

Chapter 5

Reflections on Provincial Government in South Africa since 1994

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Constitutional Framework for Provincial Governance

Unlike the pre-1994 provinces that were a mere product of legal statute, the post-1994 provinces in South Africa are provided for in the Constitution (Khosa & Muthien, 1998). They are entities with original powers and functions entrenched by the Constitution. Chapter 3 of the Constitution defines and elaborates on a clear formal framework of relations between the national, provincial and local spheres of governance. For instance, the Constitution states that these spheres “are distinctive, inter-dependent and interrelated” (RSA, 1996, s40(1)).

The use of the term “spheres” in the current Constitution is not a random occurrence. It is due to a deliberate decision deriving from a political history dominated by authoritarian political regimes at the centre and, consequently, emasculated sub-national entities within a unitary Constitution. The choice of the term “sphere” was therefore based on a theoretical construct of “equality” and the ideal of “equity”. The aim of this choice of term was to avoid entrenching the sense of hierarchy usually associated with the more traditional notion of “tiers”. The term “tiers” is traditionally germane to unitary political systems where sub-national entities are politically subordinated to the centre due to the lack of an original constitutional basis for them.

One of the most contentious issues during the constitutional negotiations of 1992 to 1994 in South Africa was to allocate constitutional power and authority equitably between the spheres of government in order to prevent the concentration of power at the centre. Institutionally, this

objective was to be achieved by, amongst others, devolving constitutional power and authority from the centre to the provinces, which were expected to countervail the power of central government. Many proponents of this view argued that devolving power to the provinces would act as a “check and balance” on the growth of the power of central government. To underpin perspective, the Constitution enumerated the concurrent and exclusive legislative and policy-making powers and functional responsibilities of the provinces in Schedules 4 and 5.

The enumeration of specific powers and functional responsibilities of the provinces in the constitutional document was also to serve as a constitutional “check and balance” to enhance the security and the autonomy of provinces vis-à-vis central government. In practice the operation of the post-1994 system of provincial government has challenged the ideals contained in the Constitution. The relationship between the provincial and national spheres of government has become very complex and poses serious difficulties to the central objective of establishing equity between these spheres of government.

The spheres of government are not only vested with original constitutional powers with regard to legislative and executive functions within their spheres of competence. They are also constitutionally guaranteed an equitable share of fiscal resources collected at national level. The equitable distribution of fiscal resources constitutes the single most critical category of disputes between spheres of government around the world. Virtually all decentralised political systems have also attempted to put in place institutional arrangements and objective formulae to resolve this problem. For instance, s214(1)(a) of our Constitution states that “an Act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government”. To give this provision a concrete institutional foundation, an independent Finance and Fiscal Commission was established to make recommendations to the National Assembly and provincial legislatures on the equitable distribution of revenue (RSA, 1996, s220). This was yet another constitutional device to serve as a “check and balance” to underpin the autonomy of provinces vis-à-vis central government.

The current Constitution therefore goes a long way towards providing more constitutional security for the political integrity and autonomy of the provinces, unlike other Constitutions in the history of this country. However, despite all these carefully crafted constitutional “checks and balances”, the Constitution still contains certain critical features that ensure that the national government retains overall constitutional supremacy over the provinces. A number of examples will serve to illustrate this. First, the Constitution appears to imply, if not directly reserve, residual powers (i.e. those powers not defined and specified in the Constitution) (Zimmerman, 1992, pp. 35-36) for the national government. It does this in at least two ways: vesting authority in the National Assembly “to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5”; (RSA, 1996, s44(1)(A)ii) and specifying only those powers over which the provinces can exercise legislative responsibility either exclusively or concurrently with central government. The exclusive functional responsibilities of the provinces are clearly enumerated in Schedule 5, while those of central government are not expressly defined beyond those it can exercise concurrently with the provinces in Schedule 4. The significance of this is that any function not expressly allocated to any sphere of government by the Constitution becomes a central government responsibility by default. In theory and in practice, this gives central government potentially enormous authority over a wide range of matters which could impinge upon the autonomy and functional responsibilities of the provinces.

Second, central government has the constitutional responsibility to make laws in terms of s44(2), amongst others to maintain national security; economic unity; essential national standards; minimum standards for service delivery; and preventing actions by provinces which are deemed prejudicial to the interests of other provinces. Added to this is the “necessary” and “incidental” powers provided for under s44(3). This provision states that the national Parliament may pass “legislation with regard to a matter that is *necessary* for, or *incidental* to, the effective exercise of a power ...”. This

gives central government enormous undefined and unspecified powers of intervention in those areas over which it exercises concurrent responsibilities with the provinces.

Third, central government is provided with overriding powers, defined within sections 146 to 148, over provinces in cases where conflict arises between national and provincial legislation. This is an indication that despite the ideal of equality between the spheres of government, the Constitution clearly establishes a hierarchy of authority, which places national legislative competence above that of the provinces. This is critical in the practical operation of the current system, particularly where it places a great deal of political premium on the notion of autonomy.

Fourth, s100 of the current Constitution empowers the national government to supervise the provinces and “intervene by taking any appropriate steps to ensure fulfilment” when a province “does not fulfil an executive obligation in terms of legislation or the Constitution”. This means that the national government may intervene and take over, under clearly defined conditions, the administration of an entire functional responsibility if a province fails to fulfil its obligations in this regard. On several occasions since 1994 the national government was called upon to use this power of intervention in the Northern Province, KwaZulu-Natal and the Eastern Cape in respect of the administration of social pensions and financial management when these provinces were unable to execute these responsibilities properly.

What these provisions indicate is that, despite the ideals of equality and provincial autonomy, the Constitution has established a hierarchy of authority and hence unequal political status between the provinces and central government. Constitutionally, therefore, central government occupies an extremely powerful position relative to the provinces in respect of legislative and functional responsibilities. This matter has remained a constant problem in the ongoing attempts by the provinces to establish equitable relations between the spheres of government as provided for in Chapter 3 of the Constitution.

Provincial Governance in Practice

The next section will assess the practical operation of the current system of provincial government in the light of the parameters provided for in the Constitution.

National-Provincial Conflicts after 1994

The constitutional hierarchy of authority and power that underlies the predominance of central government within the current system of government in South Africa is critical for understanding the experience of provincial governance in South Africa after 1994.

The unsavoury political machinations of previous regimes resulted in political mistrust of overbearing central governments. This mistrust combined with the desire of many political groupings for security and political survival in a post-apartheid era provided the basis for the creation of a decentralised system of government. For instrumental purposes, a decentralised system of authority in South Africa was also unavoidable. Due to the vastness of its territory, it would be cumbersome to run this country by a centralised government. The interests of socio-economic, ethnic and political groupings in particular regions also served as a rationale for devolving power from the centre to allow some functional responsibility and authority to be exercised at the provincial sphere. It is generally acknowledged that a decentralised system of governance gives a stake to minority political elites that are not able to achieve power at national level by allowing them the opportunity to contest for power at provincial level (Friedman, 1999, pp. 44-46).

However, the political and instrumental considerations that warranted the introduction of a constitutionally entrenched system of decentralised authority and hence autonomous provincial governance in South Africa do not necessarily guarantee the viability and sustainability of the system in practice. This has been underscored by ongoing public debates regarding the apparent inefficiencies and institutional weaknesses of the post-1994 provinces. A rift characterises the system of government in South Africa, deriving from disagreement on the fundamental question of how best to

divide powers and functions between the centre and the provinces. This problem was never resolved by the constitutional settlement and continues to cause conflict between the spheres of government.

Within the first year of the current system of provincial government being put to practice, the relationship between central government and the provinces came to be characterised by divisions and conflicts over demands by the provinces for more political authority over and greater responsibility for many functional areas (Humphries & Rapoo, 1994, pp. 3-15). At the forefront were the two opposition-controlled provinces of the Western Cape and KwaZulu-Natal on the one hand, and the two ANC-controlled provinces of Mpumalanga and Gauteng. It appears that the demands of the provinces were caused mainly by the perceived imperative on the part of the provincial political leadership to demonstrate, if not search for evidence of, their newly acquired constitutional, legal and political status vis-à-vis the central authority.

However, the demands for central government to speedily devolve more responsibilities to the provinces occurred in many instances within the context of weak institutional structures and underdeveloped political and administrative leadership (Rapoo, 1995, p. 6). This was not entirely surprising. After all, political considerations more than economic, developmental and institutional considerations were the driving force in the struggles between the protagonists and opponents of greater decentralisation of power during the constitutional negotiations, as well as between central government and the provinces during the early stages of the system. The perceived imperative to realise their constitutional power and political authority as quickly as possible appeared to preoccupy many provincial leaders while simultaneously facing the enormous challenge of establishing functioning systems of governance to deliver social services to their impoverished constituencies. This early preoccupation with questions of greater constitutional power and political authority led to the dissatisfaction with and the abolition of the former Senate which was replaced with the current National Council of Provinces (NCOP).

While the former Senate was criticised for its inability to represent and articulate the interests of the provinces adequately at central govern-

ment level, the NCOP has also been severely criticised by the provinces, amongst others for failing to enhance their influence significantly in national legislative and policy formulation processes (South African Institute of Race Relations (SAIRR) 1998, p. 468; IDASA, 11 August 1997). It appears that the NCOP has not yet established its authority as the primary national political institution through which the political status and interests of the provinces could be articulated and promoted. Wide-spread reports of national cabinet ministers failing to appear before the NCOP over the past four years have tended to fuel further debates about the role of this institution within national policy making.

The Era of Pragmatism after 1996

Initially the provincial system was characterised mainly by dogmatic debates on the nature of South Africa's federalism as well as an overly quantitative approach to the division of powers and functions between central government and the provinces. Many problems acquired an overly party-political character, with notions such as "autonomy", "self-determination", "asymmetry" and so on dominating the demands of political parties such as the IFP, the NP and DP, which tended to take up the cause of provincial autonomy vis-à-vis the centre.

The period following the launching of the National Council of Provinces in 1997 saw a marked shift in the nature of intergovernmental disputes. The reality of governing the newly created provincial authorities—with their untried institutions and processes—bore down heavily on many protagonists on both sides of the divide. This was particularly so with those in charge of the provinces. The provinces, particularly the poor ones, began to better appreciate their institutional limitations against the backdrop of rising popular expectations for rapid social service delivery and limited fiscal resources. It became clear that irrespective of all the constitutional guarantees provinces had in respect of their political autonomy, some were still so poor and institutionally weak that they would virtually be unable to fulfil their constitutional responsibilities without the technical and financial assistance of central government. Only two provinces, the Western Cape and Gauteng, were financially and economically

able to sustain some of their activities with less intervention from the centre.

The period after 1997 was therefore characterised by less strident and crude calls for more devolution of powers and responsibilities to the provinces. The debate on the devolution of powers and responsibilities to the provinces became more nuanced, increasingly emphasising the need for institution building, capacity building, civil service transformation and staff training. As the sheer scale of problems such as corruption and lack of financial resources increased, more attention shifted towards questions of financial accountability and quality of services delivered by provinces. These issues troubled political leaders at provincial and at national level.

The predominance of central government in fiscal and financial matters as well as its responsibility for setting the overall national economic policy and legislative framework in a range of policy areas has given a centralist orientation to processes of governance in South Africa. This orientation is likely to persist for some time due to a number of structural factors: many provinces still lack the administrative and technical capacity to fulfil many of their responsibilities; the economic and fiscal weaknesses of many provinces lead to dependence on fiscal transfers from central government; and central government has the constitutional responsibility to ensure fiscal discipline and determine overall national development policy priorities to which the provinces have to conform to ensure macro-economic stability (Van Zyl, 1998, p. 32).

New Wave of Discontent within the Current System

During 1998, the chorus of discontent about the current provincial system of government has grown. Although other political parties and commentators joined the main complainants, namely the ANC, much of this has been unco-ordinated. The discontent seems to signal that restructuring might be necessary. Some political leaders have suggested that the entire system needs to be radically overhauled or even abolished.

A number of factors triggered this new development. First, many provinces have struggled since 1994 to transform or rationalise their administrative institutions and systems to handle the increased socio-economic

and developmental responsibilities. This is particularly so with the poorer provinces such as KwaZulu-Natal, the Eastern Cape and Northern Province, which have also inherited remnants of the old “homeland” civil services, parastatals and personnel who continue to drain fiscal resources.

Second, a report published in August 1997 by the Public Service and Administration revealed widespread problems. These included severe lack of institutional capacity, administrative leadership and management skills; absence of financial control systems; inadequate accounting mechanisms as well as too many under-performing civil servants. Many provincial civil servants were untrained and unskilled, which in many cases led to maladministration, corruption, large-scale waste and mismanagement of provincial resources. These problems have prompted the national government and several provincial authorities over the past two years to establish numerous investigative commissions of inquiry into official corruption throughout the country (The South Africa Report, 1998a, pp. 5-8; The South Africa Report, 1998b, pp. 4-9). Mpumalanga, the Northern Province, Eastern Cape and KwaZulu-Natal have been among the most severely affected in this regard.

Third—and very important—national government has had to intervene and “bail out” provinces such as KwaZulu-Natal and the Eastern Cape for overspending their budgetary allocations (Naidoo & Pintusewitz, 1998, pp. 37-40). In both cases, the financial assistance from central government does not come without strings attached and many see these preconditions as detrimental to the cause of provincial autonomy. For instance, Finance Minister Trevor Manuel’s adjustment budget in 1998 outlined central government’s intention to make available R1,5bn to assist both the Eastern Cape and KwaZulu-Natal to overcome their severe financial difficulties, but performance-related conditions were attached to this assistance. These included a requirement for the two provinces to balance their books under supervision of officials from the national Department of Finance.

In theory, central government’s financial “bailing out” of and even technical assistance to provinces have not created a more receptive attitude to national government intervention in provincial governance. One

example of this occurred in the Eastern Cape in January 1998 when central government, through the Department of Social (Welfare and Population Development), intervened in the pensions crisis in the province. Central government provided R800m to assist the province when it was unable to pay pensions to 632 000 pensioners (South African Institute of Race Relations, 1998, p. 485). In 1997, the Presidential Review Commission also urged central government to invoke s100 of the Constitution, which empowers it to take over the administration of any provincial function if the provinces concerned are unable to execute their constitutional responsibilities. The commission recommended that the government invoke this section in relation to the Northern Province and Eastern Cape due to financial mismanagement and lack of qualified financial managers there (Presidential Review Commission, 1998).

The cumulative effect of all this has been to nurture a less favourable attitude towards provincial political autonomy among the general public as well as among senior members of government at both national and provincial levels. For instance, former Minister of Constitutional Development and Provincial Affairs, Vali Moosa, argued early in 1998 inside the NCOP that the current provincial system needs reforming (*Financial Mail*, 19 June 1998).

Northern Province premier Ramathodi in a speech to a conference echoed this sentiment in early 1998 where he called for “a fundamental re-evaluation of the powers and functions of provinces”. He indicated four future options: greater devolution of powers—favoured by KwaZulu-Natal and the Western Cape; reduction of provincial powers; the deployment of skilled personnel and administrative resources to poorer provinces; and the asymmetrical assignment of powers to provinces based on existing capacity. He seemed to indicate a preference for the latter option, arguing that the Northern Province would prefer a more visible presence of central government in certain areas of provincial responsibility such as financial management and skills development. Ramathodi believed that more latitude was needed in other areas, such as cross-border trade relations, migration and labour policy, agriculture and security. He also contended that central government was able to use the national/provincial sectoral

policy co-ordinating bodies such as the minister members of the executive council (MINMECs) to issue directives to provincial members of the executive council (MECs) who shunned their accountability to provincial premiers. He argued that such shunning of accountability was an unconstitutional encroachment upon the responsibilities of provincial premiers.

Ben Turok, convener of the National Assembly's finance committee, expressed the view that the transfer of power and functional responsibilities to the provinces between 1994 and 1996 was carried out at a time when many provinces still had inadequate technical and administrative capacity. He suggested that provincial powers over functions such as finance should be withdrawn (The South Africa Report, 1998a, p. 6).

This view appears to command some support within the ANC (The South Africa Report, 1998b, p. 5), and is likely to be popular among bureaucrats, senior managers inside national ministries and others who are more concerned with questions of resource management, financial accounting as well as technical and pragmatic aspects of social service delivery.

Former Gauteng premier Mathole Motshekga also echoed these sentiments in a document presented to the provincial cabinet in 1998. He found the overlapping powers and responsibilities between the spheres of government to be responsible for the national/provincial conflicts over the past five years. He asserted that the current intergovernmental relations' structures were failing to mediate the rivalry and tensions between national ministers and provincial MECs (*The Star*, 2 September 1998). Motshekga argued that the current system had to be co-ordinated from inside the deputy president's office. Interestingly, this statement came from a premier of one of the two economically strong and well-run provinces. Politically, a province like Gauteng would gain from a less interventionist role for central government in respect of the functional relations between the provinces and the centre. A co-ordinating role for the deputy president's office would only enhance the dominance of central government over sub-national entities, which many campaigners for provincial rights would find unacceptable. However, some commentators argued that

the role of central government in the development of the current provinces is critical at least in the short to medium term.

The early stages of the implementation of the current system of provincial government saw provincial authorities and proponents of provincial rights routinely demanding the wholesale transfer of powers and functional responsibilities to the provinces as a right and panacea for the ills afflicting the system. In contrast, current sentiments seem to demand a more nuanced approach, which might include withdrawing some critical provincial responsibilities in order to improve the system's effectiveness. It is quite clear therefore that an instrumentalist approach to improving the performance of the provinces has surreptitiously emerged. The period leading to the 1999 national election also served to bring into sharp relief the issue of government's inability to deliver on its social services programmes, especially at provincial levels. Limiting provincial autonomy could therefore become an extremely attractive option for politicians for whom turning the provinces into mere administrative tools for central government presents an easy solution to the problems of inefficiency, corruption and lack of delivery on basic services at provincial level.

In the long term though, the current receptiveness to a more dominant and interventionist role for central government in the affairs of provinces is likely to strengthen the hands of those politicians who, for ideological reasons, have always opposed the idea of constitutionally entrenching the political and administrative autonomy of provinces.

Prospects for the Future

In terms of the Constitution, the institutional integrity of provinces in South Africa is guaranteed and their powers and functions are entrenched. However, in practice many of them have struggled to establish themselves in respect of their institutional character, particularly in the context of weak administrative capacity and inadequate fiscal resources. Many provinces have not yet been able to command enough fiscal resources to determine their own developmental priorities and develop their own socio-economic agendas as constitutionally autonomous governments. Many of them have spent the first five years of their existence putting in place or

getting to grips with new systems of government as well as implementing various programmes of structural transformation.

Provincial governments face debilitating problems such as inability to reduce expenditure on personnel salaries and large numbers of civil servants (both of which can only be solved at national level), and raising sufficient own revenues to reduce dependence on central government transfers. These problems have resulted in permanent crisis management at provincial level; thus preventing the provinces from experimenting with programmes to enhance their socio-political and economic well being. Provinces therefore have yet to consolidate institutionally and carve a high political profile for themselves among their constituencies. For instance, only two opposition-controlled provinces have ever attempted to design their own provincial Constitutions and only one—the Western Cape—has succeeded in having its own Constitution adopted.

Politically, the provinces have yet to constitute a strong and united interest group that regularly lobbies for its collective welfare within the national political structures and policy-making processes. In terms of political structures in general, all the provinces have their governance institutions in place. However, many legislatures have struggled to define their roles properly within the entire system of provincial government (Rapoo et al., 1997). Many members of provincial legislature (MPLs) still have inadequate law-making and policy-making skills as well as lack of capacity to scrutinise the activities of government agencies and hold provincial governments to account effectively. This has, in many cases, created a power vacuum that has gradually led to a concentration of power and authority in the hands of provincial premiers, provincial executive councils and their departments.

Many provincial legislatures have thus evolved as weak institutions, sometimes serving as little more than rubber stamps for domineering provincial executives. This derives mainly from the current electoral system, which does not allow for MPLs to represent geographic constituencies. There is therefore a weak representative relationship between legislatures and their electorates, which creates a “democratic deficit”. This occurs when political institutions at provincial level do not com-

petently represent and articulate the interests of their electorates at all levels of policy making. Such non-representative political structures are a serious challenge for democratising countries like South Africa.

The fall out from all this is that the public have little confidence in provincial governance compared to the levels of confidence in central government, as evidenced by public opinion surveys (see Chapter 10). The results of the 1999 national and provincial elections and patterns of voter preference for political parties are interesting. For instance, the bad performance of region-based minority political parties during the elections, compared to the overwhelming victory of the ANC at both national and provincial levels, appears to reflect low levels of voter identification with either the individual provinces or the entire system of provincial government. These parties have struggled to translate the regional proximity of their power bases into greater political support against the ANC during the 1999 general election. Even the IFP and the National Party, which achieved impressive victories in the 1994 election against the ANC in KwaZulu-Natal and the Western Cape respectively, were unable to repeat their victories during the 1999 election. Moreover, many political parties, including regional minority parties, tended to conduct their provincial electioneering based on national policy issues and agendas rather than province-specific policy problems. However, the outcome of the provincial elections has nevertheless created more political diversity within provincial legislatures than was the case during the first five years of the new democracy. For instance, unlike in the past when opposition benches at national and provincial levels were dominated by the National Party and the Democratic Party, the current era sees more parties such as the United Democratic Movement (UDM) and the United Christian Democratic Movement (UCDM) added to the opposition benches in provinces such as the Eastern Cape and North West.

Conclusion

All the difficulties experienced at provincial level, however, should be placed within context. The provinces in South Africa are still evolving in terms of institutional and political identity, administrative capacity, techni-

cal effectiveness and political influence (Khosa & Muthien, 1998). Valuable experience is being gained—through trial and error—on the practice of running provincial political institutions where, in some cases, none existed before. This experience will contribute towards improving the operation of provinces in the future, based on the unique circumstances of this country. In the meantime though, a new non-partisan consensus on the need for a balance between the political and constitutional autonomy of the province vis-à-vis the centre and the need for efficient and effective delivery of basic services will be critical in improving the current system.

As a new set of developmental priorities are being determined for the period 1999-2004 by the newly elected national and provincial governments, the institutional and political development of the provinces in the medium to long term will be placed on the national agenda. Both the national and provincial political leaderships need to focus on technical and administrative capacity building for the provinces, with proper monitoring and evaluation to ensure that the objectives of these activities are achieved. Consensus or political readiness seems to be developing regarding the visible presence of central government in some areas of provincial responsibility, particularly financial management. This, at best, would be a short-term measure accompanied by vigorous financial management and skills-training programmes for key provincial departmental managers. In the meantime though, effective systems are necessary to ensure internal financial accountability in the provinces to deal with mismanagement of public resources and corruption. At the same time, the provinces have to be externally accountable to the electorate for the use of public resources.

Finally, the issue of allocating own and independent sources of revenue to the provinces remains a source of serious intergovernmental conflict and national political priority (Naidoo & Pintusewitz, 1998, pp. 37-40; Van Zyl, 1998). The Finance and Fiscal Commission has already lent its weight to the allocation of independent sources of revenue, but some provinces, particularly the poor ones lacking substantial revenues bases, apparently indicated aversion to this. Hence a co-ordinated national strategy is required to address the short and long-term fiscal needs of the provinces. The strategy would have to ensure that capacity exists to

effectively utilise already existing provincial sources of revenue (e.g. vehicle licensing; taxes on horse racing and gambling; rates; service charges; etc.) before exploring the addition of other sources such as surcharges on personal income tax as well as corporation tax. It is also important that the intergovernmental fiscal relations system in South Africa is revamped to deal effectively and efficiently with critical fiscal transfers to the poorer provinces with weak revenue bases and great social needs (Van Ryneveld, 1996; Van Zyl, 1998, p. 36). The long-term objective would be to build administratively and politically strong and accountable provinces with adequate fiscal resources to fulfil their constitutional responsibilities.

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