

**PROVINCIAL POWERS IN THE "NEW" SOUTH AFRICA:
A "QUASI-FEDERAL" POWER BASE?**

by

JOHN HENDRIK POTGIETER

submitted in part fulfilment of the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: DR M BEUKES

NOVEMBER 1996

(i)

DECLARATION

I declare that *Provincial powers in the "new" South Africa: A "quasi-federal" power base?* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SUMMARY

This study sets out to examine whether the “new” provincial governments in South Africa are in practice functioning as “quasi-federal” power bases. The study starts with an appraisal of the core constitutional concepts critical to provincial government as a prelude to the enquiry into the practical status of the provincial governments.

An enquiry is made into the application of certain provisions of the interim Constitution pertaining to provincial government. Thereafter certain provisions of the final Constitution pertaining to provincial government are compared with the corresponding provisions of the interim Constitution. The issue of provincial powers in practice and the problems experienced by provincial governments are also dealt with. The study concludes that provincial governments are currently not functioning as “quasi-federal” power bases and that it is even doubtful whether that situation will present itself in the foreseeable future.

KEY WORDS: provincial government, democracy, constitutionalism, separation of powers, federalism, autonomy, co-operative governance, Senate, National Council of Provinces and provincial administrations

TABLE OF CONTENTS

PROVINCIAL POWERS IN THE "NEW" SOUTH AFRICA: A "QUASI-FEDERAL" POWER BASE?

1	INTRODUCTION	1
2	CORE CONSTITUTIONAL CONCEPTS CRITICAL TO PROVINCIAL GOVERNMENT	3
	(a) Democracy and constitutionalism	3
	(b) Separation of powers and checks and balances	5
	(c) Federalism	6
3	PROVINCIAL POWERS UNDER THE INTERIM CONSTITUTION	9
	(a) Constitutional Principles	10
	(b) Sections 36 and 48 - establishment and composition of Senate	11
	(c) Sections 61 and 62 - power of provinces to resist certain Bills amending Constitution	11
	(d) Section 126 - legislative competences of provinces	12
	(e) Section 144 - executive authority of provinces	14
	(f) Sections 155 to 158 - provincial finance and fiscal affairs	14
	(g) Section 160 - adoption of provincial constitutions	15
	(h) Section 235(8) - assignment of administration of laws	17
4	PROVINCIAL POWERS UNDER THE FINAL CONSTITUTION	19
	(a) Impact of the Constitutional Principles	19
	(b) Sections 42 and 60 - establishment and composition of National Council of Provinces	20
	(c) Section 74 - power of provinces to resist certain Bills amending Constitution	20
	(d) Section 104 - legislative authority of provinces	21
	(e) Section 125 - executive authority of provinces	21
	(f) Sections 142 and 143 - contents of provincial constitutions	22
	(g) Section 214 - equitable share and allocation of revenue	22
	(h) "The weighing of the baskets"	23
5	PROVINCIAL POWERS IN PRACTICE: "THE CENTRE CANNOT HOLD"	24
6	CONCLUSION	28

1 INTRODUCTION

An underlying source of tension throughout the constitutional negotiation process (which started after FW de Klerk's opening of Parliament speech on 2 February 1990) has been the degree of federalism to be "allowed" within a unitary, democratic South Africa.¹ The adopted interim Constitution,² as evidenced in particular from the Constitutional Principles, adhered (in theory at least) to the principle of federalism.³ It will nevertheless be shown in this dissertation that federalism as envisaged in the interim Constitution has not been realised fully in practice with regard to provincial government.⁴

1 The major political parties, with the exception of the ANC, regarded a federal power base as indispensable for a greater measure of power sharing, as a "matter of dividing up spheres of competence", "to provide a political process for working out competences and conflict" and for keeping the government in check. In short, federalism was not dealt with from a purely constitutional point of departure but rather on the basis of political expedience. See in this regard Klaaren "Federalism" in Chaskalson *et al* *Constitutional Law of South Africa* (1996) 5-1, De Villiers "The Federal/Unitary debate: Is there light at the end of the tunnel?" 1996 *The Human Rights and Constitutional Law Journal of Southern Africa* 9 *et seq.* Although the ANC was from the outset not supportive of the federal cause a certain "softening" of this stance became necessary in the course of constitutional negotiations at Kempton Park. See in this regard Cilliers "The Prospects for Federalism in South Africa" *Responsa Meridiana* 1995 477-478 who describes any concession on the part of the ANC as "either out of necessity or because of strategic reasons". For an overview of the various political parties stances see Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 12-21 and their cited sources.

2 200 of 1993.

3 See Klaaren in fn 1 who states that "it is most accurate to describe it [the Constitution] as a federal system with unitary features" (at 5 -1).

4 Since this is a dissertation of limited scope only and the main focus of it is in any event not a theorisation on federalism *per se*, it is impossible to deal with the theoretical underpinnings of the concept of "federalism". The literature on the concept of "federalism" is vast, it deals with federalism in its so-called "pure" form, the variables necessitated by constitutional prerequisites, monetary constraints, *et cetera*. The most comprehensive source of information on the concept of "federalism" remains Elazar's vast output in this regard. See for example his *Exploring Federalism* (1987), *Constitutional Design and Power-sharing in the Post-modern Epoch* (1991) and *Federalism: an overview* (1995) and the sources cited by him in the publications. For federalism from an African perspective see Elaigwu *Federalism and Nation-building in Nigeria: The challenges of the 21st century* (1994). See too the various publications of the International Association of Centers for Federal Studies.

To serve as background for this enquiry into the practical application of some of the interim Constitution's provisions relating to provincial government⁵, a brief overview is given of the core constitutional concepts that are critical to provincial governance. The chosen concepts are: democracy and constitutionalism, separation of powers (including checks and balances) and "federalism" as provided for in the Constitutional Principles of the interim Constitution⁶. The case law on the issue of provincial powers also provides an indication as to how the balance of power between provincial and national government is shifting. Provincial powers as provided for in the final Constitution as well as the decision of the Constitutional Court with regard to the certification of the final Constitution are also dealt with. The issue of provincial powers in practice and the question as to whether the provinces are functioning, or will, in the foreseeable future, be functioning, as "quasi-federal"⁷ power bases, will finally be addressed.⁸

-
- 5 Note should be taken of the fact that space constraints do not allow for a full and comprehensive discussion and examination of, for example, established specialised commissions such as the Commission on Provincial Government (s 163) and the Financial and Fiscal Commission (s 198) (the so-called formal, specialized forums for facilitating and promoting inter-governmental relations), as well as those informal, voluntary forums which were established later, such as the MINMECs, the Premiers' Forum, the Intergovernmental Forum and the Technical Forum). For a discussion of the working of these forums see Botha "Formal and informal structures of intergovernmental relations" in *Democratic Constitutional Development* (1996) 93-98. See also De Villiers *The Role and Powers of Provincial and Local Governments in the new Constitution* (1996) 22-28. Note should be taken too that these forums had in any event mixed fortunes and/or success as regards the facilitation of intergovernmental co-operation.
- 6 It is submitted that these concepts are critical to provincial government, but it is also submitted that they do not form a *numerus clausus* of concepts. (One is aware of other concepts such as openness, transparency, accountability, *et cetera* which are also crucial in this regard, but for the purposes of this dissertation will not be dealt with.) Nevertheless, substantiation for the inclusion of these concepts chosen, is to be found in the interim Constitution itself and in particular in the preamble and Schedule 4 (*Constitutional Principles*). The preamble refers, *inter alia*, to the creation of a sovereign and *democratic constitutional state* (my emphasis) whereas the Constitutional Principles deal with, *inter alia*, separation of powers and checks and balances in Principle VI, and with federalism (South African 'style') in Principles XVI- XXVII.
- 7 It should be noted that 'quasi-federal' is not used as a term of art, but merely in the more colloquial, popular sense of the word denoting a system that is neither full-blown federalist nor full-blown unitary but merely a system that to a large degree contains "shades of federalism" or certain "variations on the theme" (of federalism). Even an acknowledged authority such as Elazar is not adverse to the use of "quasi-federal" in the more colloquial sense. See *Exploring Federalism* 248.
- 8 Erasmus "Provincial government under the 1993 Constitution. What direction will it take?" 1994 *SAPL* 407. The aim will be to establish which direction provincial government took and whether the provincial governments are in practice more or less functioning as "quasi-federal" power bases.

2 CORE CONSTITUTIONAL CONCEPTS CRITICAL TO PROVINCIAL GOVERNANCE

(a) Democracy and constitutionalism

Democracy is a very relative concept which is often used in a political or ideological context.⁹ It is not an easy concept to define because it has many faces. People abuse the concept by bending it to suit their own views and ideologies, rather than to measure their ideologies against some fixed criterion.¹⁰ Whatever formulation one uses to define democracy, the bottom line appears to be that the people (the electorate) should have the final say in regard to how they are to be governed. The fact that the interim Constitution introduced a supreme constitutional dispensation with a justiciable Bill of Rights resulted in lawyers having to deal with competing conceptions of democracy. The expression of majority opinion will have to be reconciled with the core values embodied in the Constitution.¹¹ A workable democratic model to provide for the full realisation of both these concepts still has to be developed.

Constitutionalism, like democracy, is a somewhat vague term with a philosophical rather than a practical connotation. The popular definition for constitutionalism is "limited government" or "government by law".¹² Constitutionalism obviously embodies any concept which works towards prevention of a concentration of powers in one person and which ensures the protection of rights and liberties. Separation of powers, checks and balances, and the whole concept of democracy, or democratic accountability, are thus

9 Carpenter *Introduction to South African Constitutional Law* (1987) 12; Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1 *et seq.*

10 Carpenter *op cit* 12.

11 Van Wyk *Rights and Constitutionalism* 26.

12 "When 'we the people' have formulated a constitutional choice, it binds the more limited authority of government however constituted", because the concept of separation of powers precludes one branch of government from claiming to represent the people - see Van Wyk *Rights and Constitutionalism* 2.

also incorporated in the notion of constitutionalism. Michelman¹³ points out that constitutionalism is founded on two premises regarding political freedom. The first premise is that people are to be governed by themselves collectively, and the second is that people are to be governed by laws and not by "men". At first it might appear as if there is a mutually exclusive tension between these two premises as the notions of self-rule (first premise) and that of law-rule (second premise) might seem to be incompatible. However, as Michelman points out, the two premises amount to the same thing, namely the electorate's demand to determine for themselves the norms that are to govern their social life (self-rule) and the electorate's demand for protection against abuse by arbitrary power (law-rule).¹⁴ It is important to note that the concept of federalism facilitates the attainment of both these constitutional ideals.

The conclusion reached when appraising the concepts of democracy and constitutionalism will to a large extent be determined by the perspective with which you view them. According to Acheampong democracy is regarded as being "rooted in the principle of popular sovereignty by which the citizenry is deemed to be the ultimate source of all state authority".¹⁵ Ojwang points out that constitutionalism can be regarded as a general notion of which the primary significance is good government in the sense of submission to restraint *vis-à-vis* established rights and justified public expectations.¹⁶ Given these general characteristics of the two concepts, the current realisation thereof in the new South Africa can to a certain degree be evaluated against the background of the interim Constitution.

In an overview of the events since April 1994, and given that the interim Constitution provides for the realisation of both concepts, it would seem as if democracy and constitutionalism has yet to be established as vital pillars of the new constitutional

13 Michelman "Law's Republic" 1988 (97) *Yale LJ* 1500.

14 Michelman *op cit* 1501.

15 Acheampong "Human Rights, Democracy and Development Aid to Africa" 1992 (8) *Lesotho LJ* 22.

16 Ojwang "Constitutionalism - In classical terms and in African Nationhood" 1990 (6) *Lesotho LJ* 74.

order.¹⁷ De Villiers commented (in 1992) that “[t]he verbal commitment of various organizations to democracy, and the way in which the very same organizations and their leadership handle differences of opinion, both internally and externally could be questioned.”¹⁸ His comments then could just as well have been directed at the current situation since not much has changed.

(b) Separation of powers and checks and balances

The exact meaning of the “separation of powers” doctrine is not immediately obvious as the doctrine is not applied in exactly the same way in any two countries.¹⁹ The essence of the doctrine is, however, the same, namely that power should be ameliorated, and that checks and balances should be imposed to avoid concentration of power in one person or group of persons, thus limiting the possibility of an arbitrary exercise of power. It should be borne in mind that nowhere in the world is a complete separation of powers to be found. Partial overlapping of the various governmental functions not only promotes the effective operation of checks and balances but also contributes to effective government.²⁰ In the governmental arrangement which we now have, it should be noted that separation of powers not only operates in the traditional horizontal context, but also in a vertical context as between the national and provincial governments.²¹

The interim Constitution makes adequate provision for the practical implementation of separation of powers and checks and balances.²² However, an overview of events of the past two and a half years reveals that these concepts have not yet been fully

17 *The Star* 1996-10-23 24; *Sunday Times* 1996-09-15 1.

18 De Villiers “Pitfalls for Negotiations and Democracy” 1992 HSRC Publications 4 as quoted in Licht and De Villiers (eds) *South Africa’s Crisis of Constitutional Democracy. Can the US Constitution Help?* (1994) 32.

19 Carpenter *op cit* 158; see Van Wyk *Rights and Constitutionalism* 71 n 389.

20 Carpenter *op cit* 157.

21 Ojo “Separation of Powers in a Presidential System of Government” 1981 *Public Law* 106.

22 Du Plessis & Corder *op cit* 21.

realised.²³ In spite of political rhetoric to the contrary it does not seem as if the concept of separation of powers and checks and balances is animated. The problem seems to be a lack of understanding of the concept itself as well as the vital importance thereof to the whole democratic order.²⁴ Another factor which compounds the non-realisation of this concept is the fact that in many of the provinces the opposition parties are so poorly represented in the provincial legislature that they cannot even muster enough votes to bring into play certain vital counterbalancing procedures which are provided for in the rules and orders of the provincial legislatures.

(c) Federalism

Whereas the necessity for the realisation of the preceding constitutional concepts is self-explanatory, that is not the case with federalism.²⁵ There is an ongoing pro-federalism/anti-federalism debate which is mainly contested along party-political lines. There are various reasons why federalism (whatever its precise nature) is regarded as a constitutional 'must' for South Africa.²⁶ Amongst these reasons advanced, are that federalism is about the "prevention and control of centralised 'majority' power".²⁷ Cilliers, for example, points out that the tragic history of apartheid has shown that centralised

23 *Sunday Times* 1996-04-28 4; *Financial Mail* 1996-08-30 19.

24 *The Star* 1996-10-23 24. Incidents like the Shell House and Sarafina debacles as well as the recent firing of Premier Lekota (to name only a few) all point to the concept of separation of powers not yet being "functional". At national level President Mandela has of late been involved in several acts of interference whereby the executive will of government was forced onto Parliament. Those incidents would seem to point to a lack of understanding of the importance of the separation of powers to the vitality of democracy. At provincial level it is clear to anybody who has been closely involved with the provinces that the provincial executive is viewed as the face of provincial government and that the provincial legislature is perceived to be subservient to the provincial executive and actually acts accordingly.

25 As stated in fn 4 no comprehensive discussion of the typical characteristics of the concept of federalism is undertaken except for the indication of a few features as evidenced from the provisions in both the interim and final Constitutions.

26 That federalism (in whatever form) was to be regarded as of crucial importance was already in evidence right from the start of the negotiations as seen from the arguments by the various role-players in this respect (see fn 1). The interim Constitution, after all, also makes provision for federalism in one or other form (see fn 3).

27 Van Wyk "Looking at the new South Africa: thoughts about federation and federalism" 1991 *SAPL* 99.

power should indeed be prevented and controlled through federalism because the "inescapable reality of South African society is that it is heterogenous and cosmopolitan".²⁸ Another reason is advanced by Elazar who writes (with reference to third World countries) that "federalism has proved useful in accommodating diversity".²⁹ Any element of federalism in the new constitutional dispensation could therefore serve to ameliorate the concentration of power in the hands of the national government. In the light of the underlying tensions that are prevalent in our country that seems to be the route to follow.

Even though it might seem as if we need a certain amount of federalism in our constitutional dispensation the issues of "how" and "how much" still remain extremely problematic. Federalism as a form of state can take various forms and can be approached from various angles. There is no single definition of what a federal state should be and there is no ideal or perfect federal (or unitary) state.³⁰ Many federal states have strong unitary characteristics,³¹ while numerous unitary states exhibit definite federalistic tendencies.³² As De Villiers has pointed out it should also be borne in mind that the best known federations did not originate as much a result of a clear philosophical (constitutional) plan, but were rather the outcome of pragmatic considerations and historical forces at the particular time.³³ It should also be noted that the Constitution of a particular country obviously does not necessarily offer an accurate picture of the actual state of provincial autonomy.

28 Cilliers *op cit* 482.

29 Elazar *Exploring Federalism* 248. See also De Villiers *The Federal/Unitary Debate* who refers to South Africa's geographical and population size, as well as the ethnic diversity and the need to bring government closer to the people as inevitably necessitating the application of certain aspects of federalism (11). See too Erasmus "The new Constitutional dispensation: What type of system?" 1994 *Politikon* 9 who refers to federalism as a mechanism suitable for cooperation in a society with diverse local needs and that its territorial separation of powers protects local and individual rights .

30 De Villiers *The Federal/Unitary Debate* 8.

31 For example India, Austria and Germany.

32 For example Spain, the United Kingdom and Italy.

33 De Villiers *The Federal/Unitary Debate* 8.

Irrespective of the variations in form and application it seems as if federations normally share the following fundamental characteristics that separate them from unitary systems:³⁴

- Supremacy of the constitution which means that any laws which purport to upset the balance of powers of the various levels of government and which are in conflict with the constitution, will be null and void;
- Shared rule between national and provincial governments which means that a partnership is established between the various levels of government to ensure that the functions pertaining to the different levels are performed in a co-ordinated fashion;
- Self rule by provincial governments which means that the powers and functions of provincial governments are guaranteed by a supreme constitution;
- Protection of provincial institutional and territorial integrity which means that the constitutional and territorial autonomy of provincial governments as entrenched in a supreme constitution, is guaranteed; and
- An allocation of revenue resources between the national and provincial levels of government, including some areas of autonomy for each level.³⁵

When the interim Constitution is assessed with reference to these fundamental characteristics it appears to be of a composite or hybrid nature in that it contains elements which are federal in nature, as well as elements which are more likely to be found in a unitary system. Some of the characteristics of the interim Constitution which favour federalism are the fact that there is a supreme Constitution which makes provision for three levels of government; provincial representation in the national

34 De Villiers *The Federal/Unitary Debate* 12.

35 Watts "Is the new Constitution Federal or Unitary?" in De Villiers (ed) *Birth of a Constitution* (1994) 77.

legislative process; provisions for provincial constitutions; the protection of the integrity of provincial governments and the provision for an independent arbiter in the form of the Constitutional Court.³⁶ Certain characteristics that are more akin to a unitary system are: the subordinate intergovernmental financial arrangements, the sharing of certain officers, commissions and services and the provision of overriding national legislation.

In the light of the above it seems as if there is general agreement that the interim Constitution provides for some sort of a "quasi-federal" arrangement,³⁷ which can, as Watts has done, probably be classified most accurately as a hybrid system.³⁸ It should, however, be borne in mind that, as De Villiers, Watts and Erasmus all have pointed out at one stage or another, the technical dimension of federalism is subordinate to that which is agreed upon at the political level.³⁹

A very important issue, which is constantly being overlooked, was raised by Van Wyk five years ago when he pointed out that as a "human rights culture" will have to be developed, so will a "federal culture" have to be fostered in the new South Africa.⁴⁰

3 PROVINCIAL POWERS UNDER THE INTERIM CONSTITUTION

The practical application of the provisions of the interim Constitution that pertain to provincial administration should be seen against the background that the provinces did from the outset not possess the necessary infrastructure and expertise to deal with a

36 Elazar "Form of State: Federal, Unitary or ..." in De Villiers (ed) *Birth of a Constitution* (1994) 31 *et seq.*

37 Elazar *Form of State* 36; Watts *op cit* 88, Beukes "Governing the regions: or regional (and local) government in terms of the Constitution of the Republic of South Africa Act 200 of 1993" 1994 *SAPL* 399-400; Cilliers *op cit* 480 is, however, of the opinion that the interim Constitution merely contains federal elements.

38 Watts *op cit* 86.

39 Watts *op cit* 77; Erasmus *The new Constitutional Dispensation* 17. De Villiers *Powers* 5 referred to constitutional, political and practical benchmarks that impact on provincial powers.

40 Van Wyk *Federalism* 101; Wamala "Federalism in Africa: Lessons for South Africa" in De Villiers (ed) *Evaluating Federal Systems* 265

revolutionary new constitutional arrangement.⁴¹ It was therefore extremely difficult for the provinces to facilitate full realisation of the relevant provisions of the interim Constitution.

(a) Constitutional Principles

The Constitutional Principles are a set of thirty-four provisions contained in Schedule 4 to the interim Constitution. These are principles which were agreed upon and adopted by the Negotiating Council of the multi-party negotiating process to provide guidelines for the drafting of the final Constitution.⁴² In the preamble of the interim Constitution, the Constitutional Principles are described as a solemn pact in accordance with which the elected representatives of all the people of South Africa should be mandated to adopt a new Constitution.⁴³ The new constitutional text has to comply with the Constitutional Principles and that text, even if it is passed by the Constitutional Assembly, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles.⁴⁴

The importance of the question of provincial powers is reflected in the fact that the majority of the Constitutional Principles pertain to that issue. Provincial powers were also the major consideration in the Constitutional Court's evaluation of the final Constitution for purposes of certification.⁴⁵ The Constitutional Principles, when viewed as a solemn pact, gave rise in some quarters to expectations of a more substantial federal arrangement for the provinces in the final Constitution.⁴⁶

41 The reasons why the interim Constitution does not make provision for the establishment of administrative capacity before the devolution of power onto the provinces is dealt with in para 5 *infra*.

42 Van Wyk *Rights and Constitutionalism* 159.

43 Du Plessis & Corder *op cit* 13.

44 Section 71 of the interim Constitution.

45 See fn 73.

46 See fn 76.

(b) Sections 36 and 48 - establishment and composition of Senate

Sections 36 and 48 of the interim Constitution provide for a Senate, the composition of which is designed to represent the provinces in Parliament. As the issue of provincial representation in the National Assembly is dealt with more fully elsewhere⁴⁷ suffice it to say that the one issue which most observers seem to agree upon is that the Senate failed dismally in its designed function of representing provincial interests in Parliament.⁴⁸

(c) Sections 61 and 62 - power of provinces to resist certain Bills amending Constitution

Sections 61 and 62 of the interim Constitution are aimed at preserving provincial autonomy by providing for certain procedural safeguards which come into operation when provincial boundaries or powers are to be affected by amending legislation.

In *Premier of KwaZulu/Natal v President of the Republic of South Africa*⁴⁹ the Constitutional Court had the opportunity to consider the scope of section 62(2) of the interim Constitution.⁵⁰ In this case the Premier of KwaZulu/Natal sought an order declaring unconstitutional various amendments to the interim Constitution which removed or altered powers granted to the provincial legislature and executive.

47 See para 5 *infra*.

48 De Villiers *Powers* 15. See also the series of articles alluding to this failure in *Business Day* 1995-04-12 8; *Financial Mail* 1996-05-03 43, *Financial Mail* 1996-03-22 46. See too the ANC's *Building a United Nation -ANC policy proposal for the final Constitution* 14.

49 1995 (12) BCLR 1561 (CC). Neither the purpose of this dissertation nor space constraints permit a more comprehensive, critical and penetrating analysis of the various Constitutional Court decisions referred to in this dissertation. Each of these decisions warrants a separate in-depth critical analysis. In this dissertation these decisions are only referred to by way of illustrating a particular point.

50 Section 62(2) of the interim Constitution provides as follows: "No amendments of sections 126 and 144 shall be of any force and effect unless passed separately by both Houses by a majority of at least two-thirds of all the members in each House: Provided that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature."

The Court held that for the proviso to section 62(2) to find application the relevant amending legislation sought to be passed must not be of equal application to all provinces, but should only be targeted at one or more of the provinces. In view of the fact that there is no textual justification for such an interpretation, the mere fact that the proviso is phrased in the singular can surely not be decisive. This interpretation of the Court could therefore create an avenue for abuse of power by the national government.⁵¹ For example, the national government could alter the legislative competency of a province radically by merely passing general legislation whereby the legislative competencies of all the provinces are uniformly affected. The competencies of the provinces which were not the "target" of the central government could merely be restored at a later stage.

(d) Section 126 - legislative competences of provinces

Section 126 provides for qualified provincial legislative power. A province may legislate with regard to all matters which fall within the functional areas specified in Schedule 6. Section 126(3) does, however, contain five widely-formulated exceptions which provide for overriding national powers should the national government legislate on the provincial competencies contained in Schedule 6. The provincial legislative powers in Schedule 6 are subject to overriding national legislation in the following circumstances:⁵²

- where a matter cannot be dealt with effectively at provincial level;
- where national uniform norms and standards are required for the rendering of public services;
- where national minimum standards are required for the rendering of public services;
- where the maintenance of economic unity, environmental protection, the promotion and protection of various aspects of interprovincial relations, and national security require parliamentary regulation; and

51 Gotz 1996 SAJHR 169.

52 Van Wyk *Rights and Constitutionalism* 166.

- where a provincial law has a materially negative effect on the economic, health, or security interests of another province or the country as a whole, or if it impedes the implementation of national economic policies.

The criteria in section 126(3)(a)-(e) will have to be interpreted and applied by the Constitutional Court in the event of a dispute between a province and the national government.

The provinces have not made use of their substantive legislative powers in terms of section 126. The essential Acts⁵³ were passed by the various provincial legislatures but these related to such basic infra structural issues that they can be discarded for the purpose of evaluating the effect of section 126. It would have been of great value if provincial legislative powers in the final Constitution could have been moulded on practical feedback on section 126 of the interim Constitution.⁵⁴

The reality that the provincial legislative powers in section 126 are subject to a national override in certain generally construed instances came to the fore in *In Re: The National Education Bill No 83 of 1995*.⁵⁵ In this case the constitutionality of certain provisions of the National Education Policy Bill had to be decided on. The main argument of the political parties who brought the challenge was that the Bill encroached upon the legislative authority of the provinces and their executive authority. The Constitutional Court held that the powers of Parliament and by implication those of the provincial legislatures, depended ultimately upon the language of the interim Constitution constructed in the light of our own history. The Court further held that the provinces in South Africa are not sovereign states since they were created by the interim Constitution and have only those powers which are specifically conferred on them in terms of the interim Constitution. Their legislative powers are confined to Schedule 6 matters and even those powers are only concurrent with the powers of Parliament.

53 The reference is to legislation such as the provincial Exchequer Acts, provincial Public Protector Acts, and Powers and Privileges of Provincial Legislature Acts.

54 *Finance Week* 9-15 February 1995 5.

55 1996 (4) BCLR 518 (CC).

(e) Section 144 - executive authority of provinces

In terms of section 144 of the interim Constitution the provinces derive their executive authority from three sources: exercised provincial legislative competences; powers delegated by any law; and powers assigned to the province under section 235(8) or any law.⁵⁶ In some of the provinces the perception exists that a province has executive power over all the legislative competences contained in Schedule 6. This is, however, not the case as a proper interpretation of section 144(2) reveals that executive power with regard to a specific legislative competence will only vest in a province once they have actually legislated over that given competence.⁵⁷

A question that arose when it became evident that the assignment of powers under section 235(8) could not be done overnight, was whether the provinces could not have vested executive authority with regard to a specific provincial competence by merely adopting a provincial bill which is a verbatim "replica" of the relevant Act(s) that is to be assigned to the province under section 235(8) (and which obviously pertains to that specific provincial competence). Such an argument would however seem to encroach upon the functional ambit of section 235(8), and would also be against the spirit of the interim Constitution.

(f) Sections 155 to 158 - provincial finance and fiscal affairs

Sections 155 to 158 provide for a share of the national revenue to be allocated to the provinces as well as for a limited provincial tax base. The provinces may also raise loans for capital expenditure. It is a fair assessment that the intergovernmental financial arrangements contained in these sections appear to reinforce the subordination of the provinces since the allocation of funds are left to the determination by Parliament.⁵⁸ The one element qualifying the dominance of the National Government in this regard is the

56 Chaskalson *op cit* 4.

57 See Chaskalson *op cit* 44 for a well-substantiated argument why the executive authority does not vest in a province by virtue of the mere existence of abstract legislative competence.

58 Watts *op cit* 82.

requirement that Parliament takes into account the recommendations of the Financial and Fiscal Commission.⁵⁹ The recommendations of the Commission are in any event not binding upon Parliament. It is also a well accepted fact that the Commission did not develop to its full potential under the interim Constitution and that the "protection" afforded to the provinces in that regard has subsequently not really materialised.⁶⁰

It should be noted that equitable fiscal and financial allocations in the final Constitution are "mandated" by Constitutional Principle XXVII. The financial bases of the provinces as provided for in these sections - which sections were subjected to late amendments so as to strengthen the position of the provinces somewhat - are one of the basic prerequisites for any kind of substantial autonomy by the provinces.

(g) Section 160 - adoption of provincial constitutions

The interim Constitution provides that each provincial legislature shall be entitled to pass its own provincial constitution by a resolution of a majority of at least two thirds of all its members. Subsection (3) of section 160, which was also one of the late amendments to the interim Constitution, provides that a provincial constitution may provide for legislative and executive structures different from those which are provided for in the interim Constitution.

In any "quasi-federalistic" arrangement (whatever the precise nature) one would have expected a section pertaining to provincial constitutions to find application as soon as possible. It would, after all, have provided a very marketable concretisation of provincial autonomy. In the euphoria of the "new" South Africa it therefore came as no surprise that most provinces were keen to adopt a provincial constitution so as to prove that they were not merely "beefed up" self-governing territories or provincial administrations of the national Government. At one stage (end of 1994) the idea was to entrench the existing provincial powers via a provincial constitution as rumour had it that the provincial powers

59 Section 199 of the interim Constitution.

60 De Villiers *Powers* 13.

in the final Constitution would be substantially diminished in a "trade-off" for more effective protection of provincial interests via a revamped Senate. Party politics and the introduction of the concept of co-operative governance did however see to it that most of the provinces decided against the adoption of a provincial constitution.⁶¹

KwaZulu/Natal was the only province to adopt a provincial constitution which was submitted to the Constitutional Court for certification.⁶² In the KwaZulu/Natal certification case,⁶³ the Court deemed the reference to "legislative structures and procedures" in section 160(3) to be a clear reference to structures and procedures which may be necessary or appropriate for the proper functioning of the provincial organs of government.⁶⁴ The Court emphasized that "structures and procedures" do not relate to the fundamental nature and substance of the democratic state created by the interim Constitution nor to the substance of the legislative or executive powers of the (national) Parliament or Government or those of the provinces.⁶⁵

The Constitutional Court made it quite clear that a province cannot determine its own status within the Republic: a province has no authority to confer any legislative or executive authority on itself as such power emanates exclusively from the interim Constitution.⁶⁶ The Court found that several of the provisions of the provincial constitution purported to usurp national powers.⁶⁷ It would appear from the decision that the Constitutional Court will not "tolerate" any full-blown federal or secessionist tendencies in provincial constitutions. This appears from its description of the

61 By mid-1995 it appeared that no provincial constitutions would be forthcoming from the ANC provinces.

62 The Western Cape province apparently also drafted a provincial constitution but the matter was not pursued pending certification of the final (national) Constitution.

63 *In re: Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 CCT 15/96 (as yet unreported).

64 Para 4 of the judgment.

65 Para 5 of the judgment.

66 Para 8 of the judgment.

67 Para 14 of the judgment.

KwaZulu/Natal provincial constitution as having “flagrantly and obviously exceeded the bounds of provincial legislative competence”.⁶⁸

The significance of the fact that nearly all of the provinces refrained from adopting their own provincial constitutions should not be overlooked. Leonardy regards the provision for provincial constitutions in the interim Constitution as a very important indicator of a shift from devolution towards federalism and the insertion of section 160(3) as a true federal expression of self-determination and autonomy.⁶⁹ The non-realisation of section 160(3) therefore reflects negatively on the possibility of truly autonomous provincial governments.

(h) Section 235(8) - assignment of administration of laws

Section 235(8) of the interim Constitution provides for the assignment of the administration of laws to a province if such province has the administrative capacity to exercise and perform the powers and functions in question. The application of section 235(8) of the interim Constitution was therefore the first opportunity to observe the inter-governmental balance in the new South Africa. In the beginning the premiers were (perhaps unintentionally) very supportive of certain principles which in essence were extremely federal in nature. The provincial message to the national government was quite clear: give us as much power possible in as short a time as possible.

The administrative capacity prerequisite contained in section 235(8) was disregarded and the provinces insisted that all the laws pertaining to Schedule 6 competences be assigned to them immediately. After this was eventually done, it transpired that in many instances neither the administrative capacity nor the provincial resolve existed to actually administer them and the administration of many laws came to nought.⁷⁰

68 Para 38 of the judgment.

69 Leonardy “Constitutional Provisions on Devolution and Federalism” in De Villiers (ed) *Birth of a Constitution* (1994) 167.

70 *Finance Week* 9-15 February 1995 5; The provincial officials who became responsible for the administration of laws that were assigned to the provinces did not even bother to obtain copies of such laws, let alone to become acquainted with the legal contents thereof.

Section 235(8) was in issue before the Constitutional Court in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*.⁷¹ The dispute concerned the validity of certain amendments to the Local Government Transition Act 209 of 1993, effected by proclamation by the President purporting to act in terms of powers conferred on him by that Act. The Court was divided as to whether the Local Government Act in fact fell within the scope of the President's powers under section 235(8). In interpreting section 235(8) the Court followed a holistic approach by referring to all the other transitional provisions as well. For our purposes, it would suffice to say that the approach of the majority of the judges towards the functional ambit of section 235(8) can be regarded (by necessary implication) as being supportive of strong central government competence.⁷²

Nevertheless the relevance of this case with regard to the issue of provincial powers flows from the result of the case and not so much from any particular *dicta* by the Court. The Constitutional Court not only showed its willingness to decide in favour of a province, but also one that is controlled by a minority party in the national government. However, it would be misleading to characterise this decision as a victory for federalism.

The extent to which the Constitutional Court focussed on section 235(8) is indicative of the importance of the section as a means by which the distribution of powers between the national and provincial levels of government is to be effected. Section 235(8) was also intended to act as a control mechanism in that the assignment of the administration of laws to a province is subject to the proviso that such province has the necessary administrative capacity to exercise and perform the powers and functions in question. In this latter respect section 235(8) failed as it should be fairly obvious to any observer that most, if not all, of the provinces are struggling to cope with the administrative demands of some of the assigned legislation.

71 1995 (10) BCLR 1289 (CC).

72 Klaaren 1996 SAJHR 162.

4 PROVINCIAL POWERS UNDER THE FINAL CONSTITUTION

Although the final Constitution was not certified first time round,⁷³ the necessary implication of the Constitutional Court's judgment seems to be that no substantial amendments will have to be effected thereto in order for the final Constitution to comply with the Constitutional Principles. I therefore do not foresee that the Constitutional Court will refuse to certify the final Constitutional text on account of the reformulated provincial powers,⁷⁴ despite the objections from certain political parties. In the light of the above a very brief overview will be given of certain of the provisions of the final Constitution relating to provincial powers.⁷⁵

(a) Impact of the Constitutional Principles

A point of view existed that the Constitutional Principles provide for a distinctly more federal provincial arrangement or at the very least an arrangement which is substantially more federal than that the interim Constitution provided for.⁷⁶ These expectations did not materialise and although the final Constitution was not certified it was made very clear by the Constitutional Court that the required "touch-up work" that had to be done to the final Constitution "should present no significant obstacle to the formulation of a text which complies fully with these requirements".⁷⁷ It would therefore seem as if the said expectations are also not realised in the reformulated text of the final Constitution.

Although the majority of Constitutional Principles are focused on provincial powers the Constitutional Court did not question the apparent disparity between the pronounced

73 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC). Hereinafter "the Certification judgment".

74 In any event, the provisions pertaining to provincial governance contained in the final Constitution as amended on 11 October 1996 does not differ substantially from that originally submitted to the Constitutional Court.

75 The formalistic confines of this dissertation do not permit an elaborate discussion of the relevant provisions of the final Constitution.

76 Welsh "Drafting the final Constitution" 1994 *Indicator South Africa Quarterly Report* (12) 19.

77 Para 483 of the Certification judgment.

commitment to more “autonomy” to the provinces in the Principles and the Constitutional Assembly’s “interpretation” of these Principles in drafting Chapter 7 of the final Constitution.

(b) Sections 42 and 60 - establishment and composition of National Council of the Provinces

The National Council of Provinces (NCoP) is to replace the Senate as the forum through which provincial interests are to be represented at national level.⁷⁸ The Constitutional Court found that although it is not possible to say whether the collective interest of the provinces will necessarily be enhanced by the NCoP,⁷⁹ it seems that the structure and functioning of the NCoP differs from that of the Senate to such an extent as to render it better suited than the Senate to represent provincial interests.⁸⁰ It would therefore appear that a “trade-off” of provincial legislature competences for better representation at national level could have occurred.

(c) Section 74 - power of provinces to resist certain Bills amending Constitution

Section 74(3) of the final Constitution provides for a provincial veto where a Bill before Parliament that affects the NCoP, alters the provincial boundaries or amends a provision that deals specifically with a provincial matter concerns only a specific province or provinces. Such a Bill cannot be made law unless it is approved by at least six provinces in the Council. Although the general purport of section 74(3) of the final Constitution and section 61 of the interim Constitution are similar the veto provided for in section 74(3) of the final Constitution, only pertains to Bills which amend the Constitution, and not to ordinary legislation which may also negatively affect the provinces. In this regard there is a diminution of the powers of individual provinces to resist national intervention.

78 The composition of the National Council of Provinces is discussed in para 5 *infra*.

79 Para 331 of the Certification judgment.

80 *Ibid.*

(d) Section 104 - legislative authority of provinces

The legislative authority of the provinces is provided for in section 104 of the final Constitution. The final Constitution, unlike the interim Constitution, does in fact contain a reference to exclusive provincial powers.⁸¹ *Prima facie* it would immediately therefore appear as if the “trade-off” theory was only a lot of hot air.⁸² In my opinion, the exclusive label is merely decorative. The legislative competences contained in Schedule 5 (FC) are no more exclusive than the provincial legislative competences in Schedule 6 (IC) as their ostensible exclusive nature is in effect nullified by several sections of the final Constitution.⁸³

(e) Section 125 - executive authority of provinces

As far as executive powers are concerned section 125 (FC) differs from section 144(IC). Section 125(3) (FC) provides that provinces will only enjoy executive authority in developing and implementing provincial policy to the extent that the province has the administrative capacity to assume effective responsibility. Section 125(3) (FC) also imposes an obligation on national government to assist the provinces to develop the necessary administrative capacity. The effect of section 100 (FC) is that the implementation of provincial legislation in a province is not an exclusive provincial competence anymore as it grants intervenary powers to the national executive over provincial affairs where a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution.

The Constitutional Court found that sections 100 and 125(3) (FC) do not encroach upon the legitimate autonomy of the provinces and subsequently held that no diminution of provincial powers in this regard has taken place.⁸⁴

81 Schedule 5 of the final Constitution.

82 See para 3 *supra*.

83 *Inter alia* refer to sections 44(2), 146(4)(a), 147(1)(b), 147(2) and 228(2) of the final Constitution. For ease of reference “IC” refers to “interim Constitution” and “FC” to “final Constitution”.

84 Paras 266 and 267 of the Certification judgment.

(f) Sections 142 and 143 - contents of provincial constitutions

Section 143 (FC) provides that a provincial constitution may not be inconsistent with the final Constitution save for two areas in which the provisions of a provincial constitution can be different from the corresponding provisions in the final Constitution.⁸⁵ Section 143(2) (FC) provides for areas in respect of which the constitution-making powers of the provinces are limited. The areas of limitation are essentially that a provincial constitution must comply with Chapter 3 of the final Constitution⁸⁶ and the values in section 1, and that a provincial constitution may not confer upon a province powers or functions beyond those conferred on it by the final Constitution. Although the areas of limitation in section 143 of the final Constitution seem to be more extensive than those contained in section 160 of the interim Constitution, the Constitutional Court found that the provisions do not differ substantially. The Court concluded that section 160 of the interim Constitution and sections 142 and 143 of the final Constitution all make provision for a constitution-making power which is subject to the same limitations.

(g) Section 214 - equitable share and allocation of revenue

Section 214 of the final Constitution makes provision for a different manner in which the province's equitable share of the national income is to be determined. Under section 155(2) of the interim Constitution the equitable share of the provinces was made up of various sources of revenue.⁸⁷ Section 214 of the final Constitution does however not specify the sources of funding but establishes a process for determining an equitable share for each province. The specific categories or sources of revenue under the interim Constitution have been done away with. Section 214(2), however, introduces a host of additional substantive and procedural safeguards to determine the actual amount of the equitable share.

85 Section 143(1) of the final Constitution. The areas are provincial legislation and executive structures and procedures and the issue of the traditional monarchy.

86 Chapter 3 of the final Constitution deals with co-operative government.

87 Income tax, value-added tax, fuel levies, transfer duty and additional allocations by national government.

(h) “The weighing of the baskets”⁸⁸

After comparing the provincial powers provided for in the interim Constitution with those provided for in the final Constitution, the Constitutional Court found that provincial powers in terms of the final Constitution are less than and inferior to the powers and functions which the provinces enjoy under the interim Constitution.⁸⁹

The question which the Court then had to address was whether it could be said that the provincial powers as provided for in the final Constitution were substantially less than or substantially inferior to those provided for under the interim Constitution. After consideration of this issue the Court found that with regard to provincial representation in the National Assembly, financial powers of the provinces and in respect of the nature of the provision for provincial constitutions, no material changes were effected in the final Constitution.⁹⁰

There is however a presumption in the final Constitution which favours national legislation which is sought to be justified on the grounds that it is necessary for one of the overriding purposes provided in section 146(2)(c).⁹¹ There is also an alteration in the scope of the provision for national overriding powers. The criterion for the setting of norms and standards has been changed from the “effective performance of a matter”⁹² to “in the interests of the country as a whole.”⁹³ The Constitutional Court found that these changes strengthen national legislation and weaken the position of the provinces

88 Para 443 of the Certification judgment

89 Para 471 of the Certification judgment.

90 Para 474 of the Certification judgment.

91 Section 146(4) of the final Constitution.

92 Section 126(3)(b) of the interim Constitution.

93 Section 146(2)(b) of the final Constitution.

and, along with the curtailment of provincial powers,⁹⁴ are sufficient to be considered a substantial diminishment of provincial powers.⁹⁵

5 PROVINCIAL POWERS IN PRACTICE: "THE CENTRE CANNOT HOLD"⁹⁶

With regard to the evaluation of provincial powers I fully agree with De Villiers⁹⁷ that an over-emphasis has thus far been placed on the legal and technical aspects of provincial powers while other important determinants have been overlooked.⁹⁸ De Villiers identified eight factors that are crucially influential on the powers and functions of the provinces *vis-à-vis* the national government.⁹⁹

De Villiers provides a very sound basis and departure point for any evaluation of provincial powers.¹⁰⁰ As regards the actual implementation of the interim Constitution it appeared from the outset that provincial governance in practice did not by any stretch of the imagination live up to the pre-election expectations. The reasons therefore are numerous and of a widely diverging nature. One of the main reasons is the fact that the sequence of the processes by which the provinces were empowered appears to have been completely wrong. Properly established provincial administrations should have preceded the bestowal of powers on the provinces and not the other way round as the

94 See para 471 of the Certification judgment.

95 Para 481 of the Certification judgment.

96 In the *Mail & Guardian* 22-28 November 1996 a very informative perspective into the realities of provincial governance appeared under the heading "The centre cannot hold".

97 De Villiers *Powers* 5.

98 Financial constraints, party political influence, the role of the second (provincial) chamber, importance of intergovernmental relations and the impact of civil society on a multi-tiered system.

99 De Villiers *Powers* 5. The factors are: distribution of powers; distribution of finances, composition and powers of the second house of national parliament; organization of the public service; nature of intergovernmental relations; role of party political organization and structure; role of civil society and the role of local government.

100 De Villiers *Powers* 5.

interim Constitution in fact provided for. It also appears as if the priorities of the provinces were misdirected from the outset as they paid too much attention to national politics in stead of focusing on the establishment of fully fledged provincial power bases.¹⁰¹ The other reasons for the slow development of provincial powers are too numerous to deal with individually.¹⁰²

Added to the problems referred to above are developments that are more of a political than a constitutional nature. These will obviously not be discussed here but cognizance should be taken thereof as they are of such a substantial and serious nature as to have reportedly driven a senator of the provincial house in Parliament to have called for divine intervention with regard to the provincial problem!¹⁰³

The significance of this problematic state of provincial affairs is that it makes a mockery of the constitutional endeavours that went into drafting the "provincial" provisions of the interim Constitution. It is now clearer why several sections of the interim Constitution including sections 124,¹⁰⁴ 126, 160 and 235(8) did not come to be fully realised.¹⁰⁵ This is where, in my opinion, the same mistakes as those made with the introduction of the

101 Meyer "Regional and Local Government takes shape" 1994 (August) *RSA Review* 1; Lategan "Effective provincial government ensures a winning nation" 1995 (July) *RSA Review* 33; *Business Day* 1995-04-12 8 ; *Finance Week* 4-10 August 1994 12.

102 To name a few: personal and political power aspirations, appointment of inexperienced opportunists in key provincial positions, perceived lack of legitimacy of the interim Constitution itself; lack of resolve to develop into fully-fledged provincial government.

103 "Oh God help us - the provinces! I wish we had never invented them" - *Mail & Guardian* 22-28 November 1996 13. The developments referred to which also compound the provincial governance problem are the following: the inefficiency of provincial government; the difficulties experienced in the management of the provinces, the rise of the provincial power bases as political "launching pads" for political dissidents and ambitious premiers; the amount of power concentrated at provincial level; the lack of accountability and the lack of information on provincial developments.

104 Although the issue of affected areas is adequately provided for in section 124 of the interim Constitution the governments of Mpumalanga and the Northern Province persisted in their unconstitutional and undemocratic endeavours to deal with the Groblersdal, Marble Hall and Bosbokrand issues on a political level. It was only after much public attention had been drawn to the issue and after intervention by the national government that the issue was dealt with as provided for in the Constitution - *The Star* 1995-10-02 35; *The Sowetan* 1995-10-04 16; *Business Day* 1996-03-05 7.

105 *Finansies & Tegniek* 1994-08-26 28

interim Constitution are repeated with the introduction of the final Constitution. We are again putting the cart before the horse. Without evaluating the success (and failures) of the provincial governments under the interim Constitution we are (again) plunging into some form of quasi-provincial autonomy while retaining the inherent weakness of the old system.¹⁰⁶

Although reference has been made to a number of problems facing provincial governance it is not possible to deal with them individually. The issue of provincial representation in the National Assembly is, however, of such cardinal importance to the provincial cause that it warrants elaboration. In that regard the following excerpt seems most telling:

The exact role and need for a Senate needs consideration. It does not currently have a sufficiently identifiable purpose or powers to warrant its special status. In its current form it is a mirror image of the Assembly. It does not appear to be regarded by the provinces as their 'house'. Without a specific regional function the Senate constitutes an institution with little to offer.¹⁰⁷

In addition to being a mere mirror image of the National Assembly the link that the Senate has with the provinces is also weak. The senators act and vote under the discipline of their parties' national caucuses instead of under the discipline of their provincial caucuses or of the provincial legislatures. The practical implication thereof is that the Senate has failed to represent provincial views or to promote intergovernmental relations.¹⁰⁸ Provincial premiers had to resort to various other methods to convey their views. The problem with the Senate is that the purpose it was to serve should first have been determined before the actual composition was decided. As De Villiers has pointed out, it should have been determined whether the Senate is a co-legislator, responsible

106 *Finance Week* 9-15 February 1995 5

107 Building a United Nation - ANC policy proposals for the final Constitution, National Constitutional Conference 31 March/1 April 1995 14.

108 The fact that the provincial representatives were "bullied" at the so-called min-mec meetings made proper provincial representation at the highest level even more imperative - *Finance Week* 9-15 February 1995 5.

for intergovernmental relations, an administrator of national policy or just a sounding board.¹⁰⁹

In view of the problems experienced within the Senate and also because of the important role that provincial representation has to play within the government's "revised understanding" of the provincial framework,¹¹⁰ it was decided to opt for a provincial house where the provinces are represented by members who are elected by the respective provincial legislatures. In that way it is envisaged that the provincial house will contribute to a more co-operative framework of regional and national governance.¹¹¹ It was ultimately decided that the apposite forum in this regard would be a National Council of Provinces (NCoP).

The NCoP is composed of 10 representatives per province elected by the legislature on a proportional basis from its members. Six representatives have "permanent" status which means that they must vacate their seats in the provincial legislature.¹¹² The other four representatives are called "special delegates" which entails that they could rotate depending on what the matter under discussion is. The Premier or a person nominated on his/her behalf is one of the four special delegates. The delegates vote *en bloc* with one vote per province if a matter in Schedule 4 is to be decided, while delegates each have one vote when matters falling outside the ambit of Schedule 4 are considered.

The problem is that the NCoP, when viewed from the perspective of the individual provinces, will also fail to protect the provincial interests because a political party that finds itself in a minority in the Council will simply be outvoted. The situation might therefore develop that the NCoP becomes little more than a rubber stamp for the majority party of the day. In such a case the structure and functions of the NCoP will

109 De Villiers *Powers* 15.

110 Building a United Nation - ANC policy proposals for the final Constitution *op cit* 14.

111 *Ibid.*

112 Section 60 of the final Constitution.

have to be re-examined by the law makers.¹¹³ Even where a political party is in the majority in the NCoP, provincial interests might still suffer in a clash of interests between the national and provincial governments because of the possibility of party politics. In my opinion the Council of Provinces will protect the interests of the provinces no better than the Senate currently does.¹¹⁴

6 CONCLUSION

The question whether provincial government in the new South Africa is proving to be, or is likely to develop into, workable "quasi-federal" power bases, has both a theoretical and a practical/political dimension. If approached from a theoretical viewpoint the answer will most probably be in the affirmative. If however approached from a practical viewpoint, which I would suggest is obviously the more commendable approach, the issue will ultimately be decided by factors which are of a composite (political and constitutional) nature. In our political scenario, where the ruling party is in complete dominance at the national as well as provincial levels of government, this factor will obviously have an even greater effect. The problems which were commented on in paragraph 5 above pertain to issues, which if not addressed, will continue to preclude a province from reaching full-fledged provincial government status.

Upon an appraisal of the "quasi-federal" slant of provincial government in South Africa two factors really stand out, namely the centralist stance of the ruling party and the practical means by which the quest for centralism is to be achieved via the concept of "co-operative governance".¹¹⁵ The term is descriptive of government's intention to create

113 *Financial Mail* 1996-05-03 43.

114 *Financial Mail* 1996-03-22 46. Given the fact that the NCoP will for the foreseeable future be dominated by one party, it is surely not excessively cynical to view it as a mechanism for tightening the central dominance of the government.

115 Party politics are proving so effective that some of the premiers are now also taking a centralist stance - *Business Day* 1996-02-27 8.

strong links between the centre and the regions.¹¹⁶ Firoz Cachalia explains that the concept of "co-operative governance" has certain institutional implications.¹¹⁷ In the first instance the provinces will primarily be protected through the structure of national government and secondly the concept seeks to reduce the role of judicial supervision of the allocation of powers. These implications seem to strengthen the perception that the government has a centralist approach to provincial governance.¹¹⁸

Most if not all of the independent observers agree that we, constitutionally speaking, need a federal or "quasi-federal" arrangement for our heterogenous society. However, given the lack of respect for the upholding of constitutional concepts that are of critical importance to provincial governance, the multitude of problems encountered with provincial powers in practice and the government's determined pursuit of the centralist policy of co-operative governance, the future prospects for more autonomous provincial governments which could in practice function as "quasi-federal" power bases appear to be remote and fanciful.

116 *Financial Mail* 1996-03-22 46; There have been accusations from political commentators that the real intent behind the "co-operative governance" drive was merely to tighten the hold of the ANC dominated centre. If the explanation by an ANC member of the concept of co-operative governance is anything to go by such apparently cynical reactions may not be totally unsubstantiated.

117 *Sunday Times* 1995-04-16 16.

118 The "evidence" pointing to a centralist stance by the ANC is overwhelming - refer to *The Star* 1996-10-23 24, *Sunday Times* 1996-04-28 4; *Sunday Times* 1996-09-15 1 or any of the other articles which deal with the Lekota, Holomisa, Boesak, Shell House or Mahomed incidences.

BIBLIOGRAPHY**BOOKS**

- Carpenter G *Introduction to South African Constitutional Law* (Durban: Butterworths 1987)
- Chaskalson M *et al* *Constitutional Law of South Africa* (Kenwyn: Juta 1996)
- De Villiers B (ed) *Birth of a Constitution* (Kenwyn: Juta 1994)
- De Villiers B (ed) *Evaluating Federal Systems* (Kenwyn: Juta 1994)
- De Villiers B *The Role and Powers of Provincial and Local Governments in the New Constitution* (HSRC Pretoria 1996)
- Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* (Kenwyn: Juta 1994)
- Elaigwu J *et al* *Federalism and Nation-building in Nigeria: The Challenges of the 21st Century* (Nigeria: National Council on Intergovernmental Relations (1994)
- Elazar D *Exploring Federalism* (Alabama: University of Alabama Press 1997)
- Elazar D (ed) *Constitutional Design and Power-sharing in the Post-modern Epoch* (Boston: University Press of America 1991)
- Elazar D *Federalism: An Overview* (HSRC Pretoria 1995)

Van Wyk D et al

Rights and Constitutionalism: The New South African Legal Order (Kenwyn: Juta 1994)

ARTICLES

- Acheampong KA "Human rights, democracy and development aid to Africa" 1992 *Lesotho Law Journal* vol 8 no 1 17-32
- ANC Building a United Nation - ANC policy proposals for the final Constitution, National Constitutional Conference 31 March/1 April 1995
- Beukes M "Governing the regions: or regional (and local) government in terms of the Constitution of the Republic of South Africa Act 200 of 1993" 1994 *South African Public Law* 393-406
- Botha T "'Formal and informal structures of intergovernmental relations' in Democratic Constitutional Development" 1996 *Commonwealth Secretariat* 93-98
- Cilliers CR "The prospects for federalism in South Africa" 1995 *Responsa Meridiana* (October) 475-486
- De Villiers B "Pitfalls for negotiations and democracy" 1992 *HSRC Publications* 4 as quoted in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994) 32
- De Villiers B "The federal/unitary debate: Is there light at the end of the tunnel?" 1996 *The Human Rights and Constitutional Law Journal of Southern Africa* 1996 6-14
- Elazar DJ "Form of state: federal, unitary or ...?" in De Villiers (ed) *Birth of a Constitution* (1994) 29-36

- Erasmus G "Provincial government under the 1993 Constitution. What direction will it take?" 1994 *South African Public Law* 407-429
- Erasmus G "The new constitutional dispensation: what type of system?" 1994 *Politikon* vol 21 no 1 5-19
- Gotz A "*Premier of KwaZulu/Natal v the President of the Republic of South Africa* 1995 (12) BCLR 561 (CC)" 1996 (12) *South African Journal of Human Rights* 166-172
- Klaaren J "*Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others* (1995) (10) BCLR 1289 (CC)" 1996 (12) *South African Journal of Human Rights* 158-162
- Lategan B "Effective provincial government ensures a winning nation" 1995 (July) *RSA Review* 25-34
- Leonardy U "Constitutional provisions on devolution and federalism" in De Villiers (ed) *Birth of a Constitution* (1994) 144-171
- Meyer R "Regional and local government takes shape" 1994 (July) *RSA Review* 1-9
- Michelman F "Law's republic" 1988 (97) *Yale Law Journal* 1493-1537
- Ojo A "Separation of powers in a presidential system of government" 1981 *Public Law* 105-115
- Ojwang JB "Constitutionalism - In classical terms and in African Nationhood" 1990 *Lesotho Law Journal* vol 6 no 1 57-74

- Van Wyk DH "Looking at the new South Africa: thoughts about federation and federalism" 1991 *South African Public Law* 95-102
- Wamala A "Federalism in Africa: Lessons for South Africa" in De Villiers (ed) *Evaluating Federal Systems* (1994) 251-267
- Watts RL "Is the new Constitution federal or unitary?" in De Villiers (ed) *Birth of a Constitution* (1994) 75-88
- Welsh D "Drafting the final Constitution" 1994 *Indicator South Africa*, Quarterly Report 1994 vol 12 no 1 17-20

STATUTES

Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)

Constitution of the Republic of South Africa, 1996 (as adopted by the Constitutional Assembly on 8 May 1996)

Constitution of the Republic of South Africa, 1996 (as adopted by the Constitutional Assembly on 8 May 1996 and as amended on 11 October 1996)

CASES

Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (10) BCLR 1289 (CC)

In re: Certification of the Constitution of the Province of KwaZulu/Natal, 1996 CCT 15/96 (as yet unreported)

In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)

In re: The National Education Bill No 83 of 1995 1996 (4) BCLR 518 (CC)

Premier of KwaZulu/Natal v President of the Republic of South Africa 1995 (12) BCLR 1561 (CC)

NEWSPAPER REPORTS

Business Day 1996-02-27 8

Business Day 1996-03-05 7

Financial Mail 1996-03-22 46-47

Financial Mail 1996-05-03 43

Finance Week 9-15 February 1995 5

Finansies & Tegniek 1994-08-26 28

Mail & Guardian 22-28 November 1996 13

Sowetan 1995-10-04 16

Sunday Times 1995-04-16 16

Sunday Times 1996-04-28 4

Sunday Times 1996-09-15 1

The Star 1995-10-02 35

The Star 1996-10-23 24