

Lessons from the Law and Politics of Federalism in Africa: Federalism Is Bigger Than Federation; Constitutions Are More Than Single Mega-Documents; the International Trumps the Domestic; and the Past Continues to Matter

By *Jan Erk**

Abstract: The study of federalism brings together both political scientists and constitutional lawyers. It is one of those fields of study where the scholarly and the applied are inextricably interlinked. However, studies on and from the non-Western world tend to be underrepresented in the field, subsequently leading to both scholarly and applied shortcomings. This article is an attempt to start undoing that unevenness by identifying four lessons from the African continent. While doing so, we pursue two simultaneous intellectual goals: One is to use Africa to help sharpen the theoretical insights and conceptual tools of comparative federalism in general – applicable to both the West and the rest. And secondly, running parallel to this, the article also exposes the reader to the varieties of federalism in Africa. This not only enriches our scholarly repertoire but will also help nuance and finetune some of the prevailing theoretical assumptions in the field, and thus improve the chances of federalism to deliver on its promises in applied terms. The comparative lessons drawn from the African experience can be grouped under four categories. 1) The article builds on the conceptual distinction between federalism and federation; and argues that ideas and practices of federalism in Africa are more numerous than the formal federations of the continent. 2) The pre-colonial and imperial history of the continent is marked by British-style amalgamations of constitutional documents, practices, unwritten rules, and customs – some at the imperial level, some regional, some local. 3) International-level factors, especially the arrival of colonialism, and then later, the geopolitical pressures of the Cold War, played key roles in influencing the choice and workings of constitutions on the continent. 4) History has left each African country with certain dynamics unique to them making cutting and pasting best practices from abroad without attention to the local context problematic.

* Jan Erk is with the Africa Institute for Research in Economics and Social Sciences (AIRESS) at the Faculté de Gouvernance, et Sciences Économiques et Sociales (FGSES) of Morocco's new Université Mohammed VI Polytechnique (UM6P), established with the explicit goal of addressing the policy challenges the African continent faces. Professor Erk holds two doctorates, a PhD in Political Science from McGill University, Canada and an LLD in Public Law from University of Pretoria, South Africa. He can be reached at jan.erk@um6p.ma.

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A. Federalism in Africa and Four Lessons

In the study of the law and politics of federalism, the scholarly interaction between the West and other parts of the world tends to be marked by one-way traffic: Made in the West, exported to the rest. When they happen to pop up on the radar-screen of students and practitioners of federalism, non-Western case-studies are almost always analysed under theoretical frameworks originating from the West. The most visible scholarly cost of such asymmetry is the possibility of missing or misreading things in the diagnosis of non-Western case-studies, and of course, the subsequent errors in applied prescriptions this asymmetry might engender in turn. But there is also a cost to the study of the law and politics of federalism *in toto* which accrues from this one-way scholarly traffic. The commonalities shared across advanced industrialised countries might be obscuring some of the underlying scope conditions and the dynamics of cause-and-effect when the usual comparative cases are all drawn from the West. That is, we might be overplaying the causal relevance of federal factors and underplaying the relevance of the bigger broader structural factors that are common to Western liberal democracies. Mapping out the variety of the workings of federalism across the world will only enrich our scholarly repertoire, nuance and finetune some of the prevailing theoretical assumptions in the field, and thus improve the chances of federalism to deliver on its promises in applied terms.

This article serves two simultaneous intellectual goals in its expansive approach to the law and politics of federalism. One is to use Africa to help sharpen the theoretical insights and conceptual tools of comparative federalism in general – applicable to both the West and the rest. And while doing so, the article also exposes the reader to the varieties of federalism in Africa. The bird's-eye-view covering both the past and the present, the modern and the traditional, the official and the uncoded, the scholarly and the applied sides of federalism in Africa is a comprehensive but condensed overview of the law and politics of federalism on the continent.

1. *Federalism Is Bigger Than Federation*

The continent has federations that are similar in form to the ones in the West and thus easier to study under the theoretical and conceptual parameters dominant in the scholarly literature. Yet there are also a number of case-studies from Africa where, without a formal federation, federalism dynamics have been present – be it in the form of indigenous,

imperial, traditional, or tribal forms of autonomy and union.¹ Some are still with us, but other case-studies have been lost to history. Expanding our scholarly repertoire to include both *avant-la lettre* historical examples of federalism from Africa, as well as the diverse dynamics of autonomy and union that still exist, exposes some of the shortcomings of universalist projections based on a small number of case-studies from the West. The first lesson is that the study of the law and politics of federalism will become more reflective of what happens across the world if we broaden what is studied to include the various forms of union and autonomy where political power divided between the centre and the constituent units. It is not the formal label of the written constitution, but the varieties of self-rule and shared rule in Africa that provide us with federal case-studies to add to the scholarly repertoire of our field.²

What also contributes to a more nuanced repertoire of case-studies is the inclusion of case-studies that are no longer with us. Africa has had both indigenous versions of federalism as well as imported imperial ones which have gone extinct. Other than a short-lived attempt during the 19th century to construct a Canadian-style federation among the various British colonies in the south of the continent, there was nothing formally labelled federal on the continent for a long while. Yet, various arrangements combining self-rule and shared rule existed both within and among indigenous polities of the continent as well as defining the jurisdictional relationship between the various colonial entities and their metropolitan capitals within the imperial constitutional orders. Our broader framing of federalism and the inclusion of historical case-studies can engender new theoretical insights and improve methodological reliability by constructing globally representative comparative datasets. Section B will take the reader on a little tour of the continent introducing the varieties of federalism which sometimes fall short of the constitutional form of a modern federation. But before that, let us continue with lessons from the law and politics of federalism in Africa.

- 1 In the English-language scholarly literature on federalism, it was Preston King who had first made the point of distinguishing between *federalism*, the political principle about the territorial division of power between the centre and the constituent parts, and *federation*, the formal designation of a constitutional order purported to give voice to this principle. *Preston King, Federalism and Federation*, Baltimore 1982. In most languages, words from similar etymological origins are used for both the principle and the constitutional order based on this, but in German-language literature words of different etymological origins are used for the political principle on the one hand and its formal designation on the other: *Föderalismus* is the word for the political principle of federalism while the word *Bund* (union) is used to for both federation (i.e. ‘union state’, *Bundesstaat*) and confederation (i.e. ‘a union of states’, *Staatenbund*).
- 2 The definition of federalism as ‘the combination of self-rule and shared rule’ is a contribution of Daniel J. Elazar to the literature. *Daniel J. Elazar, International and Comparative Federalism*, PS: Political Science and Politics 26 (1993), p. 190.

II. *Constitutions Are More Than Single Mega-Documents*

The assumption that federal constitutions only exist in the form of single mega-documents leads to the underplay of more traditional forms of constitutions closer to the etymological origins of the very word *constitution*. International and intra-imperial treaties, legal precedents, national legislation, tribal customary law, and even ceremonial practices can indeed *constitute* the entirety or part of the constitution of a federal polity. Our overview also incorporates imperial elements of self-rule and shared rule into the picture. Whether they were Dominions with responsible government based on limited franchise favouring settlers, or Protectorates created through treaties with indigenous polities where traditional law and governance was partially recognised, or League of Nations Mandated Territories (later United Nations Trust Territories) where the locals' right to self-rule was in principle acknowledged while the territory remained under colonial supervision in practice, all contained elements of self-rule and shared rule within the British imperial constitutional architecture. The article also covers the proposals and short-lived examples of federal unions between some of these imperial polities akin to what happened amongst Britain's North American and Antipodean colonies (that is, the two failed attempts for Southern African and East African federations, and the ten years of the Central African Federation). For territories within France's African Empire, federalism was similarly short-lived: two confederal unions, *Afrique-Occidentale Française* (AOF) and *Afrique-Équatoriale Française* (AEF) did not last long beyond the late reforms towards local representation, and the Mali Federation of Senegal and French Soudan which lasted only a year.

Once we conceptualise federalism as a combination of self-rule and shared rule, we are then able to incorporate non-Western experiences and perspectives as well as imperial arrangements of autonomy and union into our scholarly repertoire. Consequently, this leads to moving beyond the now dominant American and French constitutional models resting on a single written foundational mega-document. A broader, pre-revolutionary American and French understanding of constitution as the embodiment of the foundations of polity allows us to see the often unwritten yet sacrosanct and timeless notions of what constitutes the legitimate laws and governance of many African polities. Somewhat similar to the British version of a constitution, a collection of laws, customs, practices, treaties, precedents, ceremonies, rituals, and sometimes written documents, have been the constitution of African polities – be it a confederation of tribes or a traditional kingdom with crown lands, vassal and tributary states, allies, and others forcefully or voluntarily incorporated. Ours is an understanding of constitution which puts the foundational pillars of a polity, and the function of law and governance, before the form. Of course, Africa also had and still has indigenous polities with centralist constitutions with no territorial division of power, but most homegrown arrangements of law and governance are based on a mix of self-rule and shared rule for the constituent parts with indigenous versions of checks-and-balances and divisions of power to manage the balance between autonomy and union. Not all indigenous federal-type arrangements are recognised under modern written constitutions, some are, and

some are partially incorporated, but almost all continue to play a role invisible to more formal analyses following narrow definitions of federalism and constitutions.

While recognising the presence and resilience of traditional polities is necessary, we should also refrain from inflating their importance at the expense of formal written constitutions. What matters is that the study of comparative federalism should acknowledge that before the American federalists of the late 18th century, as it is the case in many parts of the world, various African polities also had constitutions where the centre's powers were limited, the constituent parts held constitutional rights to do some of the things their own way, and all pooled forces to do other things together. They did not rely on single mega documents for this.

III. The International Trumps the Domestic

In our overview of the law and politics of federalism in Africa in Section B, we look at factors within, above, and across the country-level of analysis. Given the continent's political history, the level of analysis below and above the nominally sovereign polities of the interstate system often reveal causal dynamics that exclusively domestic level lenses are likely to miss. The jurisdictional angle to colonialism is the first instance of this lesson. When it comes to the African Dominions and Protectorates within the British imperial architecture, the two French colonial confederal unions in Africa, and the League of Nations Mandated Territories (later United Nations Trust Territories) put under the supervision of France and Britain, it should be obvious that the study of self-rule and shared rule does not stop at the borders of states.

In addition to these formal aspects of constitutional status and jurisdiction of colonialism, there are also global dynamics and regional geopolitics which have impacted the success or failure of federalism. By the mid-1960s, the last vestiges of jurisdictional links to colonial imperial orders were on the way out. From then onwards global dynamics and regional geopolitics came to play more role in domestic politics than the relics of jurisdictional links to the metropolitan capitals of the former colonial masters. We will see that both the Cold War and the period that followed created geopolitical dynamics with direct impact on the fate of federalism. The ebb-and-flow of international level dynamics across time and place provides us with an important insight about levels of analysis which needs to be incorporated into the study of comparative federalism.

IV. The Past Continues to Matter

The claim that the past matters might appear self-evident, but how it matters is important especially for the applied side of comparative federalism since this influences the workings of imported institutions, constitutions, ideas, and models of federalism. The failures from the continent's past contain many lessons that have to be taken on-board as new federal-type arrangements are designed. While these lessons distilled from the two centuries of

federalism across the continent are grouped under four separate categories, they have often coexisted and overlapped with one another. As we proceed through the law and politics of federalism in Africa, it will become clearer that at different times in history, and in different doses and combinations, the dynamics engendering these four lessons have frequently interacted:

Federalism in Africa has sometimes revealed itself in constitutional arrangements that might fall short of modern constitutional forms. These arrangements might be in the form of international treaties, imperial edicts, national legislation, or tribal customs defying the expectations of the existence of single, comprehensive, foundational mega document in the form of a national constitution. The very reason federal-type arrangements came into being could reflect geopolitical factors at international level, be it intra-imperial competition, inter-state rivalry, or system level international factors. And once in place, the 19th century imperial constitutional status of a territory can set it on a legal and political path that continues to mould the present while defunct federal experiments of the past foreclose certain paths. While the coexistence and overlap of the four lessons could differ across time and place, what remains constant is their systematic exclusion from the existing and accepted theoretical and conceptual parameters in the field of comparative federalism.

B. The History of Federalism in Africa

1. The Pre-Colonial Federal Diversity of Africa's Indigenous Polities

Before the 19th century, the constitutional landscape of the continent was made up of diverse homegrown arrangements of law and governance. Colonialism had not yet permeated the continent beyond coastal forts and settlements. The reach and range of colonialism was limited – often temporary – relying on relatively thin military, bureaucratic, and settler presence. During this time, most of Africa's precolonial systems of law and governance remained relatively insulated from Western influence. This was the case even for those indigenous polities who traded and fought with the colonial coastal outposts.

In broad brushstrokes, we can paint three types of indigenous polities where federalism was part of the constitution: sedentary kingdoms containing both territorial and non-territorial forms of autonomy and union under the top-down political authority of the crown; bottom-up tribal confederations where self-rule of the units was the norm and shared rule was more limited; and thirdly, very loose forms of political unions between smaller tribal polities.

The continent's pre-colonial federal diversity included kingdoms composed of various different territorial constituent units. The vassal and tributary arrangements of hierarchical kingdoms like the Asante and Buganda are prime examples of such federal-type arrange-

ments where internal autonomy was combined with external deference to royal authority.³ Most of these sedentary kingdoms tended to also have non-territorial forms of checks-and-balances at the centre distributing power between the crown, the representatives of royal bureaucrats, aristocracy, and commoners. Territorially, crown lands – either because of royal inheritance or because of a historical background as incorporated enemy territories – would be part of the power dynamics at the centre. But it is the internally autonomous territories ruled by regional aristocratic dynasties of the same ethnic group or the vassal and tributary states from other ethnic groups where we see indigenous variations of the mix of self-rule and shared rule, and the most pronounced indications of federalism. The third concentric circle of the territorial order of these kingdoms would be allies and outliers with whom relations were more *ad hoc* and without the constitutional basis defining the relationship between the centre and the crown lands, constituent smaller kingdoms/chieftaincies, and vassal and tributary states.

In addition to the complex constitutions of these sedentary kingdoms, the continent also had looser tribal confederations without strong political centres. Instead of the top-down state architecture of the traditional kingdoms where constitutional power would originate from the centre and devolve out, these confederations were based on the opposite constitutional logic. That is, the starting point were the autonomous tribes, and their bottom-up cooperation would constitute the union. A belief in shared ancestral lineage / shared ethnicity would provide the cultural, religious, and ceremonial tools to manage common political and legal affairs. The constitution of the union would be based on unwritten but quite formal arrangements, underscored by customary law and precedents. One example is the Baphofu Confederacy of Batswana (from the 16th to the 18th century) which was a union of the Bahurutse, Bakwena (with their affiliates Bangwaketse and Bangwato), Batlhano, Bakgatla, Bapedi tribes.⁴ Under a loose confederal umbrella, the tribes would occasionally come together for common purposes but would otherwise remain separate within their own territories where they would have self-rule. Another example is the Xhosa Confederacy which weakened and eventually dissolved with the eastward advance of the Cape Colony in the late 19th century. It was an asymmetrical union of twelve constituent tribes, the Xosa, Tembu, Mpondo, Mpondomise, Bamvana, Bhaca, Hlubi, Bhele, Zizi, Yesibe, Ntlangwini, and Mfengu. Amongst these, the Xosa Paramount Chieftaincy and the Tembu Kingdom were the strongest, but no single member of the Confederacy was able to dominate the union.⁵ Among the Oromo of present-day Ethiopia, the confederal union of autonomous tribal territories would historically coexist with non-territorial divisions of age-groups with-

3 For further details of the constitutional order of these two traditional kingdoms see *Jan Erk*, *Traditional Kingdoms and Modern Constitutions: Parochialism, Patriarchy, and Despotism vs. Indigenous Safeguards against Absolutism*, in: Tom Ginsburg/ Rosalind Dixon/ Adem Abebe (eds.), *Comparative Constitutional Law in Africa*, Cheltenham 2022, pp. 329-60.

4 *Thomas Tlou / Alec Campbell*, *History of Botswana*, London 1997, p. 104.

5 *Anne Mager*, *The Colonial Conquest and the Tambookie Frontier: The Story of Maphasa, c. 1830-1853*, *Journal of South African Studies* 39 (2013), pp. 250-271.

in tribal moieties.⁶ Within the union of the Borana and Barentu moieties, the second one was more numerous and had four subdivisions in Wollega, Arsi-Bale, Hararghe, and Shewa until the southerly expansion of the Abyssinian Empire in the late 19th century.

Elsewhere on the continent, the smaller bands of hunter-forager communities of the Kalahari and Namib deserts practising transhumance governed themselves through less elaborate and more egalitarian indigenous constitutions. The Somali and Karamojong pastoralist herders of the Horn of Africa on the other end of the continent also practised transhumance but had more elaborate indigenous constitutions covering demographically much bigger populations. With the arrival of colonialism, some of these survived intact, others went extinct, but most remained in place – albeit in different forms than before. The modern tools available to 19th century colonial powers in the form of improved transportation, trade, and communication across the continent and with the metropolitan capitals threatened all three types of African polities where federal self-rule and shared rule defined the constitutional order. But it was this last group of indigenous constitutionalism that was most harmed from the inland expansion of colonialism. Most sedentary kingdoms survived, so did some tribal confederacies.

II. Imperial Constitutionalism: Dominions, Protectorates, Mandates, and Trust Territories

The history of colonialism in Africa is too complex to be reduced to a couple of paragraphs of course, but even a quick tour of imperial forms of union and autonomy from the continent's past reveal federal patterns within, above, and across the country-level analysis. During what is now known as the Scramble for Africa of the mid-to-late 19th century, Western colonial powers signed international treaties parcelling up the entire continent amongst themselves. Advances in military technology, communications, and transportation meant that the scale of colonial presence reached levels that would allow the projection of direct rule to many parts of the continent. This is also the time when the number of settler colonies also increased. And in places across the continent where indirect rule colonial would continue, that is, where local polities would remain responsible for law and governance but as part of the imperial constitutional order, the scale of colonial presence could now dictate, or at least influence, the workings of indigenous constitutionalism.⁷ The practice of indirect rule was particularly common in the British and Ottoman Empires which were more open to incorporating exiting kingdoms, paramount chieftaincies, sultanates, and emirates into their imperial constitutional order. Born out of the need to manage the distant territories of large empires without permanently stationing garrisons and bureaucrats, both the Ottomans and British had historically practiced what came to be known as indirect rule

6 Mohamed Hassen, *The Oromo of Ethiopia: A History 1570-1860*, Cambridge 1990, p. 14.

7 Mahmood Mamdani's influential 1996 book argues that throughout the continent the colonial policy of indirect rule came to mark the political beginnings of traditional despotism at the local level creating citizens and subjects simultaneously. *Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton 1996, pp. 16-18 and p. 23.

– an effective alternative to what the other European colonialists were trying to do by direct rule. Day-to-day governance was simply outsourced to a local polity and the polity was given the status of a Protectorate. Within the imperial constitutional order, these were units which enjoyed (limited) territorial autonomy.

Unlike their expansion into the Balkans, Ottomans did not bring in settlers to their African colonies, but some British territories in Africa were open to European settlers, some even actively recruited settlers from across Europe (Southern Rhodesia, Northern Rhodesia, Kenya, the Cape Colony, Natal, Tanganyika, South-West Africa, Nyasaland). The size of the settler community and its political power (both locally in the colony but also in the corridors of Westminster) varied across the continent but what was common was that the bigger the settler community, the weaker the indigenous polities.⁸ Colonies with settler populations often sought Dominion status within the empire – self-governing but based on limited franchise.⁹ The key constitutional distinction would be that they had ‘responsible government’ but not ‘representative government’. The law and politics of self-rule and shared rule in Africa showed similarities to British colonial structures elsewhere, be it in the Antipodes, North America, East Asia, or the Caribbean.

Directly related to the presence of sizeable settler communities from Europe and their political clout, indirect rule was fully practiced only in territories where the pre-colonial demographic composition remained intact. This was either because the climate and terrain had proven inhospitable to Europeans, or because the strength and unity of the indigenous polities rendered such an option unfeasible, or because treaties signed with indigenous rulers prevented the settlers from purchasing land. It is imperative to highlight the fact that within the national borders of present-day states, territories could have different status. For example, the Transkei region functioned as an autonomous Protectorate closed to European settlers while formally remaining within the Colony of the Cape of Good Hope (within present-day South Africa) which had a Dominion status with responsible government, while in specially designated parts of the Protectorate of Northern Rhodesia (present-day Zambia), Europeans were allowed to purchase land and settle as if it were a Dominion.

While the pre-colonial combinations of autonomy and union as *avant-la lettre* forms of indigenous federalism were dismantled and remade under colonial supervision, Western-type of federalism briefly made an appearance during the late 1870s as the Secretary of State for Colonies, Lord George Herbert Carnarvon tried to construct a federal-type union among Britain’s territories in the region. During his previous term as Colonial Secretary, Lord Carnarvon had overseen the 1867 British North American Act forming the Canadian

8 For an overview of the relative political autonomy of British colonies across East Africa, see Andrew Roberts, ‘East Africa’ in: Andrew D. Roberts (ed.), *The Cambridge History of Africa*, Volume 7, from 1905 to 1940, Cambridge 1986, pp. 649-701.

9 One of clearest demonstration of settler interest were the responses recorded in the 1925 Report of the East Africa Commission chaired by Colonies Secretary William G. Ormsby-Gore. The report contains widespread settler opposition to the inclusion of natives in newly formed local Legislative Councils; *W. G. Ormsby-Gore*, *Report of the East Africa Commission*, London 1925, pp. 7-9.

federation. But the Canadian blueprint failed to convince the local politicians from settler communities and colonial bureaucrats.¹⁰ The formal federation was stillborn, but the political principle of federalism was to make a reappearance after the Boer Wars. The 1910 Union of South Africa bringing together the two British Colonies of the Cape and Natal, and the two Boer Republics of Transvaal Zuid Afrikaansche Republiek and Oranje Vrijstaat was to contain a strong dose of federalism in the way self-rule for the four was combined with shared rule for all.

At the end of the First World War, the creation of the League of Nations created a third category of colonial territories, nominally containing more formal recognition of the right of locals to self-government while the practice on the ground could vary. Former Ottoman and German territories in Africa were placed under Western powers as so-called League of Nations Mandated Territories who were to supervise these until they became self-governing. Some ended up being settled and governed as *de facto* parts of existing colonies – the former German colony of South-West Africa (present-day Namibia) being the prime example. Britain had transferred the governance of its mandate to the Union of South Africa, who then treated the territory as its fifth province. Imperial governors elsewhere sought treaties with local polities akin to those in Protectorates and tried to stem the arrival of settlers. The former German colony of Tanganyika (the mainland part of present-day Tanzania) is an example. Elsewhere, the inhospitable climate of West Africa did not necessitate additional imperial policies to discourage European settlers and the practice of mandates in the former German colonies of Togoland and Kamerun were similar to how things were in Protectorates.

During the decades following the addition of the League of Nations Mandates Territories to the constitutional order of colonialism, relics of precolonial forms of law and governance – with the exception of British Protectorates – were steadily uprooted in British Dominions, as well as French, Belgian, and Spanish colonies and in most League of Nations Mandates. At the end of the Second World War and with the creation of a new international organisation, the mandates became United Nations Trust Territories based on the same principle of Western supervision until these territories were deemed capable of self-government. But this time the global dynamics had changed. The war in Europe had been fought to liberate occupied lands, so it was now hard to justify the continuation of colonial occupation. Besides, the war had drained the military and economic might of the former colonial masters. France was busy trying to quell independence movements in Indochina and Algeria, and Britain was similarly engaged in costly attempts to hold on to a global empire it could no longer afford. This time-period was one of constitutional innovation and experimentation for various federal schemes injecting more self-rule to their African territories.

10 For more on this failed initiative, see *R. L. Cope*, Strategic and Socio-Economic Explanations for Carnarvon's South African Confederation Policy: The Historiography and the Evidence, *History in Africa* 13 (1986), pp. 13-34.

III. Colonial Constitutional Reforms Granting More Self-Rule and Federalism on the Way Out

Starting with the mid-1950s piecemeal constitutional initiatives to introduce more local representation to running the colonies took up speed and accelerated towards more comprehensive arrangements of self-rule, albeit still within the broader colonial constitutional framework. Federal-type arrangements among French and British territories were part of this move.

France experimented with two federal arrangements. The origins of both the West African *Afrique Occidentale Française* AOF (consisting of present-day Senegal, Mauritania, Ivory Coast, Guinea, Mali, Benin, Niger, and Burkina Faso) and the Central African *Afrique Équatoriale Française* AEF (consisting of present-day Central African Republic, Cameroon, Congo-Brazzaville, Gabon, and Chad) went back to the turn of the 19th century as administrative frameworks for French colonial rule.¹¹ The constituent Lieutenant Governors of the two federations reported to their respective Governor Generals who were then responsible to Paris. French-style (con)federalism was thus inseparable from French colonialism. This explains the reluctance of liberation movements to accept and embrace some of the less hierarchical variations offered to them, one being the loosely confederal African *Communauté Française*. A decade earlier, the introduction of (qualified) electoral franchise and (limited) territorial autonomy under imperial supervision would have perhaps sufficed to placate local demands, but new majoritarian winds were blowing in the post-World War II world. Last-minute reforms in the late 1950s towards incorporating more local representation failed to stop the dissolution of AOF and AEF at the time of decolonisation in 1960.¹²

Britain created the Central African Federation between the two Protectorates of Northern Rhodesia and Nyasaland (present-day Zambia and Malawi) and the Dominion of Southern Rhodesia (present-day Zimbabwe) in 1953. But the Central African Federation was formed right at the time when the continent-wide demands for majority-rule had reached a scale that did not seem to be amenable to accommodation by piecemeal constitutional tinkering. There was little popular support for a federal union which was deemed to be dominated by the white Rhodesian minority.¹³

11 Patrick Manning, *Francophone Sub-Saharan Africa 1880-1985*, Cambridge 1988.

12 Compared to the British, French-style federalism in Africa did not only look more like administrative decentralisation under the continued supervision of the metropolitan bureaucracy, but it also came with a civil law system more limited in its capacity to acknowledge, recognise, and absorb the diverse collection of homegrown traditional laws across France's colonial holdings in Africa. Jan Erk, Chapter 18: Constitutionalisation of Traditional Authorities and the Decentralisation of Governance: Anglophone and Francophone Africa Compared, in: Charles M. Fombad / Nico Steytler (eds.), *Decentralisation and Constitutionalism in Africa*, Oxford 2019, pp. 459-84.

13 For more on the history of the Central African Federation, see John McCracken, *British Central Africa*, in: Andrew D. Roberts (ed.), *The Cambridge History of Africa*, Volume 7, from 1905 to 1940, Cambridge 1986, pp. 602-648.

What also happened during the mid-1950s was that many formally separate colonial polities were being brought together in preparation for eventual self-rule. This was coupled with internal reforms towards more representative government in the form of stronger legislative councils and the relaxation of limits on mass politics. This phase of colonial retrenchment gave birth to the continent's biggest and most enduring federation, Nigeria. The first step had been the union of Northern Nigeria and Southern Nigeria in 1914.¹⁴ By the early 1950, the Colonial Office and Nigerian leaders had entered into negotiations to devise a federal-type arrangement giving more political autonomy to the constituent parts. The colonial status within the imperial constitutional architecture was formally revised in due course. The populous south was subdivided into Western and Eastern Regions, and all three regions were given legislative councils. In 1954, the new Federation of Nigeria was established – still a Protectorate under a British Governor General but with regional and central legislative houses of legislation and a separate federal district for the capital Lagos.¹⁵ By 1960, the Nigerian Federation became independent; initially with the Queen as the Head of State, and later in 1963, with a new republican constitution and an elected president.

The process of amalgamation of formerly separate colonial polities did not always engender long-term patterns of federalism similar to Nigeria's. In 1957, the Crown Colony of the Gold Coast, the Ashanti Kingdom Protectorate, the Northern Territories Protectorate, and the Trust Territory of Togoland were merged. The territorial autonomy of these constituent units did not manage to withstand transition to the majoritarian electoral politics of the new state of Ghana. As demands for national self-determination met colonial retrenchment, reforms bringing limited-franchise, qualified autonomy, and continued imperial supervision did not seem enough for many. The continent-wide swell sparked by the independence of Ghana and Sudan in 1957 swept over the details of piecemeal and limited political and constitutional reforms that had been designed in many parts of the continent.

The Central Africa Federation was one of the first in line. The Protectorates of Northern Rhodesia and Nyasaland preferred majority rule and subsequent independence under their new names, Zambia and Malawi, outside the federation in 1963. This also impacted the ongoing attempts to form an East African Federation between Uganda, Kenya, and Tanganyika (the mainland part of present-day Tanzania). In the midst of the wave towards independence throughout the continent, there was little time and energy left to devising a workable constitutional framework acceptable to the European settlers in Kenya, the indigenous political movements and polities in the colonies, the British bureaucracy, and the metropolitan government in London. Plans for a federal union within the overarching

14 The unification process had in fact started a little earlier with constitutional consolidation in the south, that is, the merger of the Protectorates of Niger Coast and Colony of Lagos into Southern Nigeria.

15 For the complex constitutional set up of the federation, including southern Cameroons and the asymmetrical arrangements, see *L. Gray Cowan, The Federation for Nigeria, International Journal* 10 (1955), pp. 55-57.

framework of the British Commonwealth for East Africa were eventually shelved.¹⁶ The demise of the unpopular Central African Federation was very fresh. For their impending independence, no one in East Africa wanted to go back to a system of limited and multiple franchise which distinguishes between groups of residents and their collective interests, and with continued close supervision by imperial bureaucrats.

During Britain's disengagement from its African colonies, asymmetrical forms of constitutional arrangements became a preferred way to reconcile the rights of traditional polities enjoying Protectorate status and the growing calls for national self-determination demanded by liberation movements. Local political dynamics often pitted nationalist leaders of new mass parties riding the wave of populist support (Kwame Nkrumah in Ghana, Kenneth Kaunda in Zambia, Milton Obote in Uganda) seeking majoritarian unitary constitutions against traditionalists (especially from within the ranks of the Kingdoms of Asante, Buganda, and Barotseland) who sought to protect their existing autonomies in non-majoritarian, often federal or semi-federal, forms of constitutional design.

As the Central African Federation was dissolving in the early 1960s, the Lozi kingdom of Barotseland, which had signed separate treaties with the British preceding the creation of Northern Rhodesia, was convinced by both Britain and the leadership of the independence movement to accept a fate within Zambia with guarantees of territorial autonomy within. The result was what came to be popularly known as the Barotseland Agreement.¹⁷ The treaty signed in 1964 stipulated the continuation of Barotse regional autonomy over its traditional laws and governance structures.¹⁸ Constitutional deliberations over Zambia's decolonised constitutional order coincided with discussions in Kenya and Uganda further north. Future Uganda's traditional kingdoms received guarantees for an asymmetrical federal union where some constituent units would have territorial self-rule, others limited autonomy, while the rest would remain under the direct rule of the national government. According to Elliott Green:

*Concerns about a future civil war led the British Munster Commission in charge of designing the post-colonial government to recommend a federal status for Buganda but only recommend a semi-federal status for the other kingdoms and a unitary system for the rest of the country because they were not as rich or large as Buganda, thereby creating a highly unequal system of local governance upon independence in 1962.*¹⁹

- 16 Anthony. J. Hughes, *East Africa, The Search for Unity: Kenya, Tanganyika, Uganda, and Zanzibar*, Harmondsworth 1963.
- 17 Phineas Bbaala, *Local Government Reforms and the Challenge of Development in Zambia*, *African Journal of Education and Social Sciences* 1 (2016), p. 66.
- 18 Malumo Mubita/ Beatwell Sekeleti Chisala, *Zambia and the Barotseland Agreement 1964*, Lusaka 2013, p. 34.
- 19 Elliott Green, *Decentralization and Development in Contemporary Uganda, Regional and Federal Studies* 25 (2015), p. 493.

The federal amalgamation of formerly separate colonies of Britain in the run-up to independence was a mix of local demands and imperial imposition. While referenda had brought the United Nations Trust Territory of Togoland into future Ghana and part of the Trust territory of British Kamerun into future Nigeria, a similar referendum by ethnic Somalis in Kenya's Northern Frontier District to join Somalia proper was ignored by the British. Instead, they were amalgamated into the Colony and Protectorate of Kenya. Smaller ethnic groups fearing a potential ethnic Kikuyu-Luo domination in a future majoritarian unitary state had also been demanding territorial autonomy to accompany union. The result was the 1963 'quasi-federal' independence constitution of Kenya.²⁰ To the south of Kenya, the former German Colony of Tanganyika under British rule as a United Nations Trust Territory had gained its independence in 1961. Off the coast lied the Protectorate of the Sultanate of Zanzibar. In 1963 Zanzibar also became independent but the Emirate was soon toppled by an uprising and the islands joined mainland Tanganyika forming the Union of Tanzania. The nominally federal constitution of 1964 gave Zanzibar territorial autonomy within the new Tan-Zan federal union. The changing international order and the subsequent end to colonial rule had unleashed various federal initiatives; the arrival of a different international order was to nip many of these in the bud.

IV. Federalism Loses to Centralisation During the Cold War

Independence was not kind to federalism. The shortest lifespan of the various constitutional arrangements bringing a combination of self-rule and shared rule to the newly independent former colonies was the Mali Federation of Senegal and French Soudan formed in 1959 and dissolved in 1960.²¹ Neither did the various constitutional combinations of territorial autonomy and national union in British Africa – with the exception of Nigeria – survive beyond the first few years of decolonisation.

In the newly formed independent state of Ghana subject to majoritarian electoral dynamics, the powerful Asante Kingdom was unable to establish and protect its territorial autonomy. By 1964, the former liberation hero and the country's first president Kwame Nkrumah amended the constitution to make his party the only legal one and himself the president for life. A military coup in 1966 brought an end to his presidency and the country's first constitution, but the hopes of traditional polities for territorial autonomy within a federal-type union remained unfulfilled. A cycle of military coups interspersed with centralist civilian constitutions came to define the coming decades in Ghana.

Uganda's first constitution which had introduced an asymmetrical semi-federal system whereby the Buganda Kingdom enjoyed internal autonomy, the kingdoms of Bunyoro, Ankole, Toro, and the territory of Busoga enjoyed semi-autonomy while the rest of the

20 William Tordoff, Decentralisation: Comparative Experience in Commonwealth Africa, *Journal of Modern African Studies* 32 (1994), p. 563.

21 For a more detailed discussion, see William J. Foltz, *From French West Africa to the Mali Federation*, New Haven and London 1965.

country was directly governed by the central government was suspended by President Milton Obote in 1966. The new constitution which came into being in 1967 created a centralised presidential system and removed all forms of territorial autonomy for the regions. Obote's chaotic rule was followed by the brutal years under Idi Amin, and then Obote again.

The end of the Central African Federation, and the transition of Northern Rhodesia into Zambia, had happened in the context of not only reaction against the Rhodesian white minority but also the financial mismanagement which had left Northern Rhodesia with a disproportionate share of the federal debt.²² Zambia's birth was a product of the reaction to the federal union between three colonial polities within the imperial colonial architecture order. It was thus difficult for the same political principle to retain its appeal internally. A year after independence Kenneth Kaunda's government abolished the territorial autonomy established by the Barotseland Agreement in 1964. The country became first a *de facto* one-party state under Kaunda and later a *de jure* one with a new constitution.

Neither was federalism able to survive the electoral politics of Kenya. One year into independence, the political party representing different ethnic groups committed to regional autonomy, Kenya African Democratic Union (KADU), dissolved itself and many of its members joined the dominant Kenya African National Union (KANU) which soon became the only political party. Constitutional amendments together with executive and legislative action turned the country into a unitary state. By the end of 1960s, all traces of regional autonomy had been removed from the Kenyan constitution.²³

The Tan-Zan federal union was based on the recognition of Zanzibari territorial autonomy within its union with mainland Tanganyika. But the revolutionary political movement that toppled the Sultanate on the islands belonged to the same ideological family with Julius Nyerere's governing party on the Tanganyika mainland. Both parts of the union formalised single-party revolutionary rule into their systems of law and governance. Initially, the two revolutionary parties were nominally separate but they soon after formalised their merger. Within the Tan-Zan federal union, autonomy remained in name only.

Another asymmetrical federal union falling prey to the centralist political dynamics of the Cold War was in Cameroon. Similar to Tanzania, an asymmetrical union had been established between the smaller former British United Nations Trust Territory and the much bigger and more populous former French Cameroon in 1961. Within a single-party rule and strong presidency, centralism soon took hold and federalism was eventually abolished. Another asymmetrical federal union to disappear was the one between imperial Ethiopia and its former territory which had become an Italian colony, Eritrea. The federal union of

22 In his talk to the Royal African Society and Royal Commonwealth Society, 1 October 1964, the Commissioner for Zambia, J.P. Murray also put the blame on Westminster for the inconsistencies in policy. J.P. Murray, *Zambia and the Future*, African Perspectives 64 (1965), pp. 17-24.

23 Robert M. Maxon, *The Rise and Demise of Majimbo in Independent Kenya*, in: Michael Miwenda Kithinji / Mickey Mwanzia Koster/ Jerono P. Rotich (eds.), *Kenya After 50: Reconfiguring Historical, Political, and Policy Milestones*, London 2015, p. 19.

1952 had placed the Ethiopian Emperor as the head of state. The smaller partner Eritrea soon lost its autonomy and fell under the pull of imperial Ethiopia in 1962. Writing in the midst of those very dynamics in 1966, Donald Rothchild was remarkably accurate in spotting some of the bigger patterns:

Thus, despite efforts to devise federal systems in Nigeria, Mali, East Africa, Ethiopia, the Congo Republic, and the very special case of Central Africa, the results have not been notable for their enduring qualities. Federal systems have remained operative for relatively brief periods of time, followed by fissure into separate, sovereign parts or movement towards unitary systems. Federalism has proved brittle; it has disintegrated in the face of pressures beyond its capacity for reconciliation, making way for more centralised forms of government-either within the existing state framework or within the parts that composed the federal state.²⁴

While Rothchild was making those observations, decolonised Africa's new states were also dealing with secessionist uprisings in Nigeria's Biafra, the Congo's Katanga and South Kasai, and the southern regions of the Sudan.²⁵ Secessionism ended up failing in all three countries, but with different long-term consequences.

The First Republic of independent Nigeria had ended with the military coup in 1966, which also sparked the Eastern province to secede and declare its independence as the Biafran Republic. The subsequent civil war ended with the federal victory in 1969. Despite Biafra's defeat, the country did not revert to a centralist constitution. Instead, the three existing regional states were further subdivided, and federalism remained the organising logic of the state despite a cycle of military coups and democratic reforms. Secessionism failed in Nigeria, but federalism did not. In the Congo and Sudan on the other hand, the failed secessions of the 1960s were not followed by renewed federalism. The secessionist movement in the south of Sudan and the Khartoum's attempts to suppress this led to a decades long civil war which eventually led to the split of the country forty years later. In Congo, secessionism in the provinces did not succeed in splitting the country up, but neither were the unitarist hopes of the national liberation movement met. Following independence in 1960, Congo's mining-rich eastern province of Katanga had declared secession. It was soon joined by the province South Kasai. Within a couple of years of brutal civil war among various groups, both provinces were brought back into union. While

24 Donald Rothchild, *The Limits of Federalism: An Examination of Political Institutional Transfer in Africa*, *The Journal of Modern African Studies* 4 (1966), p. 276.

25 Reviewing these three cases comparatively in their immediate historical context, the changing international dynamics appear to have fuelled both movements as well as influencing the outcomes. Jan Erk, *Will the North's Secessionist Winds Blow South? The Past, Present, and Future of Self-Determination and Border Change in Africa*, *South African Journal of International Affairs* 25 (2018), pp. 161-163.

the text of the Congolese constitution was amended to form a loose federation of 21 states in 1964, the real power was now within the monopoly of the new leader, Colonel Mobutu.²⁶

In sum, the short-lived federal experiments introduced and supervised by retreating colonial authorities during the post-World War II decade did not survive into the new international order of the Cold War.²⁷ According to Victor T. Le Vine “what neither the British nor the French expected was the speed with which the independence constitutions, and more often than not their premises, were so soon modified, altered, or simply abandoned”.²⁸ Both scholarly and applied writings on political reform from the 1950s show no anticipation of the full-scale and sudden retrenchment of the colonial powers and the coming decades of semi-authoritarian dominance of presidential systems.²⁹

Despite the variation in the design of these defunct constitutions, what came to replace them showed a remarkable degree of similarity. The Western-supervised constitutional reforms during the transition from colonial rule to self-government starting with the late 1950s almost everywhere were soon replaced by presidential systems resting on one-party rule of former liberation movements.³⁰ One exception to this pattern is the Senegambia Confederation formed in 1982 and dissolved in 1989. The union between the former French Colony of Senegal and the former British Colony of Gambia appeared twenty years after the continent-wide wave of federalism accompanying decolonisation. It did not rely on external constitutional blueprints but was more of an inter-state treaty of cooperation which disappointed both sides soon after its signing and limped on until its formal dissolution a few years later. Senegambia is thus quite different from the other short-lived federations of the continent.

The short-lived experiments, the failed constitutions, and the defunct federations however do carry with them two observations about the fate of federalism. One is the fact that no matter how elaborate and thoughtful the design, without a connection to the people and the land – and the subsequent sense of grassroots ownership by the public and homegrown legitimacy – constitutions are vulnerable to political forces with alternative claims of legitimacy. In this case, the purported need to centralise political power in order to quickly

- 26 Jan Erk, The Borderlands of Order in the Borderlands of Africa: Katanga and the Caprivi Strip, in: Katherina P. Coleman/ Markus Kornprobst / Annette Seegers (eds.), *Diplomacy and Borderlands: African Agency at the Intersection of Orders*, London / New York 2019, pp. 91-111.
- 27 Similar patterns existed outside Africa as well. A 1968 book edited by Thomas Franck looks at four regions within the British colonial system (East Africa, Central Africa, West Indies and Malaya) who had tried, and subsequently failed, to form federal unions. *Thomas Franck, Why Federations Fail: An Inquiry into the Requisites for Successful Federalism*, New York 1968, p. 177.
- 28 Victor T. Le Vine, The Fall and Rise of Constitutionalism in West Africa, *The Journal of Modern African Studies* 35 (1997), p. 186.
- 29 See for example, *W. Ivor Jennings, The Approach to Self-Government*, Cambridge 1958.
- 30 For an even-handed overview of the continent's new single party presidential systems, see *Cherry Gertzel, East and Central Africa*, in: Michael Crowder (ed.), *The Cambridge History of Africa*, Volume 8, from c. 1940 to c. 1975, Cambridge 1984, pp. 383-457.

modernise, develop, and consolidate nation-building. How quickly the new constitutions unravelled almost at the very moment the West pulled out should be engraved into the canon of federalism studies. Top-down formal federations do not seem to survive long without bottom-up federalism to sustain them. And the second observation is the primacy of the global dynamics and international factors. In a world defined by the Cold War between the US-led West and Soviet-led East, internal constitutional niceties did not matter much as long as one picked the right side: political, economic, and military support would then follow. As Christopher Clapham puts it:

*African states came to independence within a global order shaped by the Cold War, in which the primary concern of major external powers was whether these states would line up on one side or the other; and issues of economic policy and domestic political structure, quite as much as foreign policy, were viewed through the prism of external alignment.*³¹

The Cold War period also included the cynical use of the façade of federalism by the apartheid regime in South Africa in the form of supposedly independent and autonomous Bantu Homelands. Apartheid's homelands policy rested on the practices and structures established by the British but took these a step further. British indirect rule was born out of the force of circumstances. The thinness of colonial administrations, both in manpower and in infrastructural reach, had historically necessitated the recognition of existing traditional polities. The National Party that came to power in 1948 turned South Africa's diverse collection of 'Native Reserves', similar to the Indian Reserves in North America, into a more comprehensive political system as part of its new policy of 'apartness'. But unlike the small and underpopulated Indian Reserves of North America, it was the majority of the population which were relegated to these homelands. And unlike the colonial powers of the 19th century, this system of indirect rule was not because apartheid regime lacked manpower or infrastructure. Instead, nominal autonomy for indigenous polities was introduced to give a semblance of constitutional legitimacy to white minority rule that could now be portrayed to be apart from Bantu self-government.³²

31 Christopher Clapham, Decolonising African Studies, *Journal of Modern African Studies* 58 (2020), p. 144.

32 Despite the comparable format, there was constitutional diversity across the homelands. Some had made more use of their limited autonomy and were able to incorporate different constitutional ideas and principles into their charters. For more on this, see *Francois Venter*, Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei, in: M.P. Vorster / M. Wiechers / D. J. Van Vuuren (eds.), *The Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, Durban 1985, p. 17.

V. *The End of the Cold-War and the Universalisation of the Western Constitutionalism*

The end of the Cold War, the triumph of the West, and the subsequent universalisation of the liberal-capitalist vision unleashed a wave of political and economic reforms, often containing federal and decentralisation components. Not only had the political, economic, and military support from the Soviet-led Eastern Bloc evaporated, but also the pull of the revolutionary-socialist vision. At the level of ideas there seemed to be no alternative to the technocratic reforms promoted and supported by the West. This time the Cold War allies and clients of the West without liberal democratic constitutions also felt the impact of global winds. Neither were authoritarian states which had mastered how to navigate between the two blocs immune to the impact of the reform currents. Political and economic interests on the one hand and the universalisation of Western ideas on the other left no other path. The post-Cold War universalisation of liberal-capitalist ideas and Western triumphalism inevitably influenced the contents of the new constitutions. There was also much support from aid agencies and donors, as well as technocratic advice from international experts. International lenders, donor, and aid agencies all made their support conditional on a set of similar criteria. As one of the most prolific students of African politics, M. Crawford Young, puts it: “There was increasingly an international consensus on liberal constitutions, democracy, and human rights. Western liberal states, directly or through intermediaries such as international agencies, influenced the constitution-making process in many countries”.³³ Christine Schwöbel-Patel calls this ‘normative global constitutionalism’: “the appeal of a constitution, the universalisation of legalist-moral principles, and the narrative of tempering of politics through law”.³⁴ The same vision defined the blueprints for decentralisation reforms across Sub-Saharan Africa. In a collection published by the United Nations evaluating these reforms, Moses L. Golola acknowledges that “the process of decentralisation in sub-Saharan Africa has coincided, and perhaps even dictated by, efforts by the donor community to reorient aid policies”.³⁵

While the Western influenced decentralisation ideas were a core part of political and economic reforms across the continent, post-conflict federalism also found its inspiration in the West. As someone who had been involved in the drafting of both the interim (1993) and the final (1996) constitutions of post-apartheid South Africa, Judge Dennis Davis, tells us that both documents had “drawn heavily upon the Canadian, American, German

33 M. Crawford Young, *The Postcolonial State in Africa: Fifty Years of Independence, 1960-2010*, Madison 2012, p. 182.

34 Christine Schwöbel-Patel, (Global) Constitutionalism and Geopolitics of Knowledge, in: Philipp Dann/ Michael Riegner/ Maxim Bönnemann (eds.), *Global South and Comparative Constitutional Law*, Oxford 2020, p. 82.

35 Moses L. Golola, *Decentralisation, Local Bureaucracies and Service Delivery in Uganda*, in: *Reforming Africa's Institutions*, in: Steve Kayizzi-Mugerwa (ed.), *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities*, New York 2003, p. 256.

constitutions”.³⁶ The text of the South African constitution and the devolution model then made their way to Kenya, and from there to Zimbabwe and Zambia’s new constitutions. Constitutional borrowing has been a big part of federalism’s history of course. The drafters of the US federalism had looked at Europe; and then Europeans – especially the Swiss 1848 constitution – looked back across the Atlantic and borrowed from the Americans in return. In the midst of democratic transitions with strict deadlines and multiple stakeholders, some borrowing by drafters is inevitable, but this should probably fall short of prescribing one’s own federal model *in toto* to others. Writing at the time US federalism was promoted as a blueprint for the rest of the world, Cass R. Sunstein was warning against the potential risks:

*A moment’s reflection, however, should be sufficient to show that there are great difficulties in evaluating governmental structures in the abstract, or in transplanting the structures designed for one nation for use in one another. The effects of such structures often cannot be reliably measured in advance. Even when we can measure effects, it is hard to evaluate them ... And in light of this, outsiders must be especially cautious in making recommendations for constitution-makers even when asked to draw on the lessons of their own experience. One needs to know a great deal about the local situation; one needs to know a lot about hopes and problems.*³⁷

Thomas Koelble and Andrew Siddle’s evaluation of the ten years of federal and decentralisation reforms in South Africa, lend support to Sunstein’s warnings about the local factors, in this case, weaknesses in administrative capacity:

*None of the well-intentioned and detailed constitutional and legislative blueprints for decentralization took into account realistic means of dealing with the necessary administrative and technical capacity at the local level. Instead, most municipalities soon became the fiefdoms of rent-seeking politicians; most of them were overwhelmed, in one way or another, by the demands placed on them.*³⁸

Starting around the same time as South Africa’s political reforms, the internationally led and supervised reforms towards federalism in South Sudan and Somalia have yet to deliver working and workable solutions. After decades of fighting, international involvement has managed to reduce all-out civil wars to something smaller scale, but within the low intensity permanent conflicts, any hope for federalism to flourish has constantly been dashed. Part of this might be the short-term horizons of some of those involved. As Peter Burnell puts it, “international actors involved in brokering the peace may set timetables for completion that

36 Dennis M. Davis, Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience, *International Journal of Constitutional Law* 1 (2003), p. 188.

37 Cass R. Sunstein, Federalism in South Africa? Notes from the American Experience, *American University International Law Review* 8 (1993), p. 421.

38 Thomas A Koelble, Andrew Siddle, Decentralization in Post-Apartheid South Africa, *Regional and Federal Studies*, 24 (2014), p. 612.

are governed by their own interest in making an early exit”.³⁹ Part of this might be because of the superimposition of various reforms blueprints on top of each other. And part of this might be the top-down copy-pasting of federal models from elsewhere instead of giving voice to bottom-up indigenous traditions of autonomy and union.

What partially explains the failure of federalism reforms to deliver in Somalia and South Sudan, the discontent in South Africa, and the hollowing out of decentralisation in the rest of the continent is something all these share: they were all products of the legalist-moral optimism of what Schwöbel-Patel labels ‘normative global constitutionalism’ designed and implemented without much attention to the indigenous federal traditions of autonomy and union. No matter how ideal they were in the abstract, most new constitutions and technocratic reforms across Sub-Saharan Africa in the post-Cold War decades could not reach and connect to the peoples they were designed for, thus falling short of a pervasive grassroots embrace of the decentralist constitutions amongst the public necessary to consolidate constitutionalism and ensure its longevity. One of the most erudite observers of the dynamics of law and politics across Sub-Saharan Africa, Martin Chanock, sums all this up in the following terms:

*The habit, in academia, and, more sadly, in practice, has been to start at the top, with the writing of increasingly complex constitutions, with increasingly sophisticated institutions and rights guarantees, which have, as has been shown time and time again, floated meaninglessly above the societies for which they have been designated, until the bubble bursts in outbreaks of violence.*⁴⁰

C. The Future of Federalism in Africa

The post-Cold War universalisation of liberal-capitalist ideas and the triumph of Western constitutional models had paved the way for both targeted political and economic reforms as well as constitutional borrowing *in toto* in the 1990s. Across the African continent, federal constitutions and decentralisation blueprints from the West were embraced. Three decades on, however, most of these federal-type arrangements have fallen short of their promises. The outward constitutional form indeed remains unchanged in many places, but the practice has been tainted by authoritarianism, crony capitalism, and ethnic favouritism. From Nigeria to South Africa, growing popular disillusionment with federal politics is accompanied by the appearance of visible cracks in liberal-democratic confidence. Add the changing global power dynamics to the pervasive domestic discontent. Whatever the new geopolitical dynamics, it is clear that the new world order will not be marked by a similar degree of universalisation of one political and economic vision and its constitutional model

39 Peter Burnell, The relationship of accountable governance and constitutional implementation, with reference to Africa, *Journal of Politics and Law* 1 (2008), p. 20.

40 Martin Chanock, Constitutionalism, Democracy, and Africa: Constitutionalism Upside Down, *Law in Context: A Socio-Legal Journal* 28 (2010), p. 127.

over its alternatives. The law and politics of federalism will thus need a new set of lines of scholarly research appropriate for a more diverse world:

How do different indigenous constitutional orders function; what indigenous forms of check-and-balances exist; what are the indigenous *Trias Politica*; how have indigenous constitutions regulated territoriality – especially considering the prevalence of conflict between pastoralist herders and sedentary farmers; how does one inject the protection of individual human rights into traditional systems more concerned with collective rights and obligations, within clan, tribe, ethnic communities and across; how does one reconcile traditional notions of collective ownership with modern entrepreneurialism; how does a modern legal system where indigenous laws are recognised deal with variations of customary law within and across tribes; and keeping an eye on regional and global geopolitics while pursuing these new lines of scholarly research. While looking for answers to these challenges, the study of the law and politics of federalism will need the factual knowledge the disciplines of history and anthropology bring as well as the normative insights philosophy provides.

The short-term casualty will be the scholarly consensus made possible by the disproportionate reliance on a handful of case-studies from the West. The long-term gain would be a richer and nuanced scholarly repertoire more appropriate to a diverse world. In their introductory chapter to the recent collection *Global South and Comparative Constitutional Law*, the editors Philipp Dann, Michael Riegner, and Maxim Bönnemann list a number of reasons, scholarly and applied, for incorporating more non-Western cases into the repertoire of constitutional studies. It is the final one that also holds for the study of the law and politics of federalism:

A final reason for engaging with the Global South in comparative constitutional law is rather simple: it is intellectually productive. It not only adds innovative legal material for comparison, but also offers fresh theoretical perspectives, alternative ways of thinking, and necessary irritations of disciplinary orthodoxies.⁴¹



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41 Philipp Dann / Michael Riegner/ Maxim Bönnemann, The Southern Turn in Comparative Constitutional Law, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *Global South and Comparative Constitutional Law*, Oxford 2020, p. 4.