



HELEN SUZMAN FOUNDATION

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Colin Eglin

Colin Eglin holds a Bachelor of Science degree in Quantity Surveying from UCT. He interrupted his university studies for war service with the South African forces in Egypt and Italy between 1943 and 1945. He was elected to the Pinelands Municipal Council in 1951 and this started a long and distinguished career in South African public life.

He was a founder member of the anti-apartheid Progressive Party and served as the Leader of the Official Opposition between 1977 and 1979 and again during 1986. In 1994 he was elected as a DP MP where he became one of the architects of our democracy through his service in the Constitutional Assembly.

Mr. Eglin was re-elected in 1999 and served as Spokesperson on Foreign Affairs. He retired from Parliamentary life in 2004 but continues to play an active role as a Member of an Independent Panel to review the performance of Parliament. Mr. Eglin has consulted on constitutional law globally and has received numerous awards and honours including an honorary doctorate in law from UCT.

He serves as a Trustee of the Helen Suzman Foundation. Mr. Eglin was recently honoured in Italy for his contribution during the Second World War.

Profiles

Mangosuthu Buthelezi

Prince Mangosuthu Buthelezi is the son of Inkosi Mathole Buthelezi, traditional Prime Minister of the Zulu Nation, and Princess Magogo, sister of King Solomon ka Dinuzulu. After studying at the University of Fort Hare, he left his legal career to become Inkosi of the Buthelezi Clan.

In 1972 he became Chief Executive Councillor to the KwaZulu Legislative Assembly and later Chief Minister of KwaZulu. He was Minister of Home Affairs for the first ten years of democracy, and Acting President on more than 20 occasions as South Africa's most senior statesman. He has travelled extensively throughout North America, Europe, Africa and the Middle East, and has received numerous awards for his contribution to humanity and peace in South Africa.

Prince Buthelezi currently leads the Inkatha Freedom Party, South Africa's largest black opposition party. He founded Inkatha in 1975 as a cultural liberation organisation committed to self-help and self-reliance. These remain the tenets of the IFP. He is also Traditional Prime Minister of the Zulu Nation and Chairperson of the KwaZulu-Natal House of Traditional Leaders.

Sediane Montsitsi

Mr. Sediane Danny Montsitsi is a former executive member of the South African Students' Movement (SASM) from 1971-1975. From November 1976 - June 1977 he was President of the Soweto Students' Representative Council at a time of great political distress and uprising. He was imprisoned on Robben Island from 1978-1983.

Mr. Montsitsi is an ANC MP. He currently chairs Parliament's Constitutional Review Committee and is enrolling for a Masters' Course in Knowledge Management at Rhodes University.



Sandra Botha

Sandra Botha was an activist for many years in the Free State Province before becoming a candidate for elected office. She became a Member of Parliament in 1999 and has had a stellar career in Parliament.

She served on various Select and Joint Committees of Parliament and served as the Chairperson of the Democratic Alliance Parliamentary Caucus. In 2004 she was honoured by being appointed as Chairperson of the House, a position she has subsequently relinquished. Botha was elected as the Leader of the Official Opposition in the National Assembly by the Democratic Alliance Caucus in 2007.

Her policy interests vary and include women's issues, issues affecting the African continent, human rights and economic policy. Her personal interests embrace art, architecture, travel in Africa and reading.



Vinothan Naidoo

Vinothan Naidoo is a Chief Researcher at the Human Sciences Research Council. He has a Masters degree in Political Studies and is currently completing a Doctorate in Political Studies at the University of Cape Town.

He has eight years of research experience in private consultancy and research think-tank environments, with interests in public and development management, as well as governance. Recent governance research includes a study on fraud prevention planning in the public service, and a study on parliamentary oversight and accountability. His doctorate is concerned with the issue of administrative capacity, and is aimed at identifying factors that influence the capacity of public organisations to carry out development programmes.

His most recent research has involved researching the place and performance of provincial governments in South Africa's current inter-governmental model.



Paul Hoffman

Advocate Paul Hoffman completed his BA, LL.B at the University of the Witwatersrand in 1974. In 1975 he was admitted as an attorney practising in Johannesburg, having served articles at Bowen Sessel & Goudvis concurrently with his part-time LL.B studies. He practised as a litigation attorney in Johannesburg and Cape Town with Bowens, Herold Gie & Broadhead, Roup Schneider and Wacks and Syfret-Godlonton Fuller Moore Inc. (now Cliffe Dekker Inc) between 1975 and 1980. He was admitted as an advocate in 1980 and practised as a junior at the Cape Bar until 1995 – many of his cases have been reported in the South African Law Reports and Industrial Law Reports.

Advocate Hoffman was the founding editor of Current Law Cassettes, and a part-time lecturer in law of contract and public international law at the University of the Western Cape. He also contributed to De Rebus and Consultus and was a Small Claims Court Commissioner as well as a Labour Appeal Court Assessor. He took silk in 1995 and continued to practice at the Cape Bar. He was also a member of AFSA (commercial and labour arbitration panels).

Both in 1997 and 1998, he accepted an acting appointment for one term on the Cape High Court Bench at the invitation of J.P. Friedman. In 1998 he accepted an acting appointment for one month on the Cape High Court Bench at the invitation of J.P. King, and in 2001 he accepted an acting appointment for one month on Cape High Court Bench at the invitation of J.P. Hlophe.



Raenette Taljaard

Raenette Taljaard is the director of The Helen Suzman Foundation. Taljaard, a former DA MP, served as Shadow Minister of Finance from 2002 and was a member of the Portfolio Committee on Finance. She also served on numerous other parliamentary committees, including the Standing Committee on Public Accounts during the arms deal investigation.

Taljaard lectures part-time at the University of the Witwatersrand's School of Public and Development Management and locally and abroad on the regulation of private military and security companies.

Taljaard is a Yale World Fellow, a Fellow of the Emerging Leaders Programme of the Centre for Leadership and Public Values (UCT's Graduate School of Business and Duke University) and a Young Global Leader of the World Economic Forum.

Taljaard holds a BA in Law, RAU (University of Johannesburg), a BA (Hons) in Political Science, cum laude, RAU (University of Johannesburg), an MA in Political Science, cum laude, RAU (University of Johannesburg) and an MSc in Public Administration and Public Policy, cum laude, London School of Economics and Political Science.

Taljaard publishes widely.



HELEN SUZMAN FOUNDATION

*Refinement or fundamental redesign?
The future of the provinces*

Friedrich Naumann
STIFTUNG **FÜR DIE FREIHEIT**



Introduction

Introduction

The Helen Suzman Foundation started what has become the Quarterly Roundtable Series about a year ago in December, with our first Roundtable looking at the role and impact of political culture on democratic institutions. The series has become quite an institution, and we're very pleased to present a Roundtable to you today which is going to look at the refinement, or fundamental redesign – the future – of South Africa's provinces. We'd like to acknowledge the Friedrich Naumann Foundation and their financial support. Without them this event would not be possible.

I'd like to hand over now to Mr Eglin, our Chairman, who needs very little introduction. He will briefly be introducing the other speakers, but if I can be so bold, I would like to introduce my former colleague, who will always live in my heart because, in 1999, I was the youngest, and he was the oldest, at that stage, parliamentarian. We shared that honour together and it

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was a very special engagement, and I very frequently deferred to his experience and opinion in caucus. I still do, on many matters of constitutional law and on contemporary politics. I'd like to hand over to you, Colin, to introduce your fellow panellists and to commence proceedings. Thank you very much.

RAENETTE TALJAARD



Welcome

Thank you. Welcome, everybody. I think this is going to be an interesting discussion, because it's an interesting subject, and I think many of you are aware that the issue of the provinces, provincial powers, and provincial boundaries has been on the front burner of political debate or discussion for a long time.

As we go back a few years, we will recall that when we all met together for the first time after the unbanning of the African National Congress [ANC] and the release of Mandela, starting on our negotiations, one of the early issues was the character of the state. Is it going to be completely federal, or is it going to be completely unitary? Was it going to consist of a central government, weak, with strong provinces, or was it going to have a strong central government with either weak, or no provinces? In the end, in the course of the discussion, with the realities of politics in South Africa and of the demographic distribution of people, the cultural differences and the regional

priorities, the compromise, which favoured a form of federalism, was reached, in which nobody who's a purist in federalism would say it was a federal state, but it did involve creating a number of provinces. Those provinces have got powers written into and entrenched in the constitution. To that extent, it was a massive decentralisation of power.

When one looks at the powers themselves, they become much more complicated, and I think this is why the discussion goes on, and where the work is going to be in the question of the restructuring, if necessary, of the provinces. The provinces have exclusive powers, but they also have concurrent powers. The important categories of health, education and housing, for instance, are concurrent, and while the provinces have certain rights there, they're overriding rights, rival to central government. The provinces also have devolved powers. The central government can ask them to take over

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certain responsibilities on its behalf. Then there's a clause, or a section, in the constitution, on what is known as co-operative government, which requires that all the levels or tiers of government have to co-operate with each other and support one another. That also creates certain obligations on the various tiers.

I raise this to say it is a fascinating, complicated issue, but one of extreme importance. It comes on to the front burner at the moment because, at the end of July, Sydney Mufamadi, the cabinet minister for Provincial and Local Government Affairs, said they were starting a process of re-examining the effectiveness of the provinces, in particular, with the view to getting new white papers, government statements of policies on provinces and on local governments. In very specific terms he says this: the policy of the cabinet is [based on] whether the central objective of our government, which is to serve the people, is advanced by the current provincial arrangements. The expectation of all South Africans, like citizens of any other country, is to have a more responsive, accountable, efficient, equitable, affordable government, and a better quality of service. So he was looking at all of these factors put together, and the question is, is the present package working adequately, but if it's not working adequately, can it be improved? And if it's working adequately, the thing is working, and don't try to destroy it.

Be that as it may, we have here a cross-section of speakers from across the political spectrum. On my right I've got Prince Mangosuthu Buthelezi, who certainly needs no introduction from me. He's known for his very, very strong views on the decentralisation of power, and on the whole question of federalism as a very important part of the philosophy of the South African constitution, and he made a significant contribution to that during the period of the [constitutional] negotiations. Mr Sediane Danny Montsitsi, on my left, is the Chairperson of the Constitutional Review Committee of Parliament. This is not a committee created by Parliament, it's created by the constitution. I served on it for some five years – it's a very difficult committee to chair, because nobody quite knows where a mandate starts and where it ends. At any rate, he is an expert on the constitution and on constitutional provincial matters. Sandra Botha, on my left, the leader of the Democratic Alliance [DA] in Parliament. Sandra was for some years on the National Council of Provinces [NCOP], and so in that sense she was intimately involved with the provincial arrangements and how they work in relation to the constitution. Then we've got Mr Vinodhan Naidoo, who is a Chief Researcher of the Human Sciences Research Council, which has been intimately involved in examining the functioning of the various organs and levels of government. And Paul Hoffman, Senior Council, who is Director of the Centre for Constitutional Rights of the FW de Klerk Foundation. He's not only knowledgeable, he's also quite vocal, and he's written a number of pieces on constitutionalism insofar as it effects the efficiency of service and delivery. These are our panellists today. Mr Naidoo, will you start please?

COLIN EGLIN

WELCOME



Vinothan Naidoo

Thank you very much, Dr Eglin. I think the fact that we can all probably speak to different aspects of this debate is really the critical thing, given Dr Eglin's reference to how complex this question is. Most of my work, particularly over the past three months, has looked at the provinces as a set of organisations, as most of it looks at public administrations and the functioning of public organisations, and I became interested in this question from that angle. I think it was in May this year that I began to take an interest when, in addresses to the NCOP, the concern that senior ministers expressed about provinces in our inter-governmental setup seemed to be about the number of institutions that have been spawned connected to the provinces, whether the country had a sufficient skills endowment to run these organisations. The issue tended to be about capacity, and I think underlying that was a concern about the extent to which national government could oversee and manage the provinces, which could be a bit problematic.

I began to look at that and some recent research that we've been doing, and I would suggest that there's a sufficient empirical basis for the argument – which would support these concerns about the optimal functioning of the provinces as a set of public organisations – that a

I would suggest that there's a sufficient empirical basis for the argument that a reduction in the number of provincial organisations... should not necessarily be considered the only option we have, nor necessarily the most desirable

reduction in the number of provincial organisations, or indeed rationalisation of the provinces, a reduction in their number, should not necessarily be considered the only option that we have, nor necessarily the most desirable. This might satisfy the more immediate concerns of national government, but there's a great deal of data which supports the need to stabilise and strengthen provincial organisational structures. I believe that that is a perspective that we ought to be taking seriously, rather than a reduction in the number of provinces.

I think there's been a great deal of effort since 1994 in trying to increase the amount of discretion and responsibility that provinces have over their budgets, and the management of their allocated monies. We can look at the Intergovernment Fiscal Relations Act (IGFR) of 1997, or the Public Finance Management Act (PFMA), with the assumption by provinces of greater management of departmental budgets within their particular spheres. So there is movement away from the basis of allocating monies on a sector basis, but rather on a provincial basis, which allows provinces to organise their budgets based on provincial priorities. I think the encouragement of provinces to develop strategic plans is another indication that there has been a

movement to provide some autonomy for provinces, to think about their strategic priorities, and how they will be addressing them. One of the areas that needs to be addressed is the resourcing of provincial legislature. The fact that they make up less than 1% of provincial allocations probably doesn't give them enough space to perform effective oversight, which I think is a need. It's an area that needs to be looked at before considering the reduction of the number of provinces.

Based on other research that I've looked at, I think that expenditure volatility is as great, if not more of a concern, than under-expenditure. When I looked at some of the figures using Treasury documents, for example, it was evident that when capacity issues were addressed in the provinces, spending did improve.

It wouldn't be fair to separate out the provinces and debate about skills, because there are certainly serious issues with vacancies at national department levels

These are some of the issues one needs to look at before going down a road where we might want to reduce provinces, and thinking that in some instances they may become a burden. A number of steps have been taken to consolidate the discretion of provinces in terms of how they manage their functions and their budgets. We've also done some research that has demonstrated to me that the issue of capacity and sufficient skills endowment cross-cuts all government. It wouldn't be fair to separate out the provinces and



Vinothan Naidoo



debate about skills, because there are certainly serious issues with vacancies at national department level, as well as provincial department level.

Another issue is a discrepancy in the senior manager-subordinate relationship. Figures I've looked at have shown that the ratio of provincial senior managers to the rest of staff is about 1/180, whereas the figure is 1/53 at national department level. That's a huge discrepancy, given the fact that provinces have an implementation mandate. That is one area that perhaps ought to be addressed before we consider a reduction in the number of provinces. The challenges that government currently has in managing its human resources cut across national, as well as provincial and local levels. It's a concern that has been expressed by government itself. All of this, for me, suggests that there is evidence to support a need to get the

internal organisational workings of our public organisations right, before we seriously contemplate major structural changes. The reason I would argue that point is that I believe that reducing provinces, for example, or rationalising them and reducing institutions, might serve a more immediate interest or concern in managing the provinces from a national perspective, but we ought to be taking a longer-term perspective, which says, let's look at our organisational mechanics. Are our public organisations functioning as effectively as they could be? And once we get those fundamentals right, then one could look at whole structural changes. There's quite a bit of work to be done, I think, at the provincial level to stabilise those structures and strengthen them, rather than the more immediate concern of reducing the burden on the national level to oversee the provinces.



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Vinothan Naidoo



Paul Hoffman

It's a privilege to be with so many politicians and political scientists when I'm merely a lawyer, and perhaps the thorn among the roses in today's panel. But the fact that the centre for which I work is a political non-aligned body doesn't mean that we are not interested in upholding the values of the constitution, and the Centre for Constitutional Rights is indeed honoured to have received the invitation from the Helen Suzman Foundation to take part in these deliberations. In view of the time constraints, I want to confine myself to three critical points in the debate. The first is, what exactly have we got with our present dispensation? Secondly, why do we have what we've got? And thirdly, where are we headed with the future of our provinces?

Section 40 of the South African constitution contemplates a provincial dispensation or a sphere of government known as provinces, which has quasi-federal characteristics, somewhat akin to the German federal model. Quite different to the competitive federation of states, which we all know from the United States of America, and certainly not a unitary system of centralised government, such as exists in France. The overlapping spheres to which Colin referred in his introductory remarks have some areas of separate responsibility, and

Section 40 of the South African constitution contemplates a provincial dispensation or a sphere of government known as provinces, which has quasi-federal characteristics, somewhat akin to the German federal model

some in which responsibility is shared. The principle of subsidiarity is at play in our current dispensation. This entails bringing the government closer to the people by bringing service delivery and accountability down to the local and provincial spheres in those areas of government of most concern to the ordinary people. Esoteric matters like foreign affairs and defence are the preserve of national government, and obviously, at the local sphere of government, the municipalities have their more mundane tasks.

The use of the words "spheres of government", rather than tiers or levels of government, was, I think, quite consciously made by the founding fathers, some of whom are on the panel today. It was to get away from the idea of top national, bottom municipal, with the poor old provinces being the proverbial ham in the sandwich between those upper and lower levels. The spheres gives one the idea of three intersecting circles, with some overlap and some areas in which they operate separately.

In a country as large as South Africa, and as diversely populous, there's much to be said in favour of this principle of subsidiarity. It's difficult for a centralist bureaucrat in Pretoria to dictate one-size-fits-all solutions for situations as economically, demographically and socially

Paul Hoffman

diverse as those in Limpopo, Gauteng and the Western Cape. If I can give you an example there, the rate of crime in Limpopo is one quarter of the rate of crime in the Western Cape. Of course, the Western Cape is the crime capital of South Africa, and if you have such different social problems relating to crime in two different provinces at opposite ends of the country, different solutions, different resources, different capacity needs to be brought to bear. Speaking more generally, programmes that might work in provinces with high population densities, such as KwaZulu-Natal, might be completely unsuited to sparsely populated and extensive regions like the Northern Cape. Also, the substantial majority of our population do not have an adequate working knowledge of the English language, but they do have an absolute constitutional right to be served in the regional languages that they understand, and such services can best be provided by provincial governments. So a system of quasi-federal government is in place in the new South Africa. Second question: why did we hit upon the system that we have? Here I have to

disagree publicly with my friend and former colleague in chambers at the Cape Bar, the Deputy Minister of Justice, Mr Johnny de Lange. The provinces as constituted at present are not, Johnny, a relic of British colonialism at all. They are not even a hang-over from the colonialism of the Nguni tribes who displaced the Koi and the San peoples, who have the best claim to being the indigenous inhabitants of what is now South Africa. It is true that the old Cape and Natal were once British colonies, but there were also Boer republics in the old Transvaal and the Orange Free State. As long ago as 1910 all of that came to an end with the formation of a four-province union. During the apartheid years, that union, later republic, was organised into a host of independent or quasi-independent homelands, which were excised from the provinces in the pursuit of grand apartheid. All that is in the past now.

Our present provincial setup is the product of the negotiations that gave rise to our new constitutional order. This is significant enough to stress. Ours is not a constitution bequeathed to us, or, worse still, foisted



Paul Hoffman



upon us, by a departing colonial power. It was painstakingly home-grown in Kempton Park and it was refined in Parliament. It is the product of a national accord struck by representatives of the vast majority of the people in our lovely land.

How, then, did the provinces and their powers come to be agreed upon? The ANC came to the negotiating table with a unitary state in mind. The smaller parties, particularly the Inkatha Freedom Party [IFP] and the now defunct National Party, brought strongly federal proposals with them. A compromise was thrashed out, and that compromise is what we have, a quasi-federation with three distinctive, interdependent, interrelated spheres of government. One of these consists of the nine new provinces, some of which we know from the past as areas which fielded rugby teams, like the Western Cape, and some which are refreshingly new and have interesting names.

The final question I promised to address is, where are we going with our provinces?

The short answer is that nobody knows for sure. Minister Mufamadi has given his assurance that the review process has only just begun, and that its outcome is not a foregone conclusion. This is as it should be in a democracy. Any suggestion that provinces be dispensed with, or radically altered, would have to be dealt with in a democratic manner too. The Constitutional Court has, in the past, insisted upon proper consultation with the people affected when some relatively minor tinkering with the cross-border municipalities of Matatiele and Khutsong was undertaken. If whole provinces are to disappear or combine, then I want to suggest that the best and most democratic way to go about such a process is a referendum in the affected provinces, in which the people so affected must themselves decide whether they wish to have the status quo interfered with in any way. Unless there is a process of this kind, loyalty to the constitution, which is required of all spheres of government in section 41 of the constitution, may come into conflict with the goals of the National Democratic Revolution still being pursued

by the ANC (but not always its alliance partners, if one is to believe what one reads in the ANC Today).

One of the central objectives of our constitution is to diffuse power through our polity by such means as the separation of powers, the Chapter Nine institutions, and the establishment of three spheres of government. It is questionable whether this aspect of our constitution is reconcilable with the National Democratic Revolution's goal of consolidating all the members of state power in the hands of a single movement.

This is really the crux of the debate. Are we going to have a dispensation in which all power, in all parts of the country and in all institutions of the state, resides in the hands of the single supreme organisation, or are we going to devolve power throughout our society? Abolishing the provinces without any referenda in pursuit of that centrist supreme power or idea would be untenable. An example would be the decision to incorporate Khutsong into the North West province. That has been vehemently rejected

by the people concerned. Can one imagine what the reaction of the people of KwaZulu-Natal and the Western Cape would be to the abolition of their provinces, or to their incorporation into other entities?

None of this would be good for international investment, and it would certainly earn the country severely bad marks when next the African Peer Review Mechanism places us under its microscope. It would also not solve the problems of our basket-case provinces, which are not structural in nature, but are based upon what the Supreme Court of Appeal has called the "terminal lethargy of public servants" in those provinces. This terminal lethargy has been referred to by senior judges who are given to behaving in a sober and considered fashion, and has been raised in the context of the failure of service delivery to the neediest of the needy in our land. The poorest of the poor are entitled to have social-welfare grants and to pensions. They simply don't get paid, not because there's a problem with the structures, but because of terminal lethargy of the public servants. Thank you Mr Chairman.



Paul Hoffman



I feel that a constructive and realistic discussion on the future of our provinces must proceed from gaining a better understanding of their genesis

Mangosuthu Buthelezi

I feel that a constructive and realistic discussion on the future of our provinces must proceed from gaining a better understanding of their genesis. Unfortunately the genesis of our provinces is one of those chapters in our process of negotiations from apartheid to democracy, which has often been erroneously reported on and analysed. I think it's important that, on an occasion such as this, one makes the effort to correct the record and appreciate what really happened.

When the ANC was unbanned and the process of negotiations began, the ANC was prepared to compete for and seize power, but was ill-prepared to negotiate a constitution. Its fundamental policy document was the Freedom Charter, and the Freedom Charter did not go into detail of how a democratic government should be organised, whether we should have provinces, whether we should have regions or states, and whether the constitution should have a bill of rights containing second- and third-generation human rights, or whether there should be a Constitutional Court, and so on and so forth. Partially to respond to its ill-preparedness, the ANC took the negotiating position that we should have an immediate election for a straight run towards a Constitutional Assembly, which would then decide all the relevant constitutional issues. The ANC did not want

to have a democratic constitution before the first democratic elections, and to bridge the gap between its position and that of all other participants, including ourselves, the two-stage process of an interim and a final constitution was then designed.

Seeing itself as gaining power, the ANC was not inclined to fragment the organisation of power in any way. When confronted with the issue, it indicated its absolute preference for a unitary state. The IFP requested that the entire negotiation process form a preliminary discussion of and determination on the issue of the "form of state", which was whether South Africa should be a unitary state, a provincial, a federal or a confederal one. The ANC, with the acquiescence of the National Party, did everything in its power to avoid the issue of the form of state, to the point of proposing the absurd notion that it should be pigeon-holed while the rest of the interim constitution was being drafted. Now, in so doing the possibility of establishing a federal state was surreptitiously eliminated. What was being drafted was a standard constitution, incompatible with the features required of a federal constitution, which dovetails with or sets a framework for constitutions to be adopted by member states. When the ANC refused to allow a debate on the form of state, and it became clear that the negotiation process was irrevocably aimed at a substantially unitary

state, the IFP walked out in protest, and this led to the finalisation of a draft interim constitution in September 1993, which made no provision for provinces to be established by such constitution. It only provided for a commission on regionalisation, which was charged with the task of looking into the issue of whether provinces or regions were to be established at a later stage, and with preparing a report for the Constitutional Assembly to decide on the matter. Therefore South Africa would have had no provinces as per 1994, and provinces or regions would have been established only if, and to the extent that, the Constitutional Assembly so decided, and would have come into reality only after the 1999 election.

It is obvious that the same ANC which did not want to have provinces during the negotiation process would have ensured that the Constitutional Assembly would not establish them. The National Party had agreed to all this, and the Democratic Party had been unable to stop it. From outside the negotiation process, we made it clear that we would have no part in a constitutional dispensation of such a nature and in a new South Africa established thereunder. And this led to a new negotiation being opened outside the World Trade Centre, which began considering the retention of provinces.

The compromise was that the original four provinces would be transformed into ten, which included the splitting of Kwazulu-Natal into two provinces, as was done for the Cape Province. We found this latter feature utterly unacceptable, and Kwazulu-Natal was retained as a single province, albeit with some territorial losses which favoured the ANC.

As the draft interim constitution was amended in haste, and towards the end of the process, the provisions relating to the Commission on Regionalisation were retained, even though they had become redundant and somehow nugatory of the power of the Constitutional Assembly. Now,

Whether or not the powers of provinces were “substantially” reduced was the most controversial, debated, and time-consuming aspect of the process through which the Constitutional Court certified that the final constitution complied with the binding constitutional principle

these provisions became totally inconsistent with the interim constitution when, in March 1994, the IFP forced a final amendment of the interim constitution, already passed by Parliament, to introduce an additional constitutional principle to bind and limit the discretion of the Constitutional Assembly, requiring that a constitutional assembly could not “substantially” reduce the power given to provinces in the interim constitution. The IFP and the National Party squabbled a lot about the word “substantially”, which we ourselves found to be too loose. We wanted it to be substituted with the words “in substance”, but the National Party failed to understand that, or appreciate the difference. In the end, the word “substantially” was the loophole through which the ANC managed to pass a final constitution which dramatically reduced the powers of provinces.

Whether or not the powers of provinces were “substantially” reduced was the most controversial, debated, and time-consuming aspect of the process through which the Constitutional Court certified that the final constitution complied with the binding constitutional principle. History, Mr Chairman, will undoubtedly take a dim view of that aspect of the Constitutional Court’s judgement, which was based on the comparison of a list of provincial powers between the interim and the final constitutions and other prosaic features, rather than a genuine assessment of whether provinces in the interim constitution could enjoy a greater degree of autonomy than



those established in the final constitution. That was the beginning of the end of provincial autonomy.

This shows that in the Constitutional Assembly the ANC maintained its intention to reduce the powers and functions of provinces as much as possible, and, in fact, did so much more than was allowed. After the adoption of the final constitution, the ANC tightened the screws on the provincial autonomy as much as possible, and in any way possible, to recreate an effectively unitary state. A complex framework of inter-governmental relations was

After the adoption of the final constitution, the ANC tightened the screws on the provincial autonomy as much as possible, and in any way possible, to recreate an effectively unitary state

progressively established, creating the legal perception and the administrative reality of a relationship of subordination between national government and provinces, which replaced the constitutional parity between the two spheres of government. Under the interim constitution, albeit binding from a political and administrative viewpoint, the chains of inter-governmental relations were still portrayed as voluntary. MINMECs

[co-ordination committees of ministers and provincial members of the executive councils (MECs)] were established to bring together the national minister with his nine provincial counterparts, and the same was developed in respect of directors-general and even lower-ranking officials. The President complemented this scheme with the President's Council, in which he convened the provincial premiers, and then took it one step further, at times convening even the provincial directors-general in the premiers' offices. Effectively, during these meetings, the President has been setting out national and general policies under the guise of consultation. The pyramidal image could not have been set out more clearly. All this created a reality in which all provinces feel bound to act in the same fashion, adopt the same policies, and be part of a concert played from the same music sheet, written by the national policy-makers. The final constitution brought this system to the next stage by legalising it, and creating the basis for it to become mandatory. The lamb was forced to lie side by side with the lion. As I have stated in the past ten years, provinces have been transformed into mere implementers of national policies, and have become part of a conveyor-belt of power which emanates from the centre.

To sanction this approach, Parliament has in the past 12 years adopted legislation on all matters which are constitutionally provincial functional areas, and has done

so in a very specific manner. It has set out what the national government is to do and what provinces are to do, describing their respective roles; the dividing lines of their powers; the mechanism of co-ordination, which ends up giving supremacy to the national level; and other aspects of the relationship between these two spheres of government. Effectively, national legislation has covered the field in its entirety in almost all aspects that the constitution prescribes to provincial autonomy.

The IFP in the KwaZulu-Natal government challenged this approach before the Constitutional Court in the landmark case of the National Education Policy Act, which was still a tame example of this type of legislation, as compared to what came down afterwards. The Constitutional Court correctly ruled that there was nothing wrong with the act because the act was only binding to the extent that provinces did not choose to adopt contrary legislation. Provinces were being walked all over, but had the opportunity to stop it at any time by writing their own laws regulating the matter as they wanted. If they failed to do so, there was nothing the Constitutional Court could do. In fact, provinces have as much power to legislate on provincial matters such as health, education, environment, etc, as the national government does, and provincial legislation prevails over conflicting national legislation as a rule, except for the specifically listed cases in which national legislation overrides the provincial one. One of the major contributions to constitutional autonomy in the negotiation process, relating to the IFP, was a strenuous negotiation of such overrides – to reduce them, if not eliminate them, as happens in some federal systems. The overrides were set out in section 126 of the interim constitution, and are now contained in section 146 of the present constitution. The scope of such overrides increased as we moved from the interim to the final constitution, which is one of the ways in which the powers of provinces have been substantially diminished – in addition to tying provincial autonomy into the forced system of inter-governmental relations, the actual reduction of their list of powers and functions, and the reduction of provincial constitution-making.

Still, a great deal of provincial autonomy exists. One can, for instance, think of the functional area of consumer protection, which was specifically demanded by the IFP and conceded to our negotiators by Mr Valli Moosa, then representing the ANC. By itself, this is a power which could enable provinces to reach into almost any field of society, yet

Provinces were being walked all over, but had the opportunity to stop it at any time by writing their own laws regulating the matter as they wanted. If they failed to do so, there was nothing the Constitutional Court could do

it has never been used. Most provinces have not exercised their powers. As we predicted, the constitution and the unitary system of politics have had a chilling effect on provincial legislatures. For this reason, we argued that in an African context one must have a typical federal system, with mutually exclusive and mutually limiting powers. Even in KwaZulu-Natal the IFP never had the power to do what it really wanted, because it was constantly in a coalition government with the ANC, in which it sought to find compromise and reconciliation for the greater good of the country. Yet we tried to push the constitutional envelope as much as we could on a variety of issues, recording a few instances in which provincial autonomy has been ever asserted against the central government in our new republic.

The fact that provinces have been lame ducks, providing no initiative and developing no policies, is clearly demonstrated by the fact that the Constitutional Court has never adjudicated a single case in which it had to apply one of the overrides to solve a conflict between provincial and national legislation. The only real conflict brought before it was that between KwaZulu-Natal and the national legislation relating to the central monitoring system required to regulate gaming activities. The conflict could not have been clearer, and the right of KwaZulu-Natal to do as it wished could not have been more unquestionable, because that province was doing what the central government

required, but was doing it itself rather than allowing the central government to do it. In that case, the Constitutional Court stopped short of entering into the merits of the issue, using another provision in the constitution, which has a chilling effect on provincial autonomy as it prevents courts, in fact, from adjudicating a conflict between

The national government has taken a comprehensive attitude, aimed at emasculating and eradicating provincial autonomy rather than supporting it

spheres of government until and unless all other ways to solve such conflict through negotiations have been exhausted. This rule applies equally to the lamb and the lion, but effectively means that the lamb may never get justice as it suffers as lambs do when they deal with lions.

The other major case in which a province challenged the national government was when the province of KwaZulu-Natal joined in the action brought to compel the whole of our government, when I was still in the cabinet myself, to distribute Nevirapine to prevent mother-to-child transmission of HIV/Aids.

The province of KwaZulu-Natal adopted a number of other laws in which it showed the capacity and willingness to think for itself, ranging from traditional leadership to agriculture, horse-racing, transport and other matters. Admittedly this record is not as good as it could, and perhaps should, have been, but it is the only one of its kind in the country. A cursory review of the legislation adopted by provinces shows that provincial legislatures may have become redundant. There is very little provincial legislation, and most of it is of no real consequence. The national government has taken a comprehensive attitude, aimed at emasculating and eradicating provincial autonomy rather than supporting it.

As we have often suggested, instead of passing legislation in provincial matters, the national government could have sent provinces uniform laws for provincial legislatures to adopt with whatever

amendments they saw fit, which would at least have forced provincial legislatures to apply their own minds to the overall regulation of a subject matter. This was done on the single occasion concerning the laws on the Houses of Traditional Leaders, which is Act 41 of 2003, which, obviously, the interim constitution had barred the central government from legislating.

The IFP introduced, at the World Trade Centre, the notion of provincial constitutions, which was fiercely fought by the ANC until it became a concession to the IFP. In the end, the meaning and purpose of constitution-making at the provincial level also became meaningless. The province of KwaZulu-Natal tested the boundaries of this power by unanimously adopting a constitution on 15 March 1996, which was drafted on the basis of the notion that the provincial constitution is able to deal with matters for as long it does not directly or indirectly contravene any provision of the national constitution. The ANC was part of this approach. In other words, it supported this, and supported the provincial constitution, but it then turned around and opposed its certification by the Constitutional Court, acting both as a party and as the central government. The Constitutional Court went with their argument and ruled that a provincial constitution can only deal with that which it is specifically empowered to do by the national constitution, applying a standard which is even stricter than the relationship between legislation and implementing regulations, for instance. The final constitution reduced the scope of provincial constitution-making even further, with the end result that the only purpose for which the provincial constitution of the Western Cape was adopted, was that of increasing the members of the executive council, which is the only purpose for which the ANC wanted to pursue constitution-making in KwaZulu-Natal. That's why it aborted, because all they wanted was to appoint more ministers.

I could continue this background for many hours, but I think that what I have said offers sufficient support to the proposition that for 15 years the ANC has been consistently opposed to provincial autonomy, and has done as much as it could

to constrain and limit it. We are here today because the issue of whether or not there is a purpose to provinces remaining part of our constitutional dispensation is ripe and real. The ANC has the two-thirds majority required to do with the constitution as it wishes. At the World Trade Centre, we sued for a federal nation which entrenched indestructible provinces in an indestructible union, but the ANC rejected it. Therefore, in all likelihood, they wish to abolish provinces. Even if they don't, it doesn't really matter, because provinces as centres of legislation and policy-formulation have in fact already been abolished or stillborn. Having said this, one might wonder why should we still care, and what there is to be done. We should care, I think, because our country is unequivocally going down the path of institutional degeneration which has seen the collapse of other African countries.

That is the path on which everything is progressively concentrated at the centre, and then the centre is left to collapse under the weight of its burdens. The productivity of our government is rapidly diminishing. The flurry of its activity – workshops, meetings, conferences and papers – translates into progressively less and less service delivery. We are entering the spiral of diminishing returns for any quantity of effort or resources put towards a given task. Dealing with this issue from an institutional viewpoint is not sufficient. The unitary nature of our present state is a reflection of the compulsory unitary nature of our political system. The ANC is a unitary party, governed by a small ruling elite, and this produces a unitary system of power which is well reflected in a unitary state in which provinces are forced into this mould. When a substantial number of elected political representatives owe their power and accountability to their voters rather than to the party bosses, we begin seeing power, which would happen if my friend Van Zyl Slabbert's recommendations were accepted. No effort can be spared to counter centralisation, and the tools through which it is implemented. Legislation which institutionalises governmental relations must be opposed. Pressure must be placed on provinces to address constituency needs



directly through their own legislation and by implementing actions, rather than bringing such needs to the attention of the government. Through debates, articles and analysis we need to promote the awareness that what is good in one province may not be suitable in another province. Unless we reverse this mindset, the entire chapter in our constitution dedicated to provincial autonomy could just as well be non-existent. It would be more honest to do what the National Party did when it abolished provincial councils, leaving only an administrator to run provinces, so as to reflect the notion that provinces had become mere administrative implementers of national policies and legislation, which is exactly what our provinces are at present. Unless we reverse the present legislation and spare no measure in such effort, we must accept that our first republic, as portrayed in the interim and final constitutions, has indeed lapsed, and we are now entering a second republic, characterised by a unitary state, constructed under the dictates of politics rather than the rules of a constitution. This would be a major setback, not only for our democracy, but also for the rule of law, which is unfortunately far from having replaced the rule of man in our country. Thank you.

Buthelezi



Sandra Botha

Power has drifted from society to state, from provincial to national level, from the legislature to the executive, and, within the national executive, from cabinet to the presidency

It's almost soporiferous to say that in government terms South Africa is unrecognisable from pre-94. Our constitution is full of carefully weighted counter-balances to power. From an academic perspective it could almost not be better, but as Richard Calland asked, does it work in practice? Does it release democratic power to serve the people or merely tie it up in procedural and institutional labyrinths? In deference to the experts I have here, I've taken a view of the political landscape against which this question is to be posed, rather than a technical one, and that is short-hand for saying that I could never do it as they can do it, so I've decided to avoid the issue of the detail of provinces.

There's a relatively clear allocation of responsibilities to three spheres of government. The constitution is free, and for this we can thank people like Colin Eglin. Under President Mbeki, however, the system of government has seen growing tension between its constitutional form and the reality of growing centralisation in the state presidency. Power has drifted from society to state, from provincial to national level, from the legislature to the executive, and, within the national executive, from cabinet to the presidency. Just consider one of the issues that we've seen: the appointment of premiers and mayors

directly from that position. A powerful presidency is almost an intuitive response to the challenges of service delivery and policy co-ordination. However, it can also provide a vehicle for personalised rule. It can be abused to exercise unaccountable power, and succession problems are likely to arise as factions compete for a prize that no significant political or economic actor dare leave in the hands of others. The ANC dominance is now up to almost 75% of the representation in the National Assembly after the last cross-over period, and it can hardly be blamed for its dominance, but this obviously raises serious questions about the sustainability of multiparty democracy and the survival of the counter-balancing powers at different determined sites in the constitution.

Dutch commentator Jacques van Doorn says that "power is never in good hands". I think he's right. It is essential to retain a large number of power centres. This includes the separation of powers and the divisions between government and opposition, the public and the private domain, church and state, and government and the media. We have already seen it a few times, and we've lately again seen the pressure on the media as exercised by the Minister in the Office of the President, threatening to withdraw advertising because the Sunday Times dared to publish

as they did. Mass democracy, however indispensable it is for democracy, offers no guarantee against the abuse of power from one political centre.

The clearest indication of the ANC moving towards aligning the structures of government with this organisational change is to be seen in the proposed centralisation of the public service, and, probably, in the review of the provinces. Centralising the public service, which is already being discussed in proposed legislation, will give national government wide powers to appoint senior public-service officials in the provinces, thus undermining the democratic right of provincial and local government to make their own appointments. Furthermore, these spheres of government will remain liable for the outcome of such appointments. The Public Services Amendment Bill expands the Minister's and the President's powers, and allows for the secondment of employees. I heard a similar sentiment from the President with regard to that most disputed of centres of government, district municipalities. (At least I know that district municipalities outside the Cape are more highly regarded than they are in the rest of the country.) Anyway, he speculated that they are the centres where expertise must be

concentrated, whence it will be disbursed as is needed to the local municipalities where such capacity is lacking. If the Public Accountability Monitoring Bill becomes law, it will make city managers and their staff beholden to ANC national ministers and bureaucrats in Pretoria, rather than the duly elected city council. The local elections will, to a large extent, be rendered irrelevant. There's an obvious constitutional threat in both these measures; the independence and integrity of different spheres of government. A single, nationally run public service would directly counter the functional and institutional integrity of provincial and local government spheres by excluding local government oversight of officialdom.

The investigation into the functioning of the provinces follows on various calls from ministers raising the issue of the number and functions of the provinces, as we heard here before. Minister Manuel called for a review of the assignment of powers and functions within government to assess whether it naturally lent itself to more efficient and effective delivery of services to the people. This was also echoed by Minister Lekota, and can be picked up in statements by the Minister of Education. Premier Rasool has specifically called for the unification of the Eastern and

Sandra Botha





Sandra Botha

Western Cape, in the belief that this was to resolve the issue of shrinking allocations to the Western Cape and poor delivery to its neighbour. As he puts it, provinces cannot merely be an agency to deliver on health, education and welfare. The DA, of course, is ideologically strongly opposed to centralisation. In reconsideration of the issue of the provinces, its federal council unambiguously restated support for the advantages of federalism and decentralisation late last year. The common sentiment is that the abuse of the present system does not nullify the values on which it was constructed.

Now I have the interesting experience of living in two provinces, in the Free State, where the local control is totally ANC, and the divisions in the legislature are entirely based on factions hoping to have control of the executive, and then in the Cape, where

The common sentiment is that the abuse of the present system does not nullify the values on which it was constructed

the DA has the rare experience of governing or co-governing in 20 local municipalities, and, of course, it's in charge of the metro. Just as an aside, the provincial government in the Free State has been probably more unstable than the Western Cape, in terms

of the two factions, the north and the south, based on whichever one has gained control of the province in replacing MECs. I once suggested to them that they have a half-way house at the Gariep, so as people move they can just stay there and wait. They move them near to the Cape, then they move them back to the province, and they move them into the municipality... they're always switching, purely for the sake of the power politics which has flared there. You may have read in the Sunday Times how interestingly things are developing with Ace Magashule, who has been premier-in-waiting as Chair of the ANC in the province, and has had three women who have been appointed instead. So he's been very anti-Mbeki on account of this. But now there seems to be some other deal on the go, and it is possible that, having been made an MEC, having been promoted, and having been made an MEC again, he may make a deal whereby he will give his support to Mbeki and he'll get the premiership.

That aside, I also spent five years at the NCOP, as Colin mentioned, where I became deeply disillusioned about the concept of provinces showing any independence in relation to local interests. Without exception, every piece of legislation was rubber-stamped. Every debate was merely a repetition of the national view, except when the Western Cape was in the hands of the Nats and KwaZulu-Natal in the hands of

Botha

the IFP. Only under the rule of different political parties did the provincial interest come to the fore. Our leader in the Free State, Roy Jankielsohn, spent a term in the National Assembly. He's now in the Free State legislature. He says he considers the oversight role of the provinces as its most important. The legislature barely sits at all; I think about 20 times per year, and one can well question the role of the executive.

I know I tend to look at the costs, but I'm assured it's a very small percentage, about 1% of the total budget – so that's not so relevant about whether they should be there or not of course somebody must hold provincial officials to account and see that delivery takes place, and I have yet to see a better substitute for that than what we have at present. I've never seen centralising power improve on delivery. By arguing that these entities should be abolished because they are not providing the service the public expects from them, we are looking at the issue the wrong way round. Conceptually it is not the provinces that are at fault, it's the way the ANC is governing, that is the problem.

My husband mentioned to me this morning the obvious differences between Steinkopf in the west and Richards Bay on the east coast. This struck me as such a clear difference in South African terms. I find it quite a striking example of diversity of language, of culture, of place, of economics. There can be no doubt that these areas require a very specific approach to the different challenges they offer. An aggregate approach will satisfy neither.

These questions should be capable of debate without reference to the present political atmosphere, but that would be totally unrealistic. I can't finish off without referring to what we have seen and has been referred to in the media as a possible constitutional threat, perhaps a real constitutional crisis, whereas two weeks ago none of us were using those terms. So to say that one can approach these issues in a very laissez-faire manner and not keep to the letter of the law may well land us in very deep trouble. I have sympathy with

my colleague, the Honourable Buthelezi, who's sung for many years the praises of federalism and the independence of the provinces. He has real experience of people not keeping their particular promises, so it's not as if these things can't happen, and I'm hoping that we'll be able to ride out this crisis. I think we will, but also that we will be able to withstand what seems to us to be an onslaught in legislative terms against the powers of the provinces. I don't want to cry wolf, but I have to when there is really a wolf at the door.





Sediane Montsitsi

I thought I knew where I was going to start, but I'm no longer sure where to start now. Perhaps I should start with the committee that I chair, the Constitutional Review Committee. What it does is to receive submissions from various stakeholders with respect to recommendations about what should go into the constitution. We have received quite a number of representations from a number of stakeholders, and we want to assure the public that our committee is prepared to entertain a number of those submissions which various political parties, or even various stakeholders, might have in mind. Where we go for public hearings we are able, for instance, to discuss intensely and give various stakeholders opportunities to make their own submissions, both oral and written. So that avenue is still open as we discuss the future of our constitution, and as we discuss the future of the provinces, whether they have to change or be reduced. Let the public bear in mind that that avenue is still open.

I will begin by looking at the scenario that the ANC has sketched out with respect to the experience we have with the provinces. The movement draws three scenarios. Firstly, they talk about the problem experienced in terms of the disparities that persist in the delivery systems. This they cite because of the distribution of income and economic opportunities in the various

... you have to look at the capacity of the state, which is unequally distributed in the various provinces

regions, and then there are those localities where there are poor communities, and also the borders and the regions that were designed by the former apartheid system. We know what impact the Group Areas Act has had. If you talk of development in South Africa right now you've got to trace it a number of years back, in terms of how South Africa has evolved up to this point. Lack of basic water; electricity; education, public health and social facilities – when you take the most rural provinces, like Limpopo, like the Northern Cape, for instance, you can well imagine the infrastructure that is required in order to bring about an improvement in the lives of those people. These are some of the problems that are being cited.

Now, also, you have to look at the capacity of the state, which is unequally distributed in the various provinces. There is a lack of efficiency in the most backward, the most rural provinces. If you look at provinces like Gauteng or the Western Cape; you can see how delivery is much easier, simply because of the enhanced technology in delivery, and also because of the skilled personnel that we'd be able to employ. The movement of personnel is mostly from the rural into the urban or into the most populated areas, like Gauteng, and the Western Cape and Kwazulu-Natal, where people have better prospects.

The other problem, obviously, is the complexity of the systems of the various spheres of government. The national, provincial and local are obviously not ordinary and simple spheres, which can easily interact with each other. Despite the fact that we speak of co-operative government, co-operative government is not that simple. You are talking of a complex system, which as a result, in certain instances, has resulted in overlapping of roles, inefficiency in certain cases, long decision-making processes and work-information flow. That is part and parcel of the problems that we have currently in our three-tier – or our three-sphere – system of government.

The fourth problem is in the disbursement of funds to the various provinces. Obviously, the allocation would not be equal. It has to address the needs of those particular provinces. Although Treasury uses a particular system, a particular formula in order to address the various problems, the reality is that you are not able to deliver precisely on housing needs, on education, on health, or road infrastructure, in certain provinces – not to mention the 2010 programmes. There you find municipalities having to say we need this, we need that, and if this is not done we're not going to be able to bear the load. These are some of the complexities of this particular type of system.

Having said that, my political party is presenting three scenarios in its policy document. In the first, we would retain the three spheres of government as they are. This means, with respect to co-operative governance, that you have to be specific. The responsibilities and powers allocated to

the provinces, through national government, should be very, very specific. For now, we know that the norms and standards reside with the national government to ensure that when the provinces deliver and implement, national government has the power to override in the event that the standards fall short. A second proposal could be a hybrid, in which you would keep a certain number of provinces and merge a certain number of provinces, but the question is, which provinces are you going to merge? On what basis are you going to bring province A and province B together? On what basis are you going to divide province A, and take 50%





The policy documents of the ANC are more tilted, and are more biased, towards the type of local government that will be able to sustain itself, and that will be much closer to the people

Sediane

of province A into province C, and 50% of province A into province B? The third option is that you could do away altogether with the system of provinces. Then, what is it that you put in their place?

The policy documents of the ANC are more tilted, and are more biased, towards the type of local government that will be able to sustain itself, and that will be much closer to the people. South Africa has been divided in the past, and with federalism, for instance, you run the risk of perpetuating the Bantustan system and the old Group Areas Act.

What the Freedom Charter said is that South Africa belongs to all those who live in it, black and white, and in this developmental state that means no area

of our country should not be able to reach service delivery. Even the smallest corner in Kuruman in the Northern Cape should be able to be serviced by a particular province. The most important thing would be, in which way would government be able to ensure that local government becomes strong and able to deliver, because that is the tier of government that is closest to the people. When people get into the streets and cry “delivery”, local government is in the forefront. So we are saying a system still has to be found to ensure that local government is able to deliver. When you say you wish to settle for a federal state, when you say the powers right now reside with one political party, you might be saying so because you belong to a minority party, or you might be saying so because you fear the power of the most powerful

Montsitsi

political party, but it's not necessary to fear the power of a party that gets the majority vote. We are saying that South Africa is a democratic state. It's in the nature of a democracy for parties to contest elections, and if any party is able to acquire a majority vote, then it means that party has been able to impress upon the electorate to elect it and give it a mandate. That is part and parcel of democracy. If, for instance, elections take place in Palestine and a certain political party is overwhelmingly voted into position, there's no need for any other superpower to undermine, and

to look down upon, and even criticise, the electorate for putting that party into place.

Most particularly for my generation of 1976, the ones that did not believe that there would be a future for whites and blacks in South Africa, the ones that thought that the whites should be actually thrown into the sea, it is the Freedom Charter that made it possible to understand that this South Africa belongs to all those who live in it, and right now we are on the path to creating a future for all our children, both black and white.



Questions

Time limitations made it necessary to curtail the question-and-answer session

Question one:

DAVE STEWART, FW DE KLERK FOUNDATION: Would there be a referendum before any changes are made to provinces?

Answer:

CHAIRMAN: I think the constitution makes provision for a referendum in cases like that if there's an amendment to the borders of the particular provinces. The powers of the provinces are a different matter, but the issue of the borders is covered by the constitution.





Concluding Remarks

CHAIRPERSON: I think this discussion has revealed that there's a strong view that the provinces are there and they perform a function. There's admission that it's not working as well as it should, but you should try to have ways and means of putting it right, and these arguments were about strengthening the capacity, strengthening the finances, strengthening the relationship between the provinces and the other spheres of government. Sediane, on the other hand, indicated there were three options, and that comes down very strongly on the issue of getting rid of the provinces, and creating a structure of central government with local government. In that case, I think what we have got to find out is, how is it that the local governments in general are the weakest tiers of government at the moment, in terms of delivery? But that's

a matter for the wise people to discuss at the end, and, I hope, for the South African people to decide.

MS TALJAARD: Ladies and gentlemen, panellists, thank you very much for your participation today. We'll have to continue the debate on the future of the provinces, not only in Parliament, but also in civil society, because we all have a material interest in the changes that may be made, as South African citizens who are active participants in our democracy. And I think that we also have a duty, both to our past and our future, to understand the genesis of the provinces, which was very articulately laid out again today, in order to understand the possibilities for their future trajectory. Thank you all, again, for your participation and willingness to take the time out of busy programmes.

Media Coverage

CAPE TIMES, 9 OCTOBER 2007

BUTHELEZI CALLS FOR DEVOLUTION OF POWERS

Panel debates future of provinces

SIBUSISO NGALWA
Political Bureau

INSTEAD of rushing to consider the reduction of provinces, the government should rather focus on its own failures in ensuring the smooth functioning of the provincial structures. This was the general view of panel members at a round-table discussion hosted by the Helen Suzman Foundation in Cape Town yesterday.

The panel included IFP leader Mangosuthu Buthelezi, DA leader in Parliament Sandra Botha, ANC MP and head of the National Assembly's Constitutional Review Committee Danny Montsitsi, Paul Hoffman of the FW de Klerk Foundation, former DA MP Colin Eglin and Vino Naidoo, a researcher for the Human Sciences Research Council.

The debate comes against the backdrop of the government's public consultation process on the provinces' future. Provincial and Local Government Minister Sydney Mufamadi recently released a questionnaire with three options on the future of the provinces for public comment – whether they be retained, reduced or abolished.

Criticism of the current system is that it creates a bottleneck in service delivery.

Naidoo called for efforts to improve the functioning of the provinces and to ensure they had the necessary capacity and the skills to deliver better services to the people.

Reducing provinces would serve short-term goals, said Naidoo.

Buthelezi – a long time proponent of federalism – argued that the devolution of more powers to the provinces was necessary to avoid them



VETERANS: IFP leader Mangosuthu Buthelezi and chairperson of the Helen Suzman Foundation Colin Eglin chat at the Quarterly Roundtable Series. They were debating a proposal to restructure the provinces.
Picture: HENK KRUGER

becoming the "lame ducks" that they currently were.

The federal system was working well in India, Germany, the US and even Nigeria, he said.

Botha was more critical of the ANC's failure to oversee the functioning of municipalities and provinces, accusing the ruling party of being engaged

in factional squabbles, instead of doing the work at hand.

The blame should be placed on the ANC-led government and not the provincial system.

The De Klerk Foundation was not opposed to any of the three options but emphasised the need to consult and involve the people affected by such changes.

It called for a referendum on the provinces – a view supported by the IFP.

Montsitsi said that the ANC was more "biased" towards the strengthening of local government to bring the "government closer to the people".

He argued that opting for a federal system would be tantamount to the reintroduction of

the apartheid-era's Group Areas Act and the Bantustan system.

The ANC's recent national policy conference also discussed three options on the future of the provinces.

A preferred option by the ruling party will be adopted at its national conference in December.

Relevant Articles

BUSINESS DAY, 4 MAY 2007

Linda Ensor

Political Correspondent

CAPE TOWN — Finance Minister Trevor Manuel has called for a review of the number of provinces in SA, saying the country does not have sufficient skills to staff the "multitude of institutions" created under the constitution.

He is the latest of the number of cabinet ministers to express reservations about the number of provinces, including Defence Minister Mosiuoa Lekota and Provincial and Local Government Minister Sydney Mufamadi.

Manuel joins call to review provinces

Addressing the National Council of Provinces yesterday, he also called for a re-evaluation of the assignment of powers and functions within the government to assess whether it "naturally lends itself to more efficient and effective delivery of services to our people".

Manuel said housing was a good example of a function that should be reassigned. Another area needing review was in relation to

oversight and accountability to ensure there was more vigorous accountability for performance in the intergovernmental system. He noted the difficulty of enforcing accountability in a situation of concurrent functions.

"For instance, would it be entirely unreasonable for an MEC to argue that his or her department failed to implement a particular policy because it was bad in the first

place? And what is our collective responsibility in such a situation?"

He also challenged the council to undertake an investigation into the protests about changes to provincial boundaries in Khutsong.

Presenting the inaugural Freedom Day lecture to the South African Wine Council last night, Manuel said he sympathised with wine industry complaints that excise duties on wine were "exces-

sive" but said his concern might not be sufficient to sway the treasury into reducing them. Excise duties on wine, beer and cigarettes are usually increased every year during the budget speech.

Manuel said: "Industry objections and ministerial sympathy are not always sufficient to counter the weighty advice that the treasury musters each year when it comes to constructing the annual budget."

There had been huge changes in the industry over the past decade, he said. These had been influenced by agricultural marketing reforms, opening up of export opportunities and restructuring of role of the KWV from about 1997 onwards.

Red wines had increased from 15%-40% of total production; exports had climbed from 12% of production in 1994 to 45%; production costs had increased from about R6 500 a hectare to more than R20 000; and production revenue had increased to about R3bn a year. Profitability however, had not yet been achieved.

THE STAR, 21 JUNE 2007

Review of number of provinces under way

BY SIBUSISO NGALWA

Political Bureau

The official process that could lead to a reduction in the number of provinces or even their phasing out ahead of the general election in 2009 will begin next month.

Minister Sydney Mufamadi announced the reviews of both local and provincial government during his budget vote debate in the National Council of Provinces yesterday.

These will culminate in a white paper on both issues. A white paper generally signifies the government's clear intention to pass a law on the subject.

The three-phase process was expected to span two years, Mufamadi told MPs.

"There will be the publication of questions in July to provide an overview of the major issues on which policy is required. Secondly, there will be continued, extended research to examine these issues in more detail and to provide possible

policy options in a green paper which will be published towards the end of the year."

Following the gazetting, public comments and feedback, the final drafting of the two white papers would start early next year, said Mufamadi.

This follows a cabinet decision last year for a provincial and local government review in the light of concerns about the state's administrative capacity and ability to deliver services.

There is growing debate – including within the ANC – about the role and relevance of provinces and the need to reduce them to either four or five or to do away with them altogether.

The feeling is that provinces have hamstrung service delivery as funds meant for municipalities get caught up in the bureaucracy and end up not fulfilling their intended purposes in time, if at all.

"We must establish a policy framework which is clear enough to enable us to navigate the necessary tension between



PLANNING AHEAD:
Minister Sydney Mufamadi.

processes of recentralising some aspects of power and those of decentralising others," said Mufamadi.

He called on all South Africans to fully embrace the opportunity created by these processes and to participate in helping to shape a "government system which will have immensely profound implications for all of us".

The issue of the provinces will again take centre stage at the ANC's national policy conference in Midrand next week. The recent provincial policy conferences indicate that the provinces are in support of a two-sphere government model.

However, they have also requested that proper research should be conducted to review the performance of the provincial system before they could decide on their future.

A discussion document – which moots a four- or five-province option – was drafted and circulated in the government last year.

Cabinet ministers, including Finance Minister Trevor Manuel, Defence Minister Mosiuoa Lekota and Mufamadi, have publicly suggested that the nine provinces should be reduced.

Arts and Culture Minister Pallo Jordan, meanwhile, has called for debate on whether the provinces system was the best set-up.

BUSINESS DAY, 16 JULY 2007

GOVERNMENT STRUCTURE/Vinothan Naidoo

Through provinces of perplexity

THE future of SA's provincial governments is attracting increasing attention and is likely to come under more scrutiny in the months to come.

In recent addresses to the National Council of Provinces, senior ministers suggested that the number of government structures created under the country's current intergovernmental system may be hampering effective public service delivery.

The governing African National Congress (ANC) has even placed the future of the provincial level of government on the agenda of its upcoming national conference in December, tabling a number of options for provincial government reform in a position paper entitled *Legislature and Governance*.

In some respects, the issue risks being viewed as "beguilingly simple" — as a member of the opposition Democratic Alliance party was recently quoted as saying — but not necessarily for exclusively political reasons, linked to an attempt by the ANC to increase and consolidate national executive authority over subnational levels of government.

The issue is more complex than that, and must take into consideration whether the provinces have been seen to be effectively delivering on the core social functions that the constitution handed to them in 1996, in areas such as education, health and social welfare. With this perspective in mind, what might some of the options for reforming the provincial level of government entail?

The first option could be described as enforcing the relatively loose constitutional principle of "co-operative government" between national, provincial and local spheres of government, where the national government assumes more direct responsibility and accountability for the execution of functions, particularly those that are currently defined as concurrent (those shared between national and provincial government). This could result in a streamlining of the policy and public financing processes that could, theoretically, facilitate service provision. The net result would see a reduction in the discretion and authority of provincial gov-



ernments, which would essentially revert to administrative tiers taking directives from national government.

A second option, suggested by the ANC, would be to retain the current system and continue to direct significant time and resources to ensuring that public service delivery is progressively and consistently improved across the provinces. The argument is that the structures, mechanisms and remedies stipulated in the constitution for this purpose have perhaps not been fully exercised or utilised.

Suggestions on improving the system include strengthening the oversight role of provincial legislatures over their executive bodies; strengthening the national government's own ability to monitor and support provincial governments; increasing the role of subprovincial structures

such as district and metropolitan governments in service provision; and facilitating the deployment of skilled administrators to subnational levels experiencing difficulties.

A third option mooted by the ANC is to remove the provincial level of government altogether. It's not clear, however, whether such a move would eliminate all administration in between the remaining national and local spheres, where provinces might be confined to co-ordinating and monitoring the implementation of services that might then get shifted to the local sphere. An important question that arises from this, however, is: given their respective and more clearly delineated roles in policy formulation and regulation, and basic service delivery, is it feasible that national and/or local

government can, in addition to their current roles, cope with the significant responsibility of administering and overseeing the huge social services sectors (education, health, and social welfare), which presently account for three-quarters of provincial budgets? This then puts options one and two back on the table.

A fourth option, also introduced by the ANC, is what it has termed a "hybrid" model, where the three spheres would be retained but with fewer provinces. This seems to correspond with the tone of recent comments made by the finance and defence ministers. Both ministers appeared to express a general concern about whether the country's administrative corps could effectively manage the number of governing structures created under the current

system. Implicit in their comments was a concern about whether the national sphere of government could exercise effective monitoring and oversight over the provincial sphere — functions the consultation obliges it to perform.

There is a certain pragmatism behind this fourth option, where evidence in the provinces of senior management capacity shortages; poor audit results, especially around personnel expenditure; expenditure volatility; financial governance; and the time and resources required to maintain a complex system of inter-governmental co-ordination, reporting, and monitoring have reasonably led some to rethink the shape of the current system where reducing the number of provincial governing structures, and so provinces, could potentially minimise such problems and/or reduce complexity.

It could also be argued that a strategic reduction in the number of provinces might yield efficiencies (such as economies of scale) in service provision. In the second instance, though, a reduction in the number of provinces would most certainly have political implications for regional party representation, and in this regard might also yield "pragmatic" political gains for parties with broad national representation, such as the ANC.

Finally, although a federal system has been raised as another option for the provinces — which would increase their legislative and executive authority — it is likely that this option will be resisted in the short to medium term by the governing party on the grounds that it offers less of an assurance that the extent of poverty and associated regional disparities in the country can be responded to in a consistent manner. It would, however, also be in the governing party's interest to oppose such a move on political grounds, where doing so would act to preserve national executive authority over the provinces in view of strong opposition support in some regional areas.

■ Naidoo is a chief researcher in the *Democracy and Governance research programme* at the Human Sciences Research Council.



Minister reviews future of provinces

Chantelle Benjamin

Chief Reporter

PROVINCIAL and Local Government Minister Sydney Mufamadi yesterday launched a review process of provincial and local government which could decide whether or not SA retains its nine provinces.

Also at stake is the future of district municipalities and whether the two tiers of local government are necessary.

In the midst of increasingly violent service delivery protests, the cabinet in January had commissioned the department of provincial and local government to evaluate the current system to see whether it was meeting the objective of serving the people.

Concerns over service delivery have also prompted proposals of a single public service by Public Service and Administration Minister Geraldine Fraser-Moleketi, which she says, would allow for greater sharing of skills and create one set of conditions.

Any changes to provincial boundaries would need to be carefully considered as changes to cross-border municipalities such as Khutsong demonstrated.

Mufamadi would not comment on speculation that the government is considering reducing the number of provinces or removing them altogether because of a duplication of services



The review process of provincial and local government comes amid increasingly violent service delivery protests, such as this recent one in Klipptown, Soweto.

and uncertainty on the role of provinces caused by a lack of policy or legislative framework.

He said: "Government will arrive at a decision after taking into consideration what all stakeholders have to say."

Director-general Lindiwe Msengana-Ndlela however, said among the 65 questions being posed in the review published to-

day in the Government Gazette were queries about whether there should be a provincial system of government, and if so what criteria should be used for determining the purpose, structure and function, the number of provinces and the sources of funding.

Mufamadi said some had admitted that they "they did not

have as much work as they would like" because most of the policy decisions were being made at national level. Mufamadi said there appeared to be duplication between provincial and national government. He called on civil society, public institutions, experts and academic organisations to contribute to the questions ahead of the white paper.



Relevant article

THE TIMES, 7 AUGUST 2007

Raenette Taljaard

ANOTHER TAKE

A rethink of SA's provincial setup must be careful not to undermine politically sensitive trade-offs

Review may open Pandora's Box

LAST week, Provincial and Local Government Minister Fikile Makhosini announced a review of the powers and functions of provincial and local governments.

"Though the words 'reflex' and 'reflexion' were used synonymously by the minister in announcing the review, he did not leave the option of constitutional amendment by the courts. This could have considerable ramifications in terms of constitutional law.

Though some argue that this rethink is purely to enhance service delivery, others query the role such a rethink could play against the backdrop of the continuing power tensions between the DA and the ANC in the Western Cape. The latter could become activists if the Northern Cape, Western Cape and Eastern Cape were merged into one province.

But, whatever the merits of any of these arguments, the three throughout any review must be the Constitution, the interests of its holders, and the national role between the 14 Constitutional Principles in the 1996 Interim Constitution and the 1996 Constitution.

Whatever the merits of an overall

rethink or review might be, it is worth reminding ourselves of the special history of the debate around the provincial and local spheres of government, and of South Africa's delicate transition to democracy.

Though few South Africans remember the four provinces of apartheid-era South Africa, many of the founders of the Constitutional Union and in the Constitutional Assembly will recall the process, debates, negotiations and trade-offs very well indeed.

There are pragmatic, political and constitutional questions at the root of this debate that will make it a hotly contested one. Through the 40 or so questions that have been drawn up by graduate policy-makers in Makhosini's department aim to involve people in a broad rethink of the various powers and functions. It is worth recalling where these powers and functions originated, and how politically charged their formulation was during the transition.

But why was the debate about the provinces so crucial during the constitutional negotiations? Was it merely to create a complex system of governance to facilitate city-wide

government? Or were there other factors at play that night, or night, still have legitimacy?

There can be no doubt that different actors in the negotiations had different views and very different agendas. Only the politically naive would not realise that the constitution about the provinces was so much about creating

'This debate reaches into the heart of some core transitional arrangements'

institutional trust. Depending on the direction of the review, it might lead on to a more complex during the constitutional certification judgment.

This debate, therefore, reaches right back into the heart of some core transitional arrangements and their subsequent to the highest court in our country.

Taljaard might be writing

alternative modes of democratic expression as about structuring the machinery of the state.

It was about citizens at different levels of government, and about the option of creating different political parties into power at different levels of government, to counter the possibility of the dominant party being too much power.

But the negotiators reached a tough compromise and did not choose an outright federal model. South Africa is a largely unitary state with core federal features.

The three elements of cooperative government arrangements in the constitution aimed to do this, specifically so that might be to write people.

Though we might legitimately ask key questions about the efficacy of our structure of government, and about the powers reserved-concernments by different spheres of government, we must realise that this debate can open a constitutional Pandora's Box if it is not conducted responsibly.

The debate has the potential to return debates going back to the historic Constitution that formed the foundation of the first con-

stitutional order relating to the provinces and local government, as well as about the need for a review, due to the experience the government faced in creating the system for 17 years.

But these questions will never answer the ultimate question, can transition trade-offs potentially be undone by a province of public consultation, so that we include the province might be done to be?

Transitions and the products of transition negotiations are inherently flawed with trade-offs and imperfections.

The current structure of our state is exactly such a trade-off between negotiations and subsequent constitutional arrangements that might no longer enjoy the broad support of the ruling party because of its frustration with the different spheres of government.

But it is a necessity for a democracy that such a trade-off be rolled only if the rolling does not desert the original architecture.

If it is to do so, it would be to attract the attention of the Constitutional Court.



Mufamadi moves on provincial borders

Karina Brown and Amy Mesgrave

CAPE TOWN — Provincial and Local Government Minister Sydney Mufamadi says government is formulating a white paper on the future of provinces, the strongest signal yet that changes to provincial boundaries are on the cards.

The move comes as government speeds up negotiations on the creation of a single public service, suggesting a policy shift on the overhauling of provinces and reorganisation of the state.

Changes to provincial boundaries are expected to directly affect the lives of South Africans — as indicated by violent protests last year when municipalities such as Khutsong were administratively moved to other provinces.

Commenting on the minister's announcement, political analyst Steven Friedman said there were extreme views among some cabinet ministers on the matter, including views on the abolition of provinces and the merging of some of them.

The view that supported doing away with provinces was informed by a belief that more centralisation would boost government efficiency.

Mufamadi's announcement is in contrast to his earlier position that changes were not "imminently on the agenda".

He told reporters in Parliament the matter would be discussed



Sydney Mufamadi is to pilot the process of reviewing the need for the nation's provinces. Photo: THE FOR SAMSON

ahead of the ANC's policy conference in June. The issue was discussed at length at the cabinet's recent lekgotla.

"At the lekgotla we agreed to revisit the provincial government model. A white paper on local government formed the basis of local government legislation, we

don't have a similar coherent level of policy with respect to the provincial sphere," he said.

Although he hinted at merging certain provinces, he would not be drawn on the details of the discussion, saying a "framework" would be developed to guide all aspects of the discussions,

including systems of governance and boundaries, Friedman said. "I'm not sure why this is something that exercises the minds of cabinet, given that a heated policy conference is coming up in the ANC and the succession debate is under way."

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MAIL & GUARDIAN, 7 AUGUST 2007

Provincial review: devolve and rule

A more rigorous federalism would enhance service delivery

Comment

Mangosuthu Buthelezi



There has been much speculation that South Africa's nine provinces could be downscaled to administrative hubs because of their apparent inefficiency and ineffectiveness. I believe this is a knee-jerk reaction, not a solution, to the present malaise.

My party and I have always believed that South Africa — like Australia, Canada, Nigeria and the United States — is simply too large and diverse to be administered as a unitary state. Federalism serves to preserve regional identities across our vast multicultural and multilingual territory. We must remember that South Africa's celebrated diversity is the sum of these many identities.

In principle, I have always maintained that the three-tier system of government suits our purpose best. This system brings political decision-making closer to the individual by setting up a network of political structures that compete with the central government and prevent power from being centralised too heavily.

It is for this reason that our quasi-federal model, at least in theory, secures a fragile balance of power. That is also why the IFP ensured during the transition process that provinces were created in principle. We played a large role in strengthening the federal character of the transitional constitution.

But it is for the very same reasons that the IFP has since often criticised the functions of these provinces in practice. The system we have in South Africa today is a far cry from what the IFP and I originally envisaged. It is a hybrid in which provinces are endowed with all the appearances of

a federal system — their own legislatures, executives and administrative capacities — but at the same time are accorded almost no policymaking power by the Constitution. It's like a car without an engine.

So we end up with the worst of both worlds: the financial expense of duplicated layers of government, combined with the political drawbacks of a unitary state.

If provinces had not existed, the DA-led Western Cape and IFP-led KwaZulu-Natal could not have used their concurrent health powers, one of the few significant powers of provinces, to deliver life-saving antiretroviral drugs to prevent the mother-to-child transmission of the HIV virus in 2002. Readers might see a clue here why errant provinces might be a minor irritant to the ruling party!

We believe that many of the perceived problems of governance at the provincial level are the result of work in progress. The fault does not lie with the system, but rather with its implementation. What we originally wanted out of provinces was smaller, more responsive, accountable and efficient political units in which individuals could participate more directly than in a monolithic unitary government. This approach should inform any review of the municipal demarcations.

The ruling party is too quick to blame the quasi-federal model for its own failures in service delivery. It is not hard to see why. The ANC has always been dedicated to the notion of South Africa as "one nation", a nation of masses who have apparently reconciled their historical and ethnic differences and who hold the same political opinions.

The political benefits of federalism — real federalism that cuts the distance between the unitary government and the individual, while conserving the individual's regional identity — are usually worth the effort and the cost.

The answer to our current crisis of service delivery is more,

not less, federalism.

When considering whether we should maintain our provinces, it is clear that devolving power is the international trend. Scrapping provinces here would be to buck this trend. Take Scotland, the home of Adam Smith. Strong regional policies over the past 30 years have transformed the Scottish economy from a basket case to one of the brighter stars in European information technology. Britain's Labour government has delivered a Scottish Parliament and Welsh Assembly in the past decade.

I believe we reject regionalism at our peril. One of the paradoxes of globalisation and economic integration has been the resurgence of regional identities. This must be managed carefully. Petty nationalisms, especially those based on blood and soil, can narrow a country's horizons and block a wider cultural inheritance.

Yet, undoubtedly, the social impact of globalisation and urbanisation is driving people to take refuge in what they know — their families, communities and regions. These are now the social institutions that offer security and opportunity. Where our people feel powerless in the face of global and urban change, they feel the local can be influenced even if the national cannot.

There is growing consumer-like demand for the reform of the ANC's one-size-fits-all, top-down model. In the first decade of the 21st century the new battleground is increasingly around the politics of localism — people want the power to shape their own lives.

Let us respond by building a South Africa of regions and nations blessed with a new dynamism.

Mangosuthu Buthelezi, MP, is president of the Inkatha Freedom Party