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FOREWORD

As a large, multiracial, multi-ethnic and multicultural country, it was a major challenge for the political parties and movements in South Africa to negotiate an adequate political structure after the historic changes in the early 1990s. One of the fundamental decisions to be taken was whether South Africa should be a unitary or a federal state.

The acceptance of provinces was among one of the most important compromises of the Codesa (Convention for a Democratic South Africa) process. It was perhaps the most contentious part of the negotiating process, and was a crucial condition to bring all major political forces on board and to convince them finally to participate in the first national elections in 1994.

Although in the end the provinces were not as strong as the Inkatha Freedom Party (IFP) and other non-African National Congress (ANC) parties would have wanted, they provided much greater devolution of power to the regions than the ANC had originally advocated. In this way, the three-tier system – comprising national, provincial and local spheres of government – became a fundamental element of the South African Constitution.

As a result, a cooperative system of government was entrenched in Chapter 3 of the Constitution. Germany has a similar concept known as Bundestreue *or federal comity, which means that the spheres of government should act in partnership rather than as adversaries.*

On the one hand, Bundestreue *offers space to counteract the concentration of too much power in the hands of central government and prevents power from being centralised. On the other hand, it allows different regions to experiment with alternative policy approaches and to compete against one another in areas for investment or in providing service delivery in terms of housing, health and education.*

Decentralisation can also be seen as part of the concept of power sharing, which should not confine itself to the judiciary, the legislature and the executive. An additional element of power sharing is a decentralised system with distinctive levels of government in a well-bounded system with clearly distributed and defined competences.

This system brings political decision-making closer to the individual by setting up a network of political structures that give a certain guarantee for checks and balances of political power. In line with the principle of subsidiarity, government should therefore be devolved to the lowest effective level.

The future of the provinces in South Africa is one of the main issues in the current political debate. The ongoing policy review process of provincial government, launched by Provincial and Local Government Minister Sydney Mufamadi in August 2007, intends to assess whether the quality of service at this level can be improved.

Although political parties and South African citizens agree generally that there is need for a review, there are fundamental differences of opinion on the matter among the various political parties. While the ANC policy document and government policy review paper focus mainly, or even exclusively, on the number or the boundaries of provinces, the opposition parties – mainly the Democratic Alliance and the IFP – are questioning how the existing three-sphere system could be made to work more efficiently.

In this policy paper, Bertus de Villiers provides a comprehensive and insightful discussion on how the

three-sphere system was established in the South African Constitution, the process that led to the creation of nine provinces and how intergovernmental relations were established in this country. Furthermore, where appropriate, reference is made to international experiences. The final part of the paper focuses on the review of the provinces.

The intention of this second issue of our new Policy Paper series is to stimulate and inform debate around the topical and crucial issue of provincial boundaries and functions in South Africa. We are confident it will do just that.

Werner Böhler
KAS Resident Representative South Africa

THE FUTURE OF PROVINCES IN SOUTH AFRICA – THE DEBATE CONTINUES

Bertus de Villiers

1. INTRODUCTION

The future of provinces in South Africa is again up for debate. The Department of Provincial and Local Government initiated a policy review process in August 2007, with the aim to develop a White Paper to set out the future of provincial and local governments for consideration by the South African cabinet and parliament by the end of 2008.

The rationale for the Policy Review is summarised as follows by the Department of Provincial and Local Government:

> This task of assessing whether existing forms of governance remains appropriate to meeting changing demands has become routine in developed and developing countries alike. This process will draw on the lessons of a decade or more of practice, wide public consultation and comprehensive research, geared towards making proposals.[1]

Although the current provinces have been in place for more than a decade, there has been some discomfort with South Africa's second-sphere governments since they came into being in the interim Constitution of 1993. The unease can be attributed to various reasons, be they historic, political, ideological, financial or practical. The fact that South Africa had to 'create' its provinces – in contrast to most other federations such as the United States (US), Switzerland and Germany, where historical provinces[2] existed – has complicated the nation's relationship with provinces.

The ongoing unease in senior government ranks regarding provincial governments is reflected in the following statements found in the Policy Review:

> The Constitution created provincial government, but it did not specify distinct objects for provincial government within the overall system. There is currently no policy or legislative framework for provinces.[3]

> The absence of a definite policy on provincial government has generated uncertainty about the role of this sphere in reconstruction and development.[4]

The process leading to the demarcation of provinces in 1993 and the allocation of their powers in the 1993 interim Constitution and in the final Constitution of

Dr Bertus de Villiers was closely involved in the South African constitutional debates from 1990–1996 that gave rise to the creation of the current provinces. He was a technical advisor to the Committee on the Demarcation of Provinces and has published extensively on international experiences with provincial/regional governments. De Villiers was head of the Centre for Constitutional Analysis at the Human Sciences Research Council during the constitution drafting phase. He holds the degrees LL.B, LL.D (University of Johannesburg) and is admitted as legal practitioner in South Africa and Australia. After completion of the constitutional negotiations in 1996, De Villiers was appointed principal legal officer for South African National Parks (1996–1999), during which time he was lead negotiator for the settlement of the Makuleke claim in the Kruger National Park. Thereafter De Villiers became principal legal officer of the Goldfields Land and Sea Council in Kalgoorlie, Australia (1999–2005) where he represented Aboriginal people in claims to their ancestral lands and other social justice issues. De Villiers is currently a member of the State Administrative Tribunal of Western Australia and a visiting fellow at the University of Western Australia Law Faculty. This report is written in his personal capacity and the content does not intend to reflect the views or opinions of his current or previous employers or those of the Konrad-Adenauer-Stiftung. De Villiers can be contacted at bertus.devilliers@justice.wa.gov.au.

1996 was characterised by a reluctance on the part of the liberation parties to create constitutionally protected second-tier governments. Through political compromise the provinces in their current form were, however, brought to life.

It is fair to conclude that without the creation of provinces, the political compromise which gave rise to South Africa's democracy would not have been possible. Provinces were one of the linchpins that made the great settlement of 1993 and the election in 1994 possible. Parties such as the Inkatha Freedom Party (IFP), the National Party (NP) and the Progressive Federal Party (PFP)/(Democratic Party – DP) would not have acceded to the interim or the new Constitution had it not provided for constitutionally guaranteed second-tier governments. The pressures within the African National Congress (ANC) for some form of provincial government also increased as the negotiations progressed.

It is, however, fair to observe that the political balance that existed in 1993 and 1996 has now been radically altered. The pro-provincial (read 'federal') parties such as the IFP, New National Party (NNP) and Democratic Alliance (DA) have lost substantial support and their political influence has been eroded. The ANC has expanded and consolidated its dominant position at all spheres of government. The inter-party political balance that necessitated the 1996 settlement has therefore been changed as support for the minority parties has withered.

So why is a review of provinces called for at this time in South Africa's history, and where could it be leading to?

The answer to this question is not entirely clear to the author. Little, if any, credible research or information is available to show why a review is necessitated at this stage. This paper will nevertheless reflect on key aspects of the process leading to the creation of the provinces, and will then consider some of the main arguments that have been raised to justify a review of provincial powers and boundaries.

In order to determine the way forward for provinces, it is important to revisit the reasons why provinces were created, why they were demarcated in their current form, and how their powers were allocated. Once the background to provinces is understood, one can consider reasons why alterations or modifications may be required at this stage.

This policy paper has three objectives, namely to:

- provide an overview of the background to the creation of the provinces, the demarcation of their boundaries and the allocation of their powers;
- reflect on international experiences in federations to determine how issues related to boundary adjustments and allocations of powers are dealt with elsewhere; and
- reflect on the rationale that is presented for a radical change to provincial boundaries and functions in South Africa.

2. WHY WERE PROVINCES CREATED?

The current debate on the future of provinces cannot be isolated from the negotiations which led to the creation of the provinces in the early 1990s. Although the current leadership is not necessarily bound to discussions that took place more than a decade ago, it would be short-sighted not to take into account the factors which influenced those negotiations and the decisions of our constitutional 'fathers' and 'mothers'.

The decision to create provinces was not taken lightly. It was preceded by intense political debate and compromise as well as by extensive research and consultation at both local and international level. It was arguably the most contentious part of the negotiating process (other than the power-sharing arrangements in the executive, but those were to be applied only on an interim basis).

The pros and cons of federalism and the creation of constitutionally protected provinces with guaranteed powers and functions, characterised much of the constitutional debates and discourse from 1990 to 1996. Prior to the creation of the nine provinces, South Africa had four historic provinces, 10 homelands and nine development regions. None of these had wide political credibility, support or legitimacy.

Four questions arose at the time when negotiations commenced: Why should there be second-tier governments? How should they be demarcated? What should be their powers? And how should their powers be protected?

It was widely recognised in the constitutional debates that due to its history, size, geographical features,

development needs and population composition, South Africa would require some form of provincial government. The concern, however, was that a balance had to be found between defining the role of the provinces as formal spheres of government with guaranteed powers, and the importance of national integration, nation building and minimum standards of development for the entire nation.

The legacy of the dreaded homeland system was so fresh in the mind that many within the liberation movements were fiercely opposed to any form of entrenched provincial system of government.

> The ANC's vision of a future form of state is based on the view that the territorial divisions wrought by apartheid, specifically the independent homelands, must be reversed … The shift which has occurred within the ANC towards greater powers for provinces still does not place the ANC within the group who advocates a federal outcome.[5]

The fact that some of the provinces that are now facing the most severe development and service challenges (such as the Eastern Cape and Limpopo) were also worst effected by the homeland system, is adding credence to the argument of those who contend that provinces should never have been created.

The sudden Damascus-conversion that political parties such as the NP, the Conservative Party and other rightwing groups experienced since 1990 by becoming staunch 'federalists', reinforced the suspicion with which provincial government was viewed when the Constitution was drafted. The concern was expressed at the time by Kader Asmal that:

> the National Party proposals of September 4, 1991, do not use the dreaded word 'federal' to describe their constitutional proposals. But words, especially used by the National Party, have lost their technical qualities. The real effect of these proposals is to impose a unique, tightly drawn, and inflexible version of federalism onto the South African body politic.[6]

There were also concerns that even a traditionally federalist party such as the IFP may use its powers to exert political dominance at a regional level within the province of KwaZulu-Natal. The IFP for its part was concerned about the risks of central dominance and hegemony. It favoured a federal system due to the power-sharing aspect that it brings, the principle of subsidiary which requires decision-making to take place at the level closest to the people, and the ability of federalism to accommodate the ethnic diversity of South Africa.

Various reasons were forwarded at the time in favour of the creation of provinces, for example:

- The size of South Africa makes it impossible to be governed only by national and local governments.
- The population composition of South Africa requires some form of regional organisation to allow informally for cultural, regional and language diversity.
- Decentralisation to regional and local governments in developed and developing countries has been shown to build capacity and to lead to more effective government.
- Political and civil society in South Africa was already organised on some form of provincial basis, for example, labour unions, political parties, sporting bodies, religious groupings, agricultural organisations, business bodies, etc.
- Provinces would be the best way to build national unity, while at the same time recognising diversity and the rights of minority political groupings.
- Decentralisation would encourage experimentation and creativity at provincial levels.
- Decentralisation would build leadership in governance and administrative sectors.
- Decentralisation would enhance the accessibility of government and decision-making.
- Decentralisation would bring government closer to the people.

Concerns were, however, also expressed at the creation of provincial governments – for example that it would:

- undermine national unity;
- perpetuate economic inequality between the provinces;

- lead to the 'balkanisation' of South Africa;
- give credibility to the previous homeland system;
- be too costly and a drain on scarce human and financial resources;
- lead to duplication, lack of accountability and unnecessary competition between levels of government;
- limit the ability of the national government to implement programmes for the benefit of the entire nation;
- be cumbersome and lead to delays in decision-making and the implementation of programmes;
- lead to litigation, as experienced by many federal-type states; and
- be a barrier between the national government and local communities.

In short, provinces were conceived and born in an atmosphere of intense distrust.

The debates of the time were summarised succinctly by Prof. Fanie Cloete at a multiparty workshop which aimed to thrash out some of the questions that faced negotiators:

> Federalism, with its delicate balance of power between diversity and unity, is a very sophisticated form of government. Even in industrial democracies where the discrepancies between the rich and the poor are not as pronounced as in developing countries, the federal balance is difficult to maintain (e.g. Canada). In younger countries, nation-building objectives are further regarded as more important than entrenching minority rights … . The prospects for successful federal regionalism are, therefore, not very good in most Third World countries, which suffer from many of these constraints,[7] unless they can be effectively overcome.[8]

The apparent deadlock in the regionalism[9] debate was broken in early 1993 when key role-players in the South African business community brought together a small team of 20 or so advisors, academics and specialists to discuss future options for provincial government. It was realised at the time that the provincial debate could make or break the negotiating process. The discussions were facilitated by Dr Frederik Van Zyl Slabbert.[10]

The team met over a period of several weeks to discuss, without a brief from any of the political parties, ways to progress the debate. The team compiled a report in March 1993 entitled 'Regions in South Africa: Constitutional Options and their Implications for Good Government and a Sound Economy', which contained detailed recommendations for the future of provincial government. The report was discussed with the leadership of all political parties over a period of about a month, and it laid the basis for the Constitutional Principles which were included in the 1993 interim Constitution.

The report contained recommendations for the demarcation of regional governments and emphasised that boundaries must be drawn in a manner to ensure that effective development needs could be met.[11] The report was, however, realistic enough to conclude that:

> the question of ensuring that regions have an adequate economic and fiscal base is important, but not to the extent of attempting the equalisation of regions in this respect. With the extremely uneven distribution of resources in South Africa, it is clear that some regions are going to have greater economic potential than others, and it is doubtful whether boundaries can be drawn in such a way as to attempt to equalise economic potential.[12]

In the light of contemporary discussions about the economic potential of some provinces, the following observation of the report is particularly pertinent:

> Attempts to draw regional boundaries in such a way as to equalise economic potential and tax bases between regions, will lead to distortions in the shape of regions to the extent that they are no longer functional in other respects. Thus, while a measure of consideration could be given to the size of the potential tax base in proposed regions, what is probably more important is to see to it that a mechanism exists at a central level (Grants Commission/Fiscal Commission), which can ensure a fair allocation of revenue to poorer regions.[13]

The report concluded that:

> Regions in a future South Africa must be so designed as to give an added depth and strength to the overall work of nation-building – political and economic. Properly constructed, they can enrich and enhance this work. To be sure, there will always be an element of competition in a system where regions are accorded significant status and powers – competition not only between region and region, but between the regions and centre. Such competition is not unhealthy, and can indeed be beneficial, as long as it is kept within bounds and does not become disruptive. The task of the country's constitution-makers must be to ensure that such bounds are set, and that the different levels of government do not merely compete, but work together in a complementary manner to further the process of national reconstruction and growth. The positive side of regions must be encouraged to develop and flourish and the negative side minimised.[14]

The four questions posed above (Why should there be second tier governments, how should they be demarcated, what should be their provincial powers and how could the powers be protected?) were therefore answered as follows by the constitution-makers:

Second-tier governments

The overall consensus was that some form of elected provincial government had to be created. The parties agreed that the potential positives of provinces outstripped the potential negatives, and that with proper leadership, resources and sound intergovernmental relations, the provinces would become a permanent feature of a democratic constitution. The 1993 interim Constitution therefore contained the following Constitutional Principles[15] which were binding on the drafters of the 1996 Constitution:

- *Principle 16:* Government shall be structured at national, provincial and local levels.
- *Principle 17:* At each level of government there shall be democratic representation.

Provincial powers and functions

It was agreed that the powers and functions of the provinces should be set out in the Constitution.

Although the parties did not use the word 'federal' to describe the 1993 or 1996 constitutions, it is now accepted that both constitutions fall within the federal-family of constitutions.[16] Steytler remarks that 'South Africa is thus a new, although reluctant, member of the family of federal polities'.[17] The parties were adamant that the powers of the provinces should be protected against arbitrary changes by a simple majority in the national parliament. The 1993 interim Constitution therefore contained the following Constitutional Principles which were binding on the drafters of the 1996 Constitution:

- *Principle 18(1):* The powers and functions of the national government and the provincial governments and the boundaries of the provinces shall be defined in the Constitution.
- *Principle 19:* The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency basis.
- *Principle 20:* Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.

National government powers

The constitution-makers furthermore agreed that regardless of the powers of the provinces, the ability of the national parliament to legislate on matters of national unity and uniform standards must be recognised in the Constitution. This is also consistent with other federal-type constitutions. The 1993 interim Constitution therefore contained the following Constitutional Principles which were binding on the drafters of the 1996 Constitution:

- *Principle 21(3):* Where it is necessary for South Africa to speak with one voice, or to act as a single entity – in particular in relation to other states – powers should be allocated to the national government.
- *Principle 21(4):* Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

- *Principle 21(5):* The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

- *Principle 22:* The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

Provincial demarcation and protection of powers

Practical questions such as the demarcation of the provinces and the definition of their powers were left for further deliberations. The 1993 interim Constitution therefore contained the following Constitutional Principles which were binding on the drafters of the 1996 Constitution:

- *Principle 18(3):* The boundaries of the provinces shall be the same as those established in terms of this [interim] Constitution.

- *Principle 18(5):* Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

- *Principle 21:* The following criteria shall be applied in the allocation of powers to the national government and the provincial governments … .[18]

The creation of the provinces, their boundaries and the powers and functions were therefore part of the heart and soul of the constitutional and political settlement that paved the way for a new South Africa and for the enactment of the first democratic constitution in 1996.

3. PROVINCIAL BOUNDARIES – HOW DID IT COME ABOUT?

In contrast to many other federal-type dispensations, South Africa did not have widely accepted historic provinces upon which the new constitutional dispensation could be built. The only way forward was therefore to demarcate provinces, and a Demarcation Commission was thus appointed to make recommendations for such demarcation.

The Commission for the Demarcation and Delimitation of Provinces was established to conduct the task and report to the main negotiators, the Negotiating Forum. The commission commenced its work in April 1993 and submitted its final report[19] and recommendations in August 1993.[20] The commission's recommendations were accepted with minor adaptations by the main negotiating parties and continue to form the basis of demarcation of the current provinces.

The process of demarcation did not occur in a vacuum. The Negotiating Forum provided the commission with 10 criteria according to which it had to make recommendations. The public was also invited to motivate their submissions by using the criteria as a point of departure. The 10 criteria were as follows:

- Historical boundary considerations, such as the existing four provinces, homelands, local governments, development regions.

- Administrative considerations, including nodal points for the delivery of services to ensure that each province would be properly served.

- Rationalisation of existing structures such as homelands, provinces and regional governments.

- Limit financial costs as far as possible.

- Minimise inconvenience to people as much as possible.

- Minimise the dislocation of services.

- Demographic considerations.

- Development potential and possible economic growth points.

- Cultural and language realities.

- Other relevant considerations.

The commission was required to take all these criteria into account and to assess the proposals submitted by the public on the basis of the criteria. It is clear from these criteria that the negotiators required a well balanced, considered and, if possible, a politically unbiased report from the commission.

Although the demarcation of provinces is inevitably a highly political exercise, the negotiators were adamant

to defuse political controversy that could derail or discredit the demarcation process. The parties were generally also at pains not to abuse the process of demarcation for political gain.

I (as a member of the technical support team to the commission) can testify from my experience that the process of consultation and demarcation was, within the time constraints, largely open and free from political interference. The outcome – which is open to criticism, as with any demarcation process – was technically defendable and was widely considered at the time as the most balanced application of all the criteria.

The enquiry of the commission was extensive: it held public hearings in various parts of the country; received more than 300 written submissions; and more than 80 oral submissions were heard. After publication of its recommendations, the commission received a further 400 submissions in response to the draft report and visited potential problematic areas to hear further submissions.

The workings of the commission were regarded as one of the most transparent and accessible processes undertaken in public consultation involving the interim Constitution, in comparison to the other committees that had responsibility for various aspects of that constitution. Many of the other committees that played a role in the negotiating process had little, if any, public participation.

It must, however, be acknowledged that during the phase of demarcation there were no democratically elected institutions in South Africa and the negotiating process was conducted between political parties and movements whose electoral support had not been tested. Dr De Coning nevertheless concluded that 'the invitation for submissions, the inclusiveness of the process, the response of the public, and the nature of submissions played an important role in the demarcation process'.[21]

The commission recommended the creation of nine provinces, and those ultimately became the provinces as we know them today. Many observers were surprised that such a complicated and politically risky process could culminate in a general consensus between the main political parties.

If provincial demarcation were to be undertaken today, the results may be different from those arrived at in 1993. But it must also be acknowledged that the general public's acceptance of provincial boundaries since 1993 is indicative that the commission was close to the mark in its recommendations.

Concerns were, however, expressed at the time that the demarcation process was too hasty, not sufficiently transparent and lacked in-depth consultation with people on the ground. For example, in a minority report Ann Bernstein criticised the general public participatory process. Her concern was that:

> to try and actually produce the regional map of the country in such a short time and [think] that this will resolve the differences that exist between all the many interests on this matter is … totally unrealistic and dangerous.[22]

David Welsh predicted after the demarcation that future disputes may arise in regard to the Eastern Cape Province. He observed that:

> neither [the ANC nor NP] originally proposed a consolidated Eastern Cape province, and the inference may reasonably be drawn that behind-the-scenes bargaining took place. As this account will show, the issue of the proposed Eastern Cape Province is not yet over.[23]

The commission identified certain 'sensitive areas' where wide-ranging submissions had indicated that diverse opinions may be held. For example:

- *Eastern Transvaal (now Mpumalanga):* Submissions were received for the inclusion of Pretoria and Pongola as part of the Eastern Transvaal province. The commission did not support either of the proposals and was instead of the view that the previous PWV area (now Gauteng) constituted an integrated economic entity and that it should not be artificially split up.

- *Free State:* Submissions were received to integrate the Free State province with what is now known as the North West province. The commission did not support the proposal and was of the view that the balance of criteria supported the creation of two separate provinces.

- *Larger Cape Province:* Several proposals were received in regard to the old Cape Province.

- A first category proposed the demarcation of a single Cape Province on the basis of the 1961 Republican Constitution. This option did not receive wide support in public submissions. The previous NP government had already made suggestions before the normalisation of South African politics in 1990 for the Cape Province to be subdivided into three administrative provinces due to its size and diverse interests. The whites-only provincial government at the time had commented on the size of the province, the difficulty in delivering services to regional areas, and the diverse interests of persons living between Upington and East London.

- A second category proposed the creation of two provinces – Transkei/Eastern Cape/Western Cape as a single province and the Northern Cape as a separate province. There were also proposals for some form of '*volkstaat*' in the Northern Cape area. The *volkstaat* proposal was discounted since it could not satisfy the balanced application of all the demarcation criteria.

- A third category also proposed two provinces – Northern Cape/Western Cape and Transkei/ Eastern Cape.

After lengthy deliberations, the commission, however, came to the conclusion that if all the demarcation criteria were applied consistently, the preferred option would be for three provinces to be created, namely Eastern Province, Western Province and Northern Cape Province. This remains, arguably, the most contentious of the commission's recommendations.

The commission was of the view that a single Cape Province would be too big for effective management and that the interests of urban areas would be emphasised to the detriment of rural areas. The commission believed that the interests of people living in the Eastern Cape may be better served if they had a specific province, rather than for them to be amalgamated with the Western Cape and its diverse interests. The commission further believed that if it appeared that the Eastern Cape was lagging behind other provinces in terms of financial and human resources, the necessary support programmes could be instituted to ensure that residents of the Eastern Cape had access to adequate facilities.

The commission acknowledged at the time that some of the proposed provinces would be less well-off than others in economic terms and might suffer a lack of resources and skilled administrators in comparison with some of the other provinces. This was particularly the case with the proposed Eastern Cape and Northern (now Limpopo) provinces.

The commission thus repeatedly used the term 'soft boundaries' to indicate that the national government and provinces would have an obligation to support and assist one another. By using the soft boundaries concept, the commission acknowledged the importance of constitutional guarantees to ensure the free flow of persons, goods and services across the entire nation.

Most, if not all, federal- or regional-type dispensations require some form of fiscal equalisation to support and assist lesser developed provinces. Throughout the world there are, for example, fiscal and financial arrangements, industrial development subsidies, training of civil servants, secondment of staff from other provinces and the national government, exchange of expertise and special development grants. The commission envisaged that similar programmes would be instituted to assist the lesser developed provinces of South Africa.

It was also acknowledged by the commission that further adjustments to the proposed provincial boundaries may be required in the future.

De Coning made the following recommendations in regard to the future adjustment of boundaries:[24]

- Extensive public consultation and debate should occur prior to demarcation.

- The mandate and terms of reference of a demarcation commission must be clearly spelt out to ensure submissions are considered on the basis of the same criteria, and any adjustments are technically and politically justifiable.

- A demarcation commission should, as far as is practicable, focus on technical issues rather than on political gerrymandering.

- Adequate time should be allowed to receive public submissions and for the public to comment on a draft report/recommendations.

- Development considerations must play a key role in any adjustments of provincial boundaries.

The demarcation of the South African provinces in 1993 is not beyond criticism. A job had to be done in order to keep the momentum of negotiations going, and the commission completed its task to the best of its ability within a limited time frame. The public consultation was conducted over a very short period and during the early days of constitutional negotiations.

Owing to the history of South Africa, many submissions were from white-dominated interest groups. Most submissions were to some extent based on the nine so-called development regions which had previously been used by the Development Bank of Southern Africa for the purpose of regional economic development initiatives and grants. The level of participation by local communities, especially those from disadvantaged backgrounds, was relatively low.

Although many public submissions were received, a similar exercise conducted properly in 2007/8 would probably see the participation of far more local communities and black interest groups.

In contrast with federal states such as the US, Switzerland and Germany where historic provinces are accepted as a given, South Africans had to get used to the idea of artificially created provinces. It is nevertheless surprising to note how well the provincial demarcation has been received by the public. In general, provincial identities have been developing over the past 14 years and there is no widespread public outcry for the demarcation of provinces to be undone or completely redone. There may be criticism against the quality of governance in some provinces, but the actual provincial boundaries have, in general, not been subject to popular challenge.

With the exception of a few local problem areas, one could contend that the general demarcation outcome has been legitimised through wide acceptance by the public.

But the general acceptance of the provincial boundaries does not mean that alterations to boundaries should never be considered. It is quite possible, as experienced in some other federal-type dispensations, that changes to boundaries may be required from time to time. This does not mean, however, that provincial boundaries should be altered at a whim. If alterations to provincial boundaries are abused for political gain, the credibility of the system could suffer and demands for further changes to boundaries could grow.

4. THE CURRENT STATUS OF PROVINCES, THEIR POWERS AND BOUNDARIES

Spheres of government

The provinces are recognised by the 1996 Constitution as being a separate 'sphere' of government. The reason why the word 'sphere' rather than 'level' of government is used, is that the constitution-makers wanted to emphasise the cooperative and non-hierarchical relationship that exists between the national, provincial and local governments. Unitary systems usually refer to 'levels' of government, thus indicating a hierarchical relationship between the respective levels.[25]

Each sphere has constitutionally guaranteed powers and functions, although the national parliament is empowered to legislate to set minimum norms and standards applicable to the entire nation. The power of the national sphere to ensure that minimum standards of services are provided to all individuals regardless of where they reside, is therefore recognised and guaranteed.

Each sphere is required to exercise its powers in a manner that does not encroach on the geographical, functional or institutional integrity of any other sphere.[26] A province is also empowered to enact its own constitution. So far only KwaZulu-Natal and Western Cape have done so.[27]

Intergovernmental relations

An intricate and complex system of intergovernmental relations regulates the way in which the three spheres cooperate and coordinate with each other in the exercise of their powers and functions. This is not unique to South Africa. Any multi-tiered system of government – especially in federal-type dispensations – requires institutions, structures, policies and procedures whereby the actions of the respective levels of government are coordinated and integrated for effective governance, avoidance of duplication and maximum use of scarce resources.

The system of intergovernmental relations is a practical recognition that the powers and functions of provincial and local governments cannot be defined in terms of watertight compartments, and that coordination must take place to ensure the best possible outcomes and the most effective use of resources. It also recognises that the national government has a responsibility to each citizen, regardless of the constitutional allocation

of powers, to ensure that certain minimum standards and safeguards are in place throughout the country.

In many countries the system of intergovernmental relations has developed due to necessity rather than by constitutional requirements. In the older federations, for example, the notion of 'cooperative federalism' was only introduced in the second half of the 20th century. Prior to that, the theory and practice of federalism was mainly characterised by an emphasis on competitive and adversarial relationships.

The complexity of modern day government, improved communication, demands from the public, protection of human rights and the proper use of scarce resources are but a few reasons why national and provincial governments across the world have sought to improve their interaction – and hence the reference to 'cooperative' federalism.

The Intergovernmental Relations Framework Act, 2005 sets out the general framework and philosophy of intergovernmental relations, the structures to facilitate intergovernmental relations and matters associated therewith.[28]

Cooperative federalism

The South African Constitution is unique among the family of federal constitutions in that is contains detailed provisions in Chapter 3 for the conduct of intergovernmental relations under the banner of 'cooperative governance'. The key elements of cooperative government can be summarised as follows:[29]

- The three spheres of government are distinct, interdependent and interrelated.
- The provinces are represented in the national parliament.
- The government of each sphere is obliged to assist the governments in other spheres in the discharge of their duties.
- The national government may, in exceptional circumstances, intervene in the legislative and executive process of the provinces.

The origin of the concept 'cooperative government' in the 1996 Constitution can be traced back to political and legal considerations that prevailed at the time of the drafting of the Constitution.

The political origin of cooperative government is found in the concerns expressed prior to and during constitutional negotiations that a system of federal government may be divisive, that it may lead to balkanisation of the provinces, that it may lock some provinces into a cycle of poverty, and that it could undermine national unity. The legacy of apartheid and the implications of the homeland system were still fresh in the minds of those who drafted the constitution, and they did not want any model that would bear the slightest resemblance to the homeland system. It was especially among the representatives from the liberation movements that a very strong apathy existed towards the notion of 'federalism', or any form of competitive relationship between the national and provincial governments.

The only way to secure support for the introduction of provincial governments was therefore to entrench in the Constitution a legal duty to cooperate and mutual respect in the form of 'cooperative government'. The willingness of a party such as the ANC to accept provincial governments was therefore for autonomy of the provinces to be balanced with the duty to cooperate in the national interest.

The legal roots of cooperative government can be traced to the German constitutional theory, the German Basic Law and the philosophy underlying the concept of *Bundestreue* or federal comity.[30] The notion that spheres of government should act in partnership rather than as adversaries has long been recognised in federal theory and practice, but the application thereof in German jurisprudence appealed to the ANC in particular and became the bridge that enabled the constitution-drafters to walk to a federal-type dispensation. Minority parties such as the NP, IFP and PFP/DP also found comfort in the concept of cooperative government as the other side of the federal coin.

Chapter 3 of the 1996 Constitution is arguably the most detailed constitutional normative framework for cooperative intergovernmental relations in any modern day constitution. While in most federations the judiciary is mainly an arbitrator of intergovernmental conflict and competition, the Constitutional Court of South Africa is responsible to ensure that the principles underlying cooperative governance are complied with,

that spheres of government act in the spirit of cooperation and that litigation between spheres of government is averted and limited as far as possible.[31]

The Constitutional Court is thus in a unique position in that it is explicitly empowered by the 1996 Constitution to serve as a guardian of cooperative government. It can therefore compel spheres of government to develop systems and processes to facilitate consultative processes and to comply therewith, before a dispute can progress to a hearing. The Constitutional Court may also refuse to hear a matter if it believes that more effort could be made to resolve the dispute amicably.

The essence of cooperative government is that a partnership between the spheres of government is pursued, rather than an adversarial relationship. The spheres must therefore cooperate for the common good of the people of the nation, rather than pursue their own selfish interests.

As a result, a wide range of formal and informal structures have been established to facilitate close cooperation between the three spheres. The Intergovernmental Relations Framework Act, 2005 formalised the respective structures, which include the President's Coordinating Council,[32] the national intergovernmental forums previously known as Minmecs,[33] the Budget Council and Budget Forum,[34] technical support structures,[35] and provincial and local government intergovernmental structures.[36]

A key forum of cooperative government is the National Council of Provinces (NCOP) in which the provinces are represented. This second chamber of parliament is unique in its composition, comprising 90 members – 10 per province. Of the 10, six are permanent and four are special members. The permanent members are designated by the provincial legislature on a proportional basis, while the special members comprise the premier and three other members of the legislature.[37] It was hoped that the composition of the NCOP would facilitate close cooperation between the provincial legislature, the provincial executives and the NCOP in matters affecting the national and provincial legislative agenda.

Provincial powers and functions

The powers and functions of the provinces are enumerated in the 1996 Constitution.[38] In essence the provinces may legislate over:

- their own constitutions;[39]
- matters within their exclusive powers;[40]
- matters on which they have concurrent powers with the national parliament;[41] and
- any matter that is assigned to a province by the national parliament.

The Constitution sets out criteria for the circumstances in which national legislation may override provincial legislation.[42] Both spheres may legislate on concurrent matters, but if an irreconcilable conflict occurs, the national law prevails if any of the criteria are satisfied. It is important to note that even if the national parliament has legislated over a certain matter, a province may also legislate on it provided that an irreconcilable conflict does not occur. The powers of the provinces are, at least theoretically, substantial. A national law that overrides a provincial law must apply uniformly to the whole nation and cannot be abused to discriminate against a specific province.

The criteria for national legislation to override provincial legislation in the field of concurrent powers are as follows:

- A matter cannot be effectively regulated by provincial legislation.
- Uniformity is required across the nation and national legislation is required to lay down norms and standards, frameworks or national policies. The provinces remain responsible to enact legislation that gives practical effect to such national norms and standards.
- The maintenance of national security, economic unity, protection of the common market.
- The promotion of trade across provincial boundaries.
- The promotion of equal opportunity or equal access to services.
- The protection of the environment.
- If it is necessary to prevent unreasonable action by a province that may prejudice the economic, health or security interests of another province or the nation.

Provincial boundaries

The provincial boundaries are essentially the same as was the case under the 1993 interim Constitution. The provincial boundaries may be altered, but only if an alteration has been approved by the legislature of the affected provinces.[43] In addition, any amendment to provincial boundaries requires an amendment to the Constitution, which must be approved by a two-thirds majority in the National Assembly and must have the support of six of the nine provinces in the NCOP.

5. IS SOUTH AFRICA A 'FEDERATION'?

Much has been written about the correct terminology to use to describe the South African Constitution – be it federal, decentralised unitary, centralised-federal, quasi-federal, composite state, etc. The outcome of the debate (if there will ever be an agreed outcome) may be of more relevance to academics than practitioners, for the simple reason that the interpretation given by the Constitutional Court is not dependent upon what the system is called, but by the text of the Constitution.

The Constitutional Court has referred to the Constitution's emphasis that South Africa is 'one sovereign, democratic state'.[44] However, the Constitutional Court has acknowledged that this section must be read with the other provisions of the Constitution as 'governmental power is not located in national entities alone.'[45] The Constitution must therefore, when interpreted by the Constitutional Court, be guided by the text and not by an academic notion of what constitutes a 'federation' or 'federalism'.

Nevertheless, in the author's view the Constitution complies with the essential criteria that distinguish federal states from unitary states in the following ways:[46]

- Provision is made for a written, entrenched constitution[47] (constitutional supremacy) that defines exclusive national and provincial (and local), as well as concurrent powers.[48]
- Oversight of the allocation of powers is the responsibility of the Constitutional Court,[49] with the power to nullify laws that breach the distribution of powers.[50]
- Provinces are represented in the bicameral parliament in the second house – the NCOP.
- Provinces have the right to enact their own constitutions.[51]
- Extensive provision is made for cooperative government between the respective spheres on a non-dominant basis in accordance with Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act, 2005.
- The territorial, functional and institutional integrity of the respective spheres of government is protected.

Government has also in effect given formal recognition to the federal structure of the Constitution when the Department of Provincial and Local Government commented as follows on the state of intergovernmental relations in South Africa:

> The core of this framework is that the decentralisation of state power in terms of the Constitution is not based on 'competitive federalism' but on the norms of 'cooperative federalism'.[52]

While the legal foundation of the South African Constitution is federal, the practical implementation thereof is influenced by a wide range of factors such as interpretation by the Constitutional Court, the way in which powers and functions are exercised, the conduct of intergovernmental relations, administrative capacity of the respective spheres, taxation and grant arrangements, societal demands due to economic challenges, support for political parties, the electoral system and the protection of human rights.

This does not make South Africa unique. Federal-type systems are, due to a variety of factors, characterised by processes of centralisation and decentralisation within the framework of the constitution. The role and influence of the national government over the provinces may change over time. This is not necessarily a one-way process. Some factors may lead to increased national intervention and influence (for example, economic hardship, war), while other factors may cause a decrease in the role and influence of the national government (for example, ethnic conflict, discovery of new resources).

The ebb and flow of the functioning of a federation is dependent on many factors, such as the interpretation given to the constitution by the judiciary, international

political and legal developments, fiscal and financial considerations, and protection of human rights. The constitutional allocation of powers is but one such factor that influences the decision-making process.

The constitution therefore sets the legal framework for the exercise of government authority; it is the backbone of the system. But the flesh is made up of the political, economic and societal realities within which the constitution operates.

Many federations have over the years experienced centralisation of decision-making without any changes to their constitutions. Australia, for example, one of the world's oldest federations, has developed into a federal system where the role of the national government is such that its influence over policies of the states has made the federation of 2007 barely recognisable from the federation established in 1901.

The allocation of powers and functions in the Constitution of Australia hardly resembles the practical power relationship between the states and the national government. It is, for example, estimated that in excess of 80% of tax revenue in Australia falls within the powers of the federal government.

Saunders correctly observes that:

> the [Australian] Constitution has become increasingly irrelevant to the structure and operation of Australian government, at least for those who regard the purpose of constitutions as being to structure power and control its abuse.[53]

The same can be said for the increasing role of national governments in federations such as the US, Germany, India, Brazil and Switzerland, to name but a few.

An analysis of modern day federal arrangements demonstrates that a complete picture of the practical functioning of its institutions can only be obtained by taking into account a wide range of historic, social, economic, legal and political realities and circumstances.

Account must also be taken in South Africa of the fact that the powers of the national and provincial governments are defined by the Constitution and not by the Constitutional Court. This may seem trite, but the Constitutional Court is limited in its interpretation of the Constitution to the text thereof. Admittedly the Constitutional Court may adopt different ways of interpreting the Constitution, but it has to remain within the text of the Constitution. In the domain of human rights, for example, the Constitutional Court has shown a willingness to interpret fundamental rights in an expansive and creative way. However, in the area of national and provincial powers, the court has acted with restraint.

The practice of cooperative government and intergovernmental relations in South Africa cannot be divorced from political reality, the party political system, the electoral system and the political support at national and provincial levels for political parties. The dominance of the ANC at all three spheres of government has had a direct impact on the way in which the respective governments exercise their powers. Any review or analysis of the South African federal system must therefore also take into account the impact of the dominance of a single party at the respective spheres.

The experience of India, for example, shows that intergovernmental relations only became a real focal point after the dominance of the Indian Congress Party made way for other political parties to take control of some of the states. Experiences of other federal states also show that the level of activity of national–provincial interaction and potential conflict between the spheres of government usually correlate closely with who governs at the respective levels. If the same party governs at both national and provincial spheres, the likelihood of competition is reduced, as is the creativity of provinces to try new things and to experiment with their powers and functions.

In South Africa, the ANC not only dominates the national parliament by a two-thirds majority, it has also expanded its gains to control all nine of the provinces and most of the local governments. As a result, the national and provincial policy and legislative agenda is basically set by the ANC internally, with opposition parties being left at the edge of real power. Any criticism that the national government may express towards the effectiveness of the provinces is therefore to a certain degree directed at itself, since the ANC controls the national and provincial spheres as well as all intergovernmental structures.

The actual intergovernmental relations in South Africa therefore occur mainly *within* the ANC structures, rather than *between* the spheres of government. This

may change if, in time, other parties gain control of one or more provinces and attempt to flex their muscles, if the national government attempts to intervene in provincial affairs or if divisions within the ANC become more pronounced and the ability of the national leadership to demand compliance weakens.

6. CHANGING PROVINCIAL BOUNDARIES AND POWERS – THE INTERNATIONAL SCENE

Although federal constitutions are generally referred to as 'rigid' since they can only be amended by special majorities and procedures, it is not to say that they are 'stagnant'. In fact, ongoing constitutional change and adaptation of new practices characterise all federations, and it is not uncommon for federal-type constitutions to be amended. South Africa is therefore in good company if it wants to revisit the state of its federation to ensure that the constitutional framework agreed to in 1996 remains capable of addressing the challenges that face the country today.

Few, if any, of the world's major democracies have not amended their constitutions to accommodate new and changing circumstances. This applies both to federal and unitary states. For example: the US included a bill of rights into the constitution by an amendment and divided the state of Virginia during the Civil War; France and Italy have created regions with decision-making powers; and the United Kingdom has embarked on a regional decentralisation process, unthinkable two or three decades ago.

Other examples of federations that have revisited the allocation of powers and the demarcation of provinces with the aim of addressing current challenges include the following:

- *Canada:* Efforts have been made over the years to accommodate the demands of Quebec for special autonomy and to build national unity among the English, French and indigenous peoples of Canada. Although it has been complicated to undertake formal and large-scale constitutional amendments, the system of intergovernmental relations and asymmetry between the Canadian provinces have in fact expanded the powers and functions of the provinces in a manner not reflected in the Canadian constitution. As a result, Canada is regarded as one of the most decentralised federations, while its constitution is one of the most centralised.

- *Switzerland:* The Constitution of Switzerland has undergone many amendments over the years, including amendments to the powers and functions of the cantons. The opportunity has also been created for cantons to be divided into half-cantons, so as to cater more effectively for the diversity of the population.

- *India:* The boundaries of the Indian states can be altered without consulting the affected states or people.[54] The boundaries of the states were redrawn in 1957/8 following the recommendation by the States Reorganisation Committee to better accommodate the language diversity of the country. The main aim of the demarcation was to bring the boundaries of states closer to the living patterns of the respective language groups. The re-demarcation, however, did not 'solve the problem of linguistic minorities entirely'[55] and other constitutional mechanisms had to be inserted into the constitution to accommodate the country's rich ethnic, language and religious diversity.

- *Nigeria:* Over the years the number of states has been increased from two administrative units, to three states and then to 36 states in an effort to accommodate regional diversity, ethnic groups and the heterogeneous nature of the population. The dilemma that arose in Nigeria, however, was that each time new states were created, new majorities and new minorities were created – and the minorities immediately started agitating for their 'own' state. A special Boundaries Commission was established by the 1989 Constitution with the task to deal with boundary disputes that may arise, to advise the national government on issues that affect Nigeria's borders with its neighbours, and to do any such thing connected with boundary matters as the president may from time to time direct.[56]

- *Spain:* A distinction has been drawn between the historic regions (such as Catelonia and Basque country) and the recently created regions. The historic regions have greater powers and could choose powers from a list of possible options to gradually expand their powers. The non-historic regions have more limited autonomy according to a fixed list of functions set out in the constitution. The historic regions could therefore negotiate with the national government the nature and extent of their powers. This gradual decentralisation has led to a large degree of 'asymmetry' between the regions,

whereby some regions have more powers and functions than others.

- *Belgium:* The country has been in a process of federalisation that started more than three decades ago and has not yet been completed. In the process, the powers of the regions and the communities have been drastically expanded to afford them greater autonomy. The process of decentralisation has gone so far that the very existence of the state of Belgium may now be at stake.

- *Germany:* The role and functions of the *Länder* have been the subject of ongoing debate. Major financial reforms were enacted in 1969. After unification, the five *Länder* in the east were re-established and united with the 11 *Länder* in the west. The Basic Law, Germany's constitution, was also amended as part of a compromise for the *Länder* to agree to greater unification of Europe. Recently, far reaching constitutional reforms were approved to further reorganise the powers and functions of the *Länder* and the role that the *Länder* play at the federal level.

- *Australia:* Although Australia has not had any major constitutional reform related to its federal–state relations, there are many voices demanding major reform. Federal–state relations have over the years become so skewed due to a variety of factors, not least the use and abuse of federal grants-in-aid, that the constitution holds little resemblance to the practical exercise of powers of the federal and state governments. It is estimated, for example, that in the area of health alone, approximately $4 billion (R25 billion) a year is wasted due to inefficiencies in the federal–state division of responsibilities.[57] The political will to implement large-scale reforms has, however, so far been lacking.

In addition to changes to a constitution, it must be borne in mind that the way in which federations function will inevitably differ from a strict reading of the constitution. It is the rule rather than the exception that the actual powers and functions of provinces are quite different from their constitutional powers and functions.

There are many factors that impact on the way in which provinces in federations exercise their constitutionally allocated powers. These include, for example:

- the way in which the constitution and the exercise of powers by the respective spheres are interpreted by the judiciary;

- financial and fiscal resources, and intergovernmental transfers;

- the use of grants-in-aid by the national government to influence the provincial legislative programme;

- intergovernmental relations and agreements;

- international legal developments and treaties;

- organisation of the civil service;

- the electoral system and the organisation and strength of political parties;

- delegation of powers between the spheres; and

- representation in the second house of the national parliament.

As a result, any assessment of the South African provinces that focuses solely on the 1996 Constitution will inevitably produce an inaccurate and incomplete picture of the status of federation in general, and the actual powers and functions of provinces and intergovernmental relations in particular.

An international expert on constitutional dynamics and change cautions as follows when it comes to the dynamics of constitutional change and the impact of external political, administrative and economic influences on the development of a constitution:

> Written constitutions can establish broad grooves in which a nation-state develops. But what happens within those grooves – the constitutional tilt favoured by history – is determined not by the constitutional text but by the political forces and events that shape the country's subsequent history.[58]

The South African constitution-makers attempted to strike a balance between providing written guarantees to the provinces of their powers and functions, while also allowing for amendments to the Constitution to take place if the required majority is obtained. The Constitution can therefore 'grow' in two ways: first, through amendments of the text of the constitution,

whereby legal account is taken of changing demands as time goes by; and second through policies, procedures and practices that may impact on the way in which the provinces and the national parliament exercise their respective powers.

The 1996 Constitution is entrenched and can only be amended if special requirements are met. For example, the provincial boundaries can only be altered if the Constitution is amended by approval of a two-thirds majority in the National Assembly and six of the provinces in the NCOP. The legislatures of the affected provinces must also approve any amendment to their boundaries.[59]

The next section looks at the arguments that gave rise to the Policy Review announced by the South African government.

7. REVIEW OF THE PROVINCES: WHY, HOW AND WHEN?

Prior to the South African government announcing its policy review of provinces in August 2007, mixed signals were sent to the public about the status of provinces. It is not clear to the author whether these signals were part of a fundamental re-think within the government of the future of provinces, or whether it was merely a form of intellectual freelancing, with ministers expressing their personal views. Given the seniority of the ministers who were quoted in the media, one could hardly consider them to have 'personal views'. The media reports could be interpreted to mean that within the inner circles of government, there is strong belief that the existing provincial arrangements must be substantially rearranged.

The following are examples of statements reported recently in the media by senior members of government:

- *Minister of Defence Mosiuoa Lekota:* 'Are there not too many provinces for the effective management? We must consider this question seriously … .We had to do [at the time of demarcation] with a very sensitive situation and at that stage it was the best route. But are those threats still relevant today? Has the situation not changed sufficiently that we need a more effective structure?'[60] Lekota is reported in the same article to have suggested that the current nine provinces should be reduced to four, and that a single Cape Province be created.

- *Minister of Finance Trevor Manuel:* 'The country does not have adequate skills to staff the multitude of institutions we have created. In this context we must look at the number of provinces as well as the assignment of powers and functions … . Accusations of unfunded mandates or misalignment between policy and budgets abound. The design of our system has an inherent tendency to lead to this tension.'[61]

- *State President Thabo Mbeki:* '… no decision has been taken to reduce the number of provinces and no decision has been taken to consider rationalising the number of provinces.'[62] President Mbeki in the same article criticised the 'grossly erroneous idea' that living in a particular province may guarantee one better or worse access to services. It was, according to him, essential that people were given access to the same standards of services regardless of the province in which they reside.

- *ANC Policy document (2007):* 'Of the three spheres of government, provincial government is thus the only sphere whose actual need and existence is still contested ten years after democracy.'[63]

Why is a review of provinces necessary?

Several reasons have been suggested by government for the review of provinces, their powers and boundaries. The main reasons offered, and arguments against these, are as follows:

'The situation has changed since 1993'

It is argued that the constitutional negotiations which led to the 1996 Constitution were influenced by the circumstances at the time and that the situation has now changed so much that a review of provinces is justified.

At the stage of drafting the Constitution, South Africans had to reach a political compromise which resulted in the current provincial arrangements. Without the compromise, it was likely that some parties would not have accepted the constitutional arrangements, and the cycle of conflict would have continued. But the situation has now changed – the political support of parties has changed, the high level of conflict has dissipated, and South Africa has had 14 years of experience with provincial government on which to rely.

It is indeed the case that the elected Constitutional Assembly which drafted the 1996 Constitution did not start with a 'clean slate'. The Constitution agreed to by the Constitutional Assembly had to be certified by the Constitutional Court as being in compliance with the Constitutional Principles contained in the 1993 interim Constitution, which had been agreed to by unelected parties that had not yet had their popular support tested. The Constitutional Assembly could therefore not, even if it wanted to, revisit the core agreements reached in 1993 in regard to the provincial boundaries or powers.

The interaction between the Constitutional Principles and the elected Constitutional Assembly provided the middle ground between those who believed that the political parties at the time (1993) should finalise the new constitution, and those who supported the election of a Constitutional Assembly to draw up a new constitution. A middle ground was found where the unelected parties would settle the key principle of a new constitution, but an elected Constitutional Assembly would draft the actual constitution.

The 1996 Constitution was therefore a product of its time, and inevitably reflects the realities as they existed and were perceived to exist at the time.

As far as provincial government was concerned, the debates between 1990–96 were largely 'theoretical' since South Africa did not have historic provinces on whose experiences to draw lessons in establishing new provinces. Negotiators therefore relied heavily on the research and recommendations of academics and advisors on international experiences with regional government, with little practical experience to guide them. The demarcation of the provinces and the finalisation of their powers and functions were therefore 'a step in the dark' to see what works and what doesn't.

In 2007, the situation has changed substantially. Fourteen years on, South Africans at all levels are now much better informed on the pros and cons of provincial government, the appropriateness of the existing boundaries of provinces and their powers and functions.

A sound argument can therefore be made for a general review of the functioning of provinces and the appropriateness of the allocation of their current powers, functions and boundaries.

'Provincial governments do not have distinct objects'

The drafters of the government's Policy Review state as a point of departure that: 'The Constitution created provincial government, but did not specify distinct objects for provincial government within the overall system.'[64] No motivation is offered in the Policy Review for what appears to be a very sweeping and unsubstantiated statement.

The 'distinct objects' of the provinces are found first and foremost in the 1996 Constitution. The powers and functions of the provinces are clearly defined and their role in the socio-economic restructuring of South Africa is contained in the highest law of the country. The Big-5 areas of government performance – education, health, welfare, housing and agriculture – are either within the exclusive or concurrent powers of the provinces. One could not ask for more clearly defined 'objects'.

The objects of the provinces are further enhanced by the outcome of the political process. The ANC governs all the provinces and it has a two-thirds majority in the national parliament. There is no reason why, given the constitutional framework supported by political dominance and the fiscal powers of the national government, the provincial governments cannot clarify and refine their objects and work consistently, with the support where necessary of the national government, towards achieving it. Provinces can therefore not only legislate on their distinct objects, they can also be obliged by the national parliament to conform to national minimum norms and standards at set out in national legislation.

In addition to objects set out by the Constitution and the political process, the system of intergovernmental relations not only provides for clear objects, it also enables the national government to coordinate and even control the exercise of policy in key development areas for the entire nation. If there is any uncertainty about the objects of provinces, it can be clarified in the intergovernmental process. The Intergovernmental Relations Framework Act, 2005 provides, for example, that the objectives of intergovernmental relations are to provide for coherent government, effective provision of services and the realisation of national priorities.[65]

The premise in the Policy Review that the provinces do not have 'distinct objects' seems to be groundless and

reflects a poor understanding of the constitutional and legal framework, the fiscal dominance of the national government and the political realities of South Africa. The premise may also be indicative of a potential bias against provincial government that could reflect negatively on the outcome of the review.

'There is no policy or legislative framework for provinces'

The drafters of the government's Policy Review state as a point of departure that: 'There is currently no policy or legislative framework for provinces.'[66] It is also suggested that there are insufficient measures in place to hold provincial legislatures and cabinets accountable to objectives set by the national government. This statement seems to be as sweeping, generalised and unfounded as those referred to above.

In short, the provinces have a very clear legal framework within which they function, namely the Constitution. The accountability of the provincial governments is set out in the Constitution and is enhanced through an open and free democratic process.

In addition to the constitutional allocation of provincial powers, provision is made in the Constitution for the national parliament to lay down minimum standards and norms to which provincial legislation must adhere. The national government can also use its fiscal powers to ensure compliance with national priorities. All of these powers combined place the national parliament and executive in a very powerful position to influence and even direct the legislative programme of the provinces. The national parliament may further legislate on a wide range of concurrent powers; and if an irreconcilable conflict with a provincial law occurs, the national law may prevail provided that certain criteria set out in the Constitution are satisfied.

The system of intergovernmental relations also enables the national government to direct, coordinate and even control (through grants and other ways) the policy agenda of the provinces (and the local governments).[67] All spheres are required to conduct their affairs in a manner that would seek to achieve coherent government, effective provision of services and the realisation of national priorities, and to monitor the implementation of legislation.

The system enables the national government to set, in consultation with provinces, benchmarks for performance in key policy areas, to provide funds for meeting the benchmarks, and to hold provinces accountable if benchmarks are not met. The function of intergovernmental relations to bind together the spheres of government in a common purpose is aptly summarised in a report done for the Presidency in 2003:

> In other words, intergovernmental relations are not an end in themselves, but a means for marshalling the distinctive effort, capacity, leadership and resources of each sphere and directing these as effectively as possible towards the developmental and service delivery objectives of government as a whole.[68]

As a result of the constitutional and legal framework, there is no shortage of powers within the Constitution or the national parliament to influence, and even direct, the provinces if they fail in their duties towards their people. Hence the conclusion reached by Steytler that the Constitution 'ensures central dominance'.[69]

The 'central dominance' of the national government is further enhanced by the fact that the ANC is in control of the national and all provincial legislatures and executives. The party can therefore, through its political machinery, ensure that provinces act in unison, that they are accountable, and that their programmes support national priorities. Thus the premise in the Policy Review that the provinces do not have a 'policy or legal framework' or that they cannot be held accountable, seems to be groundless.

The Constitution, supported by the legislative and political framework within which provinces function, gives the national government very close control over the legislative and executive programme of the provinces, and provides the national government with the ability to ensure that national priorities are pursued at provincial level. This premise of the Policy Review may thus be indicative of a potential bias against provincial government that could reflect negatively on the outcome of the review.

'The role of provinces in reconstruction and development is uncertain'

The drafters of the government's Policy Review state as a point of departure that: 'The absence of a definite policy on provincial government has created uncertainty about the role of this sphere in reconstruction and development.' [70]

This premise is unfounded and unmotivated. The functional areas that impact on reconstruction and development fall mainly within the powers of the national parliament or within the list of concurrent powers that are shared by the national and provincial spheres. Functional areas such as housing, agriculture, health, education and welfare are all within the shared (concurrent) domain of the provinces. The provinces can therefore legislate on such matters, and the national parliament may lay down minimum norms and standards to which provinces must comply.

There can be no uncertainty as to the legislative powers of the provinces towards the fulfilment of reconstruction and development objectives. The policy framework within which provinces operate is set by political leaders within the framework of the Constitution. The policy priorities of parties are in turn determined by electoral processes. The ANC is the governing party at national and provincial level. It is therefore incumbent on the ANC to formulate reconstruction and development policies that can be enacted at the two spheres.

Any statement such as that made in the Policy Review that the provinces suffer from an absence of 'definite policy' cannot be addressed by legislative means but should be laid at the door of the governing party(ies) at the respective spheres.

The composition of the NCOP and the intricate systems of intergovernmental relations further enhance the ability of the national government to set the national policy for reconstruction and development. The objects of the Intergovernmental Relations Framework Act, 2005 require that all three spheres cooperate and coordinate their actions with the aim of providing effective services and realising national objectives.[71] In fact, the President's Coordinating Council is specifically briefed to coordinate and align policies, objectives and strategies across all spheres of government.[72]

The legal powers of the national government to influence policy are further strengthened by the fact that the ANC controls the provincial governments. As in the case of the Indian Congress Party in the years after India took independence, the ANC is very well placed at national, provincial and local levels to pursue its policy programme of reconstruction and development. There is therefore no legal, political or policy reason why the provinces are not absolutely clear about their role in reconstruction and development.

The premise in the Policy Review that there is an 'absence of a definite policy on provincial government' and 'uncertainty' about the role of provinces in reconstruction and development therefore seems unfounded and unmotivated and may too indicate a potential bias against provincial government.

'Service delivery is in crisis due to concurrent powers'

It has been suggested that service delivery at provincial (and local) level is breaking down mainly due to the way in which the concurrent powers in the Constitution are set out. In some provinces, basic service delivery such as maintenance of sewerage, roads, water purification, housing, health and education is falling behind acceptable standards. This is in part due, critics say, to it not always being clear in the Constitution who has responsibility for what. The policy agenda of the national government may further be frustrated if provinces utilise resources in a manner that the national government would find wasteful.

Critics of the constitutional demarcation of powers point out that in the area of concurrent powers, in which major functional areas such as housing, health, education and agriculture are situated, difficulties are encountered when it comes to policies that are set by the national government and implemented by the provinces.

It is virtually impossible to define the field of competencies, powers and functions to such a degree that there is no vagueness or uncertainty. International experience shows that any multi-tiered system requires close collaboration and coordination between the spheres of government to address areas of overlap between the respective spheres of government, thereby ensuring that conflict is reduced and resources are used most effectively. Even if there are no formal concurrent powers in a constitution, such as in the US, there is nevertheless 'a huge field of politically and judicially accepted concurrency … .'[73]

Although general statements are made in South Africa from time to time about the complexity of these concurrent areas, there is unfortunately little or no empirical research available to indicate how service delivery in general is negatively impacted upon by the constitutional layout of concurrent powers. The President's Coordinating Council has as one of its roles 'to detect failures [in service delivery] and to initiate

preventative or corrective action'.[74] However, the author is not aware of any comprehensive report before the President's Coordinating Council in which the constitutional demarcation of provinces or their powers and functions have been singled out as the root cause for service delivery problems.

There are many other reasons, other than the constitutional allocation of powers and provincial boundaries, why service delivery is experiencing challenges. South Africa is a typical developing economy where the quality of service delivery is impacted upon by a variety of socio-economic and human resource factors. The existing constitutional arrangements may require fine tuning, but it is probably an oversimplification to contend that concurrent spheres of jurisdiction in and of themselves are the main cause for poor service delivery.

It is advisable to better highlight and isolate the reason(s) for poor service delivery through research and analysis before amending the constitutional allocation of powers or the boundaries of provinces. There may in fact be particular functions that should rather be in the exclusive list of the provinces or within the exclusive domain of the national parliament. In some instances, service delivery may be more acute in certain provinces than in others, or it may be that service delivery can be improved through better training.

The author would contend that, unless shown otherwise, the mere alteration of provincial powers or boundaries is unlikely to substantially improve service delivery. In fact, the service levels of several national departments are not exemplary and more centralisation may in fact lead to more inefficiency. There are ample experiences in developing countries where centralisation has not been a panacea for ineffective service delivery.

Experience shows that centralisation of decision-making inevitably occurs in countries such as South Africa where there are extensive concurrent matters and where the taxation base is in favour of the national government. As Kincaid remarks: 'Generally speaking, the more nationalized and centralized the party system is, the more centralized is the federal system.'[75]

The national government of South Africa is therefore legally and politically in a position where it can effectively address socio-economic issues without major constitutional reform. The respective line function ministries are clearly authorised with the task of 'developing national policy', 'implementing national policy' and the 'coordinating and alignment' of strategic and performance plans, priorities across governments and any other matter of strategic importance to the respective spheres of government.[76]

According to a newspaper article, Minister of Finance Trevor Manuel has described the problem of poor service delivery in the following way:

> Accusations of unfunded mandates or misalignment between policy and budgets abound. The design of our system has an inherent tendency to lead to this tension. Typically, a minister responsible for a concurrent function would ask for resources for a policy priority, for example 'no-fee' schools. If such resources are granted that does not guarantee that such a policy would be funded to the extent he/she would prefer it to be. Subsequent decision-making processes might see fewer or no resources allocated to that priority. To all intents and purposes a provincial executive can request its legislature to appropriate its share of the equitable share differently. Hence, many national departments prefer earmarked allocations for their priority policy programmes. This, in effect, takes away 'autonomy' and discretion from the provinces. It thus reduces their sense of ownership of the programme and account-ability.[77]

Manuel, however, also recently commented on the overall success of the provinces at delivering basic services. He concluded that a review of the annual three-year performance of provincial budgets and expenditure would enable the public to assess 'the progress we are making towards progressively realising the social and economic rights enshrined in the Bill of Rights'.[78]

The reasons for service delivery problems are clearly more nuanced than the allocation of provincial powers and functions. It is common knowledge that South Africa is experiencing serious challenges in service delivery, but this can be attributed to various reasons. More research is therefore required to ascertain:

- where service delivery problems are experienced and by which provinces;

- what the possible causes of the problems are; and
- what possible remedies can be directed to solving the problems on a province by province basis.

As Venter and Landsberg observe, many of the criticisms in regard to provincial performance may be addressed by:

> implementation of extensive financial controls and rigid application of the Public Finance Management Act. It can also be achieved by maximising the role of legislative portfolio and public accounts committees in overseeing the planning, budgeting and expenditure process of provincial departments.[79]

There is little, if any, credible evidence to justify a conclusion that the concurrency in certain legislative powers and functions between national and provincial governments is at the heart of South Africa's service delivery problem. There is a risk that policy analysts respond in a knee-jerk way by recommending major constitutional reform, without a proper analysis of the causes of poor service delivery. And the causes of the problem are probably more complex and require more analysis and debate before major constitutional reform is embarked upon.

Even if it is shown than concurrency in powers presents problems, the next question is how to best address the problems – is it by means of constitutional amendment to alter the powers of the provinces or can it be addressed by improved training, integration and coordination between national and provincial governments? There is currently a serious lack of research or reliable information and data to guide decision-makers to the right answer. The mere fact that a matter is withdrawn from the concurrent list and placed in the exclusive list of the national government, does not mean that service delivery would be automatically improved.

The observation expressed by Trevor Manuel in regard to 'earmarked grants' being used by national departments to, in effect, curtail the autonomy of provinces is not unique to South Africa. One of the most common complaints expressed by provinces within federations is in regard to the increase (and even abuse) in the use of earmarked grants by the national government to influence provincial policies. The national government is often prone to use its superior financial resources to influence, and even direct, provincial policies. However, the fact that the national government can use its grant-in-aid in a manner to influence the provinces is not reason enough for an entire legislative function to be removed from the provincial exclusive or concurrent list. If that were the case, few powers, if any, would remain with provinces in any of the world's federations.

The Policy Review process must therefore come up with:

- a clear picture of the specific problem areas and specific provinces where service delivery is an issue so as to prevent sweeping statements from giving rise to sweeping reforms;
- possible remedies to address specific problems with service delivery;
- ways to improve training and intergovernmental coordination and integration, within the framework of the existing Constitution, so as to improve service delivery in the field of concurrent powers; and
- grounds, if any, to amend the concurrent allocation of powers in the Constitution in order to improve service delivery – but this only as a last resort.

'South Africa does not need nine provinces'

Views are expressed from time to time that the nine provinces are too many, too expensive, that they do not have a historic base, and that the standard of services available within the respective provinces differs too much. It is said that as a result of the many provinces, some provinces such as the Eastern Cape and Limpopo are locked in a poverty cycle, while others such as the Western Cape and Gauteng are experiencing boom times. It may therefore be better to amalgamate some of the poorer provinces with some of the richer ones to ensure more efficiency and equitable access to, and distribution of, resources.

A question for the Policy Review in this regard, however, should be: has any re-demarcation of the provinces been justified through the practical experiences of the past 14 years and, if so, on what grounds?

The demarcation process of the provinces in 1993 took place against the background of an absence of

generally accepted historic boundaries that could form the basis for provincial demarcation. As mentioned, provinces therefore had to be 'created' artificially.

The experiences of other federal-type dispensations where provinces had to be created, such as India and Nigeria, show that amendments to provincial boundaries may be required from time to time. Even in the case of long-established federations such as Switzerland and Germany, alterations to provincial boundaries have been undertaken. It is therefore not uncommon for provincial boundaries to be adjusted in order to deal with new challenges and realities.

In South Africa, the absence of historic provinces also meant that at the time of demarcation in 1993, there was no credible or legitimate historic experience with provincial government. As mentioned, the experience that the majority of South Africans had with regional government was negative, since it was based on homelands and apartheid. Even within the white community the four provinces elicited mixed feelings, since the whites-only elected provincial legislative structures that had been in place since the forming of the union in 1910 were abolished in the 1980s by the NP and replaced with government-appointed executive and administrative structures. The irony is therefore not lost that some within the ANC are now arguing for the abolishment of provincial legislatures and replacing them with administrative structures in the same way as the NP did two decades ago.

The 1993 Demarcation Commission relied on a list of criteria, settled by the Negotiating Forum, to analyse the public inputs as to the preferred demarcation of provinces. Regardless of criticism against the 1993 demarcation process, the provinces have become part of the South African polity as if they had been in existence for many years.

An analysis of the media and scientific literature would show little public resistance against the current provincial demarcation – save for a few localised areas such as Matatiele, Umzimkulu and Khutsong (Merafong), where communities may prefer to be in one rather than another province, or where local communities have been split in two by a provincial boundary. In general, the 1993 demarcation has been ratified by wide public acceptance.

Any radical change of provincial boundaries would have to go through a consultative process to ensure that the rationale for change is clear and the new arrangements work more effectively than the previous one.

If provincial boundaries are to be revisited, the following should be considered:

- The forum that is responsible for the re-demarcation must be credible, scientific and supported with the necessary technical expertise. The forum must also be guided by clearly defined criteria for demarcation. Regardless of any criticism against the 1993 Commission, its recommendations were well received by the public and had gained legitimacy. Some of the questions that remain today – for example, the establishment of a separate Eastern Cape Province – were discussed and addressed in detail by the 1993 Commission. That is not to say that with new information, a new commission might not come up with different recommendations. Any new demarcation commission must, however, stand the test of public acceptance and guard against potential criticism of political gerrymandering and expediency.

- The current Policy Review does not provide an adequate basis for the demarcation of provinces to be revisited. The review is poorly motivated, uses generalisations and does not contain any useful criteria upon which demarcation could be based. The best result that could arise from the review is the appointment of a demarcation commission to do a thorough job.

- In order to ensure wide public debate and transparency, a demarcation commission must invite public submissions and take evidence in various parts of the country – especially in areas that are regarded as potential flash points. Territorial re-organisation is, however, a costly affair which inevitably brings some new uncertainty, adjustments, costs and relocation of staff. It is therefore essential that a cost-benefit analysis be made of the merits for and against alterations to provincial boundaries. International experience shows that well-considered boundary adjustments may improve the functioning of a federation, but hasty adjustments may give rise to strife, uncertainty and demands for further boundary changes.

- The demarcation commission must work in accordance with a very clear brief, which must

include specific criteria for demarcation. The public at large and the commission in particular must therefore know on what basis any possible re-demarcation would be undertaken. The recommendations of the commission must also be open for assessment against the criteria.

- The criteria for demarcation should include:
  - existing local, provincial and traditional authority boundaries;
  - administrative considerations, including nodal points for the delivery of services to ensure that the people of each province would be properly served;
  - if it appears that the number of provinces leads to inefficiencies that can only be addressed through boundary adjustments;
  - limited financial costs as far as possible;
  - the need to minimise inconvenience to people as much as possible;
  - the need to minimise the dislocation of services if provinces are amalgamated;
  - demographic considerations;
  - development and administrative potential of each province and possible economic growth points;
  - cultural and language realities;
  - geographical factors such as rivers and mountains; and
  - infrastructural factors such as roads, railways and airports.
- The mere fact that a political party, even if it is the governing party, is of the view that there are 'too many' provinces should not be enough to justify an amalgamation of all or some provinces. Ideally, a proper scientific analysis should be undertaken either by government or a credible research institution to provide basic data as to the performance of the respective provinces. Unless a decision to amalgamate provinces is supported by objectively verifiable data and wide public support, the process will be criticised as merely a political exercise.

'Provincial boundaries have become too rigid'

Criticism has been expressed at the purported 'rigid' nature of provincial boundaries. It is suggested that as a result of the rigidity, effective service delivery is constrained by legal technicalities as to where the jurisdiction of a province starts and ends. As a result, critics point out, a local community may believe it is important to be in one rather than another province, since the services offered by the other province may be better than those offered by the province in which the community is situated.

This is not a problem unique to South Africa. There are many international experiences where some boundary communities are split in two by a provincial boundary or where a community is closer to a neighbouring capital than to its own capital. However, boundary adjustments seldom completely resolve the issue. It is recommended that research be done to determine how such situations are dealt with elsewhere and if any lessons can be passed on to South Africa.

The 1993 Demarcation Commission was at pains to emphasise that provincial boundaries must be 'soft', so as to ensure the free flow of people, goods, services and products across the entire nation. The commission's concern arose from the experiences of some of the older federations such as the US where states for many years used their powers in a protectionist way effectively to limit the free flow of people, goods and services from other states. It took interventions by the courts and national legislatures to 'soften' the boundaries of the states in some of the older federations.

The South African Constitution contains several guarantees to ensure that provincial boundaries are 'soft' and that they can be 'perforated' by national legislation if any blockages occur. The constitution-makers were in agreement that provincial boundaries should not be allowed to become a hurdle in the effective governance of the country, particularly when it comes to delivery of services. The following are examples of how the 'softness' of provincial boundaries is ensured by the Constitution:

- The national parliament may legislate on a matter if it affects more than one province, if a matter

cannot be effectively dealt with by a province, or if it appears that a province is not responding to a matter expeditiously.

- Provincial governments and the national government may enter into agreements about the delivery of services on an agency basis across provincial boundaries. This is not without problems, as has been shown in the case of the proposed inclusion of the Merafong municipality into the North West province. But the experience of Merafong also shows how complex it is merely to alter a provincial boundary.[80]

- Services by local governments that have been split by provincial boundaries can be delivered to a community on an agency basis.

- A local government can delegate a function to a provincial government to administer on its behalf.

- Inter-provincial intergovernmental forums can be established between provinces to consider matters of mutual concern, such as providing effective services to communities affected by provincial boundaries.[81]

In the view of the author, there is no general concern regarding the perceived rigidity of provincial boundaries, nor has there been any research to demonstrate that the free flow of people, goods, services or products has in general been constrained by provincial boundaries. Even in instances where problems with service delivery may have occurred, the alteration of the provincial boundary should not be the first option to be pursued. Amendments to provincial boundaries inevitably lead to some being satisfied while others become disgruntled.

Changes to boundaries are often preceded by more demands for further changes. It is preferable to solve, as far as practical, problems with cross-border issues in an administrative way rather than through boundary alteration.

It must, however, be recognised that some communities which live close to a provincial boundary may for various reasons prefer to be included into another province. The motivations for proposed inclusion may differ. These include: cultural or linguistic reasons; the perception that better services are available in the neighbouring province; proximity to the neighbouring provincial capital in comparison to the province's own capital; more effective access to government services; economic integration with the neighbouring province; or shared interests with those living in the neighbouring province.

There is merit for the Policy Review process to seek public submissions and to invite research in regard to the following:

- An analysis of examples, if any, of cases where the free flow of people, goods, services and products have been curtailed or limited due to the 'rigidity' of provincial boundaries. The analysis should also include examples where, through agreement and administrative actions, proper service delivery has been ensured without the need to alter provincial boundaries. It may be useful to draw on international experiences as well, since this concern is not peculiar to South Africa.

- Identification of options to improve the free flow of people, goods, services and products to ensure that delays or disruptions do not occur. It is the author's premise that administrative arrangements are in the first instance better suited to deal with the typical problems that may arise in border areas, rather than alterations to provincial boundaries.

- Specific attention should be given to areas, if any, where communities are being frustrated by poor services due to the location of a provincial boundary. There are already sufficient legal and administrative options available to address such concerns, but an amendment of a provincial boundary could be treated as a last resort.

'Some provinces are suffering from a skills shortage'

It is said that due to the skills shortage the number of provinces should be reduced or that the legislative provinces should even be done away with and replaced with administrative structures.

The availability of a well trained and skilled human resource base for all of the provinces has been a concern from the very first days of constitutional negotiations. South Africans have always been relatively well-served in the cities, while many rural areas have been battling to secure proper services. Communities in the homelands and even in the rural

areas of the previous four provinces could testify to the lack of attention paid to them in contrast to their urban cousins.

The constitution-makers believed that creating provincial and local governments may in fact assist rural populations to gain access to improved services since the governments of such areas would be able to take less of a city-oriented approach to challenges. It was envisaged that policies and training schemes that are unique to rural populations could be devised, rather than for rural communities to compete with the major cities for attention.

This expectation is consistent with the observation of international experts that 'the legitimacy of the state at a local level can only be strengthened if authorities are able to respond to the legitimate needs of the population'.[82] Experts nevertheless also caution that 'decentralised government has some well-known advantages in this respect, but regularly meets technical and political difficulties, which are not easy to overcome'.[83]

A concern was often expressed during the constitutional negotiations that the multi-sphere system of government would be too advanced and complex in light of the limited skilled resource pool available to some of the provinces. It was argued, however, that training programmes could be undertaken to expand the skills base available to the provinces, and that the functions of the central bureaucracy may be expanded to give assistance to provincial administrations. It was also widely believed that a large country such as South Africa could not be administered effectively from a centralised position. Provincial administrative agencies would therefore be required, regardless of the legislative powers of the provinces.

The challenges that skills shortages cause for rural populations are not unique to South Africa. Many developed and developing countries experience skills shortages, especially in rural areas. Developing countries such as India, Brazil, Chile and Nigeria have had to develop massive training programmes to assist regional skills development. Additionally, after the unification of Germany vast assistance programmes were implemented to assist the eastern *Länder*, and that process is still continuing.

The problem of rural skills shortages cannot necessarily be solved by more centralised bureaucratic structures or by reducing the number of provinces. Central departments are often notorious for inefficiencies, urban bias and lack of understanding of rural issues. An expert on fiscal federalism observed that:

> it is hard for a central agency to know what people want in each locality, what the efficient levels of public outputs are in each place. Decentralisation takes advantage of the more complete information available in each jurisdiction. … Thus, centralised provision of many public services is likely to compromise the performance of the public sector.[84]

To add to the potential inefficiency of large central bureaucracies, provision would in any case have to be made for centralised departments to be organised into provincial and rural offices from where the interests of local communities can be serviced. Accountability of large, national departments is usually skewed towards national and urban issues, with rural concerns often low on the priority list.

Chief executive of Pan-African Capital Holdings, Iraj Abedian, recently summarised the challenge for skills development in South Africa as follows:

> The lack of a robust and effective human resource framework is our most salient obstacle in sustaining [gross domestic product] growth. South Africa's modern economy requires an integrated educational and skills development platform spanning formal schooling, vocational training and sector-specific skills augmentation, supplemented by on-the-job training. Despite much rhetoric and attempts at transformation, the level of teacher competency and commitment remains out of sync with the requirements for an effective human resource development system of an economy in a digital age.[85]

There is undoubtedly a serious skills shortage in South Africa, which is even more pronounced in rural areas. The question for the Policy Review is therefore whether the shortage of skills could be addressed through the reorganisation of provincial powers and boundaries.

There have been widespread reports in the media of symptoms that are indicative of a lack of skills and training among civil servants at a provincial level. Some symptoms of poor governance are: increased

unrest in many local communities due to the lack of basic services or the breakdown of essential services; corruption and nepotism have been reported in many provincial government departments; the auditor general has been unable to audit or certify the accounts of several provincial departments; provincial governments have been unable to spend their budgets; and there are regular reports in the media of government programmes failing due to a lack of, or inadequate, skilled support at a provincial level.

The problem of severe skills shortages is, however, not limited to the provinces. The same can be said of many national government departments where thousands of positions remain unfilled and many positions are staffed by persons who may lack adequate training. Recent media reports, for example, highlight the shortage of staff and the high staff turnover in national departments such as the Presidency, Provincial and Local Government, and Justice. It was further reported that 'officials spoke this year of vacancy rates as high as 50% in some provinces, citing this as one of the main reasons for delivery blockages'.[86]

If any sphere of government is in crisis due to a shortage of skills, it is probably local government where many local authorities are finding it difficult to meet their obligations towards their inhabitants. The private sector is also reported to be suffering from a skills shortage.

Caution must therefore be shown when using 'skills shortage' as the rationale for a radical revamp of provincial powers or boundaries. There is no scientific evidence to suggest that a reduction of provinces would in itself lead to better services or to more skills being made available. In fact, even if there were no provinces, the national government departments would require provincial offices to administer and implement policies. There is simply no shortcut out of the lack of skills dilemma. A national strategy is required to address the problem, which goes way beyond the scope of the Policy Review.

The failing of government services is arguably most visible in the Eastern Cape, but it is not limited to that province. In a recent *Sunday Times* article, the Eastern Cape is described as 'dysfunctional' and as a province 'whose liberation has been deferred'. The article goes on to say that 'social services are a mess. Money budgeted for uplifting communities simply goes "missing". MECs and senior bureaucrats behave like tinpot dictators in their interaction with communities'.[87] This crisis certainly calls for urgent action.

The Constitution provides mechanisms for resources to be shared, for assistance to be rendered across provincial boundaries and for national training to occur. The recently published Public Administration Management Bill will, if enacted, enhance the ability of the national government to recruit and train public servants for deployment at all spheres of government. The content of the bill may in some respects be controversial and could be improved, but it highlights the ability of the national government to address the lack of skills without having to radically alter the constitutional structure.

It is therefore appropriate for the Policy Review to receive submissions on issues facing the provinces in regard to their available skills. A proper assessment of the problem may assist the national government to identify specific problem areas, such as the Eastern Cape, for attention. It is not unknown in developing federations that a national government has taken over a provincial department or the entire administration of a province due to similar failures. It is, however, unlikely that the alteration of provincial boundaries or the provincial powers would offer lasting solutions. The causes for the skills crisis in South Africa run far deeper than the mere demarcation of provincial powers and boundaries.

'The process of intergovernmental relations has become too complex'

Criticism has been expressed that the network of intergovernmental relations has become so entangled and complex that accountability and transparency are lost.

The system of intergovernmental relations is to a large extent hidden from public view. To those who are not actively part of decision-making, it is understandably difficult and complex to comprehend how all the different pieces fit together. Although accountability of the executive to the legislature and the legislature to the public is not necessarily affected by intergovernmental relations, the ability of the public to scrutinise actions of the executive is impacted upon by the myriad of forums where executive decisions are made. The requirement that a report must be tabled from time to time in parliament regarding the general conduct of intergovernmental relations, the settlement

of disputes and any other relevant matter, may provide greater accessibility and transparency to the public.[88]

It is not uncommon for multi-tiered systems of government, especially federations, to face criticism that the intergovernmental structures created to facilitate coordination and effective decision-making are leading to loss of transparency and accountability in decision-making. Intergovernmental relations are often in the domain of ministers and senior civil servants, and it is only high-profile meetings such as the premiers' conferences or the Intergovernmental Forum that attract media attention. The public perception is that most of the other workings within intergovernmental bodies take place behind closed doors and removed from public scrutiny.

It is, however, also recognised in literature and in the practice of federal states that it is impossible to divide the powers of national and provincial governments in such an exact way that no interaction between the spheres is required. Modern day circumstances demand increased rather than reduced interaction between all spheres of government to make optimum use of resources and skills. No system of government, be it federal or decentralised unitary, can exist without having forums at which intergovernmental relations are discussed – hence the emphasis in the South African Constitution on the importance of 'cooperative government'.

Account must also be taken that in the daily business of any government there is ongoing interaction between the respective government departments. None of this is open to the public since it entails the day-to-day process of policy formulation and implementation. It is therefore in the very essence of government to establish structures and processes where departments can meet to coordinate and harmonise their programmes.

Can the intergovernmental structures of South Africa be rationalised, simplified or better held to account by the public?

The Policy Review could invite submissions as to how to improve the conduct of intergovernmental relations in South Africa and how to increase the accountability and transparency of the processes. In many federations annual reports are published with a focus on intergovernmental relations, the structures that exist, how the structures are performing, problem areas and so forth. Such information has become indispensable for the public, politicians and researchers.

In this regard, South Africa may consider ongoing research by a credible institution on the status and conduct of intergovernmental relations. An annual review could be published, to be used by the public and politicians to improve the system. The 2003 Layman report on intergovernmental relations commissioned by the Presidency is a step in the right direction, but it must be followed up with ongoing research and analysis against agreed benchmarks in accordance with s46 of the Intergovernmental Relations Framework Act, 2005, which envisages regular reports to parliament.

8. WHEN AND HOW IS THE PROVINCIAL BOUNDARIES AND FUNCTIONS REVIEW OCCURRING?

The Policy Review, which was launched in August 2007, provides for the review to take place in the following way:

- A list of questions has been published for completion by interested parties. The responses must be submitted no later than end October 2007.
- Based on the responses and public consultation, a Green Paper will be published by the end of December 2007 in which key policy positions are set out for further public comment.
- Based on the responses received to the Green Paper, a White Paper will be released by the end of 2008 in which government policy is set out. The White Paper will be considered by parliament and cabinet.
- The White Paper will be followed by a bill in which amendments, if any, to the Constitution are set out. At each stage, public comment would be invited.

Several observations can be made regarding the process set out in the Policy Review.

First, the extent of media coverage and public awareness of the review is so far minimal. As a result, the current process may be even less transparent than that leading to the 1996 Constitution. If compared to other countries where large-scale review of provincial boundaries and powers were considered, the Review

Process is a far cry from being accessible and transparent. An overview of media coverage of the review during October and September 2007 shows lack of attention to a review that could have far-reaching implications for South Africa.

Second, reference is made in the Policy Review to 'thorough empirical research' that would guide and inform the debate. It is not clear what research is being referred to and when the results would be made available to the public. In fact, a review of literature in South Africa over the past five years would show amazingly little empirical research in the field of provincial government powers and functions. It would be reasonable to expect government to make available research findings, if any, so as to inform the public debate before submissions are invited. If research has not yet been done, it would be advisable for government to extend the timeframe of the review so as to encourage an informed debate.

Third, it is preferable for a review of the Constitution of this scale to be conducted by a body with great credibility, expertise and legitimacy. A special committee of parliament comprising all the major parties as well as provincial and local interests would be preferred to a government department driving the process. The Department of Provincial and Local Government can provide technical input and give administrative and research support, but given the political sensitivity of provincial powers and boundaries, the review cannot be dealt with effectively at a bureaucratic level.

Fourth, it is important, as has been shown locally and internationally, that the brief of any constitutional review process most be open, transparent and free of political bias. Any re-demarcation of provincial boundaries or powers of provinces must be guided by clearly defined criteria – else the process may lack credibility, legitimacy and acceptability. The Policy Review currently only works to assess 'whether existing forms of governance remains appropriate to meeting changing demands'. This is not a well-formulated brief and could be used to justify any outcome.

Fifth, it should be considered as a matter of urgency to create a credible process to further steer the Policy Review. Re-demarcation of provincial boundaries and/or reallocation of provincial powers could have far-reaching implications for South Africa. It is essential that the lessons learnt in the 1990–96 process and the criticism of a lack of transparency not be repeated at a stage where South Africa has reached the democratic maturity to discuss and consider all options.

9. 'DO NOT THROW THE BABY OUT …'

A concern with the Policy Review is that it appears to focus mainly, or even exclusively, on the reasons why boundaries and functions should be changed without also posing the question 'What is working?'. As a result, the entire review and the outcome thereof may be skewed towards a predetermined goal – reducing the number of provinces or curtailing their powers.

It is essential for any review of this scale, nature and importance that a fair and thorough analysis is done of the benefits of the current federal system, the demarcation of boundaries and the powers and functions of the provinces.

Consideration should also be given to how the current federal system can be improved in order to strengthen the role of the provinces as agents for change. The belief held by some that the national government is by definition better capable of delivering services is not based on sound theory or international best practice.

While a review of the functioning of provinces is justified, the baby should not be thrown out with the bathwater; and worse, should not be drowned.

The following are a few examples of how the functioning of the provinces may be enhanced to enable them to function better as a second sphere of government:

- Case studies could be identified where some provinces have used their powers in a more effective and creative way than others to serve the interests of their inhabitants. In this way, provinces can learn from one another, and credit could be given where creativity has led to positive outcomes.

- The role and functions of the NCOP may be revisited to ensure that it represents provincial interests effectively and plays an integral role in national policy debates.

- Aspects of the powers and functions of the provinces may be clarified. When the original demarcation of powers was done, negotiators had

no idea what the practical application would bring about. It is now a good opportunity to revisit the powers of provinces and to consolidate and possibly expand aspects thereof.

- The system of financial equalisation may be revisited to address the financial needs of some provinces. This may be linked to expanding the tax base of provinces. International experience shows that, as far as possible and practicable, the level that spends must be the level that taxes to ensure accountability and transparency.

- National and inter-provincial support programmes could be developed to make available human, administrative, technical and financial resources to provinces that are lagging behind.

- National and inter-provincial training and capacity development programmes could be launched whereby staff are better trained and experts render professional services to provinces to help them address specific problems.

10. CONCLUSION

This policy paper provided a brief overview of the background to the provincial demarcation and provincial powers under the current South African Constitution. The way in which the Constitution came into being and factors that were taken into account by the constitution-makers are relevant to any review of provincial powers and functions.

The Policy Review provides an opportunity to bring together the events that gave rise to the 1996 Constitution and to combine it with the experiences of the past decade in order to improve and refine the system of government.

South Africa has had more than 14 years' experience with provincial government and we can now move beyond the theoretical discussions of the early 1990s to the practical situation we face today.

Much criticism has been levelled against provincial government. Some of it may be of merit and some not. This paper contends that although a review of aspects of the federal system is justified, too little credible and scientific information is available at this stage to come to sweeping and generalised conclusions about the performance of provincial governments or the remedial action to be taken to improve their performance. The paper also contends that more emphasis should be placed on what *is* working, the positive experiences of the provinces, the contributions they have made to good governance and ways in which they could become more effective.

However, the way in which the Policy Review is structured, under the guidance of the Department of Provincial and Local Government, creates the perception of bias and the absence of an open-minded approach. In order for an effective policy review to be conducted, the following could be considered:

- The Policy Review should be undertaken by a special committee of parliament rather than by a government department. This would ensure proper accountability and a higher level of media and public interest.

- Sound research and scientifically verifiable data should be undertaken, and where it has been done should be made available to inform the public debate. Other than sweeping statements on the performance (or lack thereof) of provinces, there is a general lack of credible information that could inform decision-making on the appropriateness of current provincial boundaries and powers.

- Inputs should be invited on the positive experiences with provinces, the way in which they have been creative and their ability to better serve the interests of their people.

- The time period for public participation should be extended to ensure that the process allows for maximum input from all sectors of society. The 1993 and 1996 constitution-drafting processes were, quite correctly, criticised for having been inaccessible to the public and hastily done. Unless the Policy Review process is adjusted, it would be exposed to the same or even worse criticism.

- The brief of the Policy Review must be clearly spelt out to enable the public to address specific points of interest. The brief must be as politically neutral as possible to allay any concerns that the process is biased and that the outcome has already been determined. The emphasis should be on positive and negative experiences as well as on ways to strengthen positive experiences and how to address negative experiences.

- It is unrealistic to make the Policy Review and associated questions known at the beginning of August 2007 and expect the public to finalise their inputs by end October 2007. This demonstrates a lack of understanding of the time it takes the public, local communities, research institutions and individuals to consider the questions, consult where necessary and respond.

- On the one hand, there may be grounds for provincial boundaries to be altered or for provincial powers to be redefined. On the other hand, however, constitutional amendments are seldom a magic wand to solve issues of capacity, training and delivery. There may be an unrealistic expectation in the minds of those who drafted the Policy Review that legislative arrangements would address the serious shortcomings that some provinces are facing in service delivery. The Policy Review must therefore be open to identifying other options that could increase the ability of provinces to live up to their constitutional obligations.

ENDNOTES

1 Government of South Africa, 'Policy Process on the System of Provincial and Local Government – Background: Policy Questions, Process and Participation' ('Policy Review'). Department: Provincial and Local Government, September 2007, p 3.
2 For sake of consistency, the second tier of government in this paper will be referred to as 'provinces'. It is acknowledged that different terminology is used in different federations, for example, regions, *Länder*, cantons and states.
3 Policy Review, op cit, p 4.
4 Ibid, p 6.
5 Shubane K, The representation of regions in the central government – A South African perspective, in De Villiers B & Sindane J (eds), *Regionalism: Problems and Prospects*. Pretoria: HSRC Publishers, 1993, p 182.
6 Asmal K, Federalism and the proposals of the National and Democratic parties, in Licht RA & De Villiers B (eds), *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?*. Washington: American Enterprise Institute for Public Policy Research, 1994, p 49.
7 Note from author: For example, genuine commitment to sub-national autonomous government, lack of sufficient human and financial resources, lack of national unity, and lack of support for principles and goals of regional government.
8 Cloete F, Power of regions, in De Villiers & Sindane, op cit, p 114.
9 At the time, there was no agreement as to what the future regions would be called – regions, provinces or states.
10 The author was a member of the team.
11 'Regions in South Africa: Constitutional Options and their Implications for Good Government and a Sound Economy', March 1993, p 14.
12 Ibid.
13 Ibid, p 15.
14 Ibid, p 13.
15 For a discussion of the background and implications of the Constitutional Principles refer to De Villiers B, The Constitutional Principles: Content and significance, in De Villiers B, (ed.), *Birth of a Constitution.* Kenwyn: Juta, 1994, pp 37-49.
16 The essential characteristics of a federal-type constitution are as follows: a written, entrenched constitution that is overseen by the judiciary; one in which the powers of the provinces are guaranteed; provincial representation in the national parliament, usually by means of a second chamber; the right of provinces to draw up their own constitutions within the framework of the national constitution; the right of provinces to be consulted prior to alterations to their territorial integrity; and a system of intergovernmental relations. Blindenbacher R & Watts RL, Federalism in a changing world, in Blindenbacher R & Koller A, *Federalism in a Changing World: Learning From One Another*. Montreal & Kingston: McGill-Queens University Press, 2002, p 10. Steytler N, Republic of South Africa, in Kincaid J & Tarr GA (eds), *A Global Dialogue on Federalism: Constitutional Origins, Structure and Change in Federal Countries* Vol 1. Montreal & Kingston: McGill-Queens University Press, 2005, p 312.
17 Ibid.
18 The following is a summary of the eight criteria that were applied: The level at which a decision can be taken most effectively in respect of the delivery of services should be responsible for it; certain functions such as national unity, minimum standards of services and national security justify national legislation; when South Africa must act with one voice the national government must play a leading role; where uniformity is required across the nation the national government must legislate for such minimum standards; inter-provincial commerce and free flow of persons, goods and services must be within the responsibility of the national government; provincial governments must legislate on matters such as planning and provision of services; equality of access to services could be within the concurrent responsibility of national and provincial government; and the residual powers could be allocated to the national and/or provincial governments.
19 'Report of the Commission on the Demarcation/ Delimitation of SPRs'. Multi-Party Negotiating Process, Word Trade Centre, Kempton Park, 1993.
20 For an excellent and unique overview of the working of the commission refer to De Coning C, The territorial imperative: Towards an evaluation of the provincial demarcation process, in De Villiers B, *Birth of a Constitution*, op cit, pp 189-229.
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22 'Report of the Commission on the Demarcation/ Delimitation of SPRs', op cit, p 88.
23 Welsh D, The provincial boundary demarcation process, in De Villiers, *Birth of a Constitution*, op cit, p 227.
24 De Coning in De Villiers, *Birth of a Constitution*, op cit, pp 219-220.
25 For more information regarding provincial structures refer to Chaskelson M & Claaren J, Provincial government, in Chaskelson M, Kentridge J, Klaaren J, Marcus G, Spitz D & Woolman S (eds), *Constitutional Law of South Africa*. Lansdowne: Juta, 1988, Chapter 5.
26 S 41(1)(e) and (g) of the Constitution.
27 The constitution of KwaZulu-Natal has not yet come into effect due to it not having being ratified by the Constitutional Court. The court found that the constitution was 'fatally flawed.' *In re: Certification of the Constitution of the Province of Kwazulu-Natal* 1996 11 BCLR 1419 (CC).

28 The act was enacted in pursuance with s41(2) of the Constitution, which requires parliament to set out in legislation the framework for intergovernmental relations.
29 Rautenbach IM & Malherbe EFJ, *Constitutional Law*. Durban: Butterworths, 2003, pp 263-267.
30 This is not to say that other federations such as the US, Canada and Australia do not also subscribe to the principles of 'cooperative governance'. But the way in which the Basic Law and its philosophical origin deal with multi-tiered governance struck a cord with the ANC's key negotiators. For a discussion refer to De Villiers B, Intergovernmental relations: *Bundestreue* and the duty to co-operate from a German perspective, *SA Public Law*, 1994, pp 430-437; and De Villiers B, *Bundestreue – The Soul of an Intergovernmental Partnership*. Johannesburg: Konrad-Adenauer-Stiftung, 1995.
31 Refer for example to *In re: National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (CC), 1996 3 SA 289 (CC) and par 290 of the *In re: Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC), 1996 4 SA 733 par 290 (CC).
32 S6, Intergovernmental Relations Framework Act, 2005.
33 S9,Intergovernmental Relations Framework Act, 2005.
34 S13, Intergovernmental Relations Framework Act, 2005.
35 S30, Intergovernmental Relations Framework Act, 2005.
36 SS 16 and 24, Intergovernmental Relations Framework Act, 2005.
37 S 60 of the Constitution.
38 S104 of the Constitution.
39 Chapter 6 of the Constitution.
40 Schedule 5 of the Constitution. Matters such as abattoirs, ambulance services, archives, libraries, liquor licences, provincial planning, provincial cultural affairs, sport and amenities, provincial roads and traffic.
41 Schedule 4 of the Constitution. Matters such as agriculture, gambling, casinos, cultural affairs, health services, housing, nature conservation, industrial promotion, population development, public transport, public enterprises, public works, regional planning and development, road traffic, tourism, trade and welfare services.
42 S 146 of the Constitution.
43 S74(3) and (4) of the Constitution.
44 S1. As is the case with many other federations, the South African Constitution does not describe the form of state as 'federal'.
45 *Ex parte President of the RSA In re: Constitutionality of the Liquor Bill* 2000 1 BCLR 1 (CC), 2000 1 SA 732 (CC), par. 20. This confirms that it is not a unitary system where parliament is sovereign, but rather that both parliament and provinces derive their powers and functions from the Constitution – an essential element of a federation.
46 For general reading refer to Blindenbacher &. Koller, op cit; Elazar D, *Federal Systems of the World*. Jerusalem: Jerusalem Centre for Public Affairs, 1994; Elazar D, *Exploring Federalism*. Tuscaloosa, Al: University of Alabama Press, 1987; Elazar D, *American Federalism: A View From the States*. New York: Harper & Row, 1984; De Villiers B (ed), *Evaluating Federal Systems*. Cape Town: Juta, 1994; Wheare K, *Federal Government*. Oxford: Oxford University Press, 1980; Lazar H, Telford H & Watts R, *The Impact of Global and Regional Integration on Federal Systems*. Montreal & Kingston: McGill-Queen's University Press, 2004.
47 S74.
48 Schedules 4 and 5 of the Constitution. Parliament has legislative powers over any matter not enumerated as part of exclusive provincial competency or concurrent powers. In regard to concurrent powers the national and provincial parliaments may legislate over such areas, and any irreconcilable conflict is dealt with in accordance with the criteria regulating the national override capacity. Ss44(2), 104(4) and 146(2).
49 S167(3).
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ISBN: 978-0-9802543-8-9

Published by Konrad-Adenauer-Stiftung
60 Hume Road
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Johannesburg
Republic of South Africa

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Northlands
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Telephone: (+27 +11) 214-2900
Telefax: (+27 +11) 214-2913/4
E-mail: info@kas.org.za
www.kas.org.za

Cover design: AdamBele Design

Editing, layout and production: Tyrus Text and Design

Printing: Intreprid Printers (Pty) Limited