Republic of South Africa

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At the end of three centuries of colonial and racial domination, two constitutions, forged during the 1990s, sought to establish a majoritarian, nonracial democracy in South Africa. The objective of the new order was to liberate and empower the oppressed majority in order to rectify past injustices. Coupled with this objective was the desire to unite a country divided along racial and ethnic lines. Nation building was based on the individualist thrust of human rights that would cut across the old racial divisions, establishing a republic that, according to the Preamble of the 1996 Constitution, "belongs to all who live in it, united in our diversity."

The transition from minority rule to majority rule was, however, a negotiated process, called by some a "negotiated revolution." The majority did not take control of the state by force; the incumbent white regime relinquished power through negotiations. The Interim Constitution of 1993, which ushered in majority rule, was passed by the apartheid tricameral Parliament, thus effecting legal continuity between the old and the new orders. In the negotiations, the white regime and sections of the black "homeland" elites sought to limit the power of the new majority government by preserving some remnants of their powers and privileges through decentralization of government and by protecting certain communal and individual rights. In contrast, the majoritarian objective was to gain control over the levers of state power in a centralist government that could fundamentally transform a racially skewed society.

The outcome was a constitutional dispensation that has some federal features but ensures central dominance. South Africa is thus a new, although reluctant, member of the family of federal polities. Neither the Constitution nor political discourse before and after the Constitution used the word "federalism." Given that South Africa does not self-identify as a federal country, debate continues on the nature of the state.[1] Despite its unofficial status as a federal country, South Africa's Constitution is of interest to other federations for the way power has been dispersed between three spheres of government (national, provincial, and local) and for its explicit articulation of principles of cooperative government.

The Constitution in Historical-Cultural Context

Creation of the South African State

Situated on the southern tip of Africa, the Republic of South Africa, with a land area of 1,219,090 square kilometers, has a multilingual, multicultural, and multiracial population of 44 million residing in nine provinces and 285 municipalities. In seven of the provinces, there are linguistic majorities.[2] The population is predominantly Christian (84 percent), with 13 percent adhering to traditional indigenous belief systems. There are small proportions of Muslims (1.5 percent) and Hindus (1.5 percent). Within the Christian community, 10 percent are Protestant and 9.5 percent are Roman Catholic, while the vast majority belong to African independent churches. It is a racially divided country. In terms of the apartheid system of classification -- still used for Census purposes -- 77.8 percent are regarded as African, 10.1 percent white, 8.7 percent coloured, and 2.4 percent Indian.[3] With a gross national product per capita of US$3,160, South Africa is classified by the World Bank as an upper-middle-income economy.[4]

The Constitution of 1996 is both a product of and an answer to the previous eight decades of apartheid constitution making.[5] The Union of South Africa was formed in 1910 from the

merger of four British colonies. Despite the models of uniting British colonies in federations, such as Canada (1868) and Australia (1901), federalism was not favoured by the national convention of 1909 because of the need for nation building and the fear of provincial dominance. A strong union was seen as necessary to promote nation building between the two older British colonies (Cape and Natal) and the two recent acquisitions (Transvaal and Orange River Colony), which had been engaged in war with the British Empire less than a decade before. As a sop to federal sentiments, an upper house, called the Senate, was instituted to represent provincial interests, with each provincial legislature electing an equal number of senators. Provincial legislatures and executives were created, but their powers were restricted with an automatic national legislative override. The provinces thus had no protected or residual powers.

The "homeland" policy of apartheid introduced some devolution. The objective was to create independent black nation-states, thereby robbing all Africans of their South African citizenship. Four "independent" homelands were created (Transkei in 1976, Bophutatswana in 1978, Venda in 1979, and Ciskei in 1981). In addition, there were self-governing territories that received extensive powers (i.e., KwaZulu, Kangwane, Qwa-Qwa, Gazankulu, and KwaNdebele). The territories were demarcated along ethnic lines as much as possible. The aim, in contrast to the sentiments underlying the 1909 convention, was to separate Africans from each other, as well as from whites, as far as possible in a grand strategy of divide and rule.

When it came to the coloured community, the "homeland" solution was first attempted; the coloureds were deemed to be a "nation in the making." A Colored Representative Council was set up with limited legislative powers. This attempt to create a coloured homeland soon failed. With regard to Indians originating from the Indian subcontinent, the apartheid state, after abandoning fairly late in the 1960s the objective of repatriation to India, sought to accommodate them in a separate forum, the South African Indian Council, a body that had no effective legislative or executive powers.

A tricameral parliament was created in 1983 to bring coloureds and Indians into an alliance with the whites. Racial segregation was maintained, as each group had its own parliamentary chamber, which had legislative competence over its "own affairs," while all three had to deliberate jointly over "general affairs." The upshot of the tricameral parliament was the disappearance of the Senate and the provincial legislatures, while limited executive authority was retained by the provinces.

With apartheid's demise and the unbanning of the liberation movements in 1990, a process of political negotiations commenced that saw the adoption of an Interim Constitution in 1993 and the holding of democratic elections in April 1994. This was a protracted process "often marred by widespread public disturbance, acrimonious debate and unspeakable violence."[6] At the outset, the African National Congress (ANC) insisted that adoption of a constitution be done by an elected body, arguing that a new nonracial state could only be built on a firm democratic basis.[7] The South African government and its allies opposed the idea, fearing defeat at the polls and loss of all power and privilege. They proposed a multiparty negotiating forum in which all political parties, without regard to their possible electoral support, would agree by sufficient consensus on a new constitution.[8] In this way, the incumbent governments could make constitutional deals disproportionate to their possible electoral support. The negotiated compromise eventually reached was that the Multi-Party Negotiating Process at Kempton Park would draft a constitution under whose terms the first nonracial election was to be held. Because the Constitution was not based on the will of the people but negotiated by elites, it was an interim measure to be replaced within two years by a final constitution, the 1996

Constitution. The new democratically elected Parliament would then double up as the Constitutional Assembly. However, the Constitutional Assembly would not have a free hand. Apart from the two-thirds majority required for the Constitution's adoption, the Assembly would be bound by a set of Constitutional Principles that would form the backbone of the final Constitution. Moreover, the Constitutional Principles would be enforced by the Constitutional Court, which had to certify that the Constitution accorded with the Constitutional Principles.

The democratic elections of April 1994 unified the country formally. The "independent" homelands ceased to exist, each becoming part of one of the country's new nine provinces. The Transvaal, incorporating Venda and Bophuthatswana, was split into four provinces: Gauteng, North West, Northern Province (now Limpopo), and Mpumalanga. The Cape Province -- now including Transkei and Ciskei -- devolved into three provinces: Western Cape, Northern Cape, and Eastern Cape. Only the old provinces of Natal and the Orange Free State retained their borders and parts of their names, being renamed KwaZulu-Natal and Free State respectively.

In the Interim Constitution, provision was made to divide the Eastern Cape into two provinces, hiving off the homeland areas of Transkei and Ciskei, if there was sufficient support. Continuation of the Northern Cape as a province could also be reconsidered. In the end, there was no electoral support for border changes. Because the carving up of two provinces into seven new ones was done in a hurry, many borders were contested by local communities along the borders. Provision was also made for border adjustments between provinces. No border changes had, however, been effected by February 1997, when the 1996 Constitution came into effect, thus confirming the 1994 border determinations.

The 1996 Constitution makes no provision for border adjustments or the creation of new provinces. Any changes would have to be effected by a constitutional amendment. When demarcating the country's municipalities in 2000, the artificiality of some provincial borders became apparent; functional communities were split by borders. To solve this problem, the Constitution was amended in 1998 to provide for cross-border municipalities. This compromise has not worked in practice, and the adjustment of provincial borders to eliminate the need for cross-border municipalities is on the national political agenda.

The Interim Constitution was lengthy, comprising over 251 sections and a further six schedules. Six amendments were enacted between 1994 and 1996. Two crucial amendments, which came into effect in April 1994, were aimed at bringing in political groups that had withdrawn from the political negotiations.[9] The first democratic Parliament amended the Constitution no less than eight times in the following two years, mostly with respect to technical issues. As the aim of the Interim Constitution was to be an insurance policy for the outgoing white political elite, the style was legalistic. The 1996 Constitution, however, has slightly fewer sections (243) and six schedules. In addition, a lengthy schedule and two appendices deal with transition arrangements. Unlike the Interim Constitution, which was drafted with an eye for detail to cover every eventuality, the 1996 Constitution was written in a general, open-text style.[10] The objective was also to write it in plain language, making it accessible to ordinary people.

The 1996 Constitution has been amended nine times, the most significant amendments being the establishment of cross-border municipalities; changes to the judiciary; permitting members of the national, provincial, and local legislatures to change party allegiance without losing their seats; and tightening national control over local fiscal matters.

Drafting the 1993 and 1996 Constitutions

A key issue in the negotiations between the liberation movements and the then government and its allies in the homelands was the devolution of power to subnational entities. The Inkatha Freedom Party (IFP), with a strong ethnic power base in KwaZulu-Natal, ardently advocated a federal system. The homeland leaders of Bophuthatswana and Ciskei also expressed interest in devolution. The National Party (NP), which during the apartheid era institutionalized a strong centralist state, made common cause with the homeland leaders in advocating strong regional government. Their interest was to block a strong central government under ANC control. This was coupled with the hope that the NP, in alliance with the homeland leaders, could capture some of the regional spaces. To the right of the government were the conservative Afrikaners who sought an extreme form of federalism: self-determination in their own *volkstaat*. Aligned with this grouping were key elements in the then military and police establishments.

The ANC saw the claims for federalism simply as excuses to thwart majority rule. Moreover, creating strong federal units would legitimate the homelands and create a separate white *volkstaat*. The fear was that federalism would preserve white minority privileges. A strong central state, the ANC argued, was necessary to effect the transformation of a society based on racism into one that would foster nonracialism and correct past injustices.

The end product was a pragmatic, negotiated settlement with elements of both centralism and federalism. When the NP and the ANC concluded the deal, two important players -- the IFP and conservative Afrikaners -- did not participate, but two months prior to the April 1994 elections, the Interim Constitution was amended to accommodate the IFP and conservative Afrikaners. The principle of self-determination was entrenched in the Interim Constitution and as a Constitutional Principle. A *Volkstaatraad* was established as well, namely a council in which Afrikaners could articulate and advocate their desire for self-determination. These provisions brought the majority of right-wing Afrikaners into the fold. Increasing the powers of provinces and making special accommodation for KwaZulu-Natal similarly appeased the IFP.

The 1993 Interim Constitution was the product of a negotiated settlement driven by two concerns. First, national unity was of prime importance. To break with the apartheid past, the racial and ethnic division of South Africa was to be avoided at all cost. A nonracial democracy that united the people of the country was the objective. Second, because of the threat that both conservative Afrikaners and the conflict in KwaZulu-Natal posed to the peace and stability of the country, the federal features of the Interim Constitution were aimed at peace making. The 1993 document is described as a peace treaty while the 1996 Constitution is a true constitution, being an exercise in constitution making by elected representatives.

The popular legitimacy of the 1996 Constitution lies in both the legitimacy of the 1994 election and the process of drafting the Constitution. The Interim Constitution envisaged a referendum on the Constitution only as a deadlock-breaking mechanism if the Constitutional Assembly could not produce a two-thirds majority. Reflecting this approach to legitimacy, the opening words of the Preamble to the 1996 Constitution, "We the people," are coupled with the words, "through our freely elected representatives, adopt this Constitution as the supreme law of the Republic." As a two-thirds majority was reached on the final text, the issue of a referendum did not arise. The popularity of the Constitution is, no doubt, attributed to the public relations efforts of the Assembly, which canvassed more than two million public submissions. Although these submissions did not directly shape the Constitution, the participatory process may have facilitated popular ownership.[11]

When the Constitutional Assembly convened in 1994, it was bound by the Constitutional Principles, four of which were critical for decentralization. First, the legislative and executive powers of the provinces had to be "appropriate" and "adequate," and such powers were to promote "legitimate provincial autonomy." Second, the new Constitution had to include exclusive and concurrent powers and functions for national and provincial spheres of government. Third, the powers and functions of the provinces could not be substantially less than those provided for by the Interim Constitution. Fourth, "[a] framework for local government powers, functions and structures" had to be set out in the Constitution.

The Constitutional Assembly passed the new Constitution in May 1996. It provided for provincial legislatures and executives, which had concurrent and exclusive powers with respect to items listed in Schedules 4 and 5. When the document was submitted to the Constitutional Court, it refused to certify that the text conformed to the Constitutional Principles.[12] In the main, the Court found that there was a substantial diminution of provincial powers as compared with the Interim Constitution. When the Court reviewed the amended text three months later, it found that there was still a diminution of provincial powers, but this was no longer deemed substantial. Accordingly, it certified the text,[13] which then came into effect on 4 February 1997.

In the context of decentralization, both the interim and the 1996 constitutions articulated two important points of departure. First, the basis of the constitutional dispensation was a classical liberal democracy based on individualism rather than on the protection and entrenchment of groups, be they ethnic, racial, or linguistic. Second, although subnational entities were established, there was not to be a competitive relationship between the subnational entities and the centre; nation building was the overriding concern.

The individual-rights basis of the constitutions was inevitable. Within the ANC, there has been a long rights-based tradition stemming from the Freedom Charter, an ANC policy document dating from 1955, which coupled social and economic demands with individual rights.[14] No such claim could be made by the NP, which developed an interest in human rights in the 1980s but sought to couple it with group rights. However, during the transition of the early 1990s, the outgoing white elite saw individual rights as a refuge against state intrusions into the private sphere. Both sides, it has been argued, were constrained in the negotiations by the emerging international consensus that an acceptable democratic transition required democratic constitutionalism.[15]

In answer to the demands by conservative Afrikaners for cultural and linguistic protection of minority groups through the recognition of group or communal rights, the ANC argued that such concerns would be accommodated by the individual rights set forth in the Bill of Rights. They would include freedom of association and expression as well as language rights. Only with regard to the right to education was a limited communal element recognized in the Interim Constitution. A person had the right (1) "to instruction in the language of his or her choice where this is reasonable and practicable" and (2) "to establish where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race" (Sec. 32). In the 1996 Constitution, the communal element was more pronounced with regard to language and culture: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society" (Sec. 32). However, a group's exercise of these rights must not be inconsistent with the Bill of Rights. Here, the nondiscrimination clause would be the most important limiting factor.

While the Constitution is premised on individual rights, language and cultural diversity are guaranteed. The Constitution recognizes 11 official languages: Sepedi, SeSotho, Setswana, siSwati, Tshivenda, Xitonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu. The national and provincial governments may use any official language for the purpose of government, depending on usage, practicality, and expense, but there should be at least two official languages. There is no explicit requirement for municipalities to have more than one language in government; they need take into account only the language usage and preferences of their residents. In practice, English is the country's lingua franca and forms, in effect, the language of government. In court an accused has the right to be tried in any language he or she understands or to have the proceedings interpreted in that language.

As a sop to communal interests, the Constitution mandates the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. However, although the commission must promote respect for cultural, religious, and linguistic rights, it must also pursue "friendship," "tolerance," and "national unity" among groups (Sec. 185). It has proved to be extremely difficult to establish such a body with a diverse mandate cutting across language, religion, and culture; [16] in the South African context, there is little or no commonality between culture and language, on the one hand, and religion, on the other. The enabling legislation was passed only six years after the commencement of the Constitution, and the commission was established in 2003.

Given that the decentralization of the South African polity was a negotiated compromise and that majoritarian nation building was a key objective, the form of decentralization should not be incompatible with nation building. Put differently, the decentralized units should not launch platforms promoting divisive political competition. One of the reasons why the ANC accepted decentralization was the attractiveness of the German model of cooperative government. Although there was no reference to federal comity in the Interim Constitution, the Constitutional Court found that it was inherent in the system. In the 1996 Constitution, however, cooperative government was explicitly made the bedrock of decentralization.

Constitutional Principles of the South African Polity

The Constitution states that "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated" (Sec. 40(1)). In contrast to the Interim Constitution's reference to "levels" of government, the term "spheres of government," used in the 1996 Constitution, intends to avoid any sense of hierarchy -- a promise that the national and provincial governments' powers of supervision over provinces and municipalities respectively contradict.[17] The "distinctive" element refers to the *autonomy* enjoyed by both the provinces and local governments. The spheres are "interdependent" in the sense that each must exercise its autonomy for the common good of the country by cooperating with the other spheres. Each sphere is "interrelated" in the sense that the exercise of autonomy by a sphere is supervised by the other spheres of government. Because of the strong emphasis on supervision by the national government of both provinces and local governments, the polity is centre-dominated. It has thus been described as a hybrid-federal system.

In the Interim Constitution, the dispersal of powers had some asymmetrical elements. Accommodating the conservative Afrikaners and the Zulu nationalists meant that specific provisions were made for a *Volkstaatraad* and for recognition of the right to self-determination as well as for recognition of the Zulu monarch. As the political process moved from peace

making to constitution making, the principle of symmetry prevailed; the *volkstaat* idea disappeared, and provinces and municipalities all have the same constitutional powers.[18]

Although the principle of symmetry of powers is the starting point, as in Australia and Germany, the development of provinces and municipalities with asymmetrical powers is possible. First, on the legislative field, the National Assembly may assign any of its legislative powers, except the power to amend the Constitution, to a provincial legislature or a municipality (Sec. 44). A provincial legislature may do the same with respect to a municipal council (Sec. 104). Second, in a provision drawn from the German Basic Law, a province is entitled to implement all national legislation dealing with concurrent and exclusive powers if it has the administrative capacity to do so (Sec. 125(3)). Moreover, the national and provincial governments must assign to a municipality the administration of provincial matters that necessarily relate to local government if these matters would most effectively be administered locally and if the municipality has the capacity to administer them (Sec. 156(4)). The provisions establish the principle of subsidiarity, according to whose terms the asymmetrical assignment of powers to provinces and municipalities may take place. Even so, no province or municipality, however capable, has yet been assigned additional powers.

The functional and territorial integrity of the different spheres is guaranteed in Chapter 3 on Co-operative Government. While affirming the national unity and indivisibility of the republic, and the loyalty owed to the Constitution, the republic, and its people, Section 41(1) also guarantees the existence and functioning of provinces and municipalities. It binds all spheres of government to:

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred upon them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

There are additional constitutional guarantees for local government. A municipality "has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution" (Sec. 151(3)). The national and provincial governments, in turn, "may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions" (Sec. 151(4)).

The Constitution makes no provision for secession. Indeed, Section 1 of the Constitution proclaims: "The Republic of South Africa is one, sovereign democratic state." The right to self-determination, which was included in the Interim Constitution and through Constitutional Principle XXXIV replicated in the final Constitution, is not regarded as providing any authority for secession. Section 235 reads:

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

The right to self-determination, in the legal sense, has been reduced largely to a political claim; any federating process along the route of self-determination will not be in the hands of any self-selected community relying on the Constitution directly but will be governed by Parliament.

Limited freedom is given to provinces and municipalities to create their own governments, political institutions, and processes of government. First, in Chapter 6 the Constitution prescribes the political, legislative, and executive institutions of provinces. However, a province may, in adopting a constitution, establish its own legislative and executive structures and procedures. Second, Chapter 13 on finance requires national legislation to regulate the financial management of provinces. The Public Finance Management Act 1 of 1999 governs both national departments and provinces. Third, the Constitution requires national legislation that structures the public service of provinces. There is a single public service "which must function, and be structured, in terms of national legislation" (Sec. 197(1)). This includes the terms and conditions of employment in the public service. The provinces are confined to the hiring and firing of public servants, but this must occur even within a national framework (Sec. 197(4)). In this area, the Public Service Act of 1994 regulates both the national and provincial administrations in detail. Fourth, Chapter 7 broadly sets out the political structures and procedures of municipalities and requires national legislation on a host of matters. The Municipal Structures Act of 1998, the Municipal Systems Act of 2000, and the Municipal Finance Management Bill of 2003 give effect to these constitutional provisions.

Apart from adopting national legislation on matters that fall within the exclusive domain of provinces (Sec. 44(2), see below), the national executive may intervene in a province when the province fails to comply with any constitutional or statutory executive obligation (Sec. 100). Directives may be issued, and the national executive may even assume responsibility for the execution of the neglected executive obligation if a number of conditions are present, including the need to maintain essential national standards, economic unity, and national security. Provinces have more extensive intervention powers with regard to municipalities. A constitutional amendment in 2003 empowers, and in some situations compels, provinces to intervene in case of a financial crisis by taking steps that include the dismissal of a municipal council.

Although the regulation of provinces and municipalities is extensive, the principles of cooperative government provide some guarantee that such regulation will not be excessive. The Constitutional Court accepted that national-framework legislation may be assessed in terms of the cooperative-government principle that all spheres of government "must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government of another sphere" (Sec. 41(1)(g)). This provision, the Court held, is concerned "with the way power is exercised, not with whether the power exists."[19] Thus, the Court continued, "the power given to the national legislature is one which needs to be exercised carefully in the context of the demands of section 41(1)(g) to ensure that in exercising its power, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution."[20]

In as much as the geographical and institutional integrity of a province or a municipality is protected, subnational units are also bound through the principles of cooperative government to act in the national interest as set out in Section 41 of the Constitution. In particular, they must "preserve the peace, national unity and indivisibility of the Republic, secure the well-being of the

people of the Republic; provide effective, transparent, accountable and coherent government for the Republic as a whole; [and] ... co-operate with one another in mutual trust and good faith."

The contours of the provinces' power to draft their own constitutions were the product of the negotiations aimed at ensuring the participation of the IFP in the 1994 elections. The scope of the power in terms of both the Interim Constitution and the 1996 Constitution has turned out to be limited. A provincial legislature may pass a constitution with the support of at least two-thirds of its members. Because a provincial constitution must be drafted within the narrow confines set by the Constitution, it must be certified by the Constitutional Court.[21]

The constitutional space accorded to a province is limited: A provincial constitution must be consistent with the national Constitution except for (1) legislative and executive structures and procedures that may differ from those provided for in the Constitution and (2) the inclusion of the institution, role, authority, and status of a traditional monarch (Sec. 143). Different structures and procedures must further comply with the founding values of the Constitution set out in Section 1 and with the principles of cooperative government and intergovernmental relations set out in Chapter 3. In reviewing the Western Cape Constitution in 1997, the Constitutional Court adopted a restrictive stance by holding that a separate provincial electoral system did not fall within the exception of a legislative structure or procedure that differs from the national norm.[22]

A provincial constitution is subservient to the national Constitution to the extent that it may not be inconsistent with it except on the two matters referred to above. The conformity between the two is secured through the certification process. The issue of conflict then arises only between a provincial constitution and national legislation. In the case of conflict with a national law that the Constitution specifically requires or envisages, the national legislation prevails. In all other cases, the national-override clauses pertaining to conflict with regard to exclusive and concurrent provincial legislation apply with equal force to provincial constitutions (Sec. 147(1)). As the judiciary is a national function, the national courts, with the Constitutional Court at its apex, are the interpreters of provincial constitutions.

Local Government

The Interim Constitution included a chapter on local government, but local government was placed on the list of shared provincial powers, thus placing it under the direct control of provinces. The 1996 Constitution fundamentally changed this concept of local government being the lowest tier by elevating it to a "sphere" of government alongside the national and provincial governments. This followed the trend in some modern federal constitutions of recognizing local government as constitutional state institutions, as evidenced in the constitutions of Germany (1949), Spain (1978), and Brazil (1988) and in the 1992 amendments to India's Constitution.

A number of domestic factors contributed to the shift in status.[23] Politically, within the liberation movements, local communities played a significant role in the protracted struggle against apartheid, giving rise to a strong civic movement. The drafters sought to direct this social movement toward people-centered development. The vision of local government as a driver of development also reflected modern theories of development, where local buy-in and initiative are seen as indispensable to social and economic development. Finally, given the ANC's ambivalence about provinces, there was little hesitation to strengthen local government at the expense of provinces.

The autonomy of municipalities is evident in the following areas. First, their powers and functions are listed in the Constitution. Second, they derive their main taxation powers -- rates on property and surcharges on fees charged for services rendered -- directly from the Constitution. Third, because local government officials fall outside the national and provincial public service, their conditions of employment are set by municipalities, and the hiring and firing of personnel are their prerogative.

Although local government, as a sphere, is guaranteed a measure of autonomy, there is still considerable supervision by both the national and provincial governments. First, the national government, in terms of the Constitution, must pass legislation providing a broad framework for local-government structures and operating procedures. Second, provinces are given specific powers to regulate defined aspects of local government. Third, both the national and provincial governments have the legislative and executive authority to regulate how municipalities exercise their executive authority in order to ensure that they perform their listed functions effectively (Sec. 155(7)). Fourth, the national and provincial governments have broad powers to monitor local government.

The Constitution creates three categories of municipalities: The first is metropolitan areas; the second is local municipalities; and the third is district municipalities, with which a district's local municipalities share their legislative and executive authority. The object of the latter category is to coordinate local municipalities and equalize services within districts. The demarcation of six large metropolitan areas creating municipalities with budgets rivaling those of provinces has de facto created city-states.

Indigenous Peoples

Given that South Africa's democratic revolution resulted in majority rule, the concept of indigenous people does not feature in the Constitution. Although there is a provision that the languages of the Khoi, Nama, and San -- arguably the first peoples on the subcontinent -- should be promoted and conditions created for their development (Sec. 6(5)), these groups are not accorded a different status than that of any other group.

Traditional forms of government were given only limited constitutional recognition. In Chapter 12, "the institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution" (Sec. 211(1)). To deal with issues affecting traditional leaders and customary law, provinces and the national government may establish houses of traditional leaders. For traditional leaders or institutions to participate directly in governance, national legislation may provide a role for them as "an institution at local level on matters affecting local communities" (Sec. 212(1)). Finally, traditional leadership is a matter included on the list of concurrent national and provincial powers. With democratically elected municipalities covering the entire surface of the country, the governance role of traditional leaders in matters of local government has theoretically been eclipsed. However, despite the constitutional status of municipalities, traditional leaders continue to play a significant, albeit a contested, governance role in the old "homeland" areas.

Allocation of Powers

The highly centralized nature of South Africa's decentralized system is evident from the way power is dispersed to subnational units. Although provinces and local governments are allocated powers in discrete functional areas, the national government retains a strong supervisory role.

Much influenced by the German notion of cooperative government and the constitutional architecture giving effect thereto, concurrency of powers is a central feature in the Constitution.

Like their counterparts in Germany, India, and Nigeria, provinces have both "concurrent" powers (listed in Schedule 4) and "exclusive" powers (listed in Schedule 5). Schedule 4 includes agriculture, casinos and gambling, consumer protection, cultural matters, education at all levels (excluding tertiary education), environment, health services, housing, industrial promotion, population development, public transport, regional planning and development, tourism, trade, and welfare services. Provincial powers also cover matters that are reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4. The "exclusive" powers are more restricted, and the list consists of abattoirs, ambulance services, archives other than national archives, libraries other than national libraries, liquor licenses, museums other than national museums, provincial planning, provincial cultural matters, provincial recreation and amenities, provincial sports, provincial roads and traffic, and veterinary services, excluding regulation of the professions.

Local government's powers are listed in Part B of Schedules 4 and 5. Schedule 4B includes electricity distribution, firefighting, municipal health, public transport, and water and sanitation. Schedule 5B includes street cleaning, cemeteries, control of undertakings selling liquor to the public, markets, roads, refuse removal, and traffic.

Outside the two schedules, the Constitution confers a few additional powers on provinces and municipalities. For example, while provinces may not have their own police forces, they have a limited role in monitoring and overseeing the uniform branch of the national police service. In contrast, municipalities may establish municipal police forces within the framework of national legislation.

Residual powers reside, as in Canada and India, with the national government, which may also legislate with respect to most of the provincial powers. In the case of "concurrent" powers, both the provinces and the national Parliament may validly legislate on the same matter at the same time. With respect to the "exclusive" provincial powers, national legislation is possible only when national legislation is deemed necessary "(a) to maintain national security; (b) to maintain economic unity; (c) to maintain essential national standards; (d) to establish minimum standards required for the rendering of services; or (e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or the country as a whole" (Sec. 44(2)).

The only incidences of truly provincial exclusive powers are naming a province (Sec. 104(2)), writing a provincial constitution (Sec. 142), and adopting a language policy (Sec. 6).

Local government's powers are also circumscribed by the other spheres' powers in the same functional areas.[24] Under Schedule 4B, the national and provincial governments may regulate -- by setting standards and minimum requirements -- only how municipalities exercise their executive authority. With regard to Schedule 5B matters, the national government must comply with the requirements of Section 44(2), quoted above, and provinces may regulate only by setting the legal framework within which municipalities exercise their powers.

When a conflict arises between national and provincial legislation in a concurrent functional area, a broad and generous override clause applies. National legislation that applies uniformly to the country as a whole prevails if:

(a) the matter cannot be regulated effectively by provinces individually;

(b) the matter, to be dealt with effectively, requires uniformity across the nation, and such uniformity is established by norms and standards, frameworks, or national policies;
(c) such legislation is necessary for
(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity of equal access to government services; or
(vi) the protection of the environment. (Sec. 146(2))

National legislation also prevails if it is aimed at preventing unreasonable action by a province that (1) is prejudicial to the economic health or security interests of either another province or the country as a whole or (2) impedes the implementation of national economic policy (Sec. 146(3)). If a court finds that the usual rules of paramountcy cannot resolve a conflict, the national legislation prevails over the provincial legislation or constitution (Sec. 148). Conversely, provincial legislation prevails if the requirements for a national override are not met (Sec. 148(5)). Depending on the Constitutional Court's interpretation, an expansive reading of the override clauses will place few fetters on the national government's supremacy over concurrent matters, while a narrow reading will leave some space for provinces.

In the case of a province's "exclusive" powers, the criteria for valid national legislation, set out in Section 44(2), serve also to determine the question of conflict. If national legislation meets the required criteria, it is valid and thus overrides any provincial legislation (Sec. 147(2)). If the national legislation prevails, the provincial law is not invalidated; it simply becomes inoperative but only as long as the conflict remains (Sec. 149). However, the override is confined to the area of the conflict; the entire provincial law is not necessarily rendered inoperative.

With regard to municipal bylaws, the basic rule of paramountcy is that a bylaw in conflict with national or provincial legislation is invalid. However, in a novel provision, a bylaw may trump even a national law. A national or provincial law will not prevail if it "compromise[s] or impede[s] a municipality's ability or right to exercise its powers or perform its functions" (Sec. 151(4)). This may be interpreted to mean that the national and provincial governments may not use their legislative powers in an unduly intrusive or excessively prescriptive manner.[25]

Despite the extensive overlapping of legislative powers, the level of conflict has been very low.[26] The main reason is extensive national legislation in the area of concurrent jurisdiction. There are only a limited number of provincial laws in the same areas. In turn, the national government has only once entered the provinces' "exclusive" functional area, namely with the passing of the Liquor Bill in 1999. This bill dealing with regulation of the liquor industry was challenged with partial success on the ground that the Parliament exceeded its legislative authority. With the dominance of national legislation, provinces have not come into their own legislatively. In the main, they have become administrative bodies, implementing national laws with regard to education, welfare, and health care. A few factors contribute to the dearth of provincial legislation. First, with hardly any revenue-raising powers, provinces are reluctant to adopt laws whose implementation may add to their financial burden. Second, the dominance of the ANC in eight of the nine provinces inhibits the passing of competing

legislation. Third, some provinces lack the capacity to develop their own legislation in order to exploit the available legal space.

The allocation of powers should be placed in the context of the overarching framework of cooperative government. Conflicts about the exercise of powers should be managed through participation by the spheres in various structures facilitating intergovernmental relations. Moreover, a principle of cooperative government is the avoidance of litigation to resolve intergovernmental disputes, including those that arise from concurrency.[27] All organs of state must, in complying with their duty to cooperate in mutual trust and good faith, avoid legal proceedings against one another (Sec. 41(1)). The Constitutional Court put this duty positively: Organs of state must "try and resolve their dispute amicably."[28] The rationale is, in the words of the Court, that the Constitution does not embody "competitive federalism," but, to the contrary, "co-operative government."[29] The latter entails, the Court said, that "disputes should where possible be resolved at a political level rather than through adversarial litigation."[30] The duty to avoid litigation is demanding because Section 41(3) requires that every organ of state "must make every reasonable effort to settle the dispute ... and must exhaust all other remedies before it approaches a court to resolve the dispute." The courts may enforce this duty by referring a dispute back to the parties if the requirements of Section 41(3) have not been met. The Constitutional Court has taken compliance with this duty seriously. It has said that a court, including itself, will "rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level."[31]

Structure and Operation of Government

Separation of Powers

Locked into the Westminster mode of thinking for historical reasons, the negotiators of the Interim Constitution showed little enthusiasm for American-style presidentialism; consequently, they opted, as did most former British colonies (except for Nigeria in its Constitutions of 1978 and 1999), for a parliamentary system in the national sphere. The separation of powers was, however, elevated to Constitutional Principle VI: "There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." The Constitutional Court held that this principle does not require the formal separation of personnel between the legislature and executive.[32] A parliamentary system in both the national and provincial governments, therefore, does not violate this principle. However, although there is an overlap of personnel, the functions of the legislature and the executive have to be kept separate. In an early decision, the Constitutional Court struck down as unconstitutional an act that gave the president the power, in effect, to amend the act.[33] The Court held that the granting of regulatory powers to the president exceeded the bounds of the legislative powers that could be delegated to the executive because they entailed the power to amend the act itself.

National Parliament

National legislative authority is vested in Parliament, consisting of the National Assembly and the National Council of Provinces (NCOP). The Assembly may consist of between 350 and 400 members directly elected in terms of an electoral system that results, in general, in proportional representation for a period of five years. As of 1994, the number of members was 400, elected from closed party lists. To ensure that the Assembly is as inclusive as possible, a party need only receive 0.25 percent of the overall vote to get one member elected. In the 2004 election, in

addition to the three large parties (the ANC, Democratic Alliance, and IFP), a further eight small parties gained representation.

The NCOP was created to draw the provinces into the national legislative process. In line with American and Australian models of equal representation of states, each province, irrespective of size, has ten representatives in the NCOP. In loosely following the German *Bundesrat* model, four members of each provincial delegation are members of the provincial legislature with one seat reserved for the provincial premier. The other six members are appointed on a permanent basis by the provincial legislature, with the power of recall. Organized local government, represented by the South African Local Government Association, may also participate but not vote in proceedings dealing with local matters.

The NCOP's legislative authority is limited to provincial issues. With regard to legislation falling outside the provinces' concurrent and exclusive powers, the NCOP has merely a delaying power. In these cases, each NCOP member has an individual vote. Should the NCOP reject a bill, the National Assembly may adopt it with an ordinary majority. When a matter falls within the provinces' concurrent or exclusive powers, the law-making processes of the German *Bundesrat* have been followed in the main. The voting is by province, each provincial delegation having one vote. As representatives of the provinces, each delegation must obtain a mandate from its provincial legislature on how to cast its vote. Where there is a conflict between the Assembly and the NCOP, provision is made for a mediating committee. If the conflict still persists, the will of the NCOP may be overridden by a two-thirds majority in the National Assembly.

The NCOP does not yet have high political status, and considerable practical difficulties exist in getting mandates from the provinces.[34] The dominance of the ANC in eight of the nine provinces ensures concordance between the National Assembly and the NCOP, and legislation approved by Cabinet is rarely challenged by these provinces. The lack of resources, skills, and expertise of the NCOP and the provincial legislatures, coupled with a short period within which to obtain mandates on national legislation, has meant that no substantial provincial value has been added to the Parliament by the NCOP. On a structural level, in much the same way as intergovernmental relations in Canada are dominated by an extensive system of "executive federalism" because parliamentary government concentrates powers in the executive, the executive institutions of intergovernmental relations -- the meetings of the president and the nine premiers (called the president's Coordinating Council) and the meetings between national ministers and their provincial counterparts (called MinMECs) -- have eclipsed the NCOP's deliberative function.[35] After national legislation has been negotiated at the executive level, provincial executives are unlikely to add or raise anything of substance during the NCOP proceedings that conclude the legislative process.

Although Parliament has no veto over laws made by provincial legislatures or municipal councils, it may pass countervailing legislation, the supremacy of which will then be determined by the override rules. The provinces have, through the NCOP, a number of veto powers over national executive action. First, the NCOP may terminate an intervention by the national government in a province because all interventions must be confirmed by the NCOP (Sec. 100). Second, it may terminate the national Treasury's decision to stop the transfer of funds to a province because of the latter's alleged persistent or serious breach of financial management rules (Sec. 216). Third, along with the National Assembly, the NCOP must ratify all international treaties concluded by the national executive. Finally, as a component part of Parliament, the NCOP must approve declarations of "a state of national defense" (Sec. 203(3)).

National Executive

The president, who is the head of state and head of the national executive, is elected from among the elected MPs. To the extent that half of the 400 members of the National Assembly are elected on a provincial list via proportional representation, provinces participate in an attenuated way in the eventual election of the president. Except for a possible two members, the president must select the Cabinet from the National Assembly. On election, he or she vacates his or her seat in Parliament, but this does not terminate the president's or the Cabinet's accountability to the Assembly. Apart from the power to impeach the president by a two-thirds majority, in accordance with the true Westminster system, the National Assembly may, by a majority vote, remove the president and the Cabinet by passing a motion of no confidence.

Judiciary

In the 1996 Constitution, one of the founding values of the new democratic state is the "supremacy of the constitution and the rule of law" (Sec. 1(c)). Within this dispensation, the judiciary plays a key role in safeguarding and enforcing the Constitution. During the multiparty negotiations, the future of the judiciary appointed during the apartheid area was contentious. The liberation movements argued that the existing judiciary, mainly white, male, and comprised of enforcers of the apartheid legal order, could not be trusted as the guardians of the new democratic constitutional order. The National Party, however, sought their continuation in office. Although their tenure of office was eventually accepted, a compromise was struck on the guardians of the Constitution. On all constitutional matters, a new court, called the Constitutional Court, has the final say, while on all other matters, the then existing Appellate Division is the highest court of appeal. Given the years of executive dominance of the appointment of the judiciary, the objective was to depoliticize the appointment process by establishing the Judicial Service Commission (JSC). Both institutions, the Constitutional Court and the JSC, were retained in the 1996 Constitution.

As in India, there is one national judiciary. At the apex on matters constitutional, in the same mold as the German Constitutional Court, is the Constitutional Court, the ultimate interpreter and enforcer of the Constitution. On other matters, the Supreme Court of Appeal is the highest court. Below these two courts is the High Court, divided into a number of divisions, which eventually will coincide with the new provincial boundaries. The current divisions are based on pre-1994 jurisdictional boundaries, including the "independent" homelands.

At the base of the appointment of members of the judiciary is the JSC, which has a broad membership that includes representatives of the judiciary and the legal profession, six members of the National Assembly, and four permanent delegates to the NCOP. The premier of a province becomes a member of the JSC when considering a judicial appointment to a provincial division falling within the province. The president, after consulting the JSC, among others, appoints the judges heading the Constitutional Court and the Supreme Court of Appeal. The appointment of judges to the Constitutional Court is done by the president from a list prepared by the JSC. All other judges are appointed by the JSC.

Only the Constitutional Court may decide disputes between organs of state in the national and provincial spheres concerning the constitutional status, powers, and functions of any of these organs. The Court also makes the final decision on whether national or provincial legislation is constitutional. It decides the constitutionality of any amendment to the Constitution and whether Parliament or the president failed to fulfil a constitutional obligation. The certification of a

provincial constitution is a further duty. Finally, before a national or provincial act is put into operation, the Court has the power to review its constitutionality on application by the president, the National Assembly, or a provincial legislature.[36]

Provincial Governments

The provincial institutions largely mirror the national ones. Provincial legislatures are, however, unicameral. Their size varies between 30 and 80 members, with the exact number determined by a formula prescribed in national legislation. Members are elected for five years through a system of proportional representation based on closed party lists. The premier is elected from among members of the provincial legislature and appoints all members of the executive council from the legislature. As pointed out above, a province may in its constitution provide for executive and legislative structures that differ from those in the national Constitution. The Western Cape did so in the Western Cape Constitution of 1997 with regard to the size of the provincial legislature.

Municipalities

Democratic governance is mandated for local government across the country. The fully elected municipal councils combine both the legislative and executive in one. The interim measure that entitled a traditional leader *ex officio* to be a member of a council without voting rights lapsed with the implementation of the final phase of the local-government dispensation in December 2000. The Constitution further set out the basic internal procedures of the council to ensure democratic governance.

National-Provincial-Local Relations

Within the context of those principles of cooperative government that focus on the unity of the people and a strong ethos of equality, the consequences of residency in a province are, in terms of the Constitution, not significant. To the contrary, if a province discriminates on the basis of residency, the national government may intervene. National legislation prevails over provincial legislation if the former is necessary for the "promotion of equal opportunity or equal access to government services" (Sec. 146(2)). Further, national legislation is supreme if it is necessary for the "protection of the common market in respect of the mobility of goods, services, capital and labour" (Sec. 146(2)).

Although the Constitution does not establish mechanisms to facilitate intergovernmental relations, it requires the enactment of national legislation to do so (Sec. 41(2)). No such legislation is yet in place, but statutory mechanisms have been established in discrete areas, such as intergovernmental fiscal relations. As intergovernmental relations are left largely unregulated in the Constitution, there is no prohibition against interprovincial or intermunicipal agreements.

Fiscal and Monetary Powers

When South Africa reentered the international financial world after apartheid's years of isolation, it encountered a consensus that emphasized fiscal discipline and a strict monetary policy. The impact of this consensus on the constitution-making process is not clear, but it may have had an influence on what some commentators refer to as the two constitutions: a "political constitution" featuring most elements of a federal system and a "fiscal constitution" that has the hallmarks of a very centralized system. With the fiscal side of the 1996 Constitution largely determining how the political side functions, the end result is national dominance.

Taxation

There appear to be no limits to the national government's taxation power, a power that is not explicitly mentioned in the Constitution. The taxation powers of provinces and municipalities are listed explicitly. Severe limitations are placed on the provinces' powers, whereas the powers of local government are more substantial.

Under the Constitution, a province may impose taxes, levies, and duties other than an income tax, a value-added tax, a general sales tax, rates on property, or custom duties. In addition, a province may impose a surcharge on any nationally imposed tax, levy, or duty other than on a corporate income tax, value-added tax, rate on property, or customs duty (Sec. 228(1)). However, these powers must be regulated in terms of an act of Parliament. If there is no such act, as currently is the case, then there are no taxation powers. Arguably, there is a limit on the extent to which the national government could deny provinces taxation powers by failing to pass the necessary legislation; the Constitutional Court could well entertain a constitutional claim that the national government is obliged to pass the requisite legislation.

In contrast, municipalities' taxation powers of imposing rates on property and surcharges on fees for services (Sec. 229) are not dependent on national legislation, but they may be regulated by national legislation. In addition, if authorized by national legislation, municipalities may impose other taxes, levies, and duties except an income tax, value-added tax, general sales tax, or customs duty.

Apart from the limitation that provincial taxation powers are to be exercised in terms of national regulatory legislation, the Constitution provides that provincial taxation powers "may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital and labour" (Sec. 228(2)). Similar principles apply to the exercise of local government's taxation powers (Sec. 229(2)). With only municipalities currently exercising significant taxation powers, the issue of tax harmonization is relevant only to this sphere. National legislation may regulate any aspect of local government's taxation powers, and the harmonization of rates on property was being sought through the national Property Rates Act of 2004.

The "fiscal constitution" has resulted in an extreme case of vertical fiscal imbalance in which provinces are almost entirely dependent on national-government transfers while responsible for the execution of most social services. At present, provinces raise less than 5 percent of their total revenue. The main sources of their own revenue are gambling taxes and some user fees. This contrasts sharply with the 92 percent of total revenue that municipalities raise themselves. The remainder of municipal revenue comes from national transfers, with hardly any coming from the provinces. The main sources of municipal revenue are rates on property (21 percent), surcharges on service fees (32 percent), and licenses, fees, and fines (32 percent). With the budgets of some of the six metropolitan municipalities rivaling the budgets of the provinces in which they are located, the significance of local government in South Africa is apparent.

Borrowing Powers

The Constitution regulates the borrowing powers of provinces and municipalities but is silent with regard to the national government. The borrowing powers of provinces and municipalities are subject to more or less the same conditions in the Constitution (Secs 230 and 230A). These powers are to be exercised in terms of national legislation adopted after considering the

recommendations of the Financial and Fiscal Commission. Borrowing may be for capital or current expenditure, but in the latter case, borrowing may be done only when necessary for bridging purposes during a fiscal year. Provincial borrowing is governed by the Borrowing Powers of Provincial Government Act 48 of 1996 and the Public Finance Management Act 1 of 1999. Because these acts impose a tight framework, provinces engage in little borrowing.

Guarantees

In contrast to the Constitution's silence on loans incurred by the national government, loan guarantees provided by any of the three spheres of government (standing surety for the financial obligations of another body) must be subject to conditions set out in national legislation (Sec. 218). No explicit provision makes the national government the guarantor for provincial and local debt. The only reference in the Constitution that may suggest that the national government must come to the rescue of provinces is the constitutional obligation that the national government must, by legislative or other means, help provinces develop the administrative capacity required for the effective exercise of their powers and functions (Sec. 125(3)). With respect to local government, both the national and the provincial governments must "support and strengthen the capacity of municipalities to manage their own affairs" and to exercise their powers and functions (Sec. 154(1)). However, when the Supreme Court of Appeal interpreted the constitutional obligation of provinces to "support" municipalities, it held that support did not include standing in for a municipality's bad debt.[37]

Allocation of Revenues

The provinces' main source of income is national government transfers, which consume 58 percent of the national budget. Transfers are of two kinds. First, each province is entitled to an "equitable share" of revenue raised nationally, which forms the bulk of transfers. Second, conditional grants are issued at the national government's discretion. Municipalities are also entitled to their equitable share of the revenue raised nationally and may receive conditional grants. Every year, an act of Parliament must provide for the "equitable division" of revenue raised nationally between the three spheres of government as well as within the provincial sphere. The division is made in terms of guiding principles set out in the Constitution (Sec. 214(1)) that seek to secure equalization among the provinces and municipalities. The division of local government's equitable share among the 284 municipalities is done administratively by the national Treasury.

The "equitable share" of each sphere is determined through a three-stage process. First, the Financial and Fiscal Commission, composed of representatives of the three spheres, recommends how the cake must be sliced in accordance with the broad criteria set forth in Section 214. The commission has been guided mainly by provincial population size and measurable poverty. The second step is to consult with the provinces and local governments in the Budget Council and Budget Forum respectively. These bodies for intergovernmental fiscal relations are composed of representatives of the three spheres of government. The final determination is made by the national minister of finance subject to parliamentary approval of the annual Division of Revenue Bill.

Spending of Revenues

There are no constitutional limits on how the national government spends its share of the revenue raised nationally. The Constitution requires, however, that the procurement of goods and

services by all three spheres of government must be in accordance with a "fair, equitable, transparent, competitive and cost-effective" system prescribed in national legislation (Sec. 217(1)) and that such policy must include provisions to protect or advance persons or categories of persons disadvantaged by past discrimination (Sec. 217(2)).

Although there are no constitutional restrictions on how provinces use their equitable share, in practice spending is largely prescribed by the national government. The bulk of provincial expenditure goes to education, health, and social security. Most of the spending objects are determined by national standards. For example, in social welfare, pensions are determined nationally; the provinces are concerned only with the distribution of these grants. The end result is that 85 percent of all the funds a province receives have already been preallocated by the national government.

Monetary Policy

The Constitutional Assembly sought to insulate monetary policy from the vagaries of politics. The Constitution thus establishes a central bank, the South African Reserve Bank. Its primary objective is to protect "the value of the currency in the interest of balanced and sustainable economic growth" (Sec. 224(1)). In pursuing this objective, the bank must perform its functions "independently and without fear, favor or prejudice." However, there must be regular consultation between the bank and the minister of finance (Sec. 224(2)).

Foreign Affairs and Defence Powers

International relations fall to the national government: "The negotiating and signing of all international agreements is the responsibility of the national executive" (Sec. 231(1)). Furthermore, the president is responsible for diplomacy. Although provinces and municipalities do not have foreign-affairs powers under the Constitution, they have engaged in international relations, concluding a variety of memoranda of understanding and other agreements based on a general plenary power to conclude agreements in general.[38]

Provinces are brought indirectly into international relations through their participation in the NCOP. In contrast to the NCOP's limited veto powers over national legislation that directly affects provinces, it has a veto power over the ratification of international agreements. Except for self-executing executive agreements, "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces" (Sec. 231). No evidence has yet emerged that the NCOP has asserted its role in this field, which is symptomatic of its overall marginal role in Parliament.

The security services are a national concern. The Constitution provides for "a single defense force," which is "the only lawful military force" in the country (Sec. 199(1),(2)). The president, as the head of the national executive, has the authority to deploy the defence force (Sec. 201). As security is also subject to the authority of Parliament (Sec. 198(d)), the provinces may play an important role through the NCOP. A declaration of war ("a state of national defense") by the president lapses unless it is approved by Parliament within seven days of the declaration (Sec. 203(3)). Although the NCOP's consent is not expressly required, as a component part of Parliament, it codetermines the question.

Voting, Elections, and Political Parties

In a clear break from South Africa's apartheid past of race-based voters' rolls, the Constitution proclaims in Section 1 that the founding values of the republic include "[u]niversal adult

suffrage, [and] a national common voters roll." The common voters' roll applies to all elections to the National Assembly, provincial legislatures, and municipal councils. The Bill of Rights further entrenches the right of every adult citizen, with a minimum voting age of 18 years, to vote in elections and to stand for office in these legislative bodies (Sec. 19(3)). Precluded from standing as candidates are public servants, persons declared insolvent, those declared to be of unsound mind, and those convicted to serve a prison sentence of more than a year. In addition, every citizen has the right "to free, fair and regular elections" with respect to all political institutions (Sec. 19(2)).

The entire responsibility for registering voters, conducting elections, and declaring results has been entrusted to the Independent Electoral Commission. It is one of the State Institutions Supporting Constitutional Democracy listed and described in Chapter 9, which are, in terms of the Constitution, "independent, and subject only to the Constitution and the law and ... must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice" (Sec. 181(1)). The Constitutional Court held that because of its independence and the absence of control by the national government, it does not form a part of the national sphere of government for the purposes of adhering to the principles of cooperative government, including the duty to avoid litigation.[39]

The Bill of Rights guarantees every citizen the right to form a political party (Sec. 19(1)). There are no restrictions on the nature of a party, but other provisions of the Bill of Rights, such as freedom of expression, may impose limits. Freedom of expression does not extend to "propaganda for war" or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" (Sec. 16(2)). There is no explicit regulation of political parties, but the Constitution requires that "[t]o enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis" (Sec. 236).

Protection of Rights

In the same way as Germany responded to its Nazi past in 1949 by guaranteeing individual rights, including the right to equality, the protection of individual rights was high on the agenda of the constitution makers in the wake of apartheid's race discrimination and repression. The Interim Constitution of 1993 contained a chapter on "fundamental rights," while the final Constitution's Chapter 2 refers to a "Bill of Rights." In the latter, both the content of the rights and their application are innovative.

Because the struggle against apartheid was waged also in terms of international law, international human-rights law features prominently in the Constitution. The Constitution maintains the dualist system; that is, international conventions become part of South African law only on incorporation by domestic law unless they are regarded as part of customary international law. International human-rights law applies indirectly: In interpreting the Bill of Rights, any court or tribunal must "consider international law" (Sec. 39(1)). Furthermore, in interpreting any legislation, a reasonable interpretation that conforms with international law must be preferred (Sec. 232).

The Bill of Rights contains an extensive array of rights, from the classical civil liberties and political rights to modern socio-economic rights. Taking pride of place is the right to equality, followed by the rights to human dignity, life, freedom, security of person, and privacy. The freedoms of religion, belief, opinion, expression, association, movement, and residence are also guaranteed. Extensive rights are accorded to detained and accused persons.

Limited only to citizens are political rights, rights relating to citizenship, and the right to choose a trade, occupation, or profession. Section 3 of the Constitution provides that there "is a common South African citizenship." This entails that all citizens are "equally entitled to the rights, privileges and benefits of citizenship" as well as being "equally subject to the duties and responsibilities of citizenship." This section provides further that national legislation determines the acquisition, loss, and restoration of citizenship.

Controversial in the constitutional negotiations were rights relating to education, labour relations, and property.[40] Individual rights are recognized with regard to language, culture, and education. Having considered the Indian approach to second-generation rights through nonenforceable Directive Principles of State Policy, the Constitutional Assembly included enforceable socio-economic rights relating to housing, health care, food, water, social security, and education. Specific rights are bestowed on children, too. There are also rights of access to information, just administrative action, and access to courts. As mentioned above, the right of persons to belong to a cultural, religious, or linguistic community is the only right with a communal element.

The Bill of Rights binds all spheres of government. In addition, rights may apply horizontally to natural and juristic persons, depending on the suitability of the right and the nature of the duty imposed by the right. Influenced by Canada's Charter of Rights and Freedoms, the Bill of Rights also contains a limitation clause. In states of emergency, certain rights may be suspended temporarily. However, a number of rights are nonderogable, including equality with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion, language, human dignity, and life. This emergency-suspension provision has not yet been used.

The principal method of enforcing rights is through the courts. Any law or conduct inconsistent with the Bill of Rights is invalid and must be declared as such by a court. The Constitutional Court has invalidated numerous laws dating from the apartheid era (e.g., the death penalty). Less frequent has been the invalidation of laws passed by the new democratic Parliament. The Court has also been willing to enforce the socio-economic rights. With regard to the right of access to housing, the Court found the national government wanting for not having a policy on emergency shelter for persons in destitute situations.[41] In enforcing the right of access to health, it set aside a national policy on HIV/AIDS for being unreasonable.[42] In the latter case, the Court explicitly rejected the argument that its review of government policy violated the separation of judicial and executive powers. The Court asserted in this case and others that, as guardian of the Constitution, it has the power to review all aspects of executive actions.

With human rights high on the constitution makers' agenda, a number of independent commissions and institutions are provided for, namely the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The Human Rights Commission is tasked, in general, with promoting respect for human rights and, in particular, with monitoring the measures taken by government to realize the socio-economic rights.

Although the Constitution is silent about bills of rights in provincial constitutions, the Constitutional Court held in its judgment on certification of the KwaZulu-Natal Constitution that it is permissible for a province to adopt a bill of rights but only within the parameters of the province's constitution-making powers.[43] The KwaZulu-Natal Constitution was thus rejected by

the Court on the ground, *inter alia*, that through its provincial Bill of Rights, the province had arrogated for itself additional powers. The scope of a provincial bill of rights is limited: It may deal only with matters falling within the province's powers and may not subtract from the national Bill of Rights. When the Western Cape drafted its provincial Constitution, it opted instead for a set of unenforceable Directive Principles of Provincial Policy.

Constitutional Change

Constitutional entrenchment was a highly contested issue. For the National Party, the Constitution was to serve as an insurance policy against oppressive majoritarianism. Thus, at the outset of the negotiations, the NP sought constitutional entrenchment with majorities as high as 75 percent for the Bill of Rights and regional governments.[44] This was opposed by the ANC. In the end, the standard two-thirds majority prevailed in the Interim Constitution. The norm for the 1996 Constitution is also a two-thirds majority, but there are special majorities and procedures for some aspects of the Constitution. The role of the NCOP in the amending procedure depends on the provision at issue. Amending Section 1, the founding values of the 1996 Constitution, requires the supporting vote of 75 percent in the National Assembly and six of the nine provinces in the NCOP. The Bill of Rights may be amended only with the support of a two-thirds majority in the National Assembly and six provinces in the NCOP. With regard to all other matters, a two-thirds majority is required in the National Assembly. On these amendments, the support of six provinces in the NCOP is required only when the amendment relates to a matter affecting the NCOP, alters provincial boundaries, or deals with a provincial matter. When an amendment bill concerns a specific province (or provinces), the NCOP may not pass the bill unless it has been approved by the legislature(s) of the affected province(s). This gives provinces veto power over amendments directed at them.

As indicated above, the Interim Constitution was amended ten times during its less than three-year life. The first two amendments -- enlarging the powers of provinces and recognizing the principle of self-determination and the *Volkstaatraad* -- gave shape to the eventual form that decentralization took in the 1996 Constitution. Some of the ten amendments to the 1996 Constitution have facilitated a slow rolling back of the reach of decentralization. In 1998 the significance of provincial borders was tempered by making provision for the establishment of cross-border municipalities.[45] In the same year, the dissolution of a municipal council by a province was authorized indirectly.[46] In 2001 an amendment extended local government's borrowing powers by enabling municipal councils to bind themselves and future councils in order to secure loans or investments. By a second amendment in the same year, the hand of the national Treasury was strengthened vis-à-vis the other spheres.[47] The Treasury must now "enforce compliance" with measures ensuring transparency and expenditure control in all three spheres. The national law relating to procurement, applicable to all spheres, *must* prescribe a framework for affirmative action. National legislation may now determine a framework for the operation of the provincial revenue funds. The amendment also removed the limitation that national legislation may impose only "reasonable conditions" on the raising of loans by provinces. The representation that each province had in the Financial and Fiscal Commission has been replaced by three provincial representatives appointed by the president. A 2003 amendment eased the provisions for intervention by the national government in provinces as well as in municipalities.[48] Instead of having to secure the approval of the NCOP for an intervention within 30 days, the period was extended to 180 days. In the case of a financial emergency in a municipality, the provincial government is obliged to intervene, and if it does not do so

adequately, the national government may do so in its place. The overall objective is greater national control over the financial affairs of provinces and local governments.

The Future

The 1996 Constitution is the product of negotiations and compromise. Structured by the Constitutional Principles of the Interim Constitution, the 1996 Constitution secured a strong majoritarian national government functioning within the limits of an individual-rights regime. In the first decade of democratic rule, constitutionalism has been the norm. The role of the courts in enforcing the Constitution has not been questioned by the new political elite, and the courts have not shied away from their responsibility.

The establishment of provincial governments was an important part of the "negotiated revolution." It was an uneasy compromise that left open the question of whether the country would move toward more or less decentralization. Amendments over the past four years suggest that the trend is toward greater centralization. Even if decentralization survives as the basic form of the state, the present dispersal of power between provincial and local governments may not remain intact. With the establishment of local government as a strong sphere of government, led by six megametropolitan cities, the place and role of the provinces will come under increasing pressure. The result might thus be an hourglass configuration, with the provinces squeezed thin between the national and local spheres of government.

Whether South Africa will proceed down the road of decentralization mapped out by the Constitution depends on a number of factors. First, the Constitution establishes a normative framework consisting of a complex set of institutional and procedural rules. Governing within the constitutional framework and the laws that give it effect requires skill and resources, raising the question of whether the country has the institutional capacity to make decentralization work. Insufficient human and other resources may undermine the capacity of provinces and local authorities to fulfil their constitutional mandates, thereby creating the need for a more centralized government.

Second, the dominance of one party, the ANC, which governs nationally with 70 percent of the vote and is in control of all nine provinces (being the major party in coalition governments in KwaZulu-Natal and the Western Cape),[49] raises the question of whether the party, with its strong centralist organization and philosophy, will centralize the constitutional structure. Given that central-party control is a guiding tenet of the ANC and that all provincial premiers are thus appointed centrally rather than through provincial party structures, the ANC's dominance in South Africa's political life may not result in the development of strong provincial or local governments. However, the converse is also possible: Current practice in some provinces suggests that the federal dimension of the constitutional structure might make the party more federal in the long run.

How the question resolves itself may depend on whether a federal society or federal political culture comes to underpin the Constitution. Unlike in some other federations, decentralization in South Africa was not driven principally by historical nationalities or by ethnic or language groups. Although conservative Afrikaners and Zulu nationalists influenced the shape of the decentralized state, they were not the main drivers of the process. The desire to secure a strong central government was the main impulse. Consequently, the essential federal society or federal political culture that props up federal political structures is weak, leaving these structures vulnerable to any push toward centralization. However, political culture is not static,

and if South Africa proceeds along the decentralization road, a federal culture might grow apace in the provinces and municipalities.

Third, given that "party dominance is not a permanent state" and that the fortunes of parties fluctuate,[50] will the system of decentralization, in the absence of a dominant ANC, be able to deliver effective government to the people? Will a multiparty system be able to produce decisive ruling majorities in Parliament, and will the system of cooperative government deliver government across party lines? More broadly, is there a liberal democratic political culture capable of sustaining a multiparty system? The evidence emerging from KwaZulu-Natal on cross-party government is not always encouraging. The governing ANC and IFP coalition in this province between 1994 and 2004 has been fractious and unstable. Cooperative structures and relations between the province and the municipalities across ANC and IFP party lines are also tenuous.

Although multiparty politics pose a challenge to South Africa's constitutional democracy, decentralization provides an opportunity for its entrenchment. Multiparty democracy entails more than competition at the polls to determine who will be the governing party. It includes the notion that, first, different political parties may govern in different spheres of government and, second, that different parties so governing may work together to the benefit of the people of a province and the country as a whole. The establishment of a vibrant local democracy, then, is of immense value to deepening democracy nationally. The experience internationally is that pluralist politics must be learned, and subnational governments make a good school. A key challenge, then, is making multiparty democracy work in the subnational spheres within the cooperative government framework.

The Constitution was forged in the heat of political negotiations and compromise of the 1990s. It was intended to inspire nation building based on liberal democracy. Transforming society and political culture in this image of the Constitution is under way. In this endeavour, South Africa's Constitution will both influence and be influenced by the political culture in which it operates.

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[1]See Ronald L. Watts, "Is the New Constitution Federal or Unitary," *Birth of a Constitution*, ed. Bertus de Villiers (Cape Town: Juta, 1994), pp. 75-88 at p. 86; Richard Simeon, "Considerations in the Design of Federations: The South African Constitution in Comparative Context," *SA Public Law* 13, no. 1 (1998): 42-71.

[2]Eastern Cape (iziXhosa 82.8%); KwaZulu-Natal (isiZulu 79.8%); Northern Cape (Afrikaans 69.3%); Western Cape (Afrikaans 59.2%); North West (Setswana 67.2%); Free State (Sesotho 62.1%); and Limpopo (Sepedi 52.7%). Statistics South Africa, *Stats in Brief 2002* (Pretoria: Statistics South Africa, 2002), Table 2.11.

[3]Ibid., p. 11. Less than 1 percent of the population was classified as "unspecified or other."

[4]Countries with a gross national product per capita of between US$2,996 and US$9,265 are classified by the World Bank as upper-middle-income countries.

[5]See Nico Steytler, "South Africa," *Federalism and Civil Societies*, ed. Jutta Kramer and Hans-Peter Schneider (Baden-Baden: Nomos, 1999), pp. 295-317 at pp. 295-97; Nico Steytler, "Constitution-making: In Search of a Democratic South Africa," *Negotiating Justice: A New Constitution for South Africa*, ed. Mervyn Bennun and Malyn D.D. Newitt (Exeter: University of Exeter, 1995), pp. 63-80 at pp. 62-71.

[6]Penelope Andrews and Stephen Ellman, "Introduction: Towards Understanding South African Constitutionalism," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 1-19 at p. 1.

[7]See Cyril Ramaphosa, "Negotiating a New Nation: Reflections on the Development of South Africa's Constitution," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 71-84.

[8]See Roelf Meyer, "From Parliamentary Sovereignty to Constitutionality: The Democratisation of South Africa, 1990 to 1994," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 48-70.
[9]See Nico Steytler and Johann Mettler, "Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy," *Publius: The Journal of Federalism* 31 (Fall 2001): 93-106.
[10]Christina Murray, "Negotiating beyond Deadlock: From the Constitutional Assembly to the Court," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 103-27 at p. 106.
[11]Carmel Rickard, "The Certification of the Constitution of South Africa," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 224-304.
[12]*In re: Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (10) BCLR 518 (CC).
[13]*In re: Certification of the Amended Text of the Constitution of Republic of South Africa, 1996,* 1997 (1) BCLR 1 (CC).
[14]Heinz Klug, "Participating in the Design: Constitution-making in South Africa," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 128-63 at p. 133. See also Nico Steytler, ed., *The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order* (Cape Town: Wyvern, 1991).
[15]Klug, "Participating in the Design," p. 133.
[16]Steytler and Mettler, "Federal Arrangements."
[17]Christina Murray, "The Constitutional Context of Intergovernmental Relations in South Africa," *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government*, ed. Norman Levy and Chris Tapscott (Cape Town: School of Government, University of the Western Cape and Political Information and Monitoring Service, IDASA, 2001), pp. 66-83 at p. 77.
[18]Steytler and Mettler, "Federal Arrangements."
[19]*Premier of the Province of the Western Cape v. President of the Republic of South Africa*, 1999 (4) BCLR 382 (CC), para. 57.
[20]Ibid., para. 60.
[21]See Rassie Malherbe and Dirk Brand, "Sub-national Constitutional Law: South Africa," *International Encyclopedia of Laws*, ed. P. Blanpain (Deventer: Kluwer, 2001).
[22]*In re: Certification of the Constitution of the Western Cape, 1997,* 1997 9 BCLR 1167 (CC).
[23]Rudolf Mastenbroek and Nico Steytler, "Local Government and Development: The New Constitutional Enterprise," *Law, Democracy and Development* l, no. 2 (1997): 233-50.
[24]See Jaap de Visser, "Powers of Local Government," *SA Public Law* 17, no. 2 (2002): 223-43.
[25]Ibid., 234.
[26]See Nico Steytler, "Concurrency and Co-operative Government: The Law and Practice in South Africa," *SA Public Law* 16, no. 2 (2001): 241-54.
[27]See Nico Steytler, "The Settlement of Intergovernmental Disputes," *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government*, ed. Norman Levy and Chris Tapscott (Cape Town: School of Government, University of the Western Cape and Political Information and Monitoring Service, IDASA, 2001), pp. 175-206.
[28]*National Gambling Board v. Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC), para. 4.
[29]*In re: Certification of the Constitution of the Republic of South Africa, 1996,* 1996 4 SA 744 (CC), para. 287.
[30]Ibid., para. 291.
[31]*Uthukela District Municipality and others v. President of the Republic of South Africa*, 2002 (2) BLCR 1220 (CC), para. 14.
[32]*In re: Certification of the Constitution of the Republic of South Africa, 1996,* 1996 4 SA 744 (CC).
[33]*Executive Council, Western Cape Legislature v. President of the Republic of South Africa*, 1995 (4) SA 877 (CC).
[34]Richard Simeon and Christina Murray, "Multi-Sphere Governance in South Africa: An Interim Assessment," *Publius: The Journal of Federalism* 31 (Fall 2001): 65-92 at 78-9. See also Nicholas Haysom, "The Origins of Co-operative Governance: The 'Federal' Debates in the Constitution-making Process," *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government*, ed. Norman Levy and Chris Tapscott (Cape Town:

School of Government, University of the Western Cape and Political Information and Monitoring Service, IDASA, 2001), pp. 43-65 at p. 58.
[35]Steytler, "Concurrency and Co-operative Government," p. 246.
[36]See, generally, Rassie Malherbe, "The Role of the Constitutional Court in the Development of Provincial Autonomy," *SA Public Law* 16, no. 2 (2001): 255-85.
[37]*MEC for Local Governemnt, Mpumalanga v. IMATU*, 2002 (1) SA 76 (SCA).
[38]See Dirk Brand, "The Role of Provinces in International Relations," *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger*, ed. H-J. Cremer, T. Giegerich, D. Richter, and A. Zimmermann (Berlin: Springer, 2001), pp. 677-92 at p. 677; Nico Steytler, "Cross-Border External Relations of South Africa's Provinces," *External Relations of Regions in Europe and the World*, ed. Rudolf Hrbek (Baden-Baden: Nomos Verlagsgesellschaft, 2003), pp. 247-56.
[39]*Independent Electoral Commission v. Langeberg Municipality*, 2001 (9) BCLR 883 (CC).
[40]See Katherine Savage, "Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiating Process," *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellman (Johannesburg and Athens: Witwatersrand University Press and Ohio University Press, 2001), pp. 164-93.
[41]*Government of Republic of South Africa v. Grootboom,* 2000 (11) BCLR 1169 (CC).
[42]*Minister of Health and Others v. Treatment Action Campaign and Others (1),* 2002 (10) BCLR 1033 (CC); see also, Nico Steytler, "Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDs Policy in South Africa," *Publius*: *The Journal of Federalism* 33 (Winter 2003): 59-74.
[43]*In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996,* 1996 (11) BCLR 1419 (CC).
[44]Meyer, "From Parliamentary Sovereignty to Constitutionality," p. 54.
[45]Constitution Amendment Act 87 of 1998.
[46]Constitution Amendment Act 65 of 1998.
[47]Constitution Second Amendment Act 61 of 2001.
[48]Constitution Second Amendment Act 3 of 2003.
[49]Based on the results of South Africa's 2004 general election.
[50]Steven Friedman, "No Easy Stroll to Dominance: Party Dominance, Opposition and Civil Society in South Africa," *The Awkward Embrace: One Party-domination and Democracy*, ed. Hermann Giliomee and Charles Simkins (Cape Town: Tafelberg, 1999), pp. 97-126 at p. 104.