervention must end if— (i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or (ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.</p>
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The supervision provisions highlighted in the Kenyan Constitution in Table 10 above mimic the supervision provisions in the South African devolution model. For instance, both constitutions provide for intervention in subnational governments by the national government when the former are unable to perform their functions or responsibilities. Both the senate (Kenya) and the South African National Council of Provinces (NCOP) play a supervisory role in subnational levels; however, the role of the senate is defined in legislation, whereas the role of the NCOP is set out in the Constitution. In sum, the broader concept of supervision appears to have been borrowed from the South African Constitution.

4.5.5 Cooperative government and intergovernmental relations

For different levels of government to perform their powers and functions for the betterment of society, they should be able to work together effectively. The Constitution of Kenya, like the South African Constitution, provides for such cooperation between the national and county governments. Table 11 lists the relevant principles of cooperative government principles articulated in the two constitutions.

Table 11: Cooperative government provisions in the Kenyan and South African constitutions

Constitution of Kenya	South African Constitution
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Article 189(1): Government at either level shall—

(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

(b) *assist, support* and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

(3) *In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*

(4) *National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.*

Section 41(1): All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;

(ii) *assisting and supporting one another;*

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) *avoiding legal proceedings against one another.*

(2) *An Act of Parliament must—*

(a) *establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and*

(b) *provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.*

	<p><i>(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.</i></p> <p>(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved</p>
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Chesoni remarked that the Kenyan devolution model borrowed the concept of cooperative government from the South African Constitution.⁷⁶³ At the time when the Kenyan Constitution was adopted, the South African Constitution was one of the few, if not the only, which specifically required spheres of government to resolve their disputes using available platforms before approaching a court of law. Thus, this is an example of an instance where the Kenyan model borrowed the essence of the South African model of devolution, yet without borrowing the text verbatim.

4.6 The South African Constitution’s influence on the Kenyan devolution model

4.6.1 Extent of influence

The extent of South African influence on Kenya’s devolution model varies across the constitutional drafts. Evidence of this influence is seen in the transfer of devolution concepts and texts to the Constitution of Kenya. This chapter established that the South African Constitution significantly influenced the earlier CKRC and Bomas Drafts, and in most cases such influence persisted all the way through to the final Constitution of 2010. Notable exceptions in this regard were the centralist provisions in the Wako Draft.

The CKRC Draft borrowed South African concepts in matters such as the assignment of powers and functions to the district level, equitable share, the role of the Commission on Revenue

⁷⁶³ Chesoni (2021).

Allocation, and cooperative government. At the time that the Draft was formulated, the concept of cooperative government appeared only in the South African Constitution. However, the CKRC Draft did not have detailed devolution provisions as in the South African Constitution, given that much of this was left to be determined by national legislation. For example, national legislation was to specify which national laws prevail over district legislation and vice versa.

The Bomas Draft introduced more devolution principles than all the other constitutional drafts. Thus, of all the Kenyan draft constitutions, the Bomas Draft was the one most strongly influenced by the South African Constitution. The devolution provisions were also extensively elaborated upon: little was left to be determined by legislation. The Bomas Draft borrowed not only concepts from the South African Constitution, but also constitutional texts, sometimes verbatim. For example, provisions regulating conflicting legislation and stipulating the criteria for equitable share were borrowed verbatim.

The Wako drafters did not want extensive devolution, and hence the devolution model was watered down. For the most part, they removed the South African provisions which had been incorporated in previous drafts. For example, the Wako Draft removed the provisions regulating conflicting legislation. It also reintroduced centralised provisions, seeking to reinforce the supremacy of the national government under the Independence Constitution and, correlatively, the subordination to it of subnational governments. The Draft did not pass when it was put to a referendum; the literature attributes this to the absence of a strong devolution model. The referendum was hence an indication that only a constitutional draft with a strong devolution model would pass.

The CoE revisited devolution, with the result that the CoE Draft reintroduced comprehensive devolution principles. The CoE Revised Harmonised Draft added even further devolution provisions. Its devolution provisions were comprehensive; consequently, when it was put to a referendum, the people voted in favour of it, and the Draft became the 2010 Constitution of Kenya.

4.6.2 Why did the South African model travel so well?

This chapter established that five factors largely explain why drafters drew inspiration from the South African devolution model. These are the homegrown demand for devolution; similar circumstances; good knowledge of the South African Constitution; observation of good practice; and time constraints.

4.6.2.1 Homegrown demand for devolution

There was a homegrown demand for devolution because the Kenyan people wanted to move away from the country's centralised system of governance, which had been abused for decades. The international community played a minimal role in encouraging devolution. The World Bank generally advocated for devolution as a means by which governments could foster development in their countries, and offered financial aid to devolved countries. Nonetheless, the World Bank's position was by no means imposed on Kenya. In addition, the World Bank did not compel Kenya to borrow the South African devolution model in particular – it merely advocated for devolution in general.

Led by Annan, the African community was also involved in the constitutional reform process. Its delegation's main role was to broker a peace accord between the two presidential rivals and their supporters, one which provided for a coalition government and constitutional review. While Annan's team recommended, among other things, constitutional review, it did not specify the content of the constitution. The delegation came to Kenya only after the South African Constitution had already influenced the CKRC and Bomas Drafts. However, it is not improbable that the delegation encouraged the incumbent government to devolve powers since the centralisation of power was part of the reasons for the violence and political instability which had afflicted the country. In short, devolution was, for the most part, a homegrown exercise in which Kenyans identified as an alternative to the centralised model of governance.

4.6.2.2 Similar circumstances

Kenyans were receptive to the South African devolution model because it was captured in a modern constitution and provided actual transfer of powers from the centre to devolved units. The South African model was also attractive because South Africa used its constitution to address issues such as financial inequality – Kenya too sought to address financial inequality in regions due to different ethnic groups receiving disparate financial resources owing to their ethnicity. These somewhat similar historical backgrounds played an important role. After having looked at other constitutions, the drafters observed that a constitutional model in the Scandinavian regions, for example, would most likely not have a similar context. Thus, the South African model was attractive.

4.6.2.3 Local knowledge of South African devolution model

The CKRC Draft was the entry-point for the South African devolution provisions, largely due to Kenyan experts' knowledge of the South African model. Ghai was familiar with the South African Constitution because he was interested in its devolution model and had followed the constitution-making process since its inception. Furthermore, he had reflected on the South African devolution model in his writings prior to the CKRC process. Kangu, who participated in the CKRC up to the stage of the CoE Harmonised Draft, was also familiar with the South African Constitution thanks to his studies in South Africa. The other drafters were familiar with the South African model as well, particularly those who participated in the South African study tour.

Kenyan drafters, particularly the Bomas technical committee on devolution, considered best practices in devolution models from various countries. The drafters analysed several federal systems and their allocation of revenue, in particular the role of the FFC in the South African devolution model, which appeared to work well in practice. Kangu mentioned that he was impressed by the fact that KwaZulu-Natal in South Africa received a significant amount of grants despite being run by an opposition party. That share of revenue to an opposition-led province was possible due to the objective nature of the allocation of revenue and the role of the FFC. Thanks to his knowledge of this good practice, Kangu included a similar provision in the Bomas Draft in regard to a financial commission in the hope that it, together with the other devolution provisions, would address challenges of financial inequality in Kenyan regions.

In addition, foreign actors, namely Murray and Knight, contributed to the process through their knowledge of the South African Constitution. However, the role of external actors in the migration of South African transfers was minimal. The Kenyan CKRC drafters consulted Murray and Knight, but they themselves determined the actual content of the Draft. Knight's involvement extended only to his expertise on the use of simple language in constitutions, a role which was similar to the one he had played in the South African constitution-making process. Murray played a slightly more significant role in how the South African Constitution influenced the Kenyan devolution model in the CoE Drafts. The recommendations she made in respect of supervision provisions were partly influenced by observing South Africa's best practices. The lack of supervision provisions in the earlier drafts posed a danger to the success of the Kenyan devolution model, especially given that there was much opposition to the transfer

of powers to counties; thus, Murray recommended the inclusion of supervision provisions that mirror those in the South African devolution model.

A South African expert, Steytler, made some recommendations to the CoE during the peer-review processes of the CoE Harmonised Draft. It is submitted that the recommendations were made after having observed how the South African devolution model was applied in practice. As an expert in the field, he had observed that South African provinces were becoming redundant and that the ANC-led government was advocating that provinces be removed from the levels of government. Among the recommendations Steytler made was that county government be the only devolved unit, since adding a regional level was expensive and created unnecessary bureaucracy that could lead to inefficiency. However, it is also important to note that Steytler's recommendation was not entirely new: some Kenyan drafters did not appreciate the value of three levels of government, as evidenced by the Wako Draft.

4.6.2.4 The use of similar text due to time constraints

Time limitations also contributed to how and why devolution provisions moved from South Africa to the Kenyan devolution model. When the Bomas drafters returned from the study tours, the technical committee on devolution was assigned only three weeks in which to come up with devolution principles. Three weeks is insufficient to construct constitutional provisions from scratch. Instead, the drafters looked at other constitutions that had been adopted. Faced with limited time, the drafters relied heavily on the South African Constitution.⁷⁶⁴ In some instances, the South African provisions were 'customised' to suit the Kenyan context and needs. The result was significant South African influence.

4.7 Conclusion

The glaring similarities between the Kenyan and South African devolution models prompted two questions, which this chapter sought to answer. The first was about the extent to which the South African devolution model influenced the Kenyan devolution model; the second was about the reasons that the South African Constitution influenced the Kenyan devolution model.

The Kenyan devolution model was significantly influenced by the South African Constitution, as evidenced by the numerous devolution concepts and institutions borrowed from the latter.

⁷⁶⁴ Kangu (2021). See Steytler N & Ghai Y 'Devolution: What can Kenya learn from South Africa?' in Steytler N & Ghai Y (eds) *Kenyan-South African: Dialogue on Devolution* (2015) 476.

Furthermore, Kenyan drafters ‘copied and pasted’ county powers and functions from the South African devolution model. Lastly, a number of devolution provisions in regard to the nature of the two levels of government, conflicts between national and county legislation, and equitable sharing of revenue were reproduced verbatim from the South African Constitution.

The borrowing of South African devolution provisions was a Kenyan-driven process. The call for devolution began with the Kenyan people’s wish for devolution to be part of the new constitution. In drafting the devolution provisions, the drafters were drawn to the South African devolution model due to the two countries’ similar historical backgrounds, local knowledge of the South African Constitution, and time constraints. Foreign actors such as Steytler and Murray played a relatively minor role in the South African influence on the Kenyan devolution model, given that they arrived on the scene at a later stage when the South African provisions had already been incorporated in the drafts. There were few South African influences in the drafts that came after the Bomas Draft. For example, supervision provisions found their way into the Kenyan constitution-making process during the CoE drafting process. In conclusion, a homegrown demand for a non-centralised model of government led to the South African Constitution influencing the Kenyan devolution model.

Chapter 5:

The Influence of the South African Devolution Model on the Zimbabwean Devolution Model

5.1 Introduction

The Zimbabwean devolution model entrenched in the 2013 Constitution⁷⁶⁵ bears much resemblance to the South African and Kenyan devolution models.⁷⁶⁶ As discussed in Chapter 2, this is not a unique occurrence since many constitutions in the world reflect some degree of borrowing or importation from other countries. This chapter analyses the Zimbabwean constitution-making process to establish the nature, content and intensity of the migrated South African devolution model and provisions. In addition, it evaluates the why and how the migration of the devolution model and provisions took place, with a particular focus on how knowledge was conveyed and the reasons for this dissemination of information. Lastly, the chapter examines the extent to which the Constitution of Kenya influenced the Zimbabwean devolution model, given that there are devolution provisions which are found in both the Kenyan and Zimbabwean devolution models but not in the South African one.

The chapter demonstrates that the Constitution of South Africa significantly influenced the Zimbabwean devolution model, the evidence for which is the strong correlation between the devolution concepts and texts that make up the respective models. By contrast, the extent of the Constitution of Kenya's influence is minimal given that few of the same devolution concepts and texts are found in both the Kenyan and Zimbabwean devolution models. It is observed that the South African and Kenyan influence arose from a homegrown need by Zimbabweans for a non-centralised model of government that addressed social, economic and political challenges linked to the over-centralisation of power. Zimbabweans were drawn to the South African model because of the close geographical, political, and economic ties between the two countries. Furthermore, both the South African and Kenyan constitutions were modern and therefore more accessible than the other constitutions considered during the constitution-making process.

⁷⁶⁵ Constitution of Zimbabwe, 2013.

⁷⁶⁶ As provided in the Constitution of South Africa, 1996, and Constitution of Kenya, 2010, respectively.

The chapter commences in section 5.2 by reviewing the history of the centralised model of government in Zimbabwe's Independence Constitution and its subsequent amendments. Thereafter, section 5.3 assesses the devolution model in the various constitutional drafts preceding the 2013 constitution-making process. It is important to highlight that there were other constitution-making exercises; in particular, some were held in secret and are not discussed in this chapter because the contents of those drafts are not publicly available.⁷⁶⁷ Section 5.4 analyses the constitution-making process and devolution model leading up to the 2013 Constitution, whilst section 5.5 discusses the devolution models in the 2013 Constitution. Lastly, section 5.6 analyses the extent to which the South African and Kenyan constitutions influenced the Zimbabwean devolution model and the reasons for this.

5.2 The centralised model of government under the Independence Constitution

Zimbabwe gained independence from Britain in 1980 under the terms of the Lancaster House Constitution,⁷⁶⁸ which was drafted during 'negotiations' between the British government, the Rhodesian white minority government and African nationalist movements.⁷⁶⁹ The Independence Constitution⁷⁷⁰ was imposed on Zimbabwe under the guise of negotiations.⁷⁷¹ Independence was conditional on Zimbabwe's adoption of the Lancaster House Constitution. Like most post-colonial constitutions, the Lancaster House Constitution, based on the Westminster system, was adopted through a British Act of Parliament.⁷⁷² As such, the constitutional concepts and texts that moved from the British model to the Lancaster House Constitution are an example of the theory of coercive imposition discussed in Chapter 2 and

⁷⁶⁷ In an interview, Brian Crozier, a drafter of the Kariba Draft, mentioned that there were several other draft constitutions, most which were negotiated between the Movement for Democratic Change (MDC) and Zimbabwe African National Union - Patriotic Front (ZANU-PF). See interview with Kariba Constitution drafter Brian Crozier, Harare, 13 November 2019.

⁷⁶⁸ Klug H 'Participating in the Design: Constitution-Making in South Africa' (1996) 3 *Review of Constitutional Studies* 22.

⁷⁶⁹ Former Foreign Secretary Lord Carrington represented the British government. The Rhodesian government was represented by a coalition between Ian Smith's Rhodesia Front and Abel Muzorewa's United African National Congress. Lastly, Robert Mugabe and Joshua Nkomo led and represented the African nationalist parties. See Gregory (1980) 11.

⁷⁷⁰ Lancaster House Constitution, 1979.

⁷⁷¹ Gregory M 'Rhodesia: From Lusaka to Lancaster House' (1980) 36 *The World Today* 11. See also Chigwata T C 'Three Years into the Implementation of the Zimbabwean Constitution of 2013: Progress, Challenges, Prospects and Lessons' in Fombad C M (ed) *The Implementation of Modern African Constitutions: Challenges and Prospects* (2016) 79.

⁷⁷² Chigwata (2016) 79.

entailed that African nationalist movements were forced to accept terms and provisions that were not favourable to them.⁷⁷³ This was primarily because the British government, as a superior power, set the terms for negotiation and dominated the process.⁷⁷⁴

At its inception, the Lancaster House Constitution did not focus much on provinces or local government since neither of these levels was entrenched. Through subsequent amendments, provinces became the only subnational unit to be constitutionally entrenched.⁷⁷⁵ A 1985 constitutional amendment provided for a provincial governor, appointed by the President, to oversee the administration of a province.⁷⁷⁶ The Independence Constitution, inclusive of all 19 amendments, merely recognised the physical boundaries of 10 provinces.⁷⁷⁷ Provincial governors and the councils they chaired were as good as deconcentrated bodies rather than autonomous political units.⁷⁷⁸

Powers and functions were conferred to local governments by the central government through legislation, such as the Urban Councils Act,⁷⁷⁹ Rural District Councils Act,⁷⁸⁰ and Regional, Town and Country Planning Act,⁷⁸¹ which was inherited from the colonial period.⁷⁸² The exercise of these powers and functions was supervised by the central government mainly through the Ministry of Local Government, Public Works and National Housing.⁷⁸³ Consequently, the national government could thus easily change, or even abolish, local government structures, powers and functions.

The political and socio-economic crisis that arose in the early 1990s due to elite corruption, poor governance, mismanagement by the Zimbabwe African National Union - Patriotic Front (ZANU-PF), and the shrinking of democratic space led to the unpopularity of the centralised

⁷⁷³ Krieger N 'Zimbabwe Today: Hope against Grim Realities' (2000) *Review of African Political Economy* 443.

⁷⁷⁴ Ndulo M 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order' in Miller L E & Aucoin L (eds) *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010) 181.

⁷⁷⁵ Sections 34, 38(c), 111A and 113 of the Lancaster House Constitution, 1980.

⁷⁷⁶ 'The 19 Amendments to the Constitution of Zimbabwe' 9 October 2012 available at <https://mdctsa.wordpress.com/category/all-your-copac-draft-constitution-questions-answered/> (accessed 12 July 2019).

⁷⁷⁷ Section 34 of the Constitution of Zimbabwe Amendment No. 19 Act, 2009.

⁷⁷⁸ Section 111A and Schedule 2 of the Constitution of Zimbabwe Amendment No. 19 Act, 2009.

⁷⁷⁹ Urban Councils Act of 2015.

⁷⁸⁰ Rural District Councils Act (Chapter 29:13).

⁷⁸¹ Regional, Town and Country Planning Act (Chapter 29:12).

⁷⁸² The legislation was subsequently amended, for example to incorporate democratic principles.

⁷⁸³ Muchadenyuka D 'Zimbabwe's New Constitution and Local Government: Implications for Central-Local Relations' (2014) 11 *US-China Law Review* 1372.

system of government.⁷⁸⁴ Civil society, students and the urban labour movement, particularly the Zimbabwe Congress of Trade Unions (ZCTU), resented centralist rule.⁷⁸⁵ In 1997, civil society movements began calling for a new constitution that would respond adequately to the needs of the majority.⁷⁸⁶

5.3 Early constitutional efforts towards a devolution model

The need for constitutional reform increased after independence, resulting in constitution-making processes such as the National Constitutional Assembly (NCA), Constitutional Commission, and Kariba constitutional drafts.⁷⁸⁷

5.3.1 The NCA and Constitutional Commission processes

In 1997, a civil society movement, the National Constitutional Assembly (NCA), was founded with the aim of drafting a new constitution to address Zimbabwe's political and economic problems by limiting the centralisation of power by the Mugabe government.⁷⁸⁸ The NCA was an umbrella organisation of civic organisations consisting mainly of churches, human rights groups, trade unions (including the ZCTU), women's organisations, youth groups and student movements, all of which had the collective mission of developing a homegrown democratic constitution.⁷⁸⁹

In September 1999, two years after the formation of the NCA, a new opposition political party was formed, namely the Movement for Democratic Change (MDC).⁷⁹⁰ Morgan Tsvangirai, who at the inception of the NCA headed a task force in the NCA (as a representative of the

⁷⁸⁴ The ZANU-PF led government adopted a World Bank-sponsored Economic Structural Adjustment Programme (ESAP) which led to the massive retrenchment of workers, removal of subsidies on basic commodities, and imposition of school fees and health user-fees. As a result, the ESAP hit the poor hard, whereas the politically connected reportedly benefited by gaining management positions when parastatal companies were privatised. See Ndlovu-Gatsheni S 'The Nativist Revolution and Development Conundrums in Zimbabwe' (2006) *The African Centre for the Constructive Resolution of Disputes ACCORD* 26. See also Dorman S R 'Rocking the Boat?: Church NGOs and Democratization in Zimbabwe' (2002) 101 *African Affairs* 82.

⁷⁸⁵ Ndlovu-Gatsheni (2006) 27.

⁷⁸⁶ Krieger (2000) 444.

⁷⁸⁷ There were also other constitutional drafts, such as the Law Society Model Constitution of Zimbabwe Draft, 2010, which are not discussed in this chapter.

⁷⁸⁸ Krieger (2000) 444.

⁷⁸⁹ Dzinesa G 'Zimbabwe's Tortuous Road to a New Constitution and Elections' (2012) *Institute for Security Studies Situation Report 2*. See also Ndulo (2010) 185.

⁷⁹⁰ Coltart D 'A Decade of Suffering in Zimbabwe: Economic Collapse and Political Repression under Robert Mugabe' (2008) 5 *Centre for Global Liberty and Prosperity* 13.

ZCTU), became the MDC's first president.⁷⁹¹ The leadership of the MDC consisted mostly of NCA officials and members.⁷⁹² Thus, the relationship between the NCA and MDC became intertwined: the movements shared similar ideologies and consisted largely of the same people. President Mugabe and his government disapproved of the relationship: the fact that the MDC was aligned to the NCA constitution-making process prompted accusations that the NCA was merely a front for opposition politics.⁷⁹³

Furthermore, the incumbent government was opposed to the fact that the NCA constitution-making process was funded by external organisations such as the Friedrich Ebert Stiftung (FES),⁷⁹⁴ Oxfam, Hivos, the Friedrich Naumann Foundation, and the embassies of Denmark, the Netherlands, Canada, Australia and Sweden.⁷⁹⁵ ZANU-PF accused the donors of influencing the NCA process.⁷⁹⁶ Stan Mudenge, a ZANU-PF member and then Foreign Affairs minister, asserted on national television that 'foreign governments' were pushing their own agenda through the NCA constitutional process.⁷⁹⁷

Before the NCA could produce a constitutional draft, the incumbent government established a Constitutional Commission to lead a parallel constitution review process.⁷⁹⁸ In terms of the Inquiry's Act,⁷⁹⁹ Mugabe appointed a 400-member Constitutional Commission, chaired by Justice Godfrey Chidyausiku.⁸⁰⁰ Sara Dorman remarks that Chidyausiku was a former ZANU-PF minister who as a High Court judge had a reputation of ruling in favour of ZANU-PF – rulings which were often overturned by the Supreme Court.⁸⁰¹ The Constitutional Commission was composed of 150 MPs; the remainder consisted of interest groups, namely chiefs, who were presumed to be ZANU-PF members or sympathetic to its cause; mayors, who at the time were all aligned to ZANU-PF; politicians from opposition political parties; and representatives

⁷⁹¹ Dorman (2003) 848.

⁷⁹² Dorman (2003) 855.

⁷⁹³ Dorman (2003) 855.

⁷⁹⁴ NCA, 'The NCA: First Interim Report', 3 July 1997.

⁷⁹⁵ Dorman (2003) 855.

⁷⁹⁶ Dorman (2003) 855.

⁷⁹⁷ Jonathan Moyo, a ZANU-PF politician, was also quoted sharing the same sentiments. See Dorman (2003) 855.

⁷⁹⁸ Hatchard J 'Lessons on Constitution-Making from Zimbabwe' (2001) 45 *Journal of African Law* 210. See also Ndulo (2010) 187.

⁷⁹⁹ Hatchard (2001) 210.

⁸⁰⁰ Dzinesa G A *Zimbabwe's Constitutional Reform Process: Challenges and Prospects* (2012) 3.

⁸⁰¹ Dorman S R 'NGOs and the Constitutional Debate in Zimbabwe: From Inclusion to Exclusion' (2003) 29 *Journal of Southern African Studies* 859.

of churches and NGOs.⁸⁰² Dorman observes that three-quarters of the Constitutional Commission was made up of ZANU-PF members or people sympathetic to ZANU-PF.⁸⁰³ As a result, groups such as the NCA refused to participate in the process, highlighting that the Commission over-represented ZANU-PF.⁸⁰⁴

The Constitutional Commission was given a very short period of just five months in which to draft a new constitution.⁸⁰⁵ Gwinyayi Dzinesa argues that the short timeframe was to ensure that the Constitutional Commission Draft was released before the NCA Draft.⁸⁰⁶ Thus, it can be deduced that the establishment of the Constitutional Commission was a move to control both the constitution review process and the contents of the new constitution.

Like the NCA constitution-making process, the Constitutional Commission's process was also described as a 'homegrown' exercise.⁸⁰⁷ The Ford Foundation and Kellogg Foundation, as well as South Korea, Canada, Australia, Netherlands, Sweden, Norway and Denmark, working through the United Nations Development Programme (UNDP), funded the Constitutional Commission.⁸⁰⁸ The UNDP provided and managed funds to hire constitutional experts to assist with the constitution-making exercise.⁸⁰⁹ International experts were invited by the Constitutional Commission 'to exchange ideas and experiences with commissioners and to provide comments and a critique of the draft constitution', but came only for a few days in November 1999 shortly before the Constitutional Commission finished its task.⁸¹⁰ At that stage, it is doubtful that the international experts made any significant contribution.

Both the NCA and the Constitutional Commission constitution-making processes were funded at one point or another by the same 'foreign governments', in particular Canada, Australia, Netherlands, Sweden and Denmark. Ironically, ZANU-PF insisted that the donors did not influence the Constitutional Commission process. The Constitutional Commission successfully

⁸⁰² Dorman (2003) 859.

⁸⁰³ Dorman (2003) 859.

⁸⁰⁴ Krieger (2000) 444.

⁸⁰⁵ Dzinesa (2012) 3.

⁸⁰⁶ Dzinesa (2012) 3.

⁸⁰⁷ Former minister Edison Zvobgo said the following about the constitution-making process: '[W]e are not amending the Lancaster House Constitution but moulding it in our own image as you cannot have a nation which breathes the historical experiences of another nation.' See Dorman (2003) 850.

⁸⁰⁸ Dorman (2003) 850.

⁸⁰⁹ UNDP Press Statement, UNDP Responds to News Article on COPAC, 13 May 2012 available at <http://www.undp.org.zw/mediacentre/press-releases-statements-and-speeches/233-undp-responds-to-news-article-on-copac?3a1ed061a28f8a5e62fd4865066ea7fa> (accessed 16 May 2020).

⁸¹⁰ Hatchard (2001) 212. See also Ndulo (2010) 191.

completed the exercise and submitted the Draft Constitution to President Mugabe on 29 November 1999.⁸¹¹ Upon receiving the Draft, he made significant corrections to it,⁸¹² thus undermining the role of the Constitutional Commission.

5.3.2 The devolution model of the Constitutional Commission Draft

The examination below of the devolution model proposed in the Constitutional Commission Draft focuses on aspects of multilevel governance such as the recognition of levels of government, the division of powers and functions, the nature of own-revenue sources, and cooperative government.⁸¹³

5.3.2.1 Recognition of three levels of government

Clause 12(1)(1) of the Constitutional Commission Draft Constitution proposed the recognition of three tiers of government, namely national, provincial and local government.⁸¹⁴ The proposal for the recognition of local government in the Draft Constitution was the first of its kind in post-colonial Zimbabwe. The Draft Constitution proposed that both provincial councils and local government were to be democratically elected and assigned as ‘much autonomy as is compatible with good governance’.⁸¹⁵ The recognition of three levels of government appears to reflect features of the South African devolution model – it too has three levels of government, described as ‘spheres of government which are distinctive, interdependent and interrelated’.⁸¹⁶

5.3.2.2 Provincial and local government powers and functions

The Constitutional Commission Draft did not propose the constitutional assignment of powers and functions to either provinces or local government. The Draft posited that the national government, through national legislation, had the responsibility to assign powers and functions to provinces and local government.⁸¹⁷ Furthermore, clause 12(2) proposed that provinces were responsible for ‘co-ordinating governmental activities in its province’, which suggests that

⁸¹¹ Dzinesa 2012 3.

⁸¹² Dzinesa 2012 4.

⁸¹³ This section does not discuss whether the Kenyan model influenced the Constitutional Commission Draft as the Kenyan CKRC process had not yet officially begun. It commenced only in 2001, as noted in Chapter 4.

⁸¹⁴ Constitutional Commission Draft, 1999 (hereafter Constitutional Commission Draft).

⁸¹⁵ Clause 12(1)(2)(a)-(b) of the Constitutional Commission Draft.

⁸¹⁶ Section 40(1) of the Constitution of South Africa.

⁸¹⁷ Clause 12(1)(2)(c) of the Constitutional Commission Draft.

provincial powers were not substantial.⁸¹⁸ In its lack of constitutionally protected subnational powers, the Draft differs from the South African Constitution, which entrenches provincial and local government powers.⁸¹⁹

5.3.2.3 Revenue sources

When it came to revenue-generation powers, the Draft acknowledged that both provinces and local authorities required financial resources to plan, initiate and execute their responsibilities. Clause 12(2)(e) proposed that provinces and local government should have ‘a sound financial base with reliable sources of revenue’. In addition, all taxation powers and fiscal transfers were to be regulated by Parliament.⁸²⁰

The influence of the South African Constitution on the Draft’s fiscal provisions is minimal because clause 12(2)(e) assigns revenue sources to subnational units without stating what the taxing powers are. The South African Constitution provides that provinces may impose ‘taxes, levies and duties other than income tax, value-added tax, general sales, tax, rates on property or customs duties’, as well as ‘flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties’.⁸²¹ Furthermore, the South African model stipulates that local government may impose ‘rates on property and surcharges on fees for services provided by or on behalf of the municipality’.⁸²² As such, the Draft’s provisions in regard to own-revenue sources diverge from those of the South African Constitution.

5.3.2.4 Cooperative government and intergovernmental relations

The Constitutional Commission Draft had few provisions that regulated cooperative government. For example, clause 12(2)(g) provided that cooperation between provinces and local authorities should be encouraged. The Draft neither elaborated on how cooperation was to be encouraged, nor entrenched cooperative government mechanisms. As with most of the devolution provisions, Parliament was tasked with regulating intergovernmental relations. The recognition of the term ‘cooperation’ is evidence of the influence of the South African

⁸¹⁸ Clause 12(2) of the Constitutional Commission Draft.

⁸¹⁹ Schedules 5 and 6 of the Constitution of South Africa.

⁸²⁰ Clause 11(1)(1) of the Constitutional Commission Draft.

⁸²¹ Section 228(1) of the Constitution of South Africa.

⁸²² Section 229(1)(a) of the Constitution of South Africa.

Constitution, under which all spheres of government must observe and adhere to provisions regarding cooperative government and intergovernmental relations.⁸²³

In a nutshell, the Draft's devolution model is skeletal in comparison with the South African model. An interview with one of the Constitutional Commission drafters, Brian Crozier, revealed that the drafters inevitably turned to the South African Constitution, which was very current at the time, to ascertain how South Africa had designed its devolution model.⁸²⁴ There are similarities as regards broad concepts such as the autonomous nature of the devolved units, the assignment of subnational powers and functions, the importance of the allocation of revenue to subnational units, and the nature of cooperative government. However, there is no evidence of actual text moving from the South African Constitution to the Constitutional Commission Draft. Overall, one can say that the influence of the South African devolution model was present but weak.

The Draft was scheduled to be put to a national referendum in February 2000.⁸²⁵ The ZANU-PF government campaigned in favour of the Draft, whilst the NCA, MDC and other civil groups, including trade unions, campaigned against it.⁸²⁶ These parties launched an aggressive 'No Vote' campaign based on three issues.⁸²⁷ First, the campaign argued that the process leading to the adoption of the Draft Constitution was flawed, especially due to the domination of the Constitutional Commission by ZANU-PF members.⁸²⁸ Secondly, the NCA argued that the process was flawed because President Mugabe made substantive changes to the Constitutional Commission Draft.⁸²⁹ Lastly, the NCA viewed the content as problematic because, among other things, the Constitutional Commission Draft retained an all-powerful president.⁸³⁰ The NCA also rejected the Constitutional Commission Draft because there was 'no devolution of governmental powers to the people at appropriate levels'.⁸³¹ The 'No Vote'

⁸²³ Section 40(2) of the Constitution of South Africa

⁸²⁴ Interview with Constitutional Commission drafter Brian Crozier, Harare, 13 November 2019.

⁸²⁵ Dzinesa 2012 4.

⁸²⁶ Mamdani M 'Lessons of Zimbabwe: Mugabe in Context' (2009) *Concerned African Scholars Bulletin* 6. See also National Constitutional Assembly Proposed Draft of Constitution of Zimbabwe of 31 March 2001.

⁸²⁷ Dzinesa 2012 4.

⁸²⁸ Magaya K 'Constitution by the People or to the People: A Critical Analysis of Zimbabwe's Constitutional Development in View of the Constitution Select Committee (Copac) Led Process' (2015) 3.2 *Journal of Political Sciences and Public Affairs* 6.

⁸²⁹ Statement by the NCA, National Constitutional Assembly Constitutional Draft, 2001 (hereafter NCA Draft).

⁸³⁰ Statement by the NCA, National Constitutional Assembly Constitutional Draft, 2001.

⁸³¹ Under 'Statement by the NCA', the NCA Draft listed the reasons that the NCA rejected the Constitutional Commission Draft. One of these was the failure to adequately entrench a non-centralised system of government.

campaign was successful: the Draft was rejected in the referendum by 54 per cent of the votes.⁸³²

5.3.3 The devolution model of the NCA Draft

In 2001, a year after the rejection of the Constitutional Commission Draft, the NCA concluded its constitutional review process.⁸³³ Among other things, the NCA Draft had substantive devolution provisions. This was the first time that the term ‘devolution’ had been used in a Zimbabwean constitution-making process. This was also before the Kenyan constitution-making process used the same terminology. Therefore, it is probable that the Kenyan process borrowed the term ‘devolution’, as used in this context, from the Zimbabwean constitution-making process.⁸³⁴

5.3.3.1 Recognition of three levels of government

Like the Constitutional Commission Draft, the NCA Draft entrenched three levels of government. The national government provided for a bicameral system consisting of the National Assembly⁸³⁵ and the Senate.⁸³⁶ The NCA Draft proposed that the National Assembly consist of directly elected members and the Prime Minister, and that the Senate consist of elected members from each province, traditional chiefs, and elected representatives of the National Assembly.⁸³⁷

The Draft recognised provinces as autonomous levels, unlike the Independence Constitution, which regarded provinces as administrative rather than political units.⁸³⁸ Provinces were to be composed of an executive as well as an elected legislature.⁸³⁹ Clause 172 of the Draft proposed the local government be an autonomous level of government. The Draft proposed, too, that

⁸³² Norwegian Centre for Human Rights (2013) 17.

⁸³³ Krieger (2000) 444.

⁸³⁴ The United Kingdom originally set out the legislative frameworks for devolution in the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. However, devolution is used to describe the process of transferring power from the centre (Westminster) to the nations and regions of the United Kingdom. See Torrance D ‘Introduction to Devolution in the United Kingdom: An Introduction to the Devolution Settlements in Scotland, Wales, Northern Ireland, London and Parts of England’ 25 January 2022 available at <https://researchbriefings.files.parliament.uk/documents/CBP-8599/CBP-8599.pdf> (accessed 8 April 2022).

⁸³⁵ Clause 60 of the NCA Draft.

⁸³⁶ Clause 65 of the NCA Draft.

⁸³⁷ Clauses 60 and 65 of the NCA Draft.

⁸³⁸ Clause 163 of the NCA Draft.

⁸³⁹ Clauses 163 and 164 of the NCA Draft.

local government was to be informed by the principles of providing democratic and accountable government for local communities, promoting social and economic development, and enabling popular participation in decision-making.⁸⁴⁰ Most of those principles are copied verbatim from the South African Constitution.⁸⁴¹ Thus, the NCA Draft is the point at which South African devolution provisions enter Zimbabwean constitution-making processes.

5.3.3.2 Division of powers and functions

Unlike the Constitutional Commission Draft, the NCA Draft proposed the assignment of provincial original powers and functions. For instance, clause 171 proposed a list of significant functional areas in which provincial legislatures had the power to act. For example, provinces were to legislate on provincial planning, provincial tourism, public transport, soil conservation, housing, provincial tax, education, health, rural development and roads.⁸⁴² Likewise, Schedule 4 and 5 of the South African Constitution stipulate significant functional areas where provincial legislatures can act. Functions such as tourism, public transport, soil conservation, housing, education, housing and health fall under concurrent national and provincial powers, whilst provincial planning is an exclusive provincial power.

Like the Constitutional Commission Draft, the NCA Draft did not delineate the powers and functions of local government. The responsibility to determine the powers and functions of local government was left to Parliament.⁸⁴³ This is at variance with the South African model, which entrenches local government powers and functions.⁸⁴⁴

Clause 168, which was to regulate instances where national legislation was in conflict with provincial legislation, is copied in part from section 146(3)(a) of the South African Constitution.⁸⁴⁵ Clause 168(1) proposed that

Parliament may, at a joint sitting and by a vote supported by at least two-thirds of its total membership, nullify a piece of provincial legislation, if and only if, that legislation is ***prejudicial to the economic or security interests of another province or the country as a whole*** or is grossly unreasonable.

⁸⁴⁰ Clause 173(1) of the NCA Draft.

⁸⁴¹ Section 152(1) of the Constitution of South Africa

⁸⁴² Clause 171 of the NCA Draft.

⁸⁴³ Clause 172(2) of the NCA Draft.

⁸⁴⁴ Schedules 4 and 5 of the Constitution of South Africa.

⁸⁴⁵ Section 146(3)(a) of the Constitution of South Africa.

Clause 168(1) went further than the South African Constitution in protecting provincial legislation because it proposed a requirement of a two-thirds majority in Parliament. In addition, Parliament could nullify provincial legislation only on specified grounds, which were borrowed from section 44 of the South African Constitution.

5.3.3.3 Taxation powers

Unlike section 228(1) of the South African Constitution, the Draft proposed that both provinces⁸⁴⁶ and local government should be able to impose taxes and levies, subject to national legislation.⁸⁴⁷ It went further by not linking provincial taxing powers to enabling national legislation. Furthermore, national legislation could assign additional taxation powers to local government.⁸⁴⁸

5.3.3.4 Equitable share

In addition to taxation powers, clause 143(2) of the Draft proposed that provinces were entitled to an equitable share of revenue collected nationally. Clause 143(2)(a) proposed that ‘an Act of Parliament must provide for the equitable division of revenue raised nationally between the national and provincial spheres of government’. The concept in the Draft of equitable share was influenced by the South African Constitution, as evidenced by the fact that the relevant provision is almost identical to section 214(1)(a) of the latter. The limited modification is that the Draft did not extend the equitable-share concept to local government.

In sum, the South African Constitution’s influence is stronger in the NCA Draft than in the Constitutional Commission Draft because both the NCA and MDC, which actively participated in the NCA Draft, were in support of devolution.⁸⁴⁹ The NCA Draft imported broad concepts such as the recognition of three levels, autonomous subnational units, the assignment of provincial taxation powers through national legislation, conflicting legislation, and equitable share. The drafters also went a step further by importing similar provisions. For example, the powers and functions assigned to provinces in the NCA Draft are also functional areas for South African provinces.

⁸⁴⁶ Clause 164(3) of the NCA Draft.

⁸⁴⁷ Clause 172(2) of the NCA Draft.

⁸⁴⁸ Section 229(1)(b) of the Constitution of South Africa.

⁸⁴⁹ The MDC sought to strengthen its power base constitutionally through devolution because it was stronger in urban areas than rural ones. See Dorman (2003) 859.

The ZANU-PF-led government dismissed the NCA Draft as a tactic of the MDC and foreign governments to impose their own agendas on the Zimbabwean populace.⁸⁵⁰ Without the buy-in of the government, the NCA constitutional reform process suffered a natural death.

5.3.4 The Kariba Draft review process and devolution model

The constitution-making process halted when both the Constitutional Commission and NCA Drafts were rejected, resulting in a cessation of major constitution-making processes between 2001 and 2007. Political and socio-economic challenges worsened. For example, it is alleged that the ZANU-PF-led government tampered with the judiciary⁸⁵¹ and undermined democracy and free and fair elections.⁸⁵² Amin Kamete alleges that the national government attempted to regain control of opposition-run local governments by appointing caretakers and commissioners and postponing local government elections for councillors, contrary to legislative prescriptions.⁸⁵³ Furthermore, there were reports of gross human rights violations.⁸⁵⁴ News of the atrocities led to a global outcry for intervention in the Zimbabwean crisis.

The African Union (AU), in conjunction with the Southern African Development Community (SADC), assigned Thabo Mbeki, then President of South Africa, a mandate to facilitate an intra-party dialogue in Zimbabwe to address the prevailing challenges.⁸⁵⁵ Among the qualities

⁸⁵⁰ Dorman (2003) 855.

⁸⁵¹ It was reported that the then Chief Justice, Justice Antony Gubbay, was threatened with physical violence and forced to resign by the incumbent government. He was replaced by Godfrey Chidyaisiku, a judge sympathetic to ZANU-PF, who had led the Constitutional Commission, as discussed earlier. See Coltart (2008) 14.

⁸⁵² A few weeks before the presidential election, the opposition presidential candidate Morgan Tsvangirai was arrested on treason charges. Furthermore, David Coltart argues that before the March 2002 presidential elections, Parliament passed legislation that was used to undermine these elections. The Public Order and Security Act, 2002 (POSA) hindered the opposition's ability to hold meetings, while the General Laws Amendment Act, 2002 facilitated interference with elections; similarly, the Access to Information and Protection of Privacy Act, 2002 (AIPPA) intimidated the independent print media, enabling the government to shut it down if necessary. Under the AIPPA, foreign journalists were barred from working in Zimbabwe, a new system for licensing journalists was introduced, and the freedom of expression of the media was curtailed. The elections were marred by irregularities and condemned by several international organisations and governments. Some of the irregularities were facilitated by the amended General Laws Amendment Act. Coltart argues that a subsequent audit of election materials revealed that Mugabe had lost the election to Tsvangirai. See Coltart (2008) 14–15.

⁸⁵³ Commissioners and caretakers were appointed in urban local authorities following the dismissal or suspension of councillors. Their roles were not meant to be permanent, but in some instances their terms of office were continually renewed. See Kamete A Y 'The Return of the Jettisoned: ZANU-PF's Crack at "Re-Urbanising" in Harare' (2006) 32 *Journal of Southern African Studies* 261. See also *Stevenson v Minister of Local Government and National Housing and Ors* 2002 (1) ZLR 498 (S); *Chideya v Makwavarara and Others* HC 5604/06, HH 13-2007; *Christopher Magwenzi v Zvobgo v City of Harare* HH 80-2005, HC 12862/00.

⁸⁵⁴ By the end of 2004, agents of the state had reportedly murdered more than 600 MDC supporters. Coltart argues that thousands more were tortured, assaulted or harmed in other ways. See Coltart (2008) 15. See also Solidarity Peace Trust available at <http://solidaritypeacetrust.org/about/> (accessed 2 December 2021).

⁸⁵⁵ Dzinesa (2012) 5.

that made South Africa a suitable candidate for this role was its geographical and societal proximity to Zimbabwe;⁸⁵⁶ it was also argued that South Africa had the economic and political strength to bring about a timely resolution.⁸⁵⁷

In September 2007, Mbeki induced members of ZANU-PF and the two MDC formations⁸⁵⁸ to meet in Kariba to secretly produce a draft constitution.⁸⁵⁹ The Zimbabwe Lawyers for Human Rights (ZLHR) opined that the exercise was secretive because the participants sought to draft a constitution that protected their political interests.⁸⁶⁰ The negotiations culminated in the 2007 Kariba Draft Constitution. At the negotiating table were representatives from ZANU-PF and the MDC formations.⁸⁶¹ The Kariba Draft attempted to move away from the centralist Independence Constitution, as well as produce a conducive environment for peaceful elections in 2008. However, as far as devolution was concerned, it took a highly centralist approach.

5.3.4.1 Recognition of three levels of government

Clause 241 of the Kariba Draft proposed national, provincial and local levels of government.⁸⁶² The provincial council was made up of senators and National Assembly members whose constituencies fell within the province, as well as of all local government representatives from the province.⁸⁶³ A provincial governor appointed by the President was to be the head of the provincial council.⁸⁶⁴ The appointment of the provincial governor limited the autonomy of provinces because it meant that the appointee was accountable to the central government and not to the provincial constituency. The local government provisions in the Draft were verbatim

⁸⁵⁶ Lindgren B 'Power, Education, and Identity in Post-colonial Zimbabwe: The fate of King Lobengula of Matabeleland' (2002) 6 *African Sociological Review* 50.

⁸⁵⁷ Zimbabwe is South Africa's largest trading partner. See Mathye N S 'Has South Africa managed to coordinate SADC's response to Zimbabwe?' (2013) *Africa Institute of South Africa Policy Brief* 2.

⁸⁵⁸ The MDC's split into two formations was for reasons unrelated to devolution. See 'MDC split over senate polls' *News 24* 13 October 2005 available at <https://www.news24.com/news24/mdc-split-over-senate-polls-20051012> (accessed 2 December 2021).

⁸⁵⁹ Bond P & Sharife K 'Zimbabwe's clogged political drain and open diamond pipe' (2012) *Review of African Political Economy* 364.

⁸⁶⁰ Zimbabwe Lawyers for Human Rights (ZLHR) 'Kariba Draft unacceptable in terms of process and content' available at http://archive.kubatana.net/html/archive/hr/090703zldr.asp?sector=HR&year=2009&range_start=211 (accessed 31 July 2021).

⁸⁶¹ Patrick Chinamasa represented ZANU-PF, whilst the two secretary-generals of the MDC formations, Tendai Biti and Welshman Ncube, represented their respective factions. See Bond & Sharife (2012) 364.

⁸⁶² Clause 241 of the Kariba Draft Constitution, 2007 (hereafter Kariba Draft).

⁸⁶³ Clause 245(2) of the Kariba Draft.

⁸⁶⁴ Clause 247(1) of the Kariba Draft.

reproductions of the ones in the Constitutional Commission Draft and therefore will not be discussed further.⁸⁶⁵

5.3.4.2 Division of powers and functions

The Draft proposed the assignment of provincial powers and functions such as coordinating governmental activities, planning development, planning and implementing conservation measures, improving and managing natural resources, and encouraging provincial tourism and developing facilities for that purpose.⁸⁶⁶ Furthermore, clause 246(1)(e) proposed that Parliament could assign additional provincial powers and functions. However, clause 246(2)(b) proposed that provincial powers and functions could be exercised exclusively by the national government where it was ‘necessary in the interests of efficiency and good governance’. Therefore, provinces were assigned insignificant powers and functions. Furthermore, the national government could assume these powers and functions at any point.

Like both the Constitutional Commission Draft and the NCA Draft, the Kariba Draft did not list local government powers and functions. Clause 242(c) stipulated that the national government, through legislation, was responsible for the assignment of local government powers and functions.

5.3.4.3 Subnational revenue sources

The taxation provisions in the Draft are identical to those in the Constitutional Commission Draft and therefore will not be discussed.⁸⁶⁷ However, the Draft lacked the provisions regarding borrowing powers and fiscal transfers that were in the Constitutional Commission Draft.

Overall, the non-centrist model in the Kariba Draft was a hybrid of the amended Independence Constitution and the Constitutional Commission Draft; a majority of the non-centrist provisions in the Draft mirrored those in the Constitutional Commission Draft.⁸⁶⁸ This would appear to indicate that the ZANU-PF drafters were unwilling to depart from the Constitutional

⁸⁶⁵ Clause 242 of the Kariba Draft. See also clause 12(1)(2) of the Constitutional Commission Draft.

⁸⁶⁶ Clause 246(1)(a)-(d) of the Kariba Draft.

⁸⁶⁷ The Kariba Draft provided that both provincial and local government must have adequate finance and other resources to enable them to carry out their functions. Clause 222 gave Parliament total control of taxation powers – provinces and local government had no taxation powers unless authorised by national legislation. Clause 12(1)(3) of the Constitutional Commission Draft.

⁸⁶⁸ Dzinesa (2012) 5.

Commission Draft. The result was a proposal for a system of government that in actuality did not provide for devolution. The general populace rejected the Kariba Draft when it became public because it was considered an elitist document and a Constitutional Commission Draft under a different name.⁸⁶⁹ Inevitably, the Draft was shelved, as were its predecessors.

5.4 Towards the 2016 Constitution: The COPAC Draft process

5.4.1 Events leading to the COPAC review process

Harmonised elections were held in March 2008.⁸⁷⁰ Muna Ndulo reported that the elections took place under increased levels of human rights violations.⁸⁷¹ Shortly after the elections, it was announced that the MDC factions had emerged as the largest party in the House of Assembly.⁸⁷² However, the presidential results went unannounced for almost five weeks; when they were finally announced, the Zimbabwe Electoral Commission (ZEC) declared that none of the candidates had passed with the 50 + 1 per cent threshold needed to qualify as President.⁸⁷³ Therefore, a second round of presidential elections was scheduled for 27 June 2008 between Mugabe and Tsvangirai.⁸⁷⁴ Rhoda Howard-Hassman notes that torture, assaults, beatings, and gang rapes of MDC supporters continued in the period leading to the run-off elections, but that the police refused to investigate these incidents.⁸⁷⁵ Tsvangirai fled the country and shortly afterwards withdrew from the run-off, citing voter fraud and state-sanctioned violence against his supporters.⁸⁷⁶ Nevertheless, the ZEC proceeded with the elections, with Mugabe as the only presidential candidate; naturally, he won.⁸⁷⁷

⁸⁶⁹ Dzinesa (2012) 5.

⁸⁷⁰ The joint parliamentary, presidential and local government elections were made possible by constitutional amendments passed in September 2007 by the ZANU-PF-dominated parliament. See Ndulo (2010) 187.

⁸⁷¹ Ndulo (2010) 187.

⁸⁷² The MDC had 109 seats, and ZANU-PF, 97; one seat went to an independent candidate. See Official Results of 29 March 2008 Election, House of Assembly available at http://archive.kubatana.net/docs/elec/house_assem_results_080329.pdf (accessed 1 June 2021).

⁸⁷³ The presidential results were announced only on 2 May 2008. See Ndulo (2010) 187. Tsvangirai of the MDC had 47.87 per cent of the vote; Mugabe of the ZANU-PF had 43.24 per cent; and the independent candidates Simba Makoni and Langton Towungana had 8.31 per cent and 0.58 per cent, respectively. See Presidential elections available at <http://archive.kubatana.net/html/archive/elec/080329kubres.asp> (accessed 1 June 2021).

⁸⁷⁴ Ndulo (2010) 187.

⁸⁷⁵ At least 153 MDC supporters were reportedly killed between March and June 2008. See Howard-Hassman R E 'Mugabe's Zimbabwe 2000 – 2009 Massive Human Rights Violations and the Failure to Protect' (2010) 32 *Human Rights Quarterly* 905.

⁸⁷⁶ Bureau of Democracy, Human Rights and Labor Report (2009). See also Ndulo (2010) 187.

⁸⁷⁷ Howard-Hassman (2010) 905.

There was a public outcry following the announcement of the election outcome, with the international community refusing to acknowledge Mugabe's victory.⁸⁷⁸ The international community encouraged negotiations in the hopes of ending violence and creating a framework for a power-sharing arrangement between ZANU-PF and the two MDC splinter groups.⁸⁷⁹ Once again, Mbeki was appointed to facilitate the negotiations, given that he had worked with the parties previously in 2007.⁸⁸⁰ It was argued that Mbeki was assigned this role due to the symbiotic relationship between South Africa and Zimbabwe.⁸⁸¹

In September 2008, ZANU-PF and the two MDC factions signed an executive power-sharing agreement known as the Global Political Agreement (GPA).⁸⁸² The GPA made provision for the establishment of a Government of National Unity (GNU) comprising the three major political parties.⁸⁸³ Among other issues, the GPA acknowledged the need for a new constitution.⁸⁸⁴ Thus, a parliamentary body, the Constitutional Parliamentary Selection Committee (COPAC), was set up to spearhead the drafting of the new constitution.⁸⁸⁵

5.4.2 The COPAC Draft review process

COPAC was inaugurated in February 2009 and the constitution-making process began two months later.⁸⁸⁶ COPAC consisted of 25 representatives selected from the main three political parties, as well as representatives from civil society.⁸⁸⁷ Eleven members belonged to the MDC-T; 10 were ZANU-PF members; three were MDC-N members; and there was a representative of the traditional chiefs.⁸⁸⁸ Three co-chairpersons from each political party led the committee:

⁸⁷⁸ Dzinesa (2012) 7.

⁸⁷⁹ Dzinesa (2012) 7.

⁸⁸⁰ Dzinesa (2012) 5.

⁸⁸¹ How Many Zimbabweans Live in South Africa? The Numbers are Unreliable' 5 November 2013 available at <https://africacheck.org/fact-checks/reports/how-many-zimbabweans-live-south-africa-numbers-are-unreliable> (accessed 2 August 2021).

⁸⁸² Ndulo (2010) 187.

⁸⁸³ Dzinesa (2012) 1.

⁸⁸⁴ Dzinesa (2012) 5. The Lancaster House Constitution was amended in February 2009 to accommodate these transitional arrangements. See Norwegian Centre for Human Rights (2013) 14.

⁸⁸⁵ Dzinesa (2012) 5.

⁸⁸⁶ Onslow S 'Zimbabwe and the Political Transition' (2011) *London School of Economics and Political Science LSE* 3.

⁸⁸⁷ Chigwata (2018) 57.

⁸⁸⁸ Dzinesa (2012) 5. There was a change in name from MDC-M (MDC-Mutambara) to MDC-N (MDC-Ncube) when Mutambara stepped down as political leader and was replaced by Welshman Ncube. See Moyo H 'Political highlights of 2012' *Zimbabwe Independent* 21 December 2012 available at <https://www.theindependent.co.zw/2012/12/21/political-highlights-of-2012/> (accessed 31 July 2021).

Paul Mangwana of ZANU-PF, Douglas Mwonzora of the MDC-T, and Edward Mkhosi of the MDC-N.⁸⁸⁹

COPAC commenced the constitution-making process by consulting with domestic experts.⁸⁹⁰ It also consulted international experts through study tours funded by the UNDP. The UNDP had established a basket fund for foreign donors, money which COPAC used for research, travel and the appointment of technical advisors.⁸⁹¹ COPAC members participated in study tours in South Africa, Kenya and Tanzania, among other countries. In an interview, Mwonzora explained that COPAC chose South Africa because it wanted to learn how the ANC and NP had drafted a constitution ‘that turned out to be one of the best in the world’ despite their political differences.⁸⁹² Interviews with Mwonzora and Mangwana revealed that COPAC benefited immensely from the South African study tour, particularly so from the expertise of Cyril Ramaphosa and Roelf Meyer, whom its delegation met in Johannesburg in June 2009.⁸⁹³

In July 2009, COPAC held its first stakeholders’ meeting, where it sought input from various stakeholders.⁸⁹⁴ Civil society groups such as the National Association of Non-Governmental Organisations (NANGO) and Crisis Coalition participated in the process.⁸⁹⁵ The NCA boycotted the COPAC process, arguing it had been hijacked by politicians.⁸⁹⁶ This time around, unlike with the NCA constitution-making process, the NCA and two MDC factions were on opposite sides.⁸⁹⁷ COPAC also held provincial outreach programmes to learn what people expected of the new constitution.⁸⁹⁸ The information gathered in the outreach was recorded in

⁸⁸⁹ Dzinesa (2012) 5.

⁸⁹⁰ COPAC consulted with Reginald Austin, Ben Hlatshwayo and Joyce Kazembe. See COPAC’s Final Narrative Report to Parliament, 7 February 2013 11.

⁸⁹¹ Interview with COPAC Co-chairperson Douglas Mwonzora, Harare, 15 November 2019.

⁸⁹² Mwonzora (2019).

⁸⁹³ As was discussed in Chapter 3, in the South African constitution review process, Ramaphosa was the ANC’s chief negotiator and Roelf Meyer, the National Party’s chief negotiator. This points to why COPAC chose to meet with these individuals rather than any other political leaders. See Mwonzora (2019). See also Interview with COPAC Co-chairperson Paul Mangwana, Harare, 15 November 2019.

⁸⁹⁴ Guzura T ‘Constitution Making under Governments of National Unity: The Zimbabwean Case 2009–2013’ (2016) 5 *Journal of Politics & Governance* 46.

⁸⁹⁵ ‘COPAC cedes to NGO demands’ *The Zimbabwean* 21 October 2012 available at <https://www.thezimbabwean.co/2012/10/copac-cedes-to-ngo-demands/> (accessed 1 June 2021).

⁸⁹⁶ Guzura (2016) 46.

⁸⁹⁷ The NCA proposed an alternative, people-driven process under the banner ‘Take charge’. See Dzinesa (2012) 6.

⁸⁹⁸ COPAC’s Final Narrative Report to Parliament, 7 February 2013 11.

two National Statistics Reports (NSRs)⁸⁹⁹ from which COPAC technical teams extracted constitutional principles.⁹⁰⁰

COPAC visited Kenya between late 2009 and early 2010, just before the adoption of the Kenyan Constitution.⁹⁰¹ It met with the then vice president, Kalonzo Musyoka, Prime Minister Raila Odinga, and the CoE which had drafted the 2010 Constitution of Kenya.⁹⁰² Kenya's devolution model was an attractive option because the Constitution was drafted after Kenya's post-election violence and under a GNU, as discussed in Chapter 4; similarly, COPAC was established after post-election violence and under a GNU.⁹⁰³ The Kenyan model thus potentially held solutions to challenges that both countries faced.

Lastly, COPAC conducted study tours in Tanzania.⁹⁰⁴ COPAC's Chief Rapporteur, Rejoice Ngwenya, said that COPAC disfavoured the Tanzanian devolution model particularly the autonomous position of Zanzibar vis-a-vis the unitary mainland.⁹⁰⁵ Zanzibar's status and the historical reasons for it held little relevance for Zimbabwe.⁹⁰⁶ ZANU-PF's argument against the Tanzanian model centred upon its being akin to federalism, a system which was regarded as engendering disunity and secessionism.⁹⁰⁷ ZANU-PF's fears in this regard were fuelled by a secessionist movement known as Mthwakazi.⁹⁰⁸

In addition to the resources gathered from the study tours, COPAC referred to the Kariba Draft because the GPA mandated it to use it as research material to be harmonised with subsequent constitutional provisions.⁹⁰⁹ However, the COPAC harmonisation process was meant to be

⁸⁹⁹ National Statistics Reports Version 1 and Version 2.

⁹⁰⁰ The role of the technical committee was to give effect to what the people had proposed. The technical team was also responsible for identifying any other gaps in information. Technical experts were chosen from the three main political parties, together with representatives from the Council of Chiefs. See COPAC National Statistical Report Version 2 6.

⁹⁰¹ Mwonzora (2019).

⁹⁰² Mwonzora (2019).

⁹⁰³ Interview with COPAC Chief Rapporteur Rejoice Ngwenya, Harare, 3 December 2019.

⁹⁰⁴ Ngwenya (2019).

⁹⁰⁵ Ngwenya (2019).

⁹⁰⁶ Mainland Tanzania (formerly Tanganyika) and Zanzibar existed as two separate states until 1964 when they united to form one country. See Bierwagen R M & Peter C M 'Administration of Justice in Tanzania and Zanzibar: A Comparison of Two Judicial Systems in One Country' (1989) 38 *The International and Comparative Law Quarterly* 395.

⁹⁰⁷ Sims B M *Conceptualising Local Government: Local Perceptions on Devolution and Participation in Zimbabwe* (2014) 12.

⁹⁰⁸ Mthwakazi advocated for the establishment of a separate Ndebele state in the Matabeleland provinces. The movement was strongest in provinces where Ndebele was the main spoken language. See Chigwata (2016) 82.

⁹⁰⁹ Dzinesa (2012) 5.

different from the Kenyan harmonisation process discussed in Chapter 4. Mwonzora explained that the Kariba Draft was relegated to the status of research material; drafters used the wording of concepts in the Kariba Draft if they were more acceptable, but the content of the Kariba Draft was not meant to affect the COPAC Draft's provisions.⁹¹⁰ COPAC also used the knowledge gathered from the study tours, outreaches and other materials to draft a new constitution. Lastly, it was guided by constitutional principles set out in the GPA.⁹¹¹

The first COPAC Draft was leaked in the *Herald* newspaper on 12 February 2012.⁹¹² Mwonzora and the principal drafter, Moses Chinhengo, confirmed that the leaked Draft was indeed an incomplete copy compiled exclusively by the technical team under the instructions of COPAC.⁹¹³ The aim of the leaked Draft was to serve as a template for political parties to comment on.⁹¹⁴

5.4.3 The devolution model of the leaked COPAC Draft

5.4.3.1 Recognition of three levels of government

Clause 5(2) of the COPAC Draft proposed the recognition of three 'spheres' of government, wording which moved away from the language used in the Independence Constitution or the preceding constitutional drafts. Furthermore, the Draft proposed an egalitarian relationship between the spheres because the term 'interrelated' was a defining feature of their relationship.⁹¹⁵ Thus, the use of the words 'sphere' and 'interrelated' is evidence of the strong influence of the South African Constitution, given that the latter uses the same terminology.⁹¹⁶

⁹¹⁰ Mwonzora (2019).

⁹¹¹ The constitutional principles relevant to this thesis are principles 11, 12, 19 and 21, which relate to the recognition of decentralisation, devolution of power, equitable sharing of revenue raised nationally, and the management of public finances. See COPAC National Statistical Report Version 2 144.

⁹¹² Shoko argues that the leaked draft was stolen from COPAC's computers. However, the whereabouts of the drafters was not publicly known; only a handful of people in COPAC knew of them. The purpose of the secrecy was to enable drafters to work on the draft with little to no interference, political or otherwise. See Shoko J 'Zimbabwe: Tug of War over Leaked Draft Constitution' *The Africa Report* 7 May 2012 available at <https://www.theafricareport.com/7213/zimbabwe-tug-of-war-over-leaked-draft-constitution/> (accessed 31 July 2021).

⁹¹³ Mwonzora (2019). See interview with COPAC principal drafter Judge Moses Chinhengo, Harare, 11 November 2019.

⁹¹⁴ Chinhengo (2019).

⁹¹⁵ Clause 5(2) of the COPAC Draft Constitution of Zimbabwe, 12 February 2012 (Leaked COPAC Draft).

⁹¹⁶ Section 40(1) of the Constitution of South Africa.

5.4.3.2 Division of powers and functions

The Draft proposed that government functions and responsibilities be devolved to provinces.⁹¹⁷ Furthermore, clause 5(5) proposed that the legislative authority of provinces was to vest in provincial assemblies. However, the actual provisions regulating the role of the provincial governor and functions of provinces were set aside to be finalised at a later period because they were deemed contentious issues.⁹¹⁸ Therefore, when the Draft was leaked, provincial functions and responsibilities had not yet been formulated.⁹¹⁹

The Draft proposed that government functions and responsibilities be devolved to local government.⁹²⁰ In addition, clause 5(5) provided that local legislative powers were to be vested in local councils. As with provinces, the functional areas of local government's legislative competences were not listed. Nevertheless, local government matters were not as contentious as provincial ones. The second NSR reported that the aim of the technical team was to have a schedule in the constitution that explicitly outlined local government competences, functions and responsibilities.⁹²¹ Therefore, it is probable that the COPAC Draft was leaked before the drafters had formulated local government powers and functions. In the light of the above, it is problematic to assess whether the South African Constitution influenced the assignment of subnational powers provisions in the Draft, seeing as the Draft was incomplete.

The conflicting laws provisions were influenced by the South African Constitution as evidenced by similar text in clause 5(6)(3) of the Draft and section 146(2)(c) of the South African Constitution in the table below.

Table 12: Conflicting laws provisions in the leaked COPAC Draft and South African Constitution

Leaked COPAC Draft	South African Constitution
Clause 5(6)(3): The conditions referred to in subsection (2)(a) are – (a) the national legislation provides for a <i>matter that cannot be regulated effectively</i>	Section 146(2): National legislation that applies <i>uniformly with regard to the country as a whole prevails over provincial</i>

⁹¹⁷ Clause 5(1) of the Leaked COPAC Draft.

⁹¹⁸ COPAC National Statistical Report Version 2 137.

⁹¹⁹ Chapter 4, on provincial and local government, had not yet been written when the COPAC Draft was leaked.

⁹²⁰ Clause 5(1) of the Leaked COPAC Draft.

⁹²¹ COPAC National Statistical Report Version 2 34.

<p><i>by legislation enacted by the individual provincial governments;</i></p> <p>(b) the national legislation provides for a matter which, to be dealt with effectively, require <i>uniformity across Zimbabwe, and the national legislation provides that uniformity across Zimbabwe, and the national legislation provides that uniformity</i> by establishing <i>norms standards or national policies;</i></p> <p>(c) the national legislation is necessary for—</p> <p>(i) <i>the maintenance of national security;</i></p> <p>(ii) <i>the maintenance of economic unity;</i></p> <p>(iii) <i>the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p> <p>(iv) <i>the promotion of economic activity across the boundaries of the provinces;</i></p> <p>(v) <i>the promotion of equal opportunity of equal access to government services; or</i></p> <p>(vi) <i>the protection of the environment.</i></p>	<p><i>legislation if any of the following conditions is met:</i></p> <p>(a) The national legislation deals with a <i>matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.</i></p> <p>(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—</p> <p>(i) <i>norms and standards;</i></p> <p>(ii) frameworks; or</p> <p>(iii) <i>national policies.</i></p> <p>(c) The national legislation is necessary for—</p> <p>(i) <i>the maintenance of national security;</i></p> <p>(ii) <i>the maintenance of economic unity;</i></p> <p>(iii) <i>the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p> <p>(iv) <i>the promotion of economic activities across provincial boundaries;</i></p> <p>(v) <i>the promotion of equal opportunity or equal access to government services; or</i></p> <p>(vi) <i>the protection of the environment.</i></p>
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5.4.3.3 Own-revenue sources

The subnational taxation powers in the Draft were vague and unclear. Clause 2(2) was the sole provision that referred to subnational taxation powers. It provided that taxes could be levied only if specified in the Constitution or in national or provincial legislation. Furthermore, clause 2(2) did not indicate whether the local government had taxation powers.⁹²² Lastly, the Draft did not propose borrowing powers for provincial or local government.

⁹²² The second NSR reported that the technical team recommended that local government have the authority to formulate revenue-generating policies. It is unclear why that recommendation did not appear in the leaked COPAC Draft. See COPAC National Statistical Report Version 2 34.

5.4.3.4 Fiscal transfers

a) Equitable share

Clause 16(4)(1)(a) proposed that national legislation should provide for the equitable division of national revenue between the three spheres. The national government was required to consult provinces, local government and the Fiscal Commission before the Act referred to above was enacted.⁹²³ This emulated the South African Constitution, which stipulates that national legislation must provide for the equitable division of revenue raised nationally among the three spheres of government.⁹²⁴ In addition, the South African provisions require consultation with provinces, organised local government and the FFC before the enactment of the Act.⁹²⁵ Table 13 below compares the equitable-share provisions in the Draft and South African Constitution.

Table 13: Equitable share provisions in the leaked COPAC Draft and South African Constitution

Devolution principle	Leaked COPAC Draft	South African Constitution
Intergovernmental consultation	Clause 16(4)(2): The Act referred to in subsection (1) must be enacted after <i>consultation with provincial government's, local authorities and the Fiscal Commission</i> , and must take into account, amongst other factors-	Section 214(2): The Act referred to in subsection (1) may be enacted only after the <i>provincial governments, organised local government and the Financial and Fiscal Commission have been consulted</i> , and any recommendations of the Commission have been considered, and must take into account—
Factors to be taken into account before the sharing of revenue	Clause 16(4)(2)(a) <i>the national interest;</i> (b) <i>any provision that must be made in respect of the national debts and other national obligations;</i>	Section 214(2)(a) <i>the national interest;</i> (b) <i>any provision that must be made in respect of the national debt and other national obligations;</i>

⁹²³ Clause 16(4)(2) of the Leaked COPAC Draft.

⁹²⁴ Section 214(1)(a) of the Constitution of South Africa.

⁹²⁵ Section 214(2) of the Constitution of South Africa.

	<p><i>(c) the needs and interest of the central government, determined by objective criteria</i></p> <p><i>(d) the need to ensure that provincial governments and local authorities are able to provide basic services and perform the functions allocated to them;</i></p> <p><i>(e) the fiscal capacity and efficiency of provincial governments and local authorities;</i></p> <p><i>(f) developmental and other needs of provincial governments and local authorities;</i></p> <p><i>(g) economic disparities within and between Provinces;</i></p> <p><i>(h) obligations of provincial governments and local authorities</i></p> <p><i>(i) the desirability of stable and predictable allocations of revenue;</i></p> <p><i>(j) the need for flexibility in responding to emerges and other temporary needs;</i> and the act must not be enacted unless there has been consultation with the provincial governments and local authorities and with the Financial and Fiscal Commission, any recommendations made by those bodies have been properly considered.</p>	<p><i>(c) the needs and interests of the national government, determined by objective criteria;</i></p> <p><i>(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;</i></p> <p><i>(e) the fiscal capacity and efficiency of the provinces and municipalities;</i></p> <p><i>(f) developmental and other needs of provinces, local government and municipalities;</i></p> <p><i>(g) economic disparities within and among the provinces;</i></p> <p><i>(h) obligations of the provinces and municipalities in terms of national legislation;</i></p> <p><i>(i) the desirability of stable and predictable allocations of revenue shares; and</i></p> <p><i>(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.</i></p>
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The provisions in the South African Constitution and those in the Draft are closely alike, as the italicised text in the table above indicates. In addition, the factors that have to be taken into account in the equitable sharing of revenue are identical.

b) Financial and Fiscal Commission

The Draft proposed the establishment of an FFC to facilitate the equitable sharing of revenue between the three spheres.⁹²⁶ The FFC's main function was to supervise the division of revenue between national, provincial and local governments.⁹²⁷ The South African Constitution provides for the establishment of a similar financial commission and under the same name.⁹²⁸ As discussed in Chapter 3, the main functions of the South African FFC are to consult and make recommendations before an Act regulating the division of revenue between the three spheres can be enacted.⁹²⁹ However, unlike the FFC contained in the Draft, the South African FFC is described as an impartial and independent commission subject only to the constitution and law.⁹³⁰

5.4.3.5 Cooperative government and intergovernmental relations

The Draft borrowed heavily from the South African cooperative government model, as shown in Table 14 below.

Table 14: Cooperative government and intergovernmental relations provisions in the leaked COPAC Draft and South African Constitution

Devolution principle	Leaked COPAC Draft	South African Constitution
Principles of cooperative government	Clause 5(4)(1): All spheres of government and all institutions of State within each sphere must— <i>(a) ensure good governance by being effective, transparent, accountable and institutionally coherent;</i> <i>(b) be loyal to Zimbabwe and its people;</i> <i>(c) respect the constitutional status, institutions, powers and functions of government in the other spheres;</i>	Section 41(1): All spheres of government and all organs of state within each sphere must— (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; <i>(c) provide effective, transparent, accountable and coherent</i> government for the Republic as a whole;

⁹²⁶ Clause 16(10) of the Leaked COPAC Draft.

⁹²⁷ Clause 16(10)(2)(a) of the Leaked COPAC Draft.

⁹²⁸ Section 220 of the Constitution of South Africa.

⁹²⁹ Section 214(2) of the Constitution of South Africa.

⁹³⁰ Section 220(2) of the Constitution of South Africa.

	<p><i>(d) not assume any function except those conferred on them in accordance with the Constitution;</i></p> <p><i>(e) exercise perform their functions in a manner that does not encroach on the geographical functional or institutional integrity of government in another sphere;</i></p> <p><i>(f) co-operate with one another in mutual trust and good faith by-</i></p> <p><i>(i) assisting and supporting one another;</i></p> <p><i>(ii) informing one another of, and consulting one another on, matters of common interest;</i></p> <p><i>(iii) harmonising and coordinating their actions and legislation;</i></p> <p><i>(iv) adhering to agreed procedures;</i></p> <p><i>and</i></p> <p><i>(v) avoiding legal proceedings against one another.</i></p>	<p><i>(d) be loyal to the Constitution, the Republic and its people;</i></p> <p><i>(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;</i></p> <p><i>(f) not assume any power or function except those conferred on them in terms of the Constitution;</i></p> <p><i>(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and</i></p> <p><i>(h) co-operate with one another in mutual trust and good faith by—</i></p> <p><i>(i) fostering friendly relations;</i></p> <p><i>(ii) assisting and supporting one another;</i></p> <p><i>(iii) informing one another of, and consulting one another on, matters of common interest;</i></p> <p><i>(iv) co-ordinating their actions and legislation with one another;</i></p> <p><i>(v) adhering to agreed procedures; and</i></p> <p><i>(vi) avoiding legal proceedings against one another.</i></p>
<p>Structures and institutions for cooperative government</p>	<p><i>Clause 5(4)(2): An act of parliament must-</i></p> <p><i>(a) establish or provide for structures and institutions to promote and facilitate relations between the spheres of government;</i></p> <p><i>(b) provide for appropriate mechanisms and procedures to facilitate settlement of disputes between spheres of government.</i></p>	<p><i>Section 41(2): An Act of Parliament must—</i></p> <p><i>(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and</i></p> <p><i>(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.</i></p>

As can be observed from the table above, the provisions providing for the principles as well as structures and institutions of cooperative government in the Draft and South African Constitution are verbatim replicas of each other.

In summary, the analysis above yields clear evidence of the strong South African influence on the Draft. Provisions regarding conflicting laws, equitable sharing of nationally raised revenue, cooperative government and intergovernmental relations are identical to those in the South African Constitution. Furthermore, the Draft used similar terminology as the South African Constitution, such as ‘interrelated’ and ‘spheres’. Further evidence of the South African influence is the establishment of a financial commission that was envisioned as performing essentially the same functions to the one in South Africa. In addition, the fact that both fiscal commissions had the same name is an example of how the Draft borrowed an institution found in the South African Constitution.

Crozier, a COPAC principal drafter, explained that while the Draft was the outcome of a homegrown process inasmuch as the drafters were Zimbabwean, it was based largely on foreign provisions.⁹³¹ He argued that the South African provisions were attractive because they were in simple language.⁹³² The COPAC drafters wanted to incorporate simple language in the new constitution because ordinary Zimbabweans struggled to understand the Independence Constitution.⁹³³

Despite attending the Kenyan study tours, COPAC drafters at this stage did not borrow any devolution principles that originated in Kenya. The drafters argued that the South African devolution model had been in operation for longer and there was evidence that it worked.⁹³⁴ According to Mangwana, ‘South Africa was a perfect example of what was functioning already’.⁹³⁵ By contrast, when the leaked Draft was formulated, Kenya had just adopted its new Constitution, with the implementation of devolution provisions commencing only in 2013. The Kenyan devolution provisions had not been tested yet, and thus there was no evidence that they worked in practice.

⁹³¹ Crozier (2019).

⁹³² Crozier (2019).

⁹³³ Crozier (2019).

⁹³⁴ Ngwenya (2019).

⁹³⁵ Mangwana (2019).

5.4.4 The first official COPAC Draft process

There was an outcry from ZANU-PF and its associated organisations when the Draft was leaked to the public. In a newspaper article, Mangwana argued that at least 70 per cent of its content did not come from the outreach programme but was ‘the unilateral creation of COPAC drafters’.⁹³⁶ Janet Shoko contends that ZANU-PF hardliners wanted the constitution-making process to be abandoned on the basis that the weak presidential executive powers and limitation of presidential terms were targeted at Mugabe.⁹³⁷ Shoko argues that the leaked Draft was too democratic for the incumbent government.⁹³⁸ Conversely, both of the MDC factions were pleased with the Draft for the very same reasons that ZANU-PF was not.⁹³⁹ Unhappy with the COPAC drafters’ work, ZANU-PF became more involved in the constitution-making process.⁹⁴⁰ Similarly, both the MDC-T and MDC-N actively engaged in the exercise so as to protect their interests. The result was the first COPAC Draft, released in April 2012.

5.4.5 The devolution model of the first official COPAC Draft

South African influences carried through in the first COPAC Draft, with the exception of some changes in respect of levels of government and the equitable-sharing provisions.

5.4.5.1 Levels of government

The Draft shifted from using ‘sphere’ to ‘tier’ when referring to the relations between levels of government.⁹⁴¹ The rest of clause 5(2) was unchanged. Mwonozora explained that the COPAC drafters changed the wording to ‘tiers’ because ZANU-PF had rejected the term ‘sphere’ as it signified some degree of subnational autonomy.⁹⁴² Priscilla Madzonga, a COPAC principal drafter, further explained that the drafters used the term ‘tiers’ because it referred to a hierarchy

⁹³⁶ ‘Copac Submits Draft Constitution’ *The Herald* 25 April 2012 available at <https://www.herald.co.zw/copac-submits-draft-constitution/> (accessed 1 August 2021). Some ZANU-PF supporters and officials called for the three principal drafters to be fired. See ‘Leaked Draft of Zimbabwe’s new Constitution’ *Nehanda Radio* 14 February 2012 available at <https://nehandaradio.com/2012/02/14/leaked-draft-of-zimbabwes-new-constitution/> (accessed 1 August 2021).

⁹³⁷ Shoko (2012) 1. See Clause 6(4)(2) of the leaked COPAC Draft: ‘[A] person is disqualified for election as President if he or she has already held office as President for one or more periods, whether continuous or not, amounting to ten years.’

⁹³⁸ Shoko (2012) 1.

⁹³⁹ Mwonozora (2019).

⁹⁴⁰ Ngwenya (2019).

⁹⁴¹ Section 5(2) of the 1st COPAC Draft, 2012.

⁹⁴² Mwonozora (2019).

between the levels of government.⁹⁴³ The opposition in turn agreed to the use of ‘tier’ in exchange for the inclusion of other political rights in the constitution.⁹⁴⁴

5.4.5.2 Equitable share

In addition to the equitable-share provisions in the leaked Draft, the first official Draft introduced a new concept – the minimum percentage. Clause 17(4)(3) proposed that ‘[n]ot less than fifteen per cent of the national revenues raised in any financial year must be allocated to the provinces and local authorities as their share in that year’. Clause 17(4)(3) was copied verbatim from article 203(2) of the Constitution of Kenya. Therefore, it can be concluded that the Kenyan Constitution informed the minimum percentage equitable-share provisions in the Draft. The introduction of the minimum percentage from the Constitution of Kenya was the first time the Zimbabwean constitution-making process had been influenced by the Kenyan devolution model.

In sum, there were limited changes to the first official Draft because the incumbent government directed most of its efforts to provisions that curtailed presidential executive powers.

5.4.6 The devolution model of the second COPAC Draft

The first official Draft triggered disagreement among political parties. One of the most contentious issues relevant to this study was devolution. ZANU-PF threatened to derail the entire constitution-making process because it alleged that devolution was a ‘foreign-sponsored’ idea which was being promoted by the MDC parties.⁹⁴⁵ The Management Committee, composed of GPA negotiators, COPAC co-chairpersons, and the Minister of Constitutional and Parliamentary Affairs, intervened so that the process could proceed.⁹⁴⁶ The Management Committee successfully released the second Draft three months after the first Draft had been released.⁹⁴⁷ The question arises as to what South African-inspired provisions persisted into the second Draft or emerged for the first time.

⁹⁴³ Madzonga (2019).

⁹⁴⁴ Mwonzora (2019).

⁹⁴⁵ ‘COPAC Submits Draft Constitution’ *The Herald* 25 April 2012 available at <https://www.herald.co.zw/copac-submits-draft-constitution/> (accessed 1 August 2021).

⁹⁴⁶ Thus, the Management Committee became the driver of the COPAC constitution-making process. See Zembe & Masunda (2015) 30.

⁹⁴⁷ ‘COPAC’ available at <https://www.pindula.co.zw/COPAC> (accessed 1 August 2021).

5.4.6.1 Relationship between the levels of government

The Draft continued the pattern of emphasising the hierarchy between the three levels of government. For example, the drafters removed the term, borrowed from the South African Constitution, which described the three tiers of government as ‘interrelated’.⁹⁴⁸ In an interview with Mudzonga, it emerged that the Management Committee had instructed that the word ‘interrelated’ be removed because subnational governments were not meant to be autonomous.⁹⁴⁹ Therefore, the second Draft emphasised the hierarchy among the levels of government with the national level at the top and provinces and local government at the bottom.

5.4.6.2 Division of powers and functions

The Draft removed the provision which stipulated that provincial legislative powers were vested in provincial councils. With provincial legislative powers removed, the provision regulating conflicting laws between the national and provincial government fell away. The Draft vested all legislative authority in the national government.⁹⁵⁰ However, clause 6(19) provided that Parliament could delegate legislative powers to the devolved units. Furthermore, the provincial and local government chapter (Chapter 14), which was set aside to be drafted at a later time, was fleshed out in the Draft. Clause 14(1) of Chapter 14 provided 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’.

Therefore, the Draft did not list the actual provincial powers and functions. Parliament had the responsibility to devolve powers to the devolved units at a later, unspecified time and determine when it was appropriate to do so. Furthermore, it was up to the national government to dictate which powers and functions it chose to devolve. By watering down the powers of subnational governments, the leaked Draft significantly curtailed the South African influence.

The Draft introduced a provision which stipulated that the local government was responsible for the regulation of local affairs. Clause 14(13)(1) provided that the local government had ‘***the right to govern, on its own initiative, the local affairs***’ of the people within the area for which

⁹⁴⁸ Clause 5 of the 1st COPAC Draft.

⁹⁴⁹ Madzonga (2019).

⁹⁵⁰ Clause 6(15) of the 2nd COPAC Draft.

it has been established'. The italicised text is a verbatim reproduction of section 151(3) of the South African Constitution, and thus points to the influence of the South African Constitution as far as the status of local government powers and functions is concerned, this text was inchoate during the previous COPAC drafts. However, the second COPAC Draft did not list the actual local government functional areas. Clause 4(13)(2)(a) empowered Parliament to confer functions on local government, including powers to make by-laws, regulations or rules for the effective administration. The popularity of the MDC in urban local government, as discussed above in section 5.3, deterred ZANU-PF drafters from constitutionally protecting local government powers and functions. The ruling party had already lost control of urban areas, and thus feared that constitutional protection of local government would further strengthen the opposition stronghold in urban areas and enable it to challenge the central government.⁹⁵¹

5.4.6.3 Own-revenue sources

Both factions of the MDC argued that equipping provinces with taxation powers had the potential to equalise development in all 10 provinces, particularly in those which had been neglected by ZANU-PF, such as Matabeleland North, Matabeleland South and the Midlands.⁹⁵² However, ZANU-PF disagreed. The result was that the Draft did not assign taxation powers to provinces. However, clause 14(1), discussed above, may be interpreted to mean that when devolving powers and functions to devolved units, Parliament could assign provincial taxation powers. Unlike the case with provinces, the Draft proposed that local government levy rates and taxes and raise sufficient revenue subject to national legislation.⁹⁵³

5.4.6.4 Equitable share

The concept that all subnational units are entitled to receive at least 15 per cent of the national revenue raised in any financial year was borrowed from the Kenyan Constitution and carried through in the Draft; however, the amount was reduced to five per cent.⁹⁵⁴ Both of the MDC political parties, especially the MDC-N, which initially wanted stronger fiscal devolution, were

⁹⁵¹ Muchadenyuka D & Williams J J 'Social Change: Urban Governance and Urbanization in Zimbabwe' (2016) 27 *Springer* 262.

⁹⁵² Sims (2014) 12. See also Nhede N T 'Devolution of Power and Effective Governance: The Zimbabwean Constitutional Debate' (2013) 6 *African Journal of Public Affairs* (2013) 33.

⁹⁵³ Clause 14(13)(2)(b) of the 2nd COPAC Draft.

⁹⁵⁴ Clause 17(4)(3) of the 2nd COPAC Draft.

unhappy with this change.⁹⁵⁵ However, ZANU-PF was adamant that 15 per cent was too steep, considering Zimbabwe's economic challenges.⁹⁵⁶ ZANU-PF argued that if the economy improved, the percentage could be raised. Furthermore, the Draft removed the requirement for intergovernmental consultation before the enactment of national legislation regulating equitable sharing of revenue; likewise, the FFC was discarded.

5.4.6.5 Cooperative government and intergovernmental relations

The Draft proposed the concept of cooperative government to ensure the preservation of harmony, 'peace and national unity and [the] indivisibility of Zimbabwe'.⁹⁵⁷ Clause 14(2)(1)(c) proposed that provinces and local government should exercise their functions in a manner that did not encroach on the geographical, functional or institutional integrity of other levels of government. Additionally, provinces and local government were to cooperate by consulting on matters of common interest, as well as harmonising and coordinating their activities.⁹⁵⁸ The concept of cooperative government was borrowed from the South African Constitution, given that its cooperative government principles are almost identical to the provisions in the Draft.⁹⁵⁹

To sum up, the Draft reflected the strong influence of the South African Constitution. The concept of the constitutional entrenchment of local government taxation powers and the dependency of provincial taxation on national legislation are also compelling evidence of South African influence. Further evidence is found in textual similarities, for example in phraseology concerning 'the right to govern' of local government⁹⁶⁰ and in the provisions on cooperative government. Nonetheless, a strong centralising trend was evident in the Draft, mainly because ZANU-PF fought to neutralise strong devolution provisions.⁹⁶¹ Ngwenya attributed the recentralisation partly to the reluctance of the MDC-N leader, Welshman Ncube, to advocate for devolution as strongly as he did in the earlier drafts.⁹⁶² Ngwenya claims that Ncube stepped back from the constitution-making process once he realised that local government was entrenched and would receive an equitable share of revenue.⁹⁶³ The recentralisation is evident

⁹⁵⁵ Interview with COPAC technical advisor Kucaca Phulu, Harare, 4 December 2019.

⁹⁵⁶ Phulu (2019).

⁹⁵⁷ Clause 14(2)(1)(e) of the 2nd COPAC Draft.

⁹⁵⁸ Clause 14(2)(1)(d) of the 2nd COPAC Draft.

⁹⁵⁹ Section 41(1)(g) of the Constitution of South Africa.

⁹⁶⁰ Clause 14(13)(1) of the 2nd COPAC Draft.

⁹⁶¹ Phulu (2019).

⁹⁶² Ngwenya (2019).

⁹⁶³ Ngwenya (2019).

in changes to provisions regulating the nature of the relationship between levels of government and in the removal of provincial legislative powers and the role of the FFC. Thus, the Draft marked a significant move away from the South African Constitution.

5.5 Devolution in the 2013 Constitution

After the second COPAC Draft was released, ZANU-PF proposed changes to the Draft, only one of which was in relation to the devolution model. The proposal was to allocate intergovernmental grants to local authorities only, thus removing provinces from the equation.⁹⁶⁴ Both MDC factions rejected the proposals. They insisted that political parties should not make any amendments since all party representatives had approved the Draft after in-depth negotiation and consultation with the Management Committee and their party-political principals.⁹⁶⁵

The Draft was presented at the second All Stakeholders Conference in October 2012, at which political parties, Parliament and civil society were represented.⁹⁶⁶ All stakeholders were given an opportunity to contribute.⁹⁶⁷ However, the Institute for Security Studies describes the conference as a political platform where ZANU-PF delegates, reciting from prepared scripts, attempted to push through the party's preferred changes.⁹⁶⁸ Afterwards, the technical teams compiled thematic reports on the conference for the final Draft. Another Draft was released in January 2013 and presented to Parliament, where no significant changes were made. A constitutional referendum was then held in March 2013. Here, a draft constitution was approved by 94.5 per cent of voters, thereby becoming the Constitution of Zimbabwe, 2013.⁹⁶⁹

⁹⁶⁴ Clause 16(4) of the 2nd COPAC Draft with comments from ZANU-PF.

⁹⁶⁵ Mambo E 'Zanu PF campaigns for "No" vote' *The Independent* 26 October 2012 available at <https://www.theindependent.co.zw/2012/10/26/zanu-pf-campaigns-for-no-vote/> (accessed 1 August 2021).

⁹⁶⁶ There were 246 delegates from political parties, 284 from Parliament, and 570 from civil society. See 'COPAC in U-turn Over Civic Participation at All Stakeholders Conference' *The Zimbabwean* 26 October 2012 available at <https://www.thezimbabwean.co/2012/09/copac-in-u-turn-over/> (accessed 1 August 2021).

⁹⁶⁷ Ndlovu R 'Zimbabwe's Constitution Process a Battleground' *Mail & Guardian* 28 September 2012 available at <https://mg.co.za/article/2012-09-28-00-constitution-process-a-battleground/> (accessed 1 August 2021).

⁹⁶⁸ ZANU-PF and the two MDC factions failed to agree on the key constitutional issues raised by ZANU-PF, such as the reduction of powers of the presidency, security-sector reform, and the selection of presidential running mates during elections. See 'Zimbabwe: Second All Stakeholders Conference': Historic Breakthrough or False Dawn?' *Institute for Security Studies* available at <https://issafrica.org/research/publication-archives/cpra-daily-briefing/zimbabwe-second-all-stakeholders-conference-historic-breakthrough-or-false-dawn> (accessed 31 July 2021).

⁹⁶⁹ 'Zimbabwe Approves New Constitution' *BBC* 19 March 2013 available at <https://www.bbc.com/news/world-africa-21845444> (accessed 2 August 2021).

The 2013 Constitution entrenches a devolution model that has provisions that were influenced by the South African Constitution. There is evidence of influence by the Constitution of Kenya, but the extent of this influence is very limited. The devolution provisions were developed across the Constitutional Commission, NCA, Kariba, leaked COPAC, and the first and second official COPAC Drafts. The devolution model in the Zimbabwean Constitution is a watered-down version of the South African devolution model. The devolution model is also similar to the Kariba model. This is significant because it shows that the constitutional review process was not a linear process.

5.5.1 Recognition of three levels of government

The Constitution of Zimbabwe entrenches three ‘tiers’ of government, namely the national government, provincial government (and metropolitan councils), and local government.⁹⁷⁰ This arrangement was modelled on the South African Constitution, which provides for three ‘spheres’ of government.⁹⁷¹ Although both models appear to provide for three levels of government, ‘spheres’ connotes an egalitarian relationship, whilst ‘tiers’ connotes a hierarchical one. This theoretical difference is also reflected in the body of the provisions giving effect to devolution.

Section 276(1) of the Constitution of Zimbabwe provides that, subject to the Constitution and national legislation, local government ‘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 to do so’. The South African Constitution provides that local government ‘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’.⁹⁷² While the text is similar, the meaning is different. The South African model provides more protection for local government than section 276(1) because the role of national and provincial legislation in local government affairs is subject to the framework provided in the Constitution. Section 276(1) offers less protection because there is no qualification in respect of how national legislation may affect the role of local government.

⁹⁷⁰ Section 5 of the Constitution of Zimbabwe.

⁹⁷¹ Section 40(1) of the Constitution of South Africa.

⁹⁷² Section 151(3) of the Constitution of South Africa.

The principles of devolution set out in the Constitution of Zimbabwe are very similar to the objectives of local government in the South African Constitution, as demonstrated by Table 15 below. The Zimbabwean model borrowed the concept of democratic and accountable local government from the South African Constitution.

Table 15: Correlation between the principles of devolution in the Constitution of Zimbabwe and objectives of local government in the South African Constitution

Constitution of Zimbabwe	South African Constitution
<p>Section 264(2): The objectives of the devolution of governmental powers and responsibilities to provincial and metropolitan councils and local authorities are –</p> <ul style="list-style-type: none"> (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 <i>democratic</i>, effective, transparent, <i>accountable</i> and coherent government in Zimbabwe as a whole; (c) to preserve and foster the peace, national unity and indivisibility of Zimbabwe; 	<p>Section 152(1): The objects of local government are –</p> <ul style="list-style-type: none"> (a) to provide <i>democratic and accountable government</i> for local communities; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.

5.5.2 Subnational powers and functions

The Zimbabwean Constitution does not devolve substantive powers and functions to provinces and local government. Instead, the Constitution, in a number of provisions, instructs Parliament to devolve powers to the devolved units. For instance, it states that both provinces and local government may assume only functions conferred by the Constitution or national legislation.⁹⁷³ Furthermore, section 264(1) provides that the national government, whenever appropriate, must devolve governmental powers and responsibilities to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively. The instruction to devolve powers ‘whenever appropriate’ and to ‘competent’

⁹⁷³ Section 265(1)(b) of the Constitution of Zimbabwe.

devolved units is problematic because in actuality the Constitution does not assign any powers and functions, and nor does it provide guidance on when it becomes ‘appropriate’ to devolve powers.⁹⁷⁴ By contrast, the South African Constitution assigns substantive powers and functions to provinces and the local government in Schedule 4 and 5.

5.5.3 Own-revenue sources

Like the Lancaster House Constitution, the Constitution of Zimbabwe does not assign original taxation or borrowing powers to provinces. However, section 270(1)(f) provides that provinces may exercise any other functions, including legislative functions conferred by national legislation. Thus, the door is open for provinces to exercise taxation powers if authorised by Parliament through legislation. This was modelled after the South African Constitution, which provides that provinces may exercise certain taxation powers if regulated by national legislation.⁹⁷⁵

Section 276(2)(b) of the Constitution of Zimbabwe provides that Parliament may assign local government the power to levy rates and taxes and generally raise sufficient revenue for it to carry out its objectives and responsibilities. Conversely, local government taxation powers are constitutionally protected in South Africa.⁹⁷⁶ The difference between the two is that the South African Constitution entrenches local taxation powers, while the Constitution of Zimbabwe envisages only local taxation powers. What is thus missing are all the South African provisions on local taxation and borrowing powers.

5.5.4 Fiscal transfers

a) Equitable share

There is a stark resemblance between the equitable-share provisions in the constitutions of Zimbabwe and South Africa. For instance, the Constitution of Zimbabwe provides that one of the principles of public financial management is that ‘revenue raised nationally must be shared equitably between the central government and provincial and local tiers of government’.⁹⁷⁷ For

⁹⁷⁴ Chigwata T *Provincial and Local Government Reform in Zimbabwe. An Analysis of the Law, Policy and Practice* (2018) 208.

⁹⁷⁵ Section 228(1) of the Constitution of South Africa.

⁹⁷⁶ Section 229(1)(a) of the Constitution of South Africa.

⁹⁷⁷ Section 298(1)(b)(ii) of the Constitution of Zimbabwe.

its part, the South African Constitution states that national legislation must provide for ‘the equitable division of revenue raised nationally among the national, provincial and local spheres of government’.⁹⁷⁸ As such, the Constitution of Zimbabwe borrowed the concept of equitable share as outlined in section 298(1)(b)(ii) of the South African Constitution.

However, some of the fiscal transfers in the Constitution of Zimbabwe deviate from those in the South African Constitution. For example, section 301(1)(a) of the Constitution of Zimbabwe provides that national legislation must provide for ‘the equitable allocation of capital/conditional grants between provincial and metropolitan councils and local authorities’. In addition, it reproduces verbatim the criteria or factors that have to be taken into account when making recommendations for the equitable sharing of revenue between the national, provincial and local spheres in South Africa.⁹⁷⁹ Nevertheless, according to section 301(2) of the Zimbabwean Constitution, the reproduced criteria or factors must be taken into account by Parliament when equitably allocating conditional grants between provinces and local government.⁹⁸⁰

The phrasing of the text in section 301(2) is problematic. It is illogical for Parliament to consider factors such as national interest and national debt when sharing capital or conditional grants between provinces and local government because subnational levels cannot incur national interest or national debt. The borrowed criteria or factors make sense in the Constitution of South Africa because they apply to all three spheres of government, including the national level. An alternative interpretation of section 301(2) that would make sense is that section 301(2) should be understood in the light of section 298(1)(b)(ii), which provides that ‘revenue raised nationally must be shared equitably between the central government and provincial and local tiers of government’. Only then can the consideration of factors such as national interest and national debt make sense. However, the flaw of this interpretation is the fact that section 301(2) clearly states that ‘[t]he Act referred to in subsection (1) must take into account, amongst other factors ...’ This suggests that it was not the drafters’ intention to read section 301(2) with section 298(1)(b)(ii). Thus, it is argued that no matter how one reads section 301(2), it is an example of poor drafting (or poor copying-and-pasting) because the transplanted text is incompatible with the Zimbabwean devolution model.

⁹⁷⁸ Section 214(1)(a) of the Constitution of South Africa.

⁹⁷⁹ Section 214(2) of the Constitution of South Africa.

⁹⁸⁰ Section 301(2) of the Constitution of Zimbabwe.

b) Conditional and unconditional grants

The Constitution provides for both conditional and unconditional grants. Section 301(1)(b) provides that national legislation must provide for ‘any other allocations to provinces and local authorities, and any conditions on which those allocations may be made’. The conditional and unconditional grant provisions are identical in wording to section 214(1)(c) of the South African Constitution.

The only clear Kenyan influence, introduced in the first official COPAC Draft and carried through to the Constitution of Zimbabwe, is the concept of the minimum transfer of five per cent.⁹⁸¹ Therefore, the concept of the minimum fiscal transfer is another example of how the Zimbabwean intergovernmental fiscal system deviated from the South African devolution model.

5.5.5 Cooperative government and intergovernmental relations

The Constitution modelled the concept of cooperative government on the South African Constitution. Section 194(1)(g) provides that ‘institutions and agencies of government at all levels must cooperate with each other’. Furthermore, all government institutions should observe ‘standards of good corporate governance’.⁹⁸² However, section 265(1) suggests that only provinces and local government are bound by the cooperative government provisions. As such, sections 194(1)(g), 198(c) and 265(1) are at odds with each other. This is another example of poor copying-and-pasting. Table 16 presents a side-by-side view of the similarities between the two countries’ provisions on cooperative government.

Table 16: Cooperative government provisions in the constitutions of Zimbabwe and South Africa

Constitution of Zimbabwe	South African Constitution
Section 265(1): Provincial and metropolitan councils and local authorities must, within their spheres-- <i>a. ensure good governance by being effective, transparent, accountable and institutionally coherent;</i>	Section 41(1): All spheres of government and all organs of state within each sphere must— <i>(a) preserve the peace, national unity and the indivisibility of the Republic;</i>

⁹⁸¹ Section 301(3) of the Constitution of Zimbabwe.

⁹⁸² Section 198(c) of the Constitution of Zimbabwe.

<p><i>b. assume only those functions conferred on them by this Constitution or an Act of Parliament;</i></p> <p><i>c. exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government;</i></p> <p><i>d. co-operate with one another</i>, in particular by--</p> <p><i>i. informing one another of, and consulting one another on, matters of common interest;</i></p> <p>ii. harmonising and <i>co-ordinating their activities;</i></p> <p><i>e. preserve the peace, national unity and indivisibility of Zimbabwe;</i></p> <p><i>f. secure the public welfare; and</i></p> <p>g. ensure the fair and equitable representation of people within their areas of jurisdiction.</p> <p>2. All members of local authorities must be elected by registered voters within the areas for which the local authorities are established.</p> <p>3. An Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities.</p>	<p><i>(b) secure the well-being of the people of the Republic;</i></p> <p><i>(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;</i></p> <p>(d) be loyal to the Constitution, the Republic and its people;</p> <p>(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;</p> <p><i>(f) not assume any power or function except those conferred on them in terms of the Constitution;</i></p> <p><i>(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and</i></p> <p><i>(h) co-operate with one another</i> in mutual trust and good faith by—</p> <p>(i) fostering friendly relations;</p> <p>(ii) assisting and supporting one another;</p> <p><i>(iii) informing one another of, and consulting one another on, matters of common interest;</i></p> <p>(iv) <i>co-ordinating their actions</i> and legislation with one another;</p> <p>(v) adhering to agreed procedures; and</p> <p>(vi) avoiding legal proceedings against one another.</p> <p>(2) An Act of Parliament must—</p> <p>(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and</p> <p><i>(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.</i></p>
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It can be seen from the table above that most of the provisions regulating intergovernmental relations in the Zimbabwean Constitution are verbatim copies of the provisions in the South African Constitution. However, the cooperative government structures operate differently

because the Zimbabwean provisions are limited to provinces and local government, whereas the South African provisions apply to all three spheres.

Given the moderate extent of the South African influence on the Constitution of Zimbabwe, the next question is: How and why did it happen?

5.6 The South African Constitution's influence on the Zimbabwean devolution model

5.6.1 Extent of influence

This chapter has demonstrated that the extent of the South African model's influence varies across the constitutional drafts preceding the 2013 Constitution. The extent of South African influence on the Constitutional Commission Draft's devolution model was minimal. The Draft proposed a broad framework for concepts such as the autonomous nature of devolved units, the assignment of subnational powers and functions, the allocation of revenue, and cooperative government. However, the influence of the South African Constitution is more pronounced in the NCA Draft than the Constitutional Commission Draft. The NCA Draft not only imported broad concepts from the South African Constitution, but also reproduced text from it verbatim. For example, text regarding conflict or concurrency of legislation and equitable sharing was reproduced verbatim.

As discussed in section 5.3.4, the Kariba Draft devolution model mirrored most of the devolution provisions in the Constitutional Commission Draft. Therefore, the South African influence was minimal in the Kariba Draft devolution model. As can be observed from the Kariba Draft devolution model, the involvement of the South African president did not culminate in any imposition of constitutional provisions as discussed in Chapter 2. Instead, he encouraged political parties to draft a constitution that addressed Zimbabwean problems.

The South African influence on the Zimbabwean constitution-making process was strongest in the earlier COPAC drafts, particularly the leaked Draft and the first official Draft, due to limited party-political involvement. Afterwards, politicians were actively involved in the constitutional drafting process but disagreed on the devolution provisions, which led to the watering-down of the South African influence. For example, in the second Draft, provincial powers and some cooperative government provisions were removed, while the role of the FCC disappeared.

Of the three political parties in the GNU, only ZANU-PF was opposed to devolution; both factions of the MDC were in favour of it. However, interviews with one of the COPAC drafters revealed that the MDC-T did not push for stronger devolution provisions as aggressively as the MDC-N.⁹⁸³ Crozier is of the opinion that the MDC-T was perhaps overconfident that it would win the 2013 elections and thus believed it did not need a strong devolution model.⁹⁸⁴ By contrast, the MDC-N, which initially advocated for stronger devolution provisions, toned down its advocacy in this regard towards the end of the COPAC constitution-making process. With ZANU-PF at the helm of the COPAC exercise, devolution concepts from the Kariba Draft were reintroduced despite an earlier agreement not to do so.⁹⁸⁵ The second COPAC Draft and the 2013 Constitution are centralised and have a devolution model that has provisions similar to the Kariba Draft. Consequently, both the Zimbabwean and Kenyan constitution-making processes ended with a similar ‘harmonising’ process. Thus, in comparison with the earlier COPAC Drafts, the extent of the South African influence is weaker in the second COPAC Draft.

The extent of the Kenyan influence on the Zimbabwean constitution-making process is minimal. The only clear example of it is the equitable-share provision, which states that provinces and local government are entitled to no less than the five per cent of the national revenues raised in any financial year. That provision was borrowed verbatim from the Kenyan Constitution in the first official COPAC Draft and the percentage was reduced in the drafts that followed and in the Constitution.

5.6.2 Why the South African model was considered in Zimbabwe

It appears that factors such as the need for devolution, links to South Africa, and shared knowledge of the South African Constitution influenced the transfer of the South African devolution model to Zimbabwe.

5.6.2.1 Homegrown demand for devolution

There was a homegrown demand for devolution because the Zimbabwean people sought to move away from the centralised system of governance that had contributed to the country’s

⁹⁸³ Crozier (2019).

⁹⁸⁴ Crozier speculates that the MDC-T thought it would be able to change the Constitution once it was in power or, better yet, secure all power as the central government. See Crozier (2019).

⁹⁸⁵ Mwonzora (2019).

socio-economic and political crisis. Zimbabweans considered a variety of non-centralised models. However, it was drawn to the South African model, which appeared to have contributed to South Africa's political and economic stability since 1994. The latter's devolution provisions were clear and easy to understand. Nor was it simply a theoretical model: it had been tried and tested, and seemed to be yielding positive results at the time.

Zimbabwean drafters, politicians, academics, legal experts and other actors were the actual conveyancers of the South African devolution model. Zimbabwean actors conceived the idea of considering the South African devolution model. There was already general knowledge of the functioning of the model, of how its provinces and municipalities functioned, and of how autonomous its spheres of government were. It was not a case of South African actors imposing their model on Zimbabwe.

5.6.2.2 Common knowledge and links to South Africa

Zimbabwe and South Africa have a long and deep social, economic and political relationship that dates to the pre-colonial era, during which many tribes in Zimbabwe migrated to South Africa in the *Mfecane*; as a result, certain tribes present in both countries shared the same language.⁹⁸⁶ There are also people of similar ethnic background in both countries – for example, the Ndebele, Xhosa, Tswana, Sotho, Venda and Shangaan or Tsonga⁹⁸⁷ people.⁹⁸⁸ The British South Africa Company which colonised Zimbabwe had ties with South Africa,⁹⁸⁹ and the earliest system of local government was based on the Cape Municipal Ordinance.⁹⁹⁰ The relationship between Zimbabwe and South Africa grew during the apartheid era when the former played an important role in supporting the latter's liberation struggle.⁹⁹¹ This was when the relationship between the ANC and the Zimbabwe African People's Union (ZAPU) and then

⁹⁸⁶ Lindgren (2002) 50.

⁹⁸⁷ There is debate in South Africa as to whether it is politically correct to call Tsonga people Shangaan people. However, the ethnic group in Zimbabwe identifies itself as Shangaan, which is why the text here refers to the group as Shangaan or Tsonga. See 'South Africa, Meet the Shangaan Tribe (But then who is Tsonga?)' *News 24* 13 August 2013 available at <https://www.news24.com/news24/south-africa-meet-the-shangaan-tribe-but-then-who-is-tsonga-20130814> (accessed 6 December 2021).

⁹⁸⁸ Nhongo R & Tshotsho B P 'The Problematics of Language in Education Policies in Post Independence in Zimbabwe' (2021) 56 *Journal of Asian and African Studies* 1305.

⁹⁸⁹ Madimu T, Msindo E & Swart S 'Farmer–Miner Contestations and the British South Africa Company in Colonial Zimbabwe, 1895–1923' (2018) *Journal of Southern African Studies* 44 794.

⁹⁹⁰ Chigwata (2018) 72.

⁹⁹¹ 'uMkhonto weSizwe (MK) in Exile' available at <https://www.sahistory.org.za/article/umkhonto-wesizwe-mk-exile> (accessed 2 August 2021).

ZANU-PF grew.⁹⁹² These political parties had joint meetings over the course of the years.⁹⁹³ It is because of this relationship that South Africa was appointed on a number of occasions to resolve the Zimbabwean political crisis.

There is also a close symbiotic relationship between South Africa and Zimbabwe, given that a large number of Zimbabweans are living, studying or working in South Africa. A report by SW Radio Africa said that ‘it is believed’ that, in 2013, there were ‘between two and three million Zimbabweans living and working’ in South Africa.⁹⁹⁴ Consequently, there was pre-existing knowledge and understanding of the South African devolution model.

5.6.2.3 Shared legal knowledge

The South African devolution model also migrated thanks to shared legal knowledge. There are a number of Zimbabwean academics who frequently visit South Africa and vice versa. There are interactions too between South African and Zimbabwean lawyers at the Law Society of Southern Africa. The MDC also had a significant number of lawyers who had been educated in South Africa.⁹⁹⁵ Furthermore, legal experts, whether educated in South Africa or Zimbabwe, are familiar with the South African legal system.⁹⁹⁶ Therefore, as with Kenya, the constitutional knowledge was held by local lawyers and not foreign experts. This goes to show how accessible the South African Constitution was to Zimbabwean drafters.

⁹⁹² Macmillan H ‘Past History has not been Forgotten: The ANC/ZAPU Alliance – the Second Phase, 1978–1980’ in Alexander J, McGregor J & Tendi B (eds) *Transnational Histories of Southern Africa’s Liberation Movements* (2020) 179.

⁹⁹³ Maromo J ‘Zanu-PF chastises Mugwadi over ANC trip “bombshell” threat’ *IOL* 11 January 2021 available at <https://www.iol.co.za/news/africa/zanu-pf-chastises-mugwadi-over-anc-trip-bombshell-threat-443b81f5-801b-50ea-8c94-d2e57eb31ae6> (accessed 2 August 2021).

⁹⁹⁴ ‘How Many Zimbabweans Live in South Africa? The Numbers are Unreliable’ 5 November 2013 available at <https://africacheck.org/fact-checks/reports/how-many-zimbabweans-live-south-africa-numbers-are-unreliable> (accessed 2 August 2021).

⁹⁹⁵ One of the lawyers is David Coltart, who was involved in the COPAC process for the MDC-N; he studied at the University of Cape Town in South Africa. See ‘Interview: As Mugabe Fades: Zimbabwe at the Crossroads. Robert Forsyth talks with David Coltart’ available at <https://www.cis.org.au/app/uploads/2017/09/33-3-forsyth-coltart.pdf> (accessed 2 August 2021). Lawyers such as Naison Machingauta, who were also involved in the earlier stages of COPAC, studied at the University of the Western Cape. See Machingauta N A *Legal Analysis of the Appointment of Caretakers to Act as Council in Terms of Zimbabwe’s Section 80 of the Urban Councils Act* (unpublished LLM thesis, University of the Western Cape, 2009).

⁹⁹⁶ Chinhengo (2019).

5.6.3 Secondary influences on the Zimbabwean devolution model

As discussed in Chapter 4, the Kenyan devolution model was influenced significantly by the South African Constitution. Consequently, the Kenyan devolution model has few innovative devolution concepts other than those in the South African devolution model. The Zimbabwean devolution model borrowed one of the innovations – the concept of equitable share based on a fixed minimum percentage – because it addressed the needs of both the MDC factions and the ZANU-PF. On the one hand, a fixed equitable-share minimum percentage assured the MDC factions that subnational units were guaranteed a percentage of revenue collected nationally; on the other hand, ZANU-PF agreed to 5 per cent as a minimum because the central government would remain in control of the bulk of the revenue collected nationally.

5.7 Conclusion

This chapter has demonstrated that the influence on the South African constitutionalised devolution model on the Zimbabwean model is strong. The Zimbabwean drafters borrowed concepts and texts from the South African Constitution, albeit that the two models do not operate in precisely the same way. For example, the nature of the levels of government in the Zimbabwean Constitution reflects the South African model, which also has three levels of government, but there is a hierarchical relationship in the former, whilst the spheres in South Africa are ‘distinctive, interdependent and interrelated’.

Furthermore, while the principles of devolution in the Zimbabwean devolution model are the same as the objects of local government in South Africa, the Zimbabwean model extends what were originally just the objects of local government in South Africa and applies them to all the subnational units within its scope. As far as revenue sources are concerned, the ZANU-PF admired how the centralised South African provincial taxation powers curtailed the growth of regional disparities. Therefore, the Zimbabwean drafters ensured that national legislation regulated provincial taxation powers, and extended the same principle to local government. Lastly, the minimum percentage concept, borrowed from the Kenyan devolution model, impacts the functioning of the equitable share of nationally raised revenue provisions, borrowed from South Africa.

The criteria for equitable allocation of capital grants, together with the provisions regarding cooperative government and intergovernmental relations, serve as examples of poor borrowing

practices, as these verbatim reproductions are incompatible with the rest of the Zimbabwean devolution model. In other words, simply copying and pasting text does not necessarily mean that a devolution model will function in the same way that it did in its original context.

In conclusion, the influence of the South African devolution model on the Zimbabwean model was strong, and came about because of a homegrown demand for devolution, the presence of common knowledge and links to South Africa, and the existence of shared legal knowledge.

Chapter 6:

The Influence of the South African Devolution Model on the Zambian Devolution Model

6.1 Introduction

Like the Kenyan and Zimbabwean models, the devolution model entrenched in the 2016 Constitution of Zambia bears some resemblance to the South African devolution model. It is argued in this chapter that the South African Constitution influenced the Zambian devolution model, an influence which is evident in the conceptual and textual similarities between them. This chapter seeks to analyse the Zambian constitution-making process and resultant constitution in order to establish the nature, content and intensity of the migrated devolution model and provisions. It also examines why and how the migration of the devolution model and provisions took place. The call for devolution arose within Zambia and was fuelled by external actors; within this context, Zambian constitutional drafters were drawn to the South African devolution model because they had observed how it worked in practice to improve the welfare of South Africans. In addition, the chapter assesses the extent to which the Constitution of Kenya influenced the Zambian devolution model, given that there are devolution concepts which are found in both the Kenyan and Zambian devolution models but not in the South African model.

This chapter commences in section 6.2 with an analysis of the centralised model of government in Zambia under its Independence Constitution.⁹⁹⁷ Thereafter, sections 6.3 and 6.4 discuss the devolution models which were proposed in the numerous constitutional reform processes that Zambia undertook in the lead-up to the adoption of the 2016 Constitution; these processes were driven by the Mwanakatwe and Mung'omba Commissions as well as the Technical Committee on Drafting the Zambian Constitution (TCDZC). Zambia has one of the highest numbers of constitutional review commissions in the SADC region, with five constitutional reform processes having been undertaken by 2016; however, some of the commissions' recommendations were never adopted.⁹⁹⁸ Section 6.5 analyses the devolution model in the

⁹⁹⁷ Constitution of Zambia, 1964 and the 1972 and 1991 amendments.

⁹⁹⁸ Motsamai D 'Zambia's Constitution-making Process: Addressing the Impasse and Future Challenges' (2014) *Institute for Security Studies: Situation Report 2*. See also Chinyere P R & Hamauswa S 'A Critique of the Constitutional History of Zambia' in Mukwena R & Sumaili F (eds) *Zambia at Fifty Years: What Went Right*,

2016 Constitution. Finally, section 6.6 presents the chapter's conclusions on the extent to which the South African and Kenyan constitutions influenced the Zambian devolution model and the factors that led to this influence.

6.2 From a decentralised to centralised model of government under the Independence Constitution

Similar to other former British colonies such as Kenya and Zimbabwe, the Zambian Independence Constitution⁹⁹⁹ was also 'imposed' on the newly independent Zambia.¹⁰⁰⁰ Discussions held in May 1964 between the Northern Rhodesian (now Zambia) nationalist parties, the Barotse, and representatives of the colonial regime in Zambia and the British government, culminated in the Independence Constitution, which came into effect in October 1964.¹⁰⁰¹ The latter was an imposed constitution because the British government, as a superior power, imposed the bulk of the constitutional provisions.¹⁰⁰²

The Independence Constitution barely contained any devolution provisions, as was the norm at the time among former British colonies.¹⁰⁰³ Provinces were entrenched in the Independence Constitution, but they were merely administrative entities and served as an extension of the national government.¹⁰⁰⁴ Since the pre-independence period, there had been no constitutional protection of local government.¹⁰⁰⁵ However, although they were creatures of statute, local authorities enjoyed a measure of autonomy in practice, and were empowered to make by-laws in the interest of their communities, subject to the approval of the minister responsible for local government.¹⁰⁰⁶ The powers and functions of local authorities included municipal planning, health, housing, community development, electricity supply, and water and sanitation

What Went Wrong and Wither to? A Treatise of the Country's Socio-economic and Political Developments Since Independence (2016) 33 – 38.

⁹⁹⁹ Lancaster House Constitution of Zambia, 1964 (hereafter Independence Constitution).

¹⁰⁰⁰ Chinyere & Hamauswa (2016) 31.

¹⁰⁰¹ Ndulo M B & Kent R B 'The Constitutions of Zambia' *Zambia Law Journal* (1998) 1 5. See Chinyere & Hamauswa (2016) 31.

¹⁰⁰² Situtu M W 'Barotseland: Reflections on 1964 Independence Talks and Need for New Generations to Speak Up' 3 January 2017 available at <https://unpo.org/article/19743> (accessed 8 February 2022).

¹⁰⁰³ See discussion of the Kenyan and Zimbabwean independence constitutions in previous chapters.

¹⁰⁰⁴ Chitembo A 'Local Government Finance' in *50 years of Local Government in Zambia: Treasuring the Past, Reflecting the Present, Shaping the Future* (2014) 83 - 90

¹⁰⁰⁵ Sakala J B 'Local Government System: Structure and Practice' in *50 years of Local Government in Zambia: Treasuring the Past, Reflecting the Present, Shaping the Future* (2014) 9.

¹⁰⁰⁶ Pelekamoyo G M *Local Autonomy and Central Control in Zambian Urban Authorities* (unpublished MA thesis, University of Zambia 1977) 33.

services.¹⁰⁰⁷ They were also permitted to provide transport services, run business enterprises, and operate markets and taverns.¹⁰⁰⁸ Local authorities were thus able to generate revenue from such functions.¹⁰⁰⁹ Alois Madhekeni points out that local government finances in the early independence era were substantial because urban local government raised large amounts of revenue from internal sources; in addition, intergovernmental grants were generous, steady and predictable, as they were based on a predetermined formula.¹⁰¹⁰ Furthermore, local government had wide discretion in preparing budgets and thus enjoyed a measure of budgetary autonomy.¹⁰¹¹

The central government exercised supervisory control over local government through centrally appointed provincial and district administrators under the ministry responsible for local government.¹⁰¹² That inevitably encroached on the autonomy of the local government. However, Alan Greenwood and John Howell note that the encroachment was not extensive because there were ‘persistent efforts to strengthen local government’ by the central government.¹⁰¹³

Nevertheless, decentralisation was strained when a wave of centralisation emerged. Barely a year after independence, the United National Independence Party (UNIP) government decided that the decentralised system of local government – which had been developed, first as part of a transitional arrangement to protect white minority power, and secondly as an avenue for the people’s participation in an independent Zambia – had served its purpose.¹⁰¹⁴ In the absence of constitutional protection of local government powers, there was a significant reduction of local government powers and functions when the Local Government Act of 1965 centralised local government powers.¹⁰¹⁵ Furthermore, in 1968 the government introduced a reform entitled ‘decentralisation in centralism’,¹⁰¹⁶ which President Kaunda described as ‘a measure whereby

¹⁰⁰⁷ Rakodi C ‘The Local State and Urban Local Government in Zambia’ (1988) 8 *Public Administration and Development* 33.

¹⁰⁰⁸ Pelekamoyo (1977) 33.

¹⁰⁰⁹ UN HABITAT *Fiscal Decentralisation in Zambia* (ed) 2012 5.

¹⁰¹⁰ Madhekeni A ‘Zambia’s Elusive Quest for Decentralisation’ in Chigwata T C, Steytler N, De Visser J, Kunda F (eds) *Local Government Reform in Zambia: The 2016 Constitution’s Framework for Devolution* (2020) 13.

¹⁰¹¹ Pelekamoyo (1977) 60.

¹⁰¹² Madhekeni (2020) 13.

¹⁰¹³ Greenwood A & Howell J ‘Urban Local Authorities’ in Tordoff W (ed) *Administration in Zambia* (1980) 162.

¹⁰¹⁴ Madhekeni (2020) 14.

¹⁰¹⁵ Local Government Act No. 69 of 1965.

¹⁰¹⁶ This reform was an oxymoron in itself: there was no way decentralisation could be achieved in this manner. See Mukwena R B ‘Decentralisation, Democracy, and Reflecting the Present, Shaping the Future’ (2014) 38.

through the Party and Government machinery, we will decentralise most of your Party and Government activities [w]hile retaining effective control of the party and Government machinery at the centre in the interests of unity'.¹⁰¹⁷

The centralisation of powers was unpopular because local government could no longer decide on matters affecting it; thus, for among other reasons, opposition politics intensified.¹⁰¹⁸ In the 1968 elections, opposition parties such as the Zambian African National Congress (ZANC) and the United Party (UP) won unprecedented support in the National Assembly from the southern, central and western provinces.¹⁰¹⁹ In 1969, the UNIP-led government introduced provincial political appointees who were responsible for supervising, directing and coordinating the activities of all government agencies, including elected district and local governments.¹⁰²⁰ These reforms undermined local democracy, particularly in opposition-run constituencies, which inevitably contributed to political strife.¹⁰²¹ There was also internal contention in the UNIP, partly due to centralism.¹⁰²² As a result, in 1971, Vice President Simon Kapwepwe left the UNIP and formed his own party, the United Progressive Party (UPP).¹⁰²³

When President Kaunda realised that the UNIP was losing power, he established a one-party system which was incorporated in the Constitution in 1972.¹⁰²⁴ The latter declared the UNIP the only legally recognised political party in Zambia,¹⁰²⁵ and opposition parties were banned from contesting against the UNIP in national and local government elections.¹⁰²⁶ The one-party system was unpopular because it resulted in a two-way erosion of accountability in the local government. First, residents who were not members of the UNIP were disenfranchised because local government elections based on universal adult suffrage were replaced by party elections.¹⁰²⁷ Secondly, elected councillors were subjected to a vetting process to ensure that

¹⁰¹⁷ Chikulo B 'Local Governance Reforms in Zambia: A Review' *Commonwealth Journal of Local Governance* (2009) 2 99.

¹⁰¹⁸ Chinyere & Hamauswa (2016) 33.

¹⁰¹⁹ The ZANC and UP entered into a coalition, becoming a formidable opposition to the government led by the United National Independence Party (UNIP). See Madhekeni (2020) 18.

¹⁰²⁰ Mukwena (2014) 38.

¹⁰²¹ Madhekeni (2020) 18.

¹⁰²² Motsamai (2014) 3.

¹⁰²³ Ndulo & Kent (1998) 12.

¹⁰²⁴ Interview with the Executive Director of the National Institute of Public Administration (NEPA), Royson Mukwena, Lusaka, 25 November 2019.

¹⁰²⁵ Chinyere & Hamauswa (2016) 33.

¹⁰²⁶ Madhekeni (2020) 18.

¹⁰²⁷ Madhekeni (2020) 16.

positions were filled with individuals who were loyal and answerable to the leadership of the party.¹⁰²⁸

The 1972 Constitution, like its predecessor, did not provide any significant provincial powers and functions, nor did it entrench local government.¹⁰²⁹ Local government was stifled under the one-party system. For example, in 1973, local government revenue sources deteriorated significantly when the central government stopped transferring housing, police, health and fire intergovernmental grants.¹⁰³⁰ Local government powers to charge rates on undeveloped land, raise rentals and evict defaulting tenants were also removed.¹⁰³¹ In 1974, local government's expenditure autonomy was curtailed by a national government circular which directed local government on how to prepare budgets, including which services to prioritise and in what order.¹⁰³² The attrition of fiscal powers had a dire impact on the capacity of local government to raise the revenue necessary for its service delivery function. According to Carole Rakodi, in 1974 only eight out of 53 local governments were functioning without heavy dependency on central government grants, while the remainder were so dependent on the central government that their autonomy was almost non-existent.¹⁰³³

In 1980, the Local Administration Act was passed and primary organs of the UNIP and organs of local government were combined in a single framework.¹⁰³⁴ This integration of structures led to an expansion of local government functions to include the administration of health-care centres, the registration of births and deaths, and oversight of parastatals.¹⁰³⁵ However, that did not help advance decentralisation because other developments undermined the exercise of those functions. For example, few of the additional responsibilities came with any extra financial support.¹⁰³⁶ Furthermore, senior party members made decisions at the national level of the UNIP in Lusaka, whilst local government performed administrative tasks.¹⁰³⁷ Gervase Maipose points out that the involvement of the UNIP was so intrusive that it extended to micro-

¹⁰²⁸ Madhekeni (2020) 17.

¹⁰²⁹ Sakala (2014) 4.

¹⁰³⁰ Chinyere & Hamauswa (2016) 33.

¹⁰³¹ Ndulo & Kent (1998) 14.

¹⁰³² Pelekamoyo (1977) 60.

¹⁰³³ Rakodi (1988) 37.

¹⁰³⁴ Mukwena (2014) 46.

¹⁰³⁵ Mukwena R M 'Zambia's Local Administration Act, 1980: A Critical Appraisal of the Integration Objective' (1992) 12 *Public Administration and Development* 239.

¹⁰³⁶ Madhekeni (2020) 17.

¹⁰³⁷ Madhekeni (2020) 18.

managing pothole repairs.¹⁰³⁸ Thus, a highly centralised system of government incapacitated local government's provision of efficient service delivery.¹⁰³⁹ Royson Mukwena observes that an array of problems – such as intermittent water supply, uncollected refuse, multiplying potholes in roads and accumulating salary arrears – made it apparent at the time that centralisation was not working.¹⁰⁴⁰

Zambians wanted change.¹⁰⁴¹ In addition to the challenges above, a number of factors contributed to change in the system of governance. First, in the late 1980s, there were economic problems mainly due to a decrease in the price of copper, which at the time was the backbone of Zambia's economy.¹⁰⁴² These challenges led to an increase in food prices and resulted in frequent riots.¹⁰⁴³ Secondly, pro-democracy groups, chiefly the Movement for Multi-Party Democracy (MMD), advocated for the return of plural politics.¹⁰⁴⁴ Thirdly, the fall of the Soviet Union compelled socialist countries such as Zambia to embrace democratic values.¹⁰⁴⁵ Fourth, Western countries required Zambia to adopt democratic policies in order to access financial assistance. Fifth, international monetary institutions such as the World Bank and IMF required political plurality in order for countries to qualify for financial assistance.¹⁰⁴⁶ Lastly, a failed coup d'état in June 1991 underlined the unpopularity of Kaunda's regime.¹⁰⁴⁷

The move to a democratic dispensation became inevitable due to the combination of these factors. The Kaunda government attempted to appease demands for democracy by appointing the Mvunga Constitutional Review Commission, which was tasked with making constitutional recommendations to restore multiparty politics.¹⁰⁴⁸ The efforts of the commission led to the

¹⁰³⁸ Maipose G S 'Zambia: Decentralisation under the New Democratic Era – Change and Continuity' in P S Reddy (ed) *Local Government Democratisation and Decentralisation: A Review of the Southern African Region* (1999) 257.

¹⁰³⁹ Mukwena (2019). See also Sakala (2014) 17.

¹⁰⁴⁰ Mukwena (1992) 239.

¹⁰⁴¹ Chinyere & Hamauswa (2016) 34.

¹⁰⁴² Chinyere & Hamauswa (2016) 34. See also Motsamai (2014) 3.

¹⁰⁴³ Between 1990 and 1991, sporadic food riots erupted in which at least an estimated 30 people were killed. See Mbao M 'The Politics of Constitution Making in Zambia: Where Does the Constituent Power Lie?' Draft paper presented at *African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa* Nairobi April 2007 12. See also Simutanyi N 'The Politics of Constitutional Reform in Zambia: From Executive Dominance to Public Participation?' in Chirwa D M & Nijzink L (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2013) 31.

¹⁰⁴⁴ Ndulo & Kent (1998) 16.

¹⁰⁴⁵ Venter A & Olivier M 'Human Rights in Africa' (1993) 1 *International Journal on World Peace* 27.

¹⁰⁴⁶ Zambia National Constitutional Conference Initial Report 2010 (hereafter NCC Report 2010).

¹⁰⁴⁷ Simutanyi (2013) 31.

¹⁰⁴⁸ Chinyere & Hamauswa (2016) 34.

Constitutional Amendment of 1991.¹⁰⁴⁹ While the latter reintroduced multiparty politics, the centralised system of government remained intact.

The MMD and civil society half-heartedly accepted the 1991 Constitution Amendment; they considered it as but a transitional constitution.¹⁰⁵⁰ The MMD opposed the Constitution because the perception was that the Mvunga Commission was dominated by the UNIP.¹⁰⁵¹ Furthermore, the Mvunga Commission Report was approved by a parliament controlled overwhelmingly by the UNIP.¹⁰⁵² As per the 1991 Constitution, multiparty elections were reintroduced and general elections were scheduled for October 1991. The MMD promised further constitutional reforms if elected into office,¹⁰⁵³ declaring that it would replace the 1991 Constitution with a constitution that rose above partisan considerations, strengthened democracy, and protected human rights.¹⁰⁵⁴ Frederick Chiluba of the MMD won the general elections and became the second president of Zambia.¹⁰⁵⁵

6.3 Early constitutional efforts towards a devolution model

The socio-economic and economic climate indicated that there was a need for constitutional reform. The result was the Mwanakatwe Constitutional Review Commission, the work of which culminated in the 1996 Constitution of Zambia and the Mung'omba Constitutional Review Commission. It is clear to see that the South African Constitution influenced the earlier 1996 constitutional amendments and reports, even though the extent of that influence varied. Unlike the constitutional commissions discussed in chapters 4 and 5, the Mwanakatwe and Mung'omba Commissions did not produce draft constitutions. Instead, the two Commissions presented proposals for constitutional changes in the form of reports. Thus, it is not possible for the study to do comparisons between text, only an analysis of the concepts proposed in the reports is possible.

¹⁰⁴⁹ Constitutional Amendment of Zambia, 1991.

¹⁰⁵⁰ Ndulo & Kent (1998) 17. See also Motsamai (2014) 3.

¹⁰⁵¹ Ndulo & Kent (1998) 17. See also Simutanyi (2013) 31.

¹⁰⁵² Ndulo & Kent (1998) 17.

¹⁰⁵³ Simutanyi (2013) 32.

¹⁰⁵⁴ Ndulo & Kent (1998) 20.

¹⁰⁵⁵ Chinyere & Hamauswa (2016) 35.

6.3.1 The Mwanakatwe Constitutional Review Commission process

Chiluba was under pressure to deliver on the MMD's promise of undertaking constitutional reform if it won the 1991 elections. External actors such as donors piled on the pressure, given that access to funds was tied to the adoption of decentralisation programmes.¹⁰⁵⁶ Having taken over a distressed economy incapable of funding its own development projects, the MMD was heavily reliant on donor support.¹⁰⁵⁷ Consequently, in 1993, Chiluba set up a new constitutional review commission, under John Mwanakatwe.¹⁰⁵⁸ The Mwanakatwe Constitutional Review Commission had a wide mandate to consolidate democratisation and decentralisation in the new constitution.¹⁰⁵⁹

Advocacy for the entrenchment of devolution provisions came from the bottom up, especially from local government. The Local Government Association of Zambia (LGAZ) advocated for the constitutional entrenchment of devolution to improve local government in Zambia, which had gained notoriety by failing to deliver basic services.¹⁰⁶⁰ In an interview, the former executive director and Chief Executive Officer (CEO) of the LGAZ, Maurice Mbolela, explained that the LGAZ began lobbying for strong local government in the early 1990s.¹⁰⁶¹ Its advocacy stemmed from its relationship with the International Union of Local Authorities (IULA), of which the LGAZ is a member.¹⁰⁶² Issues of local government and constitutionalism were a constant subject of discussion at the IULA,¹⁰⁶³ which served as a platform where member countries discussed the importance of the constitutional entrenchment of devolution provisions.¹⁰⁶⁴ Thus, the IULA inevitably influenced the LGAZ's approach to the Mwanakatwe

¹⁰⁵⁶ Madhekeni (2020) 20.

¹⁰⁵⁷ Madhekeni (2020) 20.

¹⁰⁵⁸ Lungwangwa (2015) 38.

¹⁰⁵⁹ Chinyere & Hamauswa (2016) 35.

¹⁰⁶⁰ With local government's history of having little to no support from the central government, decentralisation in Zambia became synonymous with the failure of the reforms and, as a result, gained notoriety. Zambians lost confidence in the local government system because they hardly received any basic services, the delivery of which is the primary objective of local government. See Chulu J 'Local Government Reform: Is it a Key to a Functional Decentralized Government in Zambia' (2014) 1 *Journal of Local Government Studies* 9.

¹⁰⁶¹ Interview with the Executive Director and Chief Executive Officer (CEO) of the Local Government Association of Zambia, Maurice Mbolela, Lusaka, 25 November 2019.

¹⁰⁶² Mbolela (2014) 198.

¹⁰⁶³ IULA had discussed matters of local government and constitutionalism as early as the late 1980s. See Mbolela (2019).

¹⁰⁶⁴ Mbolela (2019).

Constitutional Review Commission.¹⁰⁶⁵ The LGAZ lobbied for the constitutional assignment of local government powers and functions, as well as financial support for those mandates.¹⁰⁶⁶

The Mwanakatwe Commission submitted its recommendations to the MMD-led government in 1995.¹⁰⁶⁷ One of the key findings was that there was a significant power vacuum at provincial and local levels and that this vacuum had created a sense of alienation, powerlessness and marginalisation among the people.¹⁰⁶⁸ Accordingly, the Mwanakatwe Report proposed that local government be protected in the constitution by entrenching three levels of government.¹⁰⁶⁹ Furthermore, the Commission recommended that some of the national government powers and functions be devolved to provinces and local government.¹⁰⁷⁰ It also recommended the adoption in local government of broad precepts such as accountability, transparency and efficient administration.¹⁰⁷¹ The Commission also recommended that local government should be empowered to initiate and execute its plans and policies, further to which it needed to have a sound financial basis.¹⁰⁷² The recommendations are an indication of the South African influence in that the South African Interim Constitution had espoused similar ideas.¹⁰⁷³

6.3.1.1 The devolution model of the 1996 Constitution of Zambia

The MMD-led government rejected more than 80 per cent of the Commission's recommendations.¹⁰⁷⁴ This appeared to indicate that the MMD did not actually want democracy and decentralisation and that Chiluba had instead appointed the Mwanakatwe Commission so that he could access donor funds and build international goodwill.¹⁰⁷⁵ The MMD-led government had a vested interest in the preservation of power. Consequently, President Chiluba

¹⁰⁶⁵ Mbolela M 'Local Government Association of Zambia: Advocate and Voice of Local Government Authorities' in *50 years of Local Government in Zambia: Treasuring the Past, Reflecting the Present, Shaping the Future* (2014) 197.

¹⁰⁶⁶ Mbolela (2019).

¹⁰⁶⁷ Chikulo (2009) 103.

¹⁰⁶⁸ Madhekeni (2020) 24.

¹⁰⁶⁹ Mwanakatwe Commission Report (1995) 492.

¹⁰⁷⁰ Mwanakatwe Commission Report (1995) 492.

¹⁰⁷¹ Mwanakatwe Commission Report (1995) 492.

¹⁰⁷² Mwanakatwe Commission Report (1995) 492.

¹⁰⁷³ Section 6.3.1.1 assesses whether the 1996 Constitution of Zambia was influenced by the 1993 Constitution of South Africa rather than the 1996 Constitution of South Africa, given that the latter was adopted after the 1996 Constitution of Zambia.

¹⁰⁷⁴ Madhekeni (2020) 25.

¹⁰⁷⁵ Madhekeni (2020) 21.

assented to the new Constitution of Zambia which had strong centralist provisions on 28 May 1996.¹⁰⁷⁶

The only South African influences evident in the 1996 Constitution is the provision for the recognition of three levels of government, namely the national, provincial and local levels.¹⁰⁷⁷ Provinces continued to be administrative organs, with a presidential appointee as head of the province.¹⁰⁷⁸ The constitutional protection of the local government was a South African influence, because the 1993 Interim Constitution recognised the status of local government. Article 109(1) provided for a system of local government anchored on democratically elected councils.¹⁰⁷⁹ Parliament, through national legislation, was given the mandate to decide on the details of this system, including the nature of local governance structures.¹⁰⁸⁰ Thus, the Chiluba administration deviated from the Commission's recommendations in regard to entrenching local government structures, powers and functions.

In sum, the recognition of the three levels of government is an example of the weak influence of the devolution model in the 1993 Interim Constitution of South Africa, which had also recognised the national, provincial and local government as the three levels of government. Although the Zambian 1996 Constitution recognised three levels of government, the provinces and local government, unlike their South African counterparts, had no entrenched structures, powers and functions.

6.3.1.2 The unpopularity of the 1996 Constitution and its aftermath

Although the 1996 Constitution guaranteed the existence of local government as a level of government with an elected council, it did little to promote local autonomy or improve how people viewed local government. While regular and separate local government elections gave the impression that residents had an opportunity to hold their councillors accountable thanks to the separation of local from national issues in voting decisions, the elections were marred by low voter turnout.¹⁰⁸¹ For instance, in the 1998 local government elections, voter turnout was

¹⁰⁷⁶ Mbaol M L M 'Human Rights and Discrimination: Zambia's Constitutional Amendment, 1996' 42 (1998) *Journal of African Law* 1.

¹⁰⁷⁷ Constitution of Zambia, 1996.

¹⁰⁷⁸ The provincial minister was appointed from members of the National Assembly. See article 47(3) of the Constitution of Zambia, 1996.

¹⁰⁷⁹ Articles 109 and 113(e) of the Constitution of Zambia, 1996.

¹⁰⁸⁰ Article 109(1) of the Constitution of Zambia, 1996.

¹⁰⁸¹ Madhekeni (2020) 23.

a mere 12 per cent, compared to 58.7 per cent in the 1996 national election.¹⁰⁸² The low turnout in local elections reflected the public's low regard for the local government system itself, which in turn highlighted its inadequacies. Lungwangwa, Ndulo and Kent argue that the rejected recommendations had the potential to strengthen democracy and devolution in Zambia, which is something that the general populace wanted.¹⁰⁸³ In sum, the 1996 Constitution was unpopular among Zambians: it was regarded as the outcome of the MMD government's agenda rather than a people-driven exercise.¹⁰⁸⁴

In 2001, Chiluba's two presidential terms ended, and Levy Mwanawasa succeeded him after winning the 2001 elections on the MMD ticket.¹⁰⁸⁵ Like his predecessor, President Mwanawasa initiated another constitutional review commission, with Willa Mung'omba as chair.¹⁰⁸⁶ Mwanawasa promised to re-establish 'a government of the people' through the Mung'omba Constitutional Review Commission.¹⁰⁸⁷

6.3.2 The Mung'omba Constitutional Review Commission process and devolution model

The Mung'omba Constitutional Review Commission process started in 2003.¹⁰⁸⁸ The Commission had 31 terms of reference, two of which are of importance to this study. First, the Commission was responsible for 'examining and recommending effective methods to ensure grassroots participation in the political process of the country, including the type of provincial and district administration'.¹⁰⁸⁹ Secondly, it had the mandate to 'examine the local government system and recommend how a democratic system of local government as specified in the Constitution could be realised'.¹⁰⁹⁰

Furthermore, the Commission acknowledged the importance of learning from other constitutional processes, stating that 'Zambia is not an island. Therefore, it needs to learn and

¹⁰⁸² United Cities and Local Governments (UCLG) 'UCLG Country Profiles: Republic of Zambia' available at <https://www.gold.uclg.org/sites/default/files/Zambia.pdf> (accessed 2 May 2021).

¹⁰⁸³ Lungwangwa (2015) 39. See also Ndulo & Kent (1998) 20.

¹⁰⁸⁴ Madhekeni (2020) 25.

¹⁰⁸⁵ Chinyere & Hamauswa (2016) 36.

¹⁰⁸⁶ Chinyere & Hamauswa (2016) 36.

¹⁰⁸⁷ Motsamai (2014) 3.

¹⁰⁸⁸ Madhekeni (2020) 25.

¹⁰⁸⁹ Mung'omba Constitution Review Commission Report (2005) 27 (hereafter Mung'omba Report).

¹⁰⁹⁰ Mung'omba Report (2005) 27.

share experiences with other countries in the world which have undertaken, or are still undertaking constitutional reforms.’¹⁰⁹¹ With the financial assistance of the UNDP, the Commission conducted comparative study tours in South Africa, Uganda, Kenya, Ethiopia, Nigeria, Sweden, Denmark, Norway and India between 2003 and 2005.¹⁰⁹² Small groups of commissioners travelled to these countries, which were selected for having exemplary systems of governance.¹⁰⁹³ The objective of the tours was to ‘collect comparative data on their constitutions and practices and to share experiences and ideas on the constitution review processes that they had undertaken’.¹⁰⁹⁴

The Zambian study tours coincided with the Kenyan CKRC, Bomas and Wako constitution-making processes discussed in Chapter 4. On the basis of the timelines of the Zambian study tours to Kenya, when the Kenyans were working on the CKRC, Bomas and Wako Drafts, one may surmise that it is possible that the Mung’omba Commission looked at the CKRC, Bomas and Wako Drafts, which sought to devolve powers and functions to subnational units.

Unlike the constitutional review processes discussed in chapters 3, 4 and 5, the Mung’omba Commission did not have a mandate to conduct educational programmes to prepare Zambians for contributing to the constitution-making exercise.¹⁰⁹⁵ However, the Commission appreciated the need for education and, wherever meetings took place, duly sent advance parties with terms of reference translated into local languages.¹⁰⁹⁶ The majority of submissions from the meetings were in respect of the need to address principles of democratic governance, the separation of judicial, legislative and executive powers, and, of relevance to this study, the devolution of powers.¹⁰⁹⁷ Among the submissions made on devolution were that the constitution should provide for a system of local government and the entrenchment of the principle of devolution of power to lower levels of government; other submissions were that local government should be adequately funded, be assigned powers to levy and retain a substantial percentage of local taxes, and be entitled to an equitable share of national resources.¹⁰⁹⁸

¹⁰⁹¹ Mung’omba Report (2005) 15.

¹⁰⁹² Mung’omba Report (2005) 15.

¹⁰⁹³ Mung’omba Report (2005) 64.

¹⁰⁹⁴ Mung’omba Report (2005) 65.

¹⁰⁹⁵ Mung’omba Report (2005) 57.

¹⁰⁹⁶ Mung’omba Report (2005) 57.

¹⁰⁹⁷ Mung’omba Report (2005) 57.

¹⁰⁹⁸ Mung’omba Report (2005) 42.

The LGAZ was among the parties that lobbied the Commission to recommend a comprehensive devolution model in the constitution.¹⁰⁹⁹ It had observed a concerning pattern in which, regardless of which political party was in government, local government powers and functions were always centralised,¹¹⁰⁰ such that even the Chiluba government, like the Kaunda one, constantly undermined local governance. For instance, in 1995 the national government undermined local democracy by suspending local government elections and citing lack of funds as the reason for this.¹¹⁰¹ In an interview, Mbolela said it was important to the LGAZ that local government powers and functions be entrenched, as this would enable local governments to execute their responsibilities effectively.¹¹⁰²

The LGAZ's relationship with the IULA's African section, known as the African Union of Local Authorities (AULA), provided the LGAZ with support in the form of information and materials.¹¹⁰³ AULA also held workshops and conferences that provided members with opportunities to share experiences of lobbying for strong constitutional devolution models.¹¹⁰⁴ Among the events organised by AULA was the United Cities and Local Governments of Africa (UCLGA) Founding Congress, held in Pretoria (City of Tshwane, South Africa) in May 2005.¹¹⁰⁵ The UCLGA emphasised the devolution of powers and functions to local governments, the value of local democracy, the establishment of local government as a distinct level of government, and the importance of cooperative government.¹¹⁰⁶ One of the major outputs of the congress was the adoption of the UCLGA Charter of Commitments for the Establishment of Local Government as a Distinct Field of Government in Africa which set development targets for local governments.¹¹⁰⁷

The Charter drew heavily on the South African devolution model because very few African countries at the time had strong, organised local government structures in place.¹¹⁰⁸

¹⁰⁹⁹ Mbolela (2014) 197.

¹¹⁰⁰ Mbolela (2019).

¹¹⁰¹ Mbolela (2019).

¹¹⁰² Mbolela (2019).

¹¹⁰³ Mbolela (2019).

¹¹⁰⁴ Member countries alternatively hosted the workshops and conferences. See Mbolela (2019).

¹¹⁰⁵ UCLGA is a unification of three umbrella organisations, namely the African Union of Local Authorities (AULA), the Union des Villes Africaines (UVA), and the Uniao dos Cidades y Capitaes Lusofono Africana (UCCLA). See Baatjies R 'United Cities and Local Governments of Africa: Crystallisation of Local Government in Africa' (2005) 7 *Local Government Bulletin* 1.

¹¹⁰⁶ Baatjies (2005) 1.

¹¹⁰⁷ Baatjies (2005) 1.

¹¹⁰⁸ Baatjies (2005) 2.

Smangaliso Mkhathshwa, first President of the UCLGA, who at the time was also the President of SALGA and mayor of the City of Tshwane, said at the congress that

South Africa has established a progressive local government system. We need to share our experience and expertise with counterparts elsewhere in the continent. We are part of Africa and we must play a role in developing solutions to Africa's development needs.¹¹⁰⁹

The LGAZ assimilated the benefits of a strong devolution model from the congress.¹¹¹⁰ It also appreciated that the South African devolution model appeared to yield results. Mbolela said the LGAZ brought that knowledge back home and lobbied on that basis to the Commission, stressing in particular how the South African Constitution structured its devolution model.¹¹¹¹

In addition to the fact that the LGAZ was lobbying for a devolution model that resembled the South African model, the Commission itself had already been considering the South African model, as evidenced by the South African study tour discussed above. Furthermore, there was a six-week period between the end of the UCLGA congress and the submission of the Mung'omba Commission Report; thus, it is unlikely that this brief period was the genesis of the South African influence.

The Commission recommended that the Zambian devolution should follow the South African model. Unlike its predecessors, it considered the 1996 Constitution of South Africa. The relatively modern South African Constitution was attractive to the Commission because the devolution model appeared to deliver positive results. The South African economy and democracy appeared to have developed much faster than Zambia's even though South Africa attained independence three decades after Zambia.¹¹¹² In an interview, the Council Chairperson of Mumbwa Town, Gracious Hamatala, said, 'From what we see, it [the South African Constitution] has fostered development in their nation.'¹¹¹³

The South African development rate was of significant interest to Zambians because many South Africans lived in exile in Zambia during the struggle against apartheid.¹¹¹⁴ Furthermore,

¹¹⁰⁹ Baatjies (2005) 3.

¹¹¹⁰ Mbolela (2019).

¹¹¹¹ Mbolela (2019).

¹¹¹² Interview with the Council Chairperson of Mumbwa Town Council, Gracious S Hamatala, Lusaka, 21 November 2019.

¹¹¹³ Hamatala (2019).

¹¹¹⁴ Macmillan H 'The African National Congress of South Africa in Zambia: The Culture of Exile and the Changing Relationship with Home, 1964–1990' (2009) 35 *Journal of Southern African Studies* 305.

Zambia was instrumental in South Africa's liberation because the ANC's headquarters had been in Lusaka between 1969 and 1991,¹¹¹⁵ and the Zambian government had worked closely with the ANC leadership during that period.¹¹¹⁶ The relationship continued when the ANC won the 1994 elections.¹¹¹⁷ Therefore, the Commission inevitably considered the South African model.

The Commission's Report described the South African devolution model as ideal for consideration:

In terms of comparison, South Africa is a typical example of a country that has devolved power from [the] Central Government to local authorities. Under the South African system, Municipalities are the engines of social and economic development. These Municipalities are vested with legislative authority and the right to govern on their own initiative, with little or no intervention from [the] Central Government.¹¹¹⁸

The Mung'omba Commission submitted recommendations to the Mwanawasa government on 29 June 2005.¹¹¹⁹ As discussed above, the Mung'omba Commission's recommendations drew on the 1996 Constitution of South Africa. The sections below examine the South African influence in detail.

6.3.2.1 Levels of government

The Commission proposed that Zambia should consist of 'two separate, interactive and *interdependent* spheres, namely Central Government and local government',¹¹²⁰ which is reminiscent of the South African provision that 'government is constituted as national, provincial and local spheres of government which are distinctive, *interdependent* and interrelated'.¹¹²¹ The Commission proposed that provinces should remain as an administrative level of government.¹¹²² The three concepts proposed are in essence the same as the three in

¹¹¹⁵ National Heritage Council 'OR Tambo's Safe House in Lusaka Given a National Stature' 7 February 2017 available at <http://www.nhc.org.za/tambos-safe-house-lusaka-given-national-stature/> (accessed 12 November 2021).

¹¹¹⁶ Ritchie K 'Ties that Bind SA, Zambia' 26 October 2014 *Sunday Independent* available at <https://www.iol.co.za/sundayindependent/ties-that-bind-sa-zambia-1770669> (accessed 12 November 2021).

¹¹¹⁷ Ritchie (2014) 1.

¹¹¹⁸ Mung'omba Report (2005) 493.

¹¹¹⁹ Mung'omba Report (2005).

¹¹²⁰ Mung'omba Report (2005) 507.

¹¹²¹ Section 40(1) of the Constitution of South Africa.

¹¹²² Mung'omba Report (2005) 506.

the South African Constitution – ‘separate’ is the same as distinct; interactive is similar to interrelated; and interdependent appeared verbatim in the Report. Therefore, those concepts were largely influenced by the South African model. The major difference is that the South African model has three spheres of government whilst the Commission proposed two spheres.

6.3.2.2 Powers, structures and finances

The Commission acknowledged that local service delivery was poor and that, for local government to perform effectively, there was need to assign significant powers and functions to the local government sphere. The Commission singled out the period between 1962 to 1972 as the ‘most stable in Zambia’s history of local government service delivery’ because of the government reforms that promoted decentralisation.¹¹²³ The Commission sought to improve local government using that standard. Therefore, it recommended that the new constitution should ‘make provision for the system of local government in terms of objectives, structures, functions and financing and decentralisation from the Central Government of some powers, functions and resources to appropriate Local Government structures’.¹¹²⁴ However, the Report did not provide the details of the objectives, structures and functions, it merely recommended that the constitution should entrench those provisions.

Furthermore, the Commission recommended that the constitution should ‘make provision for adequate and predictable financing of local governments through appropriate resource mobilisation and allocation policies and other measures, including direct collection of local taxes’.¹¹²⁵ Lastly, the Commission did not define what ‘adequate and predictable financing’ entailed, and nor did it specify what constituted ‘local taxes’.

6.3.2.3 Role of a finance commission

The Commission proposed the establishment of an independent finance commission to determine the sharing of resources between the central and local government.¹¹²⁶ The recommendation of an independent financial commission mirrored the finance commission in

¹¹²³ Mung’omba Report (2005) 486.

¹¹²⁴ Mung’omba Report (2005) 503.

¹¹²⁵ Mung’omba Report (2005) 503.

¹¹²⁶ Mung’omba Report (2005) 505.

the South African Constitution¹¹²⁷ as well as the CKRC¹¹²⁸ and Bomas drafts.¹¹²⁹ It is possible that when the Commission saw that the establishment of a finance commission would gain traction in Kenya, this confirmed that the South African model was indeed a favourable choice.

6.3.2.4 Cooperative government and intergovernmental relations

The Mung’omba Report briefly referred to ‘cooperative governance’. The Commission recommended that ‘an innovative institutional arrangement should be put in place to streamline the role of traditional authorities in politics and governance through principles of cooperative governance’.¹¹³⁰ The Report was unclear as to whether the cooperative government recommendations extended to intergovernmental relations between the levels of government themselves or were confined just to cooperative governance between the levels of government and traditional authorities. However, Mbolela explained that the recommendations should be interpreted to mean that there was to be cooperative government between the levels of government as well.¹¹³¹

6.3.3 Death of the Mung’omba Constitutional Review Commission process

When the Mung’omba Commission Report was submitted to the MMD-led government on 29 June 2005, the next step was for the recommendations to be consolidated in a draft constitution.¹¹³² However, the government and civil society disagreed on a proposed timeline for this consolidation.¹¹³³ The government wanted a 285-week-long period whilst the civil society proposed a 71-week-long schedule. As a result, the Zambian Centre for Interparty Dialogue (ZCID) forum was established to resolve the disagreement between the government and civil society.¹¹³⁴ Thereafter, the National Constitutional Conference (NCC) was created.¹¹³⁵

¹¹²⁷ Section 221 of the Constitution of South Africa.

¹¹²⁸ Clause 225(1) of the CKRC Draft.

¹¹²⁹ Clause 259 of the Bomas Draft.

¹¹³⁰ Mung’omba Report (2005) 615.

¹¹³¹ Mbolela (2019). Furthermore, the National Constitutional Conference (NCC) Draft, which was developed from the Mung’omba Report, interpreted the cooperative government provisions to include cooperative government between the national and local government. See National Constitutional Conference (NCC) Report (2010) 663.

¹¹³² Mung’omba Report (2005).

¹¹³³ Chinyere & Hamauswa (2016) 37.

¹¹³⁴ Chinyere & Hamauswa (2016) 37.

¹¹³⁵ Chinyere & Hamauswa (2016) 37.

The NCC was responsible for drafting a constitution by reviewing the recommendations of the Mung’omba Report.¹¹³⁶ However, the legislative powers to adopt and enact the constitution were vested in Parliament.¹¹³⁷ In August 2008, Mwanawasa died,¹¹³⁸ with Rupiah Banda succeeding him as President in October 2008.¹¹³⁹ The NCC submitted the NCC Draft, but the Constitution Bill failed to pass the second reading of Parliament under the new President.¹¹⁴⁰ Dimpho Motsamai contends that the Constitution Bill did not pass due to the presidential running-mate clauses and the 50 + 1% threshold necessary to qualify as President.¹¹⁴¹ However, Madhekeni argues that the recommendations on devolution were unpopular with the central government, as evidenced by the fact that an earlier 2004 National Decentralisation Policy document – aimed at devolving decision-making authority, functions and resources from the centre – had also been shelved by the central government.¹¹⁴² As such, that marked the end of the efforts of the Mung’omba Commission and NCC.

6.4 Towards the 2016 Constitution: The TCDZC process

The need for a new constitution remained unquenched, partly because the central government had failed to devolve powers. A 2011 Ministry of Finance report indicated that the central government had failed to devolve functions to local government, and cited a number of administrative, financial and human resources challenges as factors responsible for this failure.¹¹⁴³ Ahead of the 2011 general elections, the presidential candidate Michael Sata of the Patriotic Front (PF) promised disgruntled Zambians that if he were elected as President, he would deliver a people-driven constitution within 90 days of being sworn into office.¹¹⁴⁴ The general elections were held in September 2011, and Sata emerged as the winner and new President of Zambia.¹¹⁴⁵ Like his predecessors, he initiated a constitutional reform process

¹¹³⁶ Chinyere & Hamauswa (2016) 37.

¹¹³⁷ Chinyere & Hamauswa (2016) 37.

¹¹³⁸ ‘Levy Mwanawasa buried in Zambia’ *BBC* 3 September 2008 available at <http://news.bbc.co.uk/2/hi/africa/7595149.stm> (accessed 2 September 2021).

¹¹³⁹ Shapi S ‘Zambia’s Banda Sworn in as President Despite Dispute’ *Reuters* 2 November 2008 available at <https://www.reuters.com/article/us-zambia-election-idUSTRE4A100920081102> (accessed 2 September 2021).

¹¹⁴⁰ Lungwangwa (2015) 60.

¹¹⁴¹ Motsamai (2014) 3.

¹¹⁴² Madhekeni (2020) 22.

¹¹⁴³ Ministry of Finance *Sixth National Development Plan 2011–2015* 220.

¹¹⁴⁴ Madhekeni (2020) 30.

¹¹⁴⁵ Lungwangwa (2015) 60. See also Chinyere & Hamauswa (2016) 38.

through the appointment of a technical committee of experts, known as the Technical Committee on Drafting the Zambian Constitution (TCDZC), on 16 November 2011.¹¹⁴⁶

6.4.1 The first TCDZC process

The TCDZC was headed by former Chief Justice Annel Silungwe.¹¹⁴⁷ The mandate of the TCDZC was to draft a constitution that reflected the will and aspirations of Zambians.¹¹⁴⁸ Similar to the Kenyan harmonisation process discussed in Chapter 4, the TCDZC was instructed to refer to documents from the previous constitutional review processes – such as the Mvunga Commission, 1991 Zambian Constitution, the Mwanakatwe Report, the 1993 Draft Constitution and the Mung’omba Commission Report – in addition to other resources.¹¹⁴⁹

The LGAZ submitted proposals to the TCDZC, as it had done in the previous constitution-making processes. The recommendations submitted to the TCDZC were a collaboration between the LGAZ and the Urban Councils of Zimbabwe (UCAZ). Mbolela explained that the UCAZ and the LGAZ had a close relationship since both organisations were part of AULA and AULA at the time had its regional headquarters in Harare, Zimbabwe.¹¹⁵⁰ He mentioned that the former secretary-general of UCAZ, Joel Zowa, personally assisted with recommendations that were submitted to the TCDZC.¹¹⁵¹ The UCAZ provided the LGAZ with resources such as reports, articles and commentaries that examined the South African devolution model. This was because, when the UCAZ assisted the LGAZ, Zimbabwe was undergoing its own constitution-making process, a process in which the UCAZ advocated for the entrenchment of a devolution model that resembled the South African model.¹¹⁵² The UCAZ thus became an intermediary or advocate for the South African model. This is an example of where Zimbabweans were indirectly involved in the development of the Zambian devolution model.

Zambian academics and practitioners also played a significant role in the development of the TCDZC devolution model. Isaac Ngoma, a technical advisor to the TCDZC, confirmed that Zambian academics and practitioners participated in the consultative process.¹¹⁵³ Andrew

¹¹⁴⁶ Lungwangwa (2015) 60.

¹¹⁴⁷ Lungwangwa (2015) 61.

¹¹⁴⁸ Lungwangwa (2015) 61.

¹¹⁴⁹ Lungwangwa (2015) 62. See also Motsamai (2014) 5.

¹¹⁵⁰ Mbolela (2019).

¹¹⁵¹ Mbolela (2019).

¹¹⁵² Constitution of Zimbabwe, 2013.

¹¹⁵³ Interview with TCDZC technical advisor Isaac Ngoma, Lusaka, 27 November 2019.

Chitembo, a former town clerk, indicated that his published research on global best practices in devolution formed part of the material that the TCDZC used in compiling the devolution provisions.¹¹⁵⁴ Furthermore, Chitembo advised the TCDZC on the importance of strong fiscal devolution since that was his area of expertise.¹¹⁵⁵ His proposals included a comparative study of the South African and Kenyan devolution models grounded in the two countries' similar historical backgrounds as fellow African countries.¹¹⁵⁶ Chitembo also observed that the TCDZC and the incumbent government were receptive to the South African and Kenyan devolution models because of the similar historical backgrounds.¹¹⁵⁷

Furthermore, relationships between Zambia, South Africa, Kenya and Zimbabwe – mediated through organisations such as the AU, SADC, and the Common Market for Eastern and Southern Africa (COMESA) – facilitated the movement of the South African devolution model.¹¹⁵⁸ Hamatala revealed that there were conferences and meetings where experts and technocrats from the respective countries shared experiences regarding the devolution models of their respective countries.¹¹⁵⁹

After the TCDZC harmonised the documents and drafts mentioned above and considered submissions, the next step was to submit the Harmonised Draft to local and international law experts.¹¹⁶⁰ The role of experts was to scrutinise, comment and make recommendations on the Harmonised Draft. Thereafter, the TCDZC finalised the first TCDZC Draft in December 2013, just more than two years after the TCDZC had been appointed.¹¹⁶¹ The TCDZC was instructed by the Ministry of Justice to hand over copies of the Draft only to Sata.¹¹⁶² That was contrary to the general expectation among Zambians because the handover of the Draft to the Presidency and the handover to the public were supposed to occur simultaneously. Civil society interpreted

¹¹⁵⁴ Chitembo's publications include Chitembo A 'A Manual for Local Government Financial Management in Zambia' (2002) 26 *SINPA Papers* 1 – 163; UN Habitat 'Fiscal Decentralization in Zambia' (2012) Nairobi: United Nations Human Settlements Programme. Both publications were instrumental in the formulation of Zambia's fiscal decentralisation policies.

¹¹⁵⁵ Interview with the academic and legal government practitioner, Alex Chitembo, and the civil servant and legal government practitioner, Charlston Hamulyata, Lusaka, 19 November 2019.

¹¹⁵⁶ Chitembo & Hamulyata (2019).

¹¹⁵⁷ Chitembo & Hamulyata (2019).

¹¹⁵⁸ Hamatala (2019).

¹¹⁵⁹ Hamatala (2019).

¹¹⁶⁰ Lungwangwa (2015) 62.

¹¹⁶¹ Interview with the TCDZC technical advisor, Isaac Ngoma, Lusaka, 27 November 2019.

¹¹⁶² 'The Pressure is on for Zambia to Make Public its Draft Constitution' available at <https://www.polity.org.za/article/the-pressure-is-on-for-zambia-to-make-public-its-draft-constitution-2014-03-19> (accessed 2 September 2021).

the Ministry of Justice's instruction as a sign that the administration was reluctant to adopt a new constitution.¹¹⁶³ However, the researcher's position is that the national government wanted to revise the TCDZC Draft before it was made public. It is probable that the national government wanted to remove provisions they disliked and substitute them with what was deemed favourable.

6.4.2 The devolution model of the (leaked) TCDZC Draft

The secrecy surrounding the first TCDZC Draft led to it being leaked. As with the first Zimbabwean COPAC Draft, it was leaked to an independent news site in January 2014.¹¹⁶⁴

6.4.2.1 Recognition of three levels of government

The leaked Draft proposed three levels of government, namely national, provincial and local. It also proposed autonomous provincial assemblies with legislative authority.¹¹⁶⁵ Furthermore, clause 188(2) proposed democratically elected local governments. Local governments were to be autonomous; the national and provincial governments were proscribed from interfering with local government's ability or right to perform its functions.¹¹⁶⁶ Thus, the recognition both of three levels of government and of the autonomous nature of local government is reminiscent of the South African Constitution.¹¹⁶⁷

6.4.2.2 Division of powers and functions

Like the South African Constitution, clause 176(2) of the leaked TCDZC Draft listed concurrent and exclusive functions for the national, provincial and local government levels.¹¹⁶⁸ Furthermore, the substantive powers and functions in the Draft appear to have been borrowed from Schedule 4 and 5 of the South African Constitution, given that some of the powers and functions are almost identical to each other. For example, functions such as agriculture, cultural

¹¹⁶³ Chitembo & Hamulyata (2019).

¹¹⁶⁴ The leaked draft was indeed the draft that was submitted to Sata, as was confirmed by the Zambian police, who warned that they would arrest those responsible for the leak for 'threatening the security of the state'. See Ndhlovu G 'Zambian Police Go After 'Watchdog' for Publishing Draft Constitution' *Advox Global Voices* 17 January 2014 available at <https://advox.globalvoices.org/2014/01/17/zambian-police-go-after-watchdog-for-publishing-draft-constitution/> (accessed 2 September 2021). See also Ndhlovu G (2014) 1.

¹¹⁶⁵ Clause 188(1)(1) of the Leaked TCDZC Draft.

¹¹⁶⁶ Clause 189(2) of the Leaked TCDZC Draft.

¹¹⁶⁷ Section 40 of the Constitution of South Africa.

¹¹⁶⁸ Schedules 4 and 5 of the Constitution of South Africa.

matters, health services and housing were concurrent functions of the national and provincial levels, whilst functions in areas such as pollution, building regulations and public transport were assigned to local government. In addition to those prescribed functions, local government was to be assigned the authority to oversee local programmes and projects, make by-laws and initiate local bills for consideration by the provinces.¹¹⁶⁹

The leaked TCDZC Draft also proposed ways in which to manage the legislative conflicts that could arise from the concurrent list. The italicised text in Table 17 below highlights the many similarities between the conflict-of-laws provisions proposed in the leaked TCDZC Draft and contained in the South African Constitution – similarities that demonstrate the strength of the South African influence.

Table 17: Conflict or concurrency of legislation provisions in the leaked TCDZC Draft and South African Constitution

Leaked TCDZC Draft	South African Constitution
<p>Clause 178: Where there is conflict between national and provincial legislation, national legislation prevails if it</p> <p>‘(a) applies <i>uniformly throughout Zambia</i>;</p> <p>(b) is aimed at preventing unreasonable action by the provincial administration or local authority which –</p> <p><i>(i) is prejudicial to the public interest, economic, health or security interest of Zambia or of another provincial administration or local authority; or</i></p> <p><i>(ii) impedes the implementation of national policy; or</i></p> <p>(c) provides for a matter that cannot be regulated effectively by provincial legislation; and</p> <p><i>(d) is necessary for the-</i></p> <p><i>(i) maintenance of national security;</i></p> <p><i>(ii) maintenance of economic unity;</i></p> <p><i>(iii) protection of a common market with respect to the mobility of goods, services, capital and labour; or</i></p>	<p>Section 146(2): National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:</p> <p>(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.</p> <p>(b) The national legislation deals with a matter that, to be dealt with effectively, requires <i>uniformity across the nation</i>, and the national legislation provides that uniformity by establishing—</p> <p>(i) norms and standards;</p> <p>(ii) frameworks; or</p> <p>(iii) national policies.</p> <p>(c) The national legislation is necessary for—</p> <p><i>(i) the maintenance of national security;</i></p> <p><i>(ii) the maintenance of economic unity;</i></p> <p><i>(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;</i></p>

¹¹⁶⁹ Clause 189(1) of the Leaked TCDZC Draft.

<p><i>(iv) protection of the environment.’</i></p>	<p>(iv) the promotion of economic activities across provincial boundaries; (v) the promotion of equal opportunity or equal access to government services; or <i>(vi) the protection of the environment.</i> <i>(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—</i> <i>(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or</i> <i>(b) impedes the implementation of national economic policy.</i></p>
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6.4.2.3 Own-revenue sources

When it came to revenue-generation powers, the leaked TCDZC Draft proposed that local government have ‘reliable and predictable sources of revenue’.¹¹⁷⁰ Hence, local government could levy, impose, recover and retain local taxes,¹¹⁷¹ which is similar to the South African devolution model.¹¹⁷² However, unlike the case with local government taxing powers, the leaked TCDZC Draft was silent on provincial taxing powers. That silence put into question the autonomy of provinces because subnational levels of government require sound financial resources to perform effectively.¹¹⁷³ The omission of own-revenue sources for provinces in the Draft is not too different from the South African devolution model where provinces, too, have very limited taxing powers.¹¹⁷⁴

¹¹⁷⁰ Clause 188(1)(f) of the Leaked TCDZC Draft.

¹¹⁷¹ Clause 198 of the Leaked TCDZC Draft.

¹¹⁷² Section 229 of the Constitution of South Africa.

¹¹⁷³ Bird R M ‘Subnational Revenues: Realities and Prospects. In Proceedings of Decentralization and Accountability of the Public Sector’, *Annual World Bank Conference on Development in Latin America and the Caribbean*, Washington DC, April 2000 319.

¹¹⁷⁴ Section 228(1) of the Constitution of South Africa.

6.4.2.4 Fiscal transfers

a) Equitable sharing of revenue

Clause 240(6)(ii) of the leaked TCDZC Draft proposed that revenue raised nationally be shared equitably between the different levels of government, which is similar to what the South African Constitution provides.¹¹⁷⁵ Clause 240(6)(ii) appeared to be the only revenue source for provinces. Furthermore, the Draft established a Local Government Equalisation Fund.¹¹⁷⁶ Clause 200(2) proposed that national legislation should annually appropriate funds to the Local Government Equalisation Fund, funds which should then be disbursed to local authorities by the Ministry responsible for finance. The concept of an Equalisation Fund was borrowed from Kenya.¹¹⁷⁷ Thus, the equitable-sharing provisions in the leaked Draft reflected a combination of concepts borrowed from the constitutions of Kenya and South Africa.

b) Conditional and unconditional grants

In addition, clause 200(3) proposed that the national government could provide additional funds and grants to local government as prescribed by legislation. However, the leaked TCDZC Draft, unlike the South African Constitution, was silent on whether the national government could allocate intergovernmental grants to provinces.¹¹⁷⁸

6.4.2.5 Supervision powers

A number of proposed provisions limited the autonomy of local government. For example, the leaked TCDZC Draft proposed that national and provincial government should have the responsibility to monitor and regulate local government in a manner that did not interfere with or compromise local government's ability or right to perform its functions.¹¹⁷⁹ Furthermore, provinces were to ensure that local taxes imposed by local government did not impede trade, communication and transport services in provinces; provinces were also meant to oversee the financial accountability of local government, report to the central government, and approve the

¹¹⁷⁵ Section 214 of the Constitution of South Africa.

¹¹⁷⁶ Clause 200(1) of the Leaked TCDZC Draft.

¹¹⁷⁷ Article 204 of the Constitution of Kenya.

¹¹⁷⁸ Section 214(1)(c) of the Constitution of South Africa.

¹¹⁷⁹ Clause 189(2) of the Leaked TCDZC Draft.

local government budget.¹¹⁸⁰ In addition, they were to be responsible for overseeing the performance of local government and, when necessary, intervene.¹¹⁸¹ Table 18 below is a comparison of the intervention provisions in the leaked TCDZC Draft and the South African Constitution.

Table 18: Intervention provisions in the leaked TCDZC Draft and South African Constitution

Leaked TCDZC Draft	South African Constitution
<p>Clause 187: Provinces have an obligation to intervene in local authorities when,</p> <p>(a) the local authority requests and it is in the local authority’s interest to do so;</p> <p><i>b) a local authority has failed to meet established minimum standards for rendering of services in the district;</i></p> <p>(c) it is prudent <i>to prevent the local authority from taking action that is prejudicial to the interests of another local authority or to the Province as a whole; or</i></p> <p>(e) it is necessary to <i>maintain the economic or sovereign unity of the Republic.</i></p>	<p>Section 139(1): When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—</p> <p>(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;</p> <p>(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —</p> <p><i>(i) maintain essential national standards or meet established minimum standards for the rendering of a service;</i></p> <p><i>(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or</i></p> <p><i>(iii) maintain economic unity; or</i></p>

The leaked Draft borrowed the concept of provincial intervention in local authorities from the South African Constitution, as is evident in the similarities between the italicised supervision provisions.

¹¹⁸⁰ Clause 182(2)(c)-(f) of the Leaked TCDZC Draft.

¹¹⁸¹ Clause 182(2)(f) of the Leaked TCDZC Draft.

6.4.2.6 Cooperative government and intergovernmental relations

The leaked TCDZC Draft proposed that there should be cooperative government among the three levels of government.¹¹⁸² However, it did not have further provisions elaborating how that would be achieved. By contrast, the South African model stipulates in detail the principles and mechanisms of cooperative government.¹¹⁸³ The provisions on cooperative government are thus a pale version of South Africa's extensive provisions.

Overall, the extent of South African influence is more apparent in the devolution model of the leaked TCDZC Draft than that of the Mung'omba Report. The reason for that is because the leaked TCDZC Draft was an actual constitutional draft with comparable text, whereas the Mung'omba Report merely proposed broad devolution concepts.

6.4.3 The devolution model of the official TCDZC Draft: The rejection of provinces

After the first TCDZC Draft was leaked, it appeared there was still no urgency in the Sata administration to produce a new constitution. The new constitution that Sata originally said would take no more than 90 days dragged on. His long ill-health may have contributed to the delay,¹¹⁸⁴ given that the official TCDZC Draft was published only in the month that Sata died.¹¹⁸⁵ This was released to the public in October 2014, almost three years after the TCDZC was appointed and seven months after the other Draft was leaked.¹¹⁸⁶ The devolution provisions did not change; therefore, they will not be discussed in this section.

The official Draft informed the Constitution Amendment Bill of 2015 and was presented to Parliament in 2015.¹¹⁸⁷ On 10 December 2015, Parliament rejected the concept of autonomous provinces by recommending that there should be no provincial elections¹¹⁸⁸ and that a

¹¹⁸² Clause 188(1)(c) of the Leaked TCDZC Draft.

¹¹⁸³ Chapter 3 of the Constitution of South Africa.

¹¹⁸⁴ 'Zambia's President Michael Sata Dies' *Aljazeera News* 29 Oct 2014 available at <https://www.aljazeera.com/news/2014/10/29/zambias-president-michael-sata-dies> (accessed 1 April 2024).

¹¹⁸⁵ Kuyela T 'Draft Constitution Released' *Zambia Daily Mail* 24 October 2014 available at <http://www.daily-mail.co.zm/draft-constitution-released/> (accessed 3 September 2021).

¹¹⁸⁶ *Aljazeera News* (2014).

¹¹⁸⁷ Munanula M 'The 2016 Constitution of Zambia: Elusive Search for a People Driven Process' available at <https://constitutionnet.org/news/2016-constitution-zambia-elusive-search-people-driven-process> (accessed 3 September 2021).

¹¹⁸⁸ Clause 43 of the Constitution Amendment Bill of 2015.

provincial minister should be a presidential appointee.¹¹⁸⁹ The provincial ministers' responsibilities included ensuring that national policies were implemented and that the concurrent functions of provinces and the exclusive functions of local authorities were performed in accordance with the constitution and legislation.¹¹⁹⁰ Therefore, provinces reverted to an administrative level.¹¹⁹¹ The role of provinces was to implement the decisions made at the national level. With provinces reverting to an administrative level, the supervision provisions contained in the leaked Draft fell away. Mulela Munanula argued that Parliament acknowledged that inasmuch as the South African model worked in South Africa, autonomous provinces were not suitable for Zambia due to financial constraints, fear of secession and the unwillingness of the central government to cede power.¹¹⁹²

a) Financial constraints

Parliament argued that provinces with legislatures were too expensive for the Zambian economy, and thus provincial legislatures were removed from the Constitution Amendment Bill.¹¹⁹³ With the removal of provincial legislative powers, provisions that regulated instances of conflict of laws between the national and provincial levels of government also fell away.¹¹⁹⁴ Parliament argued that the revenue sources for provinces were too weak and limited to support legislative structures.¹¹⁹⁵ Furthermore, Ngoma, a TCDZC technical adviser, mentioned that Parliament was of the opinion that provinces did not have the capacity to mobilise resources.¹¹⁹⁶ Therefore, according to the parliamentary debates, an administrative province rather than an autonomous province was ideal.

b) Fear of secession

Parliament also feared secession. The western province (home predominantly to Lozi-speaking people), which was formerly known as Barotseland, strongly advocated for autonomous

¹¹⁸⁹ Clause 117 of the Constitution Amendment Bill of 2015.

¹¹⁹⁰ Clause 117(3)(b) - (c) of the Constitution Amendment Bill of 2015.

¹¹⁹¹ Clause 150 of the Constitution Amendment Bill of 2015.

¹¹⁹² Munanula (2016) 3.

¹¹⁹³ Maniatis A 'Zambian Constitutional History' 4th *International e-Conference on Studies in Humanities and Social Sciences* held on 24 December 2019 147.

¹¹⁹⁴ The removal of all provisions that regulated instances of conflict of laws between the national and provincial levels of government did not affect the entrenched local government powers because those provisions did not extend to by-laws.

¹¹⁹⁵ Maniatis (2019) 147.

¹¹⁹⁶ Ngoma (2019).

provinces.¹¹⁹⁷ Parliament interpreted that autonomy to be akin to secession in view of the history of Barotseland,¹¹⁹⁸ which had wanted to secede from the rest of Zambia in the 1950s and 1960s.¹¹⁹⁹ Separatist sentiments resurfaced in 1996 and in 2001 when the Barotseland Patriotic Front (PFB) appealed to the UN and AU for assistance to hold a referendum on the self-determination of Barotseland.¹²⁰⁰ Hamatala argued that there were also secessionist sentiments during the TCDZC constitution-making process, and that the national government thus concluded that autonomous provinces were one step closer to secession.¹²⁰¹

c) Fear of losing power at the centre

Lastly, the central government did not want to devolve powers and functions to provinces out of fear of losing power at the centre. This notion did not come out during parliamentary debates; instead, it arose outside of the parliamentary process.¹²⁰² Between independence in 1964 and the TCDZC process, Zambia had presidents from four political parties, and all four parties wielded significant influence in different parts of the country.¹²⁰³ It also happened that Zambia was split not only politically but territorially.¹²⁰⁴ With such factors at play, opposition political parties and dissenting elites in the ruling party stood a better chance of winning at the local and provincial levels than the national level.¹²⁰⁵ Furthermore, the footholds of power that parties created for themselves in local government increased their influence and generated political and economic competition. For example, in the 2016 presidential elections, 50.4 per cent of the voters (mostly in the northern provinces) voted for Edgar Lungu, who won the election, whilst 48 per cent (mainly in the southern provinces) voted for the main rival, Hakainde

¹¹⁹⁷ Caplan G 'Barotseland: The Secessionist Challenge to Zambia' (1968) 6 *The Journal of Modern African Studies* 343.

¹¹⁹⁸ For two centuries, Barotseland acted as a 'distinct and superior breed, a chosen people'. That conviction was sanctioned in the colonial period when the territory was granted a special status. Barotseland was a British protectorate that had a superior status to the rest of Zambia (then Northern Rhodesia). The protectorate enjoyed greater freedoms than the rest of the country, while the Lozi king enjoyed moderately greater powers than those of chiefs in other regions. These factors led to the idea that the Lozi people were an entity separate from other ethnicities. See Caplan (1968) 343.

¹¹⁹⁹ Caplan (1968) 349 - 359.

¹²⁰⁰ Propopenko L Y 'The Principle "One Zambia, One Nation": Fifty Years Later' (2018) 17 *Social Evolution & History* 68.

¹²⁰¹ Hamatala (2019).

¹²⁰² Hamatala (2019).

¹²⁰³ Bratton M, Dulani B & Nkomo S 'Zambia at a Crossroads: Will Citizens Defend Democracy' (2017) 157 *Afro Barometer* 2 -3.

¹²⁰⁴ Propopenko (2018) 70.

¹²⁰⁵ Madhekeni (2020) 12.

Hichilema.¹²⁰⁶ Madhekeni remarked that, given such regional political muscle, the central government regarded the establishment of autonomous provinces as a handover of power to opponents, which is something the central government was not prepared to do.

6.5 The devolution model of the 2016 Constitution

In January 2015, Edgar Lungu became president after winning the presidential elections on the Patriotic Front (PF) ticket.¹²⁰⁷ One year later in January 2016, he assented to the Constitution Amendment Bill, and a new constitution was adopted that same year.¹²⁰⁸ The 2016 Constitution of Zambia¹²⁰⁹ entrenches a devolution model that was influenced by the South African model. The Constitution reflects the culmination of that influence, as contained mostly in the Mung'omba Report, TCDZC Drafts and the Constitution Amendment Bill. Therefore, the entrenchment of devolution provisions in the 2016 Constitution was not an original idea of the PF government; rather, it was a culmination of years of broad-based inquiries by the Mwanakatwe and Mung'omba Commissions, whose recommendations were shelved by a succession of procrastinating leaders.

Madhekeni suggests that

what broke the logjam and catalysed the advent of the 2016 Constitution and its vision of local government was not a blaze of insight on the road to Damascus but the exigencies of Lungu's dramatic succession to Sata in the face of a looming election.¹²¹⁰

Thus, Lungu assented to a Constitution Bill that had strong devolution provisions so as to secure his term in office. The devolution model in the 2016 Constitution recognises two levels of government, entrenches local government powers and functions, recognises subnational own-revenue sources, and provides for fiscal transfers and cooperative government.

¹²⁰⁶ Propopenko (2018) 70.

¹²⁰⁷ 'Zambia Defence Minister Lungu Wins Presidential Election' *BBC* 25 January 2015 available at <https://www.bbc.com/news/world-africa-30970952> (accessed 2 September 2021).

¹²⁰⁸ Madhekeni (2020) 30.

¹²⁰⁹ Constitution of Zambia Amendment No. 2 of 2016 (Constitution of Zambia).

¹²¹⁰ Madhekeni (2020) 29.

6.5.1 Recognition of two levels of government

The Constitution describes the system of a devolved government as follows: ‘the management and administration of the political, social, legal and economic affairs of the State shall be devolved from the national government level to the local government level’.¹²¹¹ Therefore, article 147(1) of the Constitution recognises two levels of government, namely national and local government. The Constitution also entrenches provinces; however, provinces are not considered a level of government because they are only administrative.¹²¹² Furthermore, the provincial administration consists of the provincial minister and a permanent secretary, both of which are national appointees.¹²¹³

Unlike the provinces, local government has democratically elected councils.¹²¹⁴ The objectives of local government include the promotion of people’s participation in democratic governance,¹²¹⁵ and social, spatial, financial, economic planning at the local level.¹²¹⁶ The Constitution protects local government autonomy through a provision that stipulates that ‘[t]he different levels of government [should] observe and adhere to the ... autonomy of the sub-structures’.¹²¹⁷ Local government autonomy is reinforced by article 152(2), which states that *‘the national Government and the provincial administration shall not interfere with or compromise a local authority’s ability or right to perform its functions’*.¹²¹⁸ This repeats section 151(4) of the South African Constitution almost verbatim.

6.5.2 Local government powers and functions

The Constitution empowers the local government to ‘initiate, plan, manage and execute policies in respect of matters that affect the people within their respective districts’.¹²¹⁹ Furthermore, local government is empowered to make by-laws in the functional areas entrenched in the Constitution.¹²²⁰ The annexure to the Constitution lists local government

¹²¹¹ Article 147(1) of the Constitution of Zambia.

¹²¹² Article 150 of the Constitution of Zambia.

¹²¹³ Article 150(1) of the Constitution of Zambia.

¹²¹⁴ Article 151(2) of the Constitution of Zambia.

¹²¹⁵ Article 151(b) of the Constitution of Zambia.

¹²¹⁶ Article 151(e) of the Constitution of Zambia.

¹²¹⁷ Article 147(3)(c) of the Constitution of Zambia.

¹²¹⁸ Emphasis added.

¹²¹⁹ Article 151(1)(d) of the Constitution of Zambia.

¹²²⁰ Articles 152(1)(c) and 147(2) of the Constitution of Zambia.

powers and functions. The list is almost identical to the local government and exclusive provincial functional areas listed in Schedules 4B and 5 of the South African Constitution. The Zambian devolution model followed the Kenyan model¹²²¹ in this regard because, like Zambian local government powers, county powers and functions are a mixture of South African provincial and local government powers, as discussed in Chapter 4.

Table 19 compares the local government functional areas in the Constitution of Zambia with the provincial and local government powers and functions in the South African Constitution.

Table 19: Local government powers in the Constitution of Zambia and provincial (PG) and local government (LG) functional areas in the South African Constitution

Local government powers in the Constitution of Zambia (Annexure to article 147(2))	Concurrent National government (NG) and Provincial government (PG), exclusive PG and local government (LG) powers in the Constitution of South Africa (Schedules 4 and 5)
	<i>Agriculture (concurrent NG and PG)</i>
<i>Abattoirs</i>	<i>Abattoirs (exclusive PG)</i>
	Animal control and diseases (concurrent NG and PG)
<i>District health services</i>	<i>Health services (concurrent NG and PG)</i> <i>Municipal health services (LG)</i>
<i>Ambulance services</i>	<i>Ambulance services (exclusive PG)</i>
<i>Licensing and control of undertakings that sell food to the public</i>	<i>Licensing and control of undertakings that sell food to the public (LG)</i>
<i>Veterinary services, excluding regulation of the veterinary profession</i>	<i>Veterinary services, excluding regulation of the profession (exclusive PG)</i>
<i>Cemeteries, funeral parlours and crematoria</i>	<i>Cemeteries, funeral parlours and crematoria (LG)</i>
<i>Refuse removal, refuse dumps and solid waste disposal</i>	<i>Refuse removal, refuse dumps and solid waste disposal (LG)</i>
<i>Pollution control</i>	<i>Pollution control (exclusive PG)</i>

¹²²¹ Fourth Schedule, Constitution of Kenya 2010.

<i>Noise pollution</i> <i>Billboards and the display of advertisements in public places</i>	<i>Air pollution (LG)</i> <i>Noise pollution (LG)</i> <i>Billboards and the display of advertisements in public places (LG)</i>
<i>Cultural matters</i>	<i>Cultural matters (exclusive PG)</i>
	Casinos, racing, gambling and wagering, excluding lotteries and sports pools (concurrent NG and PG)
<i>Liquor licencing</i>	<i>Liquor licences (exclusive PG)</i>
<i>Control of undertakings that sell liquor to the public</i>	<i>Control of undertakings that sell liquor to the public (LG)</i>
<i>Libraries</i>	<i>Libraries other than national libraries (exclusive PG)</i>
<i>Museums</i>	<i>Museums other than national museums (exclusive PG)</i>
<i>Sport</i> <i>Local sport facilities</i>	<i>Provincial sport (exclusive PG)</i> <i>Local sport facilities (LG)</i>
<i>Local parks and recreation</i> <i>Recreation and amenities</i> <i>Amusement facilities</i>	<i>Municipal parks and recreation (LG)</i> <i>Provincial recreation and amenities (exclusive PG)</i> <i>Beaches and amusement facilities (LG)</i>
<i>District public transport</i> <i>Local roads</i> Roads and traffic automation and maintenance <i>Traffic and parking</i>	<i>Public transport (concurrent NG and PG)</i> <i>Provincial roads and traffic (exclusive PG)</i> <i>Municipal roads (LG)</i> <i>Road traffic regulation (concurrent NGI and PG)</i> <i>Traffic and parking (LG)</i>
<i>Street lighting</i>	<i>Street lighting (LG)</i>
<i>Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto</i>	<i>Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto (LG)</i>
<i>Licensing of dogs</i>	<i>Licensing of dogs (LG)</i>

<i>Facilities for the accommodation, care and burial of animals</i>	<i>Facilities for the accommodation, care and burial of animals (LG)</i>
<i>Trading Markets</i>	<i>Trade (concurrent NG and PG) Trading regulations (LG) Markets (LG)</i>
<i>Local tourism</i>	<i>Tourism (concurrent NG and PG) Local Tourism (LG)</i>
<i>District planning Local spatial planning Fencing and fences</i>	<i>Regional planning and development (concurrent NG and PG) Provincial and municipal planning (PG and LG) Fencing and fences (LG)</i>
	<i>Housing (concurrent NG and PG)</i>
<i>Electricity</i>	<i>Electricity and gas reticulation (LG)</i>
<i>Child care facilities</i>	<i>Child care facilities (LG)</i>
	<i>Administration of indigenous forests (concurrent NG and PG) Soil conservation (concurrent NG and PG)</i>
<i>District public works only in respect of the needs of Districts in the discharge of councils responsibilities to administer functions specifically assigned to them under this Constitution or other law</i>	<i>Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law (concurrent NG and PG) Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law (LG)</i>
<i>Stormwater management systems in built-up areas</i>	<i>Stormwater management systems in built-up areas (LG)</i>
<i>Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems</i>	<i>Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems (LG)</i>

<i>Firefighting services</i>	<i>Firefighting services (LG)</i> <i>Disaster management (concurrent NG and PG)</i>
<i>Building regulations</i>	<i>Building regulations (LG)</i>
<i>District airports, Aerodromes and Airships</i>	<i>Airports other than international and national airports (concurrent NG and PG)</i> <i>Municipal airports (LG)</i>
Levies, tariffs and tolls	Property transfer fees (concurrent NG and PG)
<i>Vehicle licensing</i>	<i>Vehicle licensing (concurrent NG and PG)</i>
<i>Archives</i>	<i>Archives other than national archives (exclusive PG)</i>
<i>Local cleansing</i>	<i>Cleansing (LG)</i>
<i>Control of public nuisances</i>	<i>Control of public nuisances (LG)</i>
<i>Local amenities</i>	<i>Local amenities (LG)</i>
<i>Pounds</i>	<i>Pounds (LG)</i>
<i>Public places</i>	<i>Public places (LG)</i>
<i>Street trading</i>	<i>Street trading (LG)</i>
Gardens and landscaping	
	Consumer protection (concurrent NG and PG)
	Education at all levels, excluding tertiary education (concurrent NG and PG)
	Environment (concurrent NG and PG)
	Indigenous law and customary law, subject to Chapter 12 of the Constitution (concurrent NG and PG)
	Industrial promotion (concurrent NG and PG)
	Language policy and the regulation of official languages to the extent that the provisions

	of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence (concurrent NG and PG)
	Media services directly controlled or provided by the provincial government, subject to section 192 (concurrent NG and PG)
	Nature conservation, excluding national parks, national botanical gardens and marine resources (concurrent NG and PG)
	Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence (concurrent NG and PG)
	Population development (concurrent NG and PG)
	Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5 (concurrent NG and PG)
	Traditional leadership, subject to Chapter 12 of the Constitution (concurrent NG and PG)
	Urban and rural development (concurrent NG and PG)
	Welfare services (concurrent NG and PG)

The table above shows the similarities of local government powers and functions in the South African Constitution and the Constitution of Zambia. All the italicised passages are verbatim reproductions, albeit with some minor differences. For instance, the Constitution of Zambia refers to district health services, whilst the South African text refers to municipal health services. Furthermore, for the greater part, the powers and functions listed in the Zambian Constitution appear in the same order in which they are listed in the South African Constitution. This is a strong indication of the South African influence on the Constitution of Zambia.

6.5.3 Sources of revenue

Article 151(1)(f) of the Constitution of Zambia provides that a ‘sound financial base’ should be established for local governments to ensure that they have reliable and predictable sources of revenue. The Constitution further stipulates that local governments may ‘levy, impose, recover and retain local taxes’.¹²²² Similarly, the South African model provides for the concept of the constitutional entrenchment of local government taxes.¹²²³ Nevertheless, the Zambian model did not follow the details of the South African model. For example, the South African Constitution specifies that, in addition to taxes, levies and duties authorised by legislation, local governments may impose property rates and surcharges on fees for services.¹²²⁴ By contrast, the Constitution of Zambia does not specify which rates and taxes local governments may impose.

6.5.4 Fiscal transfers

a) Equitable share

The Constitution of Zambia entrenches the concept of sharing revenue raised nationally equitably among the different levels of government, which resembles the equitable-sharing provisions of the South African model.¹²²⁵ Section 198(b)(ii) of the Constitution of Zambia provides that ‘revenue raised nationally is shared equitably among the different levels of government’. Furthermore, article 163 provides for the establishment of the Local Government Equalisation Fund, a concept which mirrors the Kenyan Equalisation Fund.¹²²⁶

b) Conditional and unconditional grants

The Constitution provides that the national government may transfer additional funds to local governments in the form of grants.¹²²⁷ Article 163(3) provides that ‘[t]he Government may provide additional funds and grants to a local authority, as prescribed’. Similarly, the

¹²²² Article 161 of the Constitution of Zambia.

¹²²³ Section 229 of the Constitution of South Africa.

¹²²⁴ Section 229 of the Constitution of South Africa.

¹²²⁵ Article 198(b)(ii) of the Constitution of Zambia.

¹²²⁶ Article 204 of the Constitution of Kenya.

¹²²⁷ Article 163(3) of the Constitution of Zambia.

Constitution of South Africa has the concept of additional allocations through intergovernmental grants.¹²²⁸

6.5.5 Cooperative government and intergovernmental relations

The Constitution preserves the cooperative government provisions proposed in the earlier TCDZC draft constitutions. The wording of the provisions changed slightly to state that '[t]here is established a local government system where – ... cooperative governance with the national Government, provincial administration and local authorities is promoted to support and enhance the developmental role of local government'.¹²²⁹ The Zambian Constitution assigns Parliament the responsibility to determine the specificities of cooperative government. However, the South African cooperative government provisions are more comprehensive, with Chapter 3 of the Constitution dedicated to cooperative government. Therefore, the extent of the South African influence on cooperative government appears to be limited to the concept of cooperative government rather than the actual text.

The discussion above demonstrates the moderate extent of the South African influence on the 2016 Constitution. The next question is: How and why did it happen?

6.6 The South African Constitution's influence on the Zambian devolution model

6.6.1 Extent of influence

The South African influence on the Zambian model occurred gradually throughout the constitution-making process. The Mwanakatwe Report had minimal South African influence, particularly by the South African Interim Constitution. Thereafter, the influence increased in the Mung'omba Report. The latter indicated that it was based on some of the devolution recommendations in the South African Constitution. The Mung'omba Commission was known for having produced a comprehensive and progressive account that recommended that devolution be enshrined in the constitution.¹²³⁰ Furthermore, the Mung'omba Commission's Report was the first constitutional document to use the term 'devolution' in Zambia. Use of the

¹²²⁸ Section 227(1)(b) of the Constitution of South Africa.

¹²²⁹ Article 151(1)(c) of the Constitution of Zambia.

¹²³⁰ Mung'omba Report.

term ‘devolution’ may have been influenced by the Zimbabwean NCA Draft,¹²³¹ which introduced the term ‘devolution’ in that context in 2001, or by the Kenyan CKRC, Bomas or Wako drafts, which also subsequently used the term.¹²³²

The South African influence is most significant in the TCDZC drafts because the model, concepts and texts are most similar to the South African Constitution in comparison to the earlier *Zambian* constitutional amendments or reports. Most of the provisions reflect recommendations that were made by the Mwanakatwe and Mung’omba Commissions but which had been rejected or ignored by the MMD government under Chiluba and Mwanawasa. However, when the Constitution Amendment Bill of 2015 went to Parliament, some of the South African influences were watered down, particularly those in regard to the autonomous nature of provinces.

6.6.2 Why the South African model travelled successfully

6.6.2.1 Homegrown demand for devolution

Local government under the Independence Constitution of Zambia enjoyed a measure of autonomy and was characterised by adequate service delivery and local democracy. Thereafter, a wave of centralisation culminated in a homegrown demand for devolution. Local authorities faced numerous problems that limited their ability to deliver local services and play meaningful roles in improving local democracy and local development. External factors such as donor pressure and the need to ride the global wave of democratisation also encouraged the already-existing demand for devolution, as discussed above. This explains why politicians in opposition or within the ruling party appeared committed to promoting devolution: their motive was to use it as a campaign instrument to gain or retain power, rather than as a system of democratic governance.¹²³³ Politicians used devolution as a campaign tool because they knew it was what voters wanted. The entrenchment of devolution in the 2016 Constitution is – as noted previously – a culmination of years of broad-based inquiries by the Mwanakatwe and Mung’omba Commissions, the recommendations of which were shelved by a succession of

¹²³¹ National Constitutional Assembly Constitutional Draft, 2001.

¹²³² Constitution of Kenya Review Commission (CKRC) Draft, 2002. See also Bomas Draft, 2004; Wako Draft, 2005.

¹²³³ Madhekeni (2020) 29.

procrastinating administrations, leading to the TCDZC drafts which were later developed into the 2016 Constitution.

6.6.2.2 Sound knowledge of the South African Constitution

The LGAZ played a significant role in the importation of the South African model to the Zambian Constitution because it had sound knowledge of the South African Constitution. That knowledge dated to the devolution model provided in the South African Interim Constitution. The LGAZ's affiliation with IULA and AULA encouraged it to advocate for a strong constitutionalised devolution model because of the advantages and benefits that came with a devolved system of government. IULA and AULA also shared resources such as articles, commentaries and reports in regard to constitutions which had entrenched strong devolution principles, and among those constitutions was South Africa's. In 2005, when the UCLGA was set up, the LGAZ continued to learn about the South African model, this time from South Africans, given that the first president of UCLGA was a South African. The South African model was also used by the UCLGA as the ideal model, one which member countries of the UCLGA were encouraged to follow. The LGAZ's relationship with the UCAZ reinforced its knowledge of the South African devolution model since the UCAZ was proposing that the South African devolution provisions be entrenched in the Zimbabwean COPAC drafts. In view of its sound knowledge of the South African model and its benefits, the LGAZ made recommendations to the different constitutional commissions so that a similar devolution model could be entrenched in Zambia.

Zambian academics also played an important role in the movement of South African provisions. They achieved this mainly at the consultative stage with the constitutional commissions, at which point they recommended that Zambia entrench a devolution model that resembled the South African one.

6.6.2.3 Observation of good practice

The Zambian people and government followed how South Africa was developing after it became a democracy because Zambians had built relationships with the South Africans who had previously been in exile in Zambia. Zambians admired how the South African economy was booming at a faster rate than Zambia despite having attained its democracy three decades after Zambia. Zambians in turn attributed the success of the growing South African economy

partly to the devolution model that was yielding positive results. Local governments, which struggled to execute their duties effectively, were the major proponents of a devolution model that resembled the South African model. The hope was that, with a strong devolution model, Zambian local authorities would also experience local economic growth and development.

It is also argued that Zambians would have observed the good practices of the South Africa model during engagements at conferences and other events, such as COMESA, SADC or AU meetings, where South African delegates shared the developments in South Africa. The exchange of ideas at these meetings and conferences would then have been relayed back to the constitutional commissions.

6.7 Conclusion

Given the resemblances between the Zambian and South African devolution models, the purpose of the chapter was to examine the Zambian constitution-making process to establish the nature, content and intensity of the South African model that migrated. The second goal of the chapter was to analyse why and how the South African influence took shape in Zambia. Furthermore, the chapter assessed whether the Zambian constitution-making process borrowed devolution concepts and text from the Constitution of Kenya that did not emanate from the South African Constitution.

The Zambian devolution model was homegrown, with external parties fanning the flames of a pre-existing desire for devolution. The meetings and conferences held by the different Commissions indicated that the Zambian people wanted a devolution model that addressed the challenges the country was experiencing. The chapter demonstrated that the ordinary people wanted devolution, whilst different government administrations resisted it for diverse reasons related to the nature of the country's polity. Due to the competitive dynamics of Zambian politics, all regimes since the colonial era ignored or shelved devolution for fear of giving opposition parties and elites the means to secure regional dominance.

After years of persistent effort, a new constitution with devolution provisions was adopted. Zambians were attracted to the South African model and thus decided to import some of its devolution provisions. For example, the Constitution copied almost verbatim, and in the same order, the local government powers and functions set out in the South African Constitution. However, the Zambians drafters did not import the South African model as it was, but modified its provisions to suit the Zambian context, as evidenced by the watering-down of certain

provisions and removal of particular concepts (such as autonomous provinces) in the 2016 Constitution. The establishment of an equalisation fund is the only concept that was modelled on the Constitution of Kenya.

In conclusion, the influence of the South African devolution model on the Zambian devolution model was strong due to the homegrown demand for devolution, the existence of sound knowledge of the South African Constitution, and the observation of good practice.

Chapter 7:

Conclusion: The Influence of the South African Devolution Model on the Kenyan, Zimbabwean and Zambian Devolution Models

7.1 Introduction

The influence of the South African Constitution on other African constitutions has been acknowledged in the literature. This influence is particularly noticeable in the constitutions of Kenya, Zimbabwe and Zambia in the area of devolution, as established in this thesis. The purpose of this chapter is to answer the research question: ‘The influence of South Africa’s model of devolution in Kenya, Zimbabwe and Zambia: Why and how did the model, concepts and texts migrate?’ To answer this question, three sub-questions were posed. First, what is the nature, content and intensity of the migrated devolution model and provisions? Secondly, why and how did the migration of the devolution model and provisions take place? Lastly, can a general theory be adduced from the constitutional migration of the South African model?

As will be observed later in this chapter, the thesis established that the nature, content and intensity of the migrated devolution model varies across the constitutions adopted by the three countries and the constitutional drafts that preceded those constitutions. The case studies demonstrated that evidence of the South African influence is observed in the importation of a similar devolution model, concepts and texts (in some cases verbatim). It was observed that a homegrown demand for devolution was the main reason that the South African model migrated to Kenya, Zimbabwe and Zambia. Government officials, organised local government, academics, international and local experts, and politicians and constitutional drafters who were directly involved in the constitution-making process were some of the main players who influenced the export or import dynamics of the South African devolution model. This thesis demonstrated that local actors were the key players in transmitting knowledge of the copied or imitated model, concepts, and texts – a role that has not been researched extensively. Thus, constitutional migration was not externally driven.

The chapter commences in section 7.2 by examining the nature, content and intensity of the migrated devolution model and provisions. Section 7.2 is organised according to the themes used in chapters 4, 5 and 6, which are the recognition of levels of government, subnational powers and functions, equitable share and cooperative government and intergovernmental

relations provisions. Thereafter, section 7.3 analyses why and how the model, concepts and texts moved. Lastly, section 7.4 examines the general theory that can be deduced from the constitutional migration of the South African model to the Kenyan, Zimbabwean and Zambian devolution models.

7.2 The nature, content and intensity of the migrated devolution model and provisions

Evidence of the South African influence on the Kenyan, Zimbabwean and Zambian devolution models is observed in the similarity of the devolution concepts and texts contained in the devolution models of the respective countries. This section draws conclusions in respect of the constitutional migration that transpired and resulted in devolution provisions that were popular outside of South Africa. Devolution provisions such as own revenue sources and supervision which significantly deviated from the South African provisions in the constitutions that were adopted in the case studies were not discussed because the scope of this thesis is limited to the nature, content and intensity of the ‘migrated’ devolution model and provisions.

7.2.1 Recognition of subnational levels of government

Section 40(1) of the South African Constitution provides for three spheres of government, namely the national, provincial and local. Unlike the South African model, the Kenyan Constitution recognises only one subnational level of government – county governments.¹²³⁴ Earlier Kenyan constitutional drafts such as the CKRC Draft of 2002 and Bomas Draft of 2004 entrenched multiple levels of government. However, the middle levels of government were later dropped. While the Kenyan Constitution recognises only two levels of government, the conceptual framework is the same as that of the South African model. The South African Constitution further describes the relationship between the three spheres of government as ‘distinctive, interdependent and interrelated’.¹²³⁵ The Kenyan Constitution also describes national and county levels as ‘*distinct and interdependent*’ – the levels ought to ‘conduct their mutual relations on the basis of consultation and cooperation’.¹²³⁶ The similarity of the text, which is almost verbatim, signifies the intensity of borrowing from the South African model.

¹²³⁴ Article 6(1) of the Constitution of Kenya.

¹²³⁵ Section 40(1) of the Constitution of South Africa.

¹²³⁶ Article 6(2) of the Constitution of Kenya.

The Zimbabwean Constitution also recognises subnational levels of government, namely the levels of provinces (and metropolitan councils), on the one hand, and of local government, on the other.¹²³⁷ While the South African and Kenyan models both define the relationship between the levels of government as ‘distinct and interdependent’, the Zimbabwean model does not provide for such a relationship for all its levels of government. As was discussed in Chapter 5, the COPAC Draft of 2012 proposed a similar relationship for all three levels, but that provision fell away in the adopted Constitution. An aspect of multilevel recognition is found in respect of local government autonomy, which is a clear copy of section 151(3) of the South African Constitution. Section 276(1) of the Constitution of Zimbabwe states that, subject to the Constitution and national legislation, local government ‘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 to do so’. However, the South African model provides more protection for local government because the role of national and provincial legislation in local government affairs is subject to the framework provided in the Constitution.

The Zambian model recognises subnational levels of government. Article 147(1) of the Zambian Constitution entrenches two levels of government, the national and the local. It also provides for a provincial administration, which for the purpose of this thesis is not considered a devolved unit since it is merely an administrative extension of the national government. Article 152(2) of the Constitution of Zambia seems to have been imported verbatim from section 151(4) of the South African Constitution. Article 152(2) states that ‘[t]he national [g]overnment and the provincial administration shall not interfere with or compromise a local authority’s ability or right to perform its functions’. Thus, the Constitution provides for substantial local government autonomy.

In sum, the extent of the South African influence on the three countries is significant as far as the recognition of devolved units is concerned, but to varying degrees. The model adopted in Kenya does not have three levels which the South African model has. However, the concept of subnational autonomy which migrated from South African to the Kenyan model is substantive in its impact. The Zimbabwean model recognises three levels of subnational government, as does the South African model. However, the recognition of the three subnational levels does

¹²³⁷ Section 5 of the Constitution of Zimbabwe.

not translate into the autonomy of subnational levels. Lastly, in the Zambian model, only local government is recognised as a devolved and autonomous level.

7.2.2 Subnational powers and functions

The concept of entrenching subnational powers and functions migrated from the South African model to all three case studies. However, in Zimbabwe, the constitutional migration did not go beyond the leaked and first COPAC Drafts of 2012, since the Zimbabwean Constitution does not assign any subnational powers. The latter provides instead that the national government, ‘whenever appropriate’, must devolve powers and functions to ‘competent’ provinces and local government.¹²³⁸ Furthermore, national legislation may confer generic functions to local government, including powers to levy rates and taxes and make by-laws.¹²³⁹ By contrast, both the Kenyan and Zambian models entrench counties and local government powers and functions in a list of functional areas.

Table 20 below provides a list of the subnational powers and functions as provided in the South African, Kenyan and Zambian constitutions. Zimbabwe is thus omitted from the table because no subnational powers are listed.

Table 20: Subnational powers and functions in the South African, Kenyan and Zambian constitutions

Concurrent National government (NG) and Provincial government (PG), exclusive PG and local government (LG) powers in the Constitution of South Africa (Schedules 4 and 5)	County powers in the Constitution of Kenya (Fourth Schedule)	Local government powers in the Constitution of Zambia (Annexure to Article 147(2))
<i>Agriculture (concurrent NG and PG)</i>	<i>Agriculture</i> , including— crop and animal husbandry livestock sale yards fisheries	
<i>Abattoirs (exclusive PG)</i>	<i>County abattoirs</i>	<i>Abattoirs</i>

¹²³⁸ Section 264(1) of the Constitution of Zimbabwe.

¹²³⁹ Section 276(2) of the Constitution of Zimbabwe.

<i>Animal control and diseases (concurrent NG and PG)</i>	Plant and <i>animal disease control</i>	
<i>Health services (concurrent NG and PG)</i> <i>Municipal health services (LG)</i>	<i>County health services</i> , including, in particular— county health facilities and pharmacies promotion of primary health care	<i>District health services</i>
<i>Ambulance services (exclusive PG)</i>	<i>Ambulance services;</i>	<i>Ambulance services</i>
<i>Licensing and control of undertakings that sell food to the public (LG)</i>	<i>Licensing and control of undertakings that sell food to the public</i>	<i>Licensing and control of undertakings that sell food to the public</i>
<i>Veterinary services, excluding regulation of the profession (exclusive PG)</i>	<i>Veterinary services (excluding regulation of the profession)</i>	<i>Veterinary services, excluding regulation of the veterinary profession</i>
<i>Cemeteries, funeral parlours and crematoria (LG)</i>	<i>Cemeteries, funeral parlours and crematoria; and</i>	<i>Cemeteries, funeral parlours and crematoria</i>
<i>Refuse removal, refuse dumps and solid waste disposal (LG)</i>	<i>Refuse removal, refuse dumps and solid waste disposal</i>	<i>Refuse removal, refuse dumps and solid waste disposal</i>
<i>Pollution control (exclusive PG)</i> <i>Air pollution (LG)</i> <i>Noise pollution (LG)</i> <i>Billboards and the display of advertisements in public places (LG)</i>	<i>Control of air pollution, noise pollution, other public nuisances and outdoor advertising</i>	<i>Pollution control</i> <i>Noise pollution</i> <i>Billboards and the display of advertisements in public places</i>
<i>Cultural matters (exclusive PG)</i>	<i>Cultural activities, public entertainment and public amenities</i> , including— cinemas, video shows and hiring	<i>Cultural matters</i>

<i>Casinos, racing, gambling and wagering, excluding lotteries and sports pools (concurrent NG and PG)</i>	<i>Betting, casinos and other forms of gambling racing</i>	
<i>Liquor licences (exclusive PG)</i>	<i>Liquor licensing</i>	<i>Liquor licencing</i>
<i>Control of undertakings that sell liquor to the public (LG)</i>		<i>Control of undertakings that sell liquor to the public</i>
<i>Libraries other than national libraries (exclusive PG)</i>	<i>Libraries</i>	<i>Libraries</i>
<i>Museums other than national museums (exclusive PG)</i>	<i>Museums</i>	<i>Museums</i>
<i>Provincial sport (exclusive PG) Local sport facilities (LG)</i>	<i>Sports and cultural activities and facilities</i>	<i>Sport Local sport facilities</i>
<i>Municipal parks and recreation (LG) Provincial recreation and amenities (exclusive PG) Beaches and amusement facilities (LG)</i>	<i>County parks, beaches and recreation facilities.</i>	<i>Local parks and recreation Recreation and amenities Amusement facilities</i>
<i>Public transport (concurrent NG and PG) Provincial roads and traffic (exclusive PG) Municipal roads (LG) Road traffic regulation (concurrent NG and PG) Traffic and parking (LG)</i>	<i>County transport, including— county roads public road transport traffic and parking</i>	<i>District public transport Local roads Roads and traffic automation and maintenance Traffic and parking</i>
<i>Street lighting (LG)</i>	<i>Street lighting</i>	<i>Street lighting</i>
<i>Pontoons, ferries, jetties, piers and harbours,</i>	<i>Ferries and harbours, excluding the regulation of</i>	<i>Pontoons, ferries, jetties, piers and harbours,</i>

<i>excluding the regulation of international and national shipping and matters related thereto (LG)</i>	<i>international and national shipping and matters related thereto</i>	<i>excluding the regulation of international and national shipping and matters related thereto</i>
<i>Licensing of dogs (LG)</i> <i>Facilities for the accommodation, care and burial of animals (LG)</i>	Animal control and welfare, including— <i>licensing of dogs; and facilities for the accommodation, care and burial of animals</i>	<i>Licensing of dogs</i> <i>Facilities for the accommodation, care and burial of animals</i>
<i>Trade (concurrent NG and PG)</i> <i>Trading regulations (LG)</i> <i>Markets (LG)</i>	<i>Trade development and regulation, including—</i> <i>markets</i> trade licences (excluding regulation of professions) fair trading practices cooperative societies	<i>Trading Markets</i>
Tourism (concurrent NG and PG) <i>Local Tourism (LG)</i>	<i>Local tourism</i>	<i>Local tourism</i>
<i>Regional planning and development (concurrent NG and PG)</i> <i>Provincial planning (exclusive PG)</i> <i>Municipal planning (LG)</i> <i>Fencing and fences (LG)</i>	<i>County planning and development, including—</i> statistics land survey and mapping <i>boundaries and fencing</i>	<i>District planning</i> Local spatial planning <i>Fencing and fences</i>
<i>Housing (concurrent NG and PG)</i>	<i>Housing</i>	
<i>Electricity and gas reticulation (LG)</i>	<i>Electricity and gas reticulation</i> and energy regulation	<i>Electricity</i>
<i>Child care facilities (LG)</i>	Pre-primary education, village polytechnics, homecraft centres and <i>child care facilities</i>	<i>Child care facilities</i>

<p>Administration of indigenous forests (concurrent NG and PG)</p> <p>Soil conservation (concurrent NG and PG)</p>	<p>Implementation of specific national government policies on natural resources and environmental conservation, including—</p> <p>soil and water conservation;</p> <p>and</p> <p>forestry</p>	
<p><i>Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law (concurrent NG and PG)</i></p> <p><i>Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law (LG)</i></p>	<p>County public works and services</p>	<p><i>District public works only in respect of the needs of Districts in the discharge of councils responsibilities to administer functions specifically assigned to them under this Constitution or other law</i></p>
<p>Stormwater management systems in built-up areas (LG)</p>	<p>Stormwater management systems in built-up areas</p>	<p>Stormwater management systems in built-up areas</p>
<p>Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems (LG)</p>	<p>Water and sanitation services</p>	<p>Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems</p>

<i>Firefighting services (LG) Disaster management (concurrent NG and PG)</i>	<i>Firefighting services and disaster management</i>	<i>Firefighting services</i>
	Control of drugs and pornography	
	Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level	
<i>Building regulations (LG)</i>		<i>Building regulations</i>
<i>Airports other than international and national airports (concurrent NG and PG) Municipal airports (LG)</i>		<i>District airports, Aerodromes and Airships</i>
Property transfer fees (concurrent national and PG)		Levies, tariffs and tolls
<i>Vehicle licensing (concurrent national and PG)</i>		<i>Vehicle licensing</i>
<i>Archives other than national archives (exclusive PG)</i>		<i>Archives</i>
<i>Cleansing (LG)</i>		<i>Local cleansing</i>
<i>Control of public nuisances (LG)</i>		<i>Control of public nuisances</i>
<i>Local amenities (LG)</i>		<i>Local amenities</i>

<i>Pounds (LG)</i>		<i>Pounds</i>
<i>Public places (LG)</i>		<i>Public places</i>
<i>Street trading (LG)</i>		<i>Street trading</i>
		Gardens and landscaping
Consumer protection (concurrent NG and PG)		
Education at all levels, excluding tertiary education (concurrent NG and PG)		
Environment (concurrent NG and PG)		
Indigenous law and customary law, subject to Chapter 12 of the Constitution (concurrent NG and PG)		
Industrial promotion (concurrent NG and PG)		
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence (concurrent NG and PG)		
Media services directly controlled or provided by the provincial government, subject to section 192 (concurrent NG and PG)		

Nature conservation, excluding national parks, national botanical gardens and marine resources (concurrent NG and PG)		
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence (concurrent NG and PG)		
Population development (concurrent NG and PG)		
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5 (concurrent NG and PG)		
Traditional leadership, subject to Chapter 12 of the Constitution (concurrent NG and PG)		
Urban and rural development (concurrent NG and PG)		
Welfare services (concurrent NG and PG)		

As indicated in the table above, the concept of entrenching subnational powers and functions in schedules in both the Kenyan and Zambian constitutions migrated from the South African Constitution. The South African powers and functions listed above are clearly indicated in the South African Constitution as functional areas of concurrent national and provincial, exclusive provincial and local government legislative competences. The Kenyan Constitution appears to have borrowed the concept of exclusive and concurrent functions; however, it is unclear which

powers are exclusive and which are concurrent.¹²⁴⁰ The listed functional areas in the Fourth Schedule does not specify which powers fall under exclusive functions and which powers are concurrent powers. Both the national and county governments appear to have similar functions in certain areas, with the differentiation being the attachment of the prefix of either ‘national’ or ‘county’. As discussed in Chapter 4, article 186(4) on the face of it suggests that only the national level has exclusive powers and functions, whilst all county powers are concurrent. However, Kangu argues that article 1(3) and (4) expresses the constitution drafters’ intention to distribute powers and functions distinctly and have that power exercised at both the national and county level.¹²⁴¹ The lack of clarity as to what counts as concurrent or exclusive in the Kenyan model is a matter that courts would have to settle eventually and thus falls beyond the scope of the thesis. In the case of Zambia, there is no uncertainty: all local government powers are exclusive functions. Therefore, Zambia borrowed the concept of exclusive subnational powers from the South African Constitution.

Further evidence of the migration of the South African Constitution is found in the substance of the transplanted subnational powers and functions. The Kenyan and Zambian constitutions list provincial and local government functional areas more or less as they appear in the South African Constitution. The majority of the Kenyan county powers and functions listed in the Kenyan Constitution were transplanted from the South African model, while a few others were formulated to suit the Kenyan context.¹²⁴² However, some of the county powers and functions that migrated from the South African model were embroidered to include elements that are absent in the South African Constitution. For instance, the South African Constitution refers to the functional area of ‘agriculture’, whereas in the Kenyan model that same function is described as ‘[a]griculture, including – crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control and fisheries’.

The intensity of the migrated provisions is most pronounced in the Zambian model, where all of the Zambian local powers and functions, except one,¹²⁴³ are similar to those of local government in the South African Constitution. All of the Zambian local powers and functions are the same as in the South African model, with the only difference being that the Zambian

¹²⁴⁰ Articles 185(2), 186(1) and 187(2) Fourth Schedule of the Constitution of Kenya.

¹²⁴¹ Kangu (2015) 189.

¹²⁴² For example, county governments have the responsibility to control drugs and pornography. This is not a function borrowed from the South African model.

¹²⁴³ Legislative competence on gardens and landscaping.

model substitutes ‘municipal’ for ‘district’. Furthermore, not only does Zambia have a list of powers like the South African model, but the powers and functions also appear in the same order as they do in the South African Constitution. Therefore, among the case studies, Zambia did the most borrowing in terms of transplanted subnational powers and functions.

Some South African powers and functions listed in Table 20 did not migrate to either the Kenyan or Zambian model. What is significant about the powers that were not copied is the fact that a majority of those powers fall under the concurrent legislative competence of the South African national and provincial governments. It is probable that the Kenyan and Zambian constitution owners decided against assigning those powers and functions to the devolved units because they were of the opinion that the national government was better suited to execute them. For example, the proper execution and performance in education would have been a challenge, if not impossible, with 47 counties in Kenya and 116 local government districts in Zambia.¹²⁴⁴ As a result, the Zambian model copied only exclusive provincial and local government powers, with the exception of vehicle licensing. However, there are some exclusive provincial and local government powers that were not copied in the Kenyan model. For example, the Kenyan Constitution omitted local government powers such as cleansing, control of public nuisances, local amenities, pounds, public places and street trading. These functions are basic local government functions, and therefore it is possible that they were deemed to be already included in county jurisdictions.

In sum, in as far as subnational powers and functions are concerned, the intensity of the migrated provisions in both the Kenyan and the Zambian constitutions was significant but absent in the case of Zimbabwe.

7.2.3 Equitable share

To compensate for limited subnational taxing powers, the South African model provides for the concept of equitable sharing of revenue raised nationally between national and subnational governments. The equitable-share provisions in Kenya, Zimbabwe and Zambia reflect the notion of equitable sharing in the South African Constitution, as highlighted in the table below.

¹²⁴⁴ Ndiege J R & Wamuyu P K ‘Knowledge Management Practices and Systems in County Governments in Developing Countries: Perspectives from Selected Counties in Kenya’ (2019) 49 *VINE Journal of Information and Knowledge Management Systems* 421. See ‘Local Authorities’ available at https://www.mlgrd.gov.zm/?page_id=4743 (accessed 4 July 2024).

Table 21: Equitable share provisions in the South African, Kenyan, Zimbabwean and Zambian constitutions

South African Constitution	Constitution of Kenya	Constitution of Zimbabwe	Constitution of Zambia
Section 214(1): An Act of Parliament must provide for— (a) the <i>equitable</i> division of revenue raised nationally among the national, provincial and local spheres of government;	Article 202(1): Revenue raised nationally shall be shared <i>equitably</i> among the national and county governments.	Section 298(1)(b)(ii): Revenue raised nationally must be shared <i>equitably</i> between the central government and provincial and local tiers of government;	Article 198(b)(ii): Revenue raised nationally is shared <i>equitably</i> among the different levels of government;

The concept of equitable share in the South African model refers to the entitlement of all three spheres to a share of revenue raised nationally. As discussed in Chapter 3, in South Africa an independent FFC is responsible for recommending equitable fiscal and financial allocations to the national, provincial and local governments. However, the sharing process varies considerably in the three countries. As discussed in Chapter 4, by establishing a Commission on Revenue Allocation, the Kenyan model borrowed both the concept of equitable sharing and the sharing process.

Earlier Zimbabwean 2012 COPAC drafts proposed equitable-share provisions and a sharing process that was almost identical to those in the South African model. As discussed in Chapter 5, the proposed devolution model also provided for an independent fiscal commission which shared the same name, FFC. However, those equitable-share provisions fell away due to the recentralisation forces. As such, the Zimbabwean model departs significantly from the South African equitable-sharing processes. Section 298(1)(b)(ii) of the Zimbabwean Constitution provides that revenue raised nationally must be shared equitably between the central government and provincial and local tiers of government, yet section 301 refers to the equitable allocation of ‘conditional or capital grants’ by the national government between provincial and local government. According to section 301, there is apparently no need for ‘equity’ between the subnational levels and the national government.

The Zambian model can be seen to have borrowed the concept of equitable share and the sharing process from the South African Constitution in view of the fact that ‘revenue raised nationally is shared equitably among the different levels of government’.¹²⁴⁵ However, unlike the South African model, the Zambian model does not establish a financial commission to provide guidance on how revenue raised nationally should be shared equitably among the tiers of government.

Additionally, the Kenyan Constitution borrowed from the South African model an almost identical list of factors that ought to be considered by national legislation that provides for equitable sharing of revenue.¹²⁴⁶ The Constitution of Zimbabwe also copied the list of factors. However, the copied factors must be taken into account by Parliament when equitably allocating conditional grants between provinces and local government.¹²⁴⁷ As discussed in Chapter 5, the criteria make sense for the South African and Kenyan models because they consider factors such as national interest and national debt, which are crucial when revenue is allocated to the national sphere. While the Zimbabwean model’s criteria list the same factors, confusion arises as to the application of the provisions because section 301(1) of the Zimbabwean Constitution refers to the sharing of capital grants only between provinces and local government. Furthermore, as discussed in Chapter 5, the phrasing of the text in section 301(2) appears to exclude the application of the provision to section 298(10)(b)(ii). Therefore, how may factors such as national interest and national debt be considered when allocating conditional grants to provinces and local government? This is an example of bad copying-and-pasting: the constitutional migration was not thought-through and is misapplied.

Lastly, the Kenyan Constitution went a step further to provide for the concept of a minimum percentage of the equitable share to which devolved units are entitled.¹²⁴⁸ As discussed in Chapter 5, the first official COPAC Draft of Zimbabwe copied verbatim the concept of a minimum percentage of the equitable share. Clause 17(4)(3) proposed that ‘[n]ot less than fifteen per cent of the national revenues raised in any financial year must be allocated to the provinces and local authorities as their share in that year’. The amount of the minimum percentage was reduced to five instead of the 15 per cent in the Zimbabwean Constitution due

¹²⁴⁵ Section 198(b)(ii) of the Constitution of Zambia.

¹²⁴⁶ Section 214(2) of the Constitution of South Africa; see also article 203(1) of the Constitution of Kenya.

¹²⁴⁷ Section 301(2) of the Constitution of Zimbabwe.

¹²⁴⁸ Article 203(2) of the Constitution of Kenya.

to the highly centralised nature of the model.¹²⁴⁹ Therefore, there was no need for an allocation of 15 per cent because the Constitution of Zimbabwe does not enumerate provincial and local government powers and functions that warrant such a revenue share.

In a nutshell, the equitable-share provisions in Table 21 are an example of a concept that migrated from the South African model, but the actual provisions or texts play out differently than they do in the South African model. The Kenyan model shows the greatest intensity in respect of the migrated provisions because the model borrowed the equitable-share concept, the sharing process, and the role of an independent institution to guide the sharing of revenue. The intensity of the migrated provisions in the Zambian model is moderate because it borrowed the concept of equitable share and the sharing process in so far as allocating revenue among all levels of government is concerned. However, the Zambian Constitution is silent on the factors that should be considered when allocating revenue raised nationally. Lastly, the equitable-sharing provisions in the Zimbabwean model show the least influence among the case studies because only the concept of equitable share between the three tiers was borrowed. Furthermore, the concept of equitable allocation of conditional or capital grants to provinces and local government in the Zimbabwean devolution model contributes to how the sharing process is considerably different from the South African model.

7.2.4 Cooperative government and intergovernmental relations

The Kenyan, Zimbabwean and Zambian devolution models all entrench provisions that regulate how different levels of government ought to work together to ensure that all levels fulfil their mandates. All three devolution models provide for the concept of cooperative government, which was adopted from the South African Constitution. Table 22 points out the resemblances between the cooperative government provisions in the South African, Kenyan, Zimbabwean and Zambian constitutions.

¹²⁴⁹ Section 301(3) of the Constitution of Zimbabwe.

Table 22: Cooperative government provisions in the South African, Kenyan, Zimbabwean and Zambian constitutions

South African Constitution	Constitution of Kenya	Constitution of Zimbabwe	Constitution of Zambia
<p>Section 41(1): All spheres of government and all organs of state within each sphere must—</p> <p>(a) preserve the peace, national unity and the indivisibility of the Republic;</p> <p>(b) secure the well-being of the people of the Republic;</p> <p>(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;</p> <p>(d) be loyal to the Constitution, the Republic and its people;</p> <p>(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;</p> <p>(f) not assume any power or function except those conferred on them</p>	<p>Article 189(1): Government at either <i>level</i> shall—</p> <p>(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;</p> <p>(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and</p> <p>(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and</p>	<p>Section 194(1): Public administration in <i>all tiers of government</i>, including institutions and agencies of the State, and government-controlled entities and other public enterprises, must be governed by the democratic values and principles enshrined in this Constitution, including the following principles -</p> <p>(g) institutions and agencies of government at all levels must <i>cooperate with each other</i>.</p> <p>Section 198 An Act of Parliament must provide measures to enforce the provisions of this Chapter including measures -</p> <p>(c) specifying the standards of good <i>corporate governance</i> to be observed by government-controlled entities and other commercial entities owned or wholly controlled by the State;</p>	<p>Article 151(1): There is established a local government system where— ...</p> <p>(c) <i>co-operative governance</i> with the national Government, provincial administration and local authorities is promoted to support and enhance the developmental role of local government;</p>

<p>in terms of the Constitution;</p> <p>(g) <i>exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;</i></p> <p>(h) <i>co-operate with one another in mutual trust and good faith by—</i></p> <p>(i) fostering friendly relations;</p> <p>(ii) <i>assisting and supporting one another;</i></p> <p>(iii) informing one another of, and consulting one another on, matters of common interest;</p> <p>(iv) co-ordinating their actions and legislation with one another;</p> <p>(v) adhering to agreed procedures; and</p> <p>(vi) <i>avoiding legal proceedings against one another.</i></p> <p>(2) <i>An Act of Parliament must—</i></p>	<p>administration and enhancing capacity.</p> <p>(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.</p> <p>(3) <i>In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.</i></p> <p>(4) <i>National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation,</i></p>	<p>Section 265(1) Provincial and metropolitan councils and local authorities must, within their spheres--</p> <p><i>a. ensure good governance by being effective, transparent, accountable and institutionally coherent;</i></p> <p><i>b. assume only those functions conferred on them by this Constitution or an Act of Parliament;</i></p> <p><i>c. exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government;</i></p> <p><i>d. co-operate with one another, in particular by--</i></p> <p><i>i. informing one another of, and consulting one another on, matters of common interest;</i></p> <p><i>ii. harmonising and co-ordinating their activities;</i></p> <p><i>e. preserve the peace, national unity and indivisibility of Zimbabwe;</i></p>	
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<p><i>(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and</i></p> <p><i>(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.</i></p> <p><i>(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.</i></p> <p><i>(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved</i></p>	<p><i>mediation and arbitration.</i></p>	<p><i>f. secure the public welfare; and</i></p> <p><i>g. ensure the fair and equitable representation of people within their areas of jurisdiction.</i></p> <p><i>2. All members of local authorities must be elected by registered voters within the areas for which the local authorities are established.</i></p> <p><i>3. An Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities.</i></p>	
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The South African devolution model seeks intergovernmental harmony to ensure that the three spheres of government do not act at cross-purposes. The South African Constitution describes the spheres of government as ‘interdependent’, a concept which embodies intergovernmental relations.¹²⁵⁰ As discussed in Chapter 3, the three spheres are ‘interdependent’ in the sense that they must exercise their autonomy for the common good of the country by cooperating with each other.¹²⁵¹ Section 41(1) lists the principles of cooperative government that must be observed by the spheres of government. In addition to those principles, the South African Constitution requires national legislation to provide structures, institutions, mechanisms and procedures to promote and facilitate cooperative government.¹²⁵² Furthermore, intergovernmental disputes must be resolved by all other remedies provided in legislation before the spheres of government can approach courts: courts can be approached only as a last resort.¹²⁵³

The concept of cooperative government migrated from South African to Kenya, as evidenced by article 189 of the Kenyan Constitution, which describes the interdependency of the levels of government. Furthermore, the Kenyan model borrowed provisions that mandate the different levels of government to resolve intergovernmental disputes by using dispute resolution mechanisms before approaching a court of law for resolution. The text of the cooperative government provisions is embroidered, in comparison to the South African model. For example, the South African Constitution provides that national legislation shall ‘provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes’, whilst the Kenyan text provides that ‘[n]ational legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration’.¹²⁵⁴ Therefore, it is argued that although the Kenyan model did not copy the text verbatim from the South African model, the Kenyan Constitution incorporates the essence of the South African model in regard to intergovernmental provisions.

Similarly, as observed in Table 22 above, most of the provisions regulating cooperative government in the Zimbabwean Constitution are verbatim copies of the provisions in the South African Constitution. This is evidence of the significant intensity of the migrated provisions.

¹²⁵⁰ Section 40(1) of the Constitution of South Africa.

¹²⁵¹ Steytler N ‘Republic of South Africa’ in Kincaid J & Tarr G A (eds) *Constitutional Origins, Structure, and Change in Federal Countries* (2005) 318.

¹²⁵² Section 41(2) of the Constitution of South Africa.

¹²⁵³ Section 41(3) of the Constitution of South Africa.

¹²⁵⁴ Section 41(2)(b) of the Constitution of South Africa; see also article 189(4) of the Constitution of Kenya.

Section 194(1)(g) provides that ‘institutions and agencies of government at all levels must cooperate with each other’ and that all government institutions should observe ‘standards of good corporate governance’.¹²⁵⁵ However, section 265, which forms the bulk of the cooperative government provisions in the Constitution, provides that only the provincial and local government should have intergovernmental relations. Therefore, sections 194(1)(g), 198(c) and 265(1) appear to contradict each other, indicating another example of poor borrowing.

Lastly, the cooperative government provisions in the Zimbabwean devolution model deviate from the South African model because they do not provide for mechanisms and procedures to resolve intergovernmental disputes. It is possible that the constitution owners refrained from including those provisions because they wanted a model with mainly centralist features, one in which there is ultimately a hierarchy with the national government at the top. Entrenching mechanisms to resolve intergovernmental disputes could imply that subnational levels may challenge the national government. Therefore, by excluding those provisions, the status quo under the Lancaster House Constitution continues: the national government has a final say in most disputes.

The concept of cooperative government moved to the Constitution of Zambia but with some adjustments, as indicated in Table 22. Article 151(1)(c) provides that ‘[t]here is established a local government system where ... cooperative governance with the national Government, provincial administration and local authorities is promoted to support and enhance the developmental role of local government’. Article 151(1)(c) is the only provision in the model that provides for intergovernmental relations. The Zambian model assigns Parliament the responsibility to determine the specificities of cooperative government. As in the case of Zimbabwe, the Zambian constitution owners wanted the central government to retain control of local government. Therefore, the national government can determine what cooperative government entails and, in the legislative process, potentially weaken the position of local government.

7.2.5 Movement of the devolution model

It is clear from the discussion above that various devolution concepts and texts of the South African model migrated to the Kenyan, Zimbabwean and Zambian models. Some of the South

¹²⁵⁵ Section 198(c) of the Constitution of Zimbabwe.

African concepts and texts were not adopted as is, but were adapted to suit the objectives of the constitution owners. As a result, the Kenyan, Zimbabwean and Zambian models are at variance with the South African model. The variance presents itself in how the migrated devolution concepts and texts were adapted to fit the needs of the constitutional owners.

In Kenya, the migration of South African provisions did not result in the emergence of a devolution model identical to the South African model. For instance, the Kenyan model does not provide for three spheres of government. The Kenyan model establishes counties which are a combination of the South African provincial and local government, as discussed in Chapter 4. Consequently, counties are assigned most of the powers and functions that are assigned to South African provincial and local governments.

Furthermore, the intergovernmental fiscal system performs slightly differently from the South African model. In addition to the borrowed South African equitable-share provisions and financial commission, the Kenyan model provides that counties are entitled to a minimum of 15 percent of nationally raised revenue. By contrast, the South African model does not have the concept of minimum percentage.

Lastly, another difference in the Kenyan devolution model is in relation to the borrowed supervision provisions that were discussed in Chapter 4. For instance, both the Kenyan senate and the South African NCOP play a supervisory role over subnational governments; however, the role of the senate is defined in legislation, whereas the role of the NCOP is set out in the Constitution.¹²⁵⁶ The South African model migrated to the Kenyan model because the CoE Draft of 2009 reversed the centralist provisions that had been introduced in the Wako Draft of 2005 by the anti-devolution incumbent government. Therefore, the South African devolution model broadly migrated to the Kenyan model with some modifications.

In Zimbabwe, the leaked COPAC Draft of February 2012 for the most part had the same devolution model as the South African Constitution. However, the Constitution of Zimbabwe of 2013 ended up with the weakest devolution model and was thus furthest away from the South African model – this is because the ZANU-PF led government was against devolution. The incumbent government strongly proposed a more centralised model in the subsequent COPAC Drafts. Therefore, a devolution model with strong central elements was adopted. For example, the Zimbabwean devolution model recognises three levels of government, as does

¹²⁵⁶ Section 139 of the Constitution of South Africa; see also articles 189–190 of the Constitution of Kenya.

the South African model. However, the levels of government in the Zimbabwean model are referred to as ‘tiers’, signifying a hierarchical relationship, whereas the spheres of government in the South African model are described as ‘distinctive, interdependent and interrelated’ phraseology which denotes the autonomous nature of the spheres. Furthermore, while the principles of devolution in the Zimbabwean model are the same as the objects of local government in the South African model, the Zimbabwean model extends what was originally just the objects of local government to apply to both provinces and local government.

As far as revenue sources are concerned, the Zimbabwean model does not only centralise provincial taxation powers like South Africa, but also extends the same principle to local government. Additionally, the equalisation sharing process that migrated from the South African model was adapted in the Zimbabwean model in a rather confusing manner, as discussed in section 7.2.3 above. The Zimbabwean model provides that revenue raised nationally must be shared equitably between the national, provincial and local government, but it also refers to the equitable sharing of conditional grants between subnational levels of government by the national government. Furthermore, the minimum percentage concept borrowed from the Kenyan devolution model changes how the fiscal transfer operations borrowed from South Africa function. Lastly, as discussed in section 7.2.4, there is some contradiction in the cooperative government provisions that were borrowed and adapted from the South African model. Overall, the Zimbabwean model has more centralist features than the South African model.

Since as early as 1993, Zambian constitutional commissions proposed the entrenchment of a devolution model that reflected South African influences. The recommendations were rejected by different regimes that in their election campaigns had pledged to devolve powers and functions but failed to do so. Of all the Zambian constitutional recommendations and drafts, the leaked TCDZC Draft of January 2014 had a devolution model closest to the South African model. The devolution model that was eventually adopted in the 2016 Constitution was a watered-down version of the leaked TCDZC Draft because, as discussed in Chapter 6, the Sata administration, like its predecessors, preferred a centralised system of government.

The Zambian model deviated from the South African model in that only local government is recognised as a devolved unit, whereas the provinces are merely administrative units. Like the Kenyan model, almost all of the local government powers and functions in the Zambian model were borrowed from both the South African provincial and local government powers and

functions. Therefore, the Zambian local government has considerably more powers and functions than those set out in the South African local government. Furthermore, the Zambian model recognises the concept of subnational taxation powers. However, the taxation powers are centralised because the model does not specify which taxes and rates the local governments may impose. This is contrary to the South African model, which specifies local government taxation powers in the Constitution. Additionally, the Zambian model borrowed the concept of equitable sharing of nationally raised revenue by the levels of government. However, the sharing process is different. For example, the Zambian model provides for the establishment of the Local Government Equalisation Fund, which mirrors the Kenyan Equalisation Fund, but does not originate from the South African Constitution.¹²⁵⁷

Lastly, the cooperative government provisions in the Zambian model are not as comprehensive as those in the South African model. The Zambian Constitution assigns Parliament the responsibility to determine the specificities of cooperative government. Therefore, the Zambian model is a diluted version of the South African model because, other than local government powers and functions, which are taken verbatim from the South African model, the Zambian model mostly borrowed concepts. The majority of those concepts are to be developed by national legislation, which leaves room for the devolution model not to be fully realised in Zambia if the national government is against it.

In sum, the South African devolution model migrated to Kenya, Zimbabwe and Zambia in the earlier constitutional drafts. However, over time, the devolution models in the constitutional drafts fluctuated due to the input from various political parties. Devolution models that were eventually adopted in Kenya, Zimbabwe and Zambia were watered-down versions of the South African model because there were political parties that were opposed to devolution. Therefore, constitutional migration of the South African devolution model in all three countries was different because of the trend of recentralisation that was evident in all three case studies.

7.3 Why and how the Kenyan, Zimbabwean and Zambian models borrowed from the South African Constitution

The literature review in Chapter 2 explained that the self-selection, coercive migration and persuasion migration theories are behind global constitutional migration. It was established in

¹²⁵⁷ Article 163 of the Constitution of Zambia; see also article 204 of the Constitution of Kenya.

this thesis that the theories discussed in Chapter 2, particularly the coercive migration theory, were behind the movement of constitutional provisions in the independence constitutions of Kenya, Zimbabwe and Zambia. The self-selection theory explains the transfer of the South African devolution model to the Kenyan, Zimbabwean and Zambian models. The thesis focused on why there was constitutional migration and how the devolution model, concepts and text moved. It was established that four unique factors explain the wide-scale migration of the South African model. First, there was a homegrown demand for devolution. Secondly, the South African model was attractive due to similar historical backgrounds, simple language and the observation of good practice. Thirdly, there was a high level of knowledge of the South African model, which was conveyed mainly by local actors – the role of foreign actors was minimal. Fourth, time constraints contributed to the movement of the South African text.

Lastly, the section draws conclusions below about the dynamic migration of the South African devolution model.

7.3.1 Homegrown demand for devolution

What is common in all three case studies is that there was a homegrown demand for devolution. In Kenya, as discussed in Chapter 4, Yash Ghai observed during the CKRC information-gathering process that there was a widespread feeling among the people of alienation from the central government due to the concentration of power in the national government.¹²⁵⁸ Ghai noted that the Kenyan people felt marginalised, neglected, and deprived of their resources, as well as victimised for their political or ethnic affiliations because national political decisions and policies did not reflect the reality in which they lived.¹²⁵⁹ Therefore, Kenyan people wanted to move away from the centralised system of governance, which had been abused for decades. In the light of those sentiments, the CKRC established that there was a homegrown need to produce a constitutional draft that entrenched a non-centralised system of government, particularly a form of devolution, because that would afford Kenyan communities more control of their own affairs.¹²⁶⁰

International institutions such as the World Bank incentivised devolution by offering financial aid to devolved countries. However, international influence in the constitutional migration of

¹²⁵⁸ Ghai Y 'Devolution: Restructuring the Kenyan State' (2008) 2 *Journal of Eastern African Studies* 215.

¹²⁵⁹ Ghai (2008) 215.

¹²⁶⁰ Murray C 'Kenya's 2010 Constitution' (2013) 61 *Neue Folge Band Jahrbuch des öffentlichen Rechts* 757.

the South African devolution model to Kenya appears to be limited or negligible. The World Bank by no means imposed its position on Kenya. Nor did it compel Kenyans to borrow from the South African model in particular: it merely advocated for devolution. In addition, African delegates, among them former Tanzanian president Benjamin Mkapa, the former South African First Lady, Graca Machel, and the former UN Secretary-General, Kofi Annan, were also involved in constitutional reform after the 2007–2008 Kenyan civil unrest. While the African delegation mediated for, among other things, constitutional review, it did not specify the content of the constitution. Furthermore, the delegation came to Kenya only after the South African Constitution had already influenced the CKRC Draft of 2002 and Bomas Draft of 2004. However, as observed in Chapter 4, it is not improbable that the delegation encouraged the incumbent government to devolve powers since the centralist government contributed to the violence and political instability. At the end of the day, Kenyans identified devolution as an alternative to the centralised model of governance.

As in Kenya, Zimbabwe had a homegrown demand for devolution in that the Zimbabwean people wanted to move away from the centralised system of governance that had contributed to a socio-economic and political crisis in post-colonial Zimbabwe. As discussed in Chapter 5, the CC Draft of 1999 was rejected by the people in the 2000 national referendum. A civil society movement, the NCA, advocated for the rejection of the CC Draft partially because there was ‘no devolution of governmental powers to the people at appropriate levels’. Furthermore, opposition politics contributed to the demand for devolution. The MDC advocated for the constitutionalisation of local government powers and functions because it wanted to strengthen its stronghold in urban areas, thus propelling it to challenge the national government. Further evidence of the homegrown demand for devolution was in the National Statistics Reports of 2009, which were gathered during the COPAC public participation process and identified the need for a non-centralised form of government.¹²⁶¹

In the case of Zambia, it was established in Chapter 6 that local government during the early days of the independence constitutional order enjoyed a significant measure of autonomy. Over time, with centralisation, the local government was unable to deliver public services to communities and play meaningful roles in deepening local democracy and promoting local development. Thus, the Zambian people began advocating for devolution as a response to these challenges and to improve local government. One of the key findings of the Mwanakatwe

¹²⁶¹ National Statistics Reports (2009) Version 1 and Version 2.

Commission of 1995 was that there was a significant power vacuum at provincial and local levels and that this vacuum created a sense of alienation, powerlessness, marginalisation among the Zambian people.¹²⁶² The call for devolution continued throughout the various constitution-making processes. Lastly, external factors such as donor pressure and the need to ride the global wave of democratisation played a negligible role in the migration of the devolution model.

7.3.2 The South African model was attractive

The South African devolution model was attractive to the case-study countries investigated in this thesis. For example, the analysis in Chapter 4 demonstrated that similar historical backgrounds made the South African devolution model favourable to Kenyans. The South African Constitution addressed issues such as financial inequality. Kenya also sought to address financial inequalities in regions, particularly due to different regions having received disparate financial resources owing to their ethnicity. The Kenyan drafters observed that a model in the Scandinavian regions, for example, would most likely not suit the Kenyan context because Scandinavian regions did not necessarily need to address financial inequalities. Furthermore, the South African model was attractive because the Kenyan drafters observed that the fiscal model was not just theoretically admirable but worked in practice. For example, they read the first South African FFC's report and observed that KwaZulu-Natal received a significant amount in grants even though it was under the leadership of an opposition party.¹²⁶³

Similarly, as discussed in Chapter 5, it was observed that Zimbabwe was attracted to the South African devolution model because it appeared to have contributed to South Africa's political and economic stability. The devolution model was not just a theoretical model; it appeared to yield positive results. The South African model was thus a potential solution to the Zimbabwean post-colonial socio-economic and political crisis that had been fuelled by the centralised system of governance. Furthermore, the model, particularly its devolution concepts and texts, was attractive because it was clear and easy to understand. The COPAC drafters wanted to incorporate simple language in the new constitution because ordinary Zimbabweans struggled to understand the Independence Constitution.¹²⁶⁴

¹²⁶² Madhekeni A 'Zambia's Elusive Quest for Decentralisation' in Chigwata T C, Steytler N, de Visser J, Kunda F (eds) *Local Government Reform in Zambia: The 2016 Constitution's Framework for Devolution* (2020) 24.

¹²⁶³ Interview with the CKRC Commissioner, John Mutakha Kangu, via Zoom, 29 March 2021.

¹²⁶⁴ Interview with Constitutional Commission drafter Brian Crozier, Harare, 13 November 2019.

As discussed in Chapter 6, the Zambian people and government followed how South Africa developed after it became a democracy because Zambians had built relationships with South Africans who had previously been in exile in Zambia. Zambians admired how the South African economy developed at a faster rate than Zambia despite its having attained its democracy three decades after Zambia. As examined in Chapter 6, Zambian people attributed South African economic growth partly to the devolution model. The Zambian local government sector was a major proponent of a devolution model that resembled the South African model; the hope was that the Zambian local government would also experience local economic growth and development. Zambian local government, influenced by the IULA and AULA, respected the South African Constitution and its devolution model (discussed in detail in section 7.3.3).

Lastly, it was established in this thesis that Zambians would have observed the good practices of the South African model during engagements at conferences and events where South African delegates shared South African developments at COMESA, SADC or AU meetings. Thus, the exchange of ideas at these events was relayed back to the constitutional commissions.

7.3.3 There was a high level of knowledge of the South African model

7.3.3.1 Local knowledge of South African devolution model

The importation of South African devolution provisions was primarily an indigenous exercise in Kenya, Zimbabwe and Zambia because local actors had good knowledge of the South African devolution model. Local actors such as government officials, organised local government, academics, local experts, politicians and constitutional drafters who were directly involved in the constitution-making process were some of the main players who influenced the import dynamics of the South African model.

The thesis established that the entry-point of the South African model in Kenya was the CKRC Draft of 2002. The South African influence was introduced in the CKRC drafting process largely by Kenyan drafters. Ghai, who was involved in the Draft, was familiar with the South African Constitution because of his interest in the devolution model, which he had followed from the inception of the constitution-making process in 1993. Furthermore, Mutakha Kangu, who participated in the CKRC up to the CoE Drafts, was familiar with the South African Constitution from the time he studied in South Africa in the 1990s. Other drafters were also

familiar with the South African model, particularly those who participated in the South African study tour in 2003.

Chapter 5 established that Zimbabwe and South Africa have a long and deep social, economic and political relationship dating to pre-colonial times. The relationship continued to grow during the colonial period and beyond. There is also a close symbiotic relationship between South Africa and Zimbabwe, in that a large number of Zimbabweans live, study or work in South Africa. Therefore, there was pre-existing knowledge and understanding of the South African model. It is because of this relationship that South Africa was appointed on several occasions to facilitate mediation among the Zimbabwean political parties. The South African model also migrated because of shared legal knowledge. There are many Zimbabwean academics who frequently visit South Africa and vice versa. There are also interactions between South African and Zimbabwean lawyers at organisations such as the Law Society of Southern Africa, among other platforms and events. It was established too that a significant number of MDC lawyers who participated in the constitution-making process were trained in South Africa. In addition, legal experts trained in Zimbabwe were familiar with the South African legal system since the style of writing law is the same. Therefore, as in Kenya, constitutional knowledge was borne primarily by local experts.

In Zambia, the LGAZ, as discussed in Chapter 6, played a significant role in the importation of the South African model because it had good knowledge of the South African Constitution due to its ties with IULA and AULA. The LGAZ's affiliation with IULA and AULA encouraged it to advocate for a strong constitutionalised devolution model. The IULA and AULA were strong external influences that shared resources about constitutions with entrenched devolution principles, and among those constitutions was the South African Constitution. The South African model was taken as the ideal model, one which member countries were encouraged to extol. With its sound comprehension of the South African model and its benefits, the LGAZ made recommendations to the different constitutional commissions so that a similar model could be entrenched in Zambia. Furthermore, Zambian academics played an important role in the migration of the South African Constitution. Academics achieved that mainly in the consultative stages, when they recommended that Zambia entrench a devolution model that resembled the South African model.

7.3.3.2 Foreign actors' knowledge of the South African Constitution

External actors played a limited role in conveying knowledge of the South African devolution model. In Kenya, foreign actors contributed meaningfully to constitutional migration only when the South African provisions had already been incorporated in the constitutional drafts. One such example is the involvement of non-Kenyan actors such as Christina Murray and Phil Knight, who contributed to the CKRC constitution-making process through their knowledge of the South African Constitution. As established in Chapter 4, the role of the external actors in the migration of devolution was minimal because while Kenyan CKRC drafters consulted Murray and Knight, the drafters determined the actual contents of the Draft. Murray was consulted because of her expertise in constitutionalism in Africa, while Knight's involvement extended only to his expertise on the use of simple language in constitutions. Nevertheless, as discussed in the Kenyan chapter, Murray played a slightly more significant role in the migration of the South African supervision provisions in the CoE Drafts. The recommendations she made were partly influenced by her observation of South Africa's best practice. Thus, Murray recommended the inclusion of intergovernmental supervision provisions that mirror those in the South African Constitution.

Chapter 4 also discussed how a South African expert, Nico Steytler, made some recommendations during the CoE peer review processes. It is submitted that the recommendations were made after observing the South African model in practice. Steytler recommended that Kenya adopt two levels of government since the powers of the middle levels were too vague. However, the recommendation to have two levels was not entirely new: the Kenyan drafters in the Wako Draft did not appreciate the value of three levels of government. Similarly, in both Zimbabwe and Zambia, foreign actors played a limited role in the conveyance of the South African model because there was already general knowledge of the functioning of the South African model, particularly of how its provinces worked and how autonomous the spheres of government were. Foreign actors became involved in the constitution-making process only after local actors had started the process of considering the South African devolution model. Therefore, in all three countries, the knowledge of the South African model by local actors contributed to the constitutional migration of the South African devolution model whilst foreign actors played a limited role.

7.3.4 Time constraints

It was observed in this thesis that time constraints are one of the factors that contributed to the migration of the South African devolution texts. For example, the South African model migrated to Kenya during the CKRC constitution-making process, but the NCC wanted more detailed devolution provisions. It gave the technical working committee on devolution just three weeks to come up with more detailed devolution provisions. The drafters interviewed for this study indicated that three weeks was insufficient time in which to construct constitutional provisions from scratch. Secondary data also provides that the drafters had to rush the drafting of devolution provisions. Therefore, the drafters ended up relying heavily on the South African Constitution – hence the significant South African influences in the Bomas Draft of 2004, influences that extended to the Constitution of Kenya.

Similarly, time constraints contributed to the migration of the South African devolution texts to the devolution model in the Zimbabwean COPAC Drafts, which then partly carried through to the Constitution of Zimbabwe adopted in 2013. The drafters operated under strict timelines, which explains why there are mistakes in some of the South African texts that were copied and pasted. One such example concerns the criteria for the equitable-share provisions of conditional or capital grants in the Zimbabwean devolution model vis-à-vis the listed factors for the equitable sharing of revenue raised nationally under the South African model, as discussed in section 7.2.3. Another example is the contradicting cooperative government provisions. It is likely that the confusing intergovernmental fiscal and cooperative government provisions in the Zimbabwean model emanated from the fact that the drafters were under pressure to meet deadlines and unable to examine the copied texts properly.

Like both the Kenyan and Zimbabwean constitution-making processes, the Zambian TCDZC process had to adhere to tight deadlines. The fact that all of the Zambian local powers and functions are taken verbatim from the South African model can be explained by the time constraints faced by the drafters. The drafters most probably transplanted the local government powers and functions in an effort to meet the deadlines set by the Sata and Lungu regimes.

7.3.5 Dynamic migration process of the South African devolution model

The constitutional migration of the South African model was not uniform in Kenya, Zimbabwe and Zambia. There is substantial borrowing in all three countries. The difference is that

significant concepts and texts were carried through to the final constitution of Kenya because Kenyan proponents of devolution continued to advocate for devolution despite resistance from the government. For example, Kenyans rejected the Wako Draft that replaced devolution with centralist provisions. Consequently, the Kenyan political will culminated in the adoption of a constitution with a devolution model with strong features of the South African model.

In the case of Zimbabwe, while the call for devolution was strong at the beginning of the COPAC process, as evidenced by reports from the consultative stages or early COPAC Drafts, the lack of political will resulted in the dilution of the influence. It was observed in Chapter 5 that when opposition parties that initially advocated for devolution stepped back, ZANU-PF through its representatives in COPAC at the helm of the COPAC process removed some of the South African influences and introduced centralist elements. The negotiable nature of the constitution-making process also resulted in South African concepts falling away. For example, the opposition agreed to replace the concept of ‘spheres’ with ‘tiers’ in exchange for the inclusion of other political rights in the constitution.¹²⁶⁵

As regards Zambia, it was established in Chapter 6 that presidents Kaunda, Chiluba, Mwanawasa, Banda, and Sata all lacked the political will to adopt a devolution model. They all pledged to devolve powers and functions, but failed to honour these pledges. It was only after there was political will that a constitution with a South African-influenced devolution model was adopted.

Constitutional migration is a dynamic process that occurs over time. Zambia had a longer gestation period of interest in the South African model than the other two countries. In 2016, Zambia was the last country to entrench a devolution model among the countries analysed in this study. However, the Zambian Constitutional Commissions recommended a devolution model with South African features as far back as 1993 when the Mwanakatwe Commission was established. This was during the period when South Africa was in the middle of the interim constitution-making process. In 1993, neither Kenya nor Zimbabwe had actively started with a constitution-making process that advocated for the entrenchment of a devolution model. The earliest constitutional effort towards a devolution model in Zimbabwe was the CC Draft of 1999, which was rejected in the 2000 national referendum because, among other things, it did not have substantial devolution provisions. The NCA Draft of 2001 had more devolution

¹²⁶⁵ Interview with the COPAC Co-chairperson, Douglas Mwonozora, Harare, 15 November 2019.

provisions than the CC Draft, but those were clawed back in the Kariba Draft of 2007. The most substantial devolution provisions in the Zimbabwean constitution-making process were introduced in the COPAC Draft of February 2012, but the South African influences were significantly reduced in the COPAC Drafts that followed. The result was the adoption of the 2013 Constitution with the weakest devolution model amongst the case studies. In Kenya, interest in the South African devolution model was first observed in the CKRC Draft of 2002 and then recentralised in the Wako Draft of 2005. A strong devolution model was reintroduced in the 2009 and 2010 CoE Harmonised Drafts, and the devolution model was adopted in 2010. Therefore, constitutional migration of the South African model was not linear but a back-and-forth process.

The constitutional migration process was so dynamic that there were instances where text migrated but not the model. One example relates to the listed factors that should be considered in the equitable-sharing provisions of conditional grants in the Zimbabwean model vis-a-vis the criteria factored in during the equitable sharing of revenue in the South African model discussed in section 7.2.3. There are textual similarities but poor copying-and-pasting resulted in confusing intergovernmental fiscal provisions in the Zimbabwean model.

Lastly, the exercise of influence was not only between South Africa and the three countries: other influences came in as well. For instance, it was observed that the Zimbabwean NCA Draft of 2001 was the first draft to use the term 'devolution' to refer to the constitutional recognition of subnational levels of government and the constitutional assignment of subnational powers and functions. Thereafter, the CKRC Draft of 2002 borrowed the term 'devolution'. Prior to that, as discussed, devolution was mostly understood in the context of the process of transferring power from Westminster to the nations and regions of the United Kingdom. Another example of migration between constitutional drafts was the movement of devolution concepts and texts from the Zimbabwe COPAC Draft of 2012 to the Zambian TCDZC Draft of 2013. As discussed in Chapter 6, the COPAC and TCDZC constitution-making processes transpired simultaneously and UCAZ and LGAZ worked together on recommendations to submit to their respective constitutional commissions. This could explain the significant similarities between the devolution models proposed in the COPAC and TCDZC Drafts. There was also a movement of text from Kenya to Zimbabwe. The first official COPAC Draft of 2012 borrowed the concept of the minimum percentage fiscal transfer from the Constitution of Kenya. That minimum-percentage concept carried through to the Constitution of Zimbabwe,

as adopted. Therefore, there was constitutional migration not only from South Africa to the case studies but among the case studies as well.

7.4 General theory deduced from the constitutional migration of the South African model

A number of general observations can be extrapolated from the constitutional migration of the South African devolution model to Kenya, Zimbabwe and Zambia. First, the recipient country must be ripe for or in need of a non-centralist model of governance. A homegrown demand for importing a general model of devolution creates a conducive environment for constitutional migration. Secondly, the selection of a particular devolution model may be influenced by how attractive a particular model is. A number of factors can make a devolution model attractive, such as similarity of circumstances, familiarity of the model in theory and practice, and the expectation that such a model will yield expected results in the recipient country. Thirdly, the most effective way of importing a model is by locals themselves who have a sound understanding of the needs of the people that the new model ought to serve, and are familiar with how best to adapt the imported model to fit the local context better. Furthermore, the involvement of local actors gives legitimacy to the constitution-making process because the constitution owners are the drivers of the constitution-making process and not external actors whose role can easily become coercive. Foreign actors may play a marginal or insignificant role in the constitution-making process. Fourth, the borrowing process is dynamic because the degree of borrowing may fluctuate over time and space mainly due to different political parties' and organisations' views on devolution. Some parties might be in favour of devolution whilst others favour centralist features. Consequently, the devolution model that ends up being imported is a compromise that the constitution makers agree to. Lastly, borrowing may take different forms. For example, only the model can be borrowed, or both the model and concepts, or only the text, may be borrowed. Nevertheless, borrowing the same text may not indicate similarity in terms of concepts or models.

In conclusion, Chapter 2 discussed the general migration of constitutional provisions, without a specific focus on the movement of devolution models, concepts or texts. There is no literature, until now, that investigates the migration of constitutional devolution provisions across the world, let alone the movement of the South African model to countries such as Kenya, Zimbabwe and Zambia. The thesis has demonstrated why and how the South African

devolution model moved to these countries and how it moved. The literature discussed in chapter 2, particularly the self-selection theory, has been improved in this research because it was established in this current study that local actors play a more active role in the migration of constitutional provisions. Local actors are not merely passive actors who import constitutional provisions that are presented by foreign actors. In fact, in the case studies, the local actors actually instigated the borrowing processes and foreign actors were only invited by local actors, to participate at a later time when constitutional models, concepts and texts had already migrated to the recipient countries' constitutional drafts. Furthermore, local actors did not only copy the devolution model as is but they made some changes to suit their needs. Thus, this thesis fills a critical gap in the literature.

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