

# STRATHMORE LAW JOURNAL

VOLUME 2, NUMBER 1, AUGUST 2016



**Strathmore University**  
**Press**

Strathmore Law School  
Madaraka Estate, Ole Sangale Road  
P.O. Box 59857 00200  
Nairobi - KENYA  
Tel. + 254-703-034601  
[editor.sup@strathmore.edu](mailto:editor.sup@strathmore.edu)  
[www.press.strathmore.edu](http://www.press.strathmore.edu)  
[www.law.strathmore.edu](http://www.law.strathmore.edu)  
Twitter: @strathmorelaw

## Kenya-South Africa dialogue on devolution

Nico Steytler and Yash Pal Ghai (eds);  
Juta Publishers (2015)

*Reviewed by Teddy Musiga\**

Rarely do we find books that present a dialogue addressing issues of mutual concern between two countries. Often, books present soliloquies where each chapter is independent of the other and rarely are comparative studies of similar experiences laid out side by side in the same book.

*Kenya-South Africa dialogue on devolution* does this in a bid to draw insights from the Kenyan and South African experiences with devolution and to learn from each other. The book has been presented along thematic lines. It addresses themes such as the levels of devolution units, their numbers, size and character; political structures and institutions; powers and functions; finances; metropolitan governance, national cohesion and intergovernmental relations; marginalised communities and groups; and implementation of devolution.

Throughout those themes, the book speaks to the realities, opportunities, challenges and even threats to decentralised government as experienced in South Africa and Kenya. Though Kenya refers to its system of decentralisation as ‘devolution’, South Africa refers to it as provincial and local governance or otherwise as multi-level governance.<sup>1</sup>

The book is edited by two leading scholars in constitutional law from Kenya and South Africa, Nico Steytler and Yash Pal Ghai, both of whom have been intimately involved in crafting and advocating for the implementation of their respective countries’ constitutions.

---

<sup>1</sup> Perhaps one of the main striking differences in the devolved system of governance between Kenya and South Africa, is that while Kenya has only one level of government below the national government (the county government), South Africa has two levels (the provincial and local governments).

\* Teddy Musiga is an advocate of the High Court of Kenya. He is an Assistant Law Reporter at the National Council for Law Reporting (Kenya Law). He holds a Master of Public Policy & Administration (Kenyatta University), LL.B (Moi University) and a Diploma in Law (Kenya School of Law).

The book brings together eighteen other contributors; nine from each country. This edited collection is also exceptional as the contributors are drawn from among law, economics and public administration practitioners and academics and thus presents a multidisciplinary treatment of devolution in both Kenya and South Africa.

The book features 20 chapters. The 'dialogue' is presented by a comparison of the systems of decentralisation of the powers and functions of the state to lower levels in South Africa and Kenya. Whereas, the system of decentralisation has been implemented in South Africa in slightly over two decades, in Kenya it was only introduced six years ago following the promulgation of the new Constitution of Kenya in August 2010.

Across the chapters, several aspects of devolution are covered. For instance the book compares and examines the formal rules and structures of devolution as well as the functioning of the systems in both countries.

Yash Pal Ghai's opening chapter on 'South African and Kenyan systems of devolution: A comparison' sets the tone by giving a comparison of the two countries in their quest to implement decentralised government. Ghai goes ahead to discuss other forms of decentralised governments such as the differences in provincial government (South Africa), devolution (Kenya) and how devolution is implemented in the United Kingdom to describe the relationship between Northern Ireland, Scotland, Wales and England. The chapter is instructive in the debates on constitution and state building across the African continent.

Chapters 2 and 3 provide historical perspectives on devolution in South Africa and Kenya. Chapter 2, 'Fudging federalism: Devolution and peace-making in South Africa's transition from apartheid to a constitutional democratic state' by Derrick Powell, sketches the historical evolution and structure of the apartheid state on the eve of the political transition in 1990. It also examines the structure of the process of political negotiations and constitution making in the period 1990-1996 and presents in more detail the various dimensions of the debate about federalism and devolution.

The second chapter also discusses the key features of cooperative government. Notably, cooperative government emerged as the best formula that struck the right balance between proponents of a unitary state and those of devolution. It allowed each of those groups to claim that the Constitution reflected their respective positions.

Yash Pal Ghai, in Chapter 3 ‘Devolution in Kenya: Background and objectives’ traces the historical incidents leading to the dawn of devolution in 2010. It does this by revisiting the demands and rationale for the clamour for devolution through the various epochs. As such the chapter discusses how ethnicity and ethnic politics have largely contributed in the debate on devolution. Ghai here shows how devolution has remained a major feature in the construction of the Kenyan state from the time of negotiations for the independence of Kenya, the negotiation of the 1963 independence constitution with its concepts of *majimboism* and regionalism, and how regionalism did not survive long after independence. It was only with the promulgation of the Constitution of Kenya, 2010 that devolution is revived. Ghai concludes this Chapter by contrasting *majimbo* and devolution as implemented in Kenya.

The next two chapters interrogate how boundary determination impacts the social divisions of the respective countries. Chapter 4 by Yonatan Fessha and Jaap de Visser, ‘Drawing non-racial, non-ethnic boundaries in South Africa’ examines the interplay between the size and character of the devolved units and the objectives of devolution in South Africa. It particularly looks at how size and character of the devolved units serve the purpose and objectives of devolution and how they affect the functioning of a devolved state.

Abraham Rugo Muriu’s Chapter 5 - ‘Number, size and character of counties in Kenya’ analyses the extent to which the structure of devolution serves the objectives it was intended for. In particular, it looks at the impact of having only two levels of government – the national and county governments – and the consequences of having 47 counties. It also discusses whether the boundaries of the counties have given them a particular character. He concludes that basing the county boundaries on the old colonial districts has certainly given most of the new counties an ethnic character.

The next two sets of comparisons, in Chapters 6 and 7, turn their focus to devolution and the political life of South Africa and Kenya. In Chapter 6 - ‘Devolved political structures in South Africa: A void waiting to be filled by sub national politics’, Yonatan Fessha considers the role and impact of the devolved political structures on the functioning of the multi-sphere system of government. He argues that the South African Constitution gives an impression of devolved political structures that allows multiples centres of decision making. However, that is not the case in reality. Fessha sees the promise of a multi-sphere system of devolved political structures, each directly accountable to the sub national electorate, being significantly undermined by a dominant party which ig-

nores that system. He argues that so far, the ruling party (ANC) in South Africa controls most of the devolved political structures in all the three spheres of government. He states that ANC's centralised system of governance allows little space for provincial and municipal individuality and therefore urges that a dominant party committed to the value of multi-sphere government should leave room for its regional branches to develop sub national political structures that defend and advance local interests.

Conrad Bosire, in Chapter 7 'Political structures and politics of counties in Kenya', presents the Kenyan comparison. Here, Bosire lays out the broad political and institutional context in which county political structures are set to operate by looking at the specific issues which define the institutional and political governance of the counties. This Chapter also discusses the institutional and political structures of county governments against the broad socio economic environment in which they operate. He commences by stating that other than the previous *majimbo* system at independence, Kenya has not had any institutional or political experience with regards to devolution. The *majimbo* system was replaced by a centralised system of governance in which the central government institutions took over all spheres of public governance. As a result, it led to a culture of centralised governance and an almost non-existent culture of sub national politics. He therefore argues that such a centralised culture is likely to infiltrate the county governance, but that this can be curbed when county governments claim their rightful space. Bosire then concludes by stating that the quest by counties to claim their space is likely to be inhibited by a number of factors such as capacity constraints, transition and lack of resources. Those factors are likely to slow down the uptake of county functions and therefore hinder a smooth transition to county governance.

Continuing in the same comparative motif, the following two chapters, 8 and 9, reflect on the powers and functions of the respective devolved units. Jaap de Visser and Annette May present the intricate division of functions and powers between the national, provincial and local governments in South Africa. The authors analyse the constitutional framework for sub national powers, and the role of the courts in resolving disputes over the division of powers between the three spheres of government, paying particular attention to the impact of justiciable socio economic rights on the functions and powers of devolved units.

In his turn, Conrad Bosire offers the comparative analysis for Kenya. The chapter discusses the constitutional, political and institutional factors that influence the approach to county powers and functions. It also examines the consti-

tutional framework for county powers and approaches to interpreting them and concludes by assessing the implementation. Here, Bosire argues that the effectiveness of devolution is largely dependent on the nature and extent of powers exercised by the counties and the functions they perform.

A critical part of decentralised government is managing finances and the intergovernmental relations that facilitate sound public finance management. Chapter 10 by Bogani Khumalo, Ghalieb Dawood and Jugal Mahabir titled, 'South Africa's intergovernmental fiscal relations system' describes the financing system for provinces and municipalities in South Africa and the socio-economic and political factors that influenced its design. Specifically, the chapter highlights the expenditure assignments to provincial and local government, the extent to which taxation powers are devolved to these sub national governments to support such expenditures, and how the intergovernmental transfer in the country plays a crucial role in supplementing these taxation powers. The chapter concludes by assessing the monitoring and evaluation of the financial performance of the devolved units in South Africa.

Njeru Kirira's subsequent Chapter 11, 'Financing counties in Kenya' addresses the question of how and to what extent the Constitution of Kenya, 2010 has changed the financing of the new devolved units. Kirira discusses how the sources of revenue (own revenue or transfers) allow counties to make autonomous decisions vital to the purposes of devolution, while making them accountable to their constituencies. Kirira also discusses the mechanisms and processes that are to be followed to ensure the equitable distribution to counties of revenue raised nationally. Of particular importance to Kenya's public discourse, Kirira considers whether expenditure decisions are autonomous, and if corruptly or poorly done, the remedial measures, if any, available to the central government.

Both the Kenyan and South African socio-economic contexts have given rise to metropolitan areas which, by their nature, present unique challenges and opportunities for devolved governance. Chapter 12 by Philip van Ryneveld on 'Governing metropolitan areas in South Africa' shows how metropolitan government in South Africa has developed overtime, describing the main constitutional and legislative processes that led to metropolitan governments emerging in their present form. It also looks at the intergovernmental institutional arrangements as they relate to metropolitan government and concludes by highlighting the key challenges facing the metropolitan system.

Jill Cottrell Ghai's comparative treatment of Kenyan metropolitan governance is innovative as the Constitution of Kenya only provides for two levels of government (national and county). Jill Cottrell Ghai refers to Kenyan metropolitan and urban areas as 'the third tier'. Against the background of the earlier discussion in Chapter 5 on how Kenya's devolved units largely took on the colonial district boundaries, Jill Cottrell Ghai discusses the challenges to coherent planning and management in instances where a de facto metropolitan area covers more than one county, as is the case with Nairobi. On the other hand, if the metropolitan area coincides with the county boundaries, the Chapter considers whether such a county has the necessary powers and resources to deal with the problems of agglomeration.

The Chapter also discusses the adequacy of the constitutional and legal regime for urban governance. Cottrell Ghai concludes that unlike South Africa's, Kenya's Constitution does not provide for the role and governance of a 'third tier' below the county level and thus there will be need for in depth innovation in enacting a national legislation that deals with the governance and management of urban areas and cities.

National cohesion and intergovernmental relations is the focus of the discussions in Chapters 14 and 15. Nico Steytler begins in Chapter 14 by discussing historical concerns and fears that were deemed to be the negative consequences of devolution. For instance there was a concern that provinces would work against national political cohesion, fanning the fires of separatism and entrenching ethnic enclaves. A second fear was that since key social functions were to be shared by national government and provinces, devolution would lead to a lack of cohesion in governance and result in poor service delivery to citizens. Steytler shows how South Africa has successfully addressed those fears by ensuring inclusion and cohesion through the national legislature and the executive. Specifically, it has done so by ensuring, first; coherent government where there is legislative and executive cooperation. Second, it has done so through social solidarity by ensuring prevention of provincial and local state failure using various mechanisms.

Conrad Bosire follows in Chapter 16 with the comparative Kenyan case study. The chapter considers the constitutional mechanisms for promoting national cohesion. One such example is the checks and balances on the presidential powers to curb executive dominance. The Constitution also has provisions which seek to ensure that the composition of legislative and executive structures reflects the country's diversity. Bosire argues here that the political and governance structures established by the Constitution of Kenya, 2010 demand a fundamen-

tal transformation in the manner in which public institutions exercise their power and relate to one another.

In Chapter 16, Zemelak Ayele and Phindile Ntliziywana discuss the inclusion of marginalised groups. Ayele and Ntliziywana reflect on the exclusion factors in South Africa and identify social groups that are regarded as politically, culturally and socially marginalised. In arguing that devolution in South Africa has indeed allowed for their inclusion, they discuss how the devolved system territorially accommodates marginalised linguistic and cultural communities and finally, examines forms of non-territorial accommodation.

Korir Sing'Oei in Chapter 17 assesses the extent to which Kenya's constitutional inclusionary intent is sustained and advanced. Sing'Oei shows how empirical evidence that has emerged one year into the implementation of devolution in Kenya challenges that constitutional vision. He concludes by stating that while devolution affords minority groups numerous opportunities for reversing years of under-inclusion in social, economic and political forums, devolved units will be an optimal site for such a transformation only if national level institutions and policies crystallise broad constitutional principles into practical obligations and programmes.

The last set of comparative studies focus on implementation of devolution. Derek Powell and Phindile Ntliziywana in Chapter 18 examines the implementation of the system of provincial and local government as part of the political settlement that abolished apartheid and introduced a constitutional and democratic state in South Africa. Powell and Ntliziywana identify three features of this implementation process. First, the layer of transition mechanisms created to manage the establishment of the new devolved structures. This sketches a broad framework for analysing implementation as a distinctive transition event. Second, the stage at which national government took over the implementation. This looks at how the implementation process was structured and organised. Third, the challenge of harmonising the demands of transition management and institutional development has remained a key feature. This extracts lessons from the South African experience that might be helpful to Kenya.

Chapter 19 by Peter Wanyande discusses the implementation of Kenya's devolved system of government, highlighting in particular both the challenges that have been experienced in this regard and the safeguards that exist to address them. It presents four main arguments. First, that the promulgation of the Constitution does not guarantee its effective implementation. Secondly, imple-

mentation is not just a technical legislative matter involving the passage and enforcement of laws but a process subject to political dynamics. Third, it discusses successes and challenges that have arisen in implementing the Constitution effectively. Fourthly, it discusses the fears and risks that implementation of devolution may be derailed and attempts to give the safeguards against that outcome.

Nico Steytler and Yash Pal Ghai conclude the book with ‘Devolution: What can Kenya learn from South Africa’. This last chapter presents a summative comparison of the objectives of devolution in both countries and how it is being implemented in both countries. It observes that in many ways, Kenya borrowed heavily from South Africa in designing devolution. It brings out best practices that have come out of the devolution experience in South Africa which Kenya may borrow from and acknowledges that Kenya continues to benefit from jurisprudence from the South African courts.

Overall, the book marks a deep appreciation of devolution as a form of decentralised governance. It carefully and skilfully unpacks the concept of devolution as one of the many innovations of the Constitution of Kenya, 2010. The running thread that weaves throughout the entire book carefully unpacks and breaks down the objectives and rationale of devolution in a simplified and systematic manner. It encourages the reader to reflect on the interplay of the multiplicity of actors in devolution.

The book is rich in content, inspiring in vision and empowering of the people. Particularly, the book has examined various aspects of how devolution can be used to enhance socio-economic development.<sup>2</sup>

Generally, implementation of devolution in Kenya has significantly changed Kenya’s governance system. The book has therefore succeeded in addressing the many challenges that may emerge during the implementation process. It has attempted to fill in some gaps that may not have been addressed by the Constitution or even legislation.<sup>3</sup> For instance, one such gap is on how to govern metropolitan and urban areas. The book has commendably attempted to innovatively address those issues and as such is ahead of the law.

The contributors of the book appreciate that devolution is not strictly a legal topic but one that cuts across the broad and general governance sector. They

---

<sup>2</sup> For instance the chapters on national cohesion and intergovernmental relations (See chapters 14 and 15) and those of inclusion of marginalised communities/ groups demonstrate that fact (see chapters 16 and 17)

<sup>3</sup> See Chapters 12 and 13 on South Africa and Kenya respectively (Pages 250 – 277).

therefore approach the concept from a multi-disciplinary perspective. The multi disciplinary nature of the book presents the concept of devolution in a way that appeals to diverse audiences at the same time. For instance, chapters 10 and 11 generally address the fiscal implications of devolution in both Kenya and South Africa.

The value of the book lies in how the experience of the 20 years of devolution in South Africa can assist in the development of devolution in Kenya, given that the Kenyan Constitution liberally borrowed from the South African. The book will also be of particular value to countries across the world that are in the process of reviewing their governance structures with a view to introducing decentralisation of governance.

The editorial care of the book is commendable. Throughout the 20 chapters, the book contains elaborate notes, a selected bibliography and a very useful index. The reader also benefits from the cross-referencing where similar ideas are being discussed across various chapters.

In conclusion, the book is very instructive and is recommended to all government officers, legal practitioners, judicial officers, governance experts, law students, public administrators, policy makers and every person interested in understanding devolution as a system of governance.