



# **Assessing the Performance of South Africa's Constitution**

## **Chapter 7. The performance of federalism**

*Andrew Konstant and Khomotso Moshikaro*

© 2016 International Institute for Democracy and Electoral Assistance

This is an unedited extract from a report for International IDEA by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a Centre of the University of Johannesburg.

An abridged version of the report is available for download as an International IDEA Discussion Paper:  
<<http://www.idea.int/resources/analysis/assessing-the-performance-of-the-south-african-constitution.cfm>>.

# Chapter 7. The performance of federalism

*Andrew Konstant and Khomotso Moshikaro*

The purpose of this chapter is to evaluate the performance of the particular multi-level governance structure developed in the South African Constitution. The structure in question is complex: there are three spheres of national, provincial and local government (though local government is often divided into two spheres itself). All these layers of government are mandated by the Constitution to govern in a co-operative manner. The Constitution also allows for the recognition of the authority of traditional leadership which overlaps with these other spheres in certain respects. This chapter engages with the history of this multi-level governance structure which is rooted in the historic compromise that led to the constitutional settlement in South Africa. It also attempts to discern a number of more principled goals as to what the purpose of such a structure is. It then attempts to evaluate the actual performance of the multiple layers of government against these goals. The overall picture is one where the design of the Constitution has been given effect to: aspects of this design can be questioned as being overly complex (for instance, in relation to the division between district and local municipalities) and failing adequately to determine a clear locus of responsibility (such as in relation to concurrent competences and vagueness around exclusive competences) which reduces accountability. The existence of provincial and local spheres has enhanced democratic representivity though the participatory aspects of these structures need attention; at the same time, they often have been plagued by high-levels of inefficiency and been unable to meet their mandates to deliver on services.

## 7.1. Context and goals of the Constitution

The goals that the Constitution intends to achieve in relation to multi-level governance can be divided into two main conceptual themes. The first is the goal in relation to what type of multi-level governance was envisioned by the drafters of the Constitution. In other words, the relevant question is to what extent was the democratic government to be decentralized. The second theme, which follows from the first, deals with the goals that such a form of multi-layered government was meant to achieve. Therefore, once the government structure is identified, what are the intended results of such a structure? The first theme will be dealt with in the section on institutional design and the second theme will be dealt with below.

The Constitution of South Africa provides for three spheres of government – national, provincial and local – that operate in a cooperative, interdependent and interrelated manner.<sup>1</sup> To each of these institutions, the Constitution assigns certain powers and prerogatives. Furthermore, representatives in each of these institutions are independently elected by the citizens over whom they govern. In order to understand important aspects of the goals intended to be achieved by this structure, it is important to begin by assessing how this broad conception of decentralisation came about.

When a new constitutional model for a democratic South Africa arose on the agenda in the early 1990s, the ANC and others in the freedom movement were deeply suspicious of the notion of a decentralised democratic government. The fear was that factions, especially the minority white Afrikaans population which held power during Apartheid, could concentrate in a particular region and create a fiefdom in which the vagaries of Apartheid could be continued. In other words, such regional autonomy was seen as a way in which to side-step majority rule.<sup>2</sup> Furthermore, the ANC appreciated the large developmental agenda that lay ahead for the new democratic government. This agenda included the fact that a majority of the population had suffered generations of oppression and neglect, an economy ravaged by sanctions and international isolation and many other problems that would be faced by the new democracy. The ANC believed that these problems could best be faced through the concentration of resources in the hands of a powerful central government.

The most prominent parties in favour of a decentralised governmental system were the Nationalist Party (which represented the out-going white dominated regime), and the Inkatha Freedom Party (which was largely supported by the Zulu population in KwaZulu Natal). The National Party, previously in control of a strong central government, feared the potential that such a government in the hands of the majority black ANC would

---

<sup>1</sup> Section 40(1) of the Constitution

<sup>2</sup> Steytler and Mettler, 2001: 93-106

exact retribution on the white minority and begin an era of white oppression. The goal for the National Party with respect to decentralisation was to impose constraints on the power of the central government given the uncertainties around which a newly elected government would govern. It was also potentially allow for its own assumption of the levers of power in provinces where it might have significant support. The IFP, on the other hand, whose supporters constituted a majority in the KwaZulu-Natal province, focused on the establishment of greater provincial autonomy in the hope that they could exercise a high level of independence, assume power in the province and not be under too much control from the central government.

The birth of the multi-level system of government is more accurately located in the circumstances in which the transition was negotiated and these contrary positions were mediated. The breakthrough that brought the ANC and the National Party together and facilitated the drafting and passage of the Interim Constitution was the agreement to create a government of national unity in 1993 that would ensure a peaceful transition to democracy. The ANC and National Party agreed to share power between themselves without the creation of a multi-level system of government. In other words, the potential for shared rule as opposed to potential self-rule in a federal system was enough to pacify the concerns of the National Party and the ANC. An important factor surrounding this agreement, however, was the fact that two groups, the right wing Afrikaners and the Zulus, did not participate in the negotiations until the last minute and therefore did not feature in the governance framework that had been agreed. As a result, these groups strongly opposed the agreement and stood as potential hurdles to its successful implementation/realisation.

The disaffected groups formed an allied front against a centralised government and walked out of the continuing negotiations for the democratic transition. Their demand was that the final Constitution should establish a federal democracy. Their resistance to the implementation of the agreement struck between the ANC and the National Party grew and persisted until it became clear that the priority must be to unify the parties in order to insure a successful democratic transition. In order to achieve this, a significant compromise was reached right towards the end of the negotiations. The ANC and National Party agreed to include in the final Constitution several provisions which resulted in the establishment of a government with multiple layers.

The outcomes of these compromises were encapsulated in a series of constitutional principles that would condition the negotiation of the final constitution.<sup>3</sup> These stated that '[g]overnment shall be structured at national, provincial and local levels' (CPXVII); that constitutional amendments require the approval of the provinces, or their representatives in a provincially-constituted second house of parliament (CP XVIII); and that each level will have 'exclusive and concurrent powers' (CPXIX). It also endorses a principle of subsidiarity, stating that the 'level at which decisions can be taken effectively...shall be the level responsible and accountable' (CP XXI). As such, despite the fact that the word 'federalism' does not appear in the text of the final Constitution, the principle features of such a system had to be firmly embedded in it.<sup>4</sup>

A further concession during the negotiation of the final Constitution was the retention of the traditional authority framework which had exercised significant power over a large portion of the black population before the introduction of democracy. The compromise was captured in Constitutional Principle XI which guaranteed that '[t]he institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.' This principle was faithfully reflected in sections 211-212 of the Constitution which recognises customary law and traditional leadership, provides for a role for traditional leadership in local government and provides for the creation of institutions such as the Provincial Houses of Traditional Leaders and the National Council of Traditional Leaders.

The product of the negotiation was therefore a multi-layered system of government which included national, provincial, local and traditional spheres. While the Constitution made some effort to link the former three spheres together and assign to each an outline of their roles and relationships, it has little to say about how traditional leadership interacts with the others spheres.

---

<sup>3</sup> These constitutional principles were used as measure to assess the compliance of the Final Constitution with the final agreement that brought about the democratic transition.

<sup>4</sup> Simeon, 1998: 46.

One could argue that the internal goals of the Constitution comprise an amalgam of the separate goals of each party to the negotiation. From the ANC's perspective, the goal was to achieve unity amongst those negotiating for the transition while maintaining sufficient power in the national government to achieve certain developmental goals. The National Party sought the same conciliatory objective as the ANC; however, its primary purpose was to limit the power of the national government and perhaps create greater autonomy for minorities concentrated in certain provinces. The IFP too pushed for decentralisation with the hope that with greater provincial autonomy, they would gain greater control of the region from which their largest support-base derived. Right-wing Afrikaans groups (which later formed into the Freedom Front party) also supported decentralisation with perhaps the hope that such a structure would allow for greater autonomy. This situation was recognised in the Certification judgment where the Court candidly remarks that the adoption of a multi-level government and the preservation of provincial autonomy were motivated by the need 'to encourage political formations which refused to participate in the transition process to change their minds and to support the transition to a new political order.'<sup>5</sup> In summary, the historical context suggests that the main goal of establishing the multi-level government in the Constitution rested in political compromise between negotiating parties in order to ensure a peaceful transition (the peace-treaty abstract goal of the Constitution identified in Chapter 2. This serves to illustrate the difficulty in extrapolating further precise internal goals of the Constitution in this regard as the rationale for these structures, now that we have them, must go beyond simple political pragmatism.<sup>6</sup>

To make further progress, we suggest that the process of compiling the internal goals of the Constitution with respect to multi-level government requires us to incorporate the objective goals of such a system in the theory around federalism. These goals may have been considered by those parties which favored a federal system of government during the negotiation and we do not assert that they were solely concerned with protecting their own interests without regard to wider constitutional goals; however, there is little evidence to indicate the main principled goals underlying the support for federalism. In turning to the theory of federalism, we are able to determine a full set of internal goals which may then be mapped on to the four Ginsburg criteria.<sup>7</sup>

At its most abstract, the goal of creating a multi-tiered governance system in a country is so that the leaders of a country made up of disparate or somewhat heterogeneous groups can accomplish a set of objectives that is not feasible for any individual groups to accomplish independently.<sup>8</sup> This principle has been called 'subsidiarity' and it forms the bedrock of federalism in decentralized systems.<sup>9</sup> It ensures that the national government plays a supportive role and only intervenes in governance when local governments are incapable of adequately acting on their own.<sup>10</sup> However, more specific goals can be extrapolated from the literature to create a normative theory of multi-level governance which the South African Constitution can be measured against.

Federalism, it is claimed, generates better representation at more localised levels of government. In theory, mobile citizens congregate in particular jurisdictions which lead to local government better reflecting the collective preferences of these groups. A competitive element is added when a portion of these citizens are mobile and capable of moving to a jurisdiction which better represents their interests. This situation encourages local governments to operate more efficiently as well as to specialise.<sup>11</sup> However, even absent the presence of mobile citizens, the smaller jurisdictions enhance the weight of each individual voter and ensure that government at local level is more responsive to individual interests than at the national level.

Beyond responsiveness, the expectation is that local government can be more effective as local decision-makers have a better grasp of the relevant local facts than actors at the national level. With the enhancement in efficiency, one can expect that corruption will decrease within local governments. Corrupt local leaders will not survive against the competition from more efficient neighboring jurisdictions.<sup>12</sup> Finally, local governments offer the opportunity for policy experimentation and innovation. Local governments may adopt different policies in relation to similar problems and this may offer insights into the success of each policy. Successful policies may then be adopted by other local governments or the national government. This process further enhances the

---

<sup>5</sup> Para 862

<sup>6</sup> See Jackson, 2004 who characterizes the South African experience as such.

<sup>7</sup> For a description of the Ginsburg criteria, please see chapter 1 of this report.

<sup>8</sup> Riker and Follesdal, 1993: 613.

<sup>9</sup> Halberstam, 2012: 586.

<sup>10</sup> Halberstam, 2009: 34.

<sup>11</sup> Bednar, 2011: 272.

<sup>12</sup> Bednar, 2011: 272.

effectiveness of governance across local governments. Benefits also arise in the event that a policy fails. The effect of a failed policy is only felt by provinces that have adopted that policy. In a decentralized system, this limits the extent of damage that flows from failed policies.<sup>13</sup>

The aims of federalism can be used to argue to either devolve powers to lower levels of government or to concentrate greater powers in the national government. For example, governmental aims such as military security, economic growth and effective representation drive the direction of the concentration of power in different directions. On the one hand, military security is best achieved through command coordination which necessitates the centralisation of foreign policy and war-making powers. As a result, military security is best achieved in a federal union than a confederation or a loose alliance of states.<sup>14</sup> With respect to economic growth, the benefits of decentralisation that result in greater efficiency, effectiveness, or innovation all relate to factors necessary for economic prosperity. As a result, decentralised government should, in theory, lead to economic growth because competition between local authorities encourages policy experimentation and increased efficiency, supporting market growth and revenue collection. The same is true of political representation. A decentralised political or electoral system is known to enhance electoral participation.<sup>15</sup> The logic flows from the creation of voting districts with smaller populations in each district. With smaller populations, any one voter is more likely to be decisive. In theory, people are more likely to vote the more their vote matters.

In conclusion, the history of the negotiations plays an important role in uncovering the intended goals of the Constitution's design of the federal structure. As will become clear later, these goals may have contributed to the manner in which decentralisation occurred. However, it must be acknowledged that objective goals exist when dealing with the notion of a federal system. It is equally relevant to measure the performance of a constitution which purports to establish a federal system of government against these goals.

In summary, one can then list the goals of a federal system, if a little abstractly, as:

- The participants in the negotiated settlements that advocated for the inclusion of the federalism provisions in the Constitution had the goal of creating a check on centralised power in the form of greater autonomy for the provinces.
- The more objective goals of the federal system include greater efficiency and effectiveness, as well as political responsiveness and representation, in governance. Furthermore, a federal system is intended to reduce the level of corruption in government.
- The adherence to the principle of subsidiarity which ensures that decisions are taken by those institutions in a position that would best achieve the intended objective. The effective operation of the principle of subsidiarity rests on the mechanism the Constitution establishes for the division of decision-making prerogatives between the national, provincial and local levels of government.

Following the description of the goals of the Constitution with respect to the establishment of a multi-level structure of government, the next section will discuss the actual constitutional design adopted in South Africa.

## **7.2. Constitutional design and tensions within it**

### ***Institutional design of the multi-level governance system***

The Final Constitution established nine provinces. There was no effort made to align the borders of the provinces with the locations of tribal or ethnic groups in the country. There were both practical reasons (the migration of ethnic and tribal groups all over South Africa), and substantive reasons (the ANC's decision not to further the interest of any particular tribal or ethnic group) for the adoption of the new provincial borders. The Constitution furthermore created national, provincial and local governments which would govern in their respective boundaries.

---

<sup>13</sup> Bednar, 2009: 31.

<sup>14</sup> Bednar, 2009: 25.

<sup>15</sup> Inman and Rubinfeld, 2000: 661-91.

Chapter 3 of the Constitution sets out a system of multi-level government, with national, provincial and local governments constituting 'spheres' that are to be 'distinctive, interdependent and interrelated'.<sup>16</sup> The focus of this chapter will be on the national and provincial governments though local government and traditional authorities will be addressed briefly.<sup>17</sup> Between these two levels, the division of powers is dealt with in the Constitution. This allocation of roles and responsibilities accords the national government broad legislative power to legislate on 'any matter' except those contained in a short list of 'exclusive' provincial powers (section 44(1); Schedule 5). Provinces also have the power to legislate on matters contained in a long list of concurrent powers (Schedule 4). These have been described as critical powers.<sup>18</sup> However, the central government may override provincial laws in a wide range of circumstances though each of these circumstances are subject to qualifications. In terms of section 146, in the case of a conflict, national law will prevail if it deals with a matter that provinces cannot effectively regulate on their own or if it is necessary for 'national security', 'economic unity,' and the common market, the promotion of equal opportunity and equal access to government services, or the protection of the environment.

Furthermore, even in areas that the provincial government may have exclusive jurisdiction over which to legislate, the national government may legislate when 'necessary' to maintain security, economic unity, or national standards, or to prevent a province from harming others. Any other residual powers are vested in the national government.<sup>19</sup> These federal powers are wide in scope, but they are limited in that they must be linked to clear national purposes or to clear evidence of the negative effects of a province's actions on others in South Africa. In other words, national legislative authority does not enjoy absolute superiority. It must be justified using the criteria set out in the Constitution.

The Constitutional Court in *In Re: National Education Policy Bill No 83 of 1995*, took the opportunity to articulate its understanding of the Constitution's federal design. Chaskalson CJ confirmed that both the national and provincial legislatures are free to legislate in areas of concurrent legislative competence. In cases where there is a genuine conflict between national and provincial legislation, legislation held not to prevail 'is not invalidated; it is subordinated and to the extent of the conflict rendered inoperative'.<sup>20</sup> In other words, the subordinated legislation 'remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails. If the inconsistency falls away, the law would then have to be implemented in all respects'.<sup>21</sup>

The purpose of such a division of powers is that the national government can impose national norms and standards while allowing provinces to respond to their own particular needs. In other words, this division of responsibilities between national and provincial governments where they have shared competences requires that the national government establishes the policy-framework including the norms and standards applicable in that area, while the provincial and local government levels are responsible for the delivery of programmes.<sup>22</sup> As such, provinces hold the primary role in the system of delivery of nationally determined policies and programs. This division of powers offers a particular view of federalism with the national government responsible for the creation of the policy, and the provinces responsible for the policy's implementation. In a sense this contributes to the overarching internal goal of establishing a unitary state that also embraces diverse interests.

Provinces also have the right to establish their own constitutions, subject to the Constitution itself. It is telling that no province governed by the ANC has attempted to adopt a constitution but KwaZulu-Natal under the IFP<sup>23</sup> and the Western Cape under the DA have exercised this power. The draft constitution created by the IFP in KwaZulu-Natal failed certification before the Constitutional Court as it deviated substantially from the national Constitution.<sup>24</sup> The Court described the provincial constitution as having improperly usurped national

<sup>16</sup> Section 40 of the Constitution. In reality, local governments are typically divided into two-levels, districts and municipalities. These will be more fully discussed in the chapter dealing with local government.

<sup>17</sup> The massive scope of this project has meant that we need to focus: we recognize that a fuller engagement with the performance of the local sphere of government and traditional authorities is needed.

<sup>18</sup> Murray and Simeon, 2001: 72.

<sup>19</sup> Section 44(2).

<sup>20</sup> [1996] ZACC 3; 1996 (3) SA 289 para 16.

<sup>21</sup> Ibid para 19.

<sup>22</sup> Van Niekerk, 2012: 623.

<sup>23</sup> The IFP held control over the province from 1994 to 2004. See Electoral Institute for Sustainable Democracy in Africa *South Africa Election Updates* available at <http://www.electionupdate.org.za/2014eu2kzn.htm> [accessed on 21 March 2016].

<sup>24</sup> *Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (11) BCLR 1419 (CC).

powers and as a result struck it down.<sup>25</sup> The DA's draft constitution for the Western Cape also failed to be certified in its first attempt. The Constitutional Court held that the draft constitution purported to alter the province's electoral system in contravention of the national Constitution.<sup>26</sup> Two other relatively minor deviations from the Constitution were found by the Court. The Western Cape legislature quickly passed an amended version of the draft provincial constitution which was then certified by the Court.<sup>27</sup>

Further protection of provincial interests is given through the establishment of the National Council of Provinces (NCOP), acting as the second chamber of parliament. This institution is designed to represent the provincial interests in the national legislative process. Each province is represented in the NCOP by a ten-person delegation and each delegation includes ministers of provincial governments. When the NCOP considers national legislation directly affecting provinces, delegations vote as a single bloc, on instruction from their provincial legislatures, and a super-majority of two-thirds of the National Assembly members is required to overturn the NCOP's decisions.<sup>28</sup> On other matters, the NCOP members vote as individuals and a simple majority of the National Assembly can overrule them.<sup>29</sup>

The best description of the multi-level governance federal system established by the Constitution is in the Certification Judgment. The Court states that the Constitution provides a form of multi-level governance that is characterised by cooperation as opposed to a competitive federalism. In other words, the drafters of the Constitution did not intend to create levels of government which vied with each other over exclusive jurisdiction. Rather, it was intended that each level government work with the other in order to best fulfil constitutional obligations. This principle has been titled as 'cooperative government' and we turn to consider it in the next section.

### **Cooperative government**

The concept of cooperative government requires the three spheres of government to function as a single, unified system, collaborating rather than competing. Section 41 of the Constitution lists a number of principles which undergird the notion of cooperative government. These principles, roughly, dictate that spheres of government must 'respect the constitutional status, institutions, powers, and functions of government in the other spheres;' act 'in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;' and 'cooperate with each other in mutual trust and good faith' through 'fostering friendly relations,' ensuring communication and coordination, and avoiding taking their disputes to court.<sup>30</sup> They share responsibility for preserving the 'peace, the national unity, and the indivisibility of the Republic' and for providing 'effective, transparent, accountable and coherent government for the Republic as a whole'.<sup>31</sup>

These principles could be distilled into a basic proposition. Cooperative government does not diminish the autonomy of any sphere of government.<sup>32</sup> It simply recognises the place of each within the entire structure of government and the need for the coordination between these units in order to ensure effective and efficient government.<sup>33</sup> Furthermore, these spheres should be regarded as distinct. Chaskalson CJ in *Premier, Western Cape* notes that the constitutional principles of cooperative government possess a two-fold purpose: (a) to enable our new democracy to develop a system of government that enables each sphere to work together in a coherent fashion; and (b) to allow each sphere of government to function relatively autonomously within the scope of its legislative competence.<sup>34</sup>

---

<sup>25</sup> *KwaZulu Natal Certification* para 14.

<sup>26</sup> *Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC)

<sup>27</sup> *Certification of the amended text of the Constitution of the Western Cape*, 1997 1998 (1) SA 655 (CC)

<sup>28</sup> Section 76 of the Constitution.

<sup>29</sup> Section 75 of the Constitution.

<sup>30</sup> The Constitution does however state that the Constitutional Court is the final arbiter of relationships between the three spheres.

<sup>31</sup> Section 41; See also *Premier, WC v President* at para 50 where the Constitutional Court makes the statement that the distinctiveness of the spheres of government must be read in light of the founding provisions of the Constitution (section 1) which states that South Africa is 'one sovereign, democratic State'.

<sup>32</sup> *First Certification* judgment para 292

<sup>33</sup> *Van Wyk v Uys* NO 2002 (5) SA 92

<sup>34</sup> *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 para 58.

As part of the cooperative government framework, should the NCOP refuse to pass a bill that affects provincial powers, 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.<sup>35</sup> 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. As mentioned above, should agreement between the two houses not be reached, the National Assembly can override the objections of the NCOP with the support of two-thirds of its members.

What may be distilled from the constitutional principles of cooperative government is that 'intergovernmental relations' is placed at the heart of the South African federal system. In other words, the principle instruction to the distinct yet interdependent spheres of government is to make 'every reasonable effort to resolve any disputes through intergovernmental negotiations' and to exhaust 'all other remedies' before approaching the courts to have them resolved.<sup>36</sup> Therefore, if courts are not satisfied that such efforts have been made, they can refer the matter back to the respective governments. This feature of the federal system is present in both the legislative and executive branches at all levels of government. These spheres of governments are required to engage in a deliberative process in which they inform each other and consult with one another when matters of common interest are at stake.<sup>37</sup> The requirement to exhaust all consultative and conciliatory options before approaching the courts to resolve a dispute buttresses the deliberative nature of the engagement that the Constitution creates.

The principle of cooperative government reflects a particular model of democracy incorporated in the framework of decentralised government. A more traditional model of federalism is a purely competitive model of federalism in which sub-national governments compete with each other for highly valued citizens, and with the national government for policy-making prerogatives. With a principle of cooperative government and the institutions that it envisages, federalism operates differently. Sub-national governments are required to deliberate on areas where potential conflict may exist, include all affected decision-makers in the process of policy-making and limiting the use of courts in resolving remaining conflicts. These requirements serve to blunt the competitive nature of the traditional conception of the federalism.

### ***National and provincial intervention***

Despite the constitutional imperative of a deliberative and cooperative approach to intergovernmental relations, the Constitution ensures that provinces and local government are, within limits, subject to the monitoring and intervention powers of national and provincial government respectively. Monitoring is defined as the periodic oversight of a process, or the implementation of an activity with the purpose of determining to what extent the objectives within the organisation are achieved so that timely action may be taken to correct deficiencies that are detected. The monitoring role of provincial government over municipalities is outlined in section 139 of the Constitution and further complemented by various pieces of legislation. Provinces may monitor municipalities in the following ways: by determining whether a municipality meets its executive obligations in terms of legislation, and how well it performs those duties.

Section 100 of the Constitution provides for national intervention and supervision of provincial administrators. The national executive authority may intervene in the activities of a province when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. The NCOP plays a major role in respect of intervention under section 100, where national intervention should be tabled in the provincial legislature as well as in the NCOP.

### ***Local government***

According to the Constitution, municipalities are no longer creatures of statute. The Constitution ensures the independence of municipalities.<sup>38</sup> However, this independence is not absolute. As Steytler and de Visser aptly put it local government autonomy remains 'relative'.<sup>39</sup> Previously, provincial government largely determined the

---

<sup>35</sup> Section 76(1)(d) of the Constitution.

<sup>36</sup> Section 41(3) of the Constitution.

<sup>37</sup> Chapter 3 of the Constitution.

<sup>38</sup> Section 151(4) of the Constitution.

<sup>39</sup> Steytler and de Visser, 2006: 22-1.

powers of local authorities.<sup>40</sup> Municipalities were in essence on the lowest rung of the governmental hierarchy.<sup>41</sup> Now, however, the constitutional text unambiguously states that the national and provincial governments may not impede a municipality's right to execute its constitutional functions.<sup>42</sup>

The sphere of autonomy of local government thus depends upon an understanding of its functions according to the Constitution. The Constitution provides that the objects of local government are five-fold:

- a) To provide democratic and accountable government for local communities;
- b) To ensure the provision of services to communities in a sustainable manner;
- c) To promote social and economic development;
- d) To promote a safe and healthy environment; and
- e) To encourage the involvement of communities and community organisations in the matters of local government.<sup>43</sup>

The first and last of these objectives appears to be concerned with the development of both representative and participatory democracy at local government level. The other three objectives give expression to a mandate on the part of local government that requires the provision of services to people and a contribution towards their welfare. This could be considered to articulate a 'developmental leitmotif' which centers on municipal services.<sup>44</sup>

A municipal service is legislatively defined as 'a service that a municipality in terms of its powers and functions provides for the benefit of the local community irrespective of whether fees, tariffs are levied.'<sup>45</sup> This definition stresses that a municipal service is not a service aimed at the internal functioning of the municipality but focused upon the community.<sup>46</sup> The concept of municipal services is further refined by the areas of both concurrent and exclusive competence of local government outlined in the Constitution. Concurrent competences include such matters as air pollution, building regulations, child-care facilities and local tourism. Exclusive competences include beaches and amusement facilities, local amenities, municipal roads and refuse removal. Unfortunately, there is some lack of clarity on the exact functions of local government specifically given the very broadly worded areas of concurrent competence between local, provincial and national government in the Constitution.<sup>47</sup> There has also been a concern about a mismatch between 'the goal of developmental local government and the allocated powers of local government'.<sup>48</sup>

The concept of a municipal service, from the Schedules, is also rather broad and all-encompassing. It has been argued, however, that the scope of the obligation placed upon local government limits the broadness of what it is required to do in relation to these services.<sup>49</sup> The argument is based upon the language in two provisions: section 139 (5) of the Constitution provides that provincial government may intervene in the affairs of a municipality if it fails to deliver on its obligation to provide basic services.<sup>50</sup> This narrows the scope of services somewhat, restricting services to 'basic' services. Section 227(1)(a) of the Constitution also explicitly recognises that local government is entitled to equitable share for the explicit purpose of providing basic services. Whilst municipalities may have wide competences, their main hard obligations are to provide basic services. The Municipal Systems Act defines basic municipal services as a service that is necessary to ensure an acceptable and reasonable quality of life, and if not provided would endanger public health, safety or the environment.<sup>51</sup> The second part of the definition is interesting - it may allow for a broader interpretation that goes beyond narrow bread and butter issues.<sup>52</sup> The obligations to provide such services are strongly connected to the socio-economic rights in the South African constitution (dealt with in Chapter 3 of this report) though they may go beyond those

<sup>40</sup> *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) para 33.

<sup>41</sup> *CDA Boerdery* para 33.

<sup>42</sup> Section 151(4) of the Constitution.

<sup>43</sup> Section 152 of the Constitution.

<sup>44</sup> Steytler and de Visser, 2006: 22-64.

<sup>45</sup> Section 1(1) of the Municipal Systems Act.

<sup>46</sup> Steytler and de Visser, 2006: 22-64.

<sup>47</sup> Part B of Schedule 4 of the Constitution.

<sup>48</sup> Steytler and de Visser, 2006: 22-66.

<sup>49</sup> Steytler and de Visser, 2006: 22-69.

<sup>50</sup> Section 139(5) of the Constitution.

<sup>51</sup> Section 1 of the Municipal Systems Act.

<sup>52</sup> Steytler and de Visser, 2006: 22-70.

rights too and include matters such as the right to receive electricity from the municipality which is not expressly recognised in the bill of rights. The Constitutional Court has confirmed the notion that

‘the provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider.’<sup>53</sup>

### **Fiscal federalism**

The concentration of legislative and executive power is buttressed by the vesting of the revenue raising power mostly in the national government. Drawing on constitutional principles XVI to XXV, the Constitution assigns various expenditure functions and revenue-raising powers to the three levels of government. Despite the vagueness of the assignment, it is nevertheless possible to discern a broad outline of the nature of decision-making responsibilities associated with each tier of government. The abstract standard set for all decision-making is that all relevant decisions should take into account ‘national unity, provincial autonomy and cultural diversity’ and should be made ‘...at which level this can be done most effectively.’<sup>54</sup>

Despite this, the fiscal arrangements in the Constitution were designed to leave as much of the Apartheid era’s centralised powers intact. In other words, the revenue-raising function was left mostly in the hands of the national government. In light of this, it was deemed necessary to include in the Constitution some form of revenue-sharing arrangement. Therefore, section 214(1) of the Constitution states that each province is entitled to an ‘equitable share’ of the income collected by the national government. The term ‘equitable share’ is not defined in the Constitution. The Constitution determines that the distribution must take into account a wide variety of criteria, including the national interest and the needs of the national government, the ability of provinces to perform their tasks, and the need to combat economic disparities ‘within and among provinces’.<sup>55</sup> It has been suggested that this equitable share involves three modalities: ‘percentages of nationally collected individual income taxes, value added tax or other sales tax, and fuel levy; transfer duties on property situated within a province; and other conditional or unconditional allocations out of national revenue’.<sup>56</sup>

The provinces are left with little real autonomy financially. While section 228 of the Constitution enables provincial legislatures to raise revenues through duties, levies, user charges, and taxes, with specific exceptions of income taxes, value-added tax, and sales taxes, these may only be done with national parliamentary approval. Provincial administrations have, however, been granted exclusive powers to impose all forms of gaming taxes within their jurisdictions. Section 229 of the Constitution allows local governments to rely on property rates and various user charges. In addition, under section 227 of the Constitution, local governments in each provincial jurisdiction are entitled to “an equitable allocation” of national revenues.

Section 220 of the Constitution created the Fiscal and Financial Commission (FFC). The role of the FFC is to be an independent and impartial statutory institution, accountable to the legislatures, with the objective of contributing towards the creation and maintenance of an effective, equitable and sustainable system of intergovernmental fiscal relations, rendering advice to legislatures regarding any financial and fiscal matter which has a bearing on intergovernmental fiscal relations.<sup>57</sup>

Section 214 (2) of the Constitution sets out the normative criteria that should guide the operation of the FFC. These are the national interest; national debt; the objective needs and interests of the national government; the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them; developmental and other needs of provinces, and local government; economic disparities between provinces; and the obligations of provinces and municipalities established by national legislation.

<sup>53</sup> *Joseph v City of Johannesburg* [2009] ZACC 30 para 34

<sup>54</sup> See Constitutional Principles 20 and 21.

<sup>55</sup> Section 214 (1) and (2).

<sup>56</sup> FFC, 1995: 5.

<sup>57</sup> FFC, 1995: 5.

The FFC was established as a check on the national executive's power over the financial resources of provinces. 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.

The purpose of the FFC is therefore to offer independent and expert advice on the allocation of resources necessary in order for provincial and local governments to operate. In the role of interpreting the broad constitutional measure for an appropriate allocation, 'equitable share', the FFC plays a vital role in ensuring that provincial and local governments are equipped to formulate and execute policy that may fall within their jurisdiction, as well as implement policies of the national government. Quite simply, without adequate resources, these institutions are vulnerable to national government coercion.

As for local government, municipalities have original powers to levy rates or raise taxes.<sup>58</sup> They are also entitled to an equitable share of tax revenue from the national government.<sup>59</sup> Both of these aspects are discussed in greater detail below in the thin and thick compliance sections.

The inclusion in the Constitution of a distinct chapter that sets out the principles of cooperative government, the limited list of exclusive provincial powers, the extensive list of concurrent powers with strong national overrides, and the elaborate arrangements for group decision-making in the NCOP (where provinces are merely given a collective voice and no veto power) all demonstrate the reluctance on the part of the ANC to establish a fully federal system.<sup>60</sup> It is possible, perhaps likely, that the performance of the federal system established in the Constitution will reflect the reluctant stance of the ANC. This will be further discussed in the performance section of this report.

### **Traditional leadership**

Traditional Leadership is something of an anomaly in a constitutional democracy. As Chaskalson P stated, 'In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch.'<sup>61</sup> However, the nature of a negotiated settlement such as eventuated in the South African Constitution tends to lead to contradictory norms that are in perhaps continuous tension. Chaskalson P went on to explain that South Africa's cultural pluralism, has certain 'legal and cultural, but not necessarily governmental consequences'.<sup>62</sup> This begs the question – what governmental consequences are there due to the presence of traditional leaders in the structure of governance?

The debate around traditional leadership harkens back to the constitution drafting process itself. The voice of traditional leadership during this process was the Inkatha Freedom Party and delegates from the homeland governments. The ANC itself also had its eye on courting the rural support base controlled by traditional leaders. However, because traditional leaders had no formal representatives in the Constitutional Assembly, their influence in the general constitutional system was muted. The Constitution essentially makes provision for traditional leadership but defers the details to the legislature. Section 211(1) of the Constitution states that the institution, status and role of traditional leadership are recognised, subject to the Constitution. Section 211(2) goes further and says a traditional authority *may* function, subject to legislation and custom. This section subordinates traditional authorities not just to the Constitution, but also to the authority of parliament through legislative regulation. Section 212(1) states that national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities. It also provides the discretion to national and provincial parliaments to establish a house of traditional leaders and/or a council of traditional leaders. Thus unlike all other spheres of government, in the case of traditional leadership, there is no obligation on the state to recognise this level of government or vest it with any real power. This textual agnosticism allows parliament

<sup>58</sup> Steytler and de Visser, 2006: 22-81.

<sup>59</sup> Section 227(1) of the Constitution.

<sup>60</sup> Murray and Simeon, 2011: 545.

<sup>61</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA 1996* 1996 (4) SA 744 (cc), 1996 (10) BCLR 1253 (CC) para 195 (*First Certification judgment*)

<sup>62</sup> *First Certification Judgment* para 195.

a wide space to decide on the exact structures through which to recognise traditional authorities, a matter that will be elaborated upon below.

### 7.3. Performance

#### *Thin compliance*

##### *National and provincial government*

Since the coming into force of the final Constitution, all the provinces and municipalities have been established. The basic multi-governance structure is comprised of 9 provinces and 278 municipalities. Each province and municipality has a functioning executive and legislative arm (in the case of the municipalities these functions are combined into one institution – the Municipal Councils). Each level of government has its own electoral process. Elections at national and provincial levels are held at the same time on a five-year cycle with municipal elections held two years later.

The Constitution in section 41(2) requires that Parliament enact legislation that provides for ‘structures and institutions to promote and facilitate intergovernmental relations’ and that establishes an intergovernmental dispute-resolution mechanism. In light of this requirement, the Intergovernmental Relations Framework Act was enacted, which was primarily intended to formalise the existence of structures and mechanisms that facilitate the constitutional demand for cooperative government. Section 4 of the IGRFA further elaborates on the purpose of the Act as being ‘to provide within the principle of cooperative government...a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate coordination in the implementation of policy and legislation, including (a) coherent government; (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) the realisation of national priorities.’

The Act established various institutions in order to meet this constitutional obligation. The highest in stature of these institutions is the President’s Coordinating Council. The PPC was created to assist in enhancing relations and coordination between national and provincial governments. In addition, the PPC assists with the development of linkages between intergovernmental institutions which include the National Intergovernmental Forums; Premier’s Intergovernmental Forums; Provincial Intergovernmental Forums; Inter-Provincial Forums; District Intergovernmental Forums, and; Inter-Municipality Forums. The PCC consists of the President, Deputy President, and various ministers whose portfolios involve the operation of provinces or local government. The purpose of the PCC is to address substantive issues pertaining to provincial government with the support of the Department for Co-operative Governance and Traditional Affairs.

Additional institutions established for the purposes of promoting executive intergovernmental relations were the Committees of Ministers and Members of the Executive Councils (MINMEC). MINMECs were established for various important functions such as social development, local government, environmental affairs and tourism.

The driving purpose behind the establishment of this apparatus is the creation of formal interactions between governmental departments with overlapping substantive jurisdiction at different levels of government in order that they appropriately coordinate their activities and resolve, or avoid, conflicts. Thin compliance with the thrust of co-operative governance thus appears to have been achieved.

#### *Local government*

##### *Types of municipalities and their boundaries*

The Constitutional text requires that national legislation be passed that determines the criteria and procedures for determining municipal boundaries.<sup>63</sup> The Local Government: Municipal Demarcation Act 27 of 1998 was enacted for this purpose. It established the Municipal Demarcation Board (“Board”) which is the primary

---

<sup>63</sup> Section 155(3)(b) of the Constitution.

institution tasked with establishing the boundaries of municipalities.<sup>64</sup> The Act also provides for criteria by which the board determines these boundaries.<sup>65</sup>

The Constitution also requires that national legislation be passed that defines and determines criteria for different types of municipalities. The Municipal Structures Act 117 of 1998 meets this constitutional goal by determining the criteria for defining types of municipalities and their respective chief institutional design characteristics.

By 'types' of municipalities, the Constitution means municipalities that have varying degrees of autonomy from *other* municipalities. For instance, some municipalities have exclusive executive and legislative authority over their municipal affairs,<sup>66</sup> whilst others share this competence with another municipality.<sup>67</sup> The Constitution envisaged three 'types' of municipality: large metropolitan municipalities (which have exclusive municipal executive and legislative authority in its area); local municipalities (which share legislative and executive authority with a district municipality in whose area it falls); district municipalities (which have legislative and executive authority over an area that includes more than one municipality). Most of the areas in South Africa (other than large cities) are governed by both district and local municipalities, thus introducing four layers of governance (national, provincial, district and local). The efficiency, affordability and desirability of such a complex structure of local governance may well be doubted.

#### *Municipal functions*

In relation to the democratic mandate of local government, the Municipal Structures Act already mentioned outlines the particular structures of local government designed to meet the ends of representative and participatory democracy including Municipal Councils and ward committees. The Municipal Systems Act 32 of 2000 specifically provides for a system of participatory governance that encourages members of local communities to be involved in such processes as the creation of an integrated development plan for the municipality, the preparation of its budget and performance management systems.<sup>68</sup>

In relation to the developmental mandate of local government, the Municipal Systems Act in section 4(2) places a duty on municipalities to provide equitable access to a number of municipal services. In Chapter eight, the Act makes provision for the payment of tariffs in respect of these services. It also provides for various mechanisms through which these services can be delivered and for a participatory process in determining those mechanisms for delivery. The courts too have emphasised the mandate of local government to provide basic services.<sup>69</sup> At least formally, both legislation and the courts have thus confirmed the service delivery and developmental mandate of local government. We will engage with a number of qualitative issues affecting their performance of this function under thick compliance.

#### *Traditional authorities*

As we saw, the Constitution recognises traditional leadership and customary law. Yet, it leaves much discretion to parliament in this sphere. The Traditional Leadership and Governance Framework Act 41 of 2003 was passed that recognises traditional leadership. The Act firstly makes provision for the recognition of traditional communities. Any such community must then form a traditional council 'in line with principles set out in provincial legislation', and, the requirements for their composition set out in the national Act itself.<sup>70</sup> The provisions concerning the composition of the councils require that one third of the members of the council women and 40 per cent be democratically elected for terms of five years.<sup>71</sup> National legislation has thus sought to infuse democratic elements into these structures of traditional authorities and the governance of communities. That has been difficult for some to accept.

---

<sup>64</sup> Section 4 of the Act.

<sup>65</sup> Sections 21 of the Demarcation Act.

<sup>66</sup> Called Category A municipalities by section 155(1)(a) of the Constitution.

<sup>67</sup> Category B and C municipalities as referred to in sections 155(1)(b) and (c) of the Constitution.

<sup>68</sup> Section 16(1) of the Constitution.

<sup>69</sup> See the quote above from the *Joseph* case note 53.

<sup>70</sup> Section 3(1) of the Traditional Leadership and Governance Act and Bennett and Murray, 2006: 26-22.

<sup>71</sup> Section 3(b) and (c) of the Traditional Leadership Act.

Parliament also chose to create a National House of Traditional Leaders as a representative body for traditional leaders.<sup>72</sup> This body has representatives from each province who serve 5 year terms of office.<sup>73</sup> The functions of the National House are several but include mainly the role of advising the government on issues relating to traditional leadership, customary law and the customs of communities observing systems of customary law.<sup>74</sup> The House also has powers of investigation and can disseminate information concerning these matters.<sup>75</sup> In general, there is no obligation upon parliament and the executive to consult with the National House or to follow its advice when it gives it.<sup>76</sup> The Traditional Leadership Act, however, requires Parliament to refer bills concerning 'customary law or customs of traditional communities' to the National House before they are passed.<sup>77</sup> This is the first major obligation imposed on the state in relation to traditional leaders to consult them in public decision-making processes.

Notably, the position traditional authorities occupy in relation to other spheres is not entirely clear. It is interesting to note that 'traditional leadership' and 'indigenous law and customary law' fall under Schedule 4 of the Constitution. National government and provincial governments therefore have concurrent legislative authority over traditional leaders. The Traditional Leadership and Governance Framework Act also, interestingly, empowers provincial premiers to grant and withdraw recognition from traditional communities, senior traditional leaders, headmen and headwomen.<sup>78</sup>

The relationship with local government is less clear-cut. Section 211(2) of the Constitution provides that traditional leaders 'may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs'. There is an interesting question that arises concerning whether by-laws could constitute the legislation in question. Municipalities could then utilise their by-laws to regulate and perhaps veto decisions taken by traditional authorities.<sup>79</sup> There is perhaps a need for a clearer demarcation of the spheres of authority of traditional leadership and local government. Whilst they often perform different tasks, there is an area of overlap. The inability municipalities have shown to provide services across the board renders it unlikely in the shorter term that they will completely usurp the authority of traditional leaders in this regard.<sup>80</sup>

The legislatures have thus given expression to the constitutional requirement to recognise traditional leadership though some uncertainties remain about the relationship between traditional leadership and other facets of the multi-level governance structure.

### ***Thick compliance***

#### *Provinces*

As described above, the goals of decentralisation, in theory, largely revolve around the establishment of a node of decision-making located closer to the polity most affected by the decision. This has several benefits, such as greater political representation, enhanced government efficiency and the reduction of corruption. The requirements often cited as being necessary to achieve these goals are a competitive system of decentralisation, the political will to make the system work and the capacity adequately to staff several levels of government.

#### *Autonomy*

A competitive system of federalism requires provinces to be able to act autonomously and in the best interests of the citizens over which they govern. Doing so, may entail the adoption of conflicting policies and the assertion of each province's decision-making prerogatives. As we have seen, the Constitution does not expressly embrace competition between the provinces though, arguably, some element of competition is inherent in any form of

---

<sup>72</sup> Section 2(1) of the National House of Traditional Leaders Act 22 of 2009.

<sup>73</sup> Section 2(2) of the National House of Traditional Leaders Act provides for the terms and section 3 for the composition.

<sup>74</sup> Section 11(2)(b).

<sup>75</sup> Section 11(2)(c).

<sup>76</sup> Bennett and Murray, 2006: 26-27.

<sup>77</sup> Section 18(1).

<sup>78</sup> Section 2 of the Traditional Leadership and Governance Framework Act.

<sup>79</sup> Section 156(2) of the Constitution.

<sup>80</sup> Bennet and Murray, 2006: 26-39.

multi-level governance structure. The question then becomes whether provinces have in fact exhibited a degree of autonomy from one another.

In this respect it is relatively easy to conclude that, in general, provinces have largely not established for themselves, or been allowed by the national government to establish, any substantial degree of autonomy. This situation has arisen in large part due to the reluctance of the ANC to commit to a truly federal system of government and the fact that both provinces and national government have been dominated by the ANC (an issue discussed more at length in Chapter 4). A simple assessment of the policies adopted by the provinces controlled by the ANC and the national government show that there is very little divergence between the two.<sup>81</sup> It would appear that the national government is responsible for the establishment of the policies for provincial governments to implement.<sup>82</sup> Indeed, there has been, in general, a lack of initiative on the part of provinces in the enactment of legislation whether in areas of concurrent or exclusive jurisdiction. Provinces have been particularly passive in this respect.<sup>83</sup> This may, in part, be due to the inability to draft an adequate bill. Several provincial bills have failed to be passed on technical grounds as a result of poor drafting.<sup>84</sup> Furthermore, provincial legislatures often lack the resources or ability to make informed judgements about the way in which their delegates should respond to complex national legislation.<sup>85</sup>

The complexity of national legislation is accompanied by the complexity of the division of the jurisdiction between the national and provincial legislative powers. The broadly-termed subject matters of concurrent and exclusive jurisdiction makes the process of determining which issues fall in each category difficult. In theory, the provisions create the inevitability of a large number of potential conflicts which have been averted, in practice, largely because of the limited legislation emanating from provinces. In the event that provincial legislatures are more active in asserting their legislative powers, conflict is likely to ensue and the question arises as to whether it will be beneficial or not. In addition, with the vagueness in question, it is easy for the national legislature to claim a right to impose national legislation on provinces when asserting one of the exceptions to provincial legislative prerogative in section 146(3) of the Constitution.

Further erosion of the autonomy of provinces comes in the form of the deployment by the ANC of provincial Premiers to provinces. Premiers should be primarily responsible to the provincial legislatures; however, the fact that they are effectively placed in their position by a decision of the ANC nationally means they have a stronger fealty to the national government. This is compounded by the process by which the party lists are created: while regional party leaders have considerable say in creating the lists, the national leadership has the final say.<sup>86</sup> These two realities have the effect of directing provincial accountability upwards (and towards party structures) instead of towards the citizens of each province which harms the democratic goals of federalism.

However, it would be a mistaken picture to assert that provinces have never exercised their autonomy from national government. There have been instances where provincial leaders have adopted policies in sharp conflict with the national government. The ANC Premier of Gauteng, Mbhazima Shilowa (and the provincial leadership), for instance, refused to follow the national government policy of confining the provision of anti-retroviral medication ('ARVs') to a limited number of hospitals in the province. In response to the obvious need for the medication, Shilowa announced a broad rollout of a programme aimed at dispensing ARV medication. This position stood in sharp contrast to the policy of the national government and led to a great deal of friction.<sup>87</sup>

Of course, one of the provinces (the Western Cape) has over successive elections been governed by an opposition party (the DA). That situation has opened the door to more competition between provinces and the DA has sought to trumpet its relative success in improving certain indicators in the province to gain electoral advantages.<sup>88</sup> It has also been more active in passing legislation though, even in these circumstances, there are

---

<sup>81</sup> Murray and Simeon, 2010: 241.

<sup>82</sup> Murray and Simeon, 2009: 543.

<sup>83</sup> Murray and Nijzik, 2002: 76. See also Steytler, 2001: 242. Choudhry, 2009: 1.

<sup>84</sup> Murray and Nijzik, 2002: 79.

<sup>85</sup> Murray and Simeon, 2009: 549.

<sup>86</sup> Murray and Simeon, 2010: 241.

<sup>87</sup> For a full description of the event, see Heywood, 2003: 278.

<sup>88</sup> Democratic Alliance, 2016.

only limited examples of provincial opposition to national government policies. The predominant trend remains a subservience by provincial legislatures and executives to policies developed by the national government.

### *Capacity*

Province's lack of autonomy may be, however, of little practical relevance. More important is perhaps their lack of capacity which may be used appropriately to justify the curtailment of their autonomy. Illustrations of this may come in the form of intervention by the national government in the operation of provinces. Intervention is of course the most extreme form of power that has to be exercised by national government in the face of widespread incapacity. The lack of intervention does not indicate strong performance but simply that provinces have not reached a critical state. Interventions, as mentioned above, are permitted in instances where a province cannot or does not fulfil an executive obligation in terms of the Constitution or governing legislation.<sup>89</sup> The intervention may take the form of the national government assuming responsibility for the obligation itself, or it may take the less extreme form of monitoring the performance of provinces. Given that national intervention in the operation of a province intimately affects provincial interests, the decision requires the approval of the NCOP.<sup>90</sup> The NCOP may also terminate the intervention once it is deemed no longer necessary.<sup>91</sup>

The national government has had to intervene on several occasions in the operation of provinces.<sup>92</sup> In 2011, the most invasive intervention of national government was in the operation of the Limpopo Provincial Government.<sup>93</sup> The national government cited concerns over massive financial mismanagement by the provincial government as the reason for its intervention. Specific areas targeted for intervention were the Provincial Treasury, and Departments of Education, Transport & Roads, Health and Public Works. The fundamental concern of the national government was averting the financial collapse of the Limpopo provincial government and the devastating effect that would have on service provision in the province.

While the intervention in Limpopo relates to fiscal considerations which will be dealt with further below, there are fundamental reasons for the intervention which relate to the autonomy of provinces. Limpopo suffered from a chronic lack of capacity and an inability adequately to govern its own affairs. As a result, it was not in a position to exercise its own autonomy and its responsibilities were justifiably appropriated by the national government. Therefore, the question becomes whether the Constitution adequately took into account the reality that provinces might not have sufficient capacity to operate as an autonomous government sphere. This foreseeable problem is exacerbated, in a sense, by appointing provinces as the organs with large responsibilities around service delivery.

As a result of the coming into force of the Constitution, provinces inherited or encountered several problems. First, the provinces were constituted over areas that covered the old South African homelands. As a result, they were required to absorb the civil servants who had staffed the deeply-flawed homeland governments. Furthermore, in the provision of basic services such as healthcare, education and welfare, they were required to amalgamate Bantustan and provincial administrations that were previously divided. The new provincial administrations thus faced the difficulty of integrating a range of competing individuals often jealous of each other's influence.<sup>94</sup> In addition, these institutions had been designed to promote and defend the social and economic system of apartheid and therefore required fundamental restructuring.<sup>95</sup> Several of these administrations had also suffered severe damage under apartheid and were, in the more extreme cases, non-

---

<sup>89</sup> Section 100 of the Constitution provides for such interventions.

<sup>90</sup> Section 100(2)(b).

<sup>91</sup> Section 100(2)(b).

<sup>92</sup> See 'Interventions since 2009: NCOP Releases list' (March 20, 2014) available at <http://www.pa.org.za/blog/interventions-2009-ncop-releases-list> (accessed on 21 March 2016). This list indicates that up to 2014, intervention had occurred in 6 provincial departments.

<sup>93</sup> Interventions by the national government into provinces have occurred 6 times (5 times in Limpopo and once in the Eastern Cape).

<sup>94</sup> Lodge, 1998: 14.

<sup>95</sup> Bardell, 2000: 104.

functional.<sup>96</sup> Perhaps the most critical shortfall at the time of democratic transition was the lack of adequately skilled human resources to staff provinces.<sup>97</sup>

What this may point to are the challenges of not only establishing a federal system of government in general, but of doing so in a country emerging from an oppressive regime. These circumstances ensured that, for the early period of South African democracy, the provinces would be ill-equipped to perform their service delivery mandate effectively. That was not only an unfortunate scenario for those in need of those services, but has impacted upon the legitimacy of the institutions. Provincial government are regarded as often being ineffective in the South African governance framework. In fact, in our survey, 48% of the total respondents believe that provincial parliaments are a waste of tax-payers money and only 28 percent disagree with this proposition. Clearly, there are very limited connections with and trust in provincial governments.

#### *Political relevance*

The situation above also has impacted upon the ability of the 9 provinces to build their political legitimacy. The 9 provinces established by the Constitution were a new phenomenon in the South African political sphere and, as such, lacked any prior sense of loyalty to them. People were unsure of their function or the provincial electoral process that was newly established. They needed to build trust. Developing the political relevance of the provinces was to be a difficult task at the beginning of the democratic era. Unfortunately, the lack of autonomy and capacity already canvassed have not served to create any strong sense of faith in these structures as is evident from the survey results. Provinces remain important structures in the constitutional scheme yet, at present, can be said to lack the ability to command much fidelity from the citizenry.

#### *Cooperative government and intergovernmental relations*

The Constitution mandates that the separate spheres of government, though possessing distinct powers and responsibilities which must be respected, must cooperate with others 'in mutual trust and good faith', by 'fostering friendly relations', by assisting and supporting each other, by coordinating their actions, by adhering to agreed procedures and by avoiding legal proceedings against each other. While this may seem aspirational, it is also necessary. Given the high degree of concurrency in the division of powers and the extent of central supervision over provinces, cooperation among the various levels and spheres of government is essential in order to ensure the adequate operation of the federal system.

Several questions arise in operationalising provisions such as this. The first is whether cooperative government was supposed to reduce the competitiveness between provinces and the national government and between provinces themselves. Two possible interpretations can be given in this regard. On the one hand, the Constitution's provisions could be read in such a way that preserves the provincial autonomy to adopt different policies and legislation which may conflict with that adopted in other provinces. Co-operative governance here would simply regulate the ethos through which provinces relate to one another (in a co-operative and collegial way) and prescribe that any policy should not harm other provinces or restrict their autonomy. On the other hand, the cooperative governance provisions could be understood to require uniformity between national and provincial actions. Such a reading is undesirable – though it has perhaps been dominant – and would undermine many of the goals of a federal system.

The practical realisation of the objectives of cooperative government has faced several challenges. While it may be considered a success that such institutions are established as a matter of law and that they are mandated to meet regularly, the quality of intergovernmental meetings has been alarmingly low. Given the high frequency of meetings, attendance has been poor and those officials present tend to be of a low rank.<sup>98</sup> As a result, intergovernmental relations have not been conducted by those with a high degree of decision-making capacity and that has affected the quality of the relations and co-ordination that has developed resulting in the very inefficiencies the system was designed to guard against.

---

<sup>96</sup> Bardell, 2000: 104. In some instances, government accounts in certain previous homelands were last audited in 1988. Further, other accounts of the transition described the new provincial governments as lacking basic information as to the quality or even location of government facilities.

<sup>97</sup> MPSA, 1997.

<sup>98</sup> Presidential Review Commission, 1998: 38.

Further concerns regarding the performance of the intergovernmental relations system established by the governing legislation have been identified. The most important of these is the fact that the ANC central government has typically used the intergovernmental institutions as a means of transmitting instructions downwards. As a consequence, these institutions often do not perform their intended function of generating debate and consultation on governance issues between different spheres and levels of government, and instead act to further concentrate government power in the central government.<sup>99</sup> The centralising ambitions of the ANC are thus realised in this manner but are in tension with the creation of a true federal structure.

Other concerns relate to the inability of officials in different spheres of the government from speaking out against the policies of the national government for fear of political retribution.<sup>100</sup> This problem is reinforced by the party-list system which is established nationally and thus discourages provincial representatives from deviating from the ANC's, and thus the national government's, policies. These structural problems once again stifle the opportunity for provinces to challenge policies of the national government and respond to needs within their provinces.

Finally, it can be argued that the interaction of government within a closed system of intergovernmental relations excludes the public and thus degrades the functioning of the participatory aspects of South African democracy. In other words, when the coordination of their activities is done without taking into account or including the concerns or views of society, it is detrimental to the vision of participatory democracy established in the Constitution.

This problem is compounded when the design of the Constitution generates broad areas of shared responsibility, making accountability and clarity to citizens more difficult. It was found early on in the constitutional democracy that "[c]entral and provincial governments are quick to claim credit for successes as they are to blame each other for failure, and ... it is often difficult to establish who is accountable for what. So long as each government has the other as an excuse for non-delivery, so long will the country be held to argument and indecision."<sup>101</sup> Co-operative governance has thus often been a principle that is used by various branches of government to shirk responsibility and accountability.

A relative success in the implementation of the principle of cooperative government can be seen in the Constitutional Court's approach to the goal of minimising the court-driven resolution of intergovernmental conflicts. For example, the Constitutional Court in *National Gambling Board v. Premier of KwaZulu-Natal* refused to grant direct access to the Constitutional Court to the parties on grounds that they did not exhaust all options to resolve the dispute other than through litigation. This decision stands as a useful precedent which encourages greater deliberation within the intergovernmental framework before reaching court though the down-side is that there is often a need for a dead-lock breaking mechanism.<sup>102</sup>

Co-operative governance has the potential to allow each sphere to fulfill its respective functions whilst respecting those of the other spheres and branches. Yet, it also has the potential to obscure responsibility and accountability. Its uses really depend on the intentions of those utilising the system which is perhaps a flaw in the constitutional design that may have benefited from a clearer delineation of responsibilities. To achieve the benefits of a truly federal system, there is a need for the ANC with its dominance at a national level (and provincially) to create the space necessary for the provinces to govern. As a reluctant federalist, it is understandable why the ruling party has not always done so though such an approach may severely weaken the institutional design of the Constitution.

### *Fiscal federalism*

While the national parliament retains substantial regulatory authority, provincial governments maintain administrative responsibility for several important policy jurisdictions. These include health, welfare, as well as primary and secondary education. Together, these functions utilise more than 80% of the consolidated provincial

---

<sup>99</sup> de Villiers and Sindane, 2011: 23.

<sup>100</sup> de Villiers and Sindane, 2011: 26.

<sup>101</sup> Friedman, 1998.

<sup>102</sup> *National Gambling Board v. Premier of KwaZulu-Natal*, 2002 2 BCLR 156 (CC), 2002 2 SA 715 (CC)

spending.<sup>103</sup> The revenue-generating powers of the provinces are, however, severely limited. As a result, the provinces remain almost fully dependent on transfers and grants, which cover approximately 95% of their expenditures.<sup>104</sup> Local governments on average find themselves in different circumstances. Many municipalities derive approximately 90% of their budgeted expenditure from self-generated revenue.<sup>105</sup> However, municipalities in rural areas tend to possess a weak revenue base due to their poorer constituents.<sup>106</sup> In these cases, municipalities are also dependent on grants and transfers from the national government. As a result, despite the decentralisation in constitutional design, in reality, interdependence is a characteristic of the federal system.

This does not necessarily constitute a failure in terms of the goals of the Constitution. It is quite clear that the drafters did not intend to create a loose federation of independent regions. However, in terms of the goals of better representation and enhanced service delivery, financial dependence has limited the ability of most provinces and many municipalities to operate successfully.

As we saw, the Constitution establishes an independent commission, the FFC, to guide the revenue sharing process. The purpose of this arrangement is to depoliticise the debate on the allocation of financial resources to provinces.<sup>107</sup> Given that provinces are tasked with the administrative responsibility for several important policy areas, the allocation of resources to provinces is crucial for the provision of these vital services.<sup>108</sup>

However, the FFC has remained to a large extent on the margins of the revenue-sharing process. In 2000, the FFC stated that its main challenge remained securing ‘an appropriate, sustainable and integrated place in the public finance system’.<sup>109</sup> The reason for the reduced role of FFC is the lack of adequate response by government decision-makers to its advice and recommendations. The Chairperson of the FFC articulated this point when he stated that it would ‘indeed serve the system well were bodies like the FFC not left at times with the feeling (real or imagined) that the absence of clear protocols to facilitate its interactions with either the executive or legislative branches of government, derives from political expediency which renders the institution irrelevant’.<sup>110</sup>

Turning to local government, municipalities have an original power to levy rates and so should ideally not depend on the national or provincial governments for their liquidity. The Constitutional Court in *Fedsure* acknowledged this original power to tax held by municipalities and found that a municipality’s power to levy rates is a legislative act immune from administrative review.<sup>111</sup> This is significant and entrenches the power of the municipalities in this regard. However, *Fedsure* only considered the power to levy rates – not the power to charge tariffs or surcharges for specific services rendered to particular residents. Rates are collected and placed into a general pot and then decisions are taken about what to spend these funds on. They are the municipal equivalent of taxes charged by the national government. Tariffs on the other hand are charges for specific services whose costs must be covered. Steytler and de Visser argue that there is a need for municipal legislation to authorise the charging of tariffs for particular services and a policy to guide the setting of tariffs. The determination of any particular tariffs in terms of such a policy then becomes an administrative act that does not always requires new legislation.<sup>112</sup>

All these measures mean that municipalities are responsible for raising large amounts of their own revenue. They are also entitled to their ‘equitable share’ revenue from the national government though the amounts thereof may vary. One of the big problems in relation to local government is ensuring that their objectives (identified above) are adequately funded through these sources, particularly in areas where their own revenue-raising abilities

---

<sup>103</sup> Wehner, 2003: 1.

<sup>104</sup> National Treasury *Budget Review*, 2001:152.

<sup>105</sup> Wehner, 2003: 1. See National Treasury *Budget Review*, 2016: 75ff for an indication that this remains true.

<sup>106</sup> Wehner, 2003: 1.

<sup>107</sup> Mokgoro, 1994: 284.

<sup>108</sup> Wehner, 2003: 1.

<sup>109</sup> Financial and Fiscal Commission, 2000.

<sup>110</sup> Financial and Fiscal Commission, 2000: 4-5.

<sup>111</sup> *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC)1998 (12) BCLR (CC) at par 45.

<sup>112</sup> Steytler and de Visser, 2006: 22-76.

are limited.<sup>113</sup> This is particularly true for poorer areas where the revenue base is relatively impoverished and where basic services are most needed.

### *Local government*

#### *Boundaries*

The power to demarcate municipal boundaries, as we have seen has been vested in the Municipal Demarcation Board. The point of such an independent board, that is required in terms of section 155(3)(b) of the Constitution is according to the Constitutional Court is to prevent political interference with the boundaries of municipalities which 'would undermine our multi-party system of democratic government'.<sup>114</sup> The approach of the Court demonstrates a concern to ensure that local government functions in a manner that supports the democratic aims of multi-level governance.

The ambit of the power of the Board to actually demarcate municipal boundaries has been contested. Specifically, the national government, under the auspices of Parliament, also has the power to demarcate provincial boundaries. Inevitably these two powers clashed. The instance of this clash has resulted in a line of decisions. These court decisions stem from the phenomenon of municipalities that crossed the borders between provinces. Such municipalities arose as a result of the abolition of the homelands and the redrawing of provincial boundaries. There was no integration in the process and thus limited co-ordination between the Board and the other levels of government in redrawing these boundaries. The Constitution in turn allowed for municipalities to straddle the boundaries between provinces. As a result, different provincial authorities attempted jointly to administer cross-border municipalities. This led to great challenges: these municipalities effectively fell within two regulatory authorities of two entities with different legislation; these municipalities also imposed large financial burdens which in turn undermined service delivery.<sup>115</sup> These problems led parliament to propose disbanding these cross-border municipalities. The constitutionality of this legislation and the 12th Constitutional amendment was challenged on the basis that the new position amounted to Parliament usurping the Board's power to demarcate municipalities.<sup>116</sup> It was contended that such interference threatened to undermine one of the key purposes of local government, namely, to provide democratic and accountable government for local communities.<sup>117</sup>

The Court ruled in favour of the national government. Parliament had the power to redraw the boundaries of provinces. The Court accepted that the power of Parliament to redraw provincial boundaries includes any powers reasonably necessary to achieve this goal.<sup>118</sup> That would include the power to change the boundaries of municipalities in order to avert the possibility of cross-border municipalities. The Municipal Demarcation Board, on the other hand, did not have the power to determine provincial boundaries.<sup>119</sup> Thus, once provincial boundaries have been determined, *then* the Board can determine municipal boundaries.<sup>120</sup> This position allows Parliament to fulfill its general unitary, national economic agenda whilst still leaving the actual decision as to how a municipality is demarcated to the Board. The constitutional text simply does not vest any powers in the Board to consider the sorts of general national considerations that Parliament can take into account in provincial demarcation. The Board's focus is to consider factors that affect municipalities.

It is important to recognise that the issues around the location of municipalities have created great political controversies and stress points. The government often tried to force municipal areas into provinces that people did not want to be part of. The Constitutional Court in *Matatiele* found that the failure to engage in a process of public participation in Kwazulu-Natal surrounding the change of boundaries rendered the Twelfth Amendment invalid.<sup>121</sup> In *Moutse*<sup>122</sup>, a community dissatisfied with the movement of their municipality to the Limpopo

<sup>113</sup> Wehner, 2003: 1.

<sup>114</sup> *Matatiele Municipality v President of the RSA* [2006] ZACC 2 para 41.

<sup>115</sup> *Matatiele Municipality v President of the Republic of South Africa* [2002] ZACC 2 para 16.

<sup>116</sup> *Matatiele* para 2.

<sup>117</sup> *Matatiele* para 41.

<sup>118</sup> *Matatiele* para 50.

<sup>119</sup> *Matatiele* para 51.

<sup>120</sup> *Matatiele* para 51.

<sup>121</sup> *Matatiele Municipality v President of the Republic of South Africa* [2002] ZACC 12 para 114.

<sup>122</sup> *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27.

province (with the abolition of cross-border municipalities) also challenged the adequacy of the public hearing process, though unsuccessfully in this case. In *Merafong*,<sup>123</sup> a community was incensed when there was an attempt to move their municipality to the North-west province (and they wished to be in the better-governed Gauteng province). The majority of the Court (in a highly split decision) found that the legislation abolishing the cross-border municipality and placing it in the North-west was rational. It also found that the province had complied with its duties to facilitate public involvement despite the fact that it had changed its position when the final vote arrived in favour of the incorporation of Merafong into the North-west where it initially opposed this.

Particularly, in *Merafong*, community members felt very strongly about this and violent protests erupted. All these cases are examples of residual political controversies surrounding provincial boundary demarcation spilling over into the law courts. They also indicate the lack of attentiveness paid to the will of the people living in these areas by the central government (and ruling party) which led to a serious upsurge in violent confrontations. The lack of responsiveness to popular will in these areas reflects a failure adequately to take account of the participatory aspects of South African democracy which are meant to be enhanced by multi-level governance structures. The majority of the court in *Merafong* appears to regard participatory democracy as in some sense as secondary to representative democracy. The Court stated that ‘the public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.’<sup>124</sup>

The court held that, if the electorate is unhappy with the decisions of a party, it should vote to remove them from power. The problem here is of course that strong feelings within the Merafong community concerning the demarcation issue did not necessarily lead other communities to feel similarly. This highlights the fact one of the very purposes of local democracy is to ensure expression is given to local sentiment and that it is not lost and overruled by those in other parts of the demos. Arguably, these line of cases in some sense illustrate the sense in which individuals lack a say in governance even at a local level: our survey bears this out with only 44 percent of respondents of the view that politicians represent them.

This line of cases also, interestingly, suggests the development of some competitive element within the multi-level governance structure of South Africa. As we mentioned above, the provinces were a creation of the new constitutional order and thus the degree to which individuals were invested in them as a matter of identity was probably limited. In general, some provinces have been perceived to perform better than others: Gauteng, for instance, is widely regarded as a more functional government than that in North-west. The people in Merafong were thus expressing reasonable preferences based on their desire to live in an area with better governance. The ANC’s response of essentially forcing them into the North-west, once again, highlighted its reluctance to accept the competition that was emerging between provinces. The struggle over cross-border municipalities thus suggests that people care about structures to the extent that they impact upon what really matters to them: the efficient delivery of services.

### *Municipal functions*

Actual delivery of even these basic services, however, has not approximated the hopes articulated in the Constitution. In a 2005 study, the Department of Provincial and Local Government reported that out of the 284 municipalities, 203 could not provide sanitation to 60 % of their residents.<sup>125</sup> Generally, ten years ago, 61% of municipalities were failing to provide their municipal services.<sup>126</sup> A lot of these failures have been explained as resulting from a lack of adequate skills and an uneven distribution of such skills across the country.<sup>127</sup> There is also a worrying lack of competency in crucial areas and it has been found that most staff that already work for municipalities are not adequately qualified for their positions.<sup>128</sup> These human resource shortages obviously impact the quality and ability of municipalities to deliver municipal services. Smaller and rural municipalities appear to be those that are hardest hit by the lack of skills as a result partially of being unappealing locations for

<sup>123</sup> *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10.

<sup>124</sup> *Merafong* at para 50.

<sup>125</sup> Jackson, 2009: 26.

<sup>126</sup> Jackson, 2009: 26.

<sup>127</sup> Jackson, 2009: 26-27.

<sup>128</sup> Jackson, 2009: 27.

professionals to live due to their remoteness.<sup>129</sup> The cost of relying on private sector skills through consulting is also often not financially sustainable for these municipalities.<sup>130</sup> These problems are exacerbated by the complex structuring of local governance into district and local municipalities. Communities that can least afford it essentially must support two layers of bureaucratic structures and there are simply too few staff to populate these parts of the government.

Currently, 32% of all municipalities are almost dysfunctional (to use the national government's own words).<sup>131</sup> 31% of municipalities, a national government report has found, are plagued by endemic corruption, councils that do not function adequately, a lack of structured community engagement and participation systems, and poor financial management leading to continuous negative audit outcomes.<sup>132</sup> There is also a poor record of service delivery and service management functions such as fixing potholes, collecting refuse, maintain public places, fixing street lights, etc.<sup>133</sup> These results demonstrate that most municipalities are severely under-performing in their achievement (in a thick sense) of the goals of providing basic services or pursuing economic development.

### **Customary law and traditional authority**

As previously stated, any legal recognition given to the powers of traditional leaders is entirely within the discretion of Parliament. Moreover, customary law is the font from which traditional leaders source much of their power. The powers of traditional leaders are thus limited indirectly by the need to reconcile African customary law with general constitutional norms. If the scope of customary law is reduced, so too is the power of traditional leaders. The Constitution makes it clear that in any conflict between customary law and constitutional norms encoded in the Bill of Rights, the Bill of Rights trumps customary law.<sup>134</sup> The conflict between customary law and fundamental rights provisions has arisen thus far mainly in the area of women's and children's rights.<sup>135</sup> The generally patriarchal nature of customary law, and practices around marriage (such as levirate and sororal unions, as well as polygyny and bridewealth (lobola)) have raised questions concerning their compatibility with the strong gender equality norms contained in the Constitution.<sup>136</sup> Customary practices such as initiation rituals amongst certain tribes and child labour, as well as the denial of maintenance claims of children born outside of marriage are in potential conflict with the children's rights contained in section 28 of the bill of rights.<sup>137</sup> The guiding principle of male primogeniture, contained in the customary law of succession, was regarded as being potentially discriminatory against both women and children.<sup>138</sup> Parliament has passed legislation to regulate some matters such as the Recognition of Customary Marriages Act 120 of 1998. Nevertheless, many areas of conflict remain, which are not regulated at all or are only regulated by pre-constitutional legislation.<sup>139</sup>

A number of important court decisions have emerged that address areas of incompatibility between customary law and the Bill of Rights.<sup>140</sup> In *Bhe*<sup>141</sup>, the court declared invalid the customary rule of male primogeniture determining inheritance in the law of succession by finding that it did indeed discriminate unfairly against women. Controversially, instead of developing the law itself, it replaced customary law with the rules contained in the Intestate Succession Act. The Court in *Mayelane*<sup>142</sup> was faced with determining the validity of customary marriages in the context of polygynous practices and the impact of the Bill of Rights and norms of gender equality in such situations. In that case, the court developed customary law to require the consent of a first wife when her husband wished to conclude a second marriage. Once again, there was some evidence led in the case

---

<sup>129</sup>Jackson, 2009: 28.

<sup>130</sup>Jackson, 2009: 28

<sup>131</sup> DCGTA, 2014: 6.

<sup>132</sup> DCGTA, 2014: 6.

<sup>133</sup> DCGTA, 2014: 6.

<sup>134</sup> Section 211(3) of the Constitution.

<sup>135</sup> Lenhart, 2005: 242.

<sup>136</sup> Lenhart, 2005: 242.

<sup>137</sup> Lenhart, 2005: 242.

<sup>138</sup> Lenhart, 2005: 242.

<sup>139</sup> Lenhart, 2005: 242.

<sup>140</sup> We have dealt in Chapter 3 with the relationship between these cases and the right to equality.

<sup>141</sup> *Bhe and Others v Khayelitsba Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

<sup>142</sup> *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).

concerning the existing customary law and whether it already required such consent. In the *Shilubana*<sup>143</sup> case, the court was tasked with deciding upon who rightfully was the heir to the traditional leader of the Valoyi people who died in 2001. Most of the community itself wished to appoint a woman to the role and the traditional authorities ruled that its own customs had developed to allow for this; a small section of the community rejected this claim, holding that the chieftainship could not pass to a woman given that this went against past practice. In this instance, the traditional authorities themselves wished to develop their law in line with the Constitution and the court merely had to recognise that customary law had developed its own momentum in such a way that it allowed for women to ascend to a chieftaincy. The court in this case affirmed the flexible, living nature of customary law and that recognised the power of communities to develop their own laws.

These cases illustrate that there is a dynamic interaction between the Constitution and customary law. In some cases, existing law has been replaced; in others it has been developed in line with the Constitution; in yet others, the power of communities to change their own laws has been affirmed. Whilst many areas of customary law still remain untouched, it can be said already that the Constitution has had a significant effect on the development of customary law. In some cases, there is a mismatch between the good intentions of the secular courts and the understanding of social context and rules of customary communities. It is also clearly difficult to change a living body of law such as customary law without having unintended consequences: there is a need as a result, perhaps, for greater sensitivity on the part of secular courts as to the concrete effects any rulings would have.<sup>144</sup>

Clearly, the ability to challenge customary law and the rulings of traditional authorities in secular courts, in some sense reduces the authority of traditional leaders. On the other hand, the courts have not sought in any way to replace the jurisdiction of traditional authorities to adjudicate disputes but simply some of the laws that they base their adjudication on. Whilst there remain tensions, traditional authority has, in many ways, been given a crucial constitutional status and respect whilst also having been limited by the constitutional order (as is appropriate in a democratic space). As has been mentioned above, its interactions with other spheres, particularly local government, is often less clear. Nevertheless, overall, the picture that has emerged of the constitutionalisation of traditional authority is a positive one.

## 7.4. Performance, underperformance and recommendations

### **Performance**

As we have seen, multi-level governance structures have been set up since the advent of constitutional democracy. The fact that different political parties have and continue to govern one or two of the provinces means that there has been a limited success in introducing competition into the electoral system. Furthermore, there have been instances where provincial Premiers have taken different policy approaches from the national government, even where the premier is a member of the same political party: that indicates that there is some autonomy exercised by the provinces and that federalist norms of some kind have taken root. Provinces are able, in such instances, to plug some of the gaps of the poor policy decisions of national government as was the case with the response to the HIV/AIDS crisis.

As to local government, it is important to recognise the mammoth re-design of these institutions that took place in the new South Africa. A whole new set of structures have been created that have, at least, sought to give effect to some of the goals for which they were created. Our survey indicates a relatively high level of participation in the processes of local government: 78 percent of people vote in local government elections and 50 percent have attended a ward committee meeting. The creation of an independent Municipal Demarcation Board has been important to prevent the boundaries of municipalities being drawn according to political allegiance.

Parliament has acted on the constitutional provisions around traditional authority and passed legislation to regulate traditional leadership as well as creating structures for their interaction with other branches of government. This helps to legitimise the post-apartheid state, increasing the likelihood of acceptance of the constitutional regime by traditional communities. The Constitution has also provided recognition to customary law and the interaction between the two has led the court to affirm the power of traditional communities to

<sup>143</sup> *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)

<sup>144</sup> See the empirical research of the effects of the Bhe judgment by Mnisi Weeks, 2015: 215- 255.

develop their own law. It has also resulted in important changes to customary law that may advance other key constitutional values such as gender equality.

### ***Under-performance***

One of the major problems affecting the multi-level governance structure of the Constitution has been the areas of overlap in powers. We highlighted the fact that there is a lack of clarity of how to proceed in relation to the wide range of concurrent areas of governance included in Schedule 4 of the Constitution with no clear authority established in any sphere of the state. In some sense, this harms the federal structure of the constitution, bolsters the centralisation of power in the national government and creates gridlock on key policy issues. The lack of clear definition of who is responsible often also has an effect on service delivery. Beginning a discussion around concurrent competences may well open a can of worms. At the same time, the lack of clarity may continue to hamper some of the broader goals of the constitution. It may thus be wise to consider reducing the areas of concurrent competences and providing clear loci of responsibility.

In a similar vein, there has also been a problem a lack of clarity concerning the relationship between traditional leadership and other branches of government. In particular, the unclear relationship between municipal powers and traditional authorities needs consideration and possible amendments should be considered.

Multi-level governance requires that there be adequate human resources to ensure decent governance at each level. Unfortunately, staffing these various layers has been a problem leading to failures in governance. National government has had to intervene several times with the provinces; and the provinces have often had to intervene in the functioning of municipalities.

The ANC which is the dominant party throughout has been a reluctant federalist and, as such, has not exhibited a strong will to make the federal structures work: in many ways, its deployment policy and approach to appointing Premiers of provinces has reflected its tendencies to centralise control of the state. Given the importance and powers of the provinces and local governments within the constitutional scheme, this approach may well have been shortsighted. Poor service delivery and underfunded municipalities ultimately limit the overall constitutional project of socio-economic transformation. Failing to engage with devolved structures as possible sites of experimentation also hampers this goal.

High levels of violent service delivery protests suggest a large amount of dissatisfaction which is often directed particularly at local government. Local government has only to a limited extent succeeded in giving expression to the desire for participatory democracy: whilst the legislative framework provides for even quite radical participatory processes such as determining local government budgets with the involvement of the community (as has been experimented with in Porto Alegre, Brazil), such opportunities have generally not been taken up. Local government has taken on the mandate of providing basic services to varying degrees of success across the country and with many instances of failure adequately to provide for individuals. These problems often arise from a lack of human capacity and, sometimes, financial ability too given the limited pool of residents who can contribute to municipal coffers in many areas of the country.

Some of these problems may have resulted from a design flaw in the Constitution in that it is not clear why it was necessary to create such a complex system of local governance with both local and district municipalities in many areas: too many layers have exacerbated the problem of finding skilled staff to work in these structures and of utilising these structures to dispense political largesse to those who follow the party line. There are effectively four layers of government where district and local municipalities operate which arguably is too much in a developmental state.

Fiscal Federalism could also have more teeth when applied to provinces. Greater autonomy and local economic experimentation could have been made more effective by granting more powers to provinces to raise their own revenue instead of their heavy reliance on national allocations.

### ***Recommendations***

In light of these findings, the following recommendations are made to try and improve the performance of the multiples levels of government in South Africa.

- The development of multi-layered government, as we saw, emerged from concrete historical circumstances and interests. There are though numerous benefits to devolved government, recognised by experts in constitutional design around the world. We have attempted briefly to canvass some of these in this report. The point we wish to make is that there needs to be a more principled political commitment to make the federal structures work. Doing so requires attending to the reasons why they are important in the first place and trying to give effect to those reasons.
- There should be an investigation into areas where the lack of clarity in constitutional competences and too much overlap is hampering governance. We believe it may be time to re-visit Schedules 4 and 5 of the Constitution in which these are contained for the purpose of being able to ensure clearer loci of responsibility.
- There should be a clearer delineation of the responsibilities of traditional authorities and local governments in the areas of service delivery and perhaps mechanisms established for addressing conflicts (akin to those with other branches).
- There should be an investigation into whether the local government structures of South Africa cannot be simplified: in particular, the creation of a fourth-tier of government where district and local municipalities exist may well be unnecessary and taking away one of these layers (probably the district layer) could help enhance efficiency and service delivery.
- Investigations should be considered into how to enhance participatory democracy within local government and comparative models considered (such as participatory budgeting).
- Greater options for provincial revenue raising should be considered that can enhance provincial autonomy.
- There need to be programmes put in place for training and up-skilling those at all levels of government in order to ensure they achieve their mandates. In doing so, different levels of government need to be considered separately so as to ensure that each is properly staffed with those who gain expertise in relation to that particular level.

## References

### Statutes

Local Government Municipal Demarcation Act 27 of 1998.

Municipal Structures Act 117 of 1998

National House of Traditional Leaders Act 22 of 2009

Traditional Leadership and Governance Framework Act 41 of 2003.

### Cases

*Bhe and Others v Khayelitsba Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

*CDA Boedery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA)

*Executive Council: Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877.

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA 1996* 1996 (4) SA 744 (cc), 1996 (10) BCLR 1253 (CC)

*Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) 1998 (12) BCLR (CC)

*Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).

*Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC)

*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

*Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)

*Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC).

*National Gambling Board v. Premier of Kwazulu-Natal*, 2002 2 BCLR 156 (CC), 2002 2 SA 715 (CC)

*Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657; 1999 (4) BCLR 383 (CC)

*Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)

*Uthukela District Municipality v President of RSA* 2002 (5) BCLR 479 at 491E.

**Articles and books**

- Amar, V.D. and Tushnet, M. eds. (2009). *Global Perspectives on Constitutional Law*. Oxford: Oxford University Press
- Bardell J. (2000) 'Towards a Culture of Good Governance: The Presidential Review Commission and Public Service Reform in South Africa' *Public Administration and Development* 20:103-118
- Bednar, J. (2009) *The Robust Federation, Principles of Design*. Cambridge: Cambridge University Press.
- Bednar J. (2011) 'The Political Science of Federalism' *Annual Review of Law and Social Science* 7: 269
- Bennett, T and Murray, C. (2006). 'Traditional Leaders' in S. Woolman et al eds.
- Boukhaert, B. and DeGeest, G. eds. (200). *Encyclopedia of Law and Economics* Cheltenham: Edward Elgar.
- Choudhry, S. (2009) "'He Had a Mandate" The South African Constitutional Court and the African National Congress in a Dominant Party Democracy', *Constitutional Court Review* 2: 1-86
- De Villiers, B. (1994). *Birth of a Constitution*. Cape Town: Juta.
- De Villiers, B and Sindane J. (2011) *Cooperative Government: The Oil of the Engine*, Konrad Adebauer Stiftung Research Report.
- Goodwin, E. and Pettit, P. eds. (2012). *A Companion to Contemporary Political Philosophy*. Oxford: Blackwells.
- Halberstam., D. (2009) 'Federal Powers and the Principle of Subsidiarity' in V.D. Amar and M. Tushnet eds.
- Heywood M. (2003). 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health' *South African Journal on Human Rights* 19: 278.
- Halberstam, D. (2009) 'Federal Powers and the Principle of Subsidiarity' in V.D. Amar and M. Tushnet eds.
- Halberstam, D. (2012). 'Federalism: Theory, Policy, Law' in Michel Rosenfeld and Andras Sajó eds.
- Inman, R and Rubinfeld, D. (2000) "Federalism." in B.Bouchaert and G.DeGeest eds.
- Jackson, V. (2004) 'Comparative Constitutional Federalism and Transnational Judicial Discourse' *International Journal of Constitutional Law* 1: 91-13
- Jackson, P. (2009) *South African Governance in Review: Anti-corruption, local government, traditional leadership* Cape Town: HSRC Press.
- Lehnert W. (2005). 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' *South African Journal on Human Rights* 21: 241

- Lodge T. (1998). *South African Politics Since 1994*. Cape Town: David Phillips.
- Mokgoro J. (1994) 'Interprovincial Fiscal Equalization: The Role of the Financial and Fiscal Commission' in Bertus de Villiers ed.
- Murray, C and Nijzik, L. (2002) *Building Representative Democracy: South Africa's Legislatures and the Constitution*. Cape Town: Parliamentary Support Programme.
- Murray, C. and Simeon, R. (2001) 'Multilevel Government in South Africa: An Interim Assessment,' *Publius: The Journal of Federalism*, 31: 65-92
- Mokgoro, J. (1994) 'Interprovincial Fiscal Equalization: The Role of the Financial and Fiscal Commission' in Bertus de Villiers ed.
- Mnisi Weeks, S. (2015) 'Customary Succession and the Development of Customary Law: the Bhe Legacy' *Acta Juridica* 215-255
- Riker, W. (1964) *Federalism: Origin, Operation, Significance*. Little Brown.
- Oomen B. (2000) *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa*. Netherlands Institute for Southern Africa.
- William H. Riker, W. and Follesdal, E. (1993) 'Federalism' in R.E. Goodwin and P. Pettit eds.
- Simeon, R. (1998) 'Considerations on the design of federations: The South African Constitution in Comparative Context' *SA Public Law* 13: 42-72.
- Rosenfeld M. and Sajo, A. (2012). *Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press.
- Steytler, N. (2001) 'Concurrency and Co-operative government: The Law and Practice in South Africa' *SA Public Law* 16: 241-254.
- Steytler, N. (2003) 'Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa' *Publius: The Journal of Federalism*, 33: 59-74.
- Steytler, N and Mettler J. (2001). 'Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy' *Publius* 31: 93-106.
- Steytler, N and de Visser, J. (2006). 'Local Government' in S Woolman et al eds.
- Van Niekerk R. (2012) 'Revisiting History: The Creation of Provinces and the Politics of Social Policy in a Democratic South Africa' *Social Policy & Administration* 46: 619
- Wehner, J. (2003) 'The Institutional Politics of Revenue Sharing in South Africa', *Regional and Federal Studies*, Vol 13 No 1: 1-30.
- Woolman, S. et al. (2008). *Constitutional Law of South Africa*. Cape Town: Juta.

**Other sources**

Democratic Alliance, (2016) Economic Transformation under good DA governance a change worth striving for, available at <https://www.da.org.za/2016/03/economic-transformation-under-good-da-governance-a-change-worth-striving-for/> [accessed on 21 March 2016].

Department of Co-operative Governance and Traditional Affairs (DGTA) 'Back to Basics Concept Document' (2014) available at <http://www.cogta.gov.za/sites/cogtapub/B2BDOCS/The%20Back%20to%20Basics%20Approach%20Concept%20Document.pdf>. [accessed on 21 March 2016]

Electoral Institute for Sustainable Democracy in Africa *South Africa Election Updates* available at <http://www.electionupdate.org.za/2014cu2kzn.htm> [accessed on 21 March 2016]

Financial and Fiscal Commission (FFC) (1995), *Framework Document for Intergovernmental Fiscal Relations in South Africa*, 1995.

Financial and Fiscal Commission, (2000), Annual Report 1998-1999.

Friedman, S, (1998) 'Why we need provincial governments' *Business Day* 9 March.

Minister for the Public Service and Administration (MPSA), (1997), Provincial Review Report. Pretoria: Department of Public Service and Administration.

Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa (1998)