

THE “FEDERALISM” DEBATE IN THE SOUTH AFRICAN CONSTITUTION-MAKING PROCESS

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SUMMARY: I. Introduction. II. Concurrent legislative and executive powers. III. The constitutional principles, concurrency and the final Constitution. IV. Co-operative government. V. The NCOP. VI. The Constitutional Court and provincial powers. VII. The operation of the final Constitution. VIII. The Constitutional Court and provincial powers. IX. The operation of final Constitution. X. Evaluating the co-operative government model: the NCOP. XI. The framework of legislative competencies tested.

I. INTRODUCTION

If the South African constitutional schema were to be analysed against a formal federal checklist, it could, with justification, be classified as federal. (See also Watts, chapter 2). It has all the hallmarks of a federal system: nine sub-national political entities called provinces, with each sub-national entity possessing constitutionally protected boundaries. In each province the Constitution requires a democratically elected legislature and an executive accountable to it and through the democratic process the inhabitants of that province, the powers of each legislature and its provincial administration are original and constitutionally protected. And yet a closer examination would also reveal that the treatment of provincial or regional powers in the Final Constitution promotes or sanctions an integrated system of government in which both national and sub-national governments are deeply implicated in each others functioning and more so than one might expect in a federal system.

Diversity and difference could not be adequately met within the traditional unitarian response. Those parties that opposed federalism were seen

to be promoting intrusive government; and to be opposed to any checks on the exercise of national power, and were considered insensitive to regional and cultural difference. In this debate the use of the word “federalism” became more of a hindrance than a help, as Govender has observed (1996: 77-97). It was against this background that the parties agreed to drop the “F” word and to embark on an inquiry into an appropriate system of constitutional government whose objective would be to promote nothing other than good and effective government. The statement that a feature (a constitutional provision) was consistent with “sound federal principles” was no answer to the charge that it was a hindrance to good governance. The feature had to possess the more substantive virtue of promoting accountable and effective government. The employment of synonyms for the federal concept, such as provincialism and regionalism, allowed for real progress in the debate. It would also promote and allow for an approach to federal questions that departed from traditional federal doctrine. The first breakthrough in the federal debate began to emerge with a conceptual approach to national and provincial powers which can best be seen in the distinctively South African formulation of “concurrent” legislative and executive powers. This understanding of concurrent powers finds expression in both the Interim and Final Constitutions.

II. CONCURRENT LEGISLATIVE AND EXECUTIVE POWERS

The fact that the federalism issue—the question of the extent and nature of provincial autonomy—became the most heated, intense and enduring of the constitutional disputes suggests that the question of provincial autonomy became a vehicle for expressing the expectations, insecurities and anxieties of the fundamental political changes the Constitution might effect. Indeed the way in which the political parties lined up on the issue is eloquent testimony to this. The parties which supported the maximum devolution of power and the greatest degree of autonomy of provincial governments, were all associated in one way or another with the desire to retain at least some of the formal or informal features or structures of pre-1990 (South Africa National Party (NP), the Freedom Front (FF), the Democratic Party (DP) and the IFP). On the other hand, those that were most concerned with a transformation of the institutions and patterns of privilege and power in South Africa were those that supported a unitary

state—the ANC and the Pan Africanist Congress of Azania (PAC). Apart from the IFP, the parties which supported federal principles were not per se the representatives of geographically confined minorities or parties with a strong tradition of geographically confined support. Indeed, save for the apartheid experience, which was seen by all parties as a failed attempt at social engineering, there was either a limited indigenous tradition of federalism or none at all.

It should be noted that, on the one hand, the term “federalism” —the “F” word— is not to be found in the constitutional text and was seldom referred to in the Constitutional Assembly debates. Yet it was the federal debates, the question of the extent and nature of the powers and autonomy of the provinces, that more than any other issue dominated the constitutional negotiations. It was the issue that was the pre-eminent concern of the binding Constitutional Principles and most preoccupied the Constitutional Court in certifying the text.

The treatment of regional powers in the Final Constitution cannot be properly understood without an understanding of the background to, and the textual exposition of, these powers in the Interim Constitution. It is thus necessary to draw out those salient features which capture the distinctive federal characteristics of South Africa’s Constitution. It was these features which formed the point of departure for the Final Constitution, which illuminate the particular nature of “concurrency” governing the exercise of national and provincial powers, and which form the foundation for the elaboration of a system of “co-operative governance” which comes to be the dominant motif of the treatment of constitutional powers in the final text.

From 1990, as a broad consensus began to emerge on- the most difficult issues of the constitutional process (non-racial majoritarian democracy and the protection of cultural, religious, language and political rights through a Bill of Rights), the differences in approach to provincial autonomy —and functions became sharper—. The initial federalism debates were unhelpful with respectively the African National Congress (ANC), on the one hand, and the federalists, on the other, talking past each other. The advantages and disadvantages, of federalism, eloquently set out in the various documents, were simply repeated. For the ANC federalism became a byword for obstructing majoritarian democracy, for a costly, corrupt and inefficient system of government of which apartheid’s bantustans had been demonstrable proof. At a time when South Africa was attempting

to heal the racial and ethnic divisions created by a violent past and nurtured under apartheid, federalism would serve only to create a centrifugal dynamic at the heart of its political system. It would also become a vehicle for secessionist and even insurrectionary forces. It was in this context that federalism became pejoratively associated with apartheid. Those who advocated it were seen as promoting a system that would frustrate majoritarian democracy and, reduce the capacity of national government to effect the necessary transformation. And yet, on the other hand, the demands by the federalists for the construction of a system of government that would promote accountability and democracy, and allow for the mould of this debate was initially broken by the ANC in two position papers issued prior to and during the initial constitutional settlement deliberations (ANC, 1992). The ANC in these papers proposed a system of regional government comprised of ten regions. More importantly, the paper proposed that while a strong national government was the policy of the ANC, this did not preclude the existence of strong regional governments. In these opening position papers the ANC left aside the detailed allocation of provincial powers. It did suggest that provincial powers should be pre-eminently administrative rather than legislative (ANC, 1992). With this initial concession towards regional government came an opportunity for engagement on the question of the appropriate powers of provincial governments. Once it was clear that this was a matter that could not be resolved by mere reference to some abstract federalism as if it constituted some sort of explanatory resolution of the question, protagonists in the debate recognised that the question of which powers should be appropriately allocated to which level of government could only be resolved by reference to the question of whether the allocation promoted good government. The question remained open, however, as to what the identifying virtues of “good government” were.

In early 1993 the Consultative Business Movement (CBM) convened a group of “experts”-constitutional thinkers loosely associated with all the major players. Having agreed to discuss the critical question of regionalism without reference to the “F” word, the group began by defining the virtues of good government. These were eventually identified as the apparently self-evident virtues of accountability, democracy, effectiveness and efficiency, and the capacity to cope with regional and cultural diversity (CBM, 1993). What this group was to eventually propose was that 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” (CBM, 1993). The group was to suggest 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.

For example, in the case of education —international, national, provincial, local and perhaps even parent bodies might have a legitimate claim to decision— making power in some or other aspect of the broad area (*i. e.* from recognition of qualifications of teachers down to management of the funds of a specific primary school). What this meant was that the question of allocating powers to provinces should not be commenced along the lines of many federal models, mostly created in the 19th century, that were on offer to South Africa’s constitution makers. Such models mostly rely on mutually exclusive lists of exclusively national or exclusively provincial powers, and, perhaps, a small list of areas of joint responsibility.

In this regard article 72(2) of the German Constitution provided a clue. This article allowed the federal government to legislate in matters where there is concurrent legislative jurisdiction with the *Länder* but only when, for example, the matter cannot be effectively regulated by an individual *Land*, or where a regulation by a *Land* might prejudice the interests of other *Länder* or the country as a whole, or in the interest of the maintenance of legal and economic unity or uniform living conditions. The terms of this article can easily be seen in section 146 of the Final Constitution, section 26 of the Interim Constitution and indeed in the Constitutional Principles themselves.

Eventually the group of experts postulated that the division of powers should be in accordance with the logic, the formulae, which establish a legitimate national interest, or, as the case may be, provincial interests. This understanding allows two concrete methods for resolving the constitutional debate on who gets what powers. The first is, at the constitution-making stage, to apply the logic, the formulae, 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 to one or other level. The problem here is that the list may not be exhaustive, the nature of government involvement or the social area may change, and the negotiators may take decades to agree on the allocation. In

any event, this approach would not recognise the simultaneous interests of more than one level of government in a single governmental function.

The second approach would be to “constitutionalise” the logic, the formulae—which express the legitimate interests of different levels of government—rather than the distinct function for which it is responsible. This would mean allowing the decision-makers—and the courts—to determine which level of government is dominant in any aspect of a particular function, or even to ignore the question of dominance until a specific conflict emerged.

At the Multi-Party Negotiating Forum, the non-elected body responsible for drafting the Interim Constitution and the expert committee responsible for proposing the division of powers for adoption by the forum appeared to have adopted the lead of the CBM experts’ report and proposed a single list of concurrent powers (CBM, 1993). This expression of concurrency was to recognise that both levels of government, national and provincial, would have an interest in a lengthy list of functional areas of social life. It was only in the event of a conflict of legislative or executive authority that a mechanism would be needed to allocate pre-eminence, and subordination, to one or other level of government. It was for this purpose that section 126 established criteria for pre-eminence by allocating such pre-eminence to the national government only when it could establish certain national interests. These overriding national interests were set out in section 126(a)-(e) of the Interim Constitution.

This is a departure from conventional approaches to federalism, which generally prefer a clearly defined separation of roles, and a departure from the usual approach to ‘concurrency’, which in most jurisdictions allows one level to be... in the Canadian terminology, ‘paramount’ or to claim the entire field (field pre-emption) once it chooses to intervene (Hogg, 1992: 423; Tribe, 1988: 497). In the South African case 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. In practice, however, it would mean that a listed area would, unless the specific conditions for national pre-eminence set out in section 126 were present, be allocated to the provincial level even though it is nationally possible for the national government to intervene outside these circumstances. There is little precedence for such a comprehensive system of concurrency and it was not clear that the Final Constitution would in fact adopt this

model. As it happened the Final Constitution broadly replicates this schema of concurrency, tampering only with the text as allowed or required by the binding Constitutional Principles and the Constitutional Court.

This system of concurrency is the pre-eminent prism through which the South African system of federalism must be viewed even if, in the Final Constitution, it was to be overlaid by an emphasis on co-operative governance. In this system, there are no, or very few, exclusive powers allocated to the provincial level (see appendix 4). Accordingly, limited exclusive powers were eventually allocated to the provincial level in schedule 5 of the Final Constitution. Most of these powers were powers in which there could not be an argument that the national government would ever have a dominant interest. In a sense this was a refined application of the pre-eminent system of concurrent legislative competence introduced by the Interim Constitution.

The powers in respect of all unlisted functional areas fall, like all “residual” powers, into the national level only. It should be borne in mind that the South African constitutional negotiations did not comprise independent states seeking to create a common government, but national parties in a national state seeking to define provincial powers. It is for that reason that the Constitution makes no provision for any residual powers to automatically flow to the negotiated, and hence artificially constructed, provincial entities. Their boundaries had been drawn with, for the most part, closer reference to administrative efficiency than to historical reasons, and in any event they had not possessed, like the constituent states of the United States of America, plenary powers originally?

III. THE CONSTITUTIONAL PRINCIPLES, CONCURRENCY AND THE FINAL CONSTITUTION

In order to understand the final text, and the precise meaning to be given to its provisions, it is necessary to grasp the significance and impact of the Constitutional Principles. The Constitutional Principles in themselves marked a decisive breakthrough in a constitutional impasse, which had arisen in 1992. That impasse had arisen out of the difference between the major parties on the way in which a new South African Constitution should be negotiated and adopted. The ANC argued for a democratically elected body to draft the new Constitution. Those who feared that such an approach

would lead to a constitutional text that did not protect political or racial minorities favoured a constitution-making process in which the constellation of all existing parties including the various bantustan parties and other parties created for ethnic or racial legislatures would, on the basis of unanimity, draft a Constitution. In such a process each party, regardless of its support, would have an equal vote, and possibly a veto. This Constitution would protect diversity and be inclusive of all interests and viewpoints.

The majoritarians on the other hand held that this method would lead to a Constitution that ignores the wishes of the majority and gives disproportionate influence to minority parties or parties without any proven support. The key employed to unlock this impasse was the device of the Constitutional Principles.

The Constitutional Principles were to be a set of principles agreed to in the undemocratic Multi-Party Negotiating Forum (on the basis of one party one vote) but which would bind the democratically elected Constitutional Assembly, brought into being by democratic elections and operating under an Interim Constitution, in the formulation of the final text. In essence the Constitutional Principles provided a guarantee of a minimum content to the Final Constitution and provided the security for the minority parties to accept a process which envisaged a Final Constitution determined by a majoritarian process, a democratically elected assembly.

But in order for the Constitutional Principles to have any “bite” it was also necessary to provide that the final text would only come into being after its certification by a Constitutional Court to be created by the Interim Constitution. The idea was that the Constitutional Principles would provide, at most, a skeletal structure and would avoid putting any flesh on the Constitution. As it happens, except in the area of provincial powers, the Constitutional Principles did merely sketch out broad principles. The Constitutional Principles were more concerned with the allocation of powers to national and federal governments than any other issue. The thirty-four principles contain all in all fifty-one principles and sub-principles. Twenty-three of those are concerned with the division of powers between the levels of governments’ by contrast only one principle deals with the judiciary, and only one—in the most general terms—prescribes the content of a bill of fundamental rights. Not one deals with the structure of the national executive.

The Constitutional Principles would cease to exist upon the adoption of the final text. This would accordingly allow for subsequent amendments to the Constitution which are contrary to the principles, save that any such amendment to the Constitution would have to meet only the constitutional hurdles placed in the way of any constitutional amendment (*i. e.* the special majorities). However, as the Constitutional Court was eventually to observe, in certifying that the text was consistent with the Constitutional Principles, the Court would be required to give an interpretation of the text (and of the principles). Given that that interpretation would be a condition for the constitution’s certification and its coming into legal existence, the Constitutional Principles would cast a shadow over the Final Constitution for many years to come. It would be difficult for subsequent constitutional courts to give different interpretations of the final text to those contained in the certification interpretations, (particularly if such interpretations would not have been compatible with the principles) although this was not expressly precluded.

The Constitutional Principles were necessarily the first items to be agreed by the Multi-Party Negotiating Forum because in effect they were the condition for the process to continue. The problem was that the committee of experts charged with drafting the chapter of the Constitution dealing with provincial powers had to draft the Constitutional Principles in advance of a proper consideration of a detailed text on provincial powers which they were eventually to put before the forum. Accordingly, the principles do not properly mesh with the approach, particularly as to “concurrency”, which was eventually set out in the Interim and Final Constitutions. There is certainly an acceptance of the CBM proposals and formulations, particularly in, for example, the most important principle 21, dealing with the allocation of national and provincial powers. Yet the principles seem to assume that the constitution-makers would adopt the second method of giving effect to it that is tabulating lists of powers allocated to either the national or provincial governments in accordance with the formulae set out in the principles. Accordingly the principles set out the basis upon which the powers should be allocated in the Final Constitution rather than dealing with the more difficult question of “pre-eminence” in respect of an allocation of concurrent powers the approach they actually proposed in the text of the Interim Constitution.

Whereas most of the principles are concerned with defining the necessary powers of national government, or the minimum competencies of the provincial government, only principle 18(2) is of a completely different kind. It does not seek to specify which and what powers are to be allocated to what level and on what basis the powers should be allocated. It is a principle that simply requires that the Final Constitution should not substantially diminish the powers of provinces as provided for in the Interim Constitution. This particular principle was adopted at the last moment and at the request of and as an inducement for the participation of the federal IFP. It was principle 18(2) that was to provide the most enduring problems for the constitutional drafters and the Constitutional Court, involving a careful comparative weighing of powers between the two texts.

It was envisaged that the Constitutional Assembly, which under the Interim Constitution was to operate simultaneously as the national legislative authority, would begin the second stage of constitutional deliberations with a clean slate in front of it and without reference necessarily to the text of the Interim constitution. In fact, the Constitutional Assembly took as its draft text the Interim Constitution notwithstanding protestations to the contrary, and the Final Constitution in most respects constitutes a refinement of the interim text. This is as true for the question of provincial competencies as it is for the other provisions and chapters. Instead of re-inventing the wheel, the committee charged with drafting those chapters of the final text dealing with provincial powers began by examining the shortcomings and problems of the Interim Constitution and more specifically the way it dealt with provincial powers.

Assuming the basic structure would remain the same, there were four remedial issues that came to the fore in the constitutional deliberations. Firstly, it was felt that the mechanism for resolving the pre-eminence between provincial and national legislation in areas of concurrent competency appeared unduly complex and abstract to the administrators or decision-makers who were required to govern or make laws in those areas.

Secondly, the determination of the boundaries of competency and the pre-eminence of any levels of government within the boundaries placed undue reliance on legal intervention and on the advice of the courts. Thirdly, there was a dispute as to what precise areas should be included in the list of provincial powers. Fourthly, the assembly was concerned and required to set out the conditions for and ways by which national govern-

ment could intervene and even assume responsibility for provincial government in the event of a system failure.

With regard to the first two issues, the courts were required under the Interim Constitution (as they are, under the Final Constitution) to decide, in any particular conflict between a national and provincial law, whether for example matter could not be effectively regulated by provincial legislation' or whether a matter "to be performed effectively requires to be regulated or co-ordinated by uniform norms or standards" or whether "an act of Parliament is necessary to set minimum standards across the nation for the rendering of public services" (Klaaren, 19.65: 5, 11-13). These and similar questions often require a political judgment and yet the guarantee that the Interim Constitution provided was that the courts would act as the "border police" between the different levels of government. This approach appears to ignore experience elsewhere. The Canadian Supreme Court and the German Constitutional Court have both shown themselves to be extremely reluctant to determine such political questions and have generally referred such matters back to the political bodies or have avoided a finding that a conflict existed (Hogg, 1992: 112, 122-123, 390-391; Blair, 1981: 28-31, 78-85). With regard to the last two specific issues, the Constitutional Assembly had to simply adapt the Interim Constitution to comply with specific Constitutional Principles (such as, providing clear and sufficient grounds for national interventions; and especially whether the system of concurrency met the requirement that both the national and provincial levels of government should possess "exclusive and concurrent powers").

The powers of national government to intervene in appropriate circumstances is met in the final text through section 44(2)11 and the allocation of exclusive powers was made expressly through an additional schedule to the Final Constitution which set out certain "exclusive" provincial competencies. These were functional areas in which it could only with great difficulty be contended that national government had a legitimate interest.

With regard to the much more difficult questions of legalism and complexity, the Constitutional Assembly was to attempt to resolve this question of conflict by placing greater emphasis on "co-operative government" and by linking the mechanism for determining the pre-eminence of a competing legislative instrument to the collective political power of provinces as represented by the National Council of Provinces (NCOP).

IV. CO-OPERATIVE GOVERNMENT

A closer examination of the Interim Constitution, and indeed federalism generally, reveals that there are two ways in which the provinces exercise power or influence over matters of concern to it and its inhabitants. The first is to legislate and administer matters in the schedule of concurrent or exclusive provincial areas of competence. The second is to control, influence or even veto the actions of the national government when it wishes to exercise powers in respect of the same matters. This particular power is to be found in the Interim Constitution under section 61, which provided that national bills affecting the exercise or performance of the powers and functions of the provinces “shall be deemed not to be passed by Parliament unless passed separately by both the Senate and the National Assembly”.

These two mechanisms reflect a broader theoretical distinction between the two forms of federalism. Provinces or states may regulate the exercise of federal power by either (a) maximising their autonomy and insulating themselves from the exercise of national powers, and even positioning themselves to compete with the national level of government in regard to resources and power, or (b) by requiring the exercise of federal power to have the sanction or support of the federal units. But if each one of nine or more states or provinces was required to separately approve any national -legislative or executive action, national government would be paralysed in those areas. Thus this form of influence or control usually takes the form of provincial approval as a whole *i. e.* the support of a majority of states or, provinces is required. This latter power may be referred to as the collective exercise of the power of the provinces and puts a premium on a general provincial perspective as determined by the provinces themselves.

It is true to say that the German system of federalism provided an insight into the potential benefits of “co-operative government” as opposed to a model of “competitive federalism” best illustrated by the Canadian model, which at the time was undergoing extraordinary stress and potential disintegration.

At the Constitutional Assembly the ANC had expressed anxiety that conventional federal models were likely to promote mutually destructive competition between provinces to regulate resources (*e. g.* water) to the disadvantage of each other and to national government, to entrench the isolation of decision-makers in the provinces from national considerations

and debates (a narrow provincialism), and, the other side of the same coin, to remove real provincial participation and perspectives on national questions. Furthermore, given South Africa's divisive ethnic and racial tensions, a further geographical fragmentation would exacerbate the problems of nation-building. There was the additional threat of secession or even insurrection in a fully developed competitive federalism, particularly in KwaZulu-Natal by the IFP.²¹¹ From these anxieties a view emerged that the final text should attempt to promote co-operative government while allowing the features of competitive federalism. This would offset the centrifugal dynamics of regionalism. The mechanism proposed to achieve this was to establish the NCOP in the place of the Senate.

V. THE NCOP

It is not possible to properly appreciate the innovation of the NCOP as a substitute for the Senate without a brief critique of its predecessor the Senate as an institution'. The Senate, as set out in the Interim Constitution, had objectively defined itself as a "second" or "upper" house. Its members, although originating in equal numbers from the provinces, were, like the members of the US Senate, appointed for a fixed term and were not required to report to or obtain instructions from their provinces. Their members resided at Parliament and took instructions from the same party caucuses attended by the members of the National Assembly, in respect of which they were supposed to be a house of review. They represented no provincial interest because they were not required to account to or obey any provincial mandate. As a house constituted in proportion to party support in the provinces, and dominated by party political mandates, the Senate came merely to reflect, as it could not otherwise do, a mirror image of the National Assembly. The distinctive innovation of the NCOP was to recast the Senate as a council of nine provincial delegations comprised of "permanent delegates" (subject to recall by the provincial legislature) as well as sitting members of the provincial legislatures attending the council from time to time, known as special delegates. The German *Bundesrat* had revealed that this model could allow for effective regional participation and influence in national decision-making. Its collective veto over legislation affecting the provinces, and the fact that all provinces would now be required to actively consider and give their delegates a mandate on all na-

tional legislation on matters listed in the schedules, would mean that the provinces would no longer be removed from national perspectives on provincial issues. To maximise their influence, they would have to collaborate with other provinces and, in doing so, consider also the circumstances of other provinces. As the provinces were now an integral part of national decision-making, the simple polarity between national and provincial laws was no longer applicable.

The second initiative adopted by the Constitutional Assembly in promoting co-operative governance was to place a premium on the view of the NCOP on the question of pre-eminence of national or provincial legislation in the areas of concurrent competency. If the NCOP did not support a national bill which was in conflict with any particular provincial bill, then that lack of support would be strongly presumptive of the bill not serving one of the tabulated national interests and vice versa. Although this legal presumption served to give the NCOP's views added weight, it also watered down the power of the courts which, unless there was clear evidence to the contrary, would be bound to accept the NCOP's attitude. Thus the linkage was made between the determination of conflict over pre-eminence of the level of government responsible for any particular concurrent competency and the NCOP. It was this linkage, however, which was to fall foul of the Constitutional Court when it came time to certify the first draft text.

In addition, a chapter was added to the Constitution entitled "Co-operative governance" and it sought to enshrine the broad principles of "federal comity" —the duty of provinces and national government to work together, co-operatively, in good faith and without encroaching upon each other's proper and legitimate sphere of activity. Whereas this particular chapter of the Constitution may read like motherhood and apple pie, it is capable of judicial enforcement, and has been so enforced in the German context where the court has acted to enforce the obligation even though it is not expressly included in the German Constitution—.

VI. THE CONSTITUTIONAL COURT AND PROVINCIAL POWERS

The Constitutional Assembly, after some protracted and intense last-minute negotiations, finally agreed to a first draft text in May 1996. With regard to the provisions dealing with provinces, the text had been

crafted to meet the Constitutional Principles following the broad outline of the Interim Constitution, but there had been as yet no judicial interpretation of the meaning of the principles themselves. On the one hand, some of the powers included in the interim, text or in the schedule of concurrent powers had been removed. These included competency over some tertiary education institutions, the rights to establish provincial public service commissions and control over the police, which, while not in the original schedule, had been dealt with separately in a way which allowed some provincial say over certain policing matters. "On the other hand, new powers had been included on the list" or elsewhere. More importantly, some powers had been rendered exclusive powers to be exercised by a provincial government. These were, in all fairness, mostly confined to very specific service or local government functions. The criteria for determining pre-eminence had been marginally redrafted to favour national governments. In particular, section 146(2)(b) states that "national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation" when, inter alia, "the national legislation deals with the most important amendment had been that set out above: the link between the Determination of pre-eminence in cases of conflicting provincial and national legislation" and the views of the NCOP.

When measuring the new structure against the constitution principles that specified the criteria for the allocation of powers to provincial government, the Constitutional Court was to find that the first text had met twenty-one of the twenty-three requirements. The "first final" text had clearly erred in granting vast and inappropriate fiscal powers to municipalities in contravention of Principle 2536 and, according to the Court, had failed to properly specify a framework for local government powers and StrUCtUreS.³⁷ The principal debate, however, concerned the test set by Principle 18(2). The requirement set by this principle was qualitatively different from the other requirements. It did not specify any particular structure or power but simply required that, when viewed as a whole, the powers of provincial government must not have been substantially diminished from those they possessed under the Interim Constitution. What this required was a unique exercise in constitutional adjudication. The Court would have to weigh all the provinces' powers as set out in the Interim Constitution, and compare this aggregate of powers against all the powers in the final text. This was like comparing two bowls of assorted fruit. Val-

ues had to be given to peaches, pears and berries, as they could not simply be compared to each other. The Constitutional Assembly was to argue that the addition of exclusive powers and certain other specified powers to the schedule of concurrent powers cancelled out the specific diminutions in certain areas *e. g.* police powers. They were to argue further that the reconstitution of the Senate into a Council of Provinces —*i. e.* a body of *direct representation* of provincial legislatures with the power to veto or amend legislation affecting provinces— meant that provincial powers had in fact increased under the final text.

Those who sought to argue that the final text did not comply with the Constitutional Principles argued that the right of the national government to intervene in the circumstances set out in section 44(2) or to intervene under the circumstances set out in section 100 meant that the final text did not grant true *di* exclusive powers to the provinces as they were required to do under Principle 19. The Court rejected this. The powers of intervention were expressly required and mandated by Principle 21(2). This stated that where it is necessary for certain listed national objectives “the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution”.

They argued further that the addition of collective powers was not an augmentation of provincial powers. The Senate had had this power under section 61 of the Interim Constitution. The fact that this power was now directly exercised by the provinces (by provincial representatives as opposed to senators) meant little as the ANC controlled most of the provinces. Therefore, provinces whose governments were controlled by other minority political parties were not properly protected in the NCOP. The opposition held previous could be defeated. Finally, they argued that the diminution of powers in the schedule was not counter-balanced by the new inclusions.

The Court, in its judgment on these issues, was to hold that as regard the accretions and diminutions there had been an insubstantial diminution of specific competencies but a diminution, nonetheless. As regards the counter-balancing accretion of collective provincial powers, they accepted that this was nationally possible, but that in this instance the transformation of the Senate into the NCOP could not be demonstratively shown to be an accretion of powers because, apparently, the sway held by national political parties over their provincial governments meant that it would be “‘speculative’ to view this as an accretion of powers until it could be seen to work as such”.

This must be understood to mean that an ANC provincial government would not express a regional or provincial interest only a party political interest. In this regard the court may not have appreciated the experience in, say, Germany where *Länder* votes in the *Bundesrat* reflect provincial interests before party ones. Such a situation was not possible in the old Senate but is required by section 65(2) of the Final Constitution. This requires an act of Parliament (in terms of an elaborate procedure established by section 76 concerning ordinary bills affecting provinces) to “provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf”. To find that a prediction on the working of this section was “speculative” was strange. On the same reasoning a prediction on the working of any institutions including the courts would also be speculative. Furthermore, the Court appeared to concede elsewhere in its judgment that the NCOP would be a significant voice of direct provincial representation, unlike the Senate.

The Court held that it was the diminution of the power of the *courts* to resolve the conflicts between national or provincial powers, which tipped the scales in favour of a finding of substantial diminution of *provincial* powers in the final text. The linkage diminished the jurisdiction of the courts by placing some power of determining the pre-eminence of national or provincial legislation in the hands of the NCOP. This was the single provision that, if removed, would allow the Court to certify the first final text as being in compliance with principle 18(2).

The Court placed emphasis on the need to protect provinces under the control of political parties that were not in the majority in the National Assembly. This seems to confuse the protection of provincial interests with opposition party interests. The Court seems to have also accepted the proposition that the courts were a better guardian of provincial powers than the NCOP. Against this there is comparative jurisprudence regarding the inappropriateness of judicial decision-making in this area and hence the positive contribution that the NCOP could make in performing this adjudicatory or tie-breaking role.

The second draft was relatively rapidly prepared taking its cue from the clear directives in the Constitutional Court judgment. It was duly adopted on 11 October 1996. On this particular issue the second final draft removed the offending presumption and simply required a court, in determining whether provincial or national legislation was pre-eminent on the limited

grounds suggested by section 146(2)(c), *to have regard* to the decision of the NCOP in the passage of the legislation. The second final text was duly certified on 4 December 1996 and brought into operation in March 1997.

VII. THE OPERATION OF THE FINAL CONSTITUTION

Much of the final text was drafted after the Interim Constitution had been in operation for little more than a year. If the final text had been drafted in 2003, there may have been a less optimistic view of federalism and the regional structures established in the Final Constitution. There is currently considerable adverse comment on the performance of provincial legislatures, which have shown little legislative activity. The provincial legislatures have in fact enacted only a handful of provincial statutes each year.⁴³ Questions have now begun to arise regarding both the expense of provincial legislative and executive structures and, much more directly, the capacity of a country to provide adequate regional administrations in all nine provinces (DPSA, 1997). As recently as 2001, national government had (again) been requested to consider direct intervention in terms of section 100 in the administration of one of the provinces, ironically a province administered by the ruling party. The matter was eventually dealt with, without recourse to the drastic use of the constitutional powers of national intervention. This threatened intervention in an ANC province indicated that the national government may well have to intervene in the future to assume responsibility for what are otherwise considered provincial functions.

One of the potentially most difficult features of the regional or federal frame-work to apply is that relating to the “fiscal constitution”. It is these provisions which underwrite the system of regional government because they provide for the fair distribution of nationally raised income both between nation and province (to prevent starving the provinces as a whole) and between province and province (to prevent political favouritism). This frame-work is founded on each province’s right to an unconditional “equitable share” of national revenue.

Such a determination, in respect of each province, is a lengthy and complex one. The knock-on complications for timeous and transparent national and provincial budgeting procedures and legislative oversight are significant but not the focus of this paper. The system has co-operative governance was to place a premium on the view of the NCOP on the ques-

tion of pre-eminence of national or provincial legislation in the areas of concurrent competency. If the NCOP did not support a national bill which was in conflict with any particular provincial bill, then that lack of support would be strongly presumptive of the bill not serving one of the tabulated national interests and vice versa. Although this legal presumption served to give the NCOP’s views added weight, it also watered down the power of the courts which, unless there was clear evidence to the contrary, would be bound to accept the NCOP’s attitude. Thus the linkage was made between the determination of conflict over pre-eminence of the level of government responsible for any particular concurrent competency and the NCOP. It was this linkage, however, which was to fall foul of the Constitutional Court when it came time to certify the first draft text.

In addition, a chapter was added to the Constitution entitled “Co-operative governance” and it sought to enshrine the broad principles of “federal comity” —the duty of provinces and national government to work together, co-operatively, in good faith and without encroaching upon each other’s proper and legitimate sphere of activity. “Whereas this particular chapter of the Constitution may read like motherhood and apple pie, it is capable of judicial enforcement, and has been so enforced in the German context where the court has acted to enforce the obligation even though it is not expressly included in the German Constitution—”.

VIII. THE CONSTITUTIONAL COURT AND PROVINCIAL POWERS

The Constitutional Assembly, after some protracted and intense last-minute negotiations, finally agreed to a first draft text in May 1996. With regard to the provisions dealing with provinces, the text had been crafted to meet the Constitutional Principles following the broad outline of the Interim Constitution, but there had been as yet no judicial interpretation of the meaning of the principles themselves. On the one hand, some of the powers included in the interim, text or in the schedule of concurrent powers had been removed. These included competency over some tertiary education institutions, the rights to establish provincial public service commissions and control over the police, which, while not in the original schedule, had been dealt with separately in a way which allowed some provincial say over certain policing matters. “On the other hand, new powers had been included on the list” or elsewhere. More importantly, some pow-

ers had been rendered exclusive powers to be exercised by a provincial government. These were, in all fairness, mostly confined to very specific service or local government functions. The criteria for determining pre-eminence had been marginally redrafted to favour national governments. In particular, section 146(2)(b) states that “national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation” when, *inter alia*, the national legislation deals with comparative jurisprudence regarding the inappropriateness of judicial decision-making in this area and hence the positive contribution that the NCOP could make in performing this adjudicatory or tie-breaking role.

The second draft was relatively rapidly prepared taking its cue from the clear directives in the Constitutional Court judgment. It was duly adopted on 11 October 1996. On this particular issue the second final draft removed the offending presumption and simply required a court, in determining whether provincial or national legislation was pre-eminent on the limited grounds suggested by section 146(2)(c), to have regard to the decision of the NCOP in the passage of the legislation. The second final text was duly certified on 4 December 1996 and brought into operation in March 1997.

IX. THE OPERATION OF THE FINAL CONSTITUTION

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Such a determination, in respect of each province, is a lengthy and complex one. The knock-on complications for timeous and transparent national and provincial budgeting procedures and legislative oversight are significant but not the focus of this paper. The system has been implemented, mostly with the willing assistance of and compromise by national and all provincial governments. However, the complex constitutional requirements on budgeting procedures, treasury controls and provincial entitlements have come under parliamentary scrutiny with a view to creating a system that is simpler and better geared to fiscal control.

There are some observers of the South African constitution-making process who argue that with the benefit of hindsight in any such process the number of constitutional lawyers should be matched by an equal number of cost accountants. The structures and obligations imposed on South Africa by its Constitution are not cheap.

X. EVALUATING THE CO-OPERATIVE GOVERNMENT MODEL: THE NCOP

It is not within the scope of this chapter to fully evaluate the system of executive co-operative governance. Observations are therefore confined to the framework of intergovernmental relations in the national legislative sphere. This concerns the functioning of the NCOP as a house of provinces, and the further legal clarification by the Constitutional Court concerning the boundaries between; national and provincial competencies.

Notwithstanding the prolix rules and procedures entailed in the passage of legislation, the NCOP has so far managed to discharge its activities

without major tensions. However, there are considerable jurisprudential problems that may face the NCOP in the future. Pre-eminent amongst these is the difficulty in “tagging” legislation so, that it can be passed in the procedurally distinct requisite way by the NCOP (the NCOP i’s7... required to pass legislation in two different ways, depending on whether the legislation concerns a provincial matter or a national matter). Legislation is not often “pure” in its subject matter and may deal simultaneously with matters that can be characterised as exclusively national and matters that fall under the concurrent jurisdiction of the provinces.

It is still unclear whether the NCOP will discharge the important roles its originators claim it is capable of. Although the jury is still out, there are those who claim it is too assertive and those that claim it is not assertive enough in protecting its role as an independent chamber of provinces. It has insisted on its right to consider the budgets of national departments and to have national ministers appear before it.

There has been a useful and comprehensive review of the functioning of the NCOP within the context’ of the framework of the division of powers between national and provincial governments (Murray, 1999; Murray and Simeon, 1999).

In her assessment, Christina Murray had both positive and negative comments to make. She concluded that on the negative side, the ambivalence and even suspicion of the ruling party about the decentralisation of the central government’s powers, and the ruling party’s own decision-making structures, have meant that the “elegantly” crafted NCOP has not delivered on its promise or potential.

In a political culture shaped by disciplined and hierarchical national party machinery, there is little space for distinctly provincial viewpoints. Accordingly (as noted in chapter 1) the NCOP, even though it has functioned effectively in channelling provincial perspectives into the national legislative process, has not done much more than tinker, with and refine the bills placed before it.

It is not, argues Murray, only the centralised party structures and old antipathies to federalism that account for this. There, is also real disappointment in the failure of provincial administrations to deliver public services. Although there is no evidence to conclude that national government could- or would have performed the provincial functions more effectively, the shortfall in provincial performance has nevertheless prompted a view

—articulated at the highest level— that the provincial architecture should be reconceptualised. This criticism, has served to undermine the assertiveness of the NCOP. There is thus some force in Murray’s criticism that by 1999, the NCOP was still not adding, the value to the legislative-process. It was intended to add.

In a more positive assessment, by 2001 one could conclude that the NCOP had survived its birthpangs, established its institutional machinery and had developed a sense of its potential powers. The NCOP had designed and applied the difficult procedures and communication requirements entailed in managing the nine-province mandating process. Its problems were due to work over-load (partly a product of its structure) and deficiencies at the provincial level and its tight legislative cycle. This notwithstanding, it had also played a most significant role, in bringing the provincial legislatures, otherwise parochial and under worked, into the national legislative process and debates. On this score alone the NCOP has made a contribution to the project of co-operative governance of enlisting the provinces in the tasks and responsibilities of managing the nation as a whole.

It could also be suggested that the absence of sharp tensions between central and provincial governments need not only indicate provincial passivity-it may also be an indication of the success of the framework of inter-governmental co-operation. For example, the effective sectoral forums of inter-provincial ministers —the MinMecs— have successfully obtained provincial consensus on most national bills before they were introduced into the parliamentary law-making process. This, in part, accounts for the absence of conflict between the NCOP and the National Assembly on legislation considered by both these houses (see chapter 1).

It may be enough for the present stage of political evolution that the NCOP has demonstrated its capacity to meet the anticipated technical challenges, of its: role. As the political landscape changes —and it surely will over time— and’ if the current provincial framework remains intact, the NCOP may still come into its own. (See also Calland and Nijzink, on the as yet “unfulfilled promise of the NCOP”.)

XI. THE FRAMEWORK OF LEGISLATIVE COMPETENCIES TESTED

The Constitutional Court, and the various high courts have inevitably had to deal with disputes arising out of alleged encroachments by one or other level of government on the terrain of another. Not all of these have turned on an examination of the proper application of the schema of concurrency set out in the Constitution. Some have concerned the powers of the provinces to draft their own constitutions. In this regard, the Court refused to uphold a provincial constitution which purported to grant itself certain powers and to provide for a provincial bill of rights “but did sanction the Western Cape constitution which provided for additional cabinet members”. The Court has left only a very limited space for provinces to create different executive structures from those set out in the Constitution.

The most important legal developments concerning the meaning and consequences of the framework of provincial and national functions and powers are those which have sought to strike down laws which have allegedly gone beyond or outside the constitutionally prescribed framework. A starting point for any analysis of the general approach of the judiciary to these questions is the two certification judgements both of which contained exhaustive analysis of the powers and functions of provinces, although the analysis was carried out against the standards set by the Constitutional Principles.

One of the first matters to call for close scrutiny of the boundary between national and provincial legislative competence was the challenge to the constitutionality of two KwaZulu-Natal laws that sought to provide for the payment of traditional leaders and the forfeiture of moneys received by them from sources outside the province. In upholding these laws the Court noted that in assessing whether a law was within the competence of a legislature to adopt, it would scrutinise its purpose and its effects not merely its stated objects. A bill may have purposes and effects outside its legislative field of competence.

The most important case on these questions is the liquor bill case. This case provided an opportunity for the Court to canvass the entire framework of concurrency, exclusivity and the overriding powers of national intervention. The liquor bill sought to introduce a national system of regulation and licensing for the manufacture, distribution and retail sale of liquor. In

respect of the retail sale it sought to prescribe to the provinces, in considerable detail, the legislation that the provinces were to enact. ‘Liquor licensing’ is one of the items on the schedule of exclusive provincial competencies in respect of which the national level of government may not legislate at all.

The matter came to the Court by an unusual route. The President returned the bill (as presented to him for signature) to the National Assembly to address concerns that the bill (proposed by his own cabinet) encroached on a provincial exclusive competence. Parliament sent it back to the President unchanged, and he in turn referred it to the Court for a decision on its constitutionality. He stated in his letter to the Court that the legislation is permitted to encroach on exclusive provincial competencies only if it was necessary to maintain economic unity, to maintain essential national standards, to establish minimum standards for the rendering of services, or to prevent unreasonable and prejudicial action by one province as regards the others section 44(2). In the absence of any jurisprudential guidelines on this question, he could not say that it was “necessary”.

The Constitutional Court found that in fact the legislation had three purposes. Two purposes placed the legislation in an area of concurrency (trade and industrial promotion) (if there was doubt on this, these purposes were justified as an intervention in terms of section 44(2)). These purposes related not to liquor licensing as such but to questions of trade and competition in an industry characterised by, a high level of vertical integration. The bill’s concern is to regulate the industry, *inter alia*, to allow new entrants into it. The third purpose, however—to provide for a uniform system of retail licensing—related to a matter that was intra-provincial (unlike manufacturing and distribution, which were national or cross-boundary concerns) and was an exclusively provincial functional area. The Court struck down only those portions of the bill relating to retail licensing and micro-manufacturing (such as home brewing). It was noteworthy that the Court used the purposes of the act to determine its area of effect. It recognised that acts or bills may have more than one purpose and in its decision it would allow purposes that fell within the horizontal division of powers schema and exercise only those that fell outside it. The Court also suggested, correctly, that there may have been no need to assert the necessity of an override intervention if the functional area of the bill was not in fact a schedule 5 one. Furthermore, if the fundamental areas that were the target of the purposes of

the bill were areas of concurrent competence it would make no difference that the bill had been passed in accordance with the section 76 procedure. By implication, the Court is suggesting that if a section 76 procedure had been followed in respect of a bill dealing with an exclusively national competence it would fail to pass constitutional muster.

The Court made passing reference to the “pith and substance” approach of the Canadian courts, but did not suggest it was applicable. There is little doubt, however, that the treatment of the constitutional provisions regarding national and provincial functions and powers in the liquor bill matter cannot be faulted, nor can President Mandela’s instincts in referring the matter to the Court. It was an important and symbolic act demonstrating the coherence and integrity of the system as a whole.

By 2002, the Court had yet to deal with a full frontal conflict between contradictory provisions of a national and provincial law both properly in force in an area of concurrency. The closest the Court came to considering the pre-eminence test contained in section 126 was the Amakhosi case referred to above. From the judgment in that case (which was brought under the analogous Interim Constitutional provisions) it is clear that the Court will be unwilling to find conflicts or contradictions if it is possible to allow such provisions to stand or to ‘read’ them in a way which avoids unconstitutionally. The Court has also made reference to the chapter on co-operative governance and the need to display “federal comity” or *Bundestreue* in one’s actions. The Court has not gone so far as to deny access to the Court for the judicial resolution of a dispute on account of the fact that one or both parties had not, as mandated by section 41(3) and (4), attempted to resolve the dispute by other means or mechanisms before approaching the courts. (For further discussion on the settlement of disputes see Steytler, chapter IO.)

In general, the courts, and the Constitutional Court in particular, have played the balancing adjudicatory role envisaged in the Constitution. The courts’ judgments have shown an appreciation of the needs of good and effective government. They have also shown an appreciation of the need to protect the integrity of the system of provincial government particularly from, national encroachment, as well as the fact that the South African system of intergovernmental relationships, unique in the primacy it places on the mutual implication and dependency of each level on each other.