

# CONSIDERATIONS ON THE DESIGN OF FEDERATIONS: THE SOUTH AFRICAN CONSTITUTION IN COMPARATIVE CONTEXT

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The purpose of this paper is to explore some of the issues which arise when thinking about how to design federal institutions in a comparative context. This requires that we think carefully about what values or purposes one is trying to achieve by opting for a federal system, and about the alternative institutional arrangements or instruments which might strengthen or undermine these goals. We also have to think about how federal arrangements will interact with other elements in the political system, such as the design of the executive and legislatures and the party system, and with the underlying political, social and economic environment.

I will illustrate the issues by looking at how South Africa has thought about federalism and the ideas associated with multi-level governance in the development of its new democratic constitution. I begin with some of the normative issues underlying the choice of federalism and the design of federal institutions. Then I explore two general models of federalism, which I call divided federalism and shared federalism, and which are exemplified by Canada and Germany, before turning to an examination of the choices South Africa has made, in its new quasi-federal constitution<sup>1</sup> and their possible consequences. The new constitution was formally signed by President Nelson Mandela, in the political-charged setting of Sharpeville, on 6 December 1996. This was the culmination of a long process, starting with the negotiation of the Interim Constitution of 1993, through a Multi-Party Negotiating Process. It came into effect in

December 1993, and provided the framework for the first democratic elections which were held on 27 April 1994. The complex compromise among the parties engaged in the transition to democratic, majority rule also included a set of 34 "Constitutional Principles" set out as a schedule to the Interim Constitution. These principles were critical to securing the acquiescence of the soon-to-be minority, largely white parties. They were to provide a set of constraints and guidelines for writers of the permanent constitution, since no new constitution could come into effect until the newly-created Constitutional Court certified that it complied with the Principles. Following the election, there was a two-year deadline with which to write a "final" constitution.

This task was undertaken by the Constitutional Assembly, consisting of the two Houses of the national parliament. The assembly had two co-chairs – Cyril Ramaphosa, of the majority African National Congress, and Roelf Meyer, of the largely white, and previous governing party, the National Party. Its work was delegated to a 46-member Constitutional Committee of Members of Parliament, based on proportional representation of the parties. The Committee was divided into a number of "theme" committees focussed on different aspects of the constitution, and served by a Constitutional Secretariat and a group of "expert" constitutional advisers. The Assembly devoted enormous effort both to solicit the views of all South Africans on their new constitution, and to communicate their ongoing work back to the community in order to create a "credible and enduring constitution which will enjoy the support and allegiance of all South Africans."<sup>2</sup> Among the basic points of departure, in addition to constitutionalism, democracy, the rule of law and a Bill of Rights was to achieve a "balanced horizontal and vertical division and devolution of powers and functions."<sup>3</sup>

A first draft text, full of underlines, square brackets and "Options 1, 2, 3, etc" was published in November of 1995. There followed a

set of rolling texts with at least four successive iterations, each narrowing the areas of disagreement, before a "final" draft was adopted on 8 May 1966. Under the terms of the interim constitution, however, the Constitutional Court was required to "certify" that the text complied with the original 34 principles before the new constitution could be finally adopted. In a long judgement, handed down in September 1996, the Court found a number of areas in which the text did not comply (not least in the area of the role of the provinces).<sup>4</sup> There followed a final flurry of negotiations to amend the draft, and a final passage in the Constitutional Assembly before the new constitution was officially adopted, and the structures and institutions of "one, sovereign, democratic state" of South Africa were put into place,<sup>5</sup> with the Constitution as "the Supreme Law of the Republic." (Ss. 1, 2) Given South Africa's history, and the wide areas of conflict in the November draft, it seems almost miraculous that the task of constitution-making was successfully accomplished. Just as with the "miracle" of the 1993 constitution and subsequent successful elections, it required a huge act of last minute compromise among the major parties, and a continuing deep commitment to the politics of reconciliation which has been so striking a feature of South Africa since the end of apartheid. With justifiable pride, an "Explanatory Memorandum" to the new text could state that "This text therefore represents the collective wisdom of the South African people and has been arrived at by general agreement."

Canada, of course, is one of the world's oldest federal states, one which has changed considerably from the original 1867 design, as a result of societal change, changes in the size and role of government, and judicial decisions. As we all know, this federation is in deep crisis, and its very continuation as a federal state remains very much in question. This crisis in turn has generated a wide-ranging debate about almost every aspect of Canada's institutional design: the division of powers, the

mechanisms and processes of intergovernmental relations, fiscal arrangements, and so on. In striking contrast to South Africa, despite at least five rounds of "mega-constitutional" discussion, Canadians have, in Peter Russell's words, failed to "constitute themselves as a sovereign people."<sup>6</sup>

Perhaps the most fundamental question raised by the recent Canadian experience is whether, and under what conditions, and with what institutional designs, federalism can be an effective means of managing regional and ethno-cultural conflicts in a deeply divided society, a situation with many – but deeper – parallels in South Africa.

Canadians must think about reforming a long-established federal system. The constitution-makers in South Africa following the end of apartheid were starting with a blank sheet of paper. They had to answer the threshold question of whether to have a unitary or a federal system. The general historical position of the African National Congress has been to argue for a unitary state largely on the grounds that only it could secure majority rule, that only it could ensure the concentration of resources necessary to undertake the massive tasks of providing schools, housing, hospitals, and eroding economic disparities, and that only it could contain the potentially centrifugal tendencies of race and tribe. The language and concepts of federalism were also associated with the racist and discredited previous policy of African "homelands." But other political forces (the mainly white parties seeking an American style system of checks and balances against majority power, some Afrikaners dreaming of an Afrikaans homeland or "Volkstaat," and the Inkhata Freedom Party seeking more autonomy for KwaZulu-Natal province) all argued for a more or less federal state.<sup>7</sup> The interim constitution of 1993,<sup>8</sup> the result of the imperative of finding consensus among these political forces in order to pave the way for free elections,<sup>9</sup> states in its "Con-

stitutional Principles," that "Government shall be structured at national provincial and local levels," (XVII), that constitutional amendments require the approval of the provinces, or their representatives in a provincially-constituted second house of Parliament (XVIII), that each level will have "exclusive and concurrent powers" (XIX). It also endorses the principle of subsidiarity, stating that the "level at which decisions can be taken most effectively . . . shall be the level responsible and accountable." (XXI) So, while the word "federalism" does not appear anywhere in the constitution, the federal principle was to be deeply embedded in it. "In the Republic, government is constituted as national, provincial and local spheres<sup>10</sup> of government, which are distinctive, interdependent and interrelated." (S. 40. (1)) Each sphere is to be directly elected; each has at least some autonomous powers; and a Constitutional Court is the final arbiter of their relationships.

But having made that decision, then all the institutional design issues Canadians and others are debating had to be faced: how to divide powers, how to organize fiscal arrangements and intergovernmental relations, what role would the provinces play within the national government, etc. So despite the enormous differences between these two countries they face similar questions of institutional design. Each also must find ways of managing deep ethno-cultural cleavages, and strong autonomist movements – Quebec in Canada, KwaZulu-Natal in South Africa.

Before I proceed, a caveat. My focus is on considerations of institutional design. I think they are important, especially when, as in South Africa or Eastern Europe today, institutional regimes are in the process of being created. Thus this paper has an unabashedly institutionalist character; it assumes that institutions matter, and have consequences, and that the future of democracy is at least partly related to the quality of the Constitutional

Assembly's handiwork.. But I do not wish to assert that formal institutional arrangements are the only, or even the most important, factors which will shape the future evolution of federal systems, or of democracy. Undoubtedly the new South African constitution – though vastly more complex and detailed than the Canadian constitution – will, like ours, be a "living tree."<sup>11</sup> As Riker and others remind us, many other factors also play a large role in shaping the actual operation of federations – party systems, social structure, and the like.<sup>12</sup> Nor do I assert that how actual federal systems are designed flows neatly from abstract political principles: we know the results flow from real world conflicts, struggle, and the balance of power among competing forces. Constitutions, especially new ones which have yet to become deeply rooted, are no guarantee of democracy; they must be sustained by a democratic culture, and a supportive social and economic environment. Nevertheless, I think it useful to think through the value bases of federalism, and to examine how they can be played through in a consideration of the nuts and bolts of designing a federal constitution.

## FIRST PRINCIPLES

Whether thinking about federalism from a fresh start, or from a situation of deep dissatisfaction with the status quo, as in Canada, it is worth starting with some first principles, with a reminder of the underlying values with which federalism is supposed to be associated, and with some criteria for judgement and evaluation which might be put to political institutions, such as federalism.

Three vantage points are especially relevant to debates about federalism in Canada and South Africa: the link between federalism and democracy; the link between federalism and what we might call effective government, or policy-making capacity; and the link between federalism and the ability to manage territorially concentrated ethno-cultural divisions, or

between federalism and varying conceptions of community.<sup>13</sup>

To summarize briefly, from a *democratic* perspective, federalism serves or promotes democracy by: increasing opportunities for citizen participation, maximising the potential fit between preferences and outcomes, and offering citizens the choice of different "packages" or baskets of services in different jurisdictions. In the American literature on federalism, especially, it is also closely linked to the avoidance of tyranny through checks and balances, with the possibility that each level of government can check the excesses of the other.<sup>14</sup>

From an effective government perspective, the virtues expected of federalism are such things as the ability to tailor policy choices to local needs, the avoidance of policy overload at the centre, and the opportunity for innovation and experiment.

From a conflict management perspective the basic argument for federalism is that it minimizes the potential for conflict by empowering territorially-concentrated distinct minorities with the tools to protect and promote their distinctiveness, without fear of the national majority imposing their values on the minority, or vetoing their aspirations. It is conflict management through empowerment, disengagement, and the recognition of difference.<sup>15</sup> Donald L. Horowitz, in an analysis of the application of federalism to South Africa, adds that federalism can "furnish support for an accommodative electoral formula"; provide arenas for socializing leaders to deal with conflict; disperse conflict more widely; and make hegemonic domination by one group more difficult."<sup>16</sup>

Now what is interesting from the perspective of institutional design is that on each of these dimensions, federalism is Janus-headed; it points in two directions. Thus from the democratic perspective, it can be replied that

federalism values the rights of minority communities over those of national majorities. How to balance these two was at the heart of the South African debate over the division of powers, and the ability of the central government to assert a national interest over provincial priorities. "Progressive" interests in Canada have often been similarly worried that the "complexities of federalism," and the powers of the provinces have frustrated or delayed progress on issues valued by the national majority. They argue that federal government tends to be weak government. In addition, Canadian critics have, along with critics in both Germany and the European Union, argued that the exigencies of policy-making in a federation, where much effort must be expended in a complex process of intergovernmental coordination, results in a "democratic deficit," as citizens are frozen out of access to policy-making, accountability is blurred, and emphasis is placed on the bureaucratic interests of governments rather than in the needs of citizens. This has emerged as a major issue in Canada; so far it has engaged less attention in South Africa.<sup>17</sup>

With respect to effective policy-making, again there is this Janus-headed quality. Against the virtues of federalism are placed the dangers of duplication, contradiction and overlap. To the extent that the interaction of the division of powers and the policy agenda facing the country requires extensive intergovernmental cooperation, then critics worry about the potential for excessive coordination costs, delay, immobilism, and policy which cannot surpass the lowest common denominator – the "joint decision trap."<sup>18</sup> Again, this has important implications for institutional design: how to achieve the federalist virtues of innovation, experiment and the like, while avoiding the federalist vices of excessive intergovernmentalism and duplication? Does the interdependence among governments characteristic of all federations argue for high levels of concurrency and shared responsibili-

ties (increasing the need for intergovernmental relations); or does the need to minimize these costs argue for what in Canada is called "disentanglement," an attempt to reconstitute powers into something like the original water-tight compartments, with each government solely responsible for a clearly defined set of functions?

The most striking element of Janus-headedness, however, concerns federalism and the management of territorial conflict. The dilemma of federalism is that it institutionalizes, perpetuates and reinforces the very cleavages it is designed to manage. While providing some reassurance to territorially concentrated minorities, it also provides the institutional foundation – a provincial government – which can provide a strong base from which to argue for more powers, and indeed, for launching a plausible secessionist movement. Federalism in Canada has indeed had many successes in managing French-English conflict, but it has also helped transform French-English relations into a Quebec-Canada confrontation, and it is hard to imagine that the Quebec independence movement would be so strong without the resources of the Quebec provincial state behind it.<sup>19</sup>

Moreover, this also raises the question as to whether the best way to manage such conflicts is to *increase* the powers and autonomy of such distinctive provinces. This is the basis of a profound debate in Canada: on the one hand those who argue that responding to Quebec's demands by increasing its powers – especially if this involves a degree of asymmetry, in which that province would exercise powers not available to others – is a recipe for a slippery slope towards ever further autonomy and perhaps separation. This was the argument of former Prime Minister Trudeau: greater powers for Quebec would inevitably mean more and more such demands, and the progressive cutting of ties between Quebecers and the central government. Hence his powerful oppo-

sition to any form of "special status," and to increased decentralization. His alternative was to strengthen the presence of French-Canadians in the national political system. The contrary view is that *only* by granting recognition of Quebec as a distinct society and enhancing its powers can Quebecers be reconciled to the federal state, and the move towards independence stopped. If this is not done, Quebec will certainly opt for independence.<sup>20</sup>

South African constitutional designers faced exactly the same problem with respect to KwaZulu Natal. It and the IFP, led by Buthelezi, argued strongly for the special status model, and even managed, as the price of its agreement to participate in 1994 national elections, to get a 34th Constitutional principle added. It provides a somewhat ambiguous "right to self-determination" by any community sharing a common cultural and language heritage. This is transferred, equally ambiguously, into the new constitution. Provinces are also given the right to prepare their own provincial constitutions, subject to the overarching Republic constitution, and to certain nationally defined norms.

Thus the design problem: how to maximize the potential of federalism to empower minority communities, *and* link them to the larger system? Again the division of powers is implicated (more or less centralization, more or less asymmetry?). So also are institutions, especially the extent to which the *interstate* mechanisms of government to government relations are supplemented by stronger elements of *intrastate* federalism, in which the regional and linguistic groups are directly represented and involved in national political institutions. All regional and autonomist movement are a combination of "we want out" and "we want in." The trick is to find the right balance.

The other problem with federalism and the management of communitarian divisions also occurs both in South Africa and in Canada. That is the problem of "minorities in minori-

ties." Thus to grant more autonomy to Quebec, for example, is seen as a threat by non-Francophone in the province; just as more autonomy to the Zulus in KwaZulu Natal might be seen as a threat to non-Zulus in the province. This tension has led Alan Cairns to argue persuasively that "federalism is not enough"<sup>21</sup> – that provincial autonomy must be supplemented by nation-wide guarantees of minority rights as well. And in fact, a very strong Bill of Rights is at the heart of the new South African constitution.

A related issue is the status of the newly minoritized Afrikaners, some of whom have called for a *Volkstaat*, or Afrikaner province. Given the spread of the Afrikaner across the whole country, such a geographic entity is an impossibility, but it is interesting to note that the new constitution does have a number of provisions aimed at safeguarding the rights of distinct cultural groups. It also establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. (Ss 181, 182)

## TWO MODELS OF FEDERALISM

As South Africans considered how to design their federal system, and Canadians considered how to reform theirs, there were many models from which to draw. Indeed, it has been said that there are as many variants of federalism as there are federations. Each federation seems *sui generis*, and it is clear that the actual operation of the federal system (centralized or decentralized, conflictual or cooperative) has as much to do with other political and institutional factors as it does with the federal design itself. Among the models which South Africa considered were those of Canada and Germany – Canada perhaps because of the Commonwealth link, and its marriage of federalism with a parliamentary system of government; Germany perhaps because of other cultural affinities, and its quite different model. The United States, India

and Australia have also been sources of ideas, in the latter two cases in large part because they are relatively centralized models.

I will focus on Canada and Germany because they represent two models which give quite different answers to some of the design issues I have mentioned so far. I will label them the models of "integrated"<sup>22</sup> federalism, on one hand, and "divided" federalism on the other. I will sketch out each model in a general form before turning to the details of the South African debate. We will examine each in terms of the major building blocks of federal regimes: the division of powers, responsibilities and competencies; federal-provincial fiscal arrangements; intergovernmental relations; regional or provincial representation in central institutions; and the role of the courts as umpires of the federal system

## THE DIVIDED MODEL

The image suggested by the divided model, as illustrated broadly by Canada, is of two separate, independent sets of political institutions, federal and provincial, which interact with each other through bargaining which often looks more like the relations among independent countries than the interactions among component elements of the same political system. Hence the terms used to describe intergovernmental relations in Canada – competitive "executive federalism" or "federal-provincial diplomacy."<sup>23</sup>

### i. The Division of Powers

The model here is the classical one of clearly divided sets of responsibilities. The central government is responsible for A, B, and C; the provinces for X, Y and Z. There is a minimum of overlap or formal concurrency. In Canada, these powers are set out in Sections 91 and 92 of the *Constitution Act, 1867*. Only two areas of shared or concurrent jurisdiction were included in this Act, agriculture and immigration; a third, old age pensions, in which the provinces retain paramountcy, was

added in 1949. This is not to say that there were not significant possibilities for overlapping responsibilities, even in 1867. The 1867 *Constitution Act* implied a sweeping potential federal power in the opening words of S. 91, the power to make laws for the "Peace, Order and Good Government of Canada," but this has since been interpreted in a far less sweeping way, to imply a power to intervene only in national emergencies, or clearly defined national needs. The Act also gave the federal government potentially unlimited powers to overturn provincial legislation, though the "disallowance" power, the power of "reservation," and the power to "declare" specific projects in the provinces to be for the benefit of Canada. However all these powers have fallen into disuse and most now consider them a dead letter. Indeed, while Canadian federalism has developed into the divided, and decentralized, model described here, its initial formulation led the British student of federalism, K. C. Wheare, to describe Canada's constitution as only "quasi-federal."

This experience, however, underlines a critical issue in the division of powers: under what conditions, if any, should the central government be able to override provincial powers, even in areas assigned exclusively to them? What principles should guide such a power, and what institution should judge when such action is appropriate? It also highlights a principle which has achieved increasing prominence in Canadian debates, and has been inscribed in the Maastricht Treaty of the European Union. This is the idea of subsidiarity: that responsibilities should be assigned to the lowest level at which they can be exercised appropriately, that the default position should always be local control, and that the burden of proof should always lie on the person who proposes centralization. Attractive as such a rule of thumb is, it is far from an unambiguous standard. It may as often be used to justify centralization (though national standards, economies of scale, externalities, etc) as it is to

justify devolution. Canadian commentators have recently embraced subsidiarity largely as an argument to justify further decentralization; in the new South African constitution, while appearing as one of the original Constitutional Principles, it has turned out to underpin a broad set of criteria justifying federal paramountcy in shared or concurrent powers, and even in areas of exclusive provincial competence.

Nor does the water-tight compartments model suggest that there have not emerged large areas of *de facto* concurrency: the result of the old 1867 categories becoming obsolete, new issue areas, unmentioned in 1867 emerging, and so on. Indeed, interdependence and overlapping are as characteristic of the contemporary Canadian model as of other federations. But the logic is one of separate, divided powers, with each order of government exercising substantial autonomy in its own spheres.

## ii. Fiscal Arrangements

Similarly, each level of government in the divided model is given independent taxing powers—in Canada, Ottawa can raise revenues by any means; the provinces are restricted to direct taxation, but in practice, apart from tariffs and a few other revenue sources, there are virtually no limits on provincial taxing and borrowing powers. Each level of government is free to levy its own independent taxes. Again, this is not the whole story. Through equalization payments (unconditional grants to poorer provinces to bring their per capita revenues in line with the revenues of richer provinces) and federal grants to provinces in areas such as health, post-secondary education and welfare, there are large intergovernmental financial flows in Canada. But what is most striking about these, in a comparative sense, is how few conditions are attached and how little policy influence is gained by the centre. Put another way, Canadian intergovernmental transfers are highly respectful of provincial autonomy. In any case, driven by fiscal crisis,

these flows are now rapidly declining. There are, in addition, enormous differences in taxation rates across provinces. Again: relatively independent revenue systems.

Fiscal arrangements also highlight two other critical design issues. If there are to be large fiscal flows between governments (on the assumption that central governments have more revenue-raising capacity), then to what extent should such flows be conditional, implying considerable central control over provincial priorities), and to what extent should they be unconditional. Without fiscal autonomy, formal jurisdictional autonomy can be meaningless. Second, to what extent should it be a goal to use central powers to redistribute revenues between richer and poorer areas, and how much should fiscal federalism assure the equal capacity of the provinces to carry out the responsibilities assigned to them? In Canada, the principle of equalization, ensuring that each province should be able to carry out roughly comparable levels of services with roughly comparable levels of taxation, was enshrined in the *Constitution Act, 1982*. (S. 36) This principle helps ensure that variations in provincial policies will be a result of different choices, not of unequal fiscal capacities, and thus sustains the primary virtues of federalism.

### iii. Intergovernmental Relations

The high degree of interdependence and de facto concurrency inevitable in any federal system ensures that intergovernmental relations are indeed at the heart of the Canadian system. But several characteristics of these relations are consistent with the divided model. The machinery of intergovernmental relations has grown up in an ad hoc way; it is nowhere mentioned in the constitution, or enshrined in statute. Rather it is an add-on to the Canadian constitutional design, made necessary by the inevitable interdependence of governments in the modern policy arena. The complex array of First Ministers, Ministerial and official-level intergovernmental meetings have no formal

status, no decision-making powers, no formal schedules for meeting, no formal decision-rules, no serious bureaucratic backup. The relations among governments are conducted among high level officials and ministers – executive federalism – in which close ties among functional program officials at each level are subordinated to broader strategic considerations of power, turf and status. Again, relatively separated systems.<sup>24</sup>

### iv. Intrastate Federalism

Perhaps the clearest manifestation of the divided model in Canada is that there is no formal institutional bridge linking provincial and national politics, no institutional means through the interests of provinces (whether their people or their governments) are directly represented with the central government. In most federal systems, this is the primary role of the Senate, or Second Chamber, but the principle of provincial representation can be extended to other national institutions as well. In Canada, as is well known, the Senate has conspicuously failed to play this role. Indeed, Canada is an outlier among federal systems in this regard, though there are important informal norms about provincial representation in the cabinet and the Supreme Court. Moreover, the Westminster-style Canadian parliamentary system, with its tight party discipline and executive dominance sharply limits the ability of individual Members of Parliament explicitly to represent and speak for their regions (unlike, for example Congressmen in the United States). As noted earlier this “failure” at the centre is one important reason why regional interests, even on matters within federal jurisdiction, are most commonly manifested through assertive provincial governments, and why provincial Premiers claim a role as national, not just provincial, policy-makers.

Thus, at each of these institutional levels, and despite the reality of wide areas of interdependence, a sharp line is drawn between federal and provincial politics. They are separated



systems, which negotiate and bargain with each other. This pattern is reflected in other areas as well. One consequence is that the Canadian party system does not integrate or bridge national and provincial politics. It is, as Smiley calls it, a confederal, rather than a federal party system. In some cases, parties active at the provincial level play no role in national politics; in others federal and provincial parties of the same name have few financial, organizational, ideological or personal links. This is also reflected in the fact that, with some important exceptions, there is remarkably little mobility of political leadership between levels of government. The pattern is repeated at the public service level: there is no unified Canadian public service, and remarkably little mobility among levels. Again, divided federalism.

#### **v. The Role of the Courts**

The courts have played a critical role in the movement of Canadian federalism from the "quasi-federal" pattern noted by Wheare to the more classical, decentralized and divided model of today. Reflecting Canada's colonial past, until 1949 the final court of appeal for Canada was the Judicial Committee of the British Privy Council. Its decisions transformed Canada into a classical federal system, limiting federal powers, and asserting provincial sovereignty in their assigned areas of jurisdiction. The Supreme Court of Canada has continued to be an umpire of the federal system, consistently seeking an appropriate balance between federal and provincial powers. This role has become more rather than less important as Canadian federalism, especially in the 1970 and 1980s became more competitive and adversarial.

### **INTEGRATED FEDERALISM**

The integrated model, exemplified in large part by Germany, is different on all these counts. It is designed to integrate and pull together central and provincial politics at all

levels. "The resulting institutions and horizontal federal arrangement are of the intrastate variety, which, perforce, requires consensus-building and cooperative behaviour if any degree of co-ordination is to be achieved." While the German federal system is considerably more centralized than the Canadian, it is undeniably federal. Art. 79(3) states that: "Amendments to this Basic Law affecting the division of the federation into Länder, and their participation in the legislative process . . . are prohibited."

#### **i. The Division of Powers**

Instead of water-tight compartments there are wide areas of concurrency or shared responsibility. In Germany. A limited number of powers are allocated for both legislation and administration to the national government, including foreign affairs and, citizenship and immigration, nuclear power, domestic and international trade, currency, postal and telecommunications, social insurance, air transport, railways and national highways and a few other matters (Arts. 73, 87-90); otherwise, "the exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder" (Art. 30) However, in the case of conflict, federal law overrides Länder law. (Art. 31). There is also a long list of concurrent powers, ranging from the administration of justice, to welfare, to education, the environment and other matters. (Art. 74) Länder have the right to legislate in these areas, but only to the extent the federal government does not. Art. 72 spells out the conditions under which the federation has the right to legislate, reflecting the idea of subsidiarity: where a matter cannot be effectively regulated by individual Länder; where Land regulation might prejudice the interests of other Länder or the country as a whole; or where it is necessary for the maintenance of legal and economic unity." (Art. 72 (2)) Similar language was incorporated into the South African constitution. Another key element of the German division of powers is that it takes the form of a

national/local distinction within policy areas in which the centre is responsible for broad national "framework" legislation, within which provinces are responsible for fleshing out local variations and for implementation, with varying degrees of federal supervision, subject to approval by the Länder-appointed Bundesrat. (Arts. 75, 83-85) Most federal law is implemented by the Länder. The Basic law also provides for "joint tasks" where the federal government may participate in areas of Land jurisdiction, where they are 'relevant to the community as a whole', and 'necessary to improve living conditions.' (Art. 91a (1). The constitution specifies higher education, regional economic structures, and agriculture and coastal protection. (Art. 91a(1)) Other joint responsibilities may be specified by federal law, again with the consent of the Länder, requiring joint planning and financing. The model is one of shared powers; there are few exclusive powers, at either level. It is also one in which, subject to approval through the Bundesrat, the centre has broad latitude to act, and to shape Land legislative and administrative discretion. "The *de facto* legislative quasi-monopoly held by the Bund is counterbalanced by the undisputed supremacy of the Länder in the administrative sphere."<sup>25</sup>

## ii. Financial Arrangements

Again, the model is not one of independent states and federal government exercising revenue raising powers autonomously: rather the model is primarily one of shared revenues and taxing powers, based on negotiated formulae. Income taxes, corporation taxes and turnover (sales) taxes "jointly accrue" to the federation and the Länder; and each has "equal claims" to current revenue necessary to finance their current expenditure, based on multi-year financial planning, and implemented by federal legislation with Bundesrat approval. The distribution is to "establish a fair balance to prevent excessive burdens to the taxpayer, and to ensure equal

living conditions in the federal territory." Only a limited number of revenue sources are allocated exclusively to either level. (Art. 106)

## iii. Intergovernmental Relations

Shared powers and finances require that intergovernmental relations are not a peripheral add on to the system. Rather "in order to make the system work co-operation between the various levels of government is absolutely necessary."<sup>26</sup> As a result, Germany, compared to Canada, has a far more structured and institutionalized set of intergovernmental institutions, whose decisions are formalized by treaties or agreements, which have the full force of law.

## iv. Intrastate Federalism

The clearest difference between the integrated and the divided models is found in the direct presence of the states within the decision-making processes of the central government. The German second chamber, the Bundesrat, is made up of directly appointed ministers of the Land governments, who are subject to recall. Land Premiers and senior ministers comprise the Bundesrat's membership, and the presidency of the Bundesrat rotates among the Premiers. Members of the federal government have the right, "and on demand the duty" to attend sittings; and to keep the Bundesrat informed on federal matters. While its legislative powers are somewhat less than the lower House, the Bundestag, it is a powerful legislative body, and an important device for injecting land interests directly into the national legislative process. In area after area, central powers are qualified by the need to obtain Land approval through the Bundesrat. It is an essential element of German cooperative or integrated federalism; and a powerful means for the Länder to influence national legislation (and, more recently, German participation in the European Union).

Canadian reformers have considered adopting the Bundesrat model as an antidote to the weak intrastate elements in Canadian federal-

ism, in the form of proposals to replace the existing Senate with a Council or House of the provinces, with direct provincial representation. In recent years, however, such proposals have been superseded by arguments in favour of a directly elected Senate, with procedures designed to enhance its sensitivity to regional interests and to temper majority rule by equal representation of the provinces.<sup>27</sup> Nevertheless the idea of institutionalizing intergovernmental relations through some more regularized, institutionalized Council remains alive.<sup>28</sup>

#### v. The Constitutional Court

A separate Constitutional Court has the full power to interpret the Basic Law, and to rule on any matters of conflict between the federal and land governments.

As with divided federalism, this integrated model spills over into other aspects of the federal political system. Thus, much more than in Canada political parties are unified across state and national lines, providing a powerful integrating force. Mobility of politicians between Land and Bund is common. And Germany has a public service which is highly integrated across federal and state lines.

### IMPLICATIONS OF ALTERNATIVE CONSTITUTIONAL DESIGNS

How do these two models relate to the perspectives or lenses for thinking about federalism discussed above? Some tentative hypotheses might be advanced.

First, the divided model seems to weigh more heavily a view of democracy focussed on the rights and autonomy of provincial communities. The integrated model tends to a more centralized, majoritarian federalism, or what Samuel Beer calls "national federalism."

Second, the divided model seems to simplify transparency and accountability; at least in principle. It suggests a lower democratic deficit, as each government is more directly and visibly responsible to its electorate for its

activities. It is interesting to note that democratic criticisms of federalism in Canada, for example in constitutional negotiations, are raised in the context of those more limited areas where responsibility is in fact shared.

Third, with respect to policy-making, the picture is mixed. The integrated model tends to emphasize the need for harmony and consistency in policy across provinces; it gives provinces *collectively* a large influence on policy, but places less emphasis on the autonomy of each individual province to pursue its own policy choices, and therefore less emphasis on the federalist virtues of variety, experiment and innovation. The integrated model enhances the likelihood of consensual policy-making, at the potential cost of the "joint decision trap" – delay, lowest common denominator solutions, etc. The divided model enhances the likelihood of contradiction and conflict among policies, with the advantage, again of decisiveness and variety of policy outcomes. As Martin Painter points out, "where federal-provincial political interactions are conducted in a climate of competitive political interaction, rather than under the banner of a managerially-inspired model of rational, cooperative planning, then some of the potential costs of intergovernmentalism may be avoided."<sup>29</sup>

Fourth, with respect to conflict, the integrated model places a very high value on consensus and agreement; the divided model leans towards a more competitive, adversarial federalism.

Fifth, with respect to deep-seated territorial conflict the messages seem mixed. But one might argue that by setting provinces into a competitive relationship, and by so encouraging distinct, separate political processes in each province, the divided model both produces more autonomy for minority groups, and makes it easier for them to move in a secessionist direction. There are fewer ties to cut. The integrated model might avoid this, by

stressing the multiplicity of ties that link federal and provincial governments into a single system, making disengagement or secession more difficult. The constant interaction and need for cooperation in the shared system may also be more conducive to the building of relationships of mutual trust between officials at both levels. On the other hand, once a strong regional or separatist movement did exist, then the integrated model would be a recipe for paralysis, since the emphasis on consensus multiplies the opportunities for veto..

### TOWARDS A SOUTH AFRICAN FEDERALISM

As I have mentioned, South Africa has opted for a federal model, however reluctant it is to use the term. The 1993 Constitution and the permanent constitution both envisage federal, provincial (and local) spheres of government, each elected separately by proportional representation. The provincial executive consists of a Council, headed by the Premier, who is accountable to the provincial legislature. The federal character of the South African constitution was made necessary by the imperative of finding all-party agreement on an interim constitution in 1993, and South African constitution-writers remained highly ambivalent about it. As the Constitutional Assembly worked towards a permanent constitution for the country, many issues for federalism remained highly contentious, and these were among the very last major questions to be resolved. In this section I outline some of the choices South Africans have made in their new constitution. In general, South Africa leaned strongly towards the shared model, much closer to the German than the Canadian example. As one leading ANC strategist, Albie Sachs, now a member of the Constitutional Court, has said, the attraction of the German model was that regions could participate fully in policy formation, but final power would remain with the centre. He admired the Ger-

man system's "sophisticated network of inter-relationships, with a lot of negotiation between the centre and the regions. . . This fitted in very well with what we wanted for South Africa." As I will argue in the conclusion, I believe this is the right choice.

This model of cooperative, collaborative governance is asserted from the outset in Chapter Three. "In the Republic, government is constituted as national, provincial and local spheres (not "levels" or "orders") of government, which are distinct, interdependent and interrelated." (S. 40(1)) All spheres of government are enjoined to "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere." They are to "cooperate with each other in mutual trust and good faith," by "fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another," "adhering to agreed procedures," and "avoiding legal proceedings against one another." (S. 41 (1)). This embraces what the ANC calls a concept of "cooperative governance,"<sup>30</sup> or "Ubuntu." Such exhortations might sound a bit like some bureaucratic wedding vows, and be no better guarantee of harmony than they are, but these provisions clearly illustrate the underlying philosophy of federalism here — one much closer to Germany's than to Canada's. And, as in Germany, provincial executives are responsible for implementing national legislation in areas of concurrent or exclusive provincial jurisdiction, and any other national legislation whose implementation the national parliament assigns to them. (S. 125 (2))

#### i. Division of Powers

Legislative authority for the country is exercised by national, provincial and local governments.<sup>31</sup> The national Parliament is empowered to legislate on "any matter," in-

cluding a list of broad concurrent powers spelled out in Schedule Four. (S. 44(1)) Unlike Germany, the general residual power is left to the central government. (S. 44 (1) ii) There is also a much shorter, and more limited, Schedule Five, which lists areas of "exclusive [provincial] legislative competence."<sup>32</sup> However, Parliament also has the power to legislate in these areas of provincial jurisdiction, if it is deemed necessary to "maintain national security," "maintain economic unity," "maintain essential national standards," "to establish minimum standards required for the rendering of services," or "to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole." (S. 44(2). Otherwise, provincial legislation is to prevail. Provincial powers include the right, under strict conditions, to pass their own constitutions, to legislate in the concurrent and exclusive areas set out in Schedules Four and Five, and to act in areas where the centre has delegated powers to them (S. 104 (1)) In the concurrent areas listed in Schedule Four, S. 146 sets out the conditions under which federal law will prevail. It must apply uniformly across the country; must deal with a matter that cannot be regulated effectively by the provinces acting individually; must set out national norms, standards or policies; and must be "necessary" for the maintenance of national security, economic unity, and the common market, the promotion of economic opportunities across provincial boundaries, the promotion of equal opportunity, or the protection of the environment. (S. 146(2)) Federal legislation also prevails where it is aimed at "preventing unreasonable action by a province" that is "prejudicial to the economic, health or security interests of another province or the country as a whole." (S. 146(3)) Thus, the federal government has broad powers to exercise paramountcy – but the constitution does require that its actions be justified, and linked to specified national purposes, reflecting the idea of subsidiarity.

These limited provincial powers – and the subjection even of the "exclusive" powers to the sweeping federal override<sup>33</sup> led to much of the final debate about the constitution. Did it meet the terms of the Constitutional Principles XIX, that each level should have exclusive and concurrent powers, or of XXI, stating that decisions should be taken at the level which was most "responsible and accountable?"<sup>34</sup>

In its assessment of the constitution, the Constitutional Court concluded that the provinces do have real, genuine and meaningful exclusive and concurrent powers, with "provision for extensive legislative and executive competencies." [252]; and that the conditions for federal override were based on clear and justifiable principles, and are "defined and limited." [257] Provincial autonomy is real, but it does not mean that provinces can ignore the overall constitutional framework, which "creates one sovereign state in which the provinces will have only those powers and functions allocated to them," and in which "the national government will have powers which transcend provincial boundaries and competencies." [259] Thus, the new South African division of powers suggests a highly centralized federal system, but one in which there is the potential for considerable provincial initiative, given sufficient political will and institutional capacity.

## ii. Fiscal Arrangements

The central dominance extends into fiscal arrangements. Provinces will have very limited powers to raise revenues on their own account, and are barred from income and sales or value added taxes. (S. 228). Other provincial revenue raising and borrowing is subject to national regulation and legislation. And no provincial revenue raising activities are permitted that "materially and unreasonably" affect national economic policies, interprovincial commerce, or the mobility of economic factors. However, the provinces are entitled to an "equitable share" of revenues collected by the national

government, as set out in national legislation. (S. 214) The distribution of funds is to take into account both the "national interest" and the needs and interests of the national government, is to be "determined by objective criteria," and is to ensure that provincial and local governments are "able to provide basic services and perform the functions allocated to them." The shares are also to take into account provincial fiscal capacities, needs, and disparities, thus building in the principle of interprovincial revenue equalization, which is an important feature of both Canadian and German fiscal federalism. In addition, national legislation will determine the form and timing of the budgets at all three levels of government (S. 215); and will set out the rules to ensure "both transparency and expenditure control." (S. 216) Federal legislation sets the rules for provincial borrowing. (S. 230) The national government can also block the transfer of funds to the provinces for "serious and persistent breaches" of accounting practices and treasury norms, subject to assessment by the Auditor General and the provincial ability to respond to criticism. (S. 216) Bills prescribing such provincial standards and practices would need to be passed by both the National Assembly, and the NCOP, representing the provinces. In the event of disagreement within the Mediation Committee, then the Bill can pass in the National Assembly with a two-thirds super majority. (S. 76(4), CC 412)

Again, this is a potentially highly centralized model. But what the equitable share is, and what conditions will be attached to it, remain in question. Critical to the policy and political viability of the new provinces will be the extent to which the provinces' "equitable share" flows in the form of unconditional grants, which the provinces can allocate as they like, or in the form of conditional grants attached to specific programs. If the latter predominates, then provinces will have very little room to make their own choices and set their own priorities. The constitution is unclear

on the point, though it does envision both sorts of grants.

There is also an important cooperative element in allocating revenues: it can only be done after "the provincial governments, organized local government and the 'independent' and 'impartial' Financial and Fiscal Commission have been consulted." (S. 214(2)) The Commission is modelled broadly on the Australian Grants Commission (ss. 220-221). It is comprised of a centrally-appointed Chairperson and deputy chairperson, nine provincial nominees, two representatives of local government, and nine others. (S. 221(3)) It reports regularly to Parliament and the provincial legislatures. The Commission has argued that if the provinces are to be effective and accountable, they must have some real fiscal autonomy. Murphy Morobe, the Chairperson of the Commission, asserts that "If we continue to make significant transfers from the centre, . . . it will become difficult to have provinces with an executive." The Commission has proposed that the centre withdraw from part of the income tax, in order to allow provinces some room to impose their own.<sup>35</sup> At the moment, there is an enormous mismatch between revenues and responsibilities – and provinces raise only four per cent of their operating revenue. Provinces are highly dependant on federal funding, and are constantly under the threat of falling victim to unfunded federal mandates.<sup>36</sup> Giving provinces a stronger role in formulating national budgetary policy, and some greater autonomy in raising their own revenues will be a critical issue if provinces are to develop as viable institutional actors.

### iii. Intergovernmental Relations

Details of intergovernmental machinery are not spelled out in the constitutional draft: as in many other areas they are left to future legislation. In the summer of 1997, officials of the Ministry of Constitutional development were preparing a White paper on the subject. How-

ever, it is clear that South Africa envisions a dense network of linkages between levels of government, as part of the model of cooperative government. S. 41 (2) requires that an Act of Parliament establish or provide for structures and institutions to "promote and facilitate executive intergovernmental relations." It must provide "appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes." And there should be every effort to exhaust such remedies before recourse to the courts to resolve disputes. (S. 40 (3)). S. 148 also tries to minimise the role of the courts in adjudicating intergovernmental conflicts, stating that "if a dispute cannot be resolved by a court, the national legislation prevails. . . ." When considering conflicts, the courts must also "prefer any reasonable interpretation . . . that avoids a conflict over any alternative interpretation that results in a conflict." The Constitutional Court tartly noted that "resolving such disputes is inherent in the judicial function, and a court can hardly take the position that it is unable to do so." [246] Thus the Constitutional Court has asserted a role in acting as umpire in the South African quasi-federal system, as it has in Canada and Germany.

How this intergovernmental machinery will evolve remains unclear. Even before legislation is promulgated new institutions are beginning to emerge. An Intergovernmental Forum (IGF) is designed to bring Provincial Premiers and national Ministers together quarterly as a forum for policy dialogue at the political level. It is supported by the "technical intergovernmental committee" (TIC), made up of national and provincial senior officials, and chaired by the Director General (Deputy Minister) of the (national) Department of Constitutional development. In addition, some 20 ministerial forums (MINMECS) have been established to facilitate harmonization, consultation, and joint action in a number of functional areas. Each of these has important parallels in both Canada and Germany. And, as in these cases,

the IGF and MINMECS have been criticized for lack of interest and participation by national ministers, failure genuinely to consult, and lack of a common information base. In addition, their link to NCOP, and to national and provincial cabinets remains unclear.<sup>37</sup>

#### iv. Intrastate Federalism

As in Germany, the counterweight to the legislative superiority of the national government, and the centrepiece for the model of "cooperative governance" is a provincially oriented second chamber in the national parliament. Two distinct models were on the table, with important implications for whether the body would be able to exercise significant provincial government control over national legislation.

The weaker option, similar to that in the Interim Constitution, would have created a 90-member Senate, "to represent the province in national decision-making" and act as a "second House of Parliament." It would be elected indirectly by the provincial legislatures, and selected according to proportional representation of the parties in the legislature. Senators would not be members of the provincial legislature or executive, though provincial executives could attend and speak, but not vote. The Senate would consider and vote on all bills. Where the two Houses disagreed, a mediation committee would be struck, and if it could not reach consensus, the bill would be submitted to a joint sitting of both Houses (where the Senators would be outnumbered five to one), and a simple majority of the total membership would prevail. The Senate would have greater powers on bills directly affecting the provinces. The approval of both Houses would be required for any alteration of provincial boundaries. Constitutional amendments would require a two thirds majority of both Houses sitting together, and amendments affecting provincial powers would protect the provinces even more strongly, by requiring a vote of two-thirds of each House.

This then, would have been a fairly strong Second Chamber, which would inject a significant provincial presence into national decision-making. Unlike the Bundesrat, however, it would not represent either the legislatures or the executives of the provinces directly. To the extent that its members saw themselves less as provincial delegates, and more as members of national parties, its role as a check on central power could be greatly undermined. As the Constitutional Court observed, the method of appointment to the Senate in the Interim Constitution would have made it "more a House in which party political interests are represented than a House in which provincial interests are represented." [320]

A much more robust alternative was to establish a body much more akin to the Bundesrat. This is the model that has been chosen – one of the last big breakthroughs in the negotiations. The new second chamber is to be called the National Council of Provinces (NCOP). It is to represent the provinces "to ensure that provincial interests are taken into account in the national sphere of government," "by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces." (S. 42(4)) Its members will comprise a single, ten-person delegation from each of the nine provinces. It will be headed by the Premier, and consist of three other "special delegates," who would be selected by the legislature and, it appears, rotate according to the issues under discussion. There would be six other "permanent delegates," also selected by the legislature, under nationally determined rules to "ensure the participation of minority parties . . . in a manner consistent with democracy." (S. 61 (3)) Unlike the special delegates, they could not continue to sit as provincial legislators, but their terms would expire with that of the legislature, and they would be subject to recall by the legislature. (Ss. 58, 58, 60) Hence, the delegations would clearly be provincial delegates. Therefore, unlike in the

previous Senate, there is at least the possibility that they will act as the voice of the provinces, rather than as members of national parties, subject to national party discipline. This is reinforced by the provision that on most issues affecting the provinces, each provincial delegation has one vote, cast on its behalf by the Premier. (S. 65)

The powers of the NCOP would be significant, though varying according to the type of legislation. On ordinary legislation, not affecting the provinces, it may support, amend or reject bills passed by the Assembly. In such cases, members of NCOP vote as individuals. The National Assembly could assure passage of a Bill rejected or amended by NCOP simply by re-passing it. (S. 75) In purely national areas, then, its role is purely advisory. But on national bills in areas of concurrent responsibility set out in Schedule 4, federal intervention in matters of exclusive provincial competence, and Bills affecting the financial interests of the provinces. (S. 76(4)) NCOP's powers are much greater.<sup>38</sup> In this area, NCOP may also initiate legislation. If the two Houses cannot agree, then a Mediation Committee is established (made up of nine members of the Assembly, and one representative of each provincial delegation) (S. 76.1). If the Mediation Committee cannot agree (which requires the support of five of the nine representatives from each House), then the Bill can still be passed by the National Assembly, but it requires a two-thirds vote. (S. 76 1(d)). The Mediation Committee can also propose an alternate version of the Bill, which would then pass by a simple majority in each House.

NCOP is also the vehicle through which provinces participate in constitutional amendment. Proposed amendments to S. 1, which declares South Africa "one, sovereign, democratic state," or to the amending procedure itself, must be passed by at least 75 percent of the members of the National Assembly, and six of the nine provinces. (S. 74(1)) Chapter



Two, which sets out the principles of cooperative government, can be amended by six provinces with two thirds of the National Assembly. All other amendments can be made by two-thirds of the Assembly acting alone, if provinces are not affected; or by the Assembly with the concurrence of six provinces, if it affects the Council, alters "provincial boundaries, powers, functions or institutions," "or amends a provision that deals specifically with a provincial matter." (S. 74 (3)). Thus, if provinces are able to develop some real political autonomy from the national parties at the centre, they will have considerable protection against amendments affecting them negatively. This protection, however is not as strong as in Germany (where Art. 79 requires approval of two thirds of the members of the Bundestag, and two thirds of the votes of the Bundesrat to amend the Basic Law; and where amendments "affecting the division of the Federation into Länder, or their participation in the legislative process" are prohibited entirely. (The "eternal federalism" clause, Art. 79 (3)) Nor is it as strong as in Canada, where general amendments require the consent of the federal parliament and seven of the ten provinces, representing at least 50 percent of the population; where some amendments require unanimity of the 11 legislatures; and where provinces have the right to "opt-out" of amendments which would diminish their powers. (Constitution Act, 1982, Ss. 38-43)

The National Council of Provinces does appear to give the provinces collectively considerable influence on federal legislation, especially in the many areas of concurrent jurisdiction. While not as powerful as the German Bundesrat, it injects a large measure of intrastate federalism into the South African system. But, as the Constitutional Court pointed out, how effective it will be in this role is dependent on too many other factors to make a definitive judgement. [332,333] As a new player in South Africa's institutional structure, it will take time for the role of

NCOP to become clear. On the one hand is the question of whether it will become an important element in the national legislative process (as the Bundesrat is); on the other is how its relations with the provinces evolve? Will provincial legislatures find themselves debating national legislation, in order to instruct their provincial delegations in NCOP, rather than legislating and acting at the local level?<sup>39</sup> Another critical question is how the legislative interaction among spheres, represented by NCOP, will relate to the administrative level of intergovernmental relations.

#### v. The Constitutional Court

What role the Constitutional Court will play in interpreting the federalist aspects of the new constitution remains unclear. As we have seen, Chapter Two, on cooperative government seeks to minimize the role of the court, relying instead on political and bureaucratic mechanisms to manage the intergovernmental relationship. On the other hand, the constitution grants the Constitutional Court unlimited powers to determine whether a matter is a constitutional issue or not, and "to decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state." (S. 167 (3)a, (4)a). Whether in its two certification decisions, or on other matters, such as the constitutionality of the death penalty, the Court has already begun to carve itself an autonomous and powerful role as guardian of the constitution. Given its enormous complexity, it is not unlikely that many issues of clarification and interpretation will come before the court, and that its decisions will therefore do much to shape how federal the new South African system will be.

#### CONCLUSION

Thus the emerging South African federalism is much closer to the shared than the divided model. It is a relatively centralized

federal system, in which, subject to relatively few constraints, such as the principle of subsidiarity, the central government has broad-ranging powers to legislate, and to override provinces, in the name of the national interest. This is tempered by the representation of the provinces at the centre, through the Council. The emphasis, both in the division of powers, and the fiscal arrangements, is strongly on shared, concurrent governance, a long way from the Canadian model.

No outside observer has the right to prescribe a model for any country. In the Canadian context, I tend to lean towards a more divided and decentralized model, but a very strong case can be made that, given the enormous policy agenda facing the country, and the staggering disparities both among provinces and racial groups, there is a need for strong central leadership in South Africa, as envisioned in its new constitution. This is reinforced by the realization that most of the provinces are entirely new entities, with relatively weak regional identities and weak political and administrative capacity, which need to build legislative and bureaucratic institutions virtually from scratch.<sup>40</sup> (Nevertheless, it is fascinating to see how quickly provincial governments led by Premiers from the ANC, a party traditionally hostile to any form of federalism, have begun to assert the need for provincial autonomy and to chafe under central domination).

Thus, in terms of policy effectiveness, the new constitution may well have struck the right balance for South Africa. Provinces, especially if they develop the political will and bureaucratic capacity, do have much room to innovate, to tailor policies and programs to local interests, and so on. The danger, perhaps, is that the need for cooperation and coordination will drown the system in intergovernmental wrangling, rather than freeing each sphere of government to respond to its own needs, set its own priorities, and get on with its own job.

In this, as in other areas of the new constitution, "cooperative governance" places an enormous premium on the processes of consultation and consensus building, which may in turn slow down the process of effective policy-making.

In terms of democracy, the federalist elements are only a small part of the commitment to democracy spelled out in the constitution, with its careful balance between majority rule and protection of the rights of individual citizens and groups. The existence of three effective orders of government will permit greater citizen involvement in public affairs than would be possible in a unitary state, especially one as large and diverse as South Africa. Whether or not this potential will be realized will depend greatly on how successful both levels – and local governments as well – are in developing the mechanisms for open, accountable, participatory government, to which the constitution commits them. The long run viability of the provinces, indeed, will depend on their success in carving out a useful policy role, and on their ability to respond to citizen concerns. The complex intergovernmental machinery envisioned in this constitution, and the non-elected Second Chamber might offend Canadians worried about the "democratic deficit," but are central to the South African's desire for "cooperative governance." The hope, as President Mandela put it on the signing of the 8 May constitution<sup>41</sup>, is that the "preoccupation of elected representatives, at all levels of government, will be how to cooperate in the service of the people, rather than competing for power, which otherwise belongs not to us, but to the people." The danger is that it will be the other way around. The complexity of the new constitution may be both its greatest strength (ensuring consensus by incorporating all points of view and spelling out the fundamental requirement of ongoing consultation), and its greatest weakness (creating a system in which the preoccupation with process precludes action).<sup>42</sup>

With respect to the management of conflict in a deeply divided society, again the implications of the federal elements of the new constitution are unclear. For the protection of the rights of white South Africans in the context of an overwhelming black majority, it is other provisions, such as proportional representation and, especially the Bill of Rights and a strong Constitutional Court which offer the most important guarantees. Quasi-federalism, however, does also mean that power will be more dispersed and fragmented than in a purely unitary state. As for the specific cultural concerns of Afrikaners, there is no territorial "Volkstaat," not least because there is no single geographic area where Afrikaners would constitute a clear majority. There will however be a constitutionally mandated Commission for the Protection of the Rights of Cultural, religious and Linguistic Communities, which may recommend "cultural or other councils" to serve the many self-defined communities in South Africa. (S. 185).

The most incendiary and difficult regional/cultural issue in South Africa regains the conflict between the ANC-controlled central government and the IFP controlled KwaZulu-Natal. This is the only area in South Africa in which high levels of political violence continue. The IFP only signed on to the Interim constitution and joined the democratic election process at the last minute. It has been an uncertain participant in the constitutional process ever since. Under the terms of the Interim Constitution, the provincial government passed its own provincial constitution in March 1996. The Constitutional Court declared it unconstitutional, on the ground that it proclaimed KwaZulu-Natal a "self-governing province," that it unilaterally defined relations between it and the national government, and that it gave the legislature powers beyond those assigned in the constitution. It thus constituted a usurpation of national authority. In addition, the KwaZulu-Natal government claimed in the certification process that the

new constitution had failed to comply with the right to self-determination found in Constitutional Principle XXXIV (which had been added to the CP's at the last moment to bring the IFP on board.) The Court rejected this claim. "In this context, 'self-determination' does not embody any notion of political independence or separateness. It clearly relates to what might be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state." (CCT 37/96, para. 24) Thus the expression of cultural diversity in South Africa is primarily a private matter; it is not designed to empower a provincial majority to unilaterally determine its own powers or pursue a secessionist course.

In addition, however, it may be argued that given the fissiparous potential in a deeply divided society, the principle of cooperative governance, binding federal and provincial government, their leaders and officials, together in a multitude of interdependent relationships – legislative, administrative and financial – is a way to minimize the likelihood of provincial governments becoming the jumping off point for secessionist movements. This is not in the short run, however, a solution to the festering conflict over KwaZulu-Natal.

How well the new South African model works will depend only partly on the constitution which has just begun to operate. Similarly the real levels of provincial autonomy remains to be seen given the flexibility in the constitution. Two scenarios are plausible: that despite their separate election, provinces will become subordinate administrative arms of the centre; or that they will aggressively and creatively use the political space they have been given to carve out an important role for themselves. Which course they follow will, as with the evolution of Canadian federalism, depend on a variety of factors, including the way the Constitutional Court interprets many of its provisions, the ability of provincial govern-

ments to develop expertise and mobilize support, and whether the ANC is able to maintain its current dominance not only at the national level, but as the governing party in most of the nine provinces.<sup>43</sup>

What is clear, is that a federalist South Africa will continue to be a work in progress for many years. Despite its detail and complexity, the new constitution is full of uncertainties, contradictions and even silences. What, for example, will be the relationship between provinces and municipal governments, which in South Africa, and unlike Canada, have a constitutional status of their own? How will the tests to determine the legitimacy of federal overrides of provincial legislation evolve? Will the provinces have any real financial autonomy? And how stifling will be the role of the central government with its many powers to supervise provinces in areas such as public finance and the public service?

Despite these uncertainties, the achievement of writing the constitution is itself an extraordinary achievement. It profoundly reflects the fundamental democratic values of constitutionalism, rule of law, protection of rights, citizen participation – and federalism. Given the ANC hostility to the idea, few would have predicted this result.

Perhaps equally important is the way in which the constitutional document has been developed. The process of writing it reflected the same values. The engagement of the people at every stage of the process has ensured a powerful legitimacy for the new constitution, and thus helps ensure that its fundamental values will have strong societal roots. As President Nelson Mandela put it on 8 May 1996, "Reaching out through the media, opening the process to inputs from across society; and going out across the length and breadth of the country for face-to-face interactions with communities, the Constitutional Assembly reinvigorated civil society in a way that no other process in recent

times has done." Canadians frustrated by our own constitutional processes can only react with wonder and envy at the way in which South Africans have developed their federal constitution. It is a remarkable blend of principle and pragmatism, politics and idealism. It is impossible to imagine that Canadians would ever accept a constitution as centralized as the South African. But they should be able to learn much from the process. And the ideal of "cooperative governance" has much to recommend it.

Writing a constitution is only one of many tasks that face a democratic South Africa. It is no guarantee, in itself, of a democratic future. But it is a crucial building block for that future, and federalism has emerged as an important part of the mix. Whether or not the term appears in the constitutional document, and whether or not the institutional design meets Wheare's strict definition of federalism, the reality is that South Africa has chosen a multi-level system of government, one which incorporates many elements found in other federal constitutions, such as Germany's, but which also responds, as all federal systems do, to the unique cultural, political, and economic dynamics of its own setting.

## NOTES

1. The following analysis is based on a number of recent South African constitutional documents. They include: the Interim Constitution of the Republic of South Africa (IC), which entered into force 27 April, 1994; the "solemn pact" of the 34 Constitutional Principles (CP's), contained in Schedule 4 of the IC; the "Working Draft" of the new constitution, released on 18 November 1995; the New Text (NT) of the Constitution, agreed to by the Constitutional Assembly 8 May 1996; the Constitutional Court of South Africa, "Certification of the Constitution of the Republic of South Africa (Case CCT

23/96), 6 September 1996; the Amended Text (AT) of the constitution, October 1996; and the Constitutional Court, Certification of the Amended Text (CCT 37/96), 4 December 1996. All these documents (and other relevant materials) are found in the web site of the South African Constitutional Assembly.

2. For a detailed summary of the process, and an evaluation of its efforts at public involvement, see Secretariat of the Constitutional Assembly, *Annual Report, 1966*.
3. T. M. Mbeki, Deputy President, in the Constitutional Assembly, 24 January 1995.
4. The reservations included doubts about whether establishment of a national Public Service Commission interfered with legitimate provincial autonomy; and the finding that the powers and functions of the provincial governments failed to meet the requirement of CP XVIII.2 because they were "substantially less than and inferior" to the powers set out in the Interim Constitution. Constitutional Court of South Africa, CCT 23/96. Conclusion.
5. The final Certification concluded that provincial powers were still less than in the IC, but not substantially so.
6. Peter Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?* 2nd ed. Toronto: University of Toronto Press. 1993.
7. For an excellent review of the evolution of the positions of the major parties, see Richard Humphries, Thabo Rapoo and Steven Friedman, "The Shape of the Country: Negotiating regional government," in Steven Friedman and Doreen Atkinson, eds. *The Small Miracle: South Africa's Negotiated Settlement*. (South African Review, 7). Johannesburg: Ravan Press, 1994. 148-181.
8. Republic of South Africa. 1995. *Constitution of the Republic of South Africa, 1993 Act 200 of 1993 as amended by Acts 2, 3, 13, 14, 24 and 29 of 1994*.
9. For a superb analysis of these events, see Alister Sparks. 1994. *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution*. Sandton: Struik Book Distributors.
10. The choice of the term "spheres" rather than the more common "levels" or "orders" of government is not accidental. As we will see below, the word suggests that government in South Africa is a single regime, expressed through multiple institutions. The words "levels" or "orders" imply a conception of divided sovereignty which South Africans wished to avoid. The term "spheres" is also consistent with the constitutional principle of "cooperative government," suggesting that all three spheres are working towards similar ends.
11. Alan Cairns, "The Living Canadian Constitution," *Queen's Quarterly* 77 (1970) 1-16.
12. William Riker, *Federalism: Origin, Operation, Significance*. Boston: Little Brown, 1964.
13. See Richard Simeon, "Criteria for Choice in Federal Systems," *Queen's Law Journal* 18 (1982-3) 131-157.
14. See, for example, Vincent Ostrom, *The Political Theory of the Compound Republic*. Lincoln, ND: University of Nebraska Press, 1987.
15. For a review of these bodies of literature, see Kenneth Norrie, Richard Simeon and Mark Krasnick, *Federalism and the*

*Economic Union*. Toronto: University of Toronto Press, 1986.

16. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. Berkeley: University of California Press, 1991. 217.

17. See, for example, D. V. Smiley, "An Outsider's Observations of Federal-Provincial relations Among Consenting Adults," in Richard Simeon, ed. *Confrontation and Collaboration: Intergovernmental relations in Canada Today*, Toronto: Institute of Public administration of Canada, 1979, pp. 105-113; Albert Breton, "Supplementary Statement," Royal Commission on the Economic Union and Canada's Development Prospects, *Report Vol. III*, 1985; Richard Simeon, "The Political Context for Renegotiating Fiscal Federalism," in Keith Banting, et al, eds, *The Future of Fiscal Federalism*, Kingston: School of Policy Studies, 1994, pp. 135-148; and Roger Gibbins, "Democratic Reservations About the ACCESS Models," in Institute of Intergovernmental Relations, Queen's University, *Assessing ACCESS: Towards a New Social Union*, Kingston, 1997, pp. 41-44.

18. F. W. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration." *Public Administration*: (1988) 239-278.

19. Stephane Dion, "The origins of Quebec Nationalism," in R. Kent Weaver, ed. *The Collapse of Canada?* Washington, DC: The Brookings Institution, 1992.

20. For a thorough review of this debate, and a powerful critique of the Trudeau position, see Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*, Toronto: Oxford University Press, 1997.

21. "Constitutional Government and the two faces of Ethnicity: Federalism is Not Enough," in Karen Knop, Sylvia Ostry, Richard Simeon and Katherine Swinton, eds. *Rethinking Federalism: Citizens, Politics and markets in a Changing World*. Vancouver: University of British Columbia Press, 1995.

22. My initial intention was to label the German model "shared federalism," to capture the sense that governance is a joint responsibility of the two orders of government. I have used the term "integrated" instead, in order to avoid terminological confusion with Daniel Elazar's concept of "shared rule," which is the fundamental defining characteristic of all federal and multi-level systems of government.

23. *Federal-Provincial Diplomacy: The Making of Public Policy in Canada*. Toronto: University of Toronto Press, 1972.

24. A growing tendency in Canada, however, is to formalize intergovernmental agreements and to stress a model in which "national" standards and values are to be defined in a process of intergovernmental collaboration, and enshrined in intergovernmental agreements. The most notable example to date is the Agreement on Internal Trade (AIT), designed to strengthen the Canadian economic union. Similar initiatives are underway in social, environmental and other policy areas. Some observers see this as a move towards a more confederal system, in which the federal government plays a less and less important role in defining, enforcing, and financing national standards. For analysis and commentary on these developments, see Michael Trebilcock and Daniel Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade*, Toronto: C. D. Howe Institute,

- 1995; Richard Simeon, "Rethinking Government, Rethinking Federalism," Institute of Public Administration of Canada, forthcoming; and Institute of Intergovernmental Relations., *Assessing ACCESS*, op cit.
25. Yves Meny with Andrew Knapp, *Government and Politics in Western Europe* (New York: Oxford University Press, 1993), p. 288.
26. Yves Meny, with Andrew Knapp, *Government and Politics in Western Europe*, 2nd ed. New York: Oxford University Press, 1993. 288.
27. See Smiley and Watts, op. cit.
28. For example, Andre Brunelle, *Le mal canadien: Essai de diagnostic et esquisse d'une therapie*, Montreal: Fides, 1995. 182.
29. "Comparative Overviews: Canada," in Brian Galligan, Owen Hughes and Cliff Walsh, eds., *Intergovernmental relations and Public Policy* (North Sydney, Australia: 1991. 88-108, p. 104.
30. The term used in the constitution is "cooperative government." I use them interchangeably here.
31. This is a clearer statement of the federal principle than that found in the Interim Constitution, which stated that the legislative adhered for the Republic was the National Assembly.
32. Including: abattoirs, ambulance services, archives, museums and libraries, other than national on, liquor licences, provincial planning, cultural matters, recreation, roads and sport, and veterinary services.
33. Including S. 100, which provides for national executive intervention when a province "cannot or does not" fulfil a constitutional or legislative obligation. Here the centre may issue directives, or even assume direct responsibility, though for a limited term.
34. The first draft constitution had presented two possible options on this question. One was a plenary, unlimited power to legislate in areas of provincial jurisdiction; the other, which was eventually chosen, respects the federal principle more by specifying the conditions under which such a power can be exercised.
35. "Provinces must 'bake their own cakes.'" *Weekly Mail and Guardian* 15 November 1996.
36. Dr. Pundy Pillay, Director, Fiance and Fiscal Commission. "National-Provincial Financial Arrangements in South Africa." Paper presented at Conference of South African Officials, Ottawa and Winnipeg, April 1997.
37. J. J. Mulder, "Intergovernmental Relations in South Africa." Paper presented at a conference of South African Officials, Ottawa and Winnipeg, April 1997.
38. There remains considerable uncertainty about what criteria will be used to decide what category a particular bill fits into.
39. Bills tabled in NCOP are to be tabled in the provincial legislatures on the same day.
40. This is an important justification for the extensive federal controls over provincial budget matters, public services, etc. found in the constitution.
41. In Constitutional Assembly, 8 May 1996.
42. This dilemma was a central concern of a conference of South African Officials, organized by the Canadian International Development Research Centre (IDRC) and the Institute on Governance, Ottawa and Winnipeg, 7-11 April 1997.

43. The exceptions are KwaZulu Natal, and Western Cape, where the National Party Governs.