REPUBLIC OF SOUTH AFRICA

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In 1994 South Africa held its first democratic elections, shaking off three centuries of oppressive, undemocratic government, first by the Dutch and the British and, in the twentieth century, by a white, racist elite. The settlement that preceded the elections included a constitutional commitment to decentralization. This chapter is concerned primarily with the relationships between legislatures and executives in South Africa's new system. However, these relationships can be understood only in light of the overall architecture of the system and its political context.

The Constitution states that there is to be a single, united Republic of South Africa. This republic is divided into three "spheres" - national, provincial, and local - which are "distinctive, interdependent and interrelated" (section 40). Nine provinces have their status and powers secured in the Constitution. The third sphere, local government, also has a constitutionally entrenched role. However, the considerable power of the national sphere to direct and intervene in the affairs of provinces, and the similar powers of both the national government and the provinces to intervene in the affairs of municipalities, leads many commentators to deny that the system is federal. Indeed, at most, the Constitution establishes a weak form of federalism, and the term itself does not appear in the Constitution or in official documents.

To the extent that the system is federal, it is not a competitive, divided federalism with watertight compartments but, rather, an integrated and cooperative federalism. In this constitutional model the national government is clearly dominant - a dominance currently reinforced in political life through the hegemony of the ruling party, the African National Congress (ANC). But, as in Germany, a great many national policies are delivered by provincial and local governments.

Two principles guide the division of responsibilities. First, provinces share the authority to make laws on many major matters with the national government. The list of shared, or concurrent, powers includes most matters that are central to development in South Africa, such as education, health, and housing. In these areas the national and provincial legislatures have equal law-making powers. If they enact conflicting laws, provincial law will prevail, suggesting a presumption in favour of provincial authority. However, there is a major qualification. National law prevails if it meets a test set out in the Constitution (section 146). The Constitution lists a wide variety of circumstances that justify national supremacy – including the need for "efficient government." The result is that there are few real constraints on the assertion of national supremacy. This scheme is intended to ensure that the national sphere can impose national norms and standards while allowing provinces to respond to their own particular needs. The second principle is that provinces, and not the national government, will be responsible for implementing national laws that fall under the broad areas of shared competence. Hence the primary provincial role in the system is the delivery of nationally determined policies and programs.

Extensive powers are assigned to local governments, but they are subject to regulation by both the provincial and national governments. This is because, in many cases, local responsibilities are closely related to provincial or national functions. For instance, local governments are responsible for "municipal health services" while the national and provincial governments share responsibility for "health services." A similar pattern prevails in environmental matters and urban development.

The "soft boundaries" between the three spheres of government and the top-down character of the South African regime are also reflected in the power of the national government to intervene in the management of provincial and sometimes local governments and in the similar power vested in provinces to intervene in municipalities. Centralizing elements in the design are even more obvious in financial arrangements. The national sphere has a virtual monopoly on raising taxes and provides more than 95 percent of provincial revenue. Municipalities have slightly more fiscal autonomy than provinces through their power to raise property taxes.

Recognizing that the overlap built into the system demands a high level of intergovernmental coordination, the Constitution sets out principles of "cooperative government" to manage the

relationships between the three spheres. These principles were heavily influenced by the German concept of *Bundestreue*. They demand consultation, coordination, and cooperation among the three spheres of government and anticipate that intergovernmental relations will be regulated by national legislation (section 41).

As the rest of this chapter demonstrates, the model of shared powers has a significant impact on every aspect of government. It determines the role and functioning of the national Parliament, relationships between national and provincial legislatures and executives, the roles and practice of the central executive and provincial executives, and the development of local government.

But four basic elements of South Africa's political and social context are as significant to the way in which the system functions as is its formal design. First, South Africans are reluctant federalists. The ANC, which now governs the country, opposed strong provincial powers from the outset. It associated federalism with the hated apartheid "Bantustans." Its constitution makers believed that only though building a system of unified, concentrated authority could government address the immense challenges of building a united country out of a deeply divided society; deepening and widening democracy; and engaging in the massive tasks of economic development, eradication of poverty, and promotion of equality. Moreover, the motives of those proposing a federal system were viewed by many as attempts to protect enclaves of privilege. The political circumstances of achieving the "pact" that would make a transition possible ensured that the system would have many of the characteristics of federalism, but it was to be a federalism in which provinces and local governments would play a subordinate role in a nation-building project led from the centre.

Second, the South African democratic system is very new. It has just passed its tenth anniversary. Provincial government had to be created virtually from scratch at the outset; the implementation of local government is even more recent. The process of institution building has had successes, but it has also experienced many growing pains. To the dominant elites in South Africa "government" means the national government; decentralized institutions and the values of decentralization are not at the forefront of their minds. The complex system of shared powers remains poorly understood by citizens and political actors. The institutions and practices needed to make it work are still being developed, and there is an enormous gap between the intricate details set out in the Constitution and the realities of day-to-day political and administrative life. Citizens hardly identify with provinces. Yet, the Constitution opens the door to local and provincial autonomy and initiative and creates new political elites and new arenas for participation.

Third, all three spheres of government have very limited resources and capacity to built institutions and to carry out their substantial responsibilities. This is most obvious for local and provincial governments, but the national government also experiences resource constraints. These limitations are not simply budgetary. The scarcity of skilled policy makers, administrators, and professionals is a profound impediment to the development of effective government.

Finally, South Africa has a one-party dominant system heavily influenced by its Westminster origins. All nine provinces are governed by the ANC, which also commands 69 percent of the vote nationally. Party discipline (and loyalty) is strong, and the individuality and innovation that federal or multilevel systems may be expected to reflect and promote is yet to be seen. Provinces have developed little distinct political identity.

THE PEOPLE

The 2001 census[1] indicated a population of 44.8 million, of which black Africans comprise approximately 79 percent. The estimated GDP is US$491,400 million.[2] The majority of the population is urban. Disparities among the nine provinces are enormous. For instance, the arid Northern Cape, the biggest province, comprises 29.7 percent of the surface area of the country but has only 1.8 percent of the people. Urban Gauteng, the smallest province, comprises only 1.4 percent of the surface area but is the second most populous province with 19.7 percent of the population. Unemployment in the Eastern Cape has been estimated at 54.7 percent of the population aged between 15 and 65 years. In contrast, the unemployment

rate in the more wealthy Western Cape is estimated to be less than half that, at 26.1 percent.[3] As the *South African Human Development Report* of 2003 noted: "Poverty and inequality continue to exhibit strong spatial and racial biases."[4] Limpopo province rates at under 0.6 on the Human Development Index, while the Western Cape has the highest rating at 0.75.[5]

South Africa is also a country of minorities. There are 11 official languages and the most-spoken first language, Zulu, is the mother tongue of less than one-quarter of the population.[6] Although most of the country is Christian, no major grouping (such as Protestant, Roman Catholic, or African Independent Church) can command a majority of adherents.[7] Africans, nominally a majority, are divided on linguistic, religious, economic, and other grounds. However, politics is not primarily animated by these ethnic differences; instead, under apartheid, what dominated politics and economics was the fundamental divide between white people and black people. This divide continues to shape the views and priorities of those concerned with government and nation building. Whether the black-white difference will fade in significance and be replaced by linguistic and ethnic divisions within the majority remains to be seen, but the multiplicity of language groups, the concentration of some of these groups in particular provinces, and the continuing presence of traditional governments may suggest the future potential for ethnic political mobilization.

The final decisions on drawing the provincial map of South Africa were taken by political parties behind closed doors. This may suggest that particular interests were being served and that "a considerable degree of political horse-trading and that electoral calculations on the part of minority parties (including the national party, the democratic party, and homeland parties) played an important role."[8] However, the similarity of the current provincial boundaries to those of nine "development areas" devised by the South African development bank in the late 1980s suggests that, once negotiators agreed upon a small number of sizeable provinces rather than upon many small regions, discussions focused on some troublesome boundaries rather than on the broad parameters of the provinces.

Thus, despite the existence of many different ethnic groups, provincial boundaries are not designed to coincide with racial or tribal boundaries; indeed, given the distribution and mobility of the population, that would have been very difficult. Also, people do not identify themselves as citizens of provinces. South African constitution makers explicitly rejected the models adopted by many other federations, which are designed to empower distinct national or ethnic groups with their own political institutions. Cultural differences are recognized in the Constitution,[9] but these cultural identities are not empowered by federalism itself. As a result, debates about federalism in South Africa are not primarily about the resolution and accommodation of ethnic difference; rather, the provincial system is designed to deepen democracy and to enhance the equitable delivery of services.

HISTORY

The history of multijursdictional government in South Africa has been described by Nico Steytler in an earlier volume in this series.[10] In brief, decentralization of some form or another has been part of South Africa's constitutional design since 1910, when four British colonies merged to form the Union of South Africa. However, the four provinces that were created under the 1909 South Africa Act did not have protected powers, and government soon became highly centralized. The bantustan policy introduced by the apartheid government after 1948 introduced another form of decentralization. Part of this plan was to create ethnically distinct territories, which, in due course, would become independent states. The apartheid government declared four of these territories to be "independent" between 1976 and 1981, and four others were given extensive powers. This process was brought to an end by increasing resistance to apartheid policies during the late 1970s and 1980s. It left most South Africans with a deeply felt distaste for any form of federalism. As a result, in the negotiations to end apartheid and to establish democracy during the late 1980s and early 1990s, "federalism" was a dirty word, and progress became possible only when it was deleted from the discourse.

Now, quasi-federalism in South Africa can be seen as part of the "pact" that made a democratic transition possible, but its continuing contribution to democracy and development remains in question.

That question inevitably permeates the discussion of the executive and legislative institutions and the practices that are the focus of this chapter.

NATIONAL INSTITUTIONS

South Africa's Westminster heritage is evident in many aspects of the design and practice of its central institutions. It has a parliamentary system. The cabinet is drawn primarily from the National Assembly. Under the Constitution, ministers are both individually and collectively accountable to Parliament. As in other parliamentary democracies, virtually all legislation emanates from the executive and, with some notable exceptions, Parliament approves it with only minor amendments. There is no presidential "checking" or veto power, and the assent of the president to bills is required unless he or she has concerns about their constitutionality; if so, they must be referred back to Parliament for reconsideration. As a last resort, the president may refer such bills to the Constitutional Court (section 79).

There are some differences between South Africa's parliamentary model and its Westminster forebear. The most striking is that South Africa has no prime minister; instead, at its first sitting after an election, the National Assembly elects a president from among its members. The new president immediately resigns his or her seat in Parliament and assumes the position of both head of state and head of the national executive.[11] As head of state the president assents to bills passed by Parliament, makes various appointments on the recommendation of other authorities, recognizes ambassadors, pardons offenders, and confers honours (section 84). These powers must be exercised within the constraints of the Constitution and are subject to the bill of rights.[12] The president's role as head of the national executive is formally the same as that of a prime minister in a Westminster system. [13] The Constitution departs from the Westminster model by permitting the president to choose two members of the cabinet from outside the National Assembly (section 91(3)) and by setting a five-year term limit for the Assembly.[14] But the difference that these variations on the British parliamentary system introduce seems to be more apparent than real. The president does not have an electoral base independent of Parliament, and his or her cabinet perform executive functions subject to retaining the confidence of the legislature.

One significant difference between government in Westminster and government in South Africa lies not in the design of the system but, rather, in its practice. It is the government's attitude to opposition politics. The Westminster system embraces the notion of a loyal opposition, which is recognized as a "government in waiting" and is expected to criticize the government of the day. This idea has not taken root in South Africa, although the institution of the "official opposition" does exist; instead, a strong emphasis on consensus is propped up by the fact that there is no credible government in waiting.[15]

THE NATIONAL PARLIAMENT

The Constitution gives the national Parliament three main functions: it must pass laws, oversee the executive, and provide a forum for debate (section 42). In addition, the National Assembly is expected to choose certain officials (including the president) (section 42). While the National Assembly represents all South Africans as individuals, the second chamber, the National Council of Provinces (NCOP), represents the provinces, and its members are chosen by provincial legislatures. With characteristic detail, the Constitution spells out the oversight role of Parliament and demands public "access to and involvement in" processes in both houses (sections 59 and 72). This means that committee meetings are closed to the public only in exceptional circumstances and that public hearings are held on many matters. The Constitution also specifies that parliamentary rules must ensure that minority parties can participate in proceedings and committees "in a manner consistent with democracy" (sections 57 and 70).

The National Assembly

The 400 members of the National Assembly are elected on a closed-list proportional-representation system under which voters may vote just once for the party of their choice. The system was chosen with

simplicity and inclusiveness in mind. Illiterate voters could easily identify their chosen party. Moreover, a proportional representation system with no artificial threshold number of votes for representation in the Assembly ensures that even very small parties are represented. This was particularly important for the first election. As Andrew Reynolds comments: "It is probable that even with their geographic pockets of electoral support the Freedom Front (nine seats in the National Assembly), Democratic Party (seven seats), Pan-Africanist Congress (five seats), and African Christian Democratic Party (two seats) would have failed to win a single parliamentary seat if the elections had been held under a single-member district 'first past the post' electoral system. While these parties together only represent six percent of the new Assembly, their importance inside the structures of government far outweighs their numerical strength."[16] The proportional representation system has also contributed to the relatively strong representation of women in Parliament.

Although to voters the system appears to be one in which the country is treated as one huge constituency, it does have a provincial element. Half of the 400 seats are filled from provincial lists supplied by the parties;[17] the remaining half come from the parties' national lists. The number of seats allocated to each province to be filled from provincial lists is based on the population of the province. The purpose of provincial lists was apparently to ensure some links between parties and their provincial voters. However, most voters are unaware of this nuance in the system, and, in any event, the provinces from which these lists are drawn are so large that voters are unlikely to see them as providing a closer tie with political representatives. Nevertheless, politicians in some parties do seem to take these seats seriously. For instance, there is some evidence that ANC politicians would prefer their names to appear on the provincial list than on the national one because this shows that they have real support from local party members and are not merely placed on the list by the party elite. The national lists may be more important for the representation of diversity than are the provincial lists. These lists are usually reviewed by party leaders and adjusted to ensure that seats are secured for representatives of diverse groups and people with necessary skills.

Like other legislatures in Westminster-based systems, the work of the National Assembly is dominated by government business. However, with some exceptions, the committee system is vibrant, and the constitutional requirement that minority parties should be represented on committees contributes to timetables that enable very small parties represented in the National Assembly to join a reasonable number of committees. (Of the 12 parties currently represented in the National Assembly, nine have fewer than ten seats.) Over the past five years the National Assembly has frequently discussed its oversight role, which is so emphasized in the Constitution, but the practice of oversight remains weak where the interests of the ANC are threatened. Moreover, in the period set aside to question members of the executive, parties are allocated time according to the proportion of seats they hold, giving the ANC control of most of that part of the agenda. This degree of executive control over legislative business is, of course, the norm in parliamentary systems with majority governments. What is unexpected is the fact that, although the ANC government faces no realistic possibility of defeat, it has not eased party discipline.

The National Assembly plays little role in reflecting federalism and regionalism. Even those members selected from provincial lists do not see themselves as provincial representatives. However, the National Assembly cannot ignore the implication of the multilevel system entirely. For instance, in a dramatic break from apartheid parliamentary tradition, the National Assembly and the other South African legislatures are constitutionally committed to the participation of the public in their proceedings. This has led to some disagreement. Provinces have argued that they should be responsible for holding public hearings and reporting back to Parliament on the results through the NCOP. The National Assembly retorts that it represents all South Africans and can hold hearings both at its seat in Cape Town and elsewhere. Oversight raises similar issues about the division of responsibilities. For instance, can the National Assembly oversee local government or the implementation of national legislation by provincial executives? These and other similar questions have yet to be answered.

The National Council of Provinces

The NCOP is an ambitiously designed federal house. The Constitution describes its role as representing the provinces "to ensure that provincial interests are taken into account in the national sphere of government" (section 41[4]).[18] In fact, as an institution linking all three spheres of government (local government may send a delegation to the NCOP), it should do far more than bring provincial interests to the attention of the national government. It is a concrete expression of the commitment to cooperative government in chapter 3 of the Constitution and has the potential to become a vibrant arena of cooperative government, with an active program of inter-legislative relations.[19]

The NCOP has three main responsibilities. It considers and passes national bills; it balances the interests of the three spheres of government through a number of very specific oversight tasks allocated to it by the Constitution; and, through these and other activities, it attempts to ensure that government in South Africa is a partnership. Provinces should not act in isolation but, rather, should be alert to national needs and interests; conversely, national legislation and policies should be sensitive to provincial needs and concerns.

Membership of the NCOP is based primarily on provincial representation. Each of the nine provinces sends a ten-member delegation to the NCOP. A similarly sized delegation from organized local government may participate in the NCOP but may not vote. Each provincial delegation includes members of the provincial legislature (drawn from different parties) and the executive. Delegations are made up of six "permanent" delegates and four "special" delegates. The permanent delegates are appointed by the provincial legislature after a provincial election on the basis of the nominations of the parties entitled to delegates. (A constitutional formula ensures that representation on the permanent part of a provincial delegation to the NCOP is proportional to the representation of parties in the provincial legislature.) The four special delegates in each delegation are members of the provincial legislature chosen to represent the province from time to time on the basis of their expertise in the particular matters coming before the NCOP. The overall composition of the delegation must also reflect the party balance in the legislature and is supposed to represent both the provincial legislature and the provincial executive. The provincial premier or his or her nominee is head of the delegation, and the agreement of the legislature, the premier, and party leaders is required for the designation of other special delegates.

Although provincial politicians, recently schooled in the doctrine of separation of powers, find it difficult to understand, the representation of both the executive and the legislature on the provincial delegation is critical. This is because, under the South African system of shared powers, the provincial delegations in the NCOP must consider and pass any national legislation that imposes responsibilities on the provinces. The participation of the provincial executive is necessary because it is best placed to assess the ability of the province to implement proposed legislation. The participation of members of the provincial legislature is intended to act as a check on executive decision making and to provide a link to the provincial electorate.

The NCOP considers all national bills, but it has most influence over those that affect provincial powers. When dealing with these bills, each provincial delegation in the NCOP has just one vote, and the delegation must cast that vote on the instructions of the provincial legislature. An elaborate process of consultation between NCOP committees and provincial legislative committees is needed to manage this process. If the NCOP refuses to pass such a bill, or proposes amendments to which the National Assembly does not agree, the Constitution instructs that the bill must be sent to a mediation committee on which the NCOP and National Assembly each have nine representatives. The Mediation Committee has no decision-making powers but is intended to negotiate a solution to the impasse that will be approved by both houses. Should agreement between the two houses not be reached, the National Assembly can override the objections of the NCOP with the support of a two-thirds majority of its members. Although the absence of a final veto power suggests that the NCOP is weaker than the German *Bundesrat* upon which it is modelled, it is unlikely that the National Assembly will easily muster a two-thirds majority on a bill that has failed to command the support of even five of the nine provinces.

The NCOP's formal influence over bills that do not affect provincial powers is limited. Here it acts primarily as an arena of "sober second thought." Should it reject, or propose amendments to, such a bill, the bill will nevertheless become law if the National Assembly passes it again with a simple majority.

When the NCOP takes decisions on these matters, voting is not by delegation; rather, each delegate has one vote, and voting is effectively along party lines. When the NCOP is criticized for paying inadequate attention to provincial interests and failing to maintain real contact with the provinces, delegates frequently assert that their role in these non-provincial matters justifies the attention that they pay to national, as opposed to provincial, issues. Certainly, the Constitution anticipates that the NCOP will consider non-provincial matters. However, the emphasis placed on them contributes to the NCOP's failure to fulfill its primary role as a house of the provinces.

The NCOP's responsibility to monitor relationships between the spheres of government is as important as is its role in law making. The Constitution grants the national government substantial powers to intervene in relation to underperforming provinces and gives provinces even more drastic powers in relation to failing municipalities. It also allows the national executive to block the transfer of the equitable share of revenue to a province if it is being mismanaged. As this grant comprises about 95 percent of a province's budget, this is a drastic power. The NCOP provides a check. It may stop an intervention in a province by the national executive and overturn a decision to stop provincial funding. It has less power over provincial interventions in municipalities but must oversee these actions as well. In taking decisions here, as with law making, the delegations in the NCOP must act on the instruction of their provincial legislature.

The NCOP's third responsibility is to promote cooperative government by bringing provincial concerns to national attention, by ensuring provinces understand national concerns, and by providing a forum both for provinces to interact with one another and for local government to be heard by the national government. It is designed as a house of provinces, intended to complement rather than to duplicate the National Assembly's role. The participation of members of both the provincial executive and the legislature in delegations and the requirement that delegations vote on the instruction of their provincial legislatures is intended to avoid government by the executive as seen in the *Bundesrat*. Constitution makers may not have envisaged a totally independent second house, but they certainly saw the NCOP as a house in which provincial legislatures would engage actively with the National Assembly and the national executive. In practice this vision has not been effectively realized.

The NCOP has made progress in some respects. It runs relatively smoothly, the massive challenge of effective liaison with provincial legislatures has been met, and its internal organization is stable. Its greatest success has been in overseeing provincial interventions in municipalities. Provinces have intervened in municipalities to maintain service delivery and to manage budget processes on a number of occasions since the new local government system was established in 2000. The NCOP's role here is an excellent example of the impact of the ANC's political dominance. It has enabled the NCOP to fashion its oversight role as one focused on the shared vision of transformation and the need to build and strengthen new institutions (such as municipalities). Here oversight is, by and large, not competitive and adversarial but supportive.

The most significant failure of the NCOP is in its consideration of national bills. Members of provincial executives simply do not engage in the consideration of bills before the NCOP. A common explanation is that provincial ministers have already expressed their views on proposed laws in executive intergovernmental forums. However, as discussed later, those forums are often top-down information sessions run by the relevant national minister. They seem seldom to provide a real forum for assessing the feasibility of national policies. The engagement of provincial legislatures with national bills is equally weak. In the eight years since the NCOP was established, few amendments that reflect provincial concerns have been proposed by provinces. The failure of the NCOP to fulfill its main law-making role properly simply means that the national government takes over any real legislative role that might be played by provincial legislatures and executives. As in Germany, national legislation that is to be implemented by the provinces is very detailed. No room is left for provincial legislatures to supplement the programs it prescribes.[20]

These failures of the NCOP have many causes. Some are political. The hegemony of the ANC discourages the expression of strong provincial views in national politics. The NCOP's status is undermined by the general antipathy of many politicians and bureaucrats towards the provincial system.

For instance, it is common to hear of politicians being "promoted" from the NCOP to the National Assembly. Often it is suggested that delegates to the NCOP are chosen from candidates whose names were too low on the list to win a seat in the provincial legislature. The newness of the system and the complexity of its design also contribute to its limited success. Many provincial legislatures are weak and struggle to fulfill their own provincial responsibilities. They cannot meet the considerable demands of the NCOP, which require them to consider complex national legislation in a very brief period. Communication between provincial delegations and the provincial legislatures and executives requires extraordinarily efficient legislative bureaucracies both in the NCOP in Cape Town and in the provinces.

The question that dominates this chapter is applicable here: is the weakness of the NCOP to be attributed to the complexity of its design, to the challenges of setting up new institutions in a transitional democracy with limited human resources, or to the current political landscape? The answer is probably "all of the above." This means that it is too early to assess the institution properly.

THE NATIONAL EXECUTIVE

As already noted, the Constitution formalizes many conventions of Westminster parliamentary government. This is particularly evident in the constitutional provisions on the composition, operation, and functions of the national executive, or cabinet.[21] The cabinet is headed by the president, who takes on the role of a prime minister. The Constitution instructs the president to select his or her cabinet colleagues from among the members of the National Assembly; it unequivocally spells out the principles of individual and collective cabinet responsibility under which cabinet and all its members must account to Parliament; and it sets out procedures for and the consequences of votes of no confidence. It also lists the functions of the executive. However, from the perspective of scholars of federalism, it is not the detail of the constitutional provisions on the national executive that is interesting but two omissions. First, the Constitution does not demand power sharing. The South African president, like a Canadian or Australian prime minister, is not constitutionally restrained in the choice of cabinet colleagues. Second, the Constitution's otherwise detailed chapter on the national executive does not mention any responsibilities that the system of shared powers may place on the national executive.[22]

Power-sharing was a key element of the 1993 settlement that enabled the 1994 elections to take place. The 1993 interim constitution established a government of national unity with a multiparty cabinet for the first five years of democracy. Under this arrangement, any minority party with more than 20 percent of the vote was entitled to choose a deputy president, and each minority party was entitled to a member of cabinet for every 5 percent of the vote it commanded.[23] The majority ANC's main partner in the cabinet, the National Party, withdrew from this arrangement within three years, believing that, as a junior member of government, it had little influence, that its close identification with the majority ANC restricted its ability to build its own constituency, and that it would be more effective in opposition.[24]

Although many foreign observers advocated some form of executive power-sharing as the best way to deal with the deep racial divisions in South Africa, its rejection by constitution makers was not surprising. The experience of the defeated apartheid government, the National Party, as a junior member of the new cabinet confirmed the weakness of a power-sharing model in a system in which one party commands such a huge majority of the vote; instead, negotiators relied on the supremacy of the Constitution, a strong bill of rights, and independent courts to protect their diverse interests.

Since 1999 there has been no formal constitutional requirement for multiparty representation in cabinet, but the idea lingers on. Typically the president draws a small number of minority party members into cabinet. Today this co-option is not based on a need to bring opposing parties on board but, rather, on a deeply held South African belief in the importance of consensus politics. Cynics view this as a way of undermining opposition challenges (in particular) as collective cabinet responsibility prevents cabinet members from openly criticizing government policy.

The omission of power-sharing arrangements from the constitutional provisions on the national executive is not surprising; but the second omission - the absence of any express reference to multilevel government in the constitutional description of the responsibilities of the national executive - is critical.

This is because so much of what the national executive does involves provinces and local governments. The national government effectively determines their powers, depends on them to implement national laws, funds them, and monitors, supervises, and regulates them. It can take few decisions without considering their impact on provinces. The implementation role of provinces closely ties national policy to their capacity to perform. It also demands complex coordination between national departments responsible for national competences (such as justice and water) and both national and provincial departments working in related areas (such as social services and agriculture). For instance, policy relating to the detention of children awaiting trial by the national Department of Justice depends for its implementation on the provision of "places of safety" by the nine provincial welfare departments. In theory, these programs should be coordinated by the national government through national norms and standards and properly assured intergovernmental coordination. Indeed, since the 1997 report of the Presidential Review Commission, much attention has been paid to making cabinet more effective. Nevertheless, despite the fact that provinces are written into the plans, the disparate capacity of the provinces, the limited resources of the national government, and, some say, the absence of any inclination on the part of the national government to develop the political capacity of provinces, mean that coordination is weak. Provinces remain junior partners, instructed on their responsibilities rather than consulted.

Although the system of shared powers shapes the practice of government, it has had no obvious impression on the composition of cabinet and the allocation of portfolios. Unlike in Canada, for instance, in South Africa there is no expectation that provinces will be "represented" in the cabinet. Similarly, no cabinet members have responsibility for different regions. Nevertheless, recently there has been some public debate about what is perceived as the overrepresentation of two provinces in cabinet. This may signal the beginning of increased pubic demands for diversity in the executive.

Two other features of the national executive branch of government are important in understanding multilevel government in South Africa. First, the Constitution requires a single public service. This means that, technically, bureaucrats in the national and provincial administrations are all part of the same service, which "must function, and be structured, in terms of national legislation"[25] (section 197[1]). The implications of this were tested when the national Public Service Act[26] was amended to require a uniform change to the responsibilities of provincial directors-general. The Western Cape challenged the new legislation, arguing that national legislation that prescribed the structure of its administration infringed on its autonomy, but it lost the case.[27] Further central control is placed on provincial governments by constitutional provisions that require national legislation to regulate the terms and conditions of employment in the public service. Provincial governments may appoint and manage their own staff within a "framework of uniform norms and standards" (section 197[4]). However, salaries are negotiated centrally. As salaries make up 50 percent of most provincial budgets, the constraint that this places on provincial spending is considerable.

Second, the role of the national Department of Provincial and Local Government is to "have an effective and integrated system of government consisting of three spheres working together to achieve sustainable development and service delivery."[28] The location of this department in the national sphere allows it to work with other national departments to coordinate programs that are to be implemented by the provincial and local governments. However, it also contributes to a sense that the national government is firmly in control.

THE NATIONAL JUDICATURE

The role of the courts in South Africa changed radically in 1994 when a system of parliamentary sovereignty was replaced by constitutional supremacy. Now the Constitutional Court has the final say over the interpretation of the Constitution, and laws and executive actions that are unconstitutional can be declared invalid by the courts.

Justice is a national function, and the courts are structured in a single hierarchy. No courts fall under provincial jurisdiction.[29] Provinces have a very limited role in the justice system. The only

constitutional concession to possible provincial interest in the courts is the inclusion on the Judicial Service Commission of the relevant provincial premier when a matter relating to a provincial high court, including appointments, is before it (section 178[1] [k]).

With a few exceptions, all courts, except magistrates' courts, the lowest level of civil courts, and courts of traditional leaders, may decide on the constitutionality of laws and executive action. The Constitutional Court has exclusive jurisdiction over relationships between organs of state in the national and provincial spheres, the constitutionality of provincial constitutions, and, at the request of either the president or the relevant provincial premier, the constitutionality of national or provincial bills (section 167). In addition, only the Constitutional Court can decide that "Parliament or the President has failed to fulfil a constitutional obligation" (section 157[4] [e]). High courts and the Supreme Court of Appeal may declare national and provincial acts and conduct of the president unconstitutional and thus invalid, but their decisions are subject to confirmation by the Constitutional Court.

The powerful Constitutional Court is the most significant check on the exercise of state power. Its independence is protected in the Constitution, and its judges are appointed by the president from a short list drawn up by the Judicial Service Commission (section 174).[30] The Constitutional Court has a rather unusual role in relation to provincial constitutions. A provincial constitution does not become law until the Constitutional Court has certified that it complies with the national Constitution (section 144). The court has been asked to fulfill this role on two occasions. In both cases it rejected the proposed provincial constitution but, in the case of the Western Cape, it finally approved an amended constitution.[31] Generally, as discussed below, in disputes relating to the multilevel system, the Constitution expects the courts, including the Constitutional Court, to use their power sparingly. Section 41(3) requires parties involved in intergovernmental disputes to "make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." If a court is not satisfied that this has been done, it is entitled (and perhaps expected) to refer the dispute back to the parties to reach a settlement. The Constitutional Court has used this provision twice to avoid deciding matters,[32] but the dominance of the ANC in the local, provincial, and national spheres means that it has not really been tested.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

The Constitution establishes a "default" constitution for provinces. Provinces may depart from it within limits defined by the national Constitution by adopting their own constitution. Presently only one province (the Western Cape) has a constitution, and its departures from the national Constitution are minor.[33] Provincial constitution making is discouraged. There is a widely held view that provincial constitutions would be divisive, and now that the Western Cape is governed by the ANC, there is talk of repealing its constitution. However, KwaZulu-Natal, which failed in an attempt to adopt a provincial constitution in 1996, is once again considering a constitution. Unlike its unsuccessful predecessor, this proposed KwaZulu-Natal constitution is unlikely to contain innovations. Its purpose would be to take up the opportunity offered in the national Constitution to make provision for the Zulu king, thereby settling a matter that has threatened to destabilize the already volatile political settlement in the province.

Under the Constitution, provincial legislatures and executives are to operate in the same way as does the national Parliament and executive. The only major difference in the design of provincial institutions is that they have unicameral legislatures. Less important variations are that a provincial premier remains a member of the provincial legislature on election, unlike the national president, who resigns his or her seat; that provinces do not have deputy ministers; and that a provincial executive is limited to eleven members (section 132). The key difference lies not in the design of these institutions but in politics. When the ANC controls a province, the premier is appointed – "deployed" in South African terminology – by the national president. This has a direct impact on the ability of the provincial government to act as an autonomous instrument of its own electorate. Normally in parliamentary systems the premier and cabinet derive their legitimacy and authority from the fact that they are the leaders of the majority party in the legislature and are responsible to it. Deployment from the centre means that the

premier is in fact accountable not to his or her legislature but, rather, to the central authority. Nor is the premier accountable to the local party organization. Its leadership may be excluded from cabinet representation. This creates tensions between the local party leadership and the provincial government, which now essentially acts as an agent of the centre. The result is that provincial government has limited legitimacy, and its role as a democratic institution representing the local population is eroded. Moreover, the pattern undercuts the checks and balances implicit in the multisphere design of the system.

LEGISLATURES

In a federal system the subnational legislatures are usually expected both to deepen democracy by providing representation that is closer to the people and to promote more effective government by ensuring that policies reflect local needs and interests. In South Africa the second role is intended to be fulfilled in two ways – through the development of provincial legislation and through provincial engagement with national legislation in the NCOP. Provincial legislatures in South Africa have a third role. Together with the provincial executive they are expected to support and supervise local government (section 155[6] and [7]).

There is consensus that South Africa's provincial legislatures fail on all of these counts. The question is whether failure is built into the system or whether it is a result of the newness of the system and the current political context.

Provincial electoral systems are prescribed by national law. The constitutional framework for this law is substantially the same as that for the National Assembly; the electoral system for the provinces must result "in general in proportional representation" (section 105[1]). Within this framework the Constitution permits variation between the national and provincial systems. The Western Cape attempted to institute an alternative electoral system. Its draft constitution proposed a mixed system on the German model in order to introduce an element of constituency representation. However, the Constitutional Court rejected the plan, holding that the province was not entitled to design its own system.[34]

Provincial elections are currently held on the same day as are national elections. In fact, it was only after protracted debate in the 1993 constitutional negotiations that agreement was reached that separate ballots should be used for the election of provincial legislatures and the national Parliament. Electoral campaigns are dominated by national concerns, and provincial leadership battles do not reflect provincial concerns. Nevertheless, the opportunity for voters to split votes is a way of reminding them that provincial legislatures are, in fact, distinct from the national Parliament. Some voters have used the system to split their votes, and it seems that generally small provincial parties have benefited.[35] Significantly, although the ANC controls every provincial legislature, the composition of the opposition varies considerably from province to province.

Like the National Assembly, provincial legislatures usually serve a term of five years. As in the case of the National Assembly, the Constitution allows earlier dissolution of a provincial legislature by a vote of a majority of its members, provided three years have passed since its election. Should a provincial legislature use this power, provincial and national elections would no longer be synchronized. This is clearly viewed as undesirable by the national government, and a threat to call an early election in KwaZulu-Natal in 2003 was deftly averted through intense negotiations between political leaders in the province and in the national government.

Provincial legislatures are also expected to engage actively with the public in between elections. Proceedings in the legislatures are open to the public, and the Constitution enjoins the provincial legislatures to facilitate public involvement (section 118). In practice, public participation varies greatly from province to province with public hearings almost routine in some and rare in others. A recent survey suggests that civil society organizations are more likely to engage with provincial legislatures than with the national Parliament.[36] Nevertheless, surveys tell us that citizens in South Africa have less contact with their political representatives than do citizens in other Southern Africa Development Community states and that trust in provincial governments is low.[37]

The record of provincial legislatures in promoting effective government either through developing provincial law tailored to their particular needs or ensuring that national legislation that binds provinces is sensitive to provincial needs is equally patchy. The fact that provincial legislatures pass very few laws is often pointed to as evidence of their failure. This seems unfair. At present, as the national government is committed to implementing a massive national transformation program, the most important role of provincial legislatures is to ensure that national programs are workable and to oversee their implementation. However, although one or two legislatures spend a substantial amount of time on national legislation and participate conscientiously in the NCOP, many others hardly engage with it. The problem is not one-sided. Provinces that do attempt to participate complain that their contributions are not always welcome. The "uncooperative" style that characterizes executive intergovernmental relations in South Africa is sometimes also experienced in the NCOP.

Provincial oversight programs are no better. Again, although one or two provincial legislatures have started implementing oversight programs, others do little or no oversight. The complexity of overseeing programs developed by the national government and, in effect, merely delivered by provincial executives compounds the problems.

The third responsibility of provincial legislatures is to support local government. The legislative role here is clearly subordinate to that of the provincial executive. To avoid developing a sense that municipalities are accountable to the provincial legislature rather than to their own electorate, provincial legislatures should fulfill this role primarily through oversight of the provincial department of local government rather than through direct contact with municipalities. Either way, however, although a number of provincial legislatures plan to carry out this function, very little has been done.

Aspects of the design of the overall system of multilevel government and the provincial legislatures may contribute to the poor performance of the legislatures. For instance, some provincial legislatures are very small. Three have only 30 members. Once the premier and executive have been drawn off and a speaker elected, these provinces are left with just 18 active members. Yet they are expected to deal with large quantities of national legislation as well as their own business. These undersized legislatures are found in provinces with smaller populations and fewer skilled people to draw on as legislative staff. Second, the relationship of provincial ministers (MECs) to provincial legislatures is ambiguous. Although formally they are accountable to the legislature (section 133), the implementation of national legislation is their main concern. As suggested below, there is a strong impetus for them to account to the national government rather than to their provincial colleagues. This, and the operation of a parliamentary system that concentrates power in the executive, weakens provincial legislatures.

Together with the NCOP, provincial legislatures are the most controversial institutions in South Africa's system of government. A strong body of opinion would have them abolished: "If provincial legislatures do not serve to deepen democracy, there is no use in maintaining them." Others argue that the huge developmental needs faced by the country demand a strong central government. They see the subservient nature of provincial legislatures as an unfortunate but necessary trade-off for effective government and argue that, even if they work imperfectly, provincial legislatures provide a useful training ground for politicians.

EXECUTIVES AND ADMINISTRATION

By design, the provincial executives, like the legislatures from which they are drawn, are fully fledged provincial institutions independent of the national sphere. The Constitution stipulates that, after an election, each provincial legislature must elect a premier from among its members and, as in the national sphere, the premier then selects a cabinet (called an executive council) from the members of the legislature. The Constitution restricts the size of provincial cabinets to eleven members, including the premier. The provincial premier plays much the same role in the provincial sphere as the president does nationally. For instance, he or she signs provincial bills, may appoint commissions of enquiry, and may call a referendum (section 127). The premier is also head of the executive council and serves at the pleasure of the legislature (section 130).

The autonomy of provincial executives is limited in two significant ways – by the Constitution and by political practice. First, as already outlined, the system of shared responsibilities casts provincial executives and their administrations as implementers of national policy and not as initiators of policy. Each province must implement national legislation that falls within the list of shared competences. Even if it does adopt its own laws on these matters, the province must maintain the norms and standards that are set in such national legislation. In practice, provinces have few of their own laws and instead operate within the legislative framework established nationally. The main function of provincial executives and the administrations that they control is to implement national legislation.

Second, the provincial executives are subordinate to the party's central executive. As noted earlier, in ANC-led provinces, the premier is chosen by the national leader of the ANC, the national president. In 2004 the identity of provincial premiers was not revealed to voters until after the elections and so could not influence the casting of votes. Past practice also suggests that the National Executive Committee of the ANC plays a role in the composition of provincial cabinets.[38] There are instances of provincial individuality. For instance, in 2002, following the lead of a province then held by an opposition party, Gauteng broke ranks with the national government on its policy on the supply of drugs to people living with HIV/AIDS.[39] But such examples are rare.

These two factors, one constitutional and one political, determine the relationship of provincial members of the executive council to the national executive and national ministers. Intergovernmental forums are frequently reported to be top-down, and provinces seem to be silent. One commentator has noted that the provincial ministers view themselves as deputies to the national ministers. The question once again is: are these practices determined by the design of the system or by the current context? We will return to this question below.

LOCAL GOVERNMENT

Local government has a key place in South Africa's constitutional vision of transformation. For constitution makers, municipalities closely linked to their communities and at the front line in the delivery of government services offered real opportunities to deepen democracy and to promote development. Accordingly, local government is a separate sphere of government, with constitutionally secured powers and subject to and protected by the same principles of cooperative government that apply to the national and provincial spheres. The introductory section to the Constitution's chapter on local government draws on the German Basic Law to state that "A municipality has the right to govern, on its own initiative, the local government affairs of its community" (section 151[3]). Sections 152 and 153 supplement this by describing the developmental role of local government. The Constitution also recognizes the newness of local government and its lack of development and infrastructure. So, provinces and the national sphere have obligations to support and, if necessary, intervene in the new municipalities to ensure the delivery of services (section 139). Municipalities are thus subject to three sets of laws. First, the Constitution sets out their powers and functions. Second, a growing body of national legislation prescribes in considerable detail, among other things, how they should be structured and how they should operate, the format of their budgets, and "planning, performance management, resource mobilization" processes.[40] Third, provincial laws regulate the way in which many day-to-day functions (such as urban planning, health care, environmental protection, and transport) must be carried out.

In a slow and difficult process spanning ten years, the 284 newly demarcated municipalities are starting to take responsibility for basic service delivery. The entire country is divided into municipalities. "Metros" govern the six major metropolitan areas. Outside the metros, the new municipal system comprises two distinct levels: 47 district municipalities (covering wide areas) and local municipalities that serve smaller communities within those district municipalities. A municipal council has both executive and legislative authority. The smallest of these councils are elected on a closed list proportional representation system, but elections in larger municipalities are based on a combination of closed list proportional representation and ward representation.

The tension between the vision of local government as an equal partner with the national and provincial spheres and the level of support that the new municipalities need is stark. The increasing body of national legislation governing local government reflects this, but the clearest acknowledgment of the weakness of many municipalities is a 2003 constitutional amendment that gives provinces and, should they fail, the national government drastic powers to intervene in failing municipalities, to take over their budgets, and, if necessary, to dissolve their councils (section 139).

There is enormous variation in local government institutions. The metros are special, with considerable capacity and comparatively strong infrastructures. They have achieved an unexpected level of autonomy from the national government. Most other municipalities are battling to fulfill their functions on their own. Thus, competent, confident officials in well equipped offices are found in Cape Town, Johannesburg, and other metros; one-room municipal offices with dirt floors are still to be found in some rural areas. The challenges are compounded by the fact that the existence of two levels of local government in all but the metros increases the complexity of intergovernmental relationships. Two-tiered local government was required by the pact that enabled the transition to democracy in South Africa and governed the design of the new Constitution, but it has imposed a rigidity on the design of local government that has hampered development. There is little clarity or understanding of just who should do what in many policy areas, and how to divide responsibilities between district and local councils has preoccupied bureaucrats in the national Department of Provincial and Local Government for the past four years.

For many rural municipalities, traditional authorities add to the complexity of developing democratic processes and delivering services. Although most traditional leaders were discredited by their involvement in apartheid, the past ten years have seen powerful lobbies of chiefs demanding protection of their traditional rights to govern.[41] Traditional leaders argue that they should replace local government entirely. This extreme view has not been accepted, but many concessions have been made. Thus, the 2003 Traditional Leadership and Governance Framework Act[42] gives traditional leaders a special role in relation to the municipalities under which they fall. As traditional leaders often have an ability to deliver services that exceeds that of the new, under-resourced municipalities, they wield much influence, and reports suggest that those subject to their authority remain heavily dependent on them. This threatens to block the development of municipalities that can be responsive to real local needs because needs are filtered through the tribal elite that make up traditional authorities.

Creating totally new democratic structures is never easy, and many of the problems faced by South Africa's young municipalities may be characterized as teething problems. In part the challenges that would be faced in realizing a vision of “developmental local government” were anticipated by constitution makers, hence the provisions requiring the national and provincial governments to support municipalities. The constitutional stipulation that provinces should assign additional functions to municipalities as they develop the capacity to manage them is another provision that captures the sense of municipal capacity building as a work in progress (section 156[4]). Nevertheless, South Africa's experience in this area, as elsewhere, points to the importance of ensuring that political solutions are matched by the capacity needed for their implementation.

INTERGOVERNMENTAL RELATIONS

It is abundantly clear that government in South Africa is heavily dependent on effective intergovernmental relations. The Constitution provides a framework for a cooperative rather than competitive system of intergovernmental relations. Although many of the provisions in the section of the Constitution headed “Principles of co-operative government and intergovernmental relations” are vague, a few are very concrete. They require an act of Parliament that provides for “structures and institutions to promote and facilitate intergovernmental relations” and that establishes an intergovernmental dispute-resolution mechanism. In addition, as mentioned above, they require court proceedings to be avoided wherever possible.

Since 1994 a multitude of intergovernmental forums engaging both politicians and bureaucrats has been established. Nevertheless, the cooperation demanded by the system is hugely sophisticated. There are many examples of misunderstandings and poorly coordinated policies. In 2005 the law facilitating intergovernmental relations anticipated by section 41 of the Constitution was adopted[43] because, in the words of the president, "better co-ordination was needed if government was to realize its policy objectives."[44] There is some irony in using law to enforce cooperation "in mutual trust and good faith" (section 41[1] [h]), but experience over the past ten years has underlined the need to clarify roles and responsibilities. Nevertheless, by placing control of intergovernmental relations firmly in the hands of the president, the new law entrenches an approach to intergovernmental relations that, because of its top-down style, has been described as uncooperative.[45] Two aspects of the system are probably responsible for this. The first is the weak capacity of new provincial and local governments (and sometimes national departments) combined with the urgent need to establish efficient systems and effective delivery of services. The second is the dominant one-party system. It is unfortunate that the new act does nothing to affirm the partnership among the spheres of government envisaged by the Constitution. This may have built the confidence of provinces and municipalities in their engagement with the national government.

The Financial and Fiscal Commission, established by the Constitution as a check on the national executive's power over the financial resources of provinces, has been equally ineffective as an institution of intergovernmental relations. It has a constitutional mandate to make recommendations to Parliament and the provincial legislatures on matters affecting the share of revenue raised nationally that is allocated to the provinces and local government. These recommendations provide provinces with an analysis of the way in which the national government proposes to distribute revenue, and one might expect provinces to treat them very seriously. However, provinces have paid little attention to the recommendations, and the commission has tended to focus its attention on attempting to influence the national Treasury. Originally, each province nominated a member of a 22-member commission, but in 2001 a constitutional amendment reduced its size to nine. Now no members are chosen directly by the provinces; instead, the president selects three of the nine members of the commission from a list complied in consultation with provincial premiers. Once again, we see intergovernmental relations firmly under the control of the national government.[46]

The principles of cooperative government include an element of supervision together with cooperation and autonomy.[47] With very limited exceptions, the power to supervise reflects a hierarchy of governments. The national sphere may supervise provinces, and provinces have a significant power to intervene in local government. The supervisory role of national and provincial government has been crucial over the past decade. Although it is seldom formally invoked, it legitimates not only provincial interventions in municipalities but also active engagement of national government departments – particularly the national Treasury – in the affairs of provinces. The latter has included using the constitutional power to dissolve municipal councils. The main safeguard on the misuse of these powers used to lie with the NCOP, and, as noted above, this has been one of the areas in which the NCOP has functioned well. However, recent constitutional amendments have limited the NCOP's role in overseeing interventions by provinces in municipalities. Approval of the NCOP is no longer required for interventions,[48] and it has no veto right in interventions triggered by financial problems. This change has occurred at a time when there is a strong and shared sense of the challenges that face South Africa and an overwhelming desire simply to make it all work and to make each sphere of government viable and sustainable. These conditions and the current political unity sideline concerns about checks and balances. In the longer term, the absence of a political monitoring body may draw courts into the process, undermining the Constitution's attempts to have intergovernmental disputes resolved by discussion rather than by judicial fiat.

ANALYSIS AND CONCLUSIONS

Constitutional Framework

The Constitution sets out the arrangements for the institutions of government, including the system of three spheres, in unusual detail. As this chapter describes, it codifies many practices that are conventions in other parliamentary systems. The need for and value of such detail in the constitution of a new democracy are obvious. A full description of roles and responsibilities provides clear instructions to those who must implement the system and reduces areas of disagreement. For instance, the articulation of the rights of minority parties in Parliament, the clear description of how the president is chosen and how decisions are taken in legislatures, the framework for parliamentary privilege, and the carefully defined role of the executive in appointing judges make an important contribution to the system's stability. The relationship between the three spheres of government is equally thoroughly articulated. In a young democracy every issue is a new one, and there are few precedents to guide problem solving. Detail in the constitution can compensate for this.

However, the cost of detail is inflexibility. In South Africa, this has meant that the Constitution was amended eleven times between its implementation in 1997 and the end of 2003. By and large, these amendments have remedied oversights and ensured workability, but constitutional amendment is an elaborate and cumbersome process for what are sometimes rather mundane changes to procedures. Moreover, whether or not this is intended, each amendment reduces the authority of the Constitution by placing a question mark over its permanence and signalling its vulnerability to current political pressures. The balance of power between spheres is not less susceptible to change than other aspects of South Africa's constitutional system, and, in fact, up to now the most significant changes - those to section 139 of the Constitution - have affected this.

The Interaction between Federalism and Representative Institutions

Constitution makers must determine the way they wish to balance two equally important goals. The first is to create "limited" government. This protects rights and ensures that governments do not become coercive and authoritarian. The second is to create effective government. The tension between these goals is expressed in terms of whether power and authority will be shared and dispersed or concentrated and unified, and it may be expressed along two axes. The horizontal axis concerns the design of executives and legislatures within a single sphere of government, national or provincial. The vertical axis concerns the distribution of authority among levels of government.

On the horizontal axis is South Africa's Constitution, the Westminster model of parliamentary/cabinet government in the national and provincial spheres places emphasis on effective government with concentrated authority. However, it is balanced by the bill of rights, constitutional provisions spelling out an active role for Parliament and the provincial legislatures, and independent institutions designed to safeguard democracy. On the vertical axis authority is dispersed to provincial and local institutions, but it is also concentrated through national paramountcy and national supervision of subnational governments.

The design is imaginative and carefully crafted. However, as the discussion in this chapter shows, in some significant ways the intricate balance aspired to by the Constitution has not been achieved. This is most clear in the provincial legislatures and executives. Apparently designed to operate in the same way as legislatures and executives do in a regular parliamentary system, they are profoundly affected by their subordinate position in the system of shared responsibilities. Most provincial legislatures have yet to demonstrate that they can fulfill either of two complementary functions: those of "ordinary" parliaments (responding to the needs of the citizens that they represent and supporting the government of the day) or those required by the multilevel system (informing national policies and monitoring their implementation in the provinces). Provincial executives behave more as agents of the national executive than as independent bodies accountable to a particular region. As a result, democracy in the provinces does not temper the concentration of power at the centre. Overall, the Westminster logic of the system means that the central executive dominates. It is striking that the only institution that was carefully designed with the multilevel system in mind, the NCOP, is also one of the most unsuccessful institutions, struggling more than others to entrench its position and to fulfill its constitutional mandate.

The central question to ask is whether the problems in the system should be attributed to either an imperfect design or the context – the newness of the system, the overwhelming imperative for social transformation, and the dominance of the ANC. The answer must be that both contribute to the weaknesses. The design raises two different concerns. One is that the system is complicated so that almost any action demands much coordination and consultation. The complexities are magnified in the local government arena where responsibilities are divided between two tiers (district and local) and are overseen by another two (provincial and national). A second concern related to the design arises from the combination of a centralizing Westminster-style parliamentary system, with three spheres of government in which few powers are truly dispersed and in which accountability tends to be upward rather than towards the electorate. This means that the balance between effective government and limited government is tipped strongly in favour of the former.

But the context is also important in understanding the way the system works now. This system is new. The newness of the system is not simply an excuse for its failings. The task of establishing a properly functioning system of multilevel government with real opportunities for democratic engagement in the local and provincial spheres in a country with a limited pool of skills and even more limited experience of institutionalized democracy is enormous. Similarly, the dominance of the ANC obviously influences relationships between the spheres of government. It may explain the failure of some provincial politicians to represent provincial interests vigorously at the centre. It also explains the apparent ease with which the centre dominates decision making. However, ANC hegemony may bring with it one of the strengths of the present situation. Reasonably coherent policy can be developed to achieve the transformation goals that are certainly shared by the vast majority of the population.

Notes

[1]The following figures are taken from *Population Census, 2001*, Statistics South Africa (2003) <http://www.statssa.gov.za/census01/html/default.asp>, viewed 16 December 2005.

[2]<http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html>, viewed 29 September 2005.

[3]The official definition of unemployment is controversial and includes only those people who have taken active steps to seek employment in the four weeks prior to census night. Those who had given up looking for work, for example, would not be considered part of the economically active population.

[4]*South African Human Development Report 2003: The Challenge of Sustainable Development in South Africa - Unlocking People's Creativity*, "Introduction" (Cape Town: United Nations Development Program, South Africa Oxford University Press, 2004), 5 <http://www.undp.org.za/NHDR2003/NHDRSumFull.pdf>, viewed 21 July 2004.

[5] Figure 3, p. 8. The Human Development Index is calculated on a scale of 0 to 1.0: "All countries are classified into three clusters by achievement in human development: high human development (with an HDI of 0.800 or above), medium human development (0.500–0.799), and low human development (less than 0.500)." See United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002) 147. This scale suggests that the disparity between the Western Cape and Limpopo is significant.

[6]Statistics South Africa, *Census 2001: Census in Brief* (Pretoria: Statistics South Africa, 2003), 14.

[7]*Census 2001* data calculated by author.

[8]Yvonne Muthien and Meshack M. Khosa, "'The Kingdom, the Volksaat and the new South Africa': Drawing South Africa's New Regional Boundaries," Journal of Southern African Studies 21, 2 (1995): 303, 320.

[9]Express recognition of cultural rights is found in the bill of rights generally, in section 6 on national languages; in chapter 12 on traditional leaders; in section 185, which sets up a commission for the promotion and protection of the rights of cultural, religious and linguistic communities; and in section 235, which permits recognition of the right of cultural and linguistic communities to "self-determination," to be determined by national legislation.

[10]Nico Steytler, "Republic of South Africa," Constitutional Origins, Structure, and Change in Federal Countries, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 311–346.

[11]The president's seat is immediately filled from his or her party's list.

[12]President of the Republic of South Africa v. Hugo 1997 (4) SA 1 (CC).

[13]Section 91 of the Constitution requires the president to appoint a deputy president but the deputy has no special constitutional roles other than to "assist the president in the execution of the functions of government" (Sec. 91(5)).

[14]Section 49 of the Constitution sets a fixed term for the National Assembly; however, in section 50 provision is made for the National Assembly to be dissolved if a majority of its members resolve that this should be done.

[15]Some commentators would also argue that the racialization of politics contributes to the weakness of opposition parties: the ANC's support base is predominantly black and the strongest opposition party is still predominantly white. See, for example, J. Seekings, "Social and Economic Change since 1994: The Electoral Implications" (unpublished paper, October 2004); but B. Mattes's contemporaneous analysis of race and voting patterns - "Voter Information, Government Evaluations and Party Images, 1994-2004" (unpublished paper, October 2004) - takes the opposite position.

[16]Andrew Reynolds, *South Africa: Election Systems and Conflict Management* <http://www.aceproject.org/main/english/es/esy_za.htm>, created 13 December 1997, viewed 24 July 2004.

[17]In most parties the practice is to allow regional party structures to compile these lists.

[18]The Constitution deals with the NCOP in sections 60-72.

[19]Christina Murray and Richard Simeon, "From Paper to Practice: The National Council of Provinces after Its First Year," SA Public Law 14 (1999): 96.

[20]In theory, provincial legislatures could enact conflicting legislation that might override the national law. However, in practice this will not happen while the ANC governs at both the national level and the provincial level.

[21]See Constitution, sections 83-93.

[22]Although section 100 does provide for intervention by the national executive in the affairs of a province if the province is failing to fulfill its responsibilities.

[23]Constitution Annexure B, item 4.

[24]This assessment proved wrong. In the 2004 national elections, the National Party received just 1.7 percent of the vote. In 1994 it had commanded 20.4 percent.

[25]Local government bureaucrats are not included in the "single public service."
[26]Public Service Act, 1994 (Proc. 103/1994).
[27] Premier of the Province of the Western Cape v. President of the RSA 1999 (3) SA 657 (CC).

[28]Department of Provincial and Local Government Web site, "Vision" <http://www.dplg.gov.za>, viewed 29 July 2004.

[29]The Superior Courts Bill, currently before Parliament, proposes the alignment of the jurisdiction of the superior courts with the new (1994) provincial boundaries.
[30]This commission is dominated by the governing party, and, in 2004 in particular, its selection of judges for the high courts was very controversial. Nevertheless, its inclusion of judges and members of the profession, its practice of holding public interviews of candidates for judicial positions, and its overall record have established it as a body that contributes to securing the independence of the judiciary.
[31]Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996, 1996 (4) SA 1098 (CC); In re: Certification of the Western Cape Constitution 1997, 1997 (3) SA 795 (CC), Certification of the Amended Text of the Constitution of the Western Cape, 1997, 1997 (12) BCLR 1653 (CC).
[32]National Gambling Board v. Premier of KwaZulu-Natal, 2002 (2) BCLR 156 (CC) and Uthukela District Municipality v. President of the RSA, 2002 (11) BCLR 1220 (CC). In the first of these cases, the dispute was between a province then controlled by a national minority party and the ANC-led national government; in the second, it was an IFP-run municipality that had brought a case against the national government. It is unlikely that the section will be much used while the ANC controls virtually all government in South Africa.
[33]Christina Murray, "Provincial Constitutions in South Africa: The (non) Example of the Western Cape," Jahrbuch des offentlichen Rechts Neue Folge Band 49 (2001): 481.
[34]Certification of the Western Cape Constitution 1997, para. 58.
[35]Election results are available on <http://www.elections.org.za/>, viewed 16 December 2005.
[36]Of 253 civil society organizations concerned predominantly with service delivery that were surveyed, 70 percent reported that they engaged with provincial legislatures while only 59 percent reported that they engaged with the national Parliament. See Samantha Fleming, Collette Herzenberg, and Cherrel Africa, Civil Society, Public Participation and Bridging the Inequality Gap in South Africa(Durban: University of Natal Press, 2003), 3 and 52.
[37]Robert Mattes, Yul Derek Davids, and Cherrel Africa, Views of Democracy in South Africa and the Region: Trends and Comparisons, Afrobarometer Paper No. 8, pp. 71 and 34.
[38]Tom Lodge, Politics in South Africa: From Mandela to Mbeki (Cape Town: David Phillip, 2002), 38.
[39]Nico Steytler, "Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa," Publius: The Journal of Federalism 33, 1 (Winter 2003): 59-74.
[40]"Preamble," Local Government: Municipal Systems Act 32 of 2000. See also Local Government: Municipal Structures Act 32 of 2000 and the Municipal Financial Management Act 56 of 2003.
[41]For discussions of traditional leaders in South Africa, see T. Maloka and D. Gordon, "Chieftainship, Civil Society, and the Political Transition in South Africa," Critical Sociology 22 (1996): 37; L Bank and R Southall, "Traditional Leaders in South Africa's New Democracy," Journal of Legal Pluralism 37-38 (1996):407; and C. Murray, "South Africa's Troubled Royalty: Traditional Leaders after Democracy," Law and Policy Paper 23 (The Federation Press in association with the Centre for International and Public Law, Faculty of Law, Australian National University, 2004).
[42]Act 41 of 2003.
[43]Intergovernmental Relations Framework Act 13 of 2005.

[44]"State Organs Need a Boost," <http://www.news24.com/News24/South_Africa/Politics/0,6119,2-7-12_1548267,00.html>, viewed 19 July 2004.

[45]Nico Steytler and Lawrence Boulle, "Discussion Document: Towards a National Policy on Intergovernmental Relations," April 2002, 16.
[46]Joachim Wehner, "The Institutional Politics of Revenue-Sharing in South Africa," Regional and Federal Studies 13 (Spring 2003): 1-30.
[47]Steytler and Boulle, "Discussion Document," 2.
[48]But the NCOP may bring an intervention to an end.