DEDICATION

We dedicate this book to Neelan Tiruchelvam with pride and gratitude, and sadness. Neelan, then director of the International Centre for Ethnic Studies, was the inspiration behind the project which has resulted in this book; his ideas, enthusiasm and energy ensured its completion. He dedicated his life to the cause of ethnic harmony and inter-ethnicity equity, and grappled intellectually and practically with constitutional forms that would promote this cause. One of the forms that particularly interested him was federalism. We are sad that he did not live to see the results of the research and reflections of his collaborators on the experience and potential of autonomy to accommodate competing ethnic claims. The life of this gentle and modest person, bursting with vitality and imagination, was brought to an untimely end by a suicide bomber on 29 July 1999.

AUTONOMY AND ETHNICITY

Negotiating Competing Claims in Multi-ethnic States

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CHAPTER 5

HOW THE CENTRE HOLDS:
MANAGING CLAIMS FOR REGIONAL
AND ETHNIC AUTONOMY IN A
DEMOCRATIC SOUTH AFRICA

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Ethnic interests have shaped the quest for federalism in South Africa (Friedman 1993a; Horowitz 1991; Welsh 1993). However, federal arrangements have also been advocated by those seeking to protect non-ethnic interests. While the dominant ethnic-driven claim for federalism has provoked serious resistance, concerns about democratic accountability and effective local administration as well as regional political interests help to explain the vibrancy of the federal elements in South Africa’s new 1996 constitution. I will argue that the particular constitutional outcome, which rejects particular forms of federalism while embracing a strong regionalism, is a direct consequence of both the political majority’s reaction to particular ethnic claims as well as an attempt to incorporate a broader demand for the recognition of regional and ethnic diversity.

To explain this outcome, in which provincial governments wield limited powers yet provincial legislatures play a direct and constitutionally important role in the formulation and passage of national legislation in accordance with enshrined principles of cooperative government, it is necessary to understand both the history of federalist claims in South Africa and their particular role in the democratic transition and constitution-making process. In this context, it is also necessary to outline the ways in which ethnic demands have been recognised in the constitution and the alternative constitutional mechanisms which have been established to address these issues.

FEDERALISM’S SOUTH AFRICAN HISTORY

South Africa is a land of fairly pronounced regionalisms, including some historically distinctive regions—such as Namaqualand, the Western
Province, the Eastern Province, the Highveld, the Eastern Transvaal, and the Northern Transvaal—which, despite their geographic, economic and even social distinctiveness, have never coincided with the historic provincial boundaries (Welsh 1994:243–4). However, it is important to recognise that the apartheid project was based quite fundamentally on the spatial division of the country into racial and ethnic blocs. By the beginning of the democratic transition in 1990, apartheid policy and practice had defined and created six self-governing territories and four independent states within the internationally recognised boundaries of South Africa.

Starting with the all-white National Convention in 1909, which negotiated the formation of the Union of South Africa (Davenport 1977:147–69), fears and designs of domination have marked the history of federalist claims in South Africa. Although the convention agreed on the basic issues—the forging of white political unity in the face of African anti-colonial resistance (Roux 1964:87–100), and economic advantage (Thompson 1975:347)—the Natal delegation’s demand for a federal structure for the new state reflected a fear by English speakers in Natal that they would be dominated by the nationally more numerous Afrikaans speakers (Davenport 1977:120–46). While Natal lost its demand for a federal constitution, a few remnants remained in the creation of an upper house of parliament, based on equal representation from the four provinces, and elected provincial councils with powers to make ordinances on a number of issues, the most significant being non-tertiary education. These provisions were, however, mere sops to Natal opinion as provincial governments could be unilaterally changed by parliament, and provincial ordinances required central government endorsement before they became law. Even the Senate’s limited ability to reject bills could be overcome by a simple majority of the two houses sitting jointly.

Significantly, while the Union constitution paid lip-service to the fears of English-speaking colonials in Natal, the non-ethnic demand for federal arrangements designed to protect the non-racial franchise in the Cape colony was explicitly rejected. Instead, both the parity of English and Afrikaans as well as the Cape franchise were constitutionally entrenched, even if ineffectively in the case of the franchise. The political legacy of this early non-ethnic claim for federalism was kept alive by the small white parliamentary opposition but was completely overshadowed by the apartheid balkanisation of the country. This process reached its apogee in the apartheid regime’s proposal for the formation of a Constellation of Southern African States, in which the territory of South Africa would be forever divided into separate ethnically defined entities.

Responding to the process of decolonisation which was sweeping through Africa in the late 1950s, the apartheid regime sought to extend franchise rights to the African majority, but only within geographically bound and fragmented entities. Referred to by the apartheid regime as the policy of ‘separate development’ (Basson and Viljoen 1991:307–18; Richardson 1978), this policy led to the creation of four ‘independent’ bantustans and aimed to engineer a permanent balkanisation of the country. Rejected by the majority of South Africans and the international community as a violation of black South Africans’ right to self-determination (Klug 1990), ‘separate development’ became a process of denationalisation in which black South Africans became foreigners, regardless of an individual’s place of birth or preference.

In the face of increasing internal resistance and international isolation, the apartheid regime looked in the late 1970s to the political reincorporation of the Indian and Coloured communities as a means of broadening its social base. This led to the adoption of the 1983 constitution which purported to adopt a consociationalist model by extending the franchise to ‘Indians’ and ‘Coloureds’ in a tricameral legislature with its jurisdiction distributed according to a vague distinction between ‘own’ and ‘general’ affairs. However, two mechanisms ensured that power remained safely in the hands of the dominant white party (the National Party). First, government was effectively centralised under an executive state president with extraordinary powers. Second, all significant decisions within the legislature—such as the election of president—could be resolved by the 4:2:1 ratio of representatives, which ensured that even if the ‘non-white’ houses of parliament voted in unison, the will of the ‘white’ house would prevail. The exclusion of the African majority from this scheme and resistance from within the two target communities (Indian and Coloured) meant that the 1983 constitution was practically still-born. The escalation of resistance and rebellion, which began in late 1984 and led to the imposition of repeated states of emergency from mid-1985, sealed its fate.

This legacy holds important implications for the debate over federalism and ethnicity in South Africa. While it is possible to argue that the apartheid regime’s designs for ethnic homelands and even a constellation of states envisioned at best a confederal arrangement in which colonial domination would remain intact, and that its adoption of proportional consociationalism among the white, Coloured, and Indian minorities lacked the essential parity required by a consociational model, this manipulation of ethnicity discredited the demands for ethnic federalism which emerged in the democratic transition. Furthermore, it is important to recognise that, despite this history of ethnic fear and manipulation, ethnic divisions, whether by language, religion, race or tribal affiliation, have never completely coincided with geographic or political boundaries. Even here, such as in KwaZulu-Natal, there is a single dominant Zulu-speaking group, national patterns of economic
development have resulted in a significant dispersion of members of that group into other regions of the country. Nevertheless, it was this same region that mounted the strongest claim for regional autonomy in the transition to democracy, driven by the claims of Zulu nationalism and fears of ethnic domination within the African majority, as well as by the political interests of the former KwaZulu government’s ruling Inkatha Freedom Party (Mare 1992; Mzala 1988).

NATION BUILDING, ETHNICITY AND CULTURAL DIVERSITY

Claims for the recognition of ethnicity posed the greatest threat to South Africa’s democratic transition. While all the parties said they wished to respect cultural diversity, contestation over the nature of that diversity forced negotiators to confront claims, made by the apartheid regime and its allies since the early 1970s, that the policy of separate development was based on the protection of different cultures. Although this justification ignored the reality of ethnic and racial hierarchies and of racist domination of the black majority, it remained a significant source of many separatist claims during the negotiations.

While African National Congress (ANC) negotiators remained committed to building a non-racial South Africa, the power and fear generated by a history of ethnic identification could not be ignored. Through the forty years of apartheid, at least, South African ethnic diversity was reinforced and re-created through government sponsorship of separate ethnic administrations, and separate language radio and television stations. Although controlled by apartheid propagandists, these purported to serve the needs of cultural diversity. The reproduction of this ‘diversity’ in the creation of bantustans elites and the promotion of ethnic ‘tribalism’ created an apartheid legacy which will continue to affect debates and political struggles over issues of national development and democracy. In contrast, the quest for national liberation witnessed numerous reformulations aimed at extending the category of oppressed in ethnic and class terms, while simultaneously presenting an alternative vision of a single, non-racial South African nation free of ethnic domination.

Despite the non-racial project’s success in creating a united front against apartheid – most visibly in the Congress Alliance and later the United Democratic Front – questions of cultural diversity in language and education policies continued to plague the democratic movement. This tension between a commitment to non-racialism and the recognition of cultural and other group-based differences has mediated the ANC’s communitarian traditions and led to an embracing, in part, of individualism, constitutionalism and preferential policies. These proposals have not, however, placated those whose political standing remains tied to distinct group or ethnic identities and difference.

Although opinion polls prior to the 1994 elections revealed limited popular support for any ethnic-based party, ethnic assertions began to resonate across the political spectrum both during negotiations and in the election campaign. Addressing a 20,000-strong Inkatha rally on 5 April 1994, an Inkatha regional secretary threatened that, ‘if our demands cannot be addressed, then there is no election on the 27th of April… We will do everything in our power to destroy any attempt by any state organ used by the ANC to divide the Zulu nation’ (Lorch 1994:A13). Like Buthelezi’s Inkatha, hard-line white separatists continued to insist on ethnic diversity. Faced with the conclusion of negotiations for the transition to democratic order in October 1993, an odd assortment of parties, including Inkatha and right-wing white segregationists, formed the ‘Freedom Alliance’, demanding that the new constitution enshrine ethnic identities. This trend led to the appearance of new and as yet unsupported claims, the most flamboyant being made by a ‘coloured separatist movement’ demanding an independent state stretching across the Southern and Western Cape, with Cape Town as its capital. Even the ANC was drawn into this debate, challenging Buthelezi’s claim to speak for South Africa’s eight million Zulu speakers. Speaking at a rally in Durban, Nelson Mandela celebrated Zulu history as part of the struggle to build a nation and told 60,000 ANC supporters that ‘it is impossible to separate the threads that make the weave of our South African nation’. Although not overtly addressed in the transitional 1993 constitution, the impact of mobilised ethnic claims on this first round of constitution making was reflected in a range of constitutional provisions – including the structuring of a government of national unity – designed to ensure minority participation in governance (Ellmann 1994).

Despite the obvious salience of ethnic and racial identities in the South African context, it is important to recognise how the apartheid legacy in effect precluded a focus on ethnic divisions in the construction of the post-apartheid state. First, the very existence of the ‘independent’ bantustans, which had been denied recognition by the international community, gave the ANC’s demand for a unitary South Africa important international support. Second, the continued resistance of these entities to reincorporation – particularly Bophuthatswana, whose political leadership refused to sign the declaration of intent at the first formal negotiations (Codesa 1) because it implied reincorporation – and the Inkatha Freedom Party’s repeated withdrawal from the negotiations, threats of secession and finally alliance with white right-wing parties completely
opposed to democracy only strengthened this rejection of any federal arrangement based on the existing geographic and political divisions. Finally, the ANC's own antipathy to any recognition of ethnic claims was explicitly stated in its 1988 constitutional guidelines which went so far as to suggest the future prohibition of political parties which advocate or incite ethnic or regional exclusiveness or hatred (ANC 1988).

**NEGOTIATIONS AND THE F-WORD**

Entering negotiations, the three major political parties held distinct if developing views on federalism, regional government and diversity. For the ANC, a future South Africa would have to be based on a common citizenship and identity which could only be achieved through a collective effort to overcome apartheid's legacy (ANC 1994:1–3). The National Party (NP), on the other hand, conceived of a future in which local communities would be able to voluntarily choose to pursue their own living arrangements without interference from the state (NP 1991a, 1991b:12). To this end, the NP advocated a government of limited powers and proposed that different communities should be able to veto legislative action – if not directly at the national level, then indirectly at the local level through self-government based on local property rights and through the creation of a firewall between public and private activity (NP 1991a:15–18). Finally, the Inkatha Freedom Party (IFP) advocated complete regional autonomy which it described as 'federalism', as a means to ensure the self-determination of particular communities. The IFP's federalism would require not only that national government be a government of limited, enumerated powers but also that the national constitution would remain subject to the constitutions of the individual states of the federation. Although labelled federalism, the essence of the IFP proposal was a system of confederation.

In specific terms, the ANC proposed a combination of elements which, on the one hand, would ensure the participation in the legislature of any group that could achieve 5 per cent of the national vote through a system of proportional representation and, on the other, would address the legacy of apartheid. Constitutional provisions to address that legacy were contained in the ANC's proposed bill of rights (ANC 1993) and comprised five different prongs which together would work to produce a system of both formal and substantive equality. The most significant of these for the debate on regionalism was a provision for regional equalisation designed to address the dualistic structure of South Africa's regional development.

The NP government entered negotiations promising its constituency that the government's bottom-line would be a system of power sharing that would secure the interests of different communities – characterised at first racially, then as different ethnic nations and ultimately as distinct minorities. Attempting at first to provide an acceptable version of the failed 'consociationalism' of the 1983 constitution, the NP proposed a revolving presidency and a bicameral legislature, with the upper house – consisting of 'minority representatives' – having veto powers over all legislation. After being criticised for relying on a thinly disguised framework of racial vetoes, the NP modified its approach, demanding an extended period of transition and advocating what it described as 'constitutional rule in a participatory democracy' (NP 1991a). This proposal promoted a combination of individual rights, communal vetoes and consociationalism. Together, these elements were structured to produce a framework designed to insulate private interests and action from public power, with the net effect of allowing those with the resources and desire to pursue a system of privatised apartheid.

At the national level, the protection of individual rights was to be restricted to positively enforceable political and civil rights, while legislative power was to be dominated by a regionally constituted upper house of a bicameral legislature. Significantly, regional representation, while analagised to the system of equal state representation in the US Senate, would in fact involve a second level of equivalence which would ensure 'minority' veto power: While regions would have equal representation, each region's delegates would be made up of an equal number of representatives from every political party achieving more than 5 per cent of electoral support in the region (NP 1991a:12). The effect of this scheme would be to ensure that parties representing significant racial or ethnic minorities would receive enough seats in the Senate to effectively veto any legislation threatening their interests accumulated under apartheid.

Relying on this particular construction of a bill of rights and federalism to protect individual and community interests at the national level, the focus of the NP proposal shifted to the local level, conceiving local government as a form of consociationalism based on property rights and presenting it as securing 'participatory democracy'. According to this proposal, votes for local government would be apportioned equally between a general voters roll and one restricted to property ownership within each voting district (NP 1991a:16–17). Local government would thus enable different racial groups consigned by apartheid to different geographic areas to retain control over their local arrangements.

While the NP focused its concern on local control, the IFP early on committed itself to the consolidation of its interests in one region of the country: KwaZulu-Natal. Although, at the beginning, the IFP demanded parity in the negotiations with the ANC and the NP government, it retreated to the advocacy of regional autonomy in an attempt to perpetuate its existing advantage as a homeland government into the post-apartheid era.
(Ottaway 1993:64–72). Described as federalism, the form of regional autonomy advocated by the IFP and its allies in the Freedom Alliance was closer in substance to the form of state autonomy contained in the US Articles of Confederation. In terms of the IFP notion of federalism, the different regions would constitute autonomous states whose constitutions would dictate interpretation of the ‘federal’ constitution (IFP draft constitution 1993). In other words, any application of the federal constitution to issues within a region or to conflicts between regions would have to be consistent with the constitutions of the relevant regions (art. 92).

This conception of ‘autonomous federalism’ is further revealed in the IFP’s proposed Constitution of the State of KwaZulu-Natal the draft of which was adopted by the KwaZulu Legislative Assembly in late 1992. Declaring the sovereignty of KwaZulu-Natal to be ‘indivisible, inalienable and untransferable’ (art. 3), this constitution would have required South African armed forces to obtain permission before entering KwaZulu-Natal (art. 67(1)), required South Africa to obtain consent before levying tax (art. 67(2)), created an ‘autonomous’ central bank (art. 81), and granted a KwaZulu-Natal Constitutional Court exclusive jurisdiction to decide whether South African laws were valid within the region (arts. 67(3) and 77).

At the federal level, the IFP proposed a government of limited powers in specific areas, including a common monetary system, national defence, nationality and immigration, foreign affairs, federal judicial organisation, intellectual property rights, and external commercial relations (IFP draft constitution 1993: art. 65(a)). The national legislature would also be empowered to pass general principles of legislation in the areas of environmental regulation, banking, interstate commerce and economic development as well as framework legislation to facilitate interstate negotiation over policies in these areas (art. 65(a)). Finally, any federal legislation would have to be passed by both houses of parliament, effectively giving the Senate – made up of four representatives elected from each state – a veto over national legislation (art. 70(a)).

The federal government would be further disembowered under the IFP’s proposals by the creation of a series of independent commissions to control and regulate federal government activity. Apart from a number of internationally cognisable bodies, such as a judicial service commission (art. 78), a civil service commission (art. 83) and an electoral commission (art. 84), the proposal introduced the notion of independent policy-making institutions into the heart of traditionally government-controlled activities and called for the establishment of a series of such commissions, including a privatisation commission (art. 81), a regulatory relief commission (art. 85) – to repeal or amend burdensome, unnecessary or inadequate regulations – an environmental commission (art. 87), a consumer affairs commission (art. 88), and an economic development commission (art. 86). A significant feature of these commissions was that their membership was to be appointed from a variety of sources, including the president, federal parliament, and private bodies including the national chamber of commerce, consumer groups and representatives of industry (arts. 81(a), 85(a), 87(a) and 88(a)). This introduction of different factions into the heart of government was a unique aspect of the IFP proposal, which in the South African context would have worked to promote established interests whose racial character would, for some time, remain largely the product of apartheid’s allocation of economic and social resources.

THE CHALLENGE OF REGIONALISM

In the process of negotiating the 1993 constitution, there were significant changes in the positions of the three major players as well as important continuities which became cobbled together in the interim constitution. Most fundamentally, the ANC’s demand for a unitary state came to be interpreted to mean national sovereignty over the 1910 boundaries of South Africa, rather than meaning a central government with pre-emptive power over regional authorities. With this new emphasis, the issue of federalism/regionalism, rejected initially by the ANC because of its historic association in South Africa with the emasculation of governmental powers, became a central feature of the constitutional debate.

The adoption of the language of ‘strong regionalism’ by both the ANC and the NP government also reflected NP acceptance that the veto powers of the upper house of the legislature would be limited to regional matters and that its notion of political party-based consociationalism would be formally restricted to local government structures. Although the NP government accepted the demise of its specific proposals, many of the provisions of the 1993 constitution, and in particular its guarantee of a five-year ‘government of national unity’, satisfied many of the goals implicit in the apartheid government’s earlier proposals.

Unlike the ANC and the NP, however, the IFP refused to concede its central claim to regional autonomy and, in its alliance with white pro-apartheid parties, threatened to disrupt the transition. Although factions of the IFP seemed ready to contest the elections for the KwaZulu-Natal regional government, party leader Chief Gaafa Buthelezi interpreted his party’s poor showing in pre-election polls as cause to promote an even more autonomous position, encouraging and supporting King Goodwill Zwelithini in his demand for the restoration of the nineteenth century Zulu monarchy, with territorial claims beyond even the borders of present-day KwaZulu-Natal.
Although the protagonists of a federal solution advocated a national government of limited powers, the 1993 constitution reversed the traditional federal division of legislative powers by allocating enumerated powers to the provinces. This allocation of regional powers — according to a set of criteria incorporated into the Constitutional Principles and in those sections of the constitution dealing with the legislative powers of the provinces — was, however, rejected by the IFP on the grounds that the constitution failed to guarantee the autonomy of the provinces. Despite ANC protestations that the provincial powers guaranteed by the constitution could not be withdrawn, the IFP objected that these were only concurrent powers and that the national legislature could supersede local legislation through the establishment of a national legislative framework covering any subject matter. This tension led to an amendment to the 1993 constitution before it even came into force. The amendment granted provinces prevailing powers in enumerated areas of legislative authority: agriculture; gambling; cultural affairs; education at all levels except tertiary; environment; health; housing; language policy; local government; nature conservation; police; state media; public transport; regional planning and development; road traffic regulation; roads; tourism; trade and industrial promotion; traditional authorities; urban and rural development; and welfare services.

Although the provinces had the power to assign executive control over these matters to the national government if they lacked administrative resources to implement particular laws, the constitution provided that the provinces had executive authority over all matters over which they had legislative authority as well as matters assigned to the provinces in terms of the transitional clauses of the constitution or delegated to them by national legislation. The net effect of these provisions was continued tension between non-ANC provincial governments and the national government over the extent of regional autonomy and the exact definition of their relative powers.

THE ROLE OF THE NEW CONSTITUTIONAL COURT

It is in this context that three particular cases were litigated before the Constitutional Court in 1996, cases in which we may trace the role of the new court in addressing the challenge of regionalism in a post-apartheid South Africa. All three cases involved, among other issues, claims of autonomy or accusations of national infringement of autonomy by the province of KwaZulu-Natal where the IFP was declared the marginal winner of the regional vote in 1994. As such, they represent three moments in which the court was called upon to help shape the boundary between contending claims of constitutional authority to govern, unresolved by the negotiated settlement. While two of the cases directly implicated actions of the KwaZulu-Natal legislature and its attempts to assert authority within the province — in one case, over traditional leaders and, in the other, the constitution-making powers of the province — the first case involved a dispute over the National Education Policy Bill which was then before the National Assembly.11

Objections to the bill focused on the claim that it ‘imposed national education policy on the provinces’ and thereby ‘encroached upon the autonomy of the provinces and their executive authority’. The IFP argued that the ‘bill could have no application in KwaZulu-Natal because it [the province] was in a position to formulate and regulate its own policies’ (NEB case, 1996; para. 8). While all parties accepted that education was defined as a concurrent legislative function under the interim constitution, the contending parties imagined that different consequences should flow from the determination that a subject matter is concurrently assigned to both provincial and national government.

KwaZulu-Natal and the IFP in particular assumed a form of pre-emption doctrine in which the National Assembly and national government would be precluded from acting in an area of concurrent jurisdiction so long as the province was capable of formulating and regulating its own policies. Rejecting this argument, the Constitutional Court avoided the notion of pre-emption altogether and, instead, argued that the ‘legislative competences of the provinces and Parliament to make laws in respect of schedule 6 [concurrent] matters do not depend upon section 126(3)’, which the court argued only comes into operation if it is necessary to resolve a conflict between inconsistent national and provincial laws (para. 16). The court’s rejection of pre-emption is an interpretation of the constitution which enabled both national and provincial legislators to continue to promote and even legislate their own imagined solutions to issues within their concurrent jurisdiction without foreclosing on their particular options until there is an irreconcilable conflict.

Having avoided siding categorically with either national or provincial authority, the court argued that, even if a ‘conflict is resolved in favour of either the provincial or national law the other is not invalidated’, it is merely ‘subordinated and to the extent of the conflict rendered inoperative’ (para. 16). Supported by the comparative jurisprudence of Canada (para. 17) and Australia (para. 18), the court was able to make a distinction between ‘laws that are inconsistent with each other and laws that are inconsistent with the Constitution’ (para. 16), and thereby to argue that, ‘even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared unconstitutional’ (para. 20).

While the Constitutional Court’s approach clearly aimed to reduce tensions inherent in the conflict between provincial and national governments, particularly in relation to the continuing violent tensions in
KwaZulu-Natal, it also took the opportunity to explicitly preclude an alternative interpretation. Focusing on argument before it which relied upon the US Supreme Court's decision in *New York v. United States*, the court made the point that 'unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states' (para 23). Furthermore, the court warned that 'decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution' (para 29). In effect, the court's approach was to begin to draw a boundary around the outer limits of provincial autonomy, while simultaneously allowing concurrent jurisdiction to provide a space in which different legislatures could continue to imagine and assert their own, at times contradictory, solutions to legislative problems within their jurisdiction.

The scope of such a definition of concurrent jurisdiction was immediately tested in a case challenging two bills before the KwaZulu-Natal provincial legislature, which purported in part to preclude national action affecting the payment of salaries to traditional authorities in KwaZulu-Natal. In this case, brought by ANC members of the KwaZulu-Natal legislature, the objectors argued that the bills were unconstitutional, as they attempted to 'frustrate the implementation of the [national] Remuneration of Traditional Leaders Act', by preventing the Ingonyama (Zulu King) and traditional leaders 'from accepting remuneration and allowances which might become payable to them in terms of the national legislation'. Furthermore, the object of this provincial legislation 'was to create a relationship of subservience between them [traditional leaders] and the provincial government', an object outside the scope of the provinces' concurrent powers with respect to traditional authorities (*Amakhosi* case, 1996: para. 16).

Faced with intractable political conflict between the IFP and the ANC in KwaZulu-Natal, the court reasserted its duty to interpret legislation narrowly, so as to avoid constitutional conflicts, and upheld the legislative competence of the KwaZulu-Natal legislature and the constitutionality of the two bills. In effect, the court allowed the KwaZulu-Natal legislature to continue to imagine its own authority in this area, merely postponing clear questions of conflict between the national and provincial legislation to a later date. The outer limits of the court's tolerance for alternative constitutional visions was, however, reached in the third case, in which the court was asked to certify the Constitution of the Province of KwaZulu-Natal.

Although the KwaZulu-Natal draft constitution had been unanimously adopted by the provincial legislature, the Constitutional Court held that there are 'fundamental respects in which the provincial Constitution is fatally flawed' (*KZN Constitution* case, 1996: para. 13) and therefore declined to certify it. The court considered these flaws under three headings. Two sets of problems were essentially procedural in nature and involved attempts by the KwaZulu-Natal legislature: (1) to avoid the court's determination of the text's inconsistency with the interim constitution (paras 36–38); or (2) to suspend the certification process itself until particular sections could be tested against the final constitution (paras 39–46). While the court rejected these devices as being in conflict with the certification process and attempting to circumvent the process, respectively, the most significant problem with the text was the KwaZulu-Natal legislature's usurpation of national powers.

Referring to the court's decision on the education bill (*NEB* case), in which it made a 'distinction between the history, structure and language of the United States Constitution which brought together several sovereign states ... and that of our interim Constitution' (para. 14), the court held that parts of the proposed KwaZulu-Natal constitution appeared to have been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national legislature and even the Constitutional Assembly (para 15). Drawing a clear boundary around the permissible constitutional aspirations of the IFP in KwaZulu-Natal, the court rejected the draft text's attempt to both 'confer' legislative and executive authority upon the province (para. 32) and to 'recognize' the authority of the government and 'compete' of the national parliament in other respects (para. 34). While recognising the right of the IFP-dominated KwaZulu-Natal legislature to exercise its powers to draft a provincial constitution, even possibly including its own bill of rights, the court clearly rejected the attempt by the IFP to assert its vision of regional autonomy beyond the core meaning of the negotiated compromise represented by the 1993 constitution. Furthermore, the court clearly silenced the extreme option of provincial sovereignty, stating that the assertions of recognition were 'inconsistent with the interim constitution because KZN is not a sovereign state and it simply has no power or authority to grant constitutional "recognition" to what the national Government may or may not do' (para. 34). Even as its vision of regional autonomy became increasingly isolated, the IFP still imagined that it could be achieved within the parameters of the 1993 constitution. Its rejection by the Constitutional Court silenced this particular attempt but did not foreclose on the IFP's vision of greater regional autonomy.

Instead of suffering defeat, the IFP was able to take solace from the court's refusal, on the same day, to certify the draft of the final constitution, and in particular its decision that the draft final constitution had failed to grant provinces the degree of autonomy they were guaranteed in the constitutional principles. However, when the 1996 constitution was finally certified by the Constitutional Court, the IFP remained
dissatisfied over the limited degree of provincial autonomy recognised. But, by then, as the governing party in KwaZulu-Natal, it was not about to exit the system. Instead, it joined the other opposition parties in saying that they would take the opportunity in the following year’s legislative session to review the constitution, thus keeping their claims alive.17

CONSTITUTION MAKING AND THE RECOGNITION OF DIVERSITY

South Africa’s democratic transition was premised on a two-stage process of constitution making. The first round, while buffeted by popular participation, was ultimately under the negotiating parties’ control. In contrast, although the second round was formally constrained by a complex set of constitutional principles contained in the interim constitution (South Africa Constitution 1993, Fourth Schedule), it was driven by an elected Constitutional Assembly made up by a joint sitting of the National Assembly and the Senate of South Africa’s first democratic parliament (s. 68).

The sections of the interim constitution providing for the creation of a final constitution clearly influenced the distribution of power in the Constitutional Assembly. While requiring that a new constitution be passed within two years from the first sitting of the National Assembly (s. 73(1)), chapter 5 of the interim constitution required that at least two-thirds of all members of the Constitutional Assembly vote for the new constitution (s. 73(2)).18 In addition, sections of the final constitution dealing with the boundaries, powers and functions of the provinces had to be adopted by two-thirds of all members of the regionally constituted Senate, giving the provinces established under the interim constitution an important lever of influence in the Constitutional Assembly (s. 73(2)). However, once the negotiating parties reached a compromise requiring the Constitutional Court to certify that the final constitution was consistent with the constitutional principles (s. 71(2)), the different parties focused their attention on the content of the principles as a way of continuing their struggles for particular outcomes with respect to regional powers and racially or ethnically defined governance.

The constitutional principles contained an amalgam of broad democratic principles consistent with the new international post–cold war consensus on constitutionalism and a host of details specific to the needs of the negotiating parties. The most dramatic of these specific provisions were those requiring the recognition of the Zulu King and the provision of a Volkstaat Council, which were added by amendment shortly before the April 1994 elections as a way to include parts of the Freedom Alliance, particularly the IFP and the Afrikaans right-wing led by former South Africa Defence Force head General Constant Viljoen. The inclusion of this plethora of constitutional principles not only enabled the
elections to go forward and the democratic transition to proceed, but they also served to defer a range of substantive issues into the next phase of constitution making. Although individual principles were open to varying interpretations, the interaction of the different principles revived many of the conflicts their inclusion had been designed to lay to rest. A significant difference, however, was that these conflicts would henceforth be played out in a completely different arena.

Faith in the constitutional principles was at first vindicated when the Constitutional Court declared the text of the final constitution ‘unconstitutional’, despite its adoption after last-minute political compromises by 86 per cent of the democratically elected Constitutional Assembly. While the court’s denial of certification was based to a large extent on the failure to, on balance, grant sufficient powers to the regions, the court was also careful to point out in its unanimous, unattributed opinion that, ‘in general and in respect of the overwhelming majority of its provisions’, the Constitutional Assembly had met the predetermined requirements of the constitutional principles. In effect, however, this was a very limited and circumscribed ruling, as the major political parties rejected any attempt to use the denial of certification as a tool to reopen debates. Instead, the Constitutional Assembly focused solely on the issues raised by the Constitutional Court.

While, in the second certification judgment, it recognised that the powers and functions of the provinces — the most contentious issue in the whole constitution-making process — remained in dispute between the parties, the court held in essence that the removal of the presumption of constitutional validity of bills passed by the National Council of Provinces (NCOP) had tipped the balance.19 Thus, despite the recognition that provincial powers and functions in the Amended Text remained less than or inferior to those accorded to the provinces in terms of the interim constitution, this was not substantially so (SCJ: para. 204(e)), and therefore no longer a basis for denying certification.

THE FINAL CONSTITUTION’S REGIONALISM PROVISIONS

Although traditional notions of federalism assume the coming together of formerly sovereign entities and their retention of certain specified powers, South Africa’s 1996 final constitution represents an increasingly common means of constitutionalising the relationship between different spatial jurisdictions within the nation-state. South Africa’s constitutional regionalism is one in which the constituting act created a structure in which powers are allocated to different levels of government and includes a complex procedure for the resolution of conflicts over governance — between the respective legislative competencies, executive powers, and
relations with other branches and levels of government. Unlike its German, Indian and Canadian forebears however, South Africa's constitution places less emphasis on geographic autonomy and more on the integration of geographic jurisdictions into separate functionally determined roles in the continuum of governance over specifically defined issues. While provision is made for some exclusive regional powers, these are by and large of minor significance, all important and contested issues being included in the category of concurrent competence.

Unlike prior South African constitutions, the 1996 constitution entrenches three distinct levels of government – national, provincial and local – and makes detailed provision for their constitutional autonomy and their interaction. Unique in this regard is the inclusion of one specific chapter detailing the governmental structure of the country and laying down general principles of interaction between these different spheres of governance. Most significant among these principles is the provision requiring organs of state involved in an intergovernmental dispute to make every reasonable effort to settle the dispute and to exhaust all other remedies before it approaches a court to resolve the dispute (s 41(3)). Cooperative governance, in this sense, integrates the different geographic regions and discourages them from seeking early intervention from the courts; rather, they are forced into an ongoing interaction designed to produce interregional compromises.

While the basic structure of South Africa's constitutional regionalism is reflected in the division of functional areas of legislative power into areas of concurrent and exclusive legislative competence, specified in schedules 4 and 5 of the constitution, the substance of this constitutional design is contained in provisions: (1) requiring joint or collaborative decision making; (2) regulating inter-jurisdictional conflict; and (3) securing limited fiscal autonomy. First, the constitution provides for a second house of the national parliament – the NCOP – directly representing the provinces in the national legislative process through their provincial delegations, appointed by the legislatures and executives of each province (ss 60–72). It then provides that most bills must go before the NCOP, although the nature of the latter's role in each bill's passage will depend on the subject matter involved (ss 73–77). Constitutional amendment of the founding provisions (chap. 1), the bill of rights (chap. 2) or those sections dealing specifically with the provinces, the NCOP or provincial boundaries, powers, functions or institutions, all require the support of at least six of the nine provinces. Ordinary bills must also go before the NCOP but procedure for their passage within the NCOP will depend on whether the bill involves a matter assigned by the constitution to a particular procedure, is a matter of concurrent jurisdiction or is an ordinary bill not affecting the provinces. Unless it is an ordinary bill not affecting the provinces and therefore may be passed by a mere majority of the individual delegates to the NCOP, the decision will be made on the basis of single votes cast on behalf of each of the provincial delegations. Furthermore, the constitution requires an Act of Parliament to provide a uniform procedure through which provincial legislatures confer authority on their delegations to cast votes on their behalf (s 65(2)). Conflicts between the National Assembly and the NCOP over bills affecting the provinces are negotiated through a mediation committee consisting of nine members of the National Assembly and one from each of the nine provincial delegations in the NCOP. It is this elaborate system of structures and processes that creates a system of enforced engagement integrating provincial and national interests at the national level. The requirement that provincial legislatures mandate their NCOP delegations serves in this context to further integrate the legislative process, thus projecting provincial interests onto the national agenda while simultaneously requiring the regional bodies to debate nationally defined issues, both processes designed to limit provincial alienation.

Second, provision is made for the constitutional regulation of inter-jurisdictional conflict that may occur in the exercise of both legislative (ss 146–150) and executive (ss 100 and 139) powers. It is these provisions that effectively denote the limits of this new regionalism. In the case of executive authority, mirror provisions allow either the national or the provincial executives to directly intervene at the provincial and local level, respectively, if a province or local government cannot or does not fulfill an executive obligation in terms of legislation or the constitution (ss 100 and 139). Although these provisions establish numerous safeguards against their potential abuse, they nonetheless pose an important limit to provincial and local autonomy. In the case of legislative authority, a whole section of the constitution deals specifically with the circumstances under which national legislation will prevail over provincial legislation in areas where the two levels of government enjoy concurrent authority. Significantly, however, the default position is that, unless the conflicting national legislation meets the criteria laid down in the constitution, it is the provincial legislation that will prevail (subsection 146(5)). While this seems to grant more authority to the provinces, in fact, the broad criteria establishing national authority over provincial competence, including where the national legislation provides for uniform national norms and standards, frameworks or policies (subsections 146(2) and (3)), means that provincial competence will provide a very thin shield against national legislative intrusion. It must be remembered, however, that the provinces will be significant participants in the production of such national legislation through the NCOP. Central authority
is, however, further privileged by the inclusion of a provision establishing particular circumstances, including the need to maintain national security, economic unity or essential national standards, as the basis upon which national legislation may be passed, overriding even the exclusive subject matter competence secured for the provinces with respect to those areas defined in schedule 5 of the constitution (s. 44(2)).

The third important feature of South Africa's 'strong regionalism' is the constitutional protection of fiscal distributions to the provinces so that they might, to some extent, fulfil their constitutional mandates and provincial policies independent of the national government. Again, however, this mechanism is characterised by an emphasis on integration through the Financial and Fiscal Commission, an independent constitutionally created body which advises parliament and the provincial legislatures on, among other things, the constitutional mandate that parliament must provide for the equitable division of revenue among the national, provincial and local spheres of government (s. 214). But the national government is again privileged in that the taxing power of the regional and local governments is constitutionally constrained (ss. 228 and 229) and made dependent upon national legislation (s. 228(2)(b)), and, as in the case of executive authority, it has a carefully constrained power through the national treasury to directly cut off transfers of revenues to the provinces – at least for 120 days at a time (s. 216). The outcome is a system of mediating sources of authority which neither guarantee regional and local autonomy nor allow the national government to simply impose its will on these other spheres of government.

COOPERATIVE GOVERNMENT AND 'WEAK' REGIONALISM

In the end it is not surprising, given the anti-apartheid context, that South Africa's new constitution does not satisfy the federal aspirations of those parties whose demands were based on ethnic claims and aspirations. Yet it is notable that the new structure has a number of profoundly federal characteristics, particularly evident in the creation of the NCOP and the direct role given to provincial legislatures in the formulation of national legislation.

Despite the rhetoric of 'strong' regionalism, the new system of cooperative government precludes any significant regional autonomy and grants even less exclusive control to the provinces than did the interim constitution. The notion of 'cooperative government' is based, according to Professor Nicholas Haysom, legal adviser to former President Mandela and a member of the ANC Constitutional Committee, on a break with the nineteenth century approach to federalism which allocated 'areas of responsibility to one particular area of government only'. What the new South African approach does, argues Haysom, is to 'give the different areas of government the right to legislate on the same topic or area but only in respect of their appropriate responsibilities. Responsibility, in turn, is decided relative to appropriate interest, capacity and effective delivery but the apportionment of it is more complex than merely isolating an area of social life and parceling it out to a single sphere of government' (quoted in Bell 1997:72).

While the exact scope of regional power in this formulation remains unclear, it is evident that the Constitutional Court will have a very important role in mediating the continuing struggle over the exercise of power between the different levels of government. Although this has already begun, as indicated in my discussion of the 1996 cases involving KwaZulu-Natal, the effects of these conflicts and the general lack of administrative capacity in many of the newly formed provinces have already been brought to the attention of the central government, which is increasingly concerned about the inability of the provinces to perform their functions.  

CONCLUSION

Dharam and Yash Ghai, in an analysis of constitutional frameworks designed to tackle problems of ethnicity in South and South-East Asia, identified three distinct constitutional approaches (Ghai and Ghai 1992:79; Ghai 1994:1–16). The first approach assumes that ethnic problems are transitional and that the constitution should not inhibit the necessary process of national integration. The second approach assumes that ethnic minorities need more than individual or even group protection against arbitrary discrimination. This approach requires ethnic minorities to have a share in power that will enable each group to participate significantly in decision making. The third option is an intermediate position in which specific but limited provision is made to address the concerns of particular communities.

South Africa's democratic transition represents a context in which these different alternatives often represented the preferences of different political claimants and have to different degrees been incorporated into either the transitional constitutional arrangements or are reflected in the final 1996 constitution. While the adoption of proportional representation and strong language and cultural rights in the constitution is consistent with both the nation-building project of the ANC and the aspirations of different ethnic minorities, it is the incorporation of specific mechanisms – such as the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, as well as the special role guaranteed to 'traditional leaders' – which offer particular ethnic claims some recognition in the final constitution.
This recognition has not, however, been carried over into the struggle over regional autonomy and federalism.

Although the constitutional mandate of cooperative government may indeed represent an innovative response to the issues of decentralisation and the devolution of power, it neither recognises claims for regional autonomy nor does it give any space for the promotion of ethnic claims to self-governance. Indeed, the 1996 constitution responds to ethnic claims through a combination of individual rights and indirect political recognition through the functioning of proportional representation.

Most explicitly, there was the adoption of a limited number of mechanisms to deal with those ethnic claims which continued to threaten the political order. However, given the history of ethnic claims and the rejection of ethnic balkanisation imposed by the apartheid regime, the rejection of ethnic demands for more explicit spatial autonomy and the exclusion of the f-word, or federalism, is not surprising.

More interesting, however, is the impact that the discourse of federalism and regional autonomy had on the reconstruction of the South African polity. Although there is no way of knowing now just how centralist an unmodified version of the ANC's original vision would have been in practice, it is safe to assume, given the attempts by the national leadership to intervene in regional and local ANC party politics since 1994, that there would have been much less space for regional autonomy.

For the IFP and the NP, on the other hand, the legitimisation of a discourse of autonomy, if not federalism, has allowed them to continue to assert their own visions for the two provinces they control: KwaZulu-Natal and Western Cape, respectively. What is striking is how the failure of complete autonomy or federalism has in fact forced these parties to reshape their own visions of regional autonomy. While any analysis of these changes will have to take into consideration the post-apartheid transformation of both these parties, including the impact that the findings of the Truth and Reconciliation Commission is having on their support and internal politics, there is already evidence of a significant dissipation of the demands for autonomy that marked the democratic transition. Briefly, the IFP in KwaZulu-Natal has moved from a position of near-total antagonism to the ANC to one in which portions of the party have even been prepared to discuss merger with the ANC. The NP, on the other hand, is engulfed by its own internal ethnic divisions as it attempts to integrate the Coloured support it relied upon to win control of the Western Cape.

The fate of regional autonomy and federalism in South Africa may also be considered from the perspective of governance since 1994. While both the Western Cape and Gauteng seem to have established fairly effective regional polities, the other seven regional governments have been plagued by different degrees of conflict and lack of competence stemming from the severe lack of capacity at the local and regional level.

This brief history indicates that the adoption of a pure federal system with the degrees of autonomy initially demanded by the IFP and the NP would have most likely floundered. While governance continues to be reworked and even strengthened in South Africa, this process has been very dependent upon a very close interaction between the national ministries and the regional and local governments. The federal elements contained in the 1996 constitution, and especially the important role given to provincial legislatures in the national legislative process through the NCOP, thus represent the beginning of a new South African regionalism rather than the embrace of federalism as a means to deal with a long history of colonial and ethnic conflict.

NOTES

1 An important early example of this was Olive Schreiner and W.P. Schreiner's advocacy of federalism at the time of Union, in which they were attempting to protect the non-racial franchise in the Cape colony (First and Scott 1989:256–64).

2 See also A Review of the Present Mutual Relations of the British South Africa Colonies, 1907, Cd. 3564.

3 The elected provincial councils were in fact abolished with very little protest in the 1980s.

4 For an early critique of the policy of separate development and the idea of bantustan development, see Mbeki (1984:73–94).

5 Weekly Mail & Guardian, 1-7 October 1993, p. 9, col. 4.


17 Mail and Guardian, 11 November 1996

18 The acceptance of a two-thirds threshold involved an important shift in position for the National Party which had attempted to require a seventy-five percent majority to pass a new constitution within the constitution-making body. This demand led to the collapse of negotiations within the Codesa framework (Friedman 1999b: 31)


21 See Ministry for the Public Service and Administration (1997)

22 Such as the provisions for ‘consciencial’ local government until 1999

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