

**PROVINCIAL CONSTITUTION-MAKING IN SOUTH AFRICA:
THE (NON)EXAMPLE OF THE WESTERN CAPE***

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Constitution-making is in the air in South Africa. For four years, from 1993 to 1996, the process of negotiating the two constitutions that led South Africa to full democracy dominated the political and legal scene. The drafting process for the second ('final') constitution was accompanied by a massive public-participation programme which introduced millions of South Africans to the concept of constitutionalism and to many of the issues important in constitution-making. The scale and success of this program is reflected in the fact that 84 per cent of the people polled near the end of the programme were interested in reading the final Constitution.¹ But constitution-making has extended well beyond the national sphere right down to small communities. For instance, Barbara Oomen movingly documents a process undertaken by the rural community of Mamone to draft a constitution which will provide a framework within which their new chief can rule:

‘You can see in other communities without a constitution that this leads to lack of respect, clashes and friction.... We must go back to the tradition of our forefathers ... when there was still respect for law and order.’²

For this group the aim is ‘to draw up a tribal constitution which is in line with the national one, whilst still reflecting community values’.³ The national government’s land restitution and redistribution policy has prompted constitution-writing in other communities: the Community Property Associations Act requires beneficiaries of restitution or land reform to adopt a constitution defining the way in which they will govern their new resource.⁴ At least 150 ‘constitutions’ have been adopted in this process.⁵

In this context it may seem surprising that constitution-making has not caught on at the provincial level. Certainly, as long as a province is without its own constitution it can manage adequately on the ‘default’ provisions for provincial government provided in the national Constitution. But the national Constitution also expressly gives provinces the power to adopt provincial constitutions. In spite of this, eight of the nine provinces rely on the default provisions of the national constitution and it is only KwaZulu-Natal and the Western Cape, the two provinces held by national minorities, that have attempted to adopt their own constitutions.

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¹ Hassen Ebrahim *The Soul of a Nation – Constitution-making in South Africa* (Cape Town, Oxford University Press, 1998) p 246. Ebrahim provides a good account of the political process that led to South Africa’s transition to democracy, focusing particularly on the process of drafting the final Constitution. See also C M Murray ‘A Constitutional Beginning: Making South Africa’s Final Constitution’ *University of Arkansas at Little Rock Law Journal* forthcoming.

² Barbara Oomen ‘A door between the worlds? Reforming the traditional justice system in Mamone’ paper presented at the South African Society of Cultural Anthropologists, June 1999 p 8.

³ Oomen at p 7.

⁴ Act 28 of 1996.

⁵ See Heinz Klug ‘Constituting Community: Universalism and communal governance in the recreation of rural communities in South Africa’, paper presented for Legal Cultures IV, Onati, Spain, June 1999.

Provincial constitution-making was contentious throughout the national negotiating process and was permitted by the national Constitution despite the visible reluctance of the African National Congress (ANC). It is still viewed with suspicion by many members of the now-governing ANC. The source of the aversion to provincial constitution-making is to be found in the ANC's discomfort with the provincial system generally. Although views differ, ANC politicians in general seem to consider the provincial system an imposition required by the negotiated transition to democracy – provinces are seen as a compromise necessitated by the need to find a system which allowed political space for minority groupings.⁶ Antipathy to provinces has been encouraged by the fact that the delivery record of the provinces has been very poor. South African provinces, like their German counterparts, are expected to implement policy of central importance to the country's transformation. In some provinces virtually no progress has been made, in none has progress been sufficient. Aversion to the provincial system reveals itself in various ways – innovation by provinces is not welcomed; national politicians sometimes seem to consider provincial politicians a nuisance; and provincial politicians often pay more attention to their party's national policies than to provincial concerns. Intergovernmental relations between provinces and the national government tend to be 'top down', with little real contribution from the provinces and the National Council of Provinces, South Africa's counterpart of the Bundesrat, is struggling to assert its role. In this context, the fact that there is little enthusiasm for provincial constitution-making processes is unsurprising.

It was against this background that the province of KwaZulu-Natal sought to implement its constitutional right to a provincial constitution early in 1996.⁷ At that stage, the South African 'interim' Constitution, which bridged the old and new constitutional orders, was in force. That Constitution gave provinces the power to adopt a provincial constitution, but imposed restraints. A provincial constitution -

- (i) was not to be 'inconsistent with a provision of the interim Constitution' but it could impose 'legislative and executive structures' different from those provided for provinces in the interim Constitution⁸ and it could provide for traditional monarchs;
- (ii) had to be passed by a two-thirds majority of the provincial legislature; and
- (iii) could be of 'no force and effect' unless it had been certified by the Constitutional Court to comply with (i).⁹

The KwaZulu-Natal Constitution failed the certification test hopelessly. In a forceful judgment, the Constitutional Court identified many flaws in it, the most serious of which were categorized as the 'usurpation of national powers'.¹⁰ In the view of the Court, many provisions of KwaZulu-Natal's proposed Constitution appeared to have been passed 'under a misapprehension that [the province] enjoyed a relationship of co-supremacy with the national legislature'.¹¹ The province

⁶ Such as the old governing party, now called the New National Party, which won the Western Cape province in the first elections and which became part of a coalition government after the second elections in 1999, and the Inkatha Freedom Party which took a majority of seats in KwaZulu-Natal.

⁷ For an interesting account of the process of drafting the KwaZulu-Natal Constitution see George Devenish 'The Making and Significance of the Draft KwaZulu-Natal Constitution' (1999) 47 *Jahrbuch des öffentlichen Rechts* 503.

⁸ German readers will see a similarity between this provision and article 28 of the Basic Law. The similarity is more pronounced in section 143 of the 'final' Constitution which is quoted below.

⁹ Republic of South Africa Constitution Act, 200 of 1993 (Interim Constitution) section 160.

¹⁰ *Certification of the Constitution of the Province of KwaZulu-Natal, 1996 (KwaZulu-Natal Certification Case)* 1996 (11) BCLR 1419 (CC) paras 14ff.

¹¹ *KwaZulu-Natal Certification Case* para 15.

had overlooked the fact that in South Africa, unlike, for instance, the United States, provinces ‘were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution’.¹²

KwaZulu-Natal’s bruising experience in the Constitutional Court might have led all other provinces to hold back on constitution-making. The Western Cape did not. Instead, in a relatively unpublicized but nevertheless bitterly contested process, the Western Cape adopted a provincial constitution on 21 February 1997. Like the KwaZulu-Natal Constitution, this Constitution was submitted to the Constitutional Court for certification (this time in terms of the ‘final’ South African Constitution¹³). At first, as in the case of the KwaZulu-Natal Constitution, approval was refused.¹⁴ However, the Court’s judgment in the Western Cape certification case was very different from that in the KwaZulu-Natal case. The Western Cape had trodden carefully, respecting the national Constitution and asserting its provincial individuality in a cautious way. The Court’s difficulties with the Western Cape Constitution were based on disagreements about the best reading of the national Constitution and there was no suggestion that the province was attempting to usurp national power. The Western Cape amended its Constitution in response to the Court’s concerns and submitted it for certification once again. It was easily approved and now, subject, of course, to the national Constitution, governs the province.

The Western Cape Constitution: Round 1

When a province decides to adopt its own constitution, sections 143 and 144 of the ‘final’ national Constitution bind it. Section 144 simply deals with the certification process that has already been referred to. Following the interim Constitution closely, section 143 lays down the parameters of legitimate provincial constitution-making:

- (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for -
 - (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
 - (b) the institution, role, authority and status of a traditional monarch, where applicable.

- (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1) -
 - (a) must comply with Chapter 3 and the values in section 1; and
 - (b) may not confer on the province any power or function that falls -
 - (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
 - (ii) outside the powers and functions conferred on the province by the other sections of the Constitution.

¹² *KwaZulu-Natal Certification Case* para 14 quoting from *Ex Parte Speaker of the National Assembly: In re: Dispute concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1996* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) para 23.

¹³ The Constitution of the Republic of South Africa, 1996.

¹⁴ *Certification of the Constitution of the Western Cape, 1997 (Western Cape Certification Case I)* (1997) (9) BCLR 1167 (CC); 1997 (4) SA 795 (CC).

The leeway granted to provinces by these provisions is unclear. The precision of the wording suggests that South African provinces have less leeway in constitution-making than the German Laender,¹⁵ and the South African Constitutional Court has implicitly confirmed this. There is scope for redesigning ‘legislative or executive structures and procedures’, but the meaning of the phrase is uncertain. Some provinces might install a monarch, but this provision is not applicable to the Western Cape, which does not have established traditional leaders. Further possibilities remain vague. The Constitutional Court confirmed in the KwaZulu-Natal certification judgment that a provincial constitution could contain a Bill of Rights but concluded, at the end of thirteen paragraphs of rather labourious discussion, that ‘it must be acknowledged that the preparation of a provincial bill of rights aimed at avoiding these problems could present extremely difficult and complex drafting problems’.¹⁶ The Court proposes a device to ease these problems but does not solve them.¹⁷

Faced with these limitations and the memory of the Constitutional Court’s firm approach to the KwaZulu-Natal endeavour, the Western Cape was conservative. Its Constitution is characterised by many verbatim quotes from the national Constitution. In fact, about 39 out of 84 sections copy the national Constitution with only the editorial changes required by the provincial context. Approximately another 19 sections implement sections in the national Constitution with minor changes¹⁸ or simply refer to the national Constitution.¹⁹ In the first draft the most significant departure from the model provided in the national Constitution was the province’s attempt to redesign its electoral system. The proposed provincial Constitution also changed the size of the provincial legislature and executive. In addition to these proposals concerning the executive and legislature, the provincial Constitution established two ‘Commissions’, provided for ‘cultural councils’ and, in what was perhaps its most imaginative move, listed ‘Directive Principles of Provincial Policy’.

The proposed provincial electoral scheme

At present South Africa has a system of closed-list proportional representation for both national and provincial elections.²⁰ On the allocated election day – and all provincial elections are held on the same day as the national elections – voters vote twice: once for a party in the National Assembly and once for a party standing for the province. This system is not inappropriate in a

¹⁵ See article 28 of the Basic Law and the German principle of ‘homogeneity’. See also BverfGE 36 at 360 – 1.

¹⁶ *KwaZulu-Natal Certification Case* para 30.

¹⁷ The partial solution proposed by the Court is to include a provision expressly stipulating that the Bill of Rights applies only to matters within the jurisdiction of the province. But, the preceding discussion emphasises that this on its own is not enough. There must be a scrupulous attempt to draft the rights in a way that does not suggest that they intrude in the national sphere of government’s jurisdiction. In referring to the issue of a provincial Bill of Rights, *Western Cape Certification Case I* sums up this aspect of the KwaZulu-Natal judgment as saying that the rights must ‘not purport to intrude on the field covered by the Bill of Rights in the national Constitution’ (para 78).

¹⁸ See, for example, section 12 of the Western Cape Constitution which not only reasserts the requirement in the national Constitution that a new provincial Constitution must be published in the national *Government Gazette* but adds that it should also be published in the provincial *Gazette*.

¹⁹ For example, section 2 of the Western Cape Constitution states that the boundaries of the province are those specified in the national Constitution.

²⁰ The national Constitution set out the electoral system for the national Parliament and provincial legislatures for the 1999 elections in Schedule 6 which deals with ‘transitional arrangements’. In the future, according to the national Constitution, the electoral system must be determined by national legislation within the framework provided by the Constitution.

country in which the racial division of land would make drawing constituency boundaries nightmarish and in which many voters are illiterate. Nevertheless, there is considerable unhappiness about the system (particularly from COSATU, the largest national trade union alliance) and it is likely that it will soon change to one that combines constituencies with proportionality. The most popular model seems to be the German one in which overall proportionality is assured without sacrificing the benefits of constituencies.

Perhaps thinking that it would be ahead of the pack, the Western Cape sought to in its constitution to give its legislature the authority to prescribe for the province an electoral system 'based predominantly on the representation of geographic multi-member constituencies' and that would result 'in general, in proportional representation'.²¹ The deviation from the wording of the national Constitution lay in the proposal that the provincial electoral system was to be prescribed by provincial rather than national legislation.²²

Such a deviation from the model in the national Constitution would be legitimate if an electoral system is taken to be a 'legislative [or] executive structure' under section 143(1)(a) of the national Constitution. This, of course, is what the province argued when the Constitution went to the Constitutional Court for certification, but the Court disagreed:

It is true that an electoral system determines the selection or identification of representatives to function in the one or more elected elements constituting a legislature. It is also true that different electoral systems have a direct bearing on such selection or identification of legislators elected to the various elements constituting a legislature. But this has no effect at all on the constituent elements of the legislative structure. Their nature and number remain exactly the same. There are other factors, such as the level of a threshold for party participation in the allocation of seats, which also affect the number of representatives of the various political parties who are elected to the constituent elements of a legislature. But no such factor can have any effect on the nature or number of such constituent elements. When [the national Constitution section] 143(1)(a) permits a provincial constitution to provide for a provincial legislative structure different from that provided for in [the national Constitution] chap 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of [the national Constitution section] 143(1)(a).²³

There can be little doubt that the ANC's opposition to the proposed amendment to the province's electoral system was based in part on a fear that it would allow the party of the old apartheid government, now called the New National Party, which held a majority in the province, to exploit

²¹ First proposed Western Cape Constitution (Western Cape Constitution I) section 14.

²² Section 105(1) of the national Constitution states:

'A provincial legislature consists of women and men elected as members in terms of an electoral system that –

(a) is prescribed by national legislation

(b) ...

(c) ... and

(d) results, in general, in proportional representation.'

²³ *Western Cape Certification Case I* para 48. See also discussion in paras 10 – 18.

the racially divided voting districts which would be a consequence of the lingering geography of apartheid.²⁴ The Court may have shared this fear. In any event, it confidently adopted a very narrow interpretation of ‘legislative structures’. Perhaps the aspect of the decision that is most difficult to understand is the comment that the electoral system does not alter the ‘nature’ of a constituent element of a legislature. Obviously the Court is grappling with unclear concepts. Nevertheless, there seems ample room to argue that the electoral system, or aspects of it, could fundamentally alter the nature of a legislature. The United States provides an example where both at the federal level and in most States, different electoral districts and electoral terms determine the different characters of the chambers of bicameral legislatures. This concern is not merely abstract. The judgment leaves open the question of how representation would be dealt with if a province decides to establish a bicameral legislature, for instance. The passage quoted above clearly implies that the number of chambers in a legislature is an issue related to structure and therefore that a provincial constitution could chose a model that differs from the nationally established default position of unicameral provincial legislatures. But, as the electoral system is outside the province’s jurisdiction, it is unclear how a province would do this. There is little sense in allowing a province to opt for a bicameral legislature and yet not to allow it to use the system of representation as a tool to design the two chambers in such a way that they represent different constituencies or offer alternative views.²⁵

Bigger institutions

The proposed Western Cape Constitution introduced a variety of other minor changes to the legislative and executive structures in the province. For instance, while the national Constitution stipulates that the leader of the *largest* opposition party in the provincial legislature must be recognized as the ‘Leader of the Opposition’,²⁶ the proposed Western Cape Constitution merely stated that the leader of the opposition must be recognized, omitting the requirement that that person should be the leader of the largest opposition party.²⁷ But two of the changes to the legislature and the executive were politically significant. One concerned the size of the legislature, the other the size and composition of the provincial Cabinet.

At the time Constitution was drafted, the provincial legislature had 42 seats²⁸ but, under the national Constitution, this figure was subject to change depending on the population of the province. The Western Cape Constitution fixed the size of the legislature at 42. This seems to have irritated certain opposition politicians because a recent census had shown that the population of the Western Cape had previously been over estimated and 42 seats was certain to be a larger number than the national formula would yield. In their view, this made the legislature more expensive than it need be. But the proposed change encountered no difficulties in the certification process - the number of seats in a legislature is an aspect of its structure of the legislature and provinces are permitted to make their own decisions in this regard.

²⁴ Another factor influencing the ANC’s reaction to the Western Cape Constitution is a general desire to avoid any deviations from a nationally accepted model.

²⁵ See also EFJ Malherbe ‘Provinsiale Grondwette: Barometer van Provinsiale Outonomie?’ (1998) *Tydskrif vir Suid-Afrikaanse Reg* 344 at 352 – 3.

²⁶ National Constitution section 116(2)(d).

²⁷ Western Cape Constitution I section 24.

²⁸ The number of seats for the first provincial legislatures was determined in the Interim Constitution. See Interim Constitution Schedule 2 item 10.

In spite of the clear-cut certification decision on this aspect of the Western Cape Constitution, it unexpectedly came before the Constitutional Court again only two years later.²⁹ In preparation for the 1999 elections, the (national) Electoral Commission³⁰ allocated the Western Cape legislature 39 seats. Not unexpectedly, the province challenged this determination, referring to its provincial Constitution, but the Electoral Commission dug in its heels. In argument before the Court, the Commission relied both on technical provisions in the national Constitution designed to resolve conflicts between national legislation and provincial constitutions and on more substantive arguments of equality of representation and cost. The Court accepted none of these arguments and, firmly securing one of the few possibilities for provincial variation from national standards, found the Electoral Commission's determination of the size of the provincial legislature inapplicable.

The provision that would change the size of the provincial Cabinet was much more controversial in spite of the fact that it was intended only to span a 'transition period'.³¹ Under the national Constitution the province was to be governed by a 'GNU' or Government of National Unity for its first 5 years or until it adopted a provincial constitution providing otherwise.³² The GNU guaranteed cabinet positions for large minority parties. However, in the national government and in seven of the other provinces, the GNU had broken down in May 1996 when De Klerk's National Party decided to withdraw. In both KwaZulu-Natal and the Western Cape, the ANC, rather than the National Party, was the junior party in the GNU and it decided to remain in those cabinets. The model proposed in the Western Cape constitution for the long term was similar to that in the national Constitution – parliamentary government with a Cabinet chosen by the Premier. But until the second democratic elections in the province, the draft Constitution proposed a model that was intended to allow the province something between the enforced coalition of the GNU and regular Cabinet government: the executive would have a possible fifteen members (the Premier and 14 ministers), rather than the limit of eleven stipulated in the national Constitution, and the Premier would be entitled to choose two of these from outside the provincial legislature. The temporary inclusion of four extra cabinet positions was apparently intended give the Premier the space to appoint a number of opposition members to the provincial cabinet alongside his 'full team'. This was to ease the transition to majority party government and to reduce a sense that by ending the GNU prematurely the National Party government in the Western Cape was asserting itself in a way that was incompatible with the spirit of the negotiated transition to democracy in South Africa.

In the certification process the ANC objected to the provisions for their departure from the model of an 11-member cabinet in the national Constitution and for the possibility that they introduce of having cabinet members chosen from outside the provincial legislature. Later political events suggest, however, that the ANC did not have a clear policy position on the issue. It soon became clear that the real concern should have been the ending of the GNU and the resultant loss of cabinet posts for ANC members (and accordingly the loss of a chance to demonstrate ability to govern). Instead, most debate centered on the allegedly profligate nature of the National Party as reflected in its willingness to establish additional cabinet posts. In any event, the Constitutional

²⁹ *The Premier of the Province of the Western Cape v The Electoral Commission* 1999 (11) BCLR 1209 (CC).

³⁰ Established by section 190 of the national Constitution.

³¹ Western Cape Constitution I Schedule 3 item 8 stipulates that this transitional arrangement was to last only until 30 April 1999, the date of the end of the first legislature.

³² National Constitution Schedule 6 item 12(2).

Court considered the Western Cape proposals a legitimate reconfiguration of an executive structure.

New - or almost new - ideas

The Western Cape Constitution contains a variety of minor additions to the default model offered by the national Constitution but few innovations. Just two sets of provisions could be labeled ‘new’, and each of these built on ideas that had been raised in the national constitution-making process. The first set, found in chapter 9, establishes a Commissioner for the Environment and a Commissioner for Children and provides for the establishment of cultural councils.

The province’s authority to establish the two Commissioners is derived from its concurrent jurisdiction to legislate in the areas of the environment and welfare services.³³ A provincial Constitution was not necessary for their establishment. Their inclusion in the provincial Constitution was opposed politically by the ANC, which was concerned at the expense of yet further ‘constitutional’ bodies - the national Constitution sets up over 10, and they have proved costly and sometimes less effective than anticipated. However, unlike cultural councils, the Commissioners were legally uncontroversial. The provision dealing with cultural councils, on the other hand, raised legal questions in the certification process and will raise fundamental problems about culture, race and ethnicity in its implementation

The provincial Constitution requires the province to pass legislation providing for the ‘establishment and reasonable funding, within the Province’s available resources, of a cultural council or councils for a community or communities in the Western Cape, sharing a common cultural or language heritage’.³⁴ Provincial cultural councils were challenged in the certification process because, it was argued, they trespassed on the legitimate terrain of the national government. The national Constitution establishes a ‘Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities’ (the ‘Cultural Rights Commission’). Its ‘primary objects’ are -

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.³⁵

How, it was argued before the Constitutional Court, could *provincial* ‘cultural councils’ fit into this scheme? Legally and constitutionally without difficulty, the Court answered.³⁶ In the unlikely

³³ It must be noted that in South Africa concurrent legislative power is not understood in the same way as in Germany. While in Germany concurrency means that Laender have the power to legislate in so far as the Federation does not exercise its right to do so, in South Africa the existence of national legislation does not exclude provincial legislation. Instead, the field remains open and, if there is conflicting provincial and national legislation on a matter, the provincial legislation prevails unless the national legislation meets certain tests set out in section 146 of the national Constitution.

³⁴ Western Cape Constitution section 70.

³⁵ National Constitution section 185(1).

event of a conflict between provincial legislation establishing provincial cultural councils and national legislation passed under para (c) above, the procedure to resolve conflicts provided by the national Constitution would apply – there is no inconsistency of the sort that would prevent certification.

Implementation of cultural councils is certain to raise difficult problems. Some of these are foreshadowed by the problems encountered in setting up the national Cultural Rights Commission. Discussions concerning the national Commission have raised difficult practical and conceptual questions such as whether or not Commissioners should represent communities directly, to what degree the Commission should take an active role in promoting various communities, how one should identify a community, and how culture should be defined.³⁷ A crucial issue is whether ethnicity or race will dominate. The province will face many of the same questions when it seeks to identify communities and establish councils, and its limited resources will force difficult and certainly politically controversial choices.³⁸

The greatest danger is that the establishment of cultural councils will become a divisive process, as groups assert themselves in opposition to other groups and compete for resources rather than committing themselves to respecting one another's differences. There is a stark difference between the national and provincial provisions in this regard. The national Constitution leaves open the possibility of councils that draw together diverse communities or reflect diversity within a community. This is consistent with a view of the national Commission as a body that is to promote respect for diversity in a united country. On the other hand, by specifying that cultural councils are for communities 'sharing a common cultural or language heritage', the Western Cape demands that its councils represent homogenous groups. Thus a single provincial council dedicated to issues of diversity and reconciliation could not be established under the provincial provision. There are many possible explanations for this difference in approach. The Western Cape constitution writers may have felt that their wording created a greater distance from the national provisions and thus was more likely to survive the certification process. But it is more likely that the provincial provision reflects the New National Party's on-going interest in group rights and its emphasis on protecting Afrikaner identity rather than on healing past wounds.

The second innovation in the Western Cape Constitution is its inclusion of a chapter on 'Directive principles of provincial policy'. The opening section of this chapter states that '[t]he Western Cape government must adopt and implement policies to actively promote and advance the welfare of the people of the Western Cape...'. A long list of the aims of appropriate policies follows, including 'safety and security', 'realizing the right of access to housing; health care services; sufficient food and water; and social services', and 'the protection of the environment'.³⁹ A number of these provisions echo the wording of the Bill of Rights in the national Constitution, which includes social and economic rights. They also reflect policy goals

³⁶ *WC Certification Case I* para 73ff.

³⁷ See, for example, *Final Report of the Second National Consultative Conference on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* 24 September 1999 and Y Carrim 'Advancing nation-building: the Cultural Rights Commission' in *Between Unity and Diversity: Essays on Nation Building in post-apartheid South Africa* ed G Maharaj (Cape Town: Idasa David Philip, 1999) page 257.

³⁸ The Western Cape Cultural Commission and Cultural Councils Act 14 of 1998 provides for both a Commission and the registration of Councils by the Commission.

³⁹ Western Cape Constitution section 81 paras (a), (h), and (m).

that are uncontroversial in South Africa at present. But the section includes four ‘aims’ of a very different sort: ‘the creation of job opportunities’, ‘the promotion of a work ethic’, ‘the promotion of a market-oriented economy’ and ‘a system of taxation which is fair, transparent and accommodates the capacity of people to pay’. The inclusion of these provisions, and particularly the reference to a market-oriented economy and the taxation system, was strongly resisted by the ANC in argument before the Constitutional Court. The thrust of the ANC’s argument was that responsibility for economic policy-making lies with the national government and not provinces and, therefore, that these provisions have no business in a provincial constitution. The Court disagreed, remarking that the provisions were to be read in the context of the Western Cape’s Constitution in its entirety and that the Constitution dealt with taxing powers elsewhere in a legitimate way with appropriate deference to national policy. The Court is silent on the issue of a ‘market-oriented economy’ but comments that the matters raised by the ANC are not relevant to the process of certification, but ‘rather to potential conflicts between national and provincial legislation, a matter which is regulated by the [national] Constitution’.⁴⁰

The Court’s decision may seem surprisingly generous to the provincial Constitution. Certainly it was influenced by the fact that the Constitution states unequivocally that the Directive Principles are ‘not legally enforceable’ – they are merely to ‘guide the Western Cape government in making and applying laws’.⁴¹ Nevertheless, had the provincial committed itself to ‘central planning’ rather than to an economic policy that is, at present at least, considered uncontroversial, the Court may have been less sanguine in its approach. In any event, the decision clearly reveals that provincial powers are potentially more significant than many realize. Like all good governmental decisions, decisions taken by provinces need to be based on a thoughtful understanding of their economic implications. This will be obvious when a province exercises its taxing power. For, although the constitutional power of provinces to raise taxes is narrow, a tax law must be informed by economic policy. But all decisions in governing are underpinned by some sort of economic policy and this is especially true in areas such as housing, welfare services and education, for which provinces carry substantial responsibility. What will be interesting to follow is whether the Western Cape treats its constitutional commitment to a ‘market-oriented economy’ as informing the kind of decisions it takes in these fields.

Back to the drawing board

In the end, despite the long list of objections from the ANC, the Constitutional Court denied certification on three grounds only. Two were minor - the province could not purport to interpret a provision of the national Constitution (as it did in relation to the concept of ‘paid work’)⁴² and it could not replace the President of the Constitutional Court or his or her designee with the most senior judge in the province for the ceremonial functions associated with assembling the legislature after an election.⁴³ The third inconsistency with the national Constitution was, of

⁴⁰ *Western Cape Certification Case I* para 81.

⁴¹ Western Cape Constitution I section 82.

⁴² *Western Cape Certification Case I* paras 64ff and see section 136 of the national Constitution.

⁴³ *Western Cape Certification Case I* paras 52ff. The national Constitution stipulates that ‘a judge designated by the President of the Constitutional Court must preside over the election of a [provincial] Speaker’ (section 111(2)). Members of provincial legislatures and other provincial officials must also be sworn in before either the President of the Constitutional Court or a judge designated by him or her (Schedule 2). In practice the provincial Judge President carries out these functions and certain other functions and the provincial Constitution sought to formalise that practice. The Court, however, objected saying that because

course, the province's attempt to vary the provincial electoral system. This finding eliminated one of the most ambitious aspects of the proposed Constitution but remedying the problem simply involved removing the offensive provisions and reverting to the formula for elections found in the national Constitution.

Although none of the problems identified by the Court presented the provinces with a difficult revision process, a matter that had previously been settled, and that had passed constitutional scrutiny, reentered the process: the size and composition of the provincial Cabinet. Although the ANC had eventually supported the increased size of the provincial Cabinet in the first round of discussions, by September it seemed to have reconsidered its position and apparently decided that the cost of an increased cabinet was unjustifiable in the face of the province's R247-million budget deficit. In what looked like an irritated response to the ANC's persistent complaints, the governing National Party cut down the maximum size of the cabinet, but also decided to scrap the provision that retained the GNU until 30 April 1999. The implication of this was that the ANC stood to lose the four Cabinet seats that it held. Had the ANC taken a formal decision to leave the GNU this outcome would not be problematic. In fact, however, the prevailing view in the party in the province was that there was more to gain from membership of the GNU than from leaving it.

The dispute was characteristic of the relationship between the two largest parties in the Western Cape, described at the time in one newspaper as a 'cold war',⁴⁴ but it did not delay things. Thus, judgment denying certification was handed down on 2 September 1997 and the revised Constitution was passed by the Western Cape legislature only 9 days later, on 11 September. On 18 November, a unanimous Court certified that the amended Constitution complied with the requirements for provincial constitutions laid down in the national Constitution.⁴⁵ Nevertheless, the political disagreement did mar the process. The Western Cape Constitution was signed into law on 15 January 1998, at a ceremony boycotted by the ANC.⁴⁶ The dispute about the Cabinet remained bitter and the ANC refused an offer of two cabinet seats, arguing that its size entitled it to at least four. Two other opposition parties accepted one seat each in a 12-seat Cabinet.

Why certification?

The idea of certification originated in the national negotiating process. A fundamental question in 1993 was how to accommodate conflicting views on constitution-making. The governing National Party wanted to settle everything before elections were held and power slipped from its grasp. On the other hand, the ANC insisted that constitution-drafting was the prerogative of a democratically-elected body – in which it was justly confident of a substantial majority - and not the arbitrarily put-together group that sat around the negotiating table in 1993.

judges fall under the national sphere of government, the province had no authority over them. Cf EFJ Malherbe 'Provinsiale Grondwette' p 352.

⁴⁴ A Dufy 'Thaw in Cape cold war' *Mail & Guardian* 10 October 1997.

⁴⁵ *Certification of the amended text of the Constitution of the Western Cape, 1997* 1997 (12) BCLR 1653 (CC); 1998 (1) SA 655 (CC).

⁴⁶ 'Minister Omar responds to Kriel letter' 29 December 1997 at <http://www.polity.org.za/govdocs/pr/1998/pr0102.html> provides a description of the ANC's reasons for boycotting the ceremony.

The outcome of this debate was typical of the entire process – a compromise. The parties to the 1993 ‘Multi-Party Negotiating Process’ would negotiate an interim constitution, which would become binding immediately after the elections. The interim constitution would set up a process for drafting a ‘final’ constitution, which would come start immediately after the elections. The ‘final’ constitution would be drafted by the newly elected politicians but, critically, it was to conform to a set of ‘Constitutional Principles’, which were to be settled in the 1993 negotiating process.⁴⁷ Finally, a newly-established Constitutional Court was to be given the job of certifying that the final constitution adopted after the elections complied with the agreed principles. Only after the new constitution was certified could it be put in force.

The certification of the national Constitution was clearly a critical part of the negotiated transition to democracy, but the device of certification suited the national politicians who were determining the scope of provincial constitution-making for another reason. Many politicians feared that provincial constitutions could be used to enhance the status of provinces illegitimately and to allow provinces to assert powers that they did not have. This fear was realised in the case of the KwaZulu-Natal Constitution, which asserted among other things that ‘The province of KwaZulu-Natal is a self-governing Province within the Republic of South Africa’, prompting the Constitutional Court to respond that ‘[i]t is clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic’.⁴⁸ The certification process was thus used for the political purpose of settling the constitutional status of a provincial constitution at the outset, before the province has acted on it, and of ensuring that the constitution is not used to advance the agendas of parties seeking to wrest more power for provinces.

Because adopting a constitution is always a highly politicised process, the certification process has come to play another, more complex, political role as well – it is one that may be less than welcome in the Constitutional Court. In the national constitution-making process there was enormous political pressure to adopt a constitution that had the support of all the parties to the process because a constitution that was not seen to have widespread support would suggest that there were flaws in the negotiated transition. At the same time, reaching agreement on some of the issues was extraordinarily difficult. Eventually, an understanding developed that the parties would work towards a constitution that they could all support politically, but they would reserve the right to challenge provisions in the Constitutional Court during the certification process. This is exactly what happened. The Constitutional Assembly voted for the draft constitution with only two nays and ten abstentions, but all the opposition parties challenged certain provisions before the Constitutional Court.⁴⁹

⁴⁷ The Namibian independence process with which many South Africans were familiar had also used constitutional principles to guide (and constrain) its constitution-making process. United Nations Security Council Resolution 435, adopted by the Security Council at its 2087th meeting in September 1978, required a Constitutional Assembly to be elected which was to draft a constitution in accordance with eight principles listed in the resolution. The Constitution was to be adopted by a two-thirds majority of the Namibian Assembly. See for a full discussion Lionel Cliffe et al *The Transition to Independence in Namibia* (Boulder, Lynne Rienner Publishers 1994).

⁴⁸ KwaZulu-Natal Constitution section 1(1) and *KwaZulu-Natal Certification Case* para 14.

⁴⁹ The two members of the African Christian Democratic party voted against the new Constitution because it failed to subject all government and law to the law of God. The Freedom Front abstained. In addition, the Inkatha Freedom Party remained outside the process and did not attend.

This process repeated itself in KwaZulu-Natal. Again, the cross-party support for the constitution appears to have been prompted by an urgent desire to promote peace in the province, which, at the time, was riven by violence between the ANC and the majority Inkatha Freedom Party. Yet the proposed constitution was challenged in the Constitutional Court.⁵⁰ The Court appeared puzzled by the process, commenting that ‘the ANC and GNU have strenuously attacked many of the provisions in the provincial Constitution. Why the ANC voted in favour of it we do not know and counsel were not in a position to enlighten us.’⁵¹ The answer must be that the parties were using a legal process to contain political disagreements.

But the certification process also serves a function with which lawyers will be very comfortable. In the words of the Constitutional Court in the *KwaZulu-Natal Certification Case*:

‘The purpose of [certification] is manifestly to ensure that a provincial constitution complies with the provisions of ...[the Constitution] and thereby to place that issue beyond question. It is to ensure that there is finality with regard to the regularity and legality of a provincial constitution. The people of the province should not be left in a state of uncertainty as to their rights or obligations under their provincial constitution.’⁵²

Thus, certification promotes certainty and finality. It was this understanding of the purpose of certification that led the Constitutional Court to reject the so-called ‘consistency clauses’ in the KwaZulu-Natal Constitution. Those clauses asserted that no provision of the KwaZulu-Natal Constitution that was inconsistent with the national Constitution should have any ‘force or effect’. It was argued that the effect of the clauses was that there could be no inconsistency between the national and provincial constitutions and that certification must therefore be inevitable. But the Court denied that the province had the power to draft a constitution that ‘immunised’ itself from the ‘obligatory discipline of the constitutional certification process’ because ‘[t]he objectives of finality and certainty would thereby be defeated’.⁵³

Of course, as the Constitutional Court recognised when it certified the national Constitution, in law certainty and finality tend to be illusive. There, in determining whether the draft national Constitution complied with the Constitutional Principles, the Court was called on to interpret the new Constitution:

‘[42] When testing a particular provision or provisions of the [new Constitution] against the provisions of the CPs [Constitutional Principles] it is necessary to give to the provision or provisions of the [new Constitution] a meaning. More than one permissible meaning may sometimes reasonably be supported. On one construction the text concerned does not comply with the CPs, but on another it does. In such situations it is proper to adopt the interpretation that gives to the [new Constitution] a construction that would make it consistent with the CPs.

[43] Such an approach has one important consequence. Certification based on a particular interpretation carries with it the implication that if the alternative construction were correct the certification by the Court ... might have been withheld. In the result, a future court should approach the meaning of the relevant provision of the [Constitution] on the basis that the meaning assigned to it by the Constitutional Court in the certification

⁵⁰ George Devenish ‘The Making and Significance of the Draft KwaZulu-Natal Constitution’ (1999) 47 *Jahrbuch des öffentlichen Rechts* 503 at 511.

⁵¹ *KwaZulu-Natal Certification Case* para 12.

⁵² *KwaZulu-Natal Certification Case* para 11.

⁵³ *KwaZulu-Natal Certification Case* para 36.

process is its correct interpretation and should not be departed from save in the most compelling circumstances. If it were otherwise, an anomalous and unintended consequence would follow. A court of competent jurisdiction might in the future give a meaning to the relevant part of the [Constitution] which would have made that part of the [Constitution] not certifiable ... at the time of the certification process, but there would have been no further opportunity in the interim to refuse a certification of the [new Constitution] on that ground. This kind of anomaly must be avoided - and will be - if courts accept the approach which we have suggested in this paragraph.'

In other words, certification was not only a stamp of approval for the national Constitution; it also engendered a specially privileged interpretation of that Constitution. The same argument has been said to apply to provincial constitutions – an interpretation of a provincial constitution adopted in the process of certifying its compliance with the national Constitution should be followed in future cases.⁵⁴ I am not sure that this approach is justified. The fragile nature of the compromises embodied in the Constitutional Principles and the national Constitution justify giving super precedential value to the national certification judgments. Whether anything more than the regular application of the principles of precedent is called for in the case of provincial constitutions is less clear. Unlike the Constitutional Principles, which were superseded as soon as the final national Constitution was adopted, the national Constitution, against which provincial constitutions must be tested, remains a living document. On-going abstract challenges to provincial constitutions could clearly not be countenanced, but a re-examination of their provisions in the context of emerging understandings of the national Constitution and new provincial or national legislation should perhaps not face any greater obstacles than the standard rules of precedent impose.

The future of provincial constitutions

Constitution-making in South Africa is closely associated with national reconciliation and nation building. Of course, it is easy to romanticize nation building in the context of the national constitution-making process and it should not be forgotten that it had a hard edge. The politicians involved bargained carefully and shrewdly, protecting their party interests and building constituencies. Nevertheless, the process was marked by an overarching commitment to laying the foundation for an open and democratic society with institutions able to lead South Africa from its divided apartheid past to a united future. This influenced the most difficult moments and helped resolve apparently intractable problems.

The process in the Western Cape was different. It was initiated in a particularly bitter political climate, characterized by political tit-for-tat with little trust between the politicians of the two parties that dominated the legislature, the ANC and the New National Party. The overall purpose of the proposed constitution was unclear although both the New National Party and the minority Democratic Party seem to have seen it as a way of asserting provincial identity.⁵⁵ Although the ANC participated in the process, it had opposed the idea of a provincial constitution at the outset and this aversion to provincial constitution-making influenced its participation.

⁵⁴ See *Western Cape Constitution Case I* footnote 10.

⁵⁵ The Democratic Party, like its predecessor the Progressive Party, has always been committed to federalism and strong provinces. The New National Party's commitment to federalism and provincial autonomy is more recent.

The most striking feature of the new Western Cape Constitution is how little it changes. Once the electoral system that it initially proposed had been excised, it brought no substantial changes to the provincial model established in the national Constitution. It ended the GNU in the province a little early but, a year later, that is politically irrelevant; the Commissions that it established could have been established in ordinary provincial legislation; other small changes to provincial processes seem minor in the face of the long, costly and divisive constitution-making process.

This leads one to ask what went wrong. In part, the political climate in which the Western Cape Constitution was drafted prevented it from being a creative and constructive document. But there is a more profound underlying problem with provincial constitution-making in South Africa, related to the dominating view of the purpose of a provincial constitution. As I have already suggested, many politicians, particularly in the ANC, view provincial constitutions as political challenges to the new government and as attempts to strengthen federal aspects of the new constitutional system rather than to support a united future.⁵⁶ Certainly, subnational constitutions can be used to divide – the abortive KwaZulu-Natal Constitution provides such an example. But provincial constitutions need not assert the identity of a province against that of the nation. Instead, like the constitution described in the opening to this paper that the people who live in Mamone wish to draft, provincial constitutions could enhance constitutionalism and strengthen South Africa's new democratic order.⁵⁷

Constitutionalism and the rule of law are new concepts to most South Africans. Both the process of drafting the national Constitution and the 1994 and 1999 elections provided opportunities for huge public education campaigns on basic democratic issues. Nevertheless, constitutionalism remains fragile. The process of drafting a provincial constitution provides another opportunity for engaging the public on basic constitutional issues and questions concerning the relationship of government to the people.

But a provincial constitution should be more than an opportunity for public education. It could also implement some of the most fundamental values of the national Constitution in very concrete ways. The national Constitution establishes accountable, responsible and open multi-party government as basic values of the new constitutional order.⁵⁸ These are values that might be realized differently at different levels of government. For instance, a provincial government might expect to have closer links with its electorate than the larger national government - perhaps through mechanisms such as slower and more open legislative procedures and wider publication of bills, or perhaps even through referenda and the use of the recall. Similarly, provinces may

⁵⁶ The concern with which the national government views provincial constitutions is perhaps reflected in the fact that a team of four relatively senior advocates were employed to argue the two points that the government raised.

⁵⁷ See Paul W Kahn 'Interpretation and Authority in State Constitutionalism' (1993) 106 *Harvard Law Review* 1147 for a related argument in the context of the interpretation of state constitutions in the United States. The same point is made by the then-Premier of the Western Cape, Hernus Kriel, in his speech to the Western Cape legislature when the first version of the Western Cape Constitution was passed. Kriel commented that 'Where the national Constitution lays a basis for the political constitutional order, the Western Cape Constitution provides the detail which completes the constitutional picture in order to promote, *inter alia*, the values in section 1 and Chapter 3 of the national Constitution' (*Western Cape Hansard* Tuesday 18 February 1997, Col 287). Despite these remarks, the Western Cape process cannot be construed as a unifying one that helped to consolidate democracy in South Africa.

⁵⁸ See, for example, national Constitution section 1.

experiment with different procedures to ensure that the provincial government remains accountable and to ensure that the province is properly represented at the national level. The default structures and procedures for provincial government provided in the national Constitution are simply copied from those laid down for the national executive and Parliament. Although they are meticulous in their commitment to multiparty government, to public participation in Parliament and to accountable government, they are designed for large, national institutions. The needs of a smaller provincial government will be different, and there is room to tailor procedures to better achieve the underlying goals of the national Constitution in the provincial context. On this approach, the process of provincial constitution-making would be one geared to implementing and strengthening the national constitutional framework, not to asserting difference and independence from it.⁵⁹

There are many possibilities for provincial constitution-making, the question is whether politicians in South Africa will change their views and commit themselves to adopting creative and progressive constitutions, tailored to the needs of provincial government within the framework of values provided by the national Constitution. In the short term the answer to this question is surely 'no'. The main reason for this, as I have already suggested, is the experience of the constitutional processes in both KwaZulu-Natal and the Western Cape, which reinforced the idea that provincial constitutions are primarily concerned with provincial identity. Until the provincial system has settled down and the roles of provinces and the national government are clearer, provincial constitution-making will probably remain a highly contested area. But provinces may choose to delay constitution-making for other reasons too. Most importantly, a province may have other priorities and limited resources so that the demands of effective government may keep constitution-making off the agenda. There is also yet another, more abstract, reason for delaying provincial constitution-making. It is that to be really worthwhile, a new Constitution must be informed by new ideas; simply domesticating the national model is not enough. I have suggested that the Western Cape Constitution is strikingly short on new ideas. It may be that politicians are suffering from constitution-making fatigue. As time passes and we encounter new problems, new ideas will emerge and then provincial constitutions could enrich our democracy.

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⁵⁹ Sections 23(4) and 27 of the Western Cape Constitution do expand a little on the principles in the national Constitution but they remain fairly general. Various ideas might be drawn from the new German Laender Constitutions here. See, for instance the examples discussed by C Starck 'The Constitutionalisation Process of the Laender: A Source of Inspiration for the Basic Law?' (1994) 3 *German Politics* 118 at 119 and 120.