

**MIDLANDS STATE UNIVERSITY**

**FACULTY OF LAW**



**Realisation of socio-economic rights through devolution in Africa. The case of Kenya and Zimbabwe**

**By**

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**(STUDENT ID R1810953J)**

**A dissertation submitted to Midlands State University in partial fulfilment of the requirements of the Master of Laws (LLM) Constitutional and Human Rights Law.**

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## **TITLE PAGE**

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FULFILMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS  
(CONSTITUTIONAL AND HUMAN RIGHTS LAW).**

**MIDLANDS STATE UNIVERSITY**

**2019**

## **DECLARATION**

I declare that '**Realisation of socio-economic rights through devolution in Africa. The case of Kenya and Zimbabwe**' is my own work and all the sources I have used and quoted have been acknowledged as indicated by referencing.

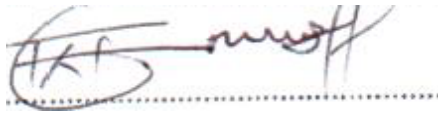
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**Realisation of socio-economic rights through devolution in Africa. The case of Kenya and Zimbabwe**

Submitted by Gaynor Rumbidzai Vambe in partial fulfilment of the requirements of the award of a **Master of Laws (LLM) in Constitutional and Human Rights Law**



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## **Abstract**

The importance of devolution as a preferred system of governance in Africa cannot be further stressed. History shows a continent that has been marred by underdevelopment, socio-economic marginalisation and hence an unacceptable disregard of socio-economic rights. These challenges have been identified as some of the most stubborn shortcomings of a centralised government. As such this has been the unfortunate common experience of a centralised government that has been shared by Kenya and Zimbabwe. Both these jurisdictions have constitutionally entrenched the system of devolution. Kenya has established a thorough legislative and institutional framework for devolution. Zimbabwe on the other hand is still to operationalise the constitutional provisions on devolution.

The Kenyan legal framework shows a strong commitment towards devolution as it manages to canvas through most of the essential matters on devolution such as detailing functions, powers and responsibilities of national government and subnational governments, as well as establish a framework for intergovernmental relations, amongst other matters. The Zimbabwean legal framework, consisting so much of the Constitution, establishes a few essential aspects of devolution such as the functions of provincial councils whilst the rest of the provisions on devolution are basically foundational and await operationalization through legislation. The system of devolution has been adopted with that hope that it can ‘cure’ the ills of centralisation and foster great socio-economic development in every region of these two jurisdictions since the subnational governments do have a developmental role to play.

The Constitutions of Kenya and Zimbabwe both recognise socio-economic rights and are therefore obliged to see to their full realisation. Unfortunately, the challenges of centralisation mentioned above coupled with the shortage of resources, makes the realisation of socio-economic rights a real challenge. Fortunately, for the realisation of socio-economic rights, local governments can, if there is a successful implementation of devolution, contribute to the advancement of socio-economic rights. This research seeks to answer the crucial question; Can the current legal framework in these two jurisdictions advance the realisation of socio-economic rights? To do so it is crucial that gaps be identified and as such suggestions on recommendations be given based on international and regional legal framework and best practices. There is a need to design a legal framework that captures the fundamentals of devolution which makes it a good governance system so as to make progressive contributions to the realisation of socio-economic rights.

The findings of this research show that there is real potential for the realisation of socio-economic rights through devolution. However, for this to happen it is important that the legal framework on devolution adhere to certain principles of devolution that enable efficient socio-economic development and public service delivery. These principles include public participation; accountability; local autonomy; and the principle of subsidiarity. Therefore, it is important that the legal framework on devolution put mechanisms in place to ensure that socio-economic rights can be realised through devolution.

## **ACKNOWLEDGEMENT**

I am humbled to have been afforded this opportunity to undertake this postgraduate degree, for that, I thank the Lord Almighty. I would like to thank my supervisor Dr W. Mugadza for his unwavering support and supervision throughout the course of this research. I am also grateful to the academic staff at the Faculty of Law for knowledge shared and their unending support. I would like to thank my mother, Mrs Vambe, for the love and kind words that kept me believing in myself throughout this journey. My son Ethan, you have contributed in so many ways. Thank you! My gratitude goes to my sisters and friends for always encouraging me to work hard. I also want to thank my husband for the love, assistance, patience and understanding when I most needed it.

## **DEDICATIONS**

I dedicate this dissertation to my loving late father, Mr G Vambe. I wish you were here. Rest in eternal peace. You are forever loved and cherished.

## **ABBREVIATIONS & ACRONYMS**

ARDCZ	Association of Rural District Councils of Zimbabwe
AU	African Union
CGA	County Government Act
CIC	Commission for the Implementation of the Constitution
CDFA	Constituencies Development Fund Act
CoG	Council of County Governors
CRA	Commission on Revenue Allocation
ECOWAS	Economic Community of West African States
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IGABS	International Guidelines on Access to Basic Services For All
IGDLSA	International Guidelines on Decentralisation and Strengthening of Local Authorities
IRA	Intergovernmental Relations Act
MoDP	Ministry of Devolution and Planning
NGCA	National Government Co-ordination Act
NCGCS	National and County Government Coordination Summit
OCoB	Office of the Controller of the Budget
PCs	Provincial Councils
PFMA	Public Finance Management Act
RDCA	Rural District Councils Act
SADC	Southern Africa Development Community
SERs	Socio-economic rights
TDGA	Transition to Devolved Government Act
UCA	Urban Councils Act



UCAZ	Urban Councils Association of Zimbabwe
UDHR	Universal Declaration of Human Rights
ZLGA	Zimbabwe Local Government Association

## Table of Contents

TITLE PAGE .....	i
DECLARATION .....	ii
<b>Abstract</b> .....	iv
ACKNOWLEDGEMENT .....	v
DEDICATIONS.....	vi
ABBREVIATIONS & ACRONYMS.....	vii
CHAPTER ONE .....	1
INTRODUCTION & BACKGROUND .....	1
1.1    INTRODUCTION .....	1
1.2    Background of the Study.....	2
1.2.1    Centralisation in African governments .....	2
1.2.2    Socio-economic Rights .....	5
1.2.3    Devolution.....	6
1.2.4    Kenya.....	8
1.2.5    Zimbabwe.....	10
1.2.6    International Legal Framework.....	12
1.2.7    Regional and Sub-regional Framework .....	13
1.3    Statement of the Problem.....	14
1.4    Significance of the study.....	15
1.5    Research questions.....	15
1.6    Limitation of the study .....	16
1.7    Research Methodology .....	16
1.8    Chapter Synopsis .....	17
CHAPTER TWO .....	19
INTERNATIONAL, REGIONAL AND SUB-REGIONAL LEGAL FRAMEWORK ON DEVOLUTION AND SERs .....	19
2.1    INTRODUCTION .....	19
2.2    General overview of Socio-economic rights.....	19
2.3    General overview of devolution of power .....	21

2.4	Legal Framework.....	23
2.5	General principles of devolution under International, Regional and Sub-regional legal frameworks .....	26
2.5.1	Autonomy .....	27
2.5.2	Accountability .....	29
2.5.3	Principle of subsidiarity .....	31
2.5.4	Public Participation .....	32
2.6	CONCLUSION.....	34
CHAPTER THREE .....		35
LEGAL FRAMEWORK FOR DEVOLUTION IN KENYA.....		35
3.1	INTRODUCTION .....	35
3.2	BACKGROUND .....	35
3.3	LEGAL FRAMEWORK.....	36
3.3.1	The Constitution of Kenya, 2010.....	37
3.3.2	County Government Act (CGA).....	38
3.3.3	Transition to Devolved Government Act (TDGA).....	38
3.3.4	Intergovernmental Relations Act (IRA) .....	38
3.3.5	National Government Co-Ordination Act (NGCA).....	39
3.3.6	Constituencies Development Fund Act (CDFA) and the Public Finance Management Act (PFM Act).....	39
3.3.7	Policy on Devolved System of Government (Devolution Policy) .....	40
3.4	INSTITUTIONAL FRAMEWORK .....	40
3.4.1	County Structures.....	40
3.4.2	Transitional Authority (TA).....	41
3.4.3	Ministry of Devolution and Planning (MoDP) .....	41
3.4.4	National and County Government Coordination Summit (NCGCS).....	41
3.4.5	Council of County Governors (CCG) .....	42
3.4.6	Commission on Revenue Allocation (CRA).....	42
3.5	FUNCTIONS AND POWERS OF COUNTY GOVERNMENTS .....	43
3.6	Principles of devolution in Kenya.....	45
3.6.1	Autonomy .....	46
3.6.2	Principle of subsidiarity .....	47

3.6.3	Public Participation.....	48
3.6.4	Accountability.....	50
3.7	Challenges with Devolution in Kenya .....	51
3.8	Socio-economic rights and Devolution in Kenya .....	53
3.9	CONCLUSION.....	54
CHAPTER FOUR.....		56
LEGAL FRAMEWORK FOR DEVOLUTION IN ZIMBABWE.....		56
4.1	INTRODUCTION .....	56
4.2	BACKGROUND .....	56
4.3	LEGAL FRAMEWORK.....	57
4.3.1	Constitution of Zimbabwe (2013).....	58
4.3.2	Urban Councils Act (UCA) and Rural District Councils Act (RDCA) .....	59
4.3.3	Provincial Councils and Administration Act (PCA Act) .....	59
4.4	INSTITUTIONAL FRAMEWORK .....	59
4.4.1	Subnational Structures .....	60
4.4.2	Ministry of Local Government, Public Works and National Housing (Ministry responsible for local government).....	60
4.4.3	Portfolio Committee responsible for local government .....	61
4.4.4	Local Government Board.....	61
4.4.5	The Zimbabwe Local Government Association (ZILGA).....	62
4.5	FUNCTIONS AND POWERS OF DEVOLVED GOVERNMENTS .....	62
4.6	PRINCIPLES OF DEVOLUTION IN ZIMBABWE .....	64
4.6.1	Autonomy .....	64
4.6.2	Subsidiarity .....	67
4.6.3	Accountability.....	68
4.6.4	Public Participation.....	69
4.7	CHALLENGES OF DEVOLUTION IN ZIMBABWE .....	70
4.8	DEVOLUTION AND SOCIO-ECONOMIC RIGHTS IN ZIMBABWE .....	74
4.9	CONCLUSION.....	76
CHAPTER FIVE .....		77
KEY FINDINGS, RECOMMENDATIONS AND CONCLUSION.....		77
5.1	INTRODUCTION .....	77

5.2	KEY FINDINGS.....	77
5.3	GENERAL RECOMMENDATIONS .....	79
5.3.1	Kenya.....	79
5.3.2	Zimbabwe .....	81
5.4	CONCLUSION.....	84
	BIBLIOGRAPHY .....	86

# **CHAPTER ONE**

## **INTRODUCTION & BACKGROUND**

### **1.1 INTRODUCTION**

This study focuses on devolution and its impact on the realisation of socio-economic rights (SERs) in Africa, with a particular focus on Kenya and Zimbabwe. Based on the characteristics of the system of devolution of governmental power this research aims to show how this system of governance is best suited to achieve the realisation of SERs in the two above-mentioned jurisdictions. This research seeks to find out the key legal principles of devolution that are crucial in the realisation of SERs. This can be achieved by examining the international, regional and sub-regional legal framework on devolution and SERs. A desirable insight into the Kenyan and Zimbabwean legal framework will follow to establish the extent to which they adhere to the key legal principles.

Kenya and Zimbabwe both share a common history of colonisation and, as a result of the transition to independence; they experienced similar socio-economic restraints under centralised governments such as poverty, marginalisation and under-development. As such Kenya constitutionalised devolution in the Constitution of Kenya (2010) and Zimbabwe constitutionalised devolution in the Constitution of Zimbabwe, Act No.20 of 2013. The process of decentralisation was motivated by the failure of a centralised government to achieve the

desired national unity and development.<sup>1</sup> It is argued that local governments have constitutional functions which lead to the actual fulfilment of international human rights obligations.<sup>2</sup>

For devolution to achieve any tangible results in the realisation of SERs there is need for a robust legal framework that embraces all the fundamentals of a devolved government in order to be effective and efficient. The legal problems that this research intends to address lie on the gap presented by the legal framework on devolution in Kenya and Zimbabwe. The assertion of this research is that devolution leads to quality service delivery, but for that to happen it requires that the powers and functions transferred resonate with the mandate of the subnational governments.<sup>3</sup>

## **1.2 Background of the Study**

### **1.2.1 Centralisation in African governments**

A centralised government is defined as system of governance whereby governance responsibilities are enforced by the central government to control lower authorities. For example the Constitution of Zimbabwe Amendment Act of 1981 (Lancaster House Constitution) did not entrench the powers and functions of local authorities and the legislation which regulated local authorities shows a significant influence of the central government in the affairs of the local authorities.<sup>4</sup> In Kenya, the Constitution of Kenya (1969)<sup>5</sup> increased the powers of the President and further diminished those of local authorities.<sup>6</sup> Only a resemblance of local government was

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<sup>1</sup> B Neuberger 'Federalism in Africa: Experience and prospects' in DJ Elazar (ed) *Federalism and political integration* (1979) 183.

<sup>2</sup> CM Bosire 'Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa' (2011) *Vol 11 Africa Human Rights Law Journal* 151-152.

<sup>3</sup> JO Fatile & GL Ejalonibu 'Decentralization and Local Government Autonomy: Quest for Quality Service Delivery in Nigeria' (2015) *Vol 10(2) British Journal of Economics, Management & Trade* 2.

<sup>4</sup> See Section 7 and section 8 of the Urban Councils Act Chapter 29:15 (Zimbabwe).

<sup>5</sup> Constitution of Kenya Act No.5 of 1969.

<sup>6</sup> World Bank 'The Evolution of Kenya's Devolution' (2014) 1.

present with a system of local authorities being established under the Local Government Act<sup>7</sup> rather than the Constitution.<sup>8</sup>

Centralisation of power in Kenya and Zimbabwe had a number of flaws. Prior to the entrenchment of devolution of power in the Constitution of Kenya (2010) the centralised governance structures formulated policies and laws that failed to ensure that local governments had adequate resources and the capacity to deliver essential services.<sup>9</sup> In addition to that the local governments were subjected to tight controls which denied them of their decision-making powers.<sup>10</sup> In Zimbabwe local authorities have faced challenges in the provision of basic services.<sup>11</sup> As a result, devolution was considered as a necessary tool to promote locally driven development as well as improve public service delivery.<sup>12</sup> The failure to successfully deliver public services has a negative impact on the realisation of SERs, as this research will show that public services are paramount in the realisation of SERs.

Under the centralised government there was disregard of the rule of law in that the centralised government displayed unscrupulous, divisive use and abuse of state powers in areas such as distribution of national resources.<sup>13</sup> As a result there was lack of accountability in the provision

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<sup>7</sup> Local Government Act [Chapter 265].

<sup>8</sup> World Bank (2014) (n 6 above) 1.

<sup>9</sup> CM Bosire 'The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 101.

<sup>10</sup> CM Bosire 'The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions' in CM Bosire & W Gikonyo (n 9 above) 101.

<sup>11</sup> T Chigwata & J De Visser 'Local Government in the 2013 Constitution of Zimbabwe: Defining the Boundaries of Local Autonomy' *Hague J Rule Law* (2018) 172.

<sup>12</sup> TC Chigwata 'Devolution demystified: Emerging debates and prospects for devolution in Zimbabwe' A discussion paper, Dullah Omar Institute for Constitutional Law, Governance and Human Rights; University of the Western Cape 3. Available at <https://zimlil.org/content/devolution-demystified-emerging-debates-and-prospects-devolution-zimbabwe-discussion-paper>

<sup>13</sup> W Gikonyo & CM Bosire 'Introduction' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 4. See also, TC Chigwata (n 15 above) 16 for an elaboration on the case of Zimbabwe.



of public services in both urban areas and rural areas.<sup>14</sup> This is notwithstanding the fact that there should be protection from policies and practices which may have a discriminatory effect<sup>15</sup> in different regions or areas.

Thus the failure of public service delivery upsets the fundamentals of the principle of progressive realisation of SERs which simply entails that a state cannot use lack of resources to justify postponement of any right.<sup>16</sup> States must adopt appropriate strategies and measures for the realisation of SERs and this may include the right to participate in government affairs that affect them such as matters of SERs advancement.<sup>17</sup>

The principle of public participation and inclusiveness<sup>18</sup> hinges on the principle of sovereign power.<sup>19</sup> Devolution enables the exercise of sovereign power directly by citizens through participation in decision making processes or indirectly through elected representatives where governmental functions and powers can be utilised in an efficient manner. Efficiency is undoubtedly the most vital factor for decentralisation of governmental powers.<sup>20</sup> An in depth discussion of these key concepts as they relate to devolution of power and the realisation of SERs will be discussed further (see in Chapter Two).

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<sup>14</sup> Y Ghai and J Ghai, *Kenya's Constitution: An Instrument for Change* (2011) 11.

<sup>15</sup> Kenya Human Rights Commission 'Devolution Manual A human rights-based Tool for governance' (2015) 15.

<sup>16</sup> Kenya Human Rights Commission (n 15 above) 15-16.

<sup>17</sup> Committee on Economic, Social and Cultural Rights General Comment No.3: The Nature of State Parties' Obligations (Article 2, Para 1 of the ICESCR). Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990. Document E/1991/23 para 7.

<sup>18</sup> Public participation is a core principle of local government, linked to the right to participation in political processes, is also protected under the International Covenant on Civil and Political Rights (ICCPR) under Arts 1(1) & 25 and the African Charter on Human and Peoples' Rights under Article 13.

<sup>19</sup> Basically it refers to the authority given to the government to make and enforce the law of the land <https://www.thelawdictionary.org/socereign-power/> Accessed 10 June 2019.

<sup>20</sup> JC Ribot 'African Decentralization Local Actors, Powers and Accountability' (2002) *UNRISD Programme on Democracy, Governance and Human Rights Paper Number 8* 8.

### 1.2.2 Socio-economic Rights

Human rights are commonly defined as those rights that are inherent in every human being by virtue of being human.<sup>21</sup> Relevant to this research however, is the realisation of socio-economic rights in particular simply because of the nature of state obligations as provided under Article 2 of the ICESCR. SERs are second generation rights that protect human dignity, freedom and general well-being of individuals by obligating states to provide education, health care, housing, a living wage, decent working conditions and other social provisions.<sup>22</sup>

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on states' obligations under the ICESCR puts forward two main aspects with respect to the states' obligations, namely progressive realisation and the issue of maximum resources available. The progressive realisation of SERs<sup>23</sup> depends mainly on the maximum available resources.<sup>24</sup>

Paragraph 28 of the Limburg Principles<sup>25</sup> provides as follows:

In the use of the available resources due priority shall be given to the realisation of rights recognised in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

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<sup>21</sup> MT Kirya 'Decentralisation and Human Rights in Uganda' (2007) *Working Paper No.16 Human Rights & Peace Centre* 1.

<sup>22</sup> D Ahmed & E Bulmer 'Social and Economic Rights' (2017) *International IDEA Constitution-Building Primer* 93.

<sup>23</sup> Progressive realization is a principle under the ICESCR which acknowledges the constraints due to the limits of available resources places a duty on the state to act within its capacity so as to progressively realise rights under the Covenant. See D Ahmed & E Bulmer (n 22 above) 20-21.

<sup>24</sup> Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This principle simply entails that states are not excused from acting on their obligation to realize socio-economic rights even in light economic constraints. States are required to carefully plan the allocation of national resources as a means to realize socio-economic rights on an equal level with any other rights as all are interdependent and indivisible.

<sup>25</sup> Limburg Principles on the Implementation of International Covenant on Economic Social and Cultural Rights (1987) (Limburg Principles). See also Article 2(1) of the ICESCR.

Though international human rights law gives recognition to the principle of progressive realisation and available resources, the state has to always meet its minimum core obligations.<sup>26</sup>

The underlying factor of state obligations to SERs is that even though economic constraints in the realisation of SERs is recognised, the ICESCR imposes obligations of immediate effect, such as, the obligation to take steps, and to eliminate discrimination in the enjoyment of SERs.<sup>27</sup>

Therefore, it is possible that efforts can be made in the form of enabling local governments to have appropriate functions and powers to ensure that progressive realisation of SERs can be achieved. The contention here is that the governmental functions that are performed by local governments of public service delivery are human rights obligations that bind the state<sup>28</sup> and can in most circumstances be effectively performed at the local level. Local governments can contribute to the realisation of SERs through their planning and budgeting functions.<sup>29</sup> In addition the Committee on Economic, Social and Cultural Rights accentuate the obligation on states to adopt legislative measures as an avenue of achieving SERs.<sup>30</sup> Therefore, local governments can play a role in realising SERs by enacting By-Laws and regulations that are consistent with the state's Bill of Rights and Constitutional principles and values.<sup>31</sup>

### **1.2.3 Devolution**

Devolution is whereby the central government transfers legislative, executive, administrative and financial decision-making authority to local governments that have clear and legally recognised jurisdictions within which they provide public services to constituents to whom they

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<sup>26</sup> It is an obligation 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'. See Committee on Economic, Social and Cultural Rights General Comment No.3: (n 17 above) para 10.

<sup>27</sup> S Joseph & A McBeth *Research Handbook on International Human Rights Law* (2010) 38.

<sup>28</sup> MT Kirya (n 21 above) 14.

<sup>29</sup> MT Kirya (n 21 above) 15.

<sup>30</sup> Committee on Economic, Social and Cultural Rights General Comment No.3 (n 17 above)

<sup>31</sup> MT Kirya (n 21 above) 15.

are accountable.<sup>32</sup> A more simplified and preferred definition describes devolution as the transfer of governance responsibility, for specified functions, to lower government levels to enable the performance of functions that are in the far reach of the central government.<sup>33</sup>

Devolution as a system of governance does away with the centralisation of resources, power and control by restoring democracy and return power to the people.<sup>34</sup> As such devolution does well to improve the delivery of basic services such as water, sanitation, health services and education to communities.<sup>35</sup>

In the South African case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another*, the court upheld the right to housing of a destitute community and held that local city authorities have a duty to plan and budget proactively for situations like emergency housing.<sup>36</sup> The court held that the responsibility of local authorities is based on its duty to protect the vulnerable and the destitute and it is duty bound to obtain required funds from national and provincial governments to exercise this function or budget own revenue for it.<sup>37</sup> The significance of this case is that it stresses that the local governments have a duty to protect human rights and that they are placed in a position where they can function to take up governmental responsibilities within their mandate.<sup>38</sup>

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<sup>32</sup> S Yilmaz et al. 'Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance' (2008) *Social Development Papers Local Governance & Accountability Series* Paper No. 113/July 2008.

<sup>33</sup> EL Yuliani 'Decentralization, deconcentration and devolution: what do they mean?' *Interlaken Workshop on Decentralization*, 27-30 April 2004 3.

<sup>34</sup> W Gikonyo & CM Bosire 'Introduction' in C M Bosire & W Gikonyo (Eds) (n 13 above) 2.

<sup>35</sup> J Ahmed et al 'Decentralisation and service delivery' (2005) *World Bank Policy Research Paper 3603* 1.

<sup>36</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 67.

<sup>37</sup> J De Visser 'The Enforcement of Socio-Economic Rights against Local Governments in South Africa' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 200.

#### 1.2.4 Kenya

Since the independence of Kenya in 1963, Kenya has experienced a number of challenges under the centralised governance system. These include; lack of accountability in the exercise of governance power; ineffective self-governance; inequitable socio-economic development; lack of public participation; and non-implementation of the subsidiarity principle of governance<sup>39</sup>

Historically, the sub-national governments of Kenya were under a system of Local Authorities, whose basis was the Local Government Act<sup>40</sup>, there was no constitutional entrenchment of local governments.<sup>41</sup> Prior to Constitution of Kenya (2010), governance structures and powers were centralised. The policy of centralisation ensured that local government did not have enough resources capacity to deliver essential services and were denied decision-making powers by subjecting them to tight control.<sup>42</sup>

The Constitution of Kenya (2010), under Article 6 saw the introduction of the system of devolution. In terms of Chapter 11 of the Constitution of Kenya (2010), the following principles of devolved government must be observed: democratic principles and the separation of powers; county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.<sup>43</sup> Kenya enacted a number of legislation which includes the County Government Act No. 17 of 2012, and the Intergovernmental Relations Act, No. 2 of 2012, amongst others. A further discussion of the legislative framework is provided.( see Chapter Three of this research)

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<sup>39</sup> W Gikonyo & CM Bosire 'Introduction' in C M Bosire & W Gikonyo (n 13 above) 1.

<sup>40</sup> Local Government Act (Chapter 265) (L.N. 256 of 1963).

<sup>41</sup> World Bank (2014) (n 6 above) 1.

<sup>42</sup> CM Bosire 'The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions' in C M Bosire & W Gikonyo ( n 9 above) 101.

<sup>43</sup> Article 175 of the Constitution of Kenya (2010).

In addition to the legal framework there is need for an institutional framework that will ensure that there is implementation of the devolution system. The independent institutions are separate from the already established structures in the devolution system, that is, the County Assemblies,<sup>44</sup> County Executive Committees.<sup>45</sup> Initially as the transition to devolution began the Taskforce on Devolution in Kenya was established which and later on dissolved after the completion of its mandate in 2011.<sup>46</sup> In addition to the Task Force on Devolution in Kenya there were other institutions mandated to implement devolution of power, and these include Transition Authority,<sup>47</sup> Commission on Revenue Allocation,<sup>48</sup> Council of County Governors (CoG),<sup>49</sup> National and County Government Coordination Summit (NCGCS)<sup>50</sup> and Ministry of Devolution and Planning (MoDP).<sup>51</sup>

However, despite the rapid enactments of legislation for the implementation of devolution in Kenya, there has been a number legal challenges. There seems to be a weakness in terms of regulating resource allocation which has affected county government service delivery obligations.<sup>52</sup> Research has also shown that there have been intergovernmental disputes caused by the lack of clarity in the transfer of powers and functions.<sup>53</sup> A more detailed discussion on these challenges will follow in Chapter Three of this research which discusses the Kenyan legal framework on devolution.

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<sup>44</sup> Article 177 of the Constitution of Kenya (2010).

<sup>45</sup> Article 179 of the Constitution of Kenya (2010).

<sup>46</sup> World Bank (2014) (n 6 above) 2.

<sup>47</sup> Established under section 4 of the Transition to Devolved Government Act.

<sup>48</sup> Established under Article 215 of the Constitution of Kenya (2010).

<sup>49</sup> The Council of County Governors was established in 2013 pursuant to the Intergovernmental Relations Act (Sections 19 – 23).

<sup>50</sup> Established as the apex body for intergovernmental relations under section 7 of the Intergovernmental Relations Act, 2012.

<sup>51</sup> World Bank (2014) (n 6 above) 25.

<sup>52</sup> World Bank (2014) (n 6 above) 22.

<sup>53</sup> M Laibuta ‘Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies’ in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 152.

### 1.2.5 Zimbabwe

Prior to the adoption of the new Constitution in 2013,<sup>54</sup> Zimbabwe was governed in terms of the Constitution of Zimbabwe Amendment Act of 1981 (Lancaster House Constitution), with its subsequent amendments.<sup>55</sup> The Lancaster House Constitution provided for a unitary form of government in which provincial and local governments did not have constitutional recognition.<sup>56</sup> The system provided for local governments which were creatures of statute with no constitutional recognition.<sup>57</sup> Local governments essentially operated in a delegated capacity<sup>58</sup> under the effective control of the central government through the Minister of Local Government, Public Works and National Housing.

Currently Zimbabwe is under a unitary government comprising subnational governments based on the system of devolution entrenched in the Constitution of Zimbabwe (2013). National objectives of devolution show that political power, policy making decisions, resource raising and distribution, as well as administrative and governance responsibilities are meant to be devolved through the local units of the government.<sup>59</sup> Devolution of governance power in Zimbabwe is based on principles of good governance that bind the state and all agencies of government<sup>60</sup> which include representative democracy; recognition for fundamental human rights; separation of powers; democratic accountability; respect of sovereign power; and equitable sharing of resource.

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<sup>54</sup> Constitution of Zimbabwe (2013).

<sup>55</sup> Constitution of Zimbabwe of 2009 (as amended by Constitution Amendment No.19) being the last amendment before the Constitution of 2013.

<sup>56</sup> TC Chigwata (n 12 above) 2.

<sup>57</sup> These include the Urban Councils Act [*Chapter 29:15*], Regional Town and Country Planning Act [*Chapter 29:12*] and the Rural District Councils Act [*Chapter 29:13*].

<sup>58</sup> Section 7 and 8 of the Urban Councils Act confers upon the Minister the authority in consultation with a council and by statutory instrument, to vest or divest the administration, control and management of a local government area to a council. Thereby, limiting the powers of local authorities to run local affairs.

<sup>59</sup> Section 264(2) of the Constitution of Zimbabwe, (2013).

<sup>60</sup> Section 3 (2) of the Constitution of Zimbabwe, (2013)

The major challenge being faced under the current legal framework is that other than the Constitution of Zimbabwe which entrenches devolution of power, the central government is still to enact laws that will operationalise devolution of governmental powers as provided under the Constitution of Zimbabwe (2013). This simply means that devolution in Zimbabwe has not progressed past the constitutional entrenchment. Therefore, the extent to which the current legal framework observes international standards on devolution is still not clear. For example, because the pre-existing legislation on local government, is yet to be aligned to the Constitution of Zimbabwe, (2013), pertinent matters of local governance such as the transfer of imperative powers to local governments, are still missing in the gap.<sup>61</sup>

In as far as institutions are concerned there has not been one established with the specific mandate of enabling a smooth transition. One of the most instructive institutions is the Ministry of Local Government, Public Works and National Housing (Ministry responsible for local government). In addition to those institutions, the Presidential Policy Guidelines on Devolution and Decentralisation of Governance provide that the provincial structures in developing their plans will be assisted by personnel from Zimbabwe Investments Development Agency and officials from the Office of the President and Cabinet for coordination of regional plans with national plans.<sup>62</sup> However, these are just guidelines that still need to be translated into a tangible legal framework that guarantees that the sub-national governments can perform their functions without interference. Chapter Four of this research discusses these institutions to the extent to which they are relevant to this research.

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<sup>61</sup> J Mapuva 'The Controversies of Devolution in Zimbabwe' (2015) *Vol 3(5) International Journal of Political Science and Development* 187.

<sup>62</sup> Available @ <https://www.sundaymail.co.zw/guidelines-for-devolution-set/amp> Accessed 8 June 2019.



### 1.2.6 International Legal Framework

There are a number of international instruments that advocate for SERs, such as, the Universal Declaration of Human Rights (1948) (UDHR); the ICESCR (1966); the Convention on the Rights of the Child (1990); the Convention on the Rights of Migrant Workers and Their Families(1990); the Convention on the Elimination of All Forms of Racial Discrimination(1969); Convention on the Person with Disabilities (2006); and the Convention on the Elimination of All Forms of Discrimination against Women (1979), with some of the instruments advocating for direct participation of the people in public affairs.<sup>63</sup> With regard to SERs, the ICESCR is the most relevant treaty in protecting SERs.

The ICESCR is a comprehensive mainstream human rights instrument that converses SERs and provides state obligations specifically for SERs. Moreover, each member state to the ICESCR is obligated to the highest possible extent of its available resources, individually or through international co-operation, to progressively achieve the full realisation of socio-economic rights.<sup>64</sup> State obligations towards the progressive realisation of SERs can be extended to bind lower levels of governments so as to ensure efficiency in public service delivery.<sup>65</sup> In relation to decentralisation there are the International Guidelines on Decentralisation and Strengthening of Local Authorities (IGDSLAs) which are instrumental in offering principles on decentralisation.<sup>66</sup> More on the principles as established under the international legal framework is discussed in Chapter Two of this research which discusses the legal framework on devolution.

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<sup>63</sup> B Nyabira 'Kenya's Emerging Judicial Interpretation of Public Participation under the Devolved System of Government' in C M Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 273.

<sup>64</sup> Article 2 of the ICESCR.

<sup>65</sup> MT Kirya (n 21 above) 14.

<sup>66</sup> The Governing Council of United Nations HABITAT in 2007 drafted the International Guidelines on Decentralization and Strengthening of Local Authorities (IGDSLAs) as a key instrument to promote good governance at all levels and to strengthen local authorities.

### **1.2.7 Regional and Sub-regional Framework**

There are various regional human rights instruments that provide for socio-economic rights, these include The American Declaration of the Rights and Duties of Man (1948); the American Convention on Human Rights (1969); the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988); the European Social Charter (1961) and European Convention on Human Rights (1950); and the African Charter on Human and Peoples' Rights (ACHPR) (1986).

However, of particular relevance to this study is the ACHPR. The ACHPR recognises all three generations of human rights and goes on further to advance the concept of indivisibility of human rights by placing all these rights on the same footing.<sup>67</sup> The ACHPR holds that states in providing SERs should pay attention to all factors of living for every individual, as they are exposed to numerous threats to their survival and well-being, including marginalisation and economic impoverishment.<sup>68</sup>

The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development calls for decentralisation, in that states should adopt and implement decentralisation policies as a means of promoting popular participation in communities.<sup>69</sup> The African Commission on Human and People's Rights (African Commission)<sup>70</sup> held that state parties should ensure that groups and communities, directly or through their representatives, are involved in decisions relating to the disposal of their wealth.

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<sup>67</sup> See Articles 15 to 18 of the ACHPR.

<sup>68</sup> State Party Reporting Guideline for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines), adopted 24 November 2011 6.

<sup>69</sup> Africa Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (adopted by the twenty-third ordinary session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014)

<sup>70</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya (Endorois v Kenya) Communication 276/03. Where the local government was held to have violated state obligations under the African Charter by disregarding the rights of the Endorois people in their traditional land. The significance of this case is that the African Commission provided an interpretation of state obligations under the African Charter on Human and Peoples' Rights to also bind local authorities.

Under the sub-regional system, there is advocacy of decentralisation under a few instruments. There is the Protocol on Democracy and Good Governance (2006/2008),<sup>71</sup> the Protocol on Democracy and Good Governance Supplementary to the Economic Community of West African States (ECOWAS) Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001/2008).<sup>72</sup> The sub-regional economic community groups, such as Common Market for Eastern and Southern Africa (COMESA) and Economic Community of West African States (ECOWAS), amongst others, have the common goal of economic transformation and development. However, over the years these economic blocs have taken up a human rights mandate to development through decentralisation.<sup>73</sup>

### **1.3 Statement of the Problem**

Despite the existence of the legal framework on devolution in Kenya and Zimbabwe, the realisation of SERs seems to be a mammoth task. Therefore, this research seeks to address the gaps in the legal framework in Kenya and Zimbabwe in light of the principles set under the international, regional and sub-regional legal frameworks. The weaknesses of the Kenyan legal framework include, intergovernmental relations challenges stemming from little clarification on the principle of subsidiarity and a weak regulatory framework on resource allocation and regulate service delivery.

The Zimbabwean legal framework has profounder gaps, such as; a vague legal framework that shows little commitment towards the implementation of devolution as there is lack of accountability and public participation mechanisms and an absence of local autonomy; a legal framework that has failed to entrench functions and powers of local government; and no

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<sup>71</sup> International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (2006/2008).

<sup>72</sup> Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001/2008) to the Treaty of the Economic Community of West African States.

<sup>73</sup> ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2012' (2013) *Vol 13 African Human Rights Law Journal* 179.

regulation of intergovernmental relations. Therefore, it is imperative for the design of a legal framework that addresses all of these issues and allows for policies to be continuously put in place to address challenges more efficiently as they emerge.

#### **1.4 Significance of the study**

This research will contribute immensely to the general design of a devolution legal framework in Africa, in particular Zimbabwe and Kenya. The novelty of the contribution lies mainly on the approach taken in this research, that is, human-rights based approach to devolution. This is so because developing an ideal legal framework for devolution of power is done with the realisation of SERs as a central focus. Basically the significance of this study is to see the framing of a legal framework of devolution of power that ensures the realisation of SERs.

#### **1.5 Research questions**

##### **Main question**

1. What legal principles must be put in place in order for devolution to advance the realisation of SERs in Africa, with specific reference to Kenya and Zimbabwe?

##### **Sub-research questions**

2. To what extent does the international, regional and sub-regional legal framework provide to the realisation of SERs through devolution of power in Africa?
3. To what extent does the Kenyan legislative framework on devolution provide for the realisation of SERs?
4. To what extent does the Zimbabwean legislative framework on devolution provide for the realisation of SERs?
5. What are the recommendations that both Kenya and Zimbabwe can adopt for their respective legal framework?

## **1.6 Limitation of the study**

This research was limited to the legal aspects of devolution of governmental power. The main focus of this research is on devolution and its impact on SERs, this being done at the exclusion of any other rights. SERs were specifically chosen because they require good governance in terms of distribution of resources as an inevitable precondition to their realisation and that is one of the main objectives under devolution of power. The study was limited to Zimbabwe and Kenya (at the exclusion of any other jurisdiction). The two jurisdictions were selected because of their historical similarities, as well as being in the same region, that is, Sub-Saharan Africa.

## **1.7 Research Methodology**

This study adopted a qualitative methodology of research. This method of research is one in which the aim is a detailed description involving analysis of data found in primary and secondary sources which include international treaties, international law, regional treaties, and domestic law such as the national Constitutions of both Zimbabwe and Kenya, and their respective subordinate laws. Qualitative research is largely an exploratory research method, which is used to gain an understanding of underlying reasons, opinions, and motivations.<sup>74</sup> This method of research provides insights into the problem to help develop solution.

Further, the study adopted a doctrinal approach as it investigated the law on the devolution and SERs. There was also a review of academic books and law journals and articles dealing with devolution and SERs. A comparative analysis of Kenya and Zimbabwe was carried out.. Kenya has since made some progressive steps towards the implementation of devolution. Zimbabwe on the other hand, is subject to this analysis as it has significant gaps in its devolution framework and as a result can draw some lessons from Kenya.

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<sup>74</sup> <https://www.snapsurveys.com/blog/qualitative-vsquantitative-research/> Accessed 8 June 2019.

## **1.8 Chapter Synopsis**

### **Chapter One**

This chapter introduced the research by giving the background and a brief on the historical trajectory of the system of governance and the socio-economic imbalances that played a part in necessitating the adoption of devolution. It provided a statement of the problem, the significance of the research, literature overview, and research methodology and also gave a brief outline of each chapter.

### **Chapter Two**

This chapter discusses the international, regional and sub-regional legal framework on devolution and socio-economic rights with much attention being given to the general principles that guide the successful implementation of devolution as it impacts the realisation of socio-economic rights.

### **Chapter Three**

Chapter three of this research examines at the legal framework on devolution in Kenya with the aim of establishing the extent to which it adheres to the general principles that underpin the system of devolution of governmental power.

### **Chapter Four**

Chapter four of this research examines at the legal framework on devolution in Zimbabwe with the aim of establishing the extent to which it adheres to the general principles that underpin the system of devolution of governmental power.

## **Chapter Five**

This concluding chapter gives a summary of the key findings of this research followed by recommendations on how the legal framework can embed all the key principles as laid out in Chapter Two of this research to ensure the realisation of SERs.

## CHAPTER TWO

### **INTERNATIONAL, REGIONAL AND SUB-REGIONAL LEGAL FRAMEWORK ON DEVOLUTION AND SERs**

#### **2.1 INTRODUCTION**

This chapter is based on the question that inquires into the extent to which the international, regional and sub-regional legal framework on devolution can achieve the realisation of SERs. To answer this question, this chapter utilises international, regional and sub-regional instruments that address decentralisation, or issues related to decentralisation, as well as legal instruments on SERs.

This chapter will begin by is on the general overview of SERs, giving a brief historical trajectory, definitions and significance of SERs and devolution. This is followed by a section on international, regional and sub-regional legal framework which will provide a glimpse into the instruments on devolution and SERs. Lastly, an overview of the general principles of devolution as provided under the discussed legal framework and the chapter conclusion follows.

#### **2.2 General overview of Socio-economic rights**

SERs are referred to as rights that provide protection for the dignity, freedom and well-being of individuals by guaranteeing state-supported entitlements. Simply put they are those rights that give people access to certain basic needs that lead to a dignified life by providing necessary resources, opportunities and services.<sup>75</sup>

Economic rights are those rights with the purpose of assuring that human beings have the ability to obtain and maintain a basic standard of living which is consistent with inherent human

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<sup>75</sup> S Khoza *Socio Economic Rights in South Africa* (2006) 20.



dignity.<sup>76</sup> These include the right to work, to an adequate standard of living, to housing, amongst others.<sup>77</sup> Social rights are defined as those rights that are necessary to assure the participation of people in the society.<sup>78</sup> These include, *inter alia*, the right to health care and the right to education.<sup>79</sup> Cultural rights imply universal human rights, that is, they are rights that are meant to guarantee access to culture to everyone.<sup>80</sup> They include the right to participate in the cultural life of the community and, possibly, also the right to education.<sup>81</sup>

The categorisation of civil and political rights as first generation rights and economic, social and cultural rights as second generations of rights has only succeeded in implying that the former is greater than the latter.<sup>82</sup> There have been concerns on the nature, content and scope of the rights and state obligations<sup>83</sup> enshrined in the ICESCR.<sup>84</sup>

Raes has opined that socio-economic rights are a luxury and individualistic in nature as compared to civil and political rights which are collective in nature,<sup>85</sup> while Eide *et al* is of the view that SERs are fundamental needs that should by all means be defined as entitlements that are protected from arbitrary interference by the government.<sup>86</sup> In the South African case of

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<sup>76</sup> HVA Conde *Handbook of International Human Rights Terminology* (2004) 55.

<sup>77</sup> OA Oladimeji ‘Economic, Social and Cultural Rights: Rights or Privileges?’ (2008) 5. Available at SSRN: <https://ssrn.com/abstract=1320204> or <http://dx.doi.org/10.2139/ssrn.1320204> accessed 23 July 2019.

<sup>78</sup> OA Oladimeji (n 77 above) 5. As social rights emerged during the 1970s, the Indian Supreme Court began to develop a range of social rights, in the case of *Sunil Batra v Delhi Administration 1978 sc 1675*.

<sup>79</sup> OA Oladimeji (n 77 above) 6.

<sup>80</sup> WK Barth ‘Cultural Rights: A Necessary Corrective to the Nation State’ in Francioni F & Scheinin M (eds) *Cultural Human Rights* (2008) 79.

<sup>81</sup> OA Oladimeji (n 77 above) 6.

<sup>82</sup> OA Oladimeji (n 77 above) 10.

<sup>83</sup> Article 2(1) of the ICESCR suggests three distinct but coherent state obligations under socio-economic rights, there is the obligation to ‘take steps’ to achieve the realisation of socio-economic rights; obligation of immediate effect and progressive realisation. The novel nature of these obligations adopt a progressive approach which can easily be abused by some states as an excuse of inaction.

<sup>84</sup> OA Oladimeji (n 90 above) 2.

<sup>85</sup> K Raes ‘The Philosophical Basis of Social, Economic and Cultural Rights’ in P Van Den Auweraert *et al* (eds.) *Social, Economic and Cultural Rights, An Appraisal of Current European and International Development* (2002) 43.

<sup>86</sup> A Eide *et al* *Economic, Social and Cultural Rights* (2001) 6.

*Government of the Republic of South Africa and Others v Grootboom and Others*<sup>87</sup> the dispute was about the state's obligations under Section 26 of the Constitution of South Africa of 1996,<sup>88</sup> which gives everyone the right of access to adequate housing, and section 28(1)(c) of the Constitution of South Africa, which affords children the right to shelter. The court remarked that where SERs are denied there is the absence of human dignity, freedom and equality.

### **2.3 General overview of devolution of power**

Devolution is identified as one of the various forms of decentralisation, which is the designation of some political, economic and local policy making powers to elected officials.<sup>89</sup> A simple definition is that it is the system of governance that transfers responsibilities for services to municipalities that elect their own mayors and councils, raise their own revenues, and have independent authority to make investment decisions.<sup>90</sup>

Decentralisation developed after democratisation in the 1990s in Africa, taking the form of a transfer of powers and functions to newly-created or existing sub-national units.<sup>91</sup> The process of decentralisation was motivated by, among other factors, the failure of centralised forms of government, adopted in most African states after independence, to achieve the desired national unity and development.<sup>92</sup>

There is the view that local government may be a major vehicle for specific poverty alleviation policies, or the implementation of productive policies through the mobilisation of local resources

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<sup>87</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.

<sup>88</sup> Constitution of the Republic of South Africa, 1996 [No. 108 of 1996].

<sup>89</sup> P Moyo & C Ncube 'Devolution of power in Zimbabwe's new constitutional order: Opportunities and potential constraints' (2014) *Vol 18 Law, Democracy & Development*, 290-291.

<sup>90</sup> S Bergh 'Democratic Decentralisation and Local Participation: A Review of Recent Research' (2004) *Vol 14 Development in Practice* 781.

<sup>91</sup> Y Fessha & C Kirkby 'A critical survey of subnational autonomy in African states' (2008) *Vol 38 Publius: The Journal of Federalism* 249.

<sup>92</sup> B Neuberger 'Federalism in Africa: Experience and prospects' in DJ Elazar (n 1 above) 183.

and increased participation.<sup>93</sup> Therefore, it is the argument of this research that devolution can indeed achieve socio-economic developmental if the legal framework is designed to transfer the needed political, fiscal and administrative powers to lower levels of government. How this can be done is a matter of principles which are the subject of this chapter.

Notwithstanding such high expectations, there are some challenges to the implementation of devolution that have been identified over the years. One of the legal obstacles to an effective system of devolution is central government showing reluctance to implement devolution because of fear of losing political control.<sup>94</sup> This may result in an entrenched presence of power dynamics,<sup>95</sup> weak supervisory frameworks which lack adherence to laid down principles and frameworks.<sup>96</sup>

An overall challenge however is the existence of underlying flaws in the design of the devolution system, such as ill-defined roles.<sup>97</sup> Unclear roles and responsibilities that may be prescribed in the legal framework by way of vague language, or laws may overlap.<sup>98</sup> Where the law is unclear it may simply be a sign that the system is provided by the law as a smokescreen but there is no political will to implement it.<sup>99</sup>

The above-mentioned challenges need to be addressed if the system of devolution is to achieve a progressive goal towards the realisation of SERs. This is so because local governments as

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<sup>93</sup> J Martinez-Vazquez & F Vaillancourt 'Obstacles to Decentralization: Lessons from the Developing World' 4. Available at <https://europa.eu/capacity4dev/public-pub.sector-reform-decentralisation/document/martinez-vazquez-and-vaillancourt-2011-obstacles-decentralisation-lessons-developing-world> accessed on 21 July 2019.

<sup>94</sup> J Martinez-Vazquez & F Vaillancourt (n 93 above) 3.

<sup>95</sup> World Bank 'Local Government Discretion and Accountability: Application of a Local Governance Framework' (2009) 66.

<sup>96</sup> For example, the structures of institutions established under the system of devolution should ensure that information is available to the public so as to enable a meaningful engagement.

<sup>97</sup> J Martinez-Vazquez & F Vaillancourt (n 93 above) 3

<sup>98</sup> World Bank (2009) (n 95 above) 68.

<sup>99</sup> J Martinez-Vazquez & F Vaillancourt (n 93 above) 3.

policy-makers and decision-makers take up with them a duty in the context of human rights.<sup>100</sup> They have roles such as socio-economic developmental role and public services delivery function, which take place in the context of the binding imperative to respect, protect, promote and fulfil rights.<sup>101</sup> In the South African case of *Mazibuko and Others v City of Johannesburg and Others*,<sup>102</sup> a case concerning the right to access<sup>102</sup> to water. The court held that the local city authorities such as the City of Johannesburg were bound to progressively advance SERs through a continuous assessment or review of its free basic water allocation.

In another South African case of *Nokotyana v Ekurhuleni Metropolitan Municipality*,<sup>103</sup> in a matter concerning service delivery at the municipal level. It illustrates the dire need for the achievement of socio-economic goals in South Africa and the crucial but limited role of courts in this regard. It also illustrated that bureaucratic efficiency and close co-operation between different spheres of Government and communities are essential for the realisation of SERs.

## **2.4 Legal Framework**

This section provides a basic outline of some of the pertinent provisions with regards to devolution and SERs provided under the international, regional and sub-regional framework. This is done so as to deduce the underlying principles to devolution of power that will ensure the realisation of SERs. The ICESCR<sup>104</sup> is the main international human rights instrument to focus

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<sup>100</sup> S Jagwanth & F Soltau ‘Socio-economic rights and implications for intergovernmental fiscal relations in South ‘ (2014) A Research Paper 1.

<sup>101</sup> S Jagwanth & F Soltau (n 100 above) 1.

<sup>102</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

<sup>103</sup> *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) 312 BCLR (CC).

on SERs, thus it is the main focus of this discussion. The ICESCR just like any other international treaty binds state members.<sup>105</sup>

The ICESCR does not discuss systems of governance pertaining to which system is most effective in the realisation of SERs. However, the Limburg Principles lay down a few principles that are essential in the realisation of SERs, such as, public participation,<sup>106</sup> accountability,<sup>107</sup> effective and efficient use of societal resources to realise the socio-economic rights of everyone<sup>108</sup> and above all SERs should be enjoyed without discrimination.<sup>109</sup> These being the same legal concepts that underpin the system of devolution as discussed in Chapter One above.

In relation to decentralisation the Governing Council of United Nations HABITAT in 2007 drafted the IGDSLAs as a key instrument to promote good governance at all levels and to strengthen local authorities. These guidelines are there to guide United Nations state parties. Intensive analytical activities were carried out to capture the state of decentralisation in the world. These efforts included reviewing the existing relevant international legal instruments of relevance to the strengthening of local democracy,<sup>110</sup> such as the ICESCR amongst others. The principles suggested in the IGDSLAs include public participation,<sup>111</sup> subsidiarity,<sup>112</sup> autonomy<sup>113</sup> and accountability<sup>114</sup>.

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<sup>105</sup> Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT'). Article 26 states, 'Every treaty in force is binding upon the parties to the treaty and must be performed by them in good faith.'

<sup>106</sup> Para 11 of the Limburg Principles provides that 'A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights'.

<sup>107</sup> Para 10 of the Limburg Principles provide that state parties are accountable to the international community as well as the people to which they serve for the compliance of the state obligations under the ICESCR.

<sup>108</sup> Para 23-24 of the Limburg Principles.

<sup>109</sup> Para 38 of the Limburg Principles.

<sup>110</sup> Such as the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic and Social Rights (1966) and other norms from international sources such as the European Charter of Local Self-government (1985), other documents approved by the Council of Europe and its organs.

<sup>111</sup> Section A of the IGDSLAs.

At the regional level the most important human rights instrument that provides for all human rights including SERs is the African Charter on Human and Peoples' Rights (ACHPR) which reflects the rights that are found in the ICESCR, a unique addition made by the ACHPR to the human rights discourse is the inclusion of solidarity rights. Solidarity rights include: right of equal access to the public service;<sup>115</sup> right to freely dispose of wealth and natural resources;<sup>116</sup> and the right to economic, social and cultural development.<sup>117</sup>

These rights provide a foundation for a certain magnitude of self-governance of communities so as to ensure the realisation of the right to freely dispose of wealth and natural resources or to realise the right to economic, social and cultural development. More relevant to this research is Article 13(1) of the ACHPR which affords the people the right to participate in the governance of their country 'either directly or through freely chosen representatives in accordance with the provisions of the law.' Article 13(2) of the ACHPR provides that every citizen has a right to equal access to the provision of public services of his country. These provisions imply that citizens should be involved in the governance of their country and that the state is under the obligation to ensure that their governance system ensures equality in the delivery of public services.

The regional legal framework on decentralisation consists of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local development (African Charter on Decentralisation), 2014. Just like any other international instrument, states are to implement these legal instruments upon ratification. The African Charter on Decentralisation provides a

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<sup>112</sup> Section B of the IGDSL A.

<sup>113</sup> Section B (3) of the IGDSL A.

<sup>114</sup> Section A (10) of the IGDSL A.

<sup>115</sup> Article 13 of the ACHPR.

<sup>116</sup> Article 21 of the ACHPR.

<sup>117</sup> Article 22 of the ACHPR.

thorough framework for decentralisation by addressing values, principles and implementation. The principles set under the African Charter on Decentralisation are the same as under those provided under the IGDSL.A.<sup>118</sup>

At the sub-regional level, the legal framework is mainly based on economic development with the economic blocs such as Southern Africa Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), amongst others, taking up a human rights mandate. The ‘recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights’ was mentioned as one of the general principles under the Treaty Establishing the Common Market for Eastern and Southern Africa.<sup>119</sup> Decentralisation of power is recognised as the preferred system of governance under the Protocol on Democracy and Good Governance.<sup>120</sup> Principles of decentralisation such as public participation,<sup>121</sup> accountability<sup>122</sup> and subsidiarity<sup>123</sup> are also addressed under the sub-regional framework.

## **2.5 General principles of devolution under International, Regional and Sub-regional legal frameworks**

The principles identified above are the following: autonomy; accountability; subsidiarity; and public participation. These principles are significant in that they will inform the design of the legal framework on devolution of power.

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<sup>118</sup> Chapter II of the African Charter on Decentralisation.

<sup>119</sup> Article 6 (e) Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA).

<sup>120</sup> Article 2(e) of the International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (2006/2008).

<sup>121</sup> Article 2 (d) of the International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (2006/2008). Also Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001/2008)-Article 1(d).

<sup>122</sup> Article 27(2)(i) of the Protocol on Democracy and Good Governance.

<sup>123</sup> Article 27(2)(i) of the Protocol on Democracy and Good Governance.

### **2.5.1 Autonomy**

This principle is recognised under the international and regional framework. Local autonomy refers to the ability of local authorities to be independent in the exercise of their powers and functions.<sup>124</sup> In United States of America, in the leading case of *City of New Orleans v. Board of Commissioners of the Orleans Levee District*<sup>125</sup> the Louisiana Supreme Court dealt with a case where the Orleans Levee District built a marina and related developments for commercial profit on state owned land inside the City of New Orleans without complying with the municipal zoning and building ordinances. The court defined autonomy as "a local government's ability to initiate legislation and regulation in the absence of express state legislative authorisation." The court held further that local governmental autonomy is not an absolute virtue. In actuality, it may exist only to the extent that the state constitution bestows a local governmental entity with two collaborative powers, that is, the power to initiate local legislation and the power of protection from control by the central government.

Basically local autonomy can be divided into three categories as discussed and these include political autonomy, administrative autonomy and fiscal autonomy.

#### **a) Political Autonomy**

Political autonomy allows for local governments extensive decision-making powers, as well as legislative authority over their specific territories.<sup>126</sup> The African Charter on Decentralisation provides for political autonomy by stating that local authorities should be enabled to adopt by-laws, develop and implement local programmes, projects or initiatives in a manner consistent with national laws and regulations.<sup>127</sup> With such powers local governments will be able to decide

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<sup>124</sup> CM Bosire (n 2 above) 154.

<sup>125</sup> *City of New Orleans v. Board of Commissioners of the Orleans Levee District* 640 So. 2d 237 (La. 1994).

<sup>127</sup> T Chigwata & D De Visser (n 11 above) 158.



autonomously on the planning, financing and administration of their newly acquired executive functions.<sup>128</sup>

#### **b) Administrative autonomy**

Administrative autonomy is a process whereby the authority to administer and to execute powers and functions is transferred from national to lower levels of government.<sup>129</sup> There are three broad powers identified as being crucial to establish administrative autonomy, there has to be power to make change and to enforce laws, a magnitude of control over the procurement system based on national set standards and to make civil service and employment decisions.<sup>130</sup> Article 16 (2)(a) of the African Charter on Decentralisation provides for administrative autonomy as a way of ensuring effective delivery of public services to local communities.

#### **c) Fiscal autonomy**

Fiscal autonomy encompasses both revenue mobilising and expenditure powers.<sup>131</sup> This kind of autonomy generally involves the power to levy taxes, explore revenue sources, and to decide on expenses priorities.<sup>132</sup> Article 7(1) of the African Charter on Decentralisation presents aspects of fiscal autonomy of local authorities by providing that there should be mechanism and measures put in place by central government to enable sub-national governments to ‘mobilise and disburse resources’. According to the IGDSL effective decentralisation and local government autonomy

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<sup>128</sup> NJO Fatile & GL Ejalonibu ‘Decentralization and Local Government Autonomy: Quest for Quality Service Delivery’ (2015) *Vol 10(2) British Journal of Economics, Management & Trade* 3.

<sup>129</sup> A Siddle & TA Koelble ‘Local government in South Africa: Can the objectives of the developmental state be achieved through the current model of decentralised governance?’ (2016) Research Report No.7 4.

<sup>130</sup> World Bank (2009) (n 95 above) 33.

<sup>131</sup> K McLean et al ‘Exploring Partnerships between Communities and Local Governments in Community Driven Development: A Framework’ (2006) *Paper No. 96 The International Bank for Reconstruction and Development* 20.

<sup>132</sup> United Nations Department of Economic and Social Affairs ‘Decentralized Governance for Democracy, Peace, Development and Effective Service Delivery’ 5. Available @ <https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2005%20Decentralized%20Governance%20for%20Democracy,%20Peace,%20Development%20and%20Effective%20Service%20Delivery.pdf> accessed 9 September 2019.

can be achieved where there are adequate financial resources.<sup>133</sup> Local autonomy entails adequate resources be controlled by local government and for them to have adequate control over such resources, so as to utilise them for local development, with accountability lying with the local community as opposed to just the central government.<sup>134</sup>

### **2.5.2 Accountability**

Public accountability refers to the practice by public institutions of giving account to horizontal or higher levels public sector institutions, which is extremely critical in establishing controls and efficiency in local government operations.<sup>135</sup> The principle of accountability is set out under the legal framework<sup>136</sup> asserting that local authorities are accountable to the local communities and central government regarding the decisions, the implementation of such decisions and the management of financial resources. The Protocol on Democracy and Good Governance holds that member states are obliged to improve delivery on essential services by ensuring transparency and accountability<sup>137</sup> and equitable distribution at all levels.<sup>138</sup>

Government operations are vital to resource utilisation for the sake of the realisation of SERs in local communities through local governmental functions and powers. Continuous evaluation of effectiveness of public institutions and officials ensure that they are performing optimally, providing value for money in the provision of public services, instilling confidence in the government and being responsive to the community they are meant to be serving.<sup>139</sup> In the *Mazibuko and Others v City of Johannesburg and Others*, the South African Court remarked that

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<sup>133</sup> Section D 2 (7) of the IGDSL A.

<sup>134</sup> WO Oyugi 'Decentralisation for good governance and development: The unending debate' (2000) *21 Regional Development Dialogue* 3.

<sup>135</sup> S Lister 'Fostering Social Accountability: From Principle to Practice' (2010) *United Nations Development Programme* 6. Available @ [http://content-ext.undp.org/aplaws\\_publications/3275402/UNDP\\_Fostering\\_PDA\\_NEW\\_web.pdf](http://content-ext.undp.org/aplaws_publications/3275402/UNDP_Fostering_PDA_NEW_web.pdf) accessed 9 September 8, 2019.

<sup>136</sup> Article 11(f) of the African Charter on Decentralisation, Section A (10) of the IGDSL A.

<sup>137</sup> Article 27(2)(i) of the Protocol on Democracy and Good Governance.

<sup>138</sup> Article 27(2)(b) of the Protocol on Democracy and Good Governance.

<sup>139</sup> J Abuodha 'Integrating accountability mechanisms in local government service delivery' 2011.

the different levels government which are placed to set targets and make budgets in relation to SERs ought to do so in light of democratic accountability.<sup>140</sup>

The African Charter on Decentralisation provides that there ought to be national legislation that outlines the various measures used in the promotion of transparency and accountability.<sup>141</sup> The public accountability framework includes these three categories namely, political accountability, administrative accountability and social accountability.

Political accountability is a process where citizens hold elected officials responsible for their actions<sup>142</sup> through elections, recalls and write-ins.<sup>143</sup> Administrative accountability refers to the bureaucratic hierarchy that provides checks on the regulatory powers of governments.<sup>144</sup> Administrative accountability could be deduced from audit and public accounts committee reports.<sup>145</sup>

Social accountability refers to the actions and mechanisms, such as voting and petitioning, that the public<sup>146</sup> can use to hold the state accountable for their performance.<sup>147</sup> Social accountability suggests using a ‘bottom-up’ approach to demand accountability that is demand-driven, that requires the availability of the structures and laws that define people’s rights, and the extent to which they can go in exacting accountability from duty bearers.<sup>148</sup>

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<sup>140</sup> *Mazibuko v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC)

<sup>141</sup> Article 14 of the African Charter on Decentralisation.

<sup>142</sup> World Bank (2009) (n 95 above) 24.

<sup>143</sup> S Kyohairwe ‘Local democracy and public accountability in Uganda: The need for organizational learning’ (2014) *Issue 15 Commonwealth Journal of Governance* 90.

<sup>144</sup> S Kyohairwe (n 143 above) 90.

<sup>145</sup> S Kyohairwe (n 143 above) 100.

<sup>146</sup> This includes civil society, media and other social actors that promote or facilitate these efforts.

<sup>147</sup> World Bank *Social Accountability Sourcebook* (2006) 3.

<sup>148</sup> S King & A Owusu ‘Social Accountability for Local Government in Ghana’ (2013) *Issue 13/14 Commonwealth Journal of Local Governance* 62.

### **2.5.3 Principle of subsidiarity**

The IGDSL A recognises the principle of subsidiarity in decentralisation to the extent that the principle is regarded as the rationale behind the system of decentralisation and that public responsibilities are performed by those closest to the citizens.<sup>149</sup> The principle of subsidiarity is defined as ‘the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level’.<sup>150</sup> This principle requires that governmental functions be exercised at the lowest level of government unless in circumstances where there is a convincing case for them to be exercised at higher levels of government.<sup>151</sup>

Nationally determined standards of local service provision should take into account the principle of subsidiarity when they are being drawn up.<sup>152</sup> There are local government service delivery functions that are linked to the fulfilment of fundamental human rights, such as SERs-basic services which include, food, water, shelter and these can be best addressed at the local levels where community representatives can respond appropriately on a need-basis to the needs of the community.<sup>153</sup>

The principle of subsidiarity in the African Charter on Decentralisation is established based on the rationale of guaranteeing ‘pertinence and efficacy’ of policy-making and implementation.<sup>154</sup>

The African Charter on Decentralisation goes on further to state that the principle of subsidiarity should foster conditions for cooperation and coordination between national and all sub-national levels of government.<sup>155</sup> This reflects the importance of strong and functional inter-governmental relations in the implementation of devolution. Furthermore the IGDSL A stresses

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<sup>149</sup> Section B (1) of the IGDSL A.

<sup>150</sup> CM Bosire (n 2 above) 152.

<sup>151</sup> Section B 1 of the IGDSL A.

<sup>152</sup> Section B 2(12) IGDSL A.

<sup>153</sup> CM Bosire (n 2 above) 153.

<sup>154</sup> Article 6 (1) of the African Charter on Decentralisation.

<sup>155</sup> Article 6 (2) of the Charter.

that the various responsibilities should be differentiated by the constitution or by legislation, in order to clarify the respective powers and to guarantee access to the resources necessary for the decentralised institutions to carry out the functions allocated to them.<sup>156</sup>

The subsidiarity principle is seen to play a role in the adjudication of disputes over competencies.<sup>157</sup> For example, in *DVB Behuising (Pty) Limited v North West Provincial Government* the South African Court remarked that there should be a purposive interpretation which enables all the different levels of governments to exercise their respective powers fully and effectively.<sup>158</sup>

#### **2.5.4 Public Participation**

Participation is recognised as the ‘underlying principle in decision making’ at the local level.<sup>159</sup>

Public participation emanates from the right to participate,<sup>160</sup> which is the right that ensures that people are free to participate, comprising of the right to be heard in decisions that affect their lives.<sup>161</sup> Public participation in local governance is considered to be an indispensable requirement for local authorities' pursuit of social justice.<sup>162</sup> The right to participate in government is a facet of good governance as it ensures effective, transparent and accountable

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<sup>156</sup> Section B (6) UN International Guidelines on decentralisation and the strengthening of local authorities.

<sup>157</sup> J De Visser ‘Institutional subsidiarity in the South African Constitution’ (2010) *Vol.21 Stellenbosch Law Review* 110.

<sup>158</sup> *DVB Behuising (Pty) Ltd V North West Provincial Government* 2000 4 BCLR 347 (CC) para 17.

<sup>159</sup> Section A (2) of the IGDSL, Article 2 (d) of the International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (2006/2008). Also Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001/2008)-Article 1(d).

<sup>160</sup> The right to participate is provided under Article 21 of the Universal Declaration on Human Rights, Article 25 of the International Covenant on Civil and Political Rights and Article 13 African Charter on Human and Peoples’ Rights.

<sup>161</sup> K Hope ‘The UNECA and good governance in Africa’ Paper presented at the Harvard International Development Conference 4-5 April 2003, Boston, Massachusetts 2.

<sup>162</sup> D Brand ‘Judicial deference and democracy in socio-economic rights cases in South Africa’ (2011) 3 *Stellenbosch Law Review* 622-625.

discharge of public responsibility,<sup>163</sup> in order to promote human rights, democracy and the rule of law.

The IGDSL A provides that local authorities should be entitled to define the appropriate methods of popular participation and civic engagement in decision-making through the constitution or legislation and this includes making provisions for vulnerable and minority groups.<sup>164</sup> There is a duty on local authorities to use their legislative, executive and administrative powers, as well as financial and human resources, to make it easier for community members to participate in the design and implementation of local policies, plans, programmes and laws.<sup>165</sup>

Devolution of governmental power should not be utilised to foster support from citizens to the central government's programs, as is the case in developing countries but rather it should be a framework that aims for genuine involvement in the decision-making processes.<sup>166</sup> A clear and legally entrenched mechanism of public participation is significant to guard against manipulation by the central government.<sup>167</sup>

In the South African case of *Doctors for Life International v The Speaker of National Assembly* the matter before the South African Court concerned a question on validity of legislation that had been passed after flawed public involvement procedures.<sup>168</sup> The court in this matter mentioned two elements encompassed by the duty to facilitate participation, the duty to facilitate public participation is satisfied by, firstly, providing meaningful opportunities for participation in

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<sup>163</sup> K Hope (n 161 above) 2.

<sup>164</sup> Section A 1 (4) IGDSL A.

<sup>165</sup> ON Fuo 'Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive' (2015) *Vol 15 African Human Rights Law Journal* 189.

<sup>166</sup> Y Olum 'Decentralisation in developing countries: preconditions for successful implementation' (2014) *Issue 15 Commonwealth Journal of Local Governance* 27.

<sup>167</sup> S Scarrow 'Direct democracy and institutional change: a comparative investigation' (2001) *Vol 34(6) Comparative Political Studies* 652.

<sup>168</sup> *Doctors for Life International v The Speaker of National Assembly* 2006 (12) BCLR 1399 (CC)

communities in local decision-making processes; and secondly, by implementing proactive measures that ensure that communities take advantage of the opportunities created for public participation.<sup>169</sup>

## **2.6 CONCLUSION**

The aim of this chapter was to discuss the overview and the general principles on devolution of power. This was done through discussing international, regional, sub-regional instruments and international literature that provide for SERs and devolution. Notable instruments discussed were the ICESCR, IGDSL, African Charter on Human and Peoples Rights, African Charter on Decentralisation, the Protocol on Democracy and Good governance, amongst others. The following principles were identified: subsidiarity; accountability; autonomy; and participation. The key aspect of these principles is mainly that all these principles are interdependent and they are all essential for the system of devolution to be effective.

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<sup>169</sup> *Doctors for Life International v The Speaker of National Assembly 2006* (12) BCLR 1399 (CC) para 129.

## CHAPTER THREE

### LEGAL FRAMEWORK FOR DEVOLUTION IN KENYA

#### 3.1 INTRODUCTION

The purpose of this chapter is to discuss the legal framework of devolution in Kenya in the context of the realisation of SERs. This discussion is done in light of the general principles of devolution that were highlighted and discussed in the previous chapter. The significance therefore is to have an appreciation of the progress of devolution in Kenya in as far as the legal framework is concerned. The chapter first looks at the legal framework, followed by the institutional framework, then a brief analysis of the principles of devolution as applied in the framework (legal and institutional framework), then a brief look at the challenges of devolution in Kenya and a brief discussion of devolution and the realisation of SERs in Kenya under the current framework.

#### 3.2 BACKGROUND

Kenya is a country in East Africa which has forty seven (47) counties,<sup>170</sup> with a combined population of 49.7 million (2017) and gross domestic product (GDP) of 74.94 billion USD (2017).<sup>171</sup> It is a constitutional state based on the doctrine of constitutional supremacy in terms of Article 2 of the Constitution of Kenya, 2010. This means that all state organs are bound by the constitutional provisions.

As a result of the history of colonisation in Kenya, there was a continued concentration of power at the centre which led to socio-economic imbalances.<sup>172</sup> In the case of *John Kabui Mwai and 3*

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<sup>170</sup> See First Schedule of the Constitution of Kenya (2010).

<sup>171</sup> Available @ <https://data.worldbank.org/country/kenya> Accessed 23 April 2019.

<sup>172</sup> AB Khakula 'Realising the right to development through devolution in Kenya' (2016) *Vol 12(1)Law Society of Kenya Journal* 22.



*Others v Kenya National Examinations Council & Others*<sup>173</sup> the court noted that one of the challenges to the realisation of SERs is financial constraints in Kenya. Therefore, the expectation is that the introduction of devolution through the Constitution of Kenya, 2010, will promote socio-economic development which in turn ensures the realisation of SERs in Kenya.<sup>174</sup> The introduction of devolution in the 2010 Constitution was driven by this desire to tackle the skewed distribution of resources across various regions of Kenya, so as to spur equitable socio-economic development.<sup>175</sup> The socio-economic imbalances in Kenya are part of the problem that gave rise to the intervention of the legal framework below.

### **3.3 LEGAL FRAMEWORK**

Kenya is a party to a number of international and regional treaties which provide for SERs and decentralisation. These include the United Nations and the Africa Union. Kenya is also a state party to a number of sub-regional blocs which include, the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (1993/1994), East African Community Treaty (as amended) (1999/2000) and the Dar-Es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (2004). All these treaties play an important role in enforcing SERs and to frame the laws of Kenya.<sup>176</sup>

As discussed previously in Chapter One of this research on the brief background on devolution in Kenya, the legal framework in Kenya consists of the Constitution of Kenya (2010); the

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<sup>173</sup> *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Petition No. 15 of 2011 [2011]eKLR.

<sup>174</sup> AB Khakula (n 172 above) 25.

<sup>175</sup> D Okello 'Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 42.

<sup>176</sup> Article 2(6) of the Constitution of Kenya (2010).

County Government Act No. 17 of 2012; the Intergovernmental Relations Act No.2 of 2012; Transition to Devolved Government Act No.1 of 2012; Public Finance Management Act No.18 of 2012; National Government Coordination Act, No. 1 of 2013; and the Constituencies Development Fund Act, No.30 of 2013.

### **3.3.1 The Constitution of Kenya, 2010**

The constitutional provisions that guide the transition to devolved government include; principles and objectives of devolution;<sup>177</sup> national values and principles of governance<sup>178</sup>; principles of public service<sup>179</sup> and principles public finance management; right to access information;<sup>180</sup> right to participation of minorities and marginalised groups;<sup>181</sup> and public participation as a measure of accountability.<sup>182</sup> The Constitution of Kenya (2010) attempts to be thorough in setting up a framework for devolution by establishing institutional mandates for participation, accountability, and setting up various autonomous functions and responsibilities of county governments, all of which will be discussed in the sections below. These provisions lay a solid foundation for the legal framework for devolution of governmental power in Kenya. However, it is prudent to note that the provisions are not exhaustive; much was left to be addressed through legislation such as those discussed below.

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<sup>177</sup> Articles 174 and 175 of the Constitution of Kenya (2010).

<sup>178</sup> Article 10(2) of the Constitution of Kenya (2010).

<sup>179</sup> Article 232(d) of the Constitution of Kenya (2010).

<sup>180</sup> Article 35 of the Constitution of Kenya, (2010).

<sup>181</sup> Article 56(a) of the Constitution of Kenya (2010).

<sup>182</sup> Public participation and county assembly in Article 196 of the Constitution. Strong emphasis has been put on citizen participation and transparency, including in government planning, budgeting, and monitoring processes. The Constitution of Kenya (2010) refers to these principles in Articles 10 and 174. Reference is made specifically to participation in public finance (Art. 201), policy-making processes (Art. 232) and, the governance and management of urban areas and cities (Art. 184).

### **3.3.2 County Government Act (CGA)**

The purpose and objectives of the **CGA** are, among others, to give effect to devolution of governmental powers as enshrined in the Constitution of Kenya (2010)<sup>183</sup> and to further establish the principles and objectives of devolution as set out in Articles 174 and 175 of the Constitution of Kenya (2010). The Act sets out roles for County Assemblies,<sup>184</sup> and County Executive Committees.<sup>185</sup> CGA provides for citizen participation in the implementation of county policies and the evaluation of public service performance.<sup>186</sup> The CGA also addresses the issue of government accountability by affirming that public authorities should promote accountability; ensure that all expenditure of public funds is subject to effective oversight; and, promote knowledgeable discussion on issues of public interest.<sup>187</sup>

### **3.3.3 Transition to Devolved Government Act (TDGA)**

This enactment gives effect to the provisions of the Constitution of Kenya (2010), by addressing issues of transitioning to a devolved system of governance. That is why there was a need for the TDGA provide transitioning mechanisms of how devolved system of government should be implemented.<sup>188</sup> It provides, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the National and County governments.<sup>189</sup>

### **3.3.4 Intergovernmental Relations Act (IRA)**

The transition system of devolution established in the TDGA provides a necessity to create mechanisms to be used to make such transfer of power and functions possible. That leads to the

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<sup>183</sup> The CGA also grants certain powers to county governments, which include, the power to enter into contracts, acquiring of land, partnering with public and private institutions, to set up agents for the provision of services. See section 6 of the CGA.

<sup>184</sup> Section 8 of the County Government Act.

<sup>185</sup> Section 34 of the CGA.

<sup>186</sup> See Sections 47 and 85 of the CGA.

<sup>187</sup> Section 89 of the CGA.

<sup>188</sup> Part II of the TDGA.

<sup>189</sup> Part III of the TDGA.

IRA, which establishes formal structures<sup>190</sup> and framework of cooperation between the two levels of government, for example the National and County Government Coordination Summit (NCGCS).<sup>191</sup> The IRA provides mechanisms for the transfer and delegation of functions, powers and competencies.<sup>192</sup> The Act also establishes the framework for dispute resolution mechanism.<sup>193</sup>

### **3.3.5 National Government Co-Ordination Act (NGCA)**

Similar to the IRA there is the NGCA, a law that restructures the national government operation at the county level in a manner that accords and respects the county government structures.<sup>194</sup> This is done by establishing a national government administrative and service delivery coordination structure at county, sub-county, ward and location levels.<sup>195</sup>

### **3.3.6 Constituencies Development Fund Act (CDFA) and the Public Finance Management Act (PFM Act)**

When it comes to financing of county governments, important legislation to consider includes the CDF Act and the PFM Act. The purpose of the CDF Act is to ensure that a specific portion of the national annual budget is devoted to constituencies for infrastructural development, wealth creation and in the fight against poverty at the constituency level. The PFM Act ensures a sound and viable management of the fiscal affairs of county governments, cities and municipalities, and other county public entities and to provide for matters connected thereto. The structures and guidelines should ensure open participation to all without discrimination.<sup>196</sup>

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<sup>190</sup> Part II of the IRA.

<sup>191</sup> Section 7 of the IRA.

<sup>192</sup> Part III of the IRA.

<sup>193</sup> Part IV of the IRA.

<sup>194</sup> W Gikonyo 'The Role of Civil Society in Promoting Devolved Governance in Kenya' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 330.

<sup>195</sup> W Gikonyo 'The Role of Civil Society in Promoting Devolved Governance in Kenya' in CM Bosire & W Gikonyo (Eds) (n 194 above) 330.

<sup>196</sup> Section 39(8) and section 207 of the PFM Act.

### **3.3.7 Policy on Devolved System of Government (Devolution Policy)**

There is also the Devolution Policy<sup>197</sup> approved by Cabinet in 2016,<sup>198</sup> which addresses the challenges and gaps identified in the course of implementing devolution. The policy further spells out processes and procedures, including monitoring and evaluation mechanisms to improve management of devolution and service delivery at both levels of government.<sup>199</sup>

## **3.4 INSTITUTIONAL FRAMEWORK**

Ultimately, the county institutional structures determine whether and how the objects in the legal framework above are pursued. Effectiveness depends on the manner in which county institutions are designed and how they approach their respective functions under the Constitution.<sup>200</sup> The importance of strong and effective institutions cannot be overstated as the shift of governmental powers and functions from national government to county governments cannot be an easy process.<sup>201</sup>

### **3.4.1 County Structures**

Kenya's new Constitution establishes forty seven new county governments, which comprises the County Assembly and County Executive.<sup>202</sup> Both the County Executive Committee and the Governor are from outside the Assembly, meaning that there will be full separation between the legislature and executive at county level. Counties (although not county governments) will also

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<sup>197</sup> Ministry of Devolution and Planning, Policy on Devolved System of Government, 2016. Available @ <https://www.undp.org/content/dam/kenya/docs/Democratic%20Governance/Final%20Devolution%20Policy.pdf> accessed 4 August 2019.

<sup>198</sup> UNDP: Making Devolution Work (2016) 5. Available @ [http://www.ke.undp.org/content/kenya/en/home/library/democratic\\_governance/making-devolution-work.html](http://www.ke.undp.org/content/kenya/en/home/library/democratic_governance/making-devolution-work.html) accessed 4 August 2019.

<sup>199</sup> Ministry of Devolution and Planning, Policy on Devolved System of Government, 2016 6.

<sup>200</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) Animating Devolution in Kenya: The Role of the Judiciary (2015) 85.

<sup>202</sup> Article 176 (1) of the Constitution of Kenya, (2010).

have a voice in the national Parliament through the new upper house, the Senate, which mainly comprises forty seven directly elected county representatives.<sup>203</sup>

### **3.4.2 Transitional Authority (TA)**

The overriding authority responsible for devolution of power is the TA.<sup>204</sup> It is a constitutional body mandated to facilitate and coordinate the transition to the devolved system of government<sup>205</sup> pursuant to the provisions of the TDGA and Section 15 of the Sixth Schedule of the Constitution of Kenya, 2010.<sup>206</sup> The purpose of the TA, includes, *inter alia*, to provide the legal and institutional framework necessary for the smooth transition to devolution; to oversee the transfer of powers and functions from the national and county governments; and assess capacity gaps and provide the mechanisms for filling of such gaps.<sup>207</sup>

### **3.4.3 Ministry of Devolution and Planning (MoDP)**

The MoDP's mandate includes management of intergovernmental relations, such as between national government and county governments, and capacity building in the counties.<sup>208</sup> The MoDP is responsible for the initiation and development of policies, legislation and administrative procedures required to implement devolution.<sup>209</sup> MoDP also has responsibility for several key agencies that play important roles in capacity building of devolved governments, including the TA.<sup>210</sup>

### **3.4.4 National and County Government Coordination Summit (NCGCS)**

This is another institution established as the apex body for intergovernmental relations under Section 7 of the IRA. It is a body that fosters consultation and cooperation between national and

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<sup>203</sup> Article 98(1)(a) of the Constitution of Kenya, (2010).

<sup>204</sup> Kenya Human Rights Commission (n 15 above) 31.

<sup>205</sup> Section 7(2) of the TDGA.

<sup>206</sup> Kenya Human Rights Commission (n 15 above) 19.

<sup>207</sup> See section 7(2) of the TDGA.

<sup>208</sup> Kenya Human Rights Commission (n 15 above) 31.

<sup>209</sup> Kenya Human Rights Commission (n 15 above) 31.

<sup>210</sup> World Bank (n 6 above) (2014) 19.

county governments.<sup>211</sup> The NCGCS is mandated to evaluate the performance of national and county governments<sup>212</sup> and to co-ordinate and harmonise the development of county and national governments' policies.<sup>213</sup> The functions of the NCGCS are mainly designed to ensure co-operation between national government and county government and to safeguard national interests.<sup>214</sup>

### **3.4.5 Council of County Governors (CCG)**

The CCG was established under section 19 of the IRA. According to Section 20 of the IRA , the CCG is mandated to facilitate consultations among county governments including the sharing of information for learning and best practices, receiving reports and monitoring the implementation of inter-county agreements on inter-county projects, consideration of matters referred to the Council by a member of the public and consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties.

### **3.4.6 Commission on Revenue Allocation (CRA)**

The CRA is an independent Commission established under Article 215 of the Constitution of Kenya (2010). The CRA's core mandate is to recommend the basis for equitable sharing of revenues raised nationally between the national and the county governments, and among the county governments.<sup>215</sup>

The significance of these various institutions is that they provide a workable framework on which the functions of county governments are to be performed. The necessity of such

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<sup>211</sup> Section 8(a) of the IRA.

<sup>212</sup> Section 8 (f) of the IRA.

<sup>213</sup> Section 8(j) of the IRA.

<sup>214</sup> See section 8 of the IRA.

<sup>215</sup> Chapter 12, Part 4 of the Constitution of Kenya (2010).

institutions is derived from Articles 6 and 10 of the Constitution of Kenya (2010), which brings together the concept of distinctiveness and cooperation of the different spheres of government.<sup>216</sup>

### **3.5 FUNCTIONS AND POWERS OF COUNTY GOVERNMENTS**

The devolved system in Kenya is based on a unitary system of government that decentralises key functions and services to the county unit.<sup>217</sup> The two levels of government are distinct and inter-dependent with constitutionally assigned and protected functions and powers as defined in the Fourth Schedule of the Constitution.<sup>218</sup> The Constitution allocates functions to both the national and county governments. These functions fall into three categories: functions exclusive to the levels of government, those that are concurrent and those that are residual.<sup>219</sup>

The Fourth Schedule of the Constitution of Kenya (2010), defines the assignment of functions and responsibilities to either the national government or the county governments. Under Article 186 (2) of the Constitution of Kenya (2010), any function assigned to both levels of government is concurrent, or shared. However, the Fourth Schedule of the Constitution of Kenya, (2010), provides functions that are ‘compound’ in nature, meaning that they need further interpretation and unbundling.<sup>220</sup>

The Sixth Schedule of the Constitution of Kenya, 2010, provides for legislation to specify the phased transfer of functions over a period of up to three years. It also specifies the criteria to be applied in determining if counties are ready to receive functions, and requires the national government to support county governments and assist in building their capacity. The law envisaged in the Sixth Schedule is the TDGA.

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<sup>216</sup> W Wanyoike ‘Safeguarding Devolution Through Public Interest Litigation’ in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 298.

<sup>217</sup> *Speaker of the Senate v Speaker of National Assembly* [2013] eKLR at para 265.

<sup>218</sup> See also Article 6(2)(b), Constitution of Kenya (2010).

<sup>219</sup> Articles 186, 187 and the Fourth Schedule of the Constitution of Kenya, 2010.

<sup>220</sup> World Bank (2014) (n 6 above) 6.



The CGA grants specific powers to County governments as follows: entering into contracts; acquiring land; delegating functions to county and sub-county institutions; partnering with public or private institutions; establishing agencies and departments for services and other functions.<sup>221</sup> Generally, the CGA affirms the functions and powers provided under the Constitution of Kenya, (2010),<sup>222</sup> such as the administrative power to employ its staff,<sup>223</sup> the legislative authority of the county assembly,<sup>224</sup> and the functions and powers that could be transferred to the county governments from the national government based on the principle of subsidiarity.<sup>225</sup>

County governments are responsible for a range of service delivery functions, including health, agriculture, transport and water. In many of these areas, the national government also has responsibilities.<sup>226</sup> In general, the national government is responsible for policy and oversight, while counties are responsible for implementation, but the national government retains some important service delivery functions, including the provision of education and social welfare services.<sup>227</sup> The Constitution of Kenya (2010) also provides for counties to take over urban functions that were previously the responsibility of local authorities established under the Local Government Act.<sup>228</sup>

The county assembly has three main responsibilities: law making,<sup>229</sup> representation of the people,<sup>230</sup> and oversight over the county executive.<sup>231</sup> The CGA sets out the roles of the County assemblies, which include, to approve the budget and expenditure of the county government, and

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<sup>221</sup> Section 6 of the CGA.

<sup>222</sup> Section 5(2) of the CGA.

<sup>223</sup> Article 235 of the Constitution of Kenya, (2010).

<sup>224</sup> Article 185 of the Constitution of Kenya (2010)

<sup>225</sup> Article 187 of the Constitution of Kenya(2010).

<sup>226</sup> See Fourth Schedule of the Constitution of Kenya (2010).

<sup>227</sup> World Bank 'Devolution without disruption: Pathways to successful new Kenya' (2012) 32.

<sup>228</sup> Section 18 of the Sixth Schedule of the Constitution of Kenya (2010).

<sup>229</sup> Article 185 of the Constitution of Kenya (2010).

<sup>230</sup> Article 196 of the Constitution of Kenya (2010).

<sup>231</sup> Article 185(3) of the Constitution of Kenya (2010).

the legislation; approve the borrowing by the county and to approve county development planning.<sup>232</sup>

The roles of the county executive committee consists of executive authority in enhancing self-governance for communities in the management of development programs; ensuring protection and promotion of interest of the minorities and marginalised communities; promote gender equity, social and economic development and equitable sharing of resource in the county;<sup>233</sup> supervise the administration and delivery of services in the counties; to carry on the functions incidental to assigned functions.<sup>234</sup>

The above-mentioned county executive functions reflect that they are community-oriented in that such functions enable county governments to ensure that the community resources cater for the needs of the local citizens. Thus, from a human rights perspective, devolution can be utilised as an alternative framework for realising rights such as socio-economic rights.<sup>235</sup> This can simply be done through equal sharing of national resources to respond to localised needs.

### **3.6 Principles of devolution in Kenya**

The formal rules, laws and constitution that govern the budget process in Kenya, as well as the informal norms, behaviour and conduct, and the implementation and oversight mechanisms have an influence over the results that are observed in the economic development of the country.<sup>236</sup>

This is why it is crucial to have a legal framework that is deeply rooted in principles that ensure the intended adherence to devolution.

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<sup>232</sup> Section 8 of the CGA.

<sup>233</sup> Section 34 of the CGA.

<sup>234</sup> See also section 36 of the CGA.

<sup>235</sup> O Nyanjom 'Devolution in Kenya's new Constitution' (2011) Constitution Working Paper Series No.4 25.

<sup>236</sup> J Kiringai, 'Public Spending in Kenya: An Inequality Perspective' in SID 'Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives' (2006) 21.

### 3.6.1 Autonomy

Even though the two levels of government are required to consult and cooperate with one another in the course of carrying out their functions and exercising their respective powers as provided under the Constitution of Kenya (2010), discussed above, the county governments enjoy a large measure of space and autonomy from the national Government.<sup>237</sup> The Constitution of Kenya (2010), now protects and safeguards the constitutional autonomy, powers and functions of the counties.<sup>238</sup> The autonomy of local governments was pronounced in the case of *Okiya Omtata Okoiti & 1 other v Attorney General and 6 Others*<sup>239</sup> the Court was asked to declare the decision of the TA to transfer health institutions that were under the national government unconstitutional. The court held that county governments under the Constitution of Kenya (2010) have now been elevated to the level of semi-autonomous governments but inter-dependent with the national government.

The county governments under the current legal framework have fiscal autonomy. The constitution specifically provides that the counties should have adequate resources to carry out their functions.<sup>240</sup> The county government can raise revenue through the minimum 15% equitable shares.<sup>241</sup> Most important to local autonomy is the power of the county governments to raise their own revenue by imposing certain taxes in their respective areas of jurisdiction.<sup>242</sup> The

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<sup>237</sup>P Wanyande & T Mboya 'Devolution: the Kenya case' 156. Available @

[https://www.hss.de/download/publications/Federalism\\_2016\\_10.pdf](https://www.hss.de/download/publications/Federalism_2016_10.pdf) accessed 4 August 2019.

<sup>238</sup>V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 84.

<sup>239</sup> *Okiya Omtata Okoiti & 1 other v Attorney General and 6 others* (2014) eKLR.

<sup>240</sup> Article 175 (b) Constitution of Kenya (2010).

<sup>241</sup> Article 203(2) of the Constitution of Kenya (2010).

<sup>242</sup> article 209 (3) of the Constitution of Kenya (2010).

taxes that a county government may impose include property rates, entertainment tax and any other tax that a county is authorised to impose by an Act of Parliament.<sup>243</sup>

County governments also have political autonomy as they have legislative authority.<sup>244</sup> Its administrative autonomy is evident in county government power to appoint its own public servants within a uniform framework of national standards prescribed by an act of Parliament.<sup>245</sup>

The CGA provides a framework that sets the administrative functions of county government to manage functions and performance,<sup>246</sup> and implement laws and policies.<sup>247</sup>

### **3.6.2 Principle of subsidiarity**

In addition to set objectives of devolution of governmental power, the Constitution of Kenya (2010) provides that, subject to agreement, a specific function can be transferred from one level of government to another level of government if that function would be more effectively performed or exercised by the receiving government.<sup>248</sup> This provision is a clear absorption of the principle of subsidiarity in that, in addition to the already listed functions, powers and responsibilities of the devolved governments, county governments can in appropriate circumstances, where it is considered to be more effective, be transferred more functions and powers. In addition, the Constitution of Kenya (2010) requires every county government to decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.<sup>249</sup>

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<sup>243</sup> P Wanyande & T Mboya (n 237 above) 155.

<sup>244</sup> Article 185 of the Constitution of Kenya (2010).

<sup>245</sup> Article 235 of the Constitution of Kenya (2010).

<sup>246</sup> Section 47 of the CGA.

<sup>247</sup> For example section 120 of the CGA.

<sup>248</sup> Article 187 of the Constitution of Kenya (2010).

<sup>249</sup> Article 176(2) of the Constitution of Kenya (2010).

The Kenyan legal framework moves a step ahead to further regulate the principle of subsidiarity in its application in the implementation of devolution. The IRA gave effect to the principle of subsidiarity<sup>250</sup> as provided in articles 186 and 187 of the Constitution of Kenya (2010). The IRA provides guidance by way of principles<sup>251</sup> and benchmarks<sup>252</sup> on which powers, functions and competencies are to be transferred. This piece of legislation goes a long way to provide a solid guidance on when powers and functions are to be transferred for efficiency. In fact putting the principle of subsidiarity into perspective, as such, shows that the public should expect efficiency in governance and when not delivered they can demand it by right.

However, while the Constitution recognises the principle of subsidiarity, its effect and application is not clear.<sup>253</sup> For instance, while primary education is a function that is conventionally allocated to the subnational level of government,<sup>254</sup> the Constitution has allocated primary education to the national government. The principle of subsidiarity calls for primary education to be either assigned or transferred to counties.<sup>255</sup> Therefore, there is need for more clarification maybe as to the limits of the principle of subsidiarity.

### **3.6.3 Public Participation**

The principle of public participation has been embraced in the Kenyan legal framework with the legislation regulating county government relations. Each county assembly is obliged to conduct its business in an open manner, to hold its sittings and those of its committees in public and to facilitate public participation and involvement in the legislative and other business of its

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<sup>250</sup> The IRA, Part III provides for the 'Transfer and Delegation of Powers, Functions and Competencies'.

<sup>251</sup> Section 25 of the IRA.

<sup>252</sup> Section 28 of the IRA.

<sup>253</sup> N Steytler & Y Fessha 'Defining provincial and local government powers and functions' (2007) Vol.124 *South African Law Journal* 335.

<sup>254</sup> World Bank 'Devolution without disruption: Pathways to successful new Kenya' (2012) 25.

<sup>255</sup> World Bank (2012) (n 254 above) 25.

assembly and committees.<sup>256</sup> Each county is required to assist and develop the capacity of communities to participate in local governance.<sup>257</sup> Participation of the people depends largely on the information availed to the public in order for them to participate in policy-making and whether or not members of the public are afforded suitable forums to express themselves.<sup>258</sup> Accordingly, Section 207 of the PFMA mandates counties to create structures, mechanisms and guidelines for citizen participation.

The Kenyan legal framework has shown its appreciation of public participation to show that it is a requirement of good governance. In the case *Robert N Gakuru & Others v Governor Kiambu County & 3 others*,<sup>259</sup> the residents of Kiambu County challenged the legality of the Kiambu County Finance Bill that had been passed by the County Assembly based on the grounds that they had not been given an opportunity to participate in the formulation of the Act. The Court declared that it was null and void as it had not met the threshold of public participation. The court asserted public participation as a constitutional and statutory requirement.

However, despite the various provisions for citizen participation in county government affairs such as those of the Constitution of Kenya (2010) and in the CGA, they are still largely unknown to the masses and as such, the level of participation is still limited, which undermines one of the key pillars of devolution.<sup>260</sup>

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<sup>256</sup> Articles 196(1) and (2) Constitution of Kenya (2010).

<sup>257</sup> Function 14 in Part 2 of Schedule 4 of the Constitution of Kenya (2010).

<sup>258</sup> *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others* [2013] eKLR.

<sup>259</sup> *Robert N Gakuru & Others v Governor Kiambu County & 3 others* [2013] eKLR.

<sup>260</sup> Transparency International Kenya 'Local Integrity System Assessment Kenya: Kisumu and Kwale Counties' (2014) 20.

### **3.6.4 Accountability**

The principle of accountability is fairly covered under the Kenyan legal framework. Firstly, the Bill of Rights<sup>261</sup> guarantees that every citizen has a right to access information held by the state. Kenya's devolution laws contain three important social accountability provisions. The provisions involve: making information transparent; enabling citizens to participate in local government; and holding local leaders to account.<sup>262</sup> Article 174(c) of the Constitution of Kenya (2010), provides that it is one of the objectives of the devolution to enhance public participation in the exercise of governmental power and in decision-making. The CGA, drawing from this, provides for the establishment of a designated office that ensures citizen's access to information regarding their county.

The CGA in Section 27 empowers the electorate in a county ward to recall their Member of the County Assembly before the end of the term of the member. In addition, Section 88 of the CGA gives the people the right to petition the County government on any matter under the responsibility of the county government. Section 89 of the CGA makes it a duty to County government authorities, agencies and agents to respond expeditiously to petitions and challenges from citizens.

In terms of political accountability, the framework makes use of state institutions as well as independent institutions. The system of devolution in Kenya adheres to the doctrine of separation of powers by establishing the County executive and County Assembly.<sup>263</sup> The County Assembly is independent and free from the Executive as spelt out in the Constitution and the CGA. The two arms of the county government have independent mandates with the Assembly being the one that

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<sup>261</sup> Article 35 of the Constitution of Kenya (2010).

<sup>262</sup> World Bank (2012) (n 254 above) 147.

<sup>263</sup> Article 176 of the Constitution of Kenya (2010).

enacts laws, represents their electorate and exercises oversight over the County Executive.<sup>264</sup> The separation of powers and functions between the county executive and county assembly was meant to enhance democratic accountability.<sup>265</sup> However, this has also led to political wrangling and competition between the two arms of government based mainly on the need to control resources.<sup>266</sup>

Over and above these mechanisms, the National Assembly and Senate exercise oversight powers over county activities as specified under the Constitution of Kenya (2010).<sup>267</sup> In addition to these state institutions there are independent institutions that can monitor the transparency and accountability of devolved governments. These include, but are not limited to, the Office of the Controller of the Budget (OCoB),<sup>268</sup> Commission for the Implementation of the Constitution (CIC);<sup>269</sup> Auditor General;<sup>270</sup> and, Commission on Revenue Allocation (CRA).<sup>271</sup> These institutions play a critical role in ensuring a certain degree of transparency and accountability in the exercise of powers and responsibilities by county governments. Their functions vary, from reviewing of policies by the Commission on Revenue Allocation<sup>272</sup> to auditing the accounts of national and county governments by the Auditor General.<sup>273</sup>

### **3.7 Challenges with Devolution in Kenya**

The transition to devolution has encountered challenges from the national government, as they fail to accept and respect county governments as distinct and independent levels of

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<sup>264</sup> Transparency International Kenya (n 260 above) 23.

<sup>265</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 99.

<sup>266</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 99.

<sup>267</sup> Articles 95(4)(c), (5)(b) and 96 (5)(b) of the Constitution of Kenya (2010).

<sup>268</sup> Established under Article 228 of the Constitution of Kenya (2010).

<sup>269</sup> Established under Section 5 (6) of the Sixth schedule of the Constitution of Kenya (2010).

<sup>270</sup> Established under Article 229 of the Constitution of Kenya (2010).

<sup>271</sup> Established in terms of Article 215 of the Constitution of Kenya (2010).

<sup>272</sup> Article 216(4) of the Constitution of Kenya (2010).

<sup>273</sup> Article 229 (4)(e) of the Constitution of Kenya (2010).



government.<sup>274</sup> As a result there are constant intergovernmental disputes which are borne out of a failed transfer of powers, process and lack of technical knowledge on the running of a devolved system of government.<sup>275</sup> It is important to note that intergovernmental relations do not mean a disregard of county government autonomy, but it involves meaningful consultations and cooperation on administrative, fiscal and political facets of how the levels of government carry out their distinct-but-interdependent mandates.<sup>276</sup> As a result of such tensions there have been a number of intergovernmental disputes before the courts of Kenya.<sup>277</sup>

County administrations and their regular operations have also been faced with challenges arising from poor design of the legal framework.<sup>278</sup> Most of the county plans do not have relevant content and there is a lack of technical capacity for both county planning and execution.<sup>279</sup> There should also be an enabling regulatory framework to regulate service delivery. There is no clear and enabling legal and policy framework to guide the executive in the effective delivery of services.<sup>280</sup> Such gaps in the legal framework pose real challenges for the institutions that were established with the mandate of achieving an effective implementation of devolution.

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<sup>274</sup> M Laibuta ‘Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies’ in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 152.

<sup>275</sup> M Laibuta ‘Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies’ in CM Bosire & W Gikonyo (Eds) (n 274 above) 152.

<sup>276</sup> M Laibuta ‘Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies’ in CM Bosire & W Gikonyo (Eds) (n 274 above) 153.

<sup>277</sup> *Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 Others [2013] eKLR, County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another [2014] eKLR, Okiya Omtatah Okoiti & another v Attorney General & 6 others [2014] eKLR.*

<sup>278</sup> V Nangidi ‘County Governance: Political and Institutional Structures and their Effectiveness’ in CM Bosire & W Gikonyo (Eds) (n 200 above) 96.

<sup>279</sup> V Nangidi ‘County Governance: Political and Institutional Structures and their Effectiveness’ in CM Bosire & W Gikonyo (Eds) (n 200 above) 96.

<sup>280</sup> V Nangidi ‘County Governance: Political and Institutional Structures and their Effectiveness’ in CM Bosire & W Gikonyo (Eds) (n 200 above) 96.

When it comes to resources and funding there is a lack of clear laws and policies at the county level and that affects the budgeting process as functions are not clearly defined to enable the counties to budget properly.<sup>281</sup> Another resource challenge is that there is a mismatch when it comes to resources,<sup>282</sup> whether the allocated funds (15% of national resources) are sufficient for the counties or not.<sup>283</sup> But determining funding needs can only be done on the basis of clearly assigned roles and responsibilities for service delivery.<sup>284</sup> A lack of clarity on expenditure responsibilities of different levels of government, results in a lack of transparency and accountability, which in turn breeds confusion and conflict.<sup>285</sup> This will in turn be a danger to the realisation of SERs when accountability cannot be guaranteed.<sup>286</sup>

### **3.8 Socio-economic rights and Devolution in Kenya**

The crossing point between devolution and socio-economic development occurs more directly in the Bill of Rights<sup>287</sup> and Public Finance<sup>288</sup> chapters of the Constitution of Kenya, 2010. This is because most of the SERs enumerated in Article 43, such as health, housing, sanitation, water, food, education, as well as the right to environment,<sup>289</sup> all fall under the functions of the developed system of government as contained in the Fourth Schedule of the Constitution of

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<sup>281</sup> Commission of the Implementation of the Constitution, 'Sustaining the Momentum - Assessment of Implementation of the Transferred Functions to the County Governments' 2nd Devolution Assessment Report (2015) 15.

<sup>282</sup> The revenues of county governments from all sources, that is, the minimum 15% equitable share revenue, revenues raised by counties and other transfers.

<sup>283</sup> World Bank (2014) (n 6 above) 22.

<sup>284</sup> World Bank (2012) (n 6 above) 30.

<sup>285</sup> World Bank (2012) (n 254 above) 30.

<sup>286</sup> A Norton & D Elson 'What's behind the budget? Politics, rights and accountability in the budget process' (2002) Overseas Development Institute 15. Available @ <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2422.pdf> accessed 4 August 2019.

<sup>287</sup> Chapter 4 of the Constitution of Kenya (2010).

<sup>288</sup> Chapter 12 of the Constitution of Kenya (2010).

<sup>289</sup> Article 42 of the Constitution of Kenya (2010).

Kenya, 2010. The resourcing of these functions is informed by the provisions in the Chapter 12 of the Constitution of Kenya (2010) on Public Finance.<sup>290</sup>

The principles of public finance under these provisions express the values of equality as set under Article 10 of the Constitution of Kenya (2010). The public finance management of Kenya aims to remedy economic disparities through equitable sharing of national resources.<sup>291</sup> There is evidence that county governments have managed to spend resources in some critical sectors of service delivery such as health and agriculture.<sup>292</sup> These developments are vital in the realisation of SERs and shows that there is real potential for further development if only the gaps in the legal framework and implementations can be addressed.

### **3.9 CONCLUSION**

The purpose of this chapter was to provide a discussion of the legal framework on devolution in Kenya. This chapter intended to answer the question probing the extent to which the legal framework on devolution in Kenya provides for the realisation of SERs. In doing so the discussion relied much on the general principles of devolution laid down in Chapter Two of this research the rationale being it is those general principles of devolution that can somehow guarantee a successful implementation of devolution that can in turn deliver on the realisation of these rights.

The end result of this discussion was the finding that the legal framework adheres to the principle of subsidiarity, autonomy, accounting and public participation. However, there are still a few gaps in the legal framework that address intergovernmental relations, the mismatch in resources

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<sup>290</sup> D Okello 'Devolution and Kenya's Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law' in CM Bosire & W Gikonyo (Eds) *Animating Devolution in Kenya: The Role of the Judiciary* (2015) 46.

<sup>291</sup> Article 203(1)(g) of the Constitution of Kenya, 2010.

<sup>292</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 98.

and the transfer of functions and powers, amongst other issues. Therefore, for devolution to be a success and for it to achieve the realisation of SERs there is need for challenges to be addressed.

## CHAPTER FOUR

### LEGAL FRAMEWORK FOR DEVOLUTION IN ZIMBABWE

#### 4.1 INTRODUCTION

The question answered under this chapter is; To what extent does the Zimbabwean constitutional and legislative framework provide for devolution of power and the realisation of socio-economic rights? Therefore, this chapter discusses the legal and institutional framework for devolution in Zimbabwe. This is done by examining the functions and powers provided under the current framework and the extent to which these functions and powers of the sub-national units touch on the realisation of SERs. The functions and powers of sub-national units are examined in light of the general principles of devolution as discussed in Chapter Two of this research.

The chapter first looks at the legal framework, followed by the second section on institutional framework, then the third subsection on the functions and powers of the sub-national units of government. The fourth section provides a brief analysis of the manifestation of the general principles in the legal framework and fifth section provides an analysis of the challenges of the legal framework on devolution in Zimbabwe. The sixth section gives a brief discussion on the prospects of devolution on the realisation of SERs in Zimbabwe and lastly is the conclusion.

#### 4.2 BACKGROUND

Zimbabwe is a Southern African country with ten (10) Provinces<sup>293</sup> with a combined population of 16.529 904 million (2015) and a GDP of 22.041 billion (2015).<sup>294</sup> Zimbabwe is a state that abides by its Constitution and has a coherent constitutional democracy doctrine entrenched in its

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<sup>293</sup> Section 267 of the Constitution of Zimbabwe (2013).

<sup>294</sup> Available @ <https://data.worldbank.org/country/zimbabwe> Accessed 24 April 2019.

Constitution of Zimbabwe.<sup>295</sup> Zimbabwe is bound by the constitutional supremacy doctrine in terms of Section 2 of the Constitution..

Research shows that some regions such as Manicaland, Midlands and Matebeleland have experienced under-development and socio-economic marginalisation over the years as a result of concentration of governance power.<sup>296</sup> The introduction of devolution in the Constitution of Zimbabwe, 2013, comes with the expectation that devolution of power together with entrenched principles of constitutionalism can ensure promotion and protection of human rights all of which are central to socio-economic development.<sup>297</sup>

#### **4.3 LEGAL FRAMEWORK**

The legal framework for devolution in Zimbabwe consists of mainly the Constitution, and the legislation that define the modus operandi of the local government sector are, namely; the Provincial Councils and Administration Act,<sup>298</sup> the Urban Councils' Act<sup>299</sup> and the Rural District Councils' Act.<sup>300301</sup>

Zimbabwe is state party to the United Nations, African Union,<sup>302</sup> Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC), all of which advocate for decentralisation of governmental power as highlighted in Chapter Two of this research. According to Section 34 of the Constitution of Zimbabwe (2013), the state must ensure that international, conventions, treaties and agreements are domesticated.

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<sup>295</sup> Section 2 of the Constitution of Zimbabwe, 2013.

<sup>296</sup> P Moyo & C Ncube (n 89 above) 296.

<sup>297</sup> G Moyo & C Ncube 'Can Devolution Aid the Construction of a Democratic Developmental State in Zimbabwe?' (2015) *Vol 4 No.2 Ubuntu: Journal of Conflict and Social Transformation* 52.

<sup>298</sup> Provincial Councils and Administration Act Chapter 29.

<sup>299</sup> Urban Councils' Act Chapter 29:15.

<sup>300</sup> Rural District Councils' Act Chapter 29:13.

<sup>301</sup> W Jonga 'Local Government System in Zimbabwe and Associated Challenges: Synthesis and Antithesis' (2014) *Vol.2 No.1 Archives of Business Research* 78.

<sup>302</sup> Available @ <http://www.claiminghumanrights.org/zimbabwe.html> accessed 8 October 2019.

#### **4.3.1 Constitution of Zimbabwe (2013)**

The Constitution of Zimbabwe (2013), entrenches devolution showing a renewed commitment towards the decentralisation of power. Section 264 (2) of the Constitution of Zimbabwe sets out three objective of devolution which are an appreciation of fiscal, political and administrative decentralisation. This is done through the provision of the ‘right’ to self-govern of local communities,<sup>303</sup> the responsibility to ensure equitable sharing of national resources<sup>304</sup> and the obligation of the national government to transfer the responsibilities and resources to enable the devolved governments to perform their duties.<sup>305</sup> The objectives and principles for devolution set up in the Constitution lay a solid foundation for devolution in Zimbabwe.

The Constitution provides that there is need to facilitate, through an Act of Parliament, local government issues such as to establish and provide for the functions of Provincial/Metropolitan Councils ;<sup>306</sup> the coordination between central government, provincial/metropolitan councils and local authorities;<sup>307</sup> and confer powers and functions upon local authorities.<sup>308</sup> The legislation should be crafted in light of the relevant provisions of the Constitution tantamount to the constitutional supremacy principle enshrined in the Constitution.<sup>309</sup> Legislation that operationalises the provisions of the Constitution are yet to be enacted. Currently the legislative framework is made up of legislation that was passed prior to the Constitution of Zimbabwe (2013).

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<sup>303</sup> Section 262(2)(d) of the Constitution of Zimbabwe (2013).

<sup>304</sup> Section 264(2)(e) of the Constitution of Zimbabwe (2013).

<sup>305</sup> Section 264(2)(f) of the Constitution of Zimbabwe (2013).

<sup>306</sup> Section 267(2) of the Constitution of Zimbabwe (2013).

<sup>307</sup> Sections 264(3) and 270(2) of the Constitution of Zimbabwe (2013).

<sup>308</sup> Section 276(2) of the Constitution of Zimbabwe (2013).

<sup>309</sup> Section 2 of the Constitution of Zimbabwe (2013).

### **4.3.2 Urban Councils Act (UCA) and Rural District Councils Act (RDCA)**

The UCA and RDCA confer a number of responsibilities and powers to urban and rural councils, respectively. These responsibilities range from basic municipal services to welfare services, among others.<sup>310</sup> The Acts, among other issues, define the mandate of local governments as well as the legal and functional relationships between and among the various actors in local government.<sup>311</sup>

### **4.3.3 Provincial Councils and Administration Act (PCA Act)**

The PCA Act establishes Provincial Councils (PCs) in Zimbabwe as well as establishment of functions of the provincial councils. The PCA Act also provides a declaration of provinces in Zimbabwe.

The legislation discussed above predate the Constitution of Zimbabwe (2013), and yet to be aligned. The danger in that is that governance in Zimbabwe remains centralised as the legislative framework fails to empower local communities through the equitable sharing of national and local resources and to facilitate public participation in local communities.<sup>312</sup> As a result this has brought about inefficiency and lack of accountability in local governance.<sup>313</sup>

## **4.4 INSTITUTIONAL FRAMEWORK**

The legal framework for devolution in Zimbabwe has not progressed as far as establishing the necessary independent institutions that are necessary to enable the transitioning from a centralised system of governance to decentralisation. The discussion below touches on the subnational structures established by the Constitution of Zimbabwe (2013) and those institutions

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<sup>310</sup> See First and Second Schedule of the Urban Councils Act, First Schedule of the Rural District Councils Act.

<sup>311</sup> W Jonga (n 301 above) 78.

<sup>312</sup> C Chikwawawa 'Constitutionalisation and Implementation of Devolution in Zimbabwe' (2019) *Vol 9 Issue 3 International Journal of Scientific and Research Publications* 21.

<sup>313</sup> C Chikwawawa (n 312 above) 22.



that existed prior to the 2013 Constitution as they are currently part of the institutional framework.

#### **4.4.1 Subnational Structures**

Zimbabwe is constitutionally recognised as a unitary, democratic and sovereign state<sup>314</sup> which, as a form of governance, adopted devolved system of governance which is comprised of a three tier governmental structure, that is, the national government, the provincial and metropolitan councils, and the local government (Rural and Urban Councils).<sup>315</sup>

However, Chakaipa argues that the notion of ‘tier’ denotes centralist tendencies of bureaucratic hierarchy, subordination and a general unwillingness to decentralise.<sup>316</sup> Olowu argues that the inclusion of a three tier government is a significant shift in local governance by offering a safeguard against the inevitable tendency towards recentralisation of governmental power and national resources by the central government.<sup>317</sup> However, whether this gives protection against arbitrary changes to local authorities is yet to be seen.

#### **4.4.2 Ministry of Local Government, Public Works and National Housing (Ministry responsible for local government)**

The Ministry responsible for local government plays a very significant role in local governments in Zimbabwe. The most prominent feature of both the UCA and the RDCA was that they both provided for a comprehensive scheme of supervision by the national government through the

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<sup>314</sup> Section 1 of the Constitution of Zimbabwe (2013).

<sup>315</sup> Section 5 of the Constitution of Zimbabwe (2013).

<sup>316</sup> S Chakaipa ‘Local Government Institutions’ Readiness to Live the Constitution’ in CLGF Southern Africa *Strengthening Capacity for Local Governance and Service Delivery in Zimbabwe Project The Constitution of Zimbabwe 2013 as a basis for local government transformation: A Reflective Analysis* 25. Available @[http://www.clgf.org.uk/default/assets/file/publications/reports/local\\_government\\_constitutionalisation\\_in\\_zimbabwe\\_clgf\\_2016.pdf](http://www.clgf.org.uk/default/assets/file/publications/reports/local_government_constitutionalisation_in_zimbabwe_clgf_2016.pdf) accessed 19 August 19, 2019.

<sup>317</sup> D Olowu ‘Decentralization and local government in the Zimbabwean Constitution’ in Kersting N (Ed.) *Constitution in transition: Academic inputs for a new constitution in Zimbabwe* (2009) 124.

minister responsible for local government.<sup>318</sup> The Minister responsible for local government is equipped, under these two legislations,<sup>319</sup> with a wide array of powers that not only allowed him to set policy parameters but also to get involved in the day-to-day activities of local authorities.<sup>320</sup>

#### **4.4.3 Portfolio Committee responsible for local government**

Another institution in devolution is the Portfolio Committee which is established in terms of the Senate Standing Order No.153(2) of Zimbabwe. It is responsible for local government and is considered as a key institution responsible for cabinet and parliamentary involvements to ensure practicable and supportable local government.<sup>321</sup> The Committee's mandate is to ensure transparent, accountable and high performing local government institutions.<sup>322</sup> However, the uncertainty of when and why this institution is to 'intervene' within the operations of local governments raises the fear of parliamentary control over local governments.<sup>323</sup>

#### **4.4.4 Local Government Board**

The existing institutional environment also has a Local Government Board appointed by the Minister.<sup>324</sup> The Board oversees operations of local authorities but its main authority is mainly in

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<sup>318</sup> See for example, section 229 & 233 of the Urban Councils Act, section 53, section 87, section 94 of the Rural District Councils Act.

<sup>319</sup> See for example, section 229 & 233 of the Urban Councils Act, section 53, section 87, section 94 of the Rural District Councils Act.

<sup>320</sup> TC Chigwata & J De Visser (n 14 above) 161.

<sup>321</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 27.

<sup>322</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 27.

<sup>323</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 27.

<sup>324</sup> Part VIII of the UCA.

the appointment or dismissal of senior council employees. Its key result areas include, guiding local authorities on the organisation and administration of personnel issues.<sup>325</sup>

#### **4.4.5 The Zimbabwe Local Government Association (ZILGA)**

Lastly, there cannot be a discussion of institutions on devolutions without a mention of the bodies that represent local authorities. These bodies include the Urban Councils Association (UCAZ) and the Association of Rural District Councils in Zimbabwe (ARDCZ).<sup>326</sup> However, in 2006 the two forums resolved to merge to form the Zimbabwe Local Government Association (ZILGA). The associations' functions include, amongst others, scrutinising local government legislation and policy frameworks in the light of current trends and thinking on local government and make recommendations thereon.<sup>327</sup> Their implementation of capacity development programmes, staff forums and other structures have been critical sources of local government strengthening.<sup>328</sup>

#### **4.5 FUNCTIONS AND POWERS OF DEVOLVED GOVERNMENTS**

In Zimbabwe the constitutional objectives of devolution are outlined in Section 264 of the Constitution of Zimbabwe, 2013, which necessitates the establishment of a legal framework that will operationalize devolution by decentralising functions and powers, amongst other mechanisms.<sup>329</sup> Section 3(c) of the Constitution of Zimbabwe (2013) lays the basis for council power to govern, on its own initiative.<sup>330</sup>

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<sup>325</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 29.

<sup>326</sup> TC Chigwata (n 12 above) 27-28.

<sup>327</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 30.

<sup>328</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 31.

<sup>329</sup> Section 265(1)(b) of the Constitution of Zimbabwe (2013).

<sup>330</sup> Section 274(1) & 275(1) of the Constitution of Zimbabwe (2013).

In a devolved system, devolved governments should have clearly and legally defined jurisdictions within which they can exercise their powers.<sup>331</sup> Therefore, it is the responsibility of the central government to develop supporting policies and legislation to implement a devolved system of governance.<sup>332</sup>

The 2013 Constitution is not emphatic on the functions of subnational governments. Section 270(1) of the Constitution of Zimbabwe (2013), makes provision of five broad functions for provincial and metropolitan council's functions. Most crucial to this research are the functions of planning and implementing social and economic development activities in its province and monitoring and evaluating the use of resources in its province. However, the Constitution fails to make demarcation of executive and legislative powers of provincial governments as is done under the Constitution of Kenya (2010). Local authorities are governed by three main legislations which pre-date the Constitution of Zimbabwe (2013), that is, the UCA, the RDCA and the Regional, Town and Country Planning Act<sup>333</sup>. The functions of local authorities are mostly of implementation, planning and coordination, such as, democratic representation of the service expectations of the local community, to govern defined areas with gazetted boundaries, powers to make a budget promotion of infrastructure development, enforcing proper development planning and coordination within their areas of jurisdiction in terms of the Regional Town and Country Planning Act and enforcing the preservation and conservation of the environment.<sup>334</sup>

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<sup>331</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 26.

<sup>332</sup> S Chakaipa 'Local Government Institutions' Readiness to Live the Constitution' in CLGF Southern Africa (n 316 above) 26.

<sup>333</sup> Regional, Town and Country Planning Act [Chapter 29:12]

<sup>334</sup> S Mushamba et al. 'The dynamics of devolution in Zimbabwe: a briefing paper on local democracy' (2014) Action Aid Denmark 8-9.

In terms of the 2013 Constitution which entrenches the system of devolution, the functions and powers of local authorities are left in the realm of the national government by placing a duty on the state to pass legislation that confers functions and powers. This was done for instance for the power to make by-laws<sup>335</sup> and the power to levy rates and taxes.<sup>336</sup> It is important to note at this juncture that while the Constitution of Zimbabwe (2013), entrenches the principle of devolution of powers from the national to the provincial and local authorities as a fundamental national value and principle, it does not devolve the necessary powers.<sup>337</sup> As a result of that setback the essence of devolution of powers is undermined.<sup>338</sup>

#### **4.6 PRINCIPLES OF DEVOLUTION IN ZIMBABWE**

The aim of this chapter is to assess the legal framework on devolution in Zimbabwe and the extent to which the legal framework can enable successful implementation of devolution. However, to do that it is important to assess the legal framework in light of the general principles to devolution that were discussed in Chapter Two of this research. The principles include, local autonomy, principle of subsidiarity, accountability and participation.

##### **4.6.1 Autonomy**

The Constitution does not list the powers and functions of local authorities. This is despite the fact that a clearly enumerated framework outlining powers would guarantee a certain degree of

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<sup>335</sup> Section 276(2)(a) of the Constitution of Zimbabwe (2013).

<sup>336</sup> 276(2)(b) of the Constitution of Zimbabwe (2013)

<sup>337</sup> K Chatiza 'The Preparedness of National Institutions for Devolution in Zimbabwe with respect to Selected Services: An Analysis and Some Proposals for Making Devolution Work' Constitution' in CLGF Southern Africa *Strengthening Capacity for Local Governance and Service Delivery in Zimbabwe Project The Constitution of Zimbabwe 2013 as a basis for local government transformation: A Reflective Analysis* 21. Available @[http://www.clgf.org.uk/default/assets/file/publications/reports/local\\_government\\_constitutionalisation\\_in\\_zimbabwe\\_clgf\\_2016.pdf](http://www.clgf.org.uk/default/assets/file/publications/reports/local_government_constitutionalisation_in_zimbabwe_clgf_2016.pdf) accessed 19 August 19, 2019.

<sup>338</sup> J Kurebwa 'A Review of Rural Local Government System in Zimbabwe from 1980 To 2014' (2015) *Vol.20, Issue 2 Ver. V IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* 102.

clarity into the powers of local authorities.<sup>339</sup> Given that the Constitution of Zimbabwe affords every local authority ‘the right to govern’ and ‘all’ the powers necessary to do so,<sup>340</sup> it requires that local authorities exercise significant powers and enjoy a certain measure of local autonomy. It is suggested that, at a minimum, it means that there are limits to the role of national government in local affairs.<sup>341</sup>

**a) Administrative autonomy**

The administrative autonomy of local authorities is not explicitly guaranteed in the Constitution.<sup>342</sup> The local government system in Zimbabwe empowers the national government to exercise direct control over local personnel issues.<sup>343</sup> For example, Section 132 of the UCA demands the approval of the Local Government Board for the appointment of the town clerk. If local governments are made dependent on centrally appointed staff, local officials may be more accountable to central government than to the local governance officials.<sup>344</sup> On the other hand one might argue that the ‘right to govern’ mentioned above, also includes the power to appoint and fire personnel as well as to determine internal administrative procedures.<sup>345</sup>

**b) Political autonomy**

In relation to political autonomy, the Constitution of Zimbabwe (2013), only provides that an Act of Parliament will confer legislative functions of the provincial councils.<sup>346</sup> Local authorities are also left to be conferred powers to make by-laws and regulations by an Act of Parliament.<sup>347</sup> The

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<sup>339</sup> C Panara ‘Conclusion: the constitution of local self-government to constitutionalism in the member states and in the EU multi-layered system of governance’ in C Panara & M Varney (eds) *Local government in Europe: the ‘fourth level’ in the EU multi-layered system of governance* (2013) 383.

<sup>340</sup> Section 276(1) of the Constitution of Zimbabwe, 2013.

<sup>341</sup> TC Chigwata & J De Visser (n 11 above) 166-167.

<sup>342</sup> TC Chigwata & J De Visser (n 11 above) 171.

<sup>343</sup> S Mushamba et al. ‘The dynamics of devolution in Zimbabwe: A briefing paper on local democracy’ (2014) Action Aid Denmark 15.

<sup>344</sup> Y Fessha & C Kirkby ‘Critical survey of subnational autonomy in African States’(2008) *Vol.38(2) Publius* 259.

<sup>345</sup> TC Chigwata & J De Visser (n 11 above) 171.

<sup>346</sup> Section 270(1)(f) of the Constitution of Zimbabwe (2013).

<sup>347</sup> Section 276(2)(a) of the Constitution of Zimbabwe (2013).

current legislation governing local authorities provides that a council has the power to make by-laws.<sup>348</sup> However, the weakness of this power is that there is need for the approval of the minister responsible for local government.<sup>349</sup>

*c) Fiscal autonomy*

Turning to fiscal autonomy, there is no recognition of revenue-raising powers or budget and expenditure controls for provincial and local government. There is an abstruse provision in Section 276 (2) of the Constitution of Zimbabwe (2013)<sup>350</sup> stating that an Act of Parliament may confer certain powers to levy taxes and to raise revenue to enable them to carry out their objectives and responsibilities.<sup>351</sup>

What remains as an only source of revenue is the 5% national revenue allocated to each provincial and local authority.<sup>352</sup> Muchadenyika argues whether that allocation of not-less-than-5% is enough to sustain sub-national governance.<sup>353</sup> However, this provision needs to be executed by way of an Act of Parliament which is yet to be enacted.<sup>354</sup>

However, the 2013 Constitution does anticipate local authorities exercising a variety of governmental powers, which can be taken to include budget powers.<sup>355</sup> According to Section 276(2)(a) of the Constitution of Zimbabwe, 2013, legislation may confer functions on local authorities for the effective administration of their respective jurisdictions. Furthermore, the ‘right to govern’, on its own initiative, the local affairs of its people,’ with ‘all’ the necessary

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<sup>348</sup> Section 88 of the RDA.

<sup>349</sup> Section 90 of the RDA.

<sup>350</sup> Ambiguous because this constitutional provision is yet to be operationalized and the provision provides no timeframe as to when such an Act of Parliament is to be enacted.

<sup>351</sup> Section 276(2)(b) of the Constitution of Zimbabwe, 2013.

<sup>352</sup> Section 301(3) of the Constitution of Zimbabwe, 2013.

<sup>353</sup> D Muchadenyika ‘The Inevitable: Devolution in Zimbabwe’s Constitution making process’ (2013) A Discussion Paper 18.

<sup>354</sup> Section 301(1)

<sup>355</sup> C Panara ‘Conclusion: the constitution of local self-government to constitutionalism in the member states and in the EU multi-layered system of governance’ in C Panara, M Varney (eds) ( n 339 above) 391.

powers to do so,<sup>356</sup> implies a degree of budget autonomy. Arguably, the words on ‘its own initiative’ suggest that local authorities are granted some latitude to make expenditure decisions in accordance to the law.<sup>357</sup>

#### **4.6.2 Subsidiarity**

The principle of subsidiarity in the Constitution of Zimbabwe is not explicitly provided for. However, one can find a few provisions in the Constitution that are suggestive of this principle. For instance, Section 264(1) of the Constitution of Zimbabwe which provides that governmental powers can be transferred to lower levels of government whenever it is appropriate to do so. The provision proceeds to attach a condition to such transfer of power and that is, the lower levels of government have to be competent to exercise the powers efficiently and effectively.<sup>358</sup> This provision is a reflection of the principle of subsidiarity as it shows an appreciation of the element of ‘efficiency’ to necessitate transfer of governmental power.

Furthermore, the right to govern suggests that it also means that the national government is under a constitutional obligation to decentralise relevant and significant powers in line with the principle of subsidiarity.<sup>359</sup> A similar implication of the principle can be deduced from the objective of devolved governments to recognise the right of communities to manage their own affairs.<sup>360</sup> The phrase “their own affairs”<sup>361</sup> equally implies the principle of subsidiarity, which calls for local decision-making for effectiveness and efficiency.<sup>362</sup> This approach is supported by

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<sup>356</sup> Section 276(1) of the Constitution of Zimbabwe (2013).

<sup>357</sup> C Panara ‘Conclusion: the constitution of local self-government to constitutionalism in the member states and in the EU multi-layered system of governance’ in C Panara, M Varney (n 339 above) 391.

<sup>358</sup> Section 264(1) of the Constitution of Zimbabwe (2013).

<sup>359</sup> TC Chigwata & J De Visser (n 11 above) 168.

<sup>360</sup> Section 264(2)(d) of the Constitution of Zimbabwe (2013), Article 174(d) of the Constitution of Kenya (2010).

<sup>361</sup> Article 174 (d) of the Constitution of Kenya (2010), Section 264 (d) of the Constitution of Zimbabwe (2013)

<sup>362</sup> World Bank *World Development Report 2000/2001: Attacking Poverty* (2000) 107.



the principle of subsidiarity, which requires all functions to be performed at the lowest possible level unless effective performance requires such functions to be retained at the national level.<sup>363</sup>

#### **4.6.3 Accountability**

The Constitution requires the Parliament to supervise public debt, finances, and the use of borrowing powers by all government departments including, local authorities.<sup>364</sup> Parliament also has an obligation to ‘monitor and oversee’ expenditure by local authorities and to enact legislation to give full effect to its financial oversight role. The Constitution establishes the office of the Auditor-General to audit the accounts, financials systems and financial management of local authorities, among other duties.<sup>365</sup> Regarding provincial councils, section 270(3) of the Constitution of Zimbabwe, 2013, deals with accountability of the members of provincial councils. It provides that the members are “accountable, collectively and individually, to residents of their province and the national government for the exercise of their functions.”

The Constitution of Zimbabwe, 2013, shows some adherence to the principle of accountability. The Constitution provides for accountability as one of the country’s values and principles to be observed by the state and all state agents and institutions in Section 3(1)(g) as well as well as a national objective in Section 9 of the Constitution of Zimbabwe. The right to access information in the Bill of Rights provides that the public has the right to access information held by the state or state institutions in the interest of public accountability.<sup>366</sup>

Additionally, in the case of *Stephenson v The Minister of Local Government and National Housing and Others*<sup>367</sup> the court upheld the right of a ratepayer to challenge the validity of

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<sup>363</sup> J De Visser (n 157 above) 102.

<sup>364</sup> Section 299(1) Constitution of Zimbabwe (2013).

<sup>365</sup> Section 309(2) Constitution of Zimbabwe (2013).

<sup>366</sup> Section 62(1) of the Constitution of Zimbabwe (2013).

<sup>367</sup> *Stephenson v The Minister of Local Government and National Housing and Others* SC 38/02.

decisions made by a local authority. The rationale behind such a right is that local authorities are accountable to the ratepayer, for the proper and efficient use of public funds.<sup>368</sup>

In terms of the institutional framework, there is not one institution in Zimbabwe established that has been established specifically for issue of devolution of governmental powers. Therefore the mandate of oversight over devolved governments will also be performed by those institutions whose responsibilities might overlap with such a mandate. For example, the Zimbabwe Human Rights Commission, an independent Commission established in terms of Section 242 of the Constitution of Zimbabwe, can perform an oversight role over devolved governments. There is also the Anti-Corruption Commission which was established in terms of Section 255 of the Constitution of Zimbabwe. The commission has a function to recommend measure to enhance integrity and accountability.

Current local government legislation equips the Minister responsible for local government with virtually unlimited supervisory powers.<sup>369</sup> In fact, the toxic intergovernmental relationship is often cited as one of the reasons why the local government system is failing to deliver basic services.<sup>370</sup> However, it can be argued, again, that the constitutional principle of devolution and the constitutional ‘right to govern’ of local authorities must be interpreted to limit Parliament’s discretion in regulating the supervision of local government.<sup>371</sup>

#### **4.6.4 Public Participation**

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<sup>368</sup> *Binza v Acting Director of Works & Anor* 1998(2) ZLR 364.

<sup>369</sup> D Muchadenyika ‘The inevitable devolution in Zimbabwe: from constitution-making to the future’ in J De Visser (ed) *Constitution-building in Africa* (2015) 125.

<sup>370</sup> S Chakunda ‘Central-local government relations: implications on the autonomy and discretion of Zimbabwe’s local government’ (2015) *Vol.3(1) Political Sci Public Aff* 4.

<sup>371</sup> TC Chigwata & J De Visser (n 11 above) 172.

Section 67 of the Constitution of Zimbabwe provides that every Zimbabwean has a right to participate in political activities.<sup>372</sup> The principles of public administration provided under Section 94 of the Constitution of Zimbabwe provide that the public administration in all tiers of the governments must encourage the public to participate in policy making.<sup>373</sup> In addition to those provisions the Bill of Rights<sup>374</sup> provides for the freedom of expression<sup>375</sup> and right to access information.<sup>376</sup> These provisions put together provide a foundation for participation of the public in local governance.

It is however important to stress that it is important that there be a legal framework that clearly defines the parameters of participation and the relationship of the public with subnational governments. Despite the main objective of devolution, as set out in the Constitution, is to develop good governance as well as to empower local communities politically and economically by enhancing their participation in decision-making and promoting the equitable sharing of national and local resources, the legal framework fails to provide the necessary mechanisms to ensure public participation as set out in Chapter Two of this research.<sup>377</sup>

#### **4.7 CHALLENGES OF DEVOLUTION IN ZIMBABWE**

The greatest challenge with the legal framework for devolution as highlighted above is that ever since the constitutional entrenchment of devolution of governmental powers there has not been any progress on the front in providing the appropriate legal powers, mechanisms and the procedures necessary to facilitate co-ordination between central government, provincial and

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<sup>372</sup> Right of youths and the elderly to participate as enshrined in Section 20(1)(b) and 21(2)(a) of the Constitution of Zimbabwe (2013)

<sup>373</sup> Section 194 (1)(e) of the Constitution of Zimbabwe (2013).

<sup>374</sup> Chapter 4, Part 2 of the Constitution of Zimbabwe (2013).

<sup>375</sup> Section 61 of the Constitution of Zimbabwe (2013).

<sup>376</sup> Section 62 of the Constitution of Zimbabwe (2013).

<sup>377</sup> C Chikwawawa (n 312 above) 19.

metropolitan councils and local authorities.<sup>378</sup> The political unwillingness to implement devolution of governmental powers in Zimbabwe even goes further by the government showing signs to subvert and undermine the constitutional provisions on devolution. The Presidential appointment of Ministers of State for Provincial Affairs responsible for each of the ten provinces in the state raised a lot of concerns that such appointments from the Cabinet would inevitably suppress the constitutionally intended devolution of power.<sup>379</sup>

It can be argued that the political unwillingness to implement devolution has led to the delay in coming up with the appropriate legal framework has also neglected the much needed alignment of the already existing legal framework. The laws that have to be aligned include the UCA, the RDCA and the Provincial Councils Administration Act, among others.<sup>380</sup> As a result the government is stuck with the centralised approach to local government, which is generally discredited as it does not empower local communities through the equitable sharing of national and local resources and effective participation in decision-making in matters affecting them.<sup>381</sup>

Unless there is implementation of successful devolution, there is really no 'local government' in existence, since it most probably is limited to implementing centrally determined policies with no local autonomy and no influential decision-making authority.<sup>382</sup> The current framework on devolution in Zimbabwe does not show sufficient appreciation of the principles on devolution,

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<sup>378</sup> P Moyo & C Ncube (n 89 above) 300.

<sup>379</sup> P Moyo & C Ncube (n 89 above) 300.

<sup>380</sup> K Chatiza 'The Preparedness of National Institutions for Devolution in Zimbabwe with respect to Selected Services: An Analysis and Some Proposals for Making Devolution Work' Constitution' in CLGF Southern Africa (337 above) 22.

<sup>381</sup> K Chatiza 'The Preparedness of National Institutions for Devolution in Zimbabwe with respect to Selected Services: An Analysis and Some Proposals for Making Devolution Work' Constitution' in CLGF Southern Africa (337 above) 21.

<sup>382</sup> Unpublished: S Nyamadzawo 'The evolution of decentralisation policy in developing countries: A policy analysis of devolution in Zimbabwe' Unpublished Masters Thesis, University of KwaZulu-Natal, (2013), 22.

there are no mechanisms provided for public participation in local governance.<sup>383</sup> The law needs also to address when and how powers and functions are to be transferred in accordance with the principle of subsidiarity if there is going to be any guarantee of efficiency at the local level.<sup>384</sup> There is neither social accountability nor political accountability mechanisms properly established in terms of the Constitution of legislation.<sup>385</sup>

There is basically no establishment of local autonomy under the current legal framework. For instance, there are threats to the administrative and political autonomy of local authorities coming through direct interference in council affairs by either central government or the Minister. Currently, interference by the latter is more prevalent. Both the UCA and the RDCA note several instances where the Minister and/or the President can intervene in the day-to-day running of local authorities.<sup>386</sup>

The only resemblance of financial autonomy for local authorities is yet to be implemented, meaning that currently there is no fiscal autonomy and therefore a great reliance on the central government for finances. The international legal framework provides there is need for financial autonomy for there to be effective decentralisation.<sup>387</sup> Governments that promulgate decentralisation policy without institutional reforms, capacity building and allowing fledgling

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<sup>383</sup> This upsets Article 12(1) of the African Charter on Decentralisation which states, “National legislation shall guarantee the rights and outline responsibilities of citizens to participate in public life at the local level.” See also, section A 1(4) of the IGDSL.

<sup>384</sup> Article 6 of the African Charter on Decentralisation.

<sup>385</sup> According to Article 14(1) of the African Charter on Decentralisation mechanisms on decentralisation need to be outlined in legislation.

<sup>386</sup> ActionAid Denmark ‘The Dynamics of Devolution in Zimbabwe: A briefing paper on local democracy’ (2014) 10.

<sup>387</sup> Section D(2) of the IGDSL.

local governments time to mature, are likely not to be successful in strengthening local government structures and enhancing local governance.<sup>388</sup>

Under the current constitutional framework that provides for devolution there is a lacuna in the provision of conditions under which devolution would take place.<sup>389</sup> Notwithstanding this promising projection, the ambiguity in some of the most pertinent provisions to devolution is a huge setback, for example:

*whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out these responsibilities effectively and efficiently.*<sup>390</sup>

Devolution of governmental powers and responsibilities seems to wholly rest in the hands of the national government which can consider what is “appropriate”.<sup>391</sup> In the case of *Nkomo v Minister of Local Government, Rural and Urban Development & Ors*<sup>392</sup> where the Applicant was alleging that the failure by the Respondents to bring a draft Bill on devolution as provided by the Constitution of Zimbabwe, 2013, constitutes a breach of Section 2(3) and Section 5(4) of the Constitution of Zimbabwe, 2013. The court held that Section 264(1) is not cast in mandatory terms and that no time limits have been set by the Constitution for the devolution of power.

There is evidence of serious debilitating in terms of service delivery, infrastructure development and weak performance of both rural and urban local government.<sup>393</sup> This shows a requirement

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<sup>388</sup> D Olowu and JS Wunsch *Local Governance in Africa: The Challenges of Democratic Decentralisation*. (2004) 27.

<sup>389</sup> Section 264 (1), Constitution of Zimbabwe (2013).

<sup>390</sup> Section 264(1) of the Constitution of Zimbabwe (2013).

<sup>391</sup> Section 264 (1), Constitution of Zimbabwe (2013).

<sup>392</sup> *Nkomo v Minister of Local Government, Rural and Urban Development & Ors* (CCZ 6/2016).

<sup>393</sup> KH Wekwete ‘Constitutionalism and Local Government in Zimbabwe’ in CLGF Southern Africa *Strengthening Capacity for Local Governance and Service Delivery in Zimbabwe Project The Constitution of Zimbabwe 2013 as a basis for local government transformation: A Reflective Analysis* 12. Available @[http://www.clgf.org.uk/default/assets/file/publications/reports/local\\_government\\_constitutionalisation\\_in\\_zimbabwe\\_clgf\\_2016.pdf](http://www.clgf.org.uk/default/assets/file/publications/reports/local_government_constitutionalisation_in_zimbabwe_clgf_2016.pdf) accessed 19 August 19, 2019.

for the provision of adequate and predictable intergovernmental fiscal transfers; supporting local revenue mobilisation for the benefit of public service delivery.<sup>394</sup> Basic service delivery by the sub-national units of the government is how the state is able to realise SERs, therefore, a failure in the provision of basic services is tantamount to an act of retrogression by the state in the advancement of SERs.

The provincial and metropolitan council's provisions are developmental in nature.<sup>395</sup> The Constitution of Zimbabwe (2013), fails to provide the limits of socio-economic development. The developmental role of these sub-national units is very crucial in the realisation of SERs, which is why it is important that the gaps be addressed and filled. Therefore, it is difficult to decipher what is required to be done to realise the developmental role of the devolved governments, whether it includes the power to adopt policies or to draw up budgets on matters that relate to socio-economic development.<sup>396</sup> There is need to buttress the importance of legislation and policies that clarify the parameters of the socio-economic development function of the councils, among other things.<sup>397</sup>

#### **4.8 DEVOLUTION AND SOCIO-ECONOMIC RIGHTS IN ZIMBABWE**

The framework for devolution established in the Constitution of Zimbabwe can be closely linked with realisation of socio-economic rights. Such implications can be seen in Section 3(2). Section 44 of the Constitution of Zimbabwe (2013), provides that the state and all state agencies and institutions at every level are bound by the duty to respect, protect, promote and fulfil the rights and freedoms. Above all the obligations imposed by the Constitution bind all state agencies and

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<sup>394</sup> KH Wekwete 'Constitutionalism and Local Government in Zimbabwe' in CLGF Southern Africa (n 393 above) 12.

<sup>395</sup> KH Wekwete 'Constitutionalism and Local Government in Zimbabwe' in CLGF Southern Africa (n 393 above) 13.

<sup>396</sup> TC Chigwata (n 12 above) 11.

<sup>397</sup> TC Chigwata (n 12 above) 11.

institutions according to the doctrine of constitutional supremacy.<sup>398</sup> In the 2013 Constitution of Zimbabwe, basic services that are ordinarily under the bounds of local authorities are provided as rights that the state should provide within the limits of its capacity and that citizens should enjoy.<sup>399</sup>

Consequently, provision of services that fulfil citizens' SERs as outlined in the constitution will inevitably raise the profile of the planning and implementation process of the sub-national units of the government.<sup>400</sup> Zimbabwe, as a member state of the United Nations and party of the ICESCR, has adopted these fundamental rights in its governance structures and very well enshrined the rights in the constitution.<sup>401</sup> Therefore, the state guarantees reasonable legislative and other measures, within the limits of the resources available, to achieve their progressive realisation.<sup>402</sup> There is a dire need to articulate what it means for local governments to deliver on the rights as espoused in the Constitution.<sup>403</sup> The sharing of functions between central and local levels of the government contributes toward improving service delivery and socioeconomic development in communities.<sup>404</sup>

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<sup>398</sup> Section 2(2) of the Constitution of Zimbabwe (2013).

<sup>399</sup> For example, health services in section 29 is also a right provided for in section 76 of the Constitution of Zimbabwe.

<sup>400</sup> V Makanza 'Service Delivery in an Era of Rights' Zimbabwe' in CLGF Southern Africa *Strengthening Capacity for Local Governance and Service Delivery in Zimbabwe Project The Constitution of Zimbabwe 2013 as a basis for local government transformation: A Reflective Analysis* 40. Available @[http://www.clgf.org.uk/default/assets/file/publications/reports/local\\_government\\_constitutionalisation\\_in\\_zimbabwe\\_clgf\\_2016.pdf](http://www.clgf.org.uk/default/assets/file/publications/reports/local_government_constitutionalisation_in_zimbabwe_clgf_2016.pdf) accessed 19 August 19, 2019.

<sup>401</sup> Section 56 on equality and non-discrimination, section 71 on property rights, section 72 on agricultural land, section 73 on environmental rights, section 76 right to health care, section 75 on the right to education, section 77 on the right to food and water.

<sup>402</sup> V Makanza 'Service Delivery in an Era of Rights' Zimbabwe' in CLGF Southern Africa (n 400 above) 43.

<sup>403</sup> V Makanza 'Service Delivery in an Era of Rights' Zimbabwe' in CLGF Southern Africa (n 400 above) 43.

<sup>404</sup> D Muchadenyika (n 353 above) 13.



## **4.9 CONCLUSION**

The purpose of this chapter was to discuss the legal framework on devolution in Zimbabwe. This was done by assessing the constitutional and legislative framework, namely, the Constitution of Zimbabwe, 2013, the Provincial Councils and Administration Act, the Urban Councils' Act, the Rural District Councils' Act and Local Government Laws Amendment Act. There was also an overview of the institutional framework which comprises the ministry responsible for local governments, amongst others. The framework was assessed in light of the general principles on devolution which, as a result, brought the assessment to the realisation of what the framework on devolution actually entails.

The findings of this chapter were that the legal framework on devolution in Zimbabwe is most significantly centred on the provisions of the Constitution of Zimbabwe, 2013 which provides a certain degree of protection from the interference from the national government. Another finding of this chapter was that after the constitutional entrenchment of devolution, subnational units of the governments as tiers of the governments are bound by principles of good governance which include due respect of human rights. The greatest finding is that the existing and current legal framework has a number of gaps that need to be filled if devolution is to be implemented successfully. Constitutional entrenchment of devolution is insufficient where functions and powers are ill-defined and local autonomy, accountability and public participation mechanisms are not clearly spelled out and guaranteed. There is need for institutions with a specific mandate to support the implementation of devolution.

## **CHAPTER FIVE**

### **KEY FINDINGS, RECOMMENDATIONS AND CONCLUSION**

#### **5.1 INTRODUCTION**

This research has explored the legal framework on devolution in two jurisdictions, Kenya and Zimbabwe. This was done as way of establishing the extent to which the mandate of sub-national governments in the two jurisdictions can aide in the realisation of SERs. The jurisprudence and various legal framework referred to in this research have shown that these devolved governments have a developmental role which is very much crucial to the realisation of SERs.

This chapter gives a brief discussion of the key findings. General recommendations that are best suited for both jurisdictions are given. These recommendations are as a result from the extensive discussions made on the international, regional, sub-regional and national legal framework.

#### **5.2 KEY FINDINGS**

The second chapter of this research focused on the legal framework on devolution under international, regional and sub-regional instruments. An overview of SERs brought out the importance of these SERs and how the function of service delivery by sub-national governments is very crucial to the realisation of SERs.<sup>405</sup> It was suggested that their developmental role and service delivery function takes place in the context of obligations to respect, fulfil, promote and protect human rights. However, to do that there has to be successful implementation of devolution and that can be done if the national legal framework on devolution adheres to a set of principles. These principles are established under international, regional and sub-regional legal

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<sup>405</sup> *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) 312 BCLR (CC).

framework. They include public participation, principle of subsidiarity, accountability and autonomy.

The third chapter then proceeded to examine the Kenyan legal framework on devolution to see the extent to which the legal framework adheres to the general principles established in chapter two. This was done through examining legal framework, institutional framework and the functions and powers of county governments. The legal framework on devolution in Kenya shows positive progress in the adherence of general principles on devolution. There is a significant presence of the general principles on devolution. As a result the current legal framework does show some capable potential to achieve the realisation of SERs. The legal challenges highlighted in this chapter include institutional weaknesses, lack of resources and intergovernmental relations challenges.

The fourth chapter focused on the Zimbabwean legal framework on devolution. The legal and institutional frameworks were discussed as well as the functions and powers of sub-national governments thereof. The examination of the legal framework was done in light of the general principles established in Chapter Two of this research. The findings of this chapter were that the central government is still dominating governments as a result of the delay in aligning key legislation to the Constitution of Zimbabwe (2013). Other than the Constitution of Zimbabwe (2013) the legal framework lacks legislation that operationalise the provisions on devolution as provided under the Constitution, so issues such as transfer of powers, functions and competencies, local autonomy, intergovernmental relations, public participation, accountability and oversight are still not clearly established.

## 5.3 GENERAL RECOMMENDATIONS

### 5.3.1 Kenya

#### *a) Enhancing the principle of subsidiarity and intergovernmental relations*

It was one of the findings of this research that the legal framework in Kenya still requires clarification on legal principles such as the transfer of powers and responsibilities based on the principle of subsidiarity as provided under the IRA. It is the submission of this research that there are three areas to which the principle of subsidiarity has an effect that should be distinguished under the legal framework, namely, allocation of competencies, protection of competencies and co-operative decision-making.<sup>406</sup> The principle is so pertinent to issues of intergovernmental relations it is important that the principle be constitutionally entrenched to avoid vagueness and confusion. There is need for clarity into when and how the principle is applicable.<sup>407</sup> This is important to avoid intergovernmental disputes and conflict, which is one of the most overbearing challenges being faced under the current legal framework.

#### *b) Strengthening regulatory framework on public service delivery and resource allocation*

Resource allocation was pointed out in Chapter Three as one of the challenges that the current legal framework in Kenya is failing to address. It is therefore recommended that county governments, in developing their own budgets, must ensure that their revenue and allocations comply with the government's human rights obligations.<sup>408</sup> Since local governments have functions and responsibilities in delivering public services but in most cases have limited

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<sup>406</sup> J De Visser (n 157 above) 94.

<sup>407</sup> J De Visser (n 157 above) 108.

<sup>408</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Realising Human Rights through Government Budgets' (2017) 48. Available @ <https://www.internationalbudget.org/wp-content/uploads/realizing-human-rights-through-government-budgets-ohchr-ibp-2017.pdf> accessed 30 August 2019.

revenue raising authority, the national government must ensure that local governments have the adequate revenue available to them to enable them to carry out their human rights responsibilities.<sup>409</sup> Effective service delivery is also hampered by the lack of clear laws to guide the executive in their function.<sup>410</sup> There is need for laws and policies at county levels that enable that counties can make proper budgets.<sup>411</sup>

***c) Strengthening of Institutional framework***

The political wrangling between County Assemblies and County Executives has an adverse effect on service delivery.<sup>412</sup> Therefore, there is need to enhance the independence and distinctive roles and responsibilities of the county governments.<sup>413</sup> Roles and responsibilities should be differentiated by the constitution or by legislation to guarantee the decentralised institutions access to resources to perform those roles.<sup>414</sup> This can also be achieved by ensuring that institutions of county governments function in line with their mandates.<sup>415</sup>

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<sup>409</sup> OHCHR (n 408 above) 67.

<sup>410</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 96.

<sup>411</sup> Commission of the Implementation of the Constitution, 'Sustaining the Momentum - Assessment of Implementation of the Transferred Functions to the County Governments' 2nd Devolution Assessment Report (2015) 15.

<sup>412</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 99.

<sup>413</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 100.

<sup>414</sup> Section B (6) of the UN International Guidelines on decentralisation and the strengthening of local authorities.

<sup>415</sup> V Nangidi 'County Governance: Political and Institutional Structures and their Effectiveness' in CM Bosire & W Gikonyo (Eds) (n 200 above) 100.

### 5.3.2 Zimbabwe

#### *a) Establish a subsidiarity mechanism hinged on efficient intergovernmental relations*

There is no mention of the principle of subsidiarity as was done under the Kenyan legal framework.. The principle is only just implied therefore it is left to interpretation. The application of this principle would require that the national government establish, through legislative framework, mechanisms to empower local governments through this principle.<sup>416</sup> Clear mechanisms are important as they help avoid intergovernmental disputes based on vague grounds of transfer of power and responsibilities. This being a lesson from Kenya as discussed in Chapter Three of this research, where there have been a number of intergovernmental disputes as a result of lack of clarification on the principle of subsidiarity. It is important that the legal framework provides a solid foundation for productive intergovernmental relations.<sup>417</sup>

#### *b) Establish accountability mechanisms*

The findings of Chapter Four(4) of this research were that the Minister responsible for local government has been given a wide range of supervisory powers that fail to stipulate when to intervene in local government operations. It is also the finding of this research that there are no properly established mechanisms under the Zimbabwean legal framework to ensure that subnational governments are accountable to the public or to bureaucratic structures. The Kenyan legal framework has established a thorough legal framework that appreciates the principle of accountability, with structures such the County Assembly that plays an oversight role over the County Executive.

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<sup>416</sup> J De Visser (n 157 above) 94.

<sup>417</sup> World Bank (2009) (n 95 above) 4.

Political accountability based on human rights would entail that the national government should have a role to monitor or supervise subnational budgets to ensure that authorities at that level are carrying out the human rights obligations.<sup>418</sup> These mechanisms include ombudsman, anti-corruption agencies and legislative monitoring bodies.<sup>419</sup> National human rights institutions are also suggested as suitable institutions for oversight.<sup>420</sup> In terms of Article 14(1) of the African Charter on Decentralisation, measures for ensuring accountability should be embedded in the constitution or legislation. Such provisions should clearly identify roles and responsibilities of national and sub-national governments, public agencies, service providers, elected and administrative officials, and civil society organisations. These institutions are to have a strict mandate to hold accountable subnational governments without arbitrary interference with local autonomy.

***c) Establish a robust public participation framework***

The importance of public participation mechanisms being legally entrenched is that they create a right to participation for the public. There is silence on what the objective to devolution on enhancing public participation<sup>421</sup> is to be realised. Linking the realisation of socio-economic rights with devolution would mean that civic participation should be enhanced.<sup>422</sup> Under the Kenyan legal framework there is also the CGA which provides mechanisms that ensure that the public has access to information in county governance. The plus side of effective public participation mechanisms is that they enable social accountability. It is important that there be establishment of social accountability mechanisms that consists of: the production of financial and performance information that is relevant to enable meaningful participation in decision-

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<sup>418</sup> OHCHR (n 408 above) 48.

<sup>419</sup> World Bank (2009) (n 95 above) 6.

<sup>420</sup> OHCHR (n 408 above) 136.

<sup>421</sup> Section 264(2)(a) of the Constitution of Zimbabwe (2013).

<sup>422</sup> MT Kirya (n 21 above) 12.

making; planning and implementation of a specifically tailored set of participatory institutions that safeguard the right to participate for the local communities; and efficient mechanisms to gather citizen feedback and grievances.<sup>423</sup>

*d) Legal protection of local autonomy*

Another principle that has not been addressed under the Zimbabwean legal framework is the principle of local autonomy. Local autonomy is emulated by the extent to which the existence of local units is legally guaranteed, more importantly, through constitutional entrenchment. It is such constitutional recognition which serves as a deterrent against executive or legislative arbitrary intervention/invasion of local powers by higher government and provides a basis for judicial enforcement of constitutional limits.<sup>424</sup> Under the Kenyan legal framework the autonomy of county governments has been entrenched in the Constitution of Kenya, 2010, and further operationalised by legislation such as the CGA which provides for fiscal, political and administrative autonomy.

The absence of entrenched local autonomy under the Zimbabwean framework reflects on the powers and responsibilities of local governments. In the case of Zimbabwe, there is absence of clearly pronounced powers and responsibilities. The principle that ‘finance follows function’<sup>425</sup> implies that local governments should have access to the finances commensurate to their responsibilities. This also implies that where there are functions and responsibilities there will be no resources for public service delivery. According to Article 5(2) of the African Charter on Decentralisation, local governments should have powers that enable them to manage their administration and finances through ‘democratically elected, deliberative assemblies and

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<sup>423</sup>World Bank (2012) (n 254 above) 162-163.

<sup>424</sup> AG Tarr ‘Symmetry and asymmetry in American federalism’ in JT Courchene et al. (eds) *The federal idea: essays in honour of Ronald Watts* (2011) 173.

<sup>425</sup> T Chigwata and J De Visser (n 11 above) 158.



executive organs'. The Zimbabwean legal framework falls short on this regard, whereas the Kenyan legal framework has County Assemblies and County Executives all of which have different powers and functions provided for under the Constitution of Kenya, 2010, and Acts of Parliament such as the CGA.

*e) Establishing an Institutional Framework*

One of the lessons that have been drawn from the key legal principles on devolution and the Kenyan legal framework is that there is need for a vigorous institutional framework that will support the implementation of devolution. Such institutions safeguard that key principles are observed at all stages of implementation, for example, institutions that ensure accountability, public participation and subsidiarity are in place. The Kenyan legal framework has managed to establish the MoDP, the NCGCS, the CRA and the TA. All these institutions play a crucial role in the implementation of devolution.

## **5.4 CONCLUSION**

The main purpose of this research was to establish the possible impact that devolution can have on the realisation of SERs. Therefore, the main research question was what legal principles must be put in place in order for devolution to advance the realisation of socio-economic rights in Africa, with specific reference to Kenya and Zimbabwe? This was done by assessing international, regional and sub-regional legal framework on devolution and SERs to determine the key principles of devolution that are intertwined with the realisation of SERs. The instigated key principles were then used to assess the extent to which domestic legal frameworks in Kenya and Zimbabwe observe them.

The results of the research were that Kenya has shown a genuine willingness to commit to the system of devolution. This is exhibited by a thorough and robust legal framework that appreciates all key principles. However, there are some legal challenges such as weakness in intergovernmental relations regulation. Zimbabwe on the other hand has shown lack of political willingness and as a result the legal framework on devolution has not progressed past the constitutional entrenchment. Therefore, the constitutional provisions have not been implemented making the potential of realising SERs through devolution a distant expectation. If SERs are to be realised through devolution of governmental powers it is important that design of the legal framework address the key principles discussed in this research extensively. Necessary powers and functionalities should be devolved to local authorities to enable them to facilitate public participation in matters concerning SERs and to perform their duties in a manner that utilises resources to realise SERs.

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