ANALYSEN UND BERICHTE

Co-operative Government in South Africa's Post-Apartheid Constitutions: Embracing the German Model?

By *Heinz Klug*

Constitutional borrowing became a major feature of the post-cold war process of state reconstruction. Regardless of the form of constitution-making adopted in each particular case, whether new constitutions were negotiated in a round-table process, most common in eastern Europe, or among parties in a democratically elected constitutional assembly, as in South Africa, the practice of borrowing has been ubiquitous. Legal transplants which result from this practice provide an opportunity to engage in a form of comparative legal analysis that, in my view, demonstrates how both the act of borrowing and subsequent outcomes have more to do with the politics of the receiving entity than with the application and meaning of the borrowed form in its original context.[1] There is however another possibility for the comparative project, and that is for the donor system to view the ways in which its borrowed form is applied in the new context, providing an opportunity to consider inherent and unchartered alternatives. In this paper I will consider South Africa's "borrowing" and "adaptation" of the German model of constitutional relations – particularly with respect to the division of legislative power – between the central and regional governments, as a way to both explore the question of constitutional borrowing and also to consider, conjecturally, how this experience may reflect back on developments within the German system.

Regionalism and the democratic transition in South Africa

South Africa is a land of "fairly pronounced regionalisms", including some historically "distinctive regions"[2] which despite their geographic, economic and even social distinctive-

1 See *Heinz Klug*, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction, 2000.

2 Such as Namaqualand, the Western Province, the Eastern Province, the Highveld, Eastern Transvaal and the Northern Transvaal.

ness, have "never coincided with the historic provincial boundaries"[3] of the country. At the same time however, it is important to recall that the apartheid project was based quite fundamentally on the spatial division of the country into racial and ethnic blocs. By the beginning of the democratic transition in 1990 apartheid policy and practice had created six "self-governing" territories and four "independent" states within the internationally recognized boundaries of South Africa, in addition to the four provinces which formed the Union of South Africa in 1910. It was in light of this history and administrative reality that the opposing parties conceived of and debated the future shape of the country after 1990.

Negotiating the Shape of the Country

Entering the negotiations the three major political parties held distinctive developing views on federalism and regional government. For the African National Congress (ANC) a future South Africa would have to be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid's legacy.[4] From this perspective the ANC demanded strong central and local governments but saw the demand for regional government as "a form of neo-apartheid".[5] While federalism remained an anathema within the ANC, the movement itself was organized on a regional basis and slowly transformed its own vision of regional governance in the period after mid-1992.

The governing National Party (NP), which had historically opposed calls for federalism, at first conceived of a future in which local communities would be able to voluntarily choose to pursue their own living arrangements without interference from the state.[6] To this end the NP advocated a government of limited powers and proposed that different communities should be able to veto legislative action – if not directly at the national level then indirectly at the local level through self-government based on local property rights and through the strict separation of public and private activity.[7] However, as their ethnically-based power sharing model began to unravel as a realistic alternative, the NP recognized that a federal

3 *David Welsh*, Federalism and the Divided Society: A South African Perspective, in *Bertus De Villiers (ed.)*, Evaluating Federal Systems, 1994, Cape Town: Juta, pp.243-244.

4 See *ANC*, The Reconstruction and Development Programme, 1994, at 1-3.

5 *Richard Humphries / Thabo Rapoo / Steven Friedman*, The Shape of the country: Negotiating regional government, in South African Review 7 (Steven Friedman & Doreen Atkinson eds., 1994), p. 149 [hereinafter *Humphries*].

6 See *National Party*, Constitutional Rule in a Participatory Democracy: The National Party's framework for a new democratic South Africa, 1991; and *National Party*, Constitutional plan, Nationalist, Vol. 11:9, November 1991, p. 12.

7 *National Party*, Constitutional Rule in a Participatory Democracy, pp. 15-18.

structure might provide them with a regional basis of power and so they embraced the idea.[8]

Finally, the Inkatha Freedom Party (IFP), which as a regionally-based party aimed to protect its power-base in KwaZulu-Natal, advocated complete regional autonomy. Describing its goal as "federalism", the IFP argued that this was a means to ensure the self-determination of particular communities. Their proposals would have required not only that national government be a government of limited, enumerated powers but also that the national constitution would remain subject to the constitutions of the individual states of the federation.[9] Although the IFP advocated for a system of "federalism", the essence of the IFP proposal was a system of confederation.

While talk of federalism was informally banished as the f-word of the political transition in South Africa, the outcome of the negotiated transition, characterized as strong regionalism – with nine provinces enjoying constitutionally protected powers and status, as well as a constitutional commitment to co-operative governance – is a system of inter-governmental arrangements no less complex than other more explicitly federal constitutions. How, one may ask, did the parties bridge their differences?

Compromise

Although the ANC would continue to argue, well into 1993, that only a democratically elected constituent assembly could decide on regional powers and functions, it was in debating its own understanding of the future shape of the country that the ANC was brought around to considering the issue of regional government.[10] First, internal debate stimulated by the demands for local power by the civic association movement, which played a major role in the uprisings against apartheid in the 1980s, led the ANC to reconsider how its conception of a centralized system of government would in fact deliver the development programs which were at the heart of the ANC's vision for overcoming the legacy of apartheid. Second, responding to the demands of the other parties in the negotiations the ANC began exploring the question of regionalism.[11] Although its initial response was to describe the prospective regional administrations as mere transmission belts of national policy and programs, it soon became clear that this approach was inadequate, even

8 *Humphries*, pp. 154-158.

9 See *Inkatha Freedom Party*, The Constitution of the Federal Republic of South Africa (Draft, June 18, 1993), reprinted in *Blaustein*, Constitutions of the World.

10 See *Humphries*, pp.149-154.

11 See *African National Congress*, Ten Proposed Regions for a United South Africa, University of the Western Cape, Bellville, 1992.

in terms of the ANC's own internal party-structure, which functioned on a regional basis. It was in this context of internal debate and external pressure in mid-1992, that a number of members of the ANC Constitutional Committee and policy makers from the local government department went on a tour of the United States and Germany. This was followed by a series of conferences and workshops in South Africa[12] at which federalism and regionalism was discussed among policy-makers from the different negotiating parties – including in significant instances experts on the German model.[13]

By the time the Consultative Business Movement (CBM) initiated a discussion of regionalism in early 1993 the ANC's views had already begun to shift. Now, among the experts the CBM brought together across party lines were those who sought to de-emphasize the distinction between the powers wielded by different levels of government. Instead, they focused on the question of good governance, identifying "the apparently self-evident virtues of accountability, democracy, effectiveness and efficiency, and the capacity to cope with regional and cultural diversity,"[14] as essential ingredients. From this beginning they went on to argue that "at the end of the 20th century it was difficult to allocate single areas of social life exclusively to any one level of government", instead when "examining any specific area of social life, such as education, at least three and perhaps four levels of government might have a legitimate regulatory or executive interest, and hence claim some rule-making or administrative role in respect of the 'functional area'."[15] The CBM team's final report proposed the adoption of legal principles similar to those in Germany to resolve potential conflicts between national and regional laws. Interpreting the purpose of then Article 72 (2) of the German Constitution, the report argued that the functions performed at each level of government should be related to the legitimate interest of that level. This 'interest' would then operate as a condition for the exercise of a related power.[16]

12 See for example, *Steven Friedman and Richard Humphries (ed.)*, Federalism and its Foes, 1993, Proceedings of the Institute for Multi-Party Democracy and the Centre for Policy Studies workshop, The Politics and Economics of Federalism, Cape Town, August 21-23, 1992, and also *Bertus de Villiers / Jabu Sindane (eds.)*, Regionalism: Problems and Prospects, 1993, the product of two workshops organized by the Human Sciences Research Council (HSRC) in March and April 1993.

13 Dr Hartmut Klatt, secretary of the committee of post and telecommunication of the German Bundestag, gave a paper entitled, "Federalism and democracy: the German experience", at the Cape Town workshop, while Uwe Leonardy, Head of Division (Ministerialrat) in the Mission of Lower Saxony to the Federation in Bonn – constitutional and legal affairs, presented a paper entitled, "Demarcation of regions: international perspectives", at the April 1993 HSRC workshop.

14 See *Nicholas Haysom*, Federal Features of the Final Constitution, (draft) p. 3, citing the Final Report published by the Consultative Business Movement, entitled Regions in South Africa (1993) [hereinafter *Haysom*].

15 Ibid.

16 See *Haysom*, p. 4.

It was these initiatives that together provided the ANC with a vision of how they might bridge the gap between the demands for regional power and the need to retain enough power at the center so as to address apartheid's legacy. Instead of rigidly dividing powers between the central and regional governments the German model provided for both concurrent powers as well as an override in favor of national authority under particular circumstances. As the ANC visitors had understood the lesson of German federalism, it was possible for central government to shape vital decisions in the name of national standards while simultaneously providing a space for regional governments which could even be ruled by other parties.[17] Thus, by the time negotiations resumed in March 1993 the ANC was in the process of adopting a regional policy which drew heavily on the German experience. Instead of proposing mere administrative regions, the new proposals gave regional governments concurrent powers in specified areas of legislative authority, law-making powers which would however be limited by the constitutional principle that they could not act in any way repugnant to an act of the national parliament. It was this acceptance of regionalism, together with the idea of a two-stage constitution-making process coupled with a five year period of shared power in a Government of National Unity that provided the formula for South Africa's historic transition.

Constitutional Principles

A primary ingredient of this negotiated transition to democracy was the acceptance by the ANC that a democratically elected constitution-making body would be bound by a set of negotiated constitutional principles. The establishment of these principles thus became the key to reaching agreement on the terms of the interim Constitution which was to provide the mechanism for a legal transfer of power. Amongst the most controversial issues in these negotiations remained the question of regional powers. Even though the acceptance of concurrent powers and the idea of subsidiarity provided a basis for common understanding, there remained, as Mandela's legal advisor Nicholas Haysom argues, two distinct means of implementing such an approach in the constitution-making process. First, was to apply this logic or formulae, at the constitution-making stage, "to every conceivable administrative or law making role in all areas of social life, and make two exhaustive lists allocating hundreds, perhaps thousands of government functions"[18] to either the national or provincial level. Second, you could agree "to 'constitutionalise' the logic, the formulae – which express the legitimate interests of different levels of government – rather than the distinct function it is responsible for." This approach would defer, leaving to the future and thus to political negotiation or the courts, the decision as to which level of government would dominate in any aspect of a particular function. Instead of bargaining over the allocation of

17 See *Humphries*, p. 153.

18 *Haysom*, p. 4.

powers in the constitution-making process this approach allowed the parties, in theory, to ignore the question of national or regional dominance until the new democratic structures began functioning and a specific conflict emerged.

While this approach was followed in the first rendition of the interim constitution, the Constitutional Principles – which would define the boundaries of the next round of constitution-making – contained a number of provisions on the division of authority between the respective levels of government which seemed to imply a tabulation of "powers allocated to either the national or provincial level in accordance with the formulae set out in the principles".[19] At the same time however, the addition of Principle 18(2),[20] requiring simply that the Final Constitution should not substantially diminish the powers of provinces as provided for in the negotiated interim constitution, provided a means to retain the focus, in the second round of constitution-making, on the formulae for co-operative governance rather then a mere division of power between the different levels of government.

The 1993 interim Constitution

Although the protagonists of a federal solution for South Africa continued to advocate for a national government of limited powers, the transitional 1993 constitution reversed the traditional federal division of legislative powers by allocating enumerated concurrent powers to the provinces. Furthermore, in the event of conflict, section 126 "established criteria for pre-eminence by allocating such pre-eminence to the national government", but only when it could establish certain overriding national interests set out in the interim Constitution. Section 126(a)-(e) of the "Interim Constitution, which reflect the national override criteria of the pre-1994 Article 72(2) of the German Constitution, provided that national legislation would prevail over an act of a province when it deals with a matter: (1) that cannot be regulated effectively by provincial legislation; (2) that requires uniform norms or standards to be performed effectively; (3) where the setting of minimum standards for the rendering of public services is necessary; (4) requiring national legislation in the interests of economic unity, the protection of the environment, promotion of inter-provincial commerce, or the maintenance of national security; and (5) where a provincial law prejudices the economic, health or security interests of another province or the country, or impedes the implementation of national economic policies."[21] Imitating the German model by providing that all regional powers be held concurrently by the national government, while reversing the allocation of residual powers from regional to national, satisfied the

19 *Haysom*, p. 7.

20 Through a last minute constitutional amendment designed to woe the IFP into participating in the forthcoming elections.

21 See Constitution of the Republic of South Africa Act 200 of 1993, section 126(3)(a)-(e).

ANC's demand for a weak or limited form of regionalism. Although this was premised on a division of legislative powers based on an innovative notion of subsidiarity – in which it was presumed that the national government would not act on a matter that could be effectively resolved by the regional level – in effect it ensured that "both levels would continue to have ongoing and full jurisdiction over the full area of the particular listed functional area and could also supplement legislation enacted at another level."[22] This innovation could not however weather the immediate politics of the transition.

This allocation of regional powers – according to a set of criteria incorporated into the constitutional guidelines and in those sections of the interim constitution dealing with the legislative powers of the provinces – was rejected by the IFP on the grounds that the constitution failed to guarantee the autonomy of the provinces. Despite the ANC's protestations that the provincial powers guaranteed by the constitution could not be withdrawn – as the apartheid government had done in 1986 in the case of the original four provinces – the IFP pointed to the fact that the allocated powers were only concurrent powers and that the national legislature could supersede local legislation through the passage of contrary national legislation covering any subject matter. As a result the IFP threatened to boycott and disrupt the first democratic elections. To diffuse this threat the 1993 Constitution was amended before it even came into force. The Amendment passed in early 1994 granted the provinces preeminent powers in enumerated areas of concurrent legislative authority. Instead of a list of simple concurrent powers schedule six of the interim constitution now defined an expanded list of areas in which provincial legislatures would have preeminent legislative authority, included: agriculture; gambling; cultural affairs; education at all levels except tertiary; environment; health; housing; language policy; local government; nature conservation; police; state media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; traditional authorities; urban and rural development and welfare services. Despite this shift in power from concurrent powers based on a principle of subsidiarity to one of provincial preeminence over listed matters, the national government retained the power to override provincial authority if and when it could establish the existence of certain national interests as defined in section 126. Difficulty would however soon arise in trying to distinguish the exact limits of a regions preeminent powers and the extent to which the national legislature would be able to pass general laws effecting these rather broad areas of governance.

Although the provinces had the power to assign executive control over these matters to the national government if they lacked administrative resources to implement particular laws, the Constitution provided that the provinces had executive authority over all matters over which they had legislative authority as well as matters assigned to the provinces in terms of the transitional clauses of the constitution or delegated to the provinces by national legisla-

22 *Haysom*, p. 5.

tion. The net effect of these provisions was continued tension between non-ANC provincial governments and the national government over the extent of regional autonomy and the exact definition of their relative powers.

The limits of regionalism under the 1993 Constitution

It is in this context that three particular cases were litigated before the Constitutional Court in 1996. All three cases involved, among other issues, claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal where the IFP was declared the marginal winner of the regional vote in 1994. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province – in one case over traditional leaders and in the other the constitution-making powers of the province – the first case involved a dispute over the National Education Policy Bill[23] which was then before the National Assembly.

Objections to the National Education Policy Bill focused on the claim that the "Bill imposed national education policy on the provinces" and thereby "encroached upon the autonomy of the provinces and their executive authority." The IFP argued that the "Bill could have no application in KwaZulu-Natal because it [the province] was in a position to formulate and regulate its own policies."[24] While all parties accepted that education was defined as a concurrent legislative function under the interim Constitution, the contending parties imagined that different consequences should flow from the determination that a subject matter is concurrently assigned to both provincial and national government. KwaZulu-Natal and the IFP in particular assumed a form of preemption doctrine in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating its own policies. In rejecting this argument the Constitutional Court avoided the notion of preemption altogether and instead argued that the "legislative competences of the provinces and Parliament to make laws in respect of schedule 6 [concurrent] matters do not depend upon section 126(3)," which the Court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws.[25] The Court's rejection of any notion of preemption is an interpretation of the Constitution which enables both national and provincial legislators to continue to promote and even legislate

23 Ex parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995, 1996 (3) SA 165 (CC) [hereinafter NEB Case].

24 Para. 8, NEB Case.

25 Para. 16, NEB Case.

on their own imagined solutions to issues within their concurrent jurisdiction without foreclosing on their particular options until there is an irreconcilable conflict.

Having avoided siding categorically with either national or provincial authority the Court took a further step arguing that even if a "conflict is resolved in favour of either the provincial or national law the other is not invalidated" it is merely "subordinated and to the extent of the conflict rendered inoperative."[26] Supported by the comparative jurisprudence of Canada[27] and Australia,[28] the Court was able to make a distinction between "laws that are inconsistent with each other and laws that are inconsistent with the Constitution,"[29] and thereby argues that "even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared unconstitutional."[30] While the Constitutional Court's approach clearly aimed to reduce the tensions inherent in the continuing conflict between provincial and national governments, particularly in relation to the continuing violent tensions in KwaZulu-Natal, it also took the opportunity to explicitly preclude an alternative interpretation. Focusing on argument before the Court which relied upon the United States Supreme Court's decision in *New York v United States*[31] the Court made the point that "[u]nlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states."[32] Furthermore the Court warned that "[d]ecisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution."[33] In effect the Court's approach was to begin to draw a boundary around the outer limits of provincial autonomy while simultaneously allowing concurrent jurisdiction to provide a space in which different legislatures could continue to imagine and assert their own, at times contradictory, solutions to legislative problems within their jurisdiction.

The scope of such a definition of concurrent jurisdiction was immediately tested in a case challenging two bills before the KwaZulu-Natal provincial legislature which purported in part to preclude national action effecting the payment of salaries to traditional authorities in

26 Para. 16, NEB Case.
27 Para. 17, NEB Case.
28 Para. 18, NEB Case.
29 Para. 16, NEB Case.
30 Para. 20, NEB Case.
31 505 U.S. 144 (1992).
32 Para. 23, NEB Case.
33 Para. 23, NEB Case.

KwaZulu-Natal.[34] In this case, brought by ANC members of the KwaZulu-Natal legislature, the objectors argued that the bills were unconstitutional as they amounted to an attempt to "frustrate the implementation of the [national] Remuneration of Traditional Leaders Act," by preventing the Ingonyama (Zulu King) and traditional leaders "from accepting remuneration and allowances which might become payable to them in terms of the national legislation."[35] Furthermore, the object of this provincial legislation "was to create a relationship of subservience between them [traditional leaders] and the provincial government," an object outside the scope of the provinces concurrent powers with respect to traditional authorities.[36]

The Court's response was to first lament that the political conflict concerning KwaZulu-Natal had degenerated to a state in which the right to pay traditional authorities, as a means to secure influence over them, should have become an issue. Recalling that traditional leaders "occupy positions in the community in which they can best serve the interests of their people if they are not dependent or perceived to be dependent on political parties or on the national or provincial governments," the Court noted that its role is limited to deciding "whether the proposed provincial legislation is inconsistent with the Constitution."[37] Faced with intractable political conflicts between the IFP and ANC in KwaZulu-Natal the Court reasserted its duty to interpret legislation narrowly so as to avoid constitutional conflicts and upheld the legislative competence of the KwaZulu-Natal legislature and the constitutionality of the two Bills. In effect the Court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date. The outer limits of the Court's tolerance for alternative constitutional visions was however reached in the third case in which the Court was asked to certify the Constitution of the Province of KwaZulu-Natal.[38]

Although the KwaZulu-Natal draft constitution had been unanimously adopted by the provincial legislature, the Constitutional Court held that there are "fundamental respects in which the provincial Constitution is fatally flawed,"[39] and therefore declined to certify it.

34 Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995, 1996 (4) SA 653 (CC) [hereinafter Amakosi Case].

35 Para. 16, Amakosi Case.

36 Para. 16, Amakosi Case.

37 Para. 18, Amakosi Case.

38 Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (4) SA 1098 (CC) [hereinafter KZN Constitution Case].

39 Para. 13, KZN Constitution Case.

The Court considered these flaws under three headings. Two sets of problems were essentially procedural in nature and involved attempts by the KwaZulu-Natal legislature: (1) to avoid the Court's determination of the text's inconsistency with the interim Constitution;[40] or (2) to suspend the certification process itself until particular sections could be tested against the final constitution.[41] While the Court rejected these devices as being in conflict with the certification process and attempting to circumvent the process respectively, the most significant problem with the text was the KwaZulu-Natal legislature's usurpation of national powers.

Referring to the Court's decision in *The National Education Policy Bill* case, in which it made a "distinction between the history, structure and language of the United States Constitution which brought together several sovereign states … and that of our interim Constitution,"[42] the Court held that parts of the proposed KwaZulu-Natal constitution appeared to have "been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly."[43] Drawing a clear boundary around the permissible constitutional aspirations of the IFP in KwaZulu-Natal the Court rejected the draft text's attempt to both "confer" legislative and executive authority upon the province[44] and to "recognize" the authority of the government and "competence" of the national Parliament in other respects.[45] While recognizing the right of the IFP-dominated KwaZulu-Natal legislature to exercise its powers to draft a provincial constitution, even possibly including its own bill of rights, the Court clearly rejected the attempt by the IFP to assert its own vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 Constitution. Furthermore, the Court clearly silenced the extreme option of provincial sovereignty stating that the assertions of recognition were "inconsistent with the interim Constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional 'recognition' to what the national Government may or may not do."[46]

Although the IFP had walked out of the negotiations in which the interim constitution was drafted and refused to participate in the Constitutional Assembly during the making of the 1996 Constitution, it nevertheless proceeded to produce its own provincial constitution and submitted it to the Constitutional Court in terms of the 1993 Constitution. Even as its

40 See para. 36-38, KZN Constitution Case.
41 See para. 39-46, KZN Constitution Case.
42 Para. 14, KZN Constitution Case.
43 Para. 15, KZN Constitution Case.
44 Para. 32, KZN Constitution Case.
45 Para. 34, KZN Constitution Case.
46 Para. 34, KZN Constitution Case.

vision of regional autonomy became increasingly isolated, the IFP still imagined that it could be achieved within the parameters of the 1993 Constitution. Its rejection by the Constitutional Court silenced this particular attempt, but did not foreclose on the IFP's vision of greater regional autonomy.

Instead of suffering defeat, the IFP was able to take solace from the Court's refusal, on the same day, to certify the draft of the final constitution, and in particular the Court's decision that the draft of the final constitution had failed to grant provinces the degree of autonomy they were guaranteed in the Constitutional Principles.[47] However, when the 1996 Constitution was finally certified by the Constitutional Court[48] the IFP remained dissatisfied over the limited degree of provincial autonomy recognized in the Constitution. However, by then the IFP, as the governing party in KwaZulu-Natal, was not about to exit the system. Instead, they joined the other opposition parties in saying that they would take the opportunity in the following year's legislative session to review the Constitution,[49] thus keeping their claims alive.

The Final Constitution

Although traditional notions of federalism assume the coming together of formerly sovereign entities and their retention of certain specified powers, South Africa's 1996 "final" Constitution represents an increasingly common means of constitutionalizing the relationship between different spacial jurisdictions within the nation-state. South Africa's "constitutional regionalism" is one in which the constituting act created a structure in which powers are allocated to different levels of government and includes a complex procedure for the resolution of conflicts over governance — between the respective legislative competencies, executive powers, and relations with other branches and levels of government. Unlike its Indian and Canadian forebears however, South Africa's Constitution follows more closely in the footsteps of the German Constitution, placing less emphasis on geographic autonomy and more on the integration of geographic jurisdictions into separate functionally determined roles in the continuum of governance over specifically defined issues. While provision is made for some exclusive regional powers these are by and large of minor significance, all important and contested issues being included in the category of concurrent competence.

47 See Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC).

48 See Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SA 97 (CC).

49 Mail and Guardian, Nov. 11, 1996.

Unlike prior South African constitutions, the 1996 Constitution entrenches three distinct levels of government – national, provincial and local – and makes detailed provision for both their constitutional autonomy and interaction. Unique in this regard is the inclusion of one specific chapter detailing the governmental structure of the country and laying down general principles of interaction between these different spheres of governance.[50] Most significant among these principles is the provision requiring organs of state involved in an intergovernmental dispute to "make every reasonable effort to settle the dispute" and to "exhaust all other remedies before it approaches a court to resolve the dispute."[51] Co-operative governance in this sense integrates the different geographic regions and discourages them from seeking early intervention from the courts, rather they are forced into an ongoing interaction designed to produce interregional compromises through political negotiation — as has in practice been the German experience.[52]

While the basic structure of South Africa's "constitutional regionalism" is reflected in the division of functional areas of legislative power into areas of concurrent and exclusive legislative competence, specified in Schedules 4 and 5 of the Constitution, the substance of this constitutional design is contained in provisions: (1) requiring joint or collaborative decision-making; (2) regulating inter-jurisdictional conflict, and; (3) securing limited fiscal autonomy. First, the Constitution provides for a second house of the national parliament – the National Council of Provinces (NCOP) – directly representing the provinces in the national legislative process through their provincial delegations, appointed by the legislatures and executives of each province.[53] The Constitution then provides that most bills must go before the NCOP although the nature of the NCOP's role in each bill's passage will depend on the subject matter involved.[54] Constitutional amendment of either the founding provisions,[55] bill of rights[56] or those sections dealing specifically with the provinces, the NCOP or provincial boundaries, powers, functions or institutions, all require the support of at least six of the nine provinces. Ordinary bills must also go before the NCOP but procedure for their passage within the NCOP will depend on whether the bill involves a matter assigned by the Constitution to a particular procedure, is a matter of concurrent jurisdiction or is an ordinary bill not affecting the provinces. Unless it is an ordinary bill not affecting the provinces and therefore may be passed by a mere majority of the individual delegates to

50 See Chapter 3: Co-operative Governance, Constitution of the Republic of South Africa, Act 108 of 1996 [hereinafter all references to Constitutional sections are to the 1996 Constitution].

51 Section 41(3).

52 See *Donald Kommers*, The Constitutional Jurisprudence of the Federal Republic of German, 2nd ed., 1997, pp. 61-114.

53 See sections 60-72.

54 See sections 73-77.

55 Chapter One.

56 Chapter Two.

the NCOP, the decision will be made on the basis of single votes cast on behalf of each of the provincial delegations. Furthermore, the Constitution requires an Act of Parliament to provide a uniform procedure through which "provincial legislatures confer authority on their delegations to cast votes on their behalf".[57] Conflicts between the National Assembly and the NCOP over bills affecting the provinces are negotiated through a Mediation Committee consisting of nine members of the National Assembly and one from each of the nine provincial delegations in the NCOP. It is this elaborate system of structures and processes that creates a system of enforced engagement integrating provincial and national interests at the national level. The requirement that provincial legislatures mandate their NCOP delegations serves in this context to further integrate the legislative process, thus projecting provincial interests onto the national agenda while simultaneously requiring the regional bodies to debate nationally defined issues, both processes designed to limit provincial alienation.

Second, provision is made for the constitutional regulation of inter-jurisdictional conflict that may occur in the exercise of both legislative[58] and executive[59] powers. It is these provisions that effectively denote the limits of this new "regionalism." In the case of executive authority, mirror provisions allow either the national or the provincial executives to directly intervene at the provincial and local level respectively, if a province or local government "cannot or does not fulfil an executive obligation in terms of legislation or the Constitution."[60] Although these provisions establish numerous safeguards against their potential abuse, they nonetheless pose an important limit to provincial and local autonomy. In the case of legislative authority, a whole section of the Constitution deals specifically with the circumstances under which national legislation will prevail over provincial legislation in areas where the two levels of government enjoy concurrent authority. Significantly, however, the default position is that unless the conflicting national legislation meets the criteria laid down in the Constitution, it is the provincial legislation that will prevail.[61] While this seems to grant more authority to the provinces, in fact, the broad criteria establishing national authority over provincial competence, including where the national legislation provides for uniform national norms and standards, frameworks or policies,[62] means that provincial competence will provide a very thin shield against national legislative intrusion. It must be remembered, however, that the provinces will be significant participants in the production of such national legislation though the NCOP. Central authority is however

57 Section 65(2).
58 See sections 146-150.
59 Sections 100 and 139.
60 See sections 100 and 139.
61 Subsection 146(5).
62 See subsections 146(2) and (3).

further privileged by the inclusion of a provision establishing particular circumstances, including the need to maintain national security, economic unity or essential national standards, as the basis upon which national legislation may be passed overriding even the exclusive subject matter competence secured for the provinces with respect to those areas defined in Schedule 5 of the Constitution.[63]

The third important feature of South Africa's "strong regionalism" is the constitutional protection of fiscal distributions to the provinces so that they might, to some extent, fulfil their constitutional mandates and provincial policies independent of the national government. Again however this mechanism is characterized by an emphasis on integration through the Financial and Fiscal Commission (FCC) – an independent constitutionally created body which advises Parliament and the provincial legislatures on among other things the constitutional mandate that Parliament must provide for the equitable division of revenue among the national, provincial and local spheres of government.[64] Again, however, national government is privileged in that the taxing power of the regional and local governments are constitutionally constrained[65] and made dependent upon national legislation,[66] and as in the case of executive authority, the national government has a carefully constrained power through the national treasury to directly cutoff transfers of revenues to the provinces — at least for 120 days at a time.[67] The outcome is a system of mediating sources of authority which neither guarantees total regional and local autonomy nor allows the national government to simply impose its will on these other spheres of government.

Defining the legislative dimension of co-operative government

As was the case under the interim constitution, tensions between the central ANC government and non-ANC controlled provinces soon brought cases to the Constitutional Court in which the court was called upon to define the parameters of cooperative government. Although wide-ranging in scope these early cases addressed three issues central to the question of legislative authority under the 1996 Constitution. First, the court was called upon to define the constitutional allocation of legislative power in a case in which the province claimed implied legislative powers to define the structure of its own civil service. Second, the court was required to determine the scope of residual national legislative power in a case where the national government claimed concurrent authority over the establish-

63 See section 44(2).
64 See section 214.
65 See sections 228 and 229.
66 Section 228(2)(b).
67 See section 216.

ment of municipal governments despite the Constitution's simultaneous allocation in this field of specific functions to different institutions and spheres of government. Finally, an attempt by the national government to extensively regulate liquor production, sale and consumption, a field in which the regions were granted at least some exclusive powers under the Constitution, required the court to define the specific content of the exclusive legislative powers of the provinces.

Constitutional allocation of legislative power

One of the first such cases involved a challenge to national legislation which sought to define the structure of the public service including all provincial public services. The Western Cape argued that the legislation infringed "the executive power vested in the provinces by the Constitution and detracts from the legitimate autonomy of the provinces recognised in the Constitution."[68] The Court however pointed to the fact that not only did the national Constitution provide that the public service is to be structured in accordance with national legislation, but also that the Western Cape Constitution required the Western Cape government to implement legislation in accordance with the provisions of the national constitution.[69]

Describing national framework legislation as a feature of the system of cooperative government provided for by the Constitution, the Court noted that such legislation "is required for the raising and division of revenue, the preparation of budgets at all spheres of government, treasury control, procurements by organs of state, conditions according to which governments at all spheres may guarantee loans, the remuneration of public officials at all spheres of government and various other matters."[70] While the court agreed that provincial governments are empowered to "'employ, promote, transfer and dismiss personnel in the provincial administrations of the public service," the court rejected the idea of an implied provincial power depriving the national government of its "competence to make laws for the structure and functioning of the civil service as a whole," which is expressly retained in section 197(1) of the Constitution.[71]

Turning to consider whether the national government's structuring of the public service encroached on the "geographical, functional or institutional integrity" of the provincial

68 The Premier of the Province of the Western Cape v The President of the Republic of South Africa and the Minister of Public Service, CCT 26/98 (1999), 1999 (12) BCLR 1360 (CC) para. 4, [hereinafter Public Service Case].

69 Para. 8, Public Service Case.

70 Para. 9, Public Service Case (footnotes omitted).

71 Para. 11, Public Service Case.

government in violation of s 41(1)(g), the Court considered the provisions of Chapter 3 of the Constitution dealing with cooperative government. The court's interpretation of these provisions emphasized the description of all spheres of government being "distinctive, inter-dependent and inter-related," yet went on to point out that the "national legislature is more powerful than other legislatures, having a legislative competence in respect of any matter," and that the "national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution."[72] While the court accepted that the purpose of section 41(1)(g) is to prevent one sphere of government from using its power to undermine other spheres of government and preventing them from functioning effectively, it concluded that the section "is concerned with the way power is exercised, not whether or not a power exists."[73] The relevant question before the court in this case however was whether the national government had the constitutional power to structure the public service.[74] Finding that indeed the power vests in the national sphere of government, the court emphasized that the Constitutional Principles "contemplated that the national government would have powers that transcend provincial boundaries and competences and that 'legitimate provincial autonomy does not mean that the provinces can ignore [the constitutional] framework or demand to be insulated from the exercise of such power'."[75] The Court did however strike down a clause in the law empowering the national minister to direct a provincial official to transfer particular functions to another department (provincial or national) because such power encroached on the ability of the provinces to carry out the functions entrusted to them by the Constitution.

Concurrent powers and the legislative authority of the national parliament

Although the court seemed to come down strongly in favor of national legislative authority, at least when it is explicitly granted in the Constitution, the question of the allocation of legislative authority soon arose again, this time in the context of a dispute between the national government and the regional governments of the Western Cape and KwaZulu-Natal.[76] The provincial governments in this case challenged provisions of the Local Government: Municipal Structures Act 117 of 1998 in which the national government claimed residual concurrent powers to determine the structure of local government, despite

72 Para. 18 and 19, Public Service Case.

73 Para 23, Public Service Case.

74 Para. 23 and 24, Public Service Case.

75 Para. 25, Public Service Case (footnotes omitted).

76 The Executive Council of the Province of the Western Cape v The Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v the President of the Republic of South Africa and Others, 1999 (12) BCLR 1360 (CC) [Hereinafter Municipal Structures Case].

the provisions of the local government Chapter of the Constitution which set out a comprehensive scheme for the allocation of powers between the national, provincial and local levels of government. Considering this allocation of power the court recognized that the Constitution left residual legislative powers to the national sphere, however at the same time the Court determined that section 155 of the Constitution – which controls the establishment of local governments – allocates powers and functions between different spheres of government and the independent demarcation board so that: "(a) the role of the national government is limited to establishing criteria for determining different categories of municipality, establishing criteria and procedures for determining municipal boundaries, defining different types of municipalities that may be established within each category, and making provision for how powers and functions are to be divided between municipalities with shared powers; (b) the power to determine municipal boundaries vests solely in the Demarcation Board; and (c) the role of the provincial government is limited to determining the types of municipalities that may be established within the province, and establishing municipalities 'in a manner consistent with the [national] legislation enacted in terms of subsections (2) and (3)'."[77] Applying this scheme to the challenged legislation the court found unconstitutional the attempt in section 13 of the Municipal Structures Act to tell the provinces how they must set about exercising power in respect of a matter falling outside of the competence of the national government. Despite claims by the national government that the provincial official was only obliged to take the guidelines into account and not to implement them, the court argued that what mattered was that the national government legislated on a matter falling outside of its competence.[78] Thus, despite the court's earlier recognition of the predominance of the national sphere of government in the scheme of co-operative government, here the court drew the line and clarified that there was a constitutional limit to the legislative power of the national government.

The exclusive powers of the provinces — defining provincial autonomy

Although these early cases seem on the whole to have rejected the autonomy claims of the provincial governments by recognizing the commanding role of the national legislature, the court was soon given the opportunity to explore the arena of exclusive provincial power after the national parliament passed legislation which sought to regulate the production, distribution and sale of liquor through a nationally defined licensing scheme.[79] Referred to the Constitutional Court by President Mandela, who had refused to sign the Bill on the grounds that he had reservations about its constitutionality, the law sought in part to control

77 Para. 14, Municipal Structures Case (footnotes omitted).

78 Para. 20 and 21, Municipal Structures Case.

79 Ex parte the President of the Republic of South Africa, In Re: Constitutionality of the Liquor Bill, CCT 12/99, 11 November 1999, 2000 (1) BCLR 1 (CC) [hereinafter Liquor Licensing case].

the manufacture, wholesale distribution and retail sale of liquor, functions which at least with respect to licensing are expressly included as exclusive legislative powers of the provinces in Schedule 5 of the Constitution. Citing a "history of overt racism in the control of the manufacturing, distribution and sale of liquor," the national government contended that the "provisions of the Bill constitute a permissible exercise by Parliament of its legislative powers."[80] The Western Cape complained however that the "Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor; and that even in the retail sphere the structures the Bill seeks to create reduce the provinces, in an area in which they would (subject to section 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators."[81] The province went on to claim that the Bill thereby intrudes into its area of exclusive legislative competence.

Turning once again to the issue of cooperative government the court noted that "[g]overnmental power is (...) distributed [at source] between the national, provincial and local spheres of government, each of which is subject to the Constitution, and each of which is subordinated to the constitutional obligation to respect the requirements of cooperative governance."[82] The court then proceeded to argue that cooperative governance includes the duty "not [to] assume any power or function except those conferred on them in terms of the Constitution" and that the Constitution's "distribution of legislative power between the various spheres of government" and its itemization of functional areas of concurrent and exclusive legislative competence, must be read in this light.[83]

Accepting that the national government enjoys the power to regulate the liquor trade in all respects because of the industry's impact on the "determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility," the court went on to conclude that the structure of the Constitution precluded the national government's regulation of liquor licensing.[84] This the court achieved by carefully defining three distinct objectives of the proposed law and distinguishing those functions which would apply predominantly to intra-provincial regulation as opposed to those aspects of the liquor business requiring national regulation because of their extra-provincial and even international impact.

80 Para. 33, Liquor Licensing Case.
81 Para. 37, Liquor Licensing Case.
82 Para. 41, Liquor Licensing Case.
83 Para. 41, Liquor Licensing Case.
84 Para. 58, Liquor Licensing Case.

The Bill, according to the court, divided the liquor trade into three tiers and provided distinct forms of regulation for these specific aspects of the business. It provided: first, for "the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely producers, distributors and retailers"; second, in an attempt to establish national uniformity in the trade, for "the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors"; and third, for "the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms."[85]

Having defined an aspect of the Bill which focused primarily on the provincial level, the court then proceeded to define the primary purpose of granting exclusive competencies to the provinces as implying power over the regulation of activities "that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone." In relation to "liquor licences," it is obvious, the court argued, "that the retail sale of liquor will, except for a probably negligible minority of sales that are effected across provincial borders, occur solely within the province." Given this fact the court concluded that the heart of the exclusive competence granted to the regions in the Constitution, must in this arena "lie in the licensing of retail sale of liquor".[86]

Returning to an analysis of the "three-tier" structure of the Bill the court argued that the manufacture or production of liquor, including wholesale trades in liquor – which have a national and international dimension – were not intended to be the primary field of "liquor licences"[87] – as little, if any production is directed solely at the intra-provincial market.[88] This approach enabled the court to simultaneously reject the Western Cape claim of a right to regulate and control the production and distribution of liquor,[89] as these functions clearly fall outside of the primary basis for the defining of exclusive provincial competence, while at the same time framing a clear arena in which the constitutionally guaranteed exclusive competences of the provinces could be more vigorously defended. Distinguishing between licensing retail outlets on the one hand and manufacturing and distribution on the other, the court concluded that "if the exclusive provincial legislative competence regarding "liquor licences" in Schedule 5 applies to all liquor licences, the national government has made out a case in terms of section 44(2) justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade." However, as the court pointed out, the

85 Para. 69, Liquor Licensing Case.
86 Para. 71, Liquor Licensing Case.
87 Para. 72, Liquor Licensing Case.
88 Paras. 72-74, Liquor Licensing Case.
89 Para. 78, Liquor Licensing Case.

national government had failed to make a case for the necessity of such national regulation in "regard to retail sales of liquor, whether by retailers or by manufacturers, nor for micro-manufacturers whose operations are essentially provincial." To this extent then the national Parliament did not have the competence to enact the Liquor Bill and the Bill was therefore unconstitutional.[90]

Conclusion: Whether the German Model?

The German model of intergovernmental relations has clearly provided a source for much constitutional borrowing in the South African case, yet there are also rather significant lapses, particularly with respect to the fiscal and administrative arrangements. While the NCOP seems to be clearly modeled on the *Bundesrat*, there are also significant innovations. In the fiscal field however the South Africans have clearly avoided the more stringent imperatives of equalization that have led the *Bundesverfassungsgericht* to give such leeway to national legislative authority in the German system.

It is in the allocation of legislative authority that the South Africans have both borrowed most extensively from the German model yet managed to apply the model so as to give more power to the regions. In Germany the national level's assertion of concurrent authority effectively ousts the legislative authority of the Lander and has led to whole areas of the law becoming federalized, especially under the impact of the preemption doctrine. While the German Constitution has since been amended[91] in an attempt to increase the legislative authority of the Lander[92] – including rather specific directions addressed to the *Bundesverfassungsgericht* to encourage interpretations granting more generous powers to the Lander – South Africa has managed, using essentially the same clauses as the pre-1994 German Constitution to create a system of continuing concurrency in which the powers of the national and regional level coexist until such time as there is an irreconcilable conflict. Fundamental to this innovation has, on the one hand, been the Constitutional Court's rejection of the preemption doctrine, while on the other hand, this has been made possible because of the inclusion of specific provisions in the Constitution which provide for the resolution of direct conflicts. The result has been an ongoing contestation over the exact parameters of legislative competence, producing an extraordinary jurisprudence in which specific functions – other than whole subject areas – are being specifically delegated by the courts to the different levels of government. This assignment of legislative power, through the mechanism of the national override clauses as well as the interpretation of specific

90 Para. 87, Liquor Licensing Case.

91 See 1994 amendment to Article 72(2) of the Basic Law of the Federal Republic of Germany.

92 See *Charlie Jeffery*, German Unification and the Future of the Federal System, in *Bertus de Villiers (ed.)*, Evaluating Federal Systems, 1994, pp. 268-298.

grants of legislative power to the relevant level of government, has given some form to the idea of subsidiarity, and thus provided a way to give life to the constitutionally-mandated idea of cooperative governance, enabling the Constitutional Court to balance the claims of legislative authority being asserted by both the national and regional levels of government in South Africa.

ABSTRACTS

Co-operative Government in South Africa's Post-apartheid Constitutions: Embracing the German Model?

By *Heinz Klug*

This article explores the introduction of the notion of co-operative government in post-apartheid South Africa in order to reflect upon the nature of constitutional borrowing and the impact of legal transplants that have been a common feature of post-cold war constitution-making processes around the world. Introduced to regulate the relationship between national, regional and local levels of government in post-apartheid South Africa, the idea of co-operative government and its constitutional form, including the constitutional principles for the distribution of legislative power between different levels of government, were borrowed primarily from the German Basic Law. While the form matches the Basic Law's pre-1994 Article 72(2) criteria, the interpretation of its meaning by the South African Constitutional Court has produced significantly different results, including a greater protection of regional powers. This difference in outcome is explained by adopting a contextual understanding of the role of legal transplants in constitution-making processes and under historical and political conditions prevailing in the receiving jurisdiction. Despite the seeming anomaly of similar texts but distinct outcomes, the article provides an example of how a comparative constitutional understanding must be based on a contextual analysis of the process of reception and on the limits implicit in the transfer of any particular model to a new context. Conversely, it offers a way for us to reflect on alternative understandings of the model and to explore why these options were foreclosed in the donating jurisdiction.

The New Ethiopian Constitution and its effects on the legal order

By *Heinrich Scholler*

This article is the second part of "The reception of the occidental law in Ethiopia" ["La réception du droit occidental en Ethiopie"] published in VRÜ 32 (1999), pp. 296. The author describes the history of the New Ethiopian Constitution of 1994 and points out its basic structure focussing on General Principles, Human Rights, Federal Structure and Jurisdiction. A closer look is taken to the changes in comparison with the old "Transitional