

## Promises Unmet – Multi-level Government in South Africa<sup>1</sup>

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### **Introduction**

In its 1996 Constitution, South Africa adopted a system of multi-level governance divided into three 'spheres' of government – national, provincial and local – that are to be 'distinctive, interdependent and interrelated' [Section 40(1)]. Each is established by the Constitution, each has assigned powers, and each is independently elected. In addition, sovereignty is divided – provinces must agree to certain fundamental constitutional amendments. Thus, South Africa bears the hallmarks of a federation – albeit a highly centralized one. Nine provinces were established at the outset of the democratic dispensation. The system of 'wall to wall' local government extending from the dynamic metropolises of Johannesburg, Cape Town and Durban to the remotest rural areas was established a few years later.

But when a new constitutional model for a democratic South Africa was first discussed in the early 1990s, the African National Congress (ANC) and others in the freedom movement were deeply suspicious of federalism. It was the out-going white-dominated Apartheid regime and the Zulu-nationalist Inkatha Freedom Party that insisted on federalism as a condition of a final constitutional settlement. The out-going regime believed that federalism would contribute to limited government and restrain the majority that was about to take office. Some harboured the dream that in a federal South Africa there might be room for an Afrikaans province or homeland. The ANC acquiesced, but remained deeply reluctant federalists. For the ANC, federalism and decentralization were indelibly linked to the Apartheid model of *Bantustans* – quasi-autonomous puppet regimes that

would deny Black South Africans full citizenship in the country. ANC leaders had also studied at the feet of teachers in London, Moscow and elsewhere. For example, Harold Laski at the LSE had taught them that federalism was obsolete in a world dominated by class differences. More important, ANC leaders were acutely aware of the immense developmental tasks that would face a democratic non-racial South Africa. The idea was to find out what political system could address the enormous disparities between black and white, rural and urban, that the new regime was to inherit. Also to find out who could address the challenges of educating South Africans, and providing them with housing, water, electricity, and health care.

These debates have some interesting parallels with India. In its Constituent Assembly, some voices called for a unitary state in an independent India, others argued for considerable state autonomy. The result was a compromise, but one that leaned to strong central authority. In the words of the leading crafter of the Indian constitution, B. R. Ambedkar, 'The Draft Constitution has sought to forge means and methods whereby India will have Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country'.<sup>2</sup> As Granville Austin puts it – 'India produced a Constitution with a unitary tone, and strong centralizing features'.<sup>3</sup> The South African constitution, both in its perspective on federalism (labeled multi-sphere government) and in its architecture, broadly follows the Indian pattern. Both Indians and South Africans in their constitution-writing moments, were worried about similar things. Both wished to avoid deepening and exacerbating ethnic, religious and linguistic conflicts in their deeply divided societies, hence deciding not to institutionalize these differences and assuring the central government a strong hand in managing conflict.<sup>4</sup> Both wished to give the centre the tools to mitigate deep inequalities between regions states and provinces. And both faced enormous developmental challenges which, their leaders believed, could be achieved only through a powerful central government with the necessary powers and resources. James Manor<sup>5</sup> discusses the 'Nehruvian vision of rapid development led by a centralized state', a view common in the de-colonizing postwar world, whether Marxist or social democratic in orientation. Leaders of the ANC, schooled in places such as London, Sussex, and Moscow, and allied with the Communist Party of South Africa (SACP) and the Trade Unions (COSATU), had similar ambitious state-led development goals, and sought a Constitution that would not hold them back.<sup>6</sup> The vogue for decentralization advocated by the World Bank and others in the 1980s and 1990s had little appeal for South Africa's new leaders. Thus despite large differences in size and colonial experience, there

were many parallels between South Africa and India, and resulting parallels in their constitutional choices.

The trajectory India has followed since independence has modified its practice of federalism. The number of states has increased and boundaries have been re-drawn to bring about a closer fit between language and state boundaries. The frequency of central government 'emergency rule' in the states has declined, powers have been clarified, and states have been put on a sounder financial footing. Local governments have been given constitutional status. In short, India has become more decentralized and fully federal.<sup>7</sup> Rekha Saxena puts it as:

'The working of the system has gradually become more federal under the impact of growing politicization in society, regionalization of the party system, the belated judicial activism favouring state autonomy, and the liberalization of the economy in the 1990s'.<sup>8</sup>

It remains uncertain whether South Africa will develop along the same path as India has followed, towards a more robust federalism. Or whether, on the other hand, the deep misgivings about federalism in South Africa, and current disappointment with the functioning of the multi-level system, will result in a diminished role for provinces and an enhancement of central power. Saxena has identified some of the key variables that will shape the result – whether regional interests and identities become more politicized, whether the ANC hegemony fragments into a more regionalized party system, as happened in India, and how the Constitutional Court adjudicates federalist issues.

## **The South African Debate**

The South African debate about federalism reflects what is found in the international literature. On the one hand, federalism is usually argued to bring three strong benefits – to deepen democracy by promoting closer linkages between citizens and government and greater political participation, to increase governmental effectiveness through policies that are more responsive to local needs, with greater accountability and transparency, and, to accommodate and respect diversity by allowing a degree of autonomy for different cultural, language or ethnic groups. Each of these three benefits is potentially important to nation building in South Africa.

It was managing difference in such a diverse and divided nation that preoccupied many observers in the 1980s and 1990s. They believed that

once the heavy hand of Apartheid repression was lifted, traditional ethnic and linguistic differences – that had been assiduously cultivated by the old regime – could re-emerge in a highly divisive fashion. Federalism, with provinces broadly designed along ethnic lines, was widely seen as a desirable solution. Conflict would be minimized by giving each group its own political space. The majority rejected this advice. It came much too close to a re-imposition of the Bantustan regime, and could institutionalize and entrench the very conflicts it was designed to avoid.<sup>9</sup>

In the end, South Africa did adopt a federalist model, but it carefully avoided the term federalism. Its constitution does recognize and affirm the country's diversity – in the recognition of 11 official languages and in a variety of other measures – but this recognition is confined largely to the private sphere rather than the political empowerment of specific cultural groups. The 1996 constitution also embraced power-sharing at the centre for an initial period, ensuring that all significant groups would be represented in the national government. This strategy appears to have worked. While ethnic tensions have not disappeared entirely, the most threatening of them, the Zulu nationalist movement led by the IFP, has dramatically declined in salience. Thus far ethnicity has played a very limited role in post 1994 South African politics.

The other two potential benefits of federalism are more relevant to South Africa. A system of government that could provide multiple opportunities for democratic engagement for South Africans who had no experience with democracy is an obvious good. And, after half a century of highly centralized government under the National Party, devolved power promises government that can respond to the needs of all South Africans, building marginalized and excluded groups into the polity much closer to the level in which they live their daily lives.

Similarly, as the government attests through its aggressive programme to encourage locally and provincially delivered development initiatives, regional development plans may be better able to exploit local entrepreneurship and involvement in growth than are policies and programmes organized by remote bureaucracies and corporations.

However, none of the claimed benefits of federalism is unambiguous. The ANC's concerns in the negotiating process echo the disadvantages of federalism raised in the literature. The benefit of democratic institutions closer to the people must be set against the danger that regional government may stand in the way of majority rule, the complexity of federal systems, the danger of buck passing as one level of government attributes failures to others, and the realization that corruption and cronyism can occur at any level, not least the local. And the virtue of

more effective government, sensitive to local needs, may be counterbalanced by a loss of efficiency, particularly economies of scale, and, particularly in a society in need of massive transformation. Decentralization may limit government's ability to coordinate programmes in the broader national interest and make it more difficult to redistribute wealth and opportunity between richer and poorer.

Despite the ANC's misgivings, a multi-level system was put into place. It has now been functioning for a little over a decade. But doubts and criticism about its efficacy have persisted, and, at a policy conference preceding its 52nd National Congress in December, 2007, the ANC considered an internal document – *Legislature and Governance for a National Democratic Society*.<sup>10</sup> It provided a critical assessment of the experience of multi-level governance, and put a number of alternatives up for discussion, including the possibility of abolishing the provincial governments entirely. That conference concluded that a 'comprehensive review' of the system was needed.<sup>11</sup> Accordingly, the government Department of Provincial and Local Government (DPLG) has undertaken a review of the system, which will lead to a White Paper on the future of the system.<sup>12</sup> The process has involved research on the way the current system operates, consultations with provincial and local governments and other bodies, and an invitation for 'public input'. Major changes would require amendment to the Constitution and would rescind parts of the 1993 constitutional pact that opened the way to the peaceful transition in 1994. But, although the ANC does not command the two-thirds majority necessary to amend the constitution, it is unlikely to have difficulty in garnering the few extra votes it needs from minority parties to do so.

### **The South African Multi-Sphere Design**

The degree to which South Africa's system of multi-level government was a compromise, is reflected clearly both in the constitution-making process itself and in the resulting design. Stage one in the negotiations produced agreement on an Interim Constitution (IC) and a set of Constitutional Principles. These Principles would have to be included in the 'final' constitution that would be negotiated in a Constitutional Assembly following the first democratic elections. The new Constitutional Court was to be the final arbiter as to whether the pact was honoured or not. Fully twelve of the 34 Principles concerned detailed provisions related to federal or multi-level government – a clear reflection of the importance of the devolution of powers in the negotiated settlement. Little was to be left to chance – or to the inclinations of the yet-to-be-elected Constitutional Assembly with its inevitable black majority.

Consequently, Chapter 3 of the Constitution sets out a system of cooperative government, with national, provincial and local governments constituting 'spheres' that are to be 'distinctive, interdependent and interrelated.' (Section 40). In fact, in all but the six major cities, the local sphere is made up of two levels – districts and municipalities – bringing the total number of levels to four. Thus we have nine provinces, 46 district municipalities and 231 local municipalities. All levels are independently elected. Chapter 3 requires that they all respect each other's powers and responsibilities, and enjoins them to 'cooperate with each other in mutual trust and good will.' [Section 41(1)]. The division of powers between the national government and provinces is set out 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 Five)]. Provinces also have the power to legislate on matters contained in a long list of concurrent powers (Schedule 4), but the central government may override provincial laws in a wide range of circumstances. And, even in those areas in which provinces have 'exclusive' jurisdiction, the central government may legislate when 'necessary' to maintain security, economic unity, or national standards, or to prevent a province harming others. All other powers are vested in the national government. This central legislative dominance is buttressed by a concentration of revenue-raising power at the centre, and by other national powers to monitor provincial effectiveness, and to help build their capacity. While provinces and localities are intended to play some autonomous role in policy development, the broader model is one of national legislative leadership and direction, with lower levels chiefly focused on implementation and delivery of nationally-mandated programmes.

Provincial interests are given some protection against complete central dominance through the National Council of the Provinces (NCOP). It is the second chamber of Parliament, modeled broadly on the German Bundesrat, and designed to represent provincial interests in the central legislature. 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 the provinces, delegations vote as a single block, on instruction from their provincial legislatures. A super-majority of the National Assembly is required to overturn the NCOP's decision. On other matters, NCOP members vote as individuals and a simple majority of the Assembly can overrule them.<sup>13</sup> Overall, the federalist elements of the Constitution clearly envisage provinces as subordinate actors within the multi-level

system. The power of local governments is also secured in the Constitution but it is even more limited than that of provinces. Municipalities are subject to substantial regulation by the national and provincial governments. Provinces also have strong powers to intervene in failing municipalities.<sup>14</sup>

Provinces were not designed to constitute linguistically or culturally homogeneous entities. In the eyes of the ANC, this would have entrenched one of the most pernicious evils of apartheid, a state designed along ethnic lines. In fact, once the decision was taken to establish nine provinces, their borders were adopted from 'development areas' designed by the apartheid government in the 1980s to promote economic development in rural areas. Thus there was little discussion of provincial borders in the constitution-making process and the six or so boundaries which were disputed were simply set aside for future settlement.<sup>15</sup> Several provinces do have clear linguistic majorities – a result simply of demographic realities – but at present this seems to have little relevance in national politics. Indeed, in a recently contested case involving adjustment of the border between largely Zulu KwaZulu-Natal and largely Xhosa Eastern Cape, language and ethnicity were not an issue.<sup>16</sup>

Chapter 3 sets out federalist principles quite clearly. Each level is elected independently, they are to treat each other with mutual respect, and the Constitutional Court is to be the final arbiter of disputes. But the limited list of exclusive provincial powers and extensive list of concurrent powers with strong national overrides, central fiscal dominance and the elaborate arrangements for group decision making in the NCOP (where provinces are merely given a collective voice but no veto power) all demonstrate the reluctance on the part of the dominant ANC to establish a fully federal system. Likewise, the constitutional emphasis on local government – an approach to decentralization which granted broad administrative powers to many municipalities under the firm control of the centre – was far more in line with ANC thinking than were provinces which might assume a clear political identity pursue distinctive policy priorities, and potentially challenge the centre.

Visits to Germany – a culturally homogeneous federation that emphasizes cooperative and consensual decision-making and provincial implementation of national legislation – by delegates in the pre-1994 negotiating process and, after 1994, by members of the Constitutional Assembly facilitated the compromise. Indeed, the South African system draws heavily on the German model, most obviously in its conception of provinces as primarily administrative bodies, implementing legislation that is agreed nationally, and in the design of the NCOP. The perceived centralism of German federalism allayed the worst fears of the ANC

negotiators. A senior member of the ANC's negotiating team reported back after a visit to Berlin that Germany 'is not federal at all'.

Nevertheless, it was on matters relating to multi-level government that the first version of the new constitution approved by the Constitutional Assembly was most energetically challenged in the certification process in the Constitutional Court. It was argued, and the Court agreed that in significant ways provisions of the new text concerning provinces and their powers did not comply with the pre-election pact reflected in the 34 principles. Constitutional provisions relating to local government in the first draft of the constitution also failed to meet muster in the Constitutional Court. The Court found that the draft failed to set out 'a framework for local government powers, functions and structures' as required by Constitutional Principle XXIV because, it did not specify the categories of municipality that could be established or 'set out a clear conception of the institutional design and roles of local government in the larger political system.'<sup>17</sup> Revisions to the Constitution accommodating these concerns were duly made, and the revised Constitution was certified by the Court some three months later.<sup>18</sup>

This South African model – in which parties negotiated an initial settlement before democratic elections have been held, and in which that settlement then constrained the final constitution-writing process – was a critical factor in the peaceful resolution of conflict, and in the ability to adopt a constitution with virtually unanimous support of political actors. But it also meant that the new government would be required to put into practice a federalist constitutional order about which it had little enthusiasm and deep misgivings. The fact that multi-level governance was the result of a peace settlement rather than of a careful analysis of the costs and benefits of decentralization in a society such as South Africa, has had important consequences for the operation of the system.

## **Assessing the Current System**

Implementing the multi-level regime has been a major challenge. Provinces had to be established at the same time as other massive reforms necessary to make the political and institutional transition from authoritarian minority rule to democratic majority rule. The integration of the old Bantustans into the new provinces was a particularly difficult task. Most of their workers were under-qualified, with limited training or understanding of the role of bureaucracy in a democratic regime. The most qualified public servants and political leaders sought roles in the national government, leaving less talent to staff the new provinces. Implementing the new local

government regime a few years later was equally difficult. There too was lack of talent and experience, and a complex set of relationships among local governments, district councils, provincial and national governments remained to be worked out. In many rural areas, tensions between the new democratic system of municipal governments and traditional leaders, who felt that their turf had been usurped, compounded the problems.<sup>19</sup> It was thus to be expected that there would be many growing pains.

And indeed this has been the case. After more than a decade of experience with multi-level government, few today argue that it is serving South Africa well. Multi-level government seems to be more a problem to be managed than a contributor to democracy and effective governance in South Africa – two of the strongest reasons for adopting a devolved system of government. And, as noted later, its role in the management of potential ethnic conflict is unclear. Few of the benefits usually associated with federalism – governments closer to the people and greater opportunities for participation, public policies more closely attuned to local needs and preferences, etc. – appear to have been met. The dispersal of decision-making and implementation to new institutions does not appear to have led to the development of new centres of growth or, in any significant measure, to the improvement of the conditions of the poorest South Africans or the fundamental transformation of the state.

In seeking to understand this, three explanations dominate. First is the initial reluctance of the ANC to embrace federalism or, more specifically, autonomous provincial governments. The result is that it has no clear rationale, no clear vision of the role that provinces should play, no strong political commitment of leaders to develop the provincial system, and no mass support for provincial governments.<sup>20</sup> Moreover, ANC ideology places a very high value on unity, cohesion and discipline. This plays out in its emphasis on nation-building as a primary goal and a deep distrust of the idea of alternative and competing centres of power. The party's own constitution requires that members (including Premiers and the national President) must follow party policy in making their decisions. These ideas are in sharp tension with the image of shared and divided power, and with the virtues of competition associated with federalism.

Second is the Achilles heel of most decentralist proposals in developing countries – governmental capacity – or the lack of it. Of course this can be a problem at any level of government, but in South Africa it is particularly acute at the provincial and local levels. Capacity is a multi-dimensional phenomenon. There is political capacity – the ability of governments to establish a presence in the minds of citizens as an important centre of authority and initiative. There is legislative capacity – the ability of

legislatures and their ministers to develop and formulate legislative initiatives responsive to their citizens' needs and preferences. There is fiscal capacity – the ability to command the resources necessary to carry out assigned responsibilities. And there is bureaucratic capacity – the ability to actually deliver services to citizens. And finally, there is what might be called intergovernmental capacity – the ability of all the units and levels to cooperate and coordinate their activities in ways that maximize service delivery and minimize pointless battles over turf, blame avoidance and credit-claiming.

Evaluating South African provinces along these dimensions is a difficult task, but a few observations are possible. First, with respect to political capacity, most provinces have not established themselves as autonomous political actors. There is little evidence that citizens identify with their provincial governments, or see them as agents of political and policy action. There is equally little evidence that provincial leaders see themselves in this way.<sup>21</sup> Instead, analysis of their speeches, initiatives and policy announcements shows that they follow closely themes and initiatives originating from the centre. This is not surprising. It follows directly from the hegemony of the ANC as South Africa's dominant party. With the (partial) exceptions of the provinces of Western Cape (where the DP with support in the coloured community has had some success) and KwaZulu-Natal, (where until recently the Zulu-based Inkatha Freedom Party and the ANC formed a coalition government), the ANC with its strong centralist tendencies rules.<sup>22</sup> While technically provincial Premiers are responsible to their local legislatures, since 1997 they have been 'deployed' by the ANC National Executive Committee.<sup>23</sup> The same applies to the heads of municipalities.<sup>24</sup> While regional party leaders have considerable say in creating lists of candidates for election, the national party apparatus has the final say.<sup>25</sup> Provincial Premiers and ministers are presently well-represented in the national executive of the party. But in important respects, provincial and local governments are more accountable 'up' to the central government than they are down to their own electorates.

Second, with respect to legislative capacity, municipalities are not expected to engage in law-making in any substantive way. The subordination of provincial governments to the centre means that provincial governments have also done little in the way of initiating new legislation, either in their exclusive or concurrent areas of jurisdiction. There is room in the Constitution for provinces to take legislative initiatives, but most provinces have failed to exploit it.<sup>26</sup> Again the lead is taken from the centre. Moreover, provincial legislatures have a great deal of difficulty playing their other law-making role – that of voting on national legislation

through their membership in the National Council of Provinces. Communications between Parliament in Cape Town and the provincial capitals are difficult, and the small provincial legislatures are ill-equipped to make informed judgments about the way in which their delegations should respond to complex national laws. Provinces, then, have come largely to act as administrative agencies, implementing and delivering a wide range of services mandated in national legislation.

But they have had great difficulty in doing this as well. This is not because of lack of fiscal capacity. Provinces have very few revenue-raising powers. Most of their budgets – about 95 per cent – consist of transfers – unconditional and conditional – from the national government. However, the Constitution states that provinces must receive an ‘equitable share’ of national revenues sufficient to meet their responsibilities (Section 214) and, although there are complaints that provinces are underfunded, the system of transfers and fiscal equalization is working efficiently. It is on the spending side that many provinces have the most difficulty.

The problem arises in the provincial and local governments’ lack of ability to spend these resources and to translate them into improved services on the ground.<sup>27</sup> Problems have arisen in key areas of provincial responsibility in most provinces. Thus, schools are poorly supplied with materials, the construction of new schools is too slow, morale and discipline amongst teachers is low and overall high school results are not improving.<sup>28</sup> Similarly, tales abound of understaffed and undersupplied clinics and hospitals.<sup>29</sup> Capital allocations to build schools, clinics and the like have often gone unspent for lack of ability to design and implement the relevant programmes.<sup>30</sup> A number of provinces also had great difficulty managing pensions and other social grants.<sup>31</sup> That programme has now been taken over by a single national agency (South African Social Security Agency Act 9 of 2004). If anything, the position in municipalities is worse. In 2004 major national programme designed to strengthen local governments identified over 130 municipalities as being in need of extra assistance in the areas of service delivery and governance.<sup>32</sup> The situation has improved considerably since then but protests reminiscent of the apartheid era continue in a number of municipalities in which the delivery of basic services is virtually non-existent.<sup>33</sup>

These difficulties should not be exaggerated. The demands on government have been immense and initially government seriously underestimated the difficulties of replacing apartheid systems and personnel with systems suitable for serving the entire population. Some provinces, such as urbanized, relatively wealthy Gauteng and the Western Cape, have managed well. It is the poorest provinces, and particularly

those which had to inherit the bureaucracies of former Bantustans that have had the greatest difficulties (the Eastern Cape, Limpopo and the North West, for example). Similarly at the local level, large dynamic 'Metros' such as Johannesburg, Cape Town and Durban have proven a considerable success, embarking on expansive plans to become 'global cities.' It is the smaller, more rural, and completely new District Municipalities and local governments that have struggled. Thus there is considerable variation in capacity among provinces and local authorities.<sup>34</sup> Moreover, many of the difficulties provinces have experienced in service delivery are not necessarily the result of decentralization. If the relevant bureaucracies had remained a part of the central government it is likely that the same problems stemming from limited human resources would still exist.<sup>35</sup>

Finally, there is intergovernmental capacity. Given the high degree of concurrency in the division of powers, the close fiscal ties, and the extent of central supervision over provinces and local governments, cooperation among the four levels is critical. Moreover, the Constitution mandates – and the massive task of capacity building in the new institutions requires – support and, sometimes, intervention by the national government, especially in the affairs of local governments.<sup>36</sup> As has been noted, the Constitution calls for 'cooperative' government, but the general relationship is less that of a partnership between three levels of government with equal status than it is a paternalistic, centrally dominated process. Provincial and local governments are, in the Department's words, 'to exercise their authority within a framework and direction set and supervised by the national government'.<sup>37</sup> Provinces are required to develop Provincial Growth and Development Strategies and local governments, working with the provinces, are to create their own Integrated Development Plans.<sup>38</sup> Elaborate guidelines for these monitoring, supervision, and intervention processes have been developed at the centre.

The intergovernmental relations process is also highly structured. It is governed by legislation, including the Intergovernmental Fiscal Relations Act, 97 of 1997, and the Intergovernmental Relations Framework Act, 13 of 2005. The latter sets out principles for resolving intergovernmental disputes, and is supplemented by the Intergovernmental Dispute Guidelines issued in 2007.<sup>39</sup> A wide range of intergovernmental bodies has been set up. At the apex is the President's Council, made up of the President, Deputy President, senior ministers and provincial premiers. 'MinMECs' bring together national and provincial ministers (MECs) in different policy sectors. A Budget Council seeks coordination between the Minister of Finance and his provincial counterparts. Premiers' Intergovernmental Forums bring them together with municipal leaders. Top

administrators in national and provincial government work together in the Director-Generals' Forum. But, despite attempts to structure the system of IGR, co-ordination remains a serious challenge and the delivery of services to the poor suffers as a result.<sup>40</sup>

While South Africans have worked hard, and with some success, to build the capacity of provincial and local governments, and to mobilize all governments around the common theme of the developmental state, little if any attention has been paid to the role of provinces in deepening democracy. In fact, resistance by the central government to provincial innovation and the development of provincial political identity runs directly counter to that. Members of provincial legislatures appear to have few links to voters. An attempt by the opposition led Western Cape provincial government to write a provincial constitution that would embrace a German-style 'mixed member proportional' electoral system instead of a pure proportional list system was struck down by the Constitutional Court.<sup>41</sup> Premiers and provincial executive councils often hold community meetings – *imbizos* – but these appear to be primarily public relations exercises. There is little evidence that provincial legislatures exercise effective scrutiny and oversight of their executives. Concern is frequently expressed about developing a greater level of citizen participation at local government level but even there government seems to remain removed from the people – an assertion substantiated by opinion polls which show that local government politicians are the least respected of all politicians in South Africa.<sup>42</sup>

A third explanation for the failure of the system of multi-level government is closely linked to the problems of capacity. It is its complexity. Many politicians have little understanding of the constitutional relationships amongst the spheres of government and, in particular, of the mediating role that the Constitution intends the NCOP to play. And, although much attention has been paid to developing the administrative apparatus of provincial and local government, the high level of concurrency and interdependence of the governments leaves little scope for any to act autonomously and brings high administrative and coordination costs. Administratively, particular confusion lies in the triangular relationship among the three levels, especially because both national and provincial governments have a responsibility to supervise and develop municipalities<sup>43</sup> and because the constitutional division of functions is far from clear.<sup>44</sup> Similarly, the division of roles between district and local councils has remained confused and few local governments work well. What success there has been in coordinating national, provincial and local capacity has been facilitated by the overarching hegemony of the ANC. One can imagine

that were opposition parties with very different strategic goals to win power at the provincial level, the system would become a great deal more difficult to operate.

### **The ANC Position: Framing the Debate**

Whether and how a multi-level system of governance hinders or promotes democracy, development, and social harmony is now a matter of considerable debate. It is within the governing ANC that debate about the future of the system is most active in South Africa. The party's June 2007 discussion document, *Legislature and Governance* is highly critical of the status quo much along the lines we have discussed.<sup>45</sup> It canvasses a number of alternatives, but does not specifically recommend any one. This, as Steven Friedman<sup>46</sup> points out, is probably because of a genuine uncertainty about how to proceed, and perhaps because elements within the ANC – in provincial governments where ministerial, legislative and bureaucratic patronage is available, and in provincial party organs – have developed a significant stake in the system.

The chief target of ANC concern is the provinces. Implicit in the approach is the idea that South Africa may have erred in establishing three tiers of constitutional government. And if one is redundant, which is it? The answer for the ANC is the provinces. As the party document states: 'Of the three spheres of government, provincial government is thus the only sphere whose actual need and existence is still contested ten years after democracy'. It argues that provinces add little value on their own to governance in South Africa; many of their roles could be better played by either national or local levels: 'This would release massive public resources for reallocation to local government'.<sup>47</sup> Provinces have been unable to monitor and support local government as the Constitution expects them to do, leaving the job to national government. Service delivery by provinces is poor, and cooperative government – with all its complexity and overlapping – has done little to improve it. The document is particularly troubled by the weaknesses of provincial government in the Eastern and Northern Capes. But more generally it remains concerned by the large continuing disparities among provinces in incomes and well-being, which is closely related to disparities in governmental capacity.

The document is also critical of ability of the provinces to promote democracy, suggesting that provinces (unlike municipalities) are often too distant from the real needs of citizens. Provincial legislatures do little to enhance oversight of their governments and generally have too little to do. There is doubt about the very logic of decentralization – any display

of independence for provinces or local governments risks compromising national policy goals, and perhaps exacerbating the disparities that already exist:

‘Concrete plans and budgets are delivered by provinces and municipalities. This means that national government must depend on the capacity of these spheres to in effect translate the goals of the Age of Hope into practical and measurable social and economic outcomes. It also means that provinces and municipalities can take their own decisions, in some cases different to those of national government. Where these two spheres do not have the capacity to deliver these programmes national policy goals are put at risk.’

And there is a political dimension as well. The ANC shares with dominant parties in other countries hostility to autonomous centres of authority that could challenge their political hegemony. In South Africa one such threat lies with provinces. The experience in KwaZulu-Natal, which has been led by the Inkatha Freedom Party, and the Western Cape, which has been led by the Democratic Alliance are the cases in point.

The document concludes that the costs of running and managing the system are simply too high:

‘The three sphere system is a complex system to operate, which results in inefficiency, overlapping roles, long decision-making processes, weak information flows, and the dispersal of public sector skills and experience within the state. To operate the system requires multiple layers of effective political leadership and highly skilled public servants, huge investments of time in coordination, and very strong intergovernmental processes.’<sup>48</sup>

Despite its strong critique, especially of the provinces, the discussion document is cautious about making fundamental changes. It acknowledges that such an effort could produce political and administrative instability, that it would have perhaps unpredictable effects on the other spheres; and that change takes time and careful planning and management. It also realizes that other factors might have a greater influence on governmental performance than institutional change.

As has been earlier noted, the policy conference at which this document was discussed was also cautious in its recommendations, concluding only that a ‘comprehensive review’ of the system was needed.<sup>49</sup> The first stage of that review currently being undertaken by the national Department of Provincial and Local Government is framed by 65 questions.<sup>50</sup> The review is of both local and provincial government but there is a subtle difference

in the questions asked of each level, reflecting the ANC's view that it is provinces that are most problematic. For instance, the questions on local government open positively – 'How can municipalities involve local communities in municipal affairs?' while the section on provinces starts with a question about the control of provinces – 'To what extent can we ensure that provinces spend their allocation on national priorities, such as education, health, housing and social development services?' The closest that the section on provincial government comes to a question that is concerned with the strengthening of democracy is the rather bland question 'Do we need provincial legislatures? What are their advantages and disadvantages in the provincial sphere of government?'

This approach, which identifies provinces at the core of the problem leads to the three broad options that the ANC policy paper offers – abolishing the provinces entirely, retaining the system but reducing the number of provinces, or retaining the system but reforming it. A full assessment of these proposals requires careful scrutiny of the claims that are made. For instance, would the abolition of the provinces in fact release large sums of money that local governments could use on delivering essential services? Would reducing the number of provinces genuinely reduce disparities or simply alter the statistical presentation of the facts, better masking poverty? Similarly, the practical details of any proposals for change need to be scrutinised. It is to be seen what level would manage housing, agriculture and environmental matters? Who would be responsible for building and staffing schools and clinics etc.?

It is difficult to answer these questions at this stage. But the process of reevaluating the provincial system and the system of local government also raises some broader questions that concern South Africa's transition to democracy and puts a spotlight on the role of multi-level government in nation building and the implications of changing it. So, proposals for change should not merely be assessed pragmatically but also, more broadly, through the lenses suggested by the three benefits that federalism or multi-level government promises that is discussed in the introduction to this chapter. First, *democracy* – how well or badly has the existing system served to promote close linkages between citizens and government, political participation, and governmental responsiveness, accountability, and transparency? Would any of the proposed reforms enhance the quality of democracy in South Africa?

Second, *governmental effectiveness* – critical in a developing society like South Africa is governmental capacity to legislate, implement and deliver public policies and programmes that will promote economic development, equality and social justice, and serve the needs of citizens for housing,

health care and other government services. Indeed, the South African Bill of Rights includes a number of social and economic rights that governments are required to meet. Does the multi-level system enhance, or undermine, the capacity of governments – federal, provincial, and local; individually and collectively – to fulfill these obligations? This is the primary driver of the current reform movement.

Third, *accommodating and managing ethnic conflict* – in racially, ethnically, and linguistically diverse societies like South Africa, promoting unity in diversity, as the Constitution puts it, is a primary requirement. Many predicted that with the ending of the oppressive apartheid regime, ethnic tensions within the Black majority would escalate. In fact, South Africa has been remarkably successful in minimizing these potential conflicts. But it is important to ask whether any of the proposals under consideration could threaten harmony and stability.

In the context of proposed changes to a system, a fourth criterion must be added – workability and feasibility. Fundamental change is often highly disruptive and may take a great deal of time to implement successfully. The result may be that a reform that is desirable in principle or theory may not be achievable, or only be achievable at unacceptable cost and delay. We deal with this at the conclusion of the chapter.

## **Abolition**

The most radical alternative is abolition of the provinces altogether, leaving a two-sphere system of government consisting of national and local government, with provincial responsibilities and staffs re-deployed either upwards to the national government or downward to stronger local governments.

This model has significant attractions, but also major difficulties. As the ANC puts it:

[It] has the potential advantage of releasing significant resources and capacity for local government. This must be balanced against disadvantages such as departments would still have to be spatially decentralized to regional level, new forms of coordination with local government would be required, legislation would have to be amended, and local government capacity would still have to be developed to take on new functions. The question of timing, sequencing and managing change are critical considerations.<sup>51</sup>

Abolition would weaken rather than strengthen democracy in South Africa. While it is true that the democratic potential of provinces has not

been realized, to abolish them would remove another arena for citizen representation and participation. This would be particularly worrisome in South Africa, given the hegemony – likely to last for the foreseeable future – of a single party. Political opposition within the national Parliament – while vocal – is largely ineffective, not only as a result of ANC dominance, but also as a result of the party list electoral system that concentrates power with party elites, ensuring that members of the National Assembly will be responsible upwards, rather than to individual citizens or constituents. Thus, while critics argue that the provinces are too distant from voters, this is even more the case with the national government. The democratic deficit arising from abolition might be counter-balanced by enhancing democracy at the local level, which is indeed closest to the people. The problem here is that in most areas local democracy remains largely undeveloped, and that decentralized government spread among 283 local units is unlikely to develop any real challenge to central dominance.<sup>52</sup> Municipal governments would likely be even more subordinate to the centre – and function much more as simple service delivery agents – than the provinces are today.<sup>53</sup> In a transitional democracy like South Africa, it is believed that multiple avenues and arenas for democratic participation are necessary, and that alternative sites of authority to counter-balance central authority are required.

With respect to effective government, abolition would certainly greatly simplify the intergovernmental system and lower transaction costs. It could also create more clarity in the distribution of responsibilities. The overall costs of government would be reduced to some extent by eliminating payment for provincial offices, ministers and members. But there would be disadvantages as well. Many of the difficulties provinces face result from the fact that they are responsible for delivering a vast range of nationally-mandated services, and employing armies of teachers, health care workers and the like. These activities and workers would remain after provinces were abolished. Some might be re-deployed to local governments; others to the central government. But the challenges of service delivery would remain – they would simply be shifted. Moreover, at the moment, many national departments are not performing significantly better than provincial ones. The new national Social Security Agency, established to take over the management of the pension and other social benefits system from the provinces will test this point. It is yet to be seen if it will be more effective than the provinces were. Because it relies on the staff that used to do the job for the provinces it will not necessarily improve matters; and, self evidently, money has not been released to the national or local sphere of government by this shift of function. As with

most of the money spent by provinces, its expenditure is largely determined by service obligations which do not change when they are shifted from one sphere of government to another.

A benefit of the current system is that the central government is not burdened with all the responsibilities that provinces carry, and this arguably allows it to focus more on strategic planning and policy. Abolition would undermine this benefit, making the central government more cumbersome and difficult to manage, and distracting its leaders from more important roles. This concern becomes more acute when one considers the way in which the current functions of provinces would be reallocated, were provinces to be abolished. Many of the most important and burdensome functions, like education, health, and large parts of the welfare portfolio, for instance, would move to the national government increasing its administrative burden significantly and, simultaneously, decreasing the ability of citizens to contribute to government in these areas.

With respect to the management of ethnic conflict, provincial governments are also something of a safety valve. Although ethnic issues remain subdued, it has been suggested that in a few provinces where there are ethnic differences, the system has allowed them to be contained at a lower level, rather than being played out on the national scene. In addition, important minorities that are opposed to the ANC, such as many Zulu speakers in KwaZulu-Natal and Coloured people in the Western Cape, have been able to achieve some political voice and representation at the provincial level. Arguably, this has helped diminish ethnic tension, and has helped reconcile these groups to the new dispensation. But the provincial system has a less visible and less easy to measure but perhaps equally significant role for ethnic minorities that are part of the ANC. Thus, the Venda and Tsonga in Limpopo have a place in the provincial government and, under the Constitution, their languages are used by provincial government. Similarly, in the Free State, Tswana speakers will be represented in the legislature and should see their language used in government. If provinces were abolished, there would be fewer opportunities for minority representation, and a number of groups would be likely to feel weak and marginalized at the centre.

### **A three Sphere System but with Fewer Provinces**

The second option is less radical. It is to retain the provincial system but to reduce the number of provinces. This has attractions, especially in the possibility that, if the weakest provinces could be absorbed into stronger ones, disparities among provinces might decline.

Much would depend on how this is done. As the ANC policy paper asks – how many provinces would be retained, how would their boundaries be drawn? Would some provinces be considered so dysfunctional that they would be incorporated into existing provinces? Or would the map be redrawn from scratch? (An alternative approach, that dysfunctional provinces become wards of the national state, rather like the Territories that exist in Canada and Australia has not been considered at all.)

There is little justification for this move in terms of democracy. Indeed the political voice of citizens in merged or abolished provinces would be reduced. And, were the provinces to be reduced from nine to, say, four, the dynamics of provincial politics vis a vis the national government would change, offering much less opportunity for changing groupings of provinces to demand attention from the centre. On the other hand, in the long run, fewer larger provinces could pose a political counterweight to the centre more effective than a larger number of smaller provinces.

In terms of effective government, again the likely results of reducing the number of provinces are unclear. The policy and governance problems in the rural, poverty-stricken and misgoverned provinces would not go away. They would simply become a further burden on either the central government or the provinces that incorporated them. There would perhaps be some additional tools for combating poverty and disparities in the affected provinces, and the skills of the best provincial bureaucrats might be better used. But it could be argued that the central government already has the tools to achieve re-distribution and regional development in its control of the public service, supervisory powers and in the constitutional requirement that provinces not be given responsibilities that they do not have the capacity to fulfil.<sup>54</sup>

The process of re-drawing boundaries and incorporating populations in existing problems could also disturb ethnic relationships and as a result possibly increase political tensions. This would almost certainly be the case if amalgamation of provinces was seen to be a device to reduce the chances of an opposition party governing in the Western Cape.

### **Reform based on the Existing System**

A third option is to retain the system as it is. The ANC's document makes it clear that this is not to be ruled out. It would ensure stability, and it would allow the improvements in capital spending and service delivery that are already taking place to continue. Unfortunately, it would, on the other hand, also allow major provincial differences in capacity to continue. So, the policy paper asserts, retaining the *status quo* would still require

major reforms. Taken together these would shift influence from the provinces to local and central governments, including strengthening the public service at the local level to make it more effective, a gradual transfer of more responsibilities to municipalities, improved central government monitoring; continued work on improving intergovernmental relations, and so on.

Reform will be more successful and much less disruptive if it builds on and improves the existing three sphere system. Moreover, it would intrude less on the pact embodied in the Interim Constitution.

## **Conclusion**

In December 2007 the ANC voted a new party President, Jacob Zuma, into office. For a period the party and the government were controlled by distinct and competing factions in the ANC. Predictably work on what would be complex and sensitive changes to the country's constitutional framework slowed down. Other, more urgent matters, absorbed the attention of party leaders. In May 2009, after national elections, Jacob Zuma became national President. The ANC's party and government leadership were once again unified but it remains unclear whether devolved government will be a central issue on the national agenda or whether the clear electoral mandate of the 2009 elections to fight poverty will consume all the government's attention.

Nevertheless, the discussion of the role of the provinces that was started in 2007 provides a useful platform from which to reflect on the provincial system. Three distinct issues arise. First is the question of a 'pacted' constitution – what does the South African experience teach us about the longer term effects of a negotiated compromise for effective government in the longer term? Second are issues raised by the challenges of implementing a system of multi-level government more or less from scratch in a country with a very limited experience of democratic government. Third is the model itself – what are its main flaws and can they be addressed in a process short of radical revision of the Constitution?

## **The Pacted Constitution**

South Africa's pacted constitution is widely regarded as part of the genius of South Africa's transition. It gave the outgoing regime confidence in the future and gave the incoming government enough space to assume office with legitimacy and to implement its massive programme of national transformation. But, as already seen, one effect of the pact was to impose a provincial system on a reluctant majority.

A substantial body of academic literature argues that pacts may undermine the very democracy that they are intended to secure. Referring to conclusions drawn by O'Donnell and Schmitter, Karl, Hagopian, Przeworski and Diamond, Omar Encarnacion has said that may 'undermine democratic ideals and practices, stall social and economic progress, foster clientelism and corruption, limit political competition and access to the policy arena, and obstruct the democratizing virtues of civil society'.<sup>55</sup> Despite its failures, this is not true of South Africa's negotiated settlement. There is no evidence that democracy would have been more vigorous in the absence of the provincial system. Nor could it be suggested that the system has fostered corruption. However, it may be that the negotiated nature of the transition led participants to pay too little attention both to the overall design of the system and to the demands of implementing it.

## **Implementing Multi-level Government**

South Africa's constitution-makers took account of the complexity of implementing a democratic system of local government, phasing its introduction in over six years. But the provincial system was to be implemented immediately. A complicated set of 'transitional provisions' in the interim constitution provided for the disestablishment of the bantustans and the establishment of nine provinces. There was scope for a gradual allocation of responsibility to the new provinces but, here, diverse political pressures made asymmetrical allocation of powers impossible and, whether or not they had viable administrations, the provinces assumed responsibility for a formidable set of tasks in the young democracy. The failure to anticipate how difficult it is to set up and staff legislatures and establish the procedures and rules for their operation, and to build administrations that could deliver services not to the privileged 13 per cent of the population that the apartheid government primarily served but to all South Africans, contributed substantially to the problems that provincial government has faced. These implementation problems were compounded by the complexity of the model and South Africa's lack of bureaucratic capacity.

## **South Africa's Model**

It has been earlier suggested that South Africa's system of multi-level government reaps few of the democratic benefits that federalism promises and does not lead to more effective government. The reasons are threefold

– the reluctance of the ANC to embrace the system, the limited capacity of government, and the complexity of the system. The first of these may be addressed through the engagement of South Africa’s democratically elected politicians with the design and reform of the system. But change to the system needs to be guided both by the benefits (and disadvantages) of a multi-level system and by the specific problems that the current system faces. The emphasis in the ANC’s policy paper and the initial DPLG documents is on local government. This, as has already been suggested, seems to be a result of the ANC’s reluctance to embrace a provincial system. But, if the provinces are to remain in existence their role as well as that of the municipalities needs to be considered carefully. First, the democratic potential of provincial government needs to be dramatically improved. Most important is to move accountability from the bottom up to the top down. Second, with respect to effective government, the system must be simplified and mechanisms for supporting struggling provinces and municipalities further developed. The dilemma here is that the transitional provincial and local governments do need central support, but that support can easily become a heavy-handed control that ends up as a barrier that inhibits the ability of the lower levels to undertake their own democratic and developmental tasks. Whatever changes are introduced, they need to be preceded by a careful re-thinking the roles of each sphere, and carving out more areas in which each is able to make decisions autonomously, without the need for central approval.

The difficulties and dilemmas that South Africa has faced in putting a successful decentralized, multi-level system into practice are by no means unique. The literature on federalism, decentralization and the like in developing countries seems often to be caught in a contradiction. In theory, decentralization offers many benefits, in practice they are seldom realized. Capacity is the over-riding issue. But it is not the only one – central government’s fear of challenges to their own authority may subvert genuine devolution, newly empowered local elites may frustrate national goals, and may exacerbate ethnic tensions. Responding to citizens is a common challenge for all levels of government. But multi-level government was what South Africa chose as it emerged into a democratic state. To fundamentally change it would be risky and dangerous. Far better to concentrate on incremental reform to improve its performance, and to build a culture in which the commitments reflected in Chapter 3 of the Constitution, become truly part of the contemporary governing culture.

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  43. For instance, Jaap De Visser (2008) states: 'Local government's relationship with provincial governments is rife with contradiction.'
  44. Matters relating to the environment demonstrate this particularly well. The national and provincial spheres of government share responsibility for the environment which is on the concurrent list, but air pollution is a local matter subject to supervision by both the national government and provinces; provincial planning is an exclusively provincial matter, beaches and waste disposal are local, and marine resources national.
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