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Transition to Cooperative Federalism: The South African Experience

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TRANSITION TO COOPERATIVE FEDERALISM:

THE SOUTH AFRICAN EXPERIENCE

DEREK POWELL

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Abstract

Between 1990 and 1996 South Africa's political leaders negotiated a political settlement that brought white minority rule to an end and introduced constitutional democracy. South Africa's political transition took place in two stages: The political negotiations phase resulted in an interim constitution drafted by a multi-party forum (1993) which provided the rules for transitional government and constitution-making. The constitution-making phase (1994-1996) followed the country's first democratic elections (1994) and saw an elected constitutional assembly draft the final constitution subject to a set of principles set out in the interim constitution. Federal arrangements in the form of constitutionally protected provincial and local orders formed part of the political settlement. Known as 'cooperative government' in the final constitution, the federal system is highly centralized and integrated, and resembles devolution rather than classical federal government. The transition from unitary government to cooperative government was defined by the objectives of the wider political transition.

Implementation involved a number of tasks relating to the establishment of the provincial and local orders, with the two orders following different transition pathways. The nine provinces were established in a short space of time (1994-1996). The local order only came into being in 2000 after a long process of transition that began in 1993. In the early phases a variety of special purpose transitional institutions linked the creation of the provincial and local orders to the goals of political settlement. Later on national government assumed lead responsibility to establish and transform the federal state, and implementation was directed by national policy objectives and embedded in the budgets and operations of state departments.

Keywords: constitution; decentralisation; democracy; federal; national; orders of government; provincial; South Africa; transition.

Introduction

Between 1990 and 1996, South Africa's political leaders negotiated a political settlement that abolished generations of white minority rule (apartheid), averted full-scale civil war, and established a democratic state for the first time in the country's history. The outcomes were a democratically elected government of national unity in 1994, under an interim constitution (adopted by a non-elected multi-party negotiation forum in 1993) and a new constitution in 1996 (drafted by an elected constitutional assembly).

Agreement on a form of federal government was an important breakthrough in the negotiations. The formula the parties agreed to was substantial, but not comprehensive. It provided for a significant measure of authority for the national order and enough autonomy for the sub-national orders to accommodate political diversity - without compromising national unity. The final constitution thus established a form of federal government, known as cooperative government, which is closer to devolution than the classical federal model of separate and autonomous orders.

South Africa's cooperative government is founded on distinctive national, provincial and local orders (called spheres of government), which have their own powers but are bound together by strong ties of interdependence and interlocking functional responsibilities.

The implementation of the new system involved a transition from the unitary Westminster government of the apartheid era to cooperative, federal government under the new constitution. This paper addresses a particular aspect of that transition, namely the implementation of the new provincial and local orders and the intergovernmental system.

In general, the transition period covered in the paper is the period between the date the interim (1993) and the final (1996) constitutions came into effect and when the provincial and local orders of government were formally established. The transition to cooperative federalism spans both constitutional periods, because the institutions of the present federal order emerged at various points during the course of political negotiations, not at one point, and key elements of the new order were agreed on during the early phase of negotiations and survived the later constitution-making process largely unchanged. For example, the nine provinces and their territorial boundaries were established under the 1993 interim constitution and left unchanged in the final constitution of 1996. Thus, the implementation of the provincial order of government had begun even before the final constitution was written.

Within this transition pathway, defined by the political process, the implementation of a federal system involved a specific set of activities relating to the establishment of the provincial and local orders and intergovernmental relations, namely:

- The determination of the territorial boundaries of the provincial and local orders;

- The enactment of legislation setting out the transition timeline to democratic local government;

- The enactment of legislation required by the interim and final constitutions to establish the political and administrative organs of the provincial and local orders (the legislature and executive, and the administration);

- The physical establishment of provincial and local organizational structures and departments, including the assignment of staff, service delivery functions and budgets to the provincial and local orders; and

- The enactment of legislation to establish the system of intergovernmental relations.

These form the subject of this paper, which is divided into three parts:

Part A provides a very brief background on South Africa, the political negotiations, the constitution-making process and the structure of its federal government. Maps of South Africa showing current and pre-1994 boundaries, and a timeline of the negotiations and constitution-making processes, are provided in Annexes A and B, respectively.

Part B explains what the establishment of the provincial and local orders and the system of intergovernmental relations involved and how the transition was managed. Key pieces of national legislation relating to the intergovernmental system are provided in Annex C.

Part C highlights some of the main "lessons learned" from South Africa's experience.

A. BACKGROUND

1.   The Republic of South Africa

The Republic of South Africa is the southernmost country on the African continent, established by the Dutch as the first colony in the territory in1652. South Africa was later incorporated into the British Empire at the end of the Napoleonic Wars, became a self governing dominion in 1910, and remained part of the British Commonwealth until 1961, when the Afrikaner nationalist party, which had come to power in 1948, broke ties with the Commonwealth and declared the country a republic.

Successive colonial and white minority governments had promoted policies of racial separation between the minority white and majority black populations. The National Party, however, adopted strict racial separation between blacks and whites (apartheid) as formal policy. The population was classified into racial and ethnic groups and forced to live apart in separate group areas.

Separate "homelands" were established for each black ethnic group in the view that these would one day become independent states, and black people were forcibly relocated to these areas. The homelands were not economically sustainable, nor were they intended to be. Their function was to provide the black labour that the South African economy needed to sustain white privilege. Resistance to apartheid grew under the leadership of the African National Congress (ANC).

Growing black resistance, the reality of black urbanization, and international pressure forced the government to reform apartheid; but this stopped short of political rights for the majority. By the 1980's the country was effectively a police state, on the brink of civil war, with its economy in ruins, and a negotiated settlement was the only solution.

South Africa is a middle income country, with a population of 48 million, and a real GDP per capita of $3075.[1] The official unemployment rate is high, at 23.6 percent.[2] Levels of income inequality are amongst the highest in the world and follow historical patterns of racial and gender exclusion. The political violence of the apartheid era has disappeared, and in 2009 the country held its fourth democratic elections for national and provincial governments without incident. However, public protests over poor service delivery and governance in municipalities across the country are common and often violent.

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1. The Presidency of the Republic of South Africa, *Development Indicators 2009* (Pretoria, the Presidency: 2009): p.1.

2. The Presidency, Ibid, p.20. The Gini coefficient (which measures income inequality with 0 representing perfect equality and 1 perfect inequality) increased from 0.64 in 1995 to 0.69 in 2005, with significant shifts within population sub-groups. Iraj Abedien, "Achievements, Failures and Lessons of the South African Macroeconomic Experience, 1994-2008," *Transformation Audit: Risk and Opportunity*, The Institute for Justice and Reconciliation (Cape Town: The Institute for Justice and Reconciliation, 2008), pp.6-7.

2.   Political negotiations (1990-93) and constitution-making process (1994-96)

Bilateral negotiations, between the ANC and the government, commenced shortly after Nelson Mandela's release from prison in 1990. The first multi-party conference, the Congress for a Democratic South Africa (Codesa), comprising 19 political parties and apartheid administrations, took place in December 1991.

By May 1992 the parties were deadlocked over the form of the constitution-making process[3]: The ANC wanted early elections and an elected constitutional assembly to draft the constitution and interim government. The National Party, fearful of the mass support the ANC would enjoy in elections, wanted a deal with the ANC on power-sharing and strong regional government before elections. The Inkhata Freedom Party wanted agreement on a federal form of government before elections. Political violence intensified in 1992; but, despite this, bilateral negotiations between the ANC and National Party continued during this period. Those talks resulted in an agreement between the two parties on an interim constitution, an elected constitutional assembly which would draft the constitution but subject to a set of agreed constitutional principles, an interim government of national unity with the constitutional assembly functioning as an interim parliament, and provisions for regional government.

This agreement paved the way for the resumption of formal, multi-party negotiations in April 1993, and agreement between the major parties excepting the Inkatha Freedom Party (based in KwaZulu Natal) and certain smaller parties, which had withdrawn from the negotiations, but subsequently took part in the first elections.[4] The outcomes were an interim constitution (1993), a multi-party transitional executive council to facilitate the first democratic elections (1993)[5], the election of a five year government of national unity and provincial governments (1994) and the final constitution drafted by an elected Constitutional Assembly (1996).

These were crucial milestones in the transition to a system of cooperative federalism, because they defined the critical institutional pathways that future implementation processes would follow, determined the start and completion points of its key phases, and prescribed the processes and methods through which it was managed.

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3. The events during this period are recounted by the lead negotiators of the ANC, Mr Cyril Ramaphosa, and the NP, Mr Roelf Meyer in Cyril Ramaphosa, "Negotiating a New Nation," and Roelf Meyer as told to Hennie Marais, "From Parliamentary Sovereignty to Constitutionality: The Democratization of South Africa, 1990-94," in *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg, Witwatersrand University Press: 2001), p.71 and p.48 respectively.
4. For an excellent account of the political negotiations in 1993 see *The Small Miracle: South Africa's Negotiated Settlement*, eds Steven Friedman and Doreen Atkinson (Randburg, Raven Press (Pty) Ltd: 1994).
5. Established by the Transitional Executive Council Act 151 of 1993.

3.   The system of cooperative federalism

The national sphere of government (national order) consists of parliament and the presidency. Legislative authority is vested in a National Assembly and a National Council of Provinces to represent the interests of the provincial sphere of government in the national legislative process.[6] Executive authority is vested in the president (elected by parliament but not a member of parliament) and a cabinet of ministers (members of parliament appointed by the President).[7]

The provincial sphere of government (provincial order) consists of nine provinces with elected governments.[8] Provincial governments include a premier and a provincial legislature. Legislative authority is vested in the provincial legislatures.[9] Executive authority rests with the premier and a provincial executive council.[10] The status and means of appointing the provincial executives correspond to those of the national sphere.

Parliament and the provincial legislatures are elected on the basis of proportional representation.

The local sphere of government comprises two hundred and eighty three municipalities. Municipal councils are elected through a mixed system of proportional representation and direct elections.

The national sphere of government is more powerful than the provincial and local spheres of government. It has legislative authority over any matter not listed in the constitution as a provincial or local competence, concurrent competence with the provincial sphere over most of the latter's functions, control over the major tax instruments and the vertical division of revenue between the three spheres, and powers to supervise the affairs of the other two spheres under certain circumstances.[11]

The status of the provincial and local spheres is constitutionally protected, but the scope of their legislative authority is confined to matters listed in schedules that form part of the constitution.[12] Both spheres are entitled to an equitable share of nationally raised revenue.

Provinces have a limited set of exclusive functions and limited revenue-raising powers and all but 5 percent of total provincial revenue comes from national transfers. Most provincial functions are concurrent national functions, and these include major social services such as education, health, and social welfare.

6. *Constitution of the Republic of South Africa 1996*, section 43 and 44.

7. *Constitution*, Ibid, section 85, 86, and 91.

8. *Constitution*, Ibid, section 103: The provinces are Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West, Western Cape. See the map in Annexure

9. *Constitution*, Ibid, sections 43 and 104.

10. *Constitution*, Ibid, sections 125 and 128.

11. These taxing powers include personal income, customs and excise, value-added, and companies taxes. The intergovernmental fiscal arrangements between the three spheres of government are set out in Chapter 13 of the Constitution. National government's supervisory powers over provincial government are set in section 100 and over local government in section 139 of the Constitution.

12. Parts A to Schedules 4 and 5 in the Constitution, respectively, provide for provincial concurrent and exclusive legislative competencies. Local government has the power to administer the functions in Parts B of both Schedules.

Municipalities are responsible for providing basic services, such as water, electricity and sanitation, to households. They raise their own revenue through property taxes and charges for services, but a large portion of their revenue comes from national transfers. In practice, the primary role of the provincial and local spheres is implementing national legislation and policy.

The constitution sets out principles of cooperative government that protect the status and functional integrity of the spheres, but bind them to obligations to work together openly and in good faith, resolve their disputes through political dialogue not court action, and coordinate their activities in the interests of coherent government for the country as a whole.[13] The constitution requires mandatory national legislation to provide a framework for the conduct of intergovernmental relations and the resolution of intergovernmental disputes.[14]

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13. The provisions dealing with cooperative government are in Chapter 3 of the Constitution.
14. *Constitution*, section 41.

B. The transition from unitary government to cooperative federalism

1. Overview of the transition to cooperative federal government

(a) The political negotiations established the pathway to cooperative federalism

With respect to the establishment of federal government the multi-party political negotiations phase was perhaps the most important of the entire process of negotiations. The critical political deals relating to the future distribution of political power, including agreement on second tier government, were all struck during this phase and encoded in the 34 principles of the interim constitution which bound the Constitutional Assembly.

For example, the parties agreed that there should be provincial governments, although the degree of those governments' exclusive authority would only be determined by the Constitutional Assembly. The first provincial governments in the nine provinces were in office by the time the Constitutional Assembly got underway. The fact that provinces actually existed and their incumbent governments would remain in office until 1999, as per the deal on the government of national unity, made it exceedingly difficult for the Assembly to alter the basic scheme for provincial government in any material way. For this reason, the nine provinces remained largely unchanged in the final constitution.

(b) The Transitional Executive Council (TEC) coordinated the initial stages of establishing the provinces

The Transitional Executive Council was a statutory multi-party structure which exercised executive authority alongside the national party cabinet in the period between the promulgation of the interim constitution (December 1993) and the date the government of national unity took office following the first elections (April 1994). Although its primary function was to ensure a level political playing field in the run up to the first elections, one of its important tasks was to pave the way for provincial government to take office. The Council functioned through various multi-party sub-councils, and one of these was responsible for regional authorities.[15] This sub-council "formed an important link between the Transitional Executive Council and the implementation of the interim constitution, since its chief task was to define the boundaries of, and appoint officials to, the provinces."[16] This was a period of instability and political violence in the country. Certain homeland administrations had also

15. The full name of the council was The Sub-Council on Regional and Local Government and Traditional Authorities. The terms of its mandate in respect of regional and local government included…"to make proposals regarding regional and local government budgets, the powers, duties and functions and the restructuring and rationalization of regional and local government administrations (Transitional executive Council Act, Ibid, section 14(a)."
16. Ivor Sarakinsky, "Rehearsing Joint Rule," in *The Small Miracle: South Africa's Negotiated Settlement*, ed. Steven Friedman and Doreen Atkinson (Randburg, Raven Press: 1994), p.78.

challenged the authority of the Council in their jurisdiction, which threatened election preparations and thus made the Transitional Executive Council's work difficult.[17] The implementation of provincial government is examined later on in this paper in more detail.

(c) After the 1994 elections, national government led the implementation of the new constitutional order

After the 1994 elections, all three orders of government were involved in implementing the new framework for government; but, overall, the national order led the process to implement the new order. Several reasons explain the national order's leading role:

- One, the constitution created a five year government of national unity.

- Two, the final constitution explicitly sought to transform the racist apartheid state, society and economy, envisaged national government playing a lead role in transformation and redress, and equipped it with the powers to do so.

- Three, the final constitution required the enactment of national legislation to put much of the federal framework into operation.

- Four, the former apartheid government had deliberately "balkanized" the country into separate ethnic political territories and structures. The territory and structure of the state thus had to be integrated before the constitution could be implemented, and only national government could do that. Inevitably, the national order's prominent role meant that the policy objectives of the first democratic national government powerfully influenced the pace and course of implementation, in particular its policies to transform the state and modernize the economy.

(d) There was no single "grand plan" or process for the entire transition, but a series of plans, with transition to the new order rolling out in phases

The implementation of a federal system of government was not managed according to a single over-arching plan, nor through a single all inclusive process, nor by one agency. When the final constitution (1996) came into effect, a special structure, called the Technical Constitutional Working Group (TCW), which is discussed below, was established to coordinate the implementation of the constitution's many provisions. Although the Working Group worked from an overarching implementation plan, this was not in any sense a master plan for the entire transition.

The broad framework for the transition was set out in the constitution. There were separate plans, processes, phasing and timelines for the establishment of

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17. The TEC and the government sent troops to bring order in Bophutatswana (a so called independent state)in March 1994 after the administration fell into chaos, and established a transitional authority for the area. See Sarakinsky, Ibid, p.86.

provincial government and local government respectively. In other words, there were separate transitions for each order, with each more or less following its own path. Both transitions were already well underway long before the 1996 constitution had even been written. This meant there was an iterative relationship between these processes of transition and the final constitution-making process.

After the election of national and provincial governments in 1994, neither process of transition was self-standing but formed part of the core business and budgets of particular national departments. In practice, both transitions were managed as part of major policy and legislative reform processes led by these national departments working together with their provincial counterparts, which sought to implement the policy mandate of the first democratic government. Most of the national legislation to establish the intergovernmental system was enacted much later, after the final constitution had come into operation.

The following was the sequence of events leading to the establishment of the provincial and local orders and the intergovernmental system:

Provincial government (1993-1996): The nine provinces were established by the interim constitution (1993). The first provincial governments were elected in 1994. The final constitution (1996) retained the nine provinces. Provincial administrations were formed in terms of national legislation providing for a single public service for the national and provincial orders. The process was led by the national ministries responsible for the public service, finance and concurrent functions (such as education, health and housing).

Local government (1993-2000): The transition path for local government was the product of a separate process of political negotiations which ran parallel but fed into the multi-party negotiations in 1993. A detailed phased transition plan was enshrined in a specific local government transition act, adopted by the apartheid parliament as one of its last formal acts (the transitional legislation remained in force until 2000).The interim constitution incorporated this legislation as a transitional arrangement for local government. Transitional local councils were elected in 1995/6. The final form of local government was only settled in the final constitution.

The policy and legislative frameworks for local government were developed from 1996-2000. The new system of local government came into operation in 2000 (during the second term of national government) when the first democratic local elections were held. Local government reform was led by the national Ministry for Provincial Affairs and Constitutional Development (1993-1999) and its successor the Ministry of Provincial and Local Government (after 1999).

The system of intergovernmental relations (1995-2005): The various pieces of legislation dealing with intergovernmental fiscal relations were enacted between 1995 and 2005. The national Ministry of Finance led these processes. The general act regulating intergovernmental relations and disputes,

which was required by the final constitution, was enacted in 2005. The national Ministry of Provincial and Local Government led this process.

(e) A structure with a specific vocation and role, the Technical Constitutional Working Group, was established to coordinate the implementation of the final constitution.

The final constitution required the enactment of many national and provincial laws to implement its various articles. In 1996 the national cabinet assigned the responsibility for "the overall coordination and facilitation of the implementation of the constitution" to the national Ministry for Provincial Affairs and Constitutional Development (MPACD). Cabinet also approved the establishment of an intergovernmental task force, known as the Technical Constitutional Working Group (TCW), to assist the ministry with that task.[18]

The Working Group played an important but specialized part in coordinating the completion of the scheme of implementation in its final stages, because many of the constitution's articles which required implementing legislation dealt with the structures, powers and functions of the sub-national orders. For example, the constitution required national legislation to provide for various matters relating to the establishment of local government and the revenue powers and entitlements of the provincial and local orders.

The Working Group was not directly responsible for formulating or implementing this body of legislation, which remained the task of particular national departments, as indicated in the previous section. By the time the Technical Constitutional Working Group was formed, the transition processes in both the provincial and local orders were also clearly established and well underway.

Important lessons about the complexity involved in coordinating the implementation of a constitution were learned through the Technical Constitutional Working Group. The usefulness of the Working Group model for comparative purposes lies in that fact that the South Africa government saw a need for a coordinated approach to implementing the final constitution, and this body provided valuable collective technical support to provincial departments to assist them with their establishment-related tasks . This section examines three issues concerning the Technical Constitutional Working Group: Who was represented? What was its function? How did it organize its work?

Membership of the Technical Constitutional Working Group

The Technical Constitutional Working Group was an intergovernmental forum of senior public servants representing those government organs which had mandates to implement specific articles of the constitution. Officials of Parliament, key national departments, and all nine provinces were represented.

18. Cabinet approved the establishment of the TCW on 12 June 1996. Technical Constitutional Working Group, Progress with the Implementation of the Constitution 1996: *Report of the Technical Constitutional Working Group* (Pretoria, Department of Constitutional Development: July 1999), p. 1.

All of the key departments responsible for implementing the federal system were represented: finance, public service, justice, constitutional development. Organized local government had observer status only. There were no politicians. The national Department of Constitutional Development (which was renamed the Department of Provincial and Local Government in 1999) convened the body.

Functions of the Technical Constitutional Working Group

The Working Group had four functions and met 4-5 times a year[19]:

- *To prepare an implementation work plan:* This was a procedural plan which allocated implementation-related tasks to the various government agencies and set broad timeframes for completion. The plan is discussed below.

- *To advise government on the date when the constitution should come into effect:* It was allocated this task because many technical issues had to be resolved before the constitution could come into operation, including uncertainty relating to what certain provisions meant and what their implementation required. The constitution came into effect on the 4th of February 1997 as it had recommended.

- *To coordinate and monitor the implementation process:* The Working Group interacted with and received progress reports from implementing departments. It submitted comprehensive progress reports to cabinet, parliament and intergovernmental bodies.

- *To provide technical assistance to provinces:* This function arose through necessity but was not part of its formal mandate. Many provinces and national departments required guidance and specialist expertise. For example, the Working Group assisted several provinces to draft implementing legislation and rationalize apartheid legislation still on the books.

How the Technical Constitutional Working Group organized its work

The Working Group developed a comprehensive work programme to implement the constitution. The work plan classified tasks according to specific timeframes when they had to be completed. These timeframes were informed by substantive and procedural considerations, including timeframes set in the constitution and whether the constitution provided for mandatory or discretionary implementing action. Implementation tasks were classified into four categories of tasks that had to be completed[20]:

- Before the constitution could come into effect;

- As soon as possible after the constitution had come into effect;

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19. Technical Constitutional Working Group, Ibid, pp.1-4.
20. Technical Constitutional Working Group, Ibid, p.3.

- Within a reasonable time after the constitution had come into effect; and
- At the discretion of an organ of state.

The Working Group's reports were structured according to these categories, and thus could provide a comprehensive account of the "state of the implementation process." These reports kept government and the public informed about the state of progress. Working Group members also engaged other departments continuously in order to maintain momentum. When the Working Group was disbanded in 1999, all legislation required by the constitution had been implemented.

2.   The implementation of provincial government (1993-1996)

(a) What implementation involved and how the transition was managed

The apartheid state was designed to foster the separate political and economic "development" of the different racial and ethnic groups in the country. Separate territorial homelands for so called black ethnic groups were established, with the intention that these would one day become politically independent ethnic "states." The homelands were designed to serve white minority rule and economic interests by excluding the black majority politically and exploiting black labour, and were unsustainable developmentally.

The so-called independent states were Transkei (1976), Bophuthatswana (1977), Venda (1979) and Ciskei (1981) (collectively referred to as the "TBVC" states). On the eve of the new democratic order, there were 15 territorial systems of government with separate administrations.[21] These entities had to be integrated to form the territory of the new South Africa and its nine provinces before the 1994 elections could be held. Many resisted incorporation into the new order.

The transition to the present provincial order involved (a) demarcating the nine provinces to form new electoral regions and geographic precincts of provincial governments, (b) closing down the apartheid structures, establishing provincial administrations under a new legal framework and absorbing civil servants into these, and (c) the assigning laws, powers, functions to the new provinces.

The demarcation of provinces

The number, names and boundaries of the provinces were established in the interim constitution (1993) and retained in the final constitution (1996). In May 1993, the multi-party negotiating forum appointed a non-partisan Commission for the Delimitation and Demarcation of Provinces and a technical committee of demarcation specialists to support it. Its mandate was

21. Gerrie Firfield, "The Transformation of the South African Public Service, 1994-97," *Public Personnel Management, Volume 27 No. 2* Summer 1998, p. 385. In addition to the TBVC states, "there were (a) the central administration of the Republic of South Africa, (b) the administrations of the four provinces of the Republic, the administrations of the six self-governing territories of Gazankulu, Kangwane, Kwazulu, and Qwa-Qwa (p. 386)."

"to make recommendations on the demarcations of states/ provinces/regions" to the negotiating forum in terms of 10 criteria.[22] The ten criteria were:

    (1) historical boundaries, including provincial, magisterial, and district boundaries and infrastructures;

    (2) administrative considerations, including the availability or non-availability of infrastructure and nodal points of services;

    (3) the question of whether to rationalize existing structures, including the "TBVC" states, self-governing territories, and regional governments;

    (4) the necessity of limiting financial and other costs as much as reasonably possible;

    (5) the need to minimize inconvenience to the people;

    (6) the need to minimize the dislocation of services;

    (7) demographic considerations;

    (8) economic viability;

    (9) development potential; and

    (10) cultural and language realities."[23]

The commission then grouped these criteria into four broad categories: "economic aspects (4,5.6 and 9); geographic coherence (1); institutional and administrative capacity (2-6); and socio-cultural issues (7 and 10)."[24] From this it is clear that drawing boundaries according to existing ethnic group territories was not the approach, although the outcome did in fact lead to most provinces having a dominant language group. "There are 11 official languages corresponding to the major cultural groups, with Zulu the most-spoken language.[25] Provincial boundaries are not coextensive with ethnic group territories, but in fact each province is home to a dominant cultural linguistic group. The provinces differ greatly in size, population, development, geography, wealth, resources, and levels of poverty.[26] Poverty and inequality

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22. Christo De Coning, "*The Territorial Imperative: Towards and Evaluation of the Provincial Demarcation Process*," in ed Bertus De Villiers, *Birth of a Constitution* (Kenwyn: Juta & Co Ltd, 1994), p.193.

23. Christo De Coning, Ibid, p.208.

24. Christo De Coning, Ibid, p.208.

25. The official languages (with the percentage of the population speaking a language as home language) are Zulu (23.8 percent), Xhosa (17.6 percent), Afrikaans (13.3 percent), Sesotho sa Leboa (9.4 percent), English (8.2 percent), Setswana (8.2 percent), Sesotho (7.9 percent), isiTsonga (4.4 percent), Sepedi (2.7 percent), siVenda (2.3 percent), isiNdebele (1.6 percent). Statistics South Africa, Census 2001, quoted in *The Presidency of the Republic of South Africa, A Nation in the Making: A Discussion Document on Macro-social Trends in South Africa* (Pretoria: The Presidency, 2004), p.33.

26. Gauteng is the smallest province geographically, but has the largest share of population (21.5 percent) and is the largest contributor to national GDP (33.5 percent). The Northern Cape is the largest province, but only has 2.3 percent of the country's population and contributes the least to GDP (2.2 percent). See *Statistics South Africa, Mid-Year Population Estimates PO302*, p.3., and *Global Insight, Comprehensive Profile of All Nine Provinces of Selected Indicators on Development and Governance* (Gauteng: Global Insight, 2008), p.6.

are highest in provinces that incorporated former apartheid homelands or large rural areas. Migration from these provinces to urban areas has contributed to the growth of informal settlements on the fringes of the largest cities and the urbanization of poverty."[27]

The question of second-tier government had not been settled at the time the commission was formed, thus the powers and functions of provinces did not form part of its mandate.[28] It was mandated to hold public hearings on provincial boundaries. It completed its work in six weeks. Its report recommending nine territorial provinces was largely accepted by negotiators and formed the basis for the current nine provinces.[29] Decisions regarding certain boundaries were controversial and contested, with vested economic and political interests cutting across party lines.[30] The political solution was to provide in the interim constitution for a referendum to test local opinion in these areas and to count the votes in these areas in the election separately, but neither of these mechanisms worked satisfactorily, and the dispute festered on in some parts of the country years later.[31]

The establishment of provincial organs and administrations

Establishing the nine provinces required substantial structural reorganization. Homeland administrations had to be absorbed into the new provinces. A single national-provincial public service had to be formed out of the multiple civil services and brought under a common public service legal code in line with constitutional values. Rationalizing these structures "entailed fitting the 15 administrations, made up of 195 departments, into ten new administrations via the national departments and 9 provincial administrations."[32] For example, there were 19 separate departments responsible for education with different staff structures, cultures and conditions of service. Legislative and executive structures, assembly buildings and offices had to be formed in provinces that were entirely new entities. Over 700 000 serving officials, about 400 000 from the homelands, were absorbed into the provinces.[33]

Although, as already mentioned, the Transitional Executive Council had done some preparatory work and the process of amalgamating and establishing

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27. This extract is taken from Derek Powell, *Intergovernmental Relations in South Africa,*" Forum of Federations Global Dialogue Series: Intergovernmental Relations.
28. This matter fell within the mandate of a separate technical committee on constitutional issues.
29. For an account of how the existing boundaries were reshaped to form the nine provinces see Tom Lodge, *Provincial Government and State Authority in South Africa*," Journal of Southern African Studies, Volume 31, Number 4, December 2005, p.738.
30. Richard Humphries, Thabo Rapoo and Steven Friedman, *The Shape of the Country: Negotiating Regional Government*," in Steven Friedman and Doreen Atkinson, Ibid, p.174.
31. *Constitution of the Republic of South Africa* (The Interim Constitution) Act 200 of 1993, section 124(3).
32. Firfield, Ibid, p. 387.
33. These figures come from Public Service Commission, *Annual Report, 1994*, p.9. cited in Tom Lodge, Ibid, p.738. For a comprehensive examination of public service reform during this period see Louis A. Picard, *The State of the State: Institutional Transformation, Capacity and Political Change in South Africa* (Johannesburg, Wits University Press: 2005), p.309.

provincial organizations took place in earnest under the first democratic government between 1994 and 1996.

The core element of the provincial transition was the reorganization of provincial territories, functions and administrations. The interim constitution established a Commission on Provincial Government to continue the work of establishing provincial government which had begun under the negotiations process.[34] It was comprised of fifteen members appointed by the President, with one member appointed per province with the concurrence of the premier of that province.[35] Its mandate was "to facilitate the establishment of provincial government" during the transition and under the final constitution.[36] Its powers were largely advisory: "advising national government on the establishment and consolidation of administrative institutions and structures;" making "recommendations to the national government or the provincial government on the rationalization of statutory enactments and public sector resources."[37] Aside from its responsibility with respect to transitional matters, its more important function was to advise the Constitutional Assembly on constitutional matters relating to provincial government, including:

(a) "Finalizing the number and the boundaries of the provinces and the Republic;

(b) The constitutional dispensation of such provinces, including the constitutional structures within such provinces as well as the method of their election and their authority, functions and procedures;

(c) Measures, including transitional measures, which provide for the phasing in of new constitutional dispensations;

(d) The final delimitation of powers and functions between national and provincial institutions of government;

(e) Fiscal arrangements between the institutions of national government and those of the provincial governments;

(f) The powers and functions of local governments; and

(g) Any matter which the Commission considers to be relevant."[38]

By the time the Commission got underway other players had entered the field and its role during the transition increasingly became one of monitoring progress with the transition. In practice, the rationalization of provincial structures was managed as part of a national policy process to formulate new public service legislation[39] led by the national Ministry for Public Service and Administration, the Public Service Commission and its provincial counterparts.

The interim constitution had provided for a national commission and for provinces to establish provincial commissions to "make recommendations and

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34. *Interim Constitution*, section 163.
35. *Interim Constitution*, section 165.
36. *Interim Constitution*, section 164(1).
37. *Interim Constitution*, section 164.
38. *Interim Constitution*, section 164(2). For the Commission's own assessment of its work see *Report of the Commission on Provincial Government: 1 June 1994-31 July 1996.*
39. The Public Service Act of 1994 provided for a single national and provincial public service.

give directions on, amongst other things, the organization and administration of departments and the public service and the province respectively."[40]

Other key role-players were the Ministries of Finance (departmental budgets and remuneration of office bearers), Labour (public service labour bargaining), and Justice (legal and technical advice and drafting). Establishing the new administrations involved wide-ranging technical activities such as finalizing departmental establishments, staff structures, human resource management systems, personal information systems, and so forth. This technical work was undertaken by various national technical task teams from the departments mentioned and intergovernmental working groups which included provincial officials.

Of the various transitional structures concerned with establishing provincial government, only the national Public Service Commission survived under the final constitution, albeit with reduced powers. By this stage policy and institutional reform lay squarely with the national ministries.

The assignment of functions to the new provinces

The creation of provincial governments was politically controversial within the liberation movements, and agreement on a second tier was a crucial breakthrough in constitutional negotiations and a major concession to minority parties.

Areas of provincial legislative responsibility (hereafter called functions) were only settled in the final constitution. Under the interim constitution, provincial governments had only concurrent functions with the national government, but no exclusive functions. The final constitution provided for concurrent functions (which are the majority of provincial functions) and limited exclusive functions for provinces.

Transitional arrangements in the interim constitution dealt with the status of old order legislation, which remained in force until repealed under the interim constitution. Most of this legislation was national legislation and much of that governed matters now falling within areas of provincial functional competence. This legislation had to be assigned to provinces.

Between 1994 and 1996, state lawyers assigned 1,374 statutes.[41] Apartheid legislation also had to be repealed and replaced with new legislation consistent with the constitution and the electoral mandate of national government. After 1994, national departments responsible for concurrent functions led the process of law reform within their specific sectors. Generally this took place under the auspices of major national policy-making processes to establish the policies to give effect to the constitution and national political objectives.

Comprehensive policy and law reform was the defining feature of the first democratic government. Most of the national legislation applying to provincial

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40. *Interim Constitution*, Ibid, sections 210 and 213. The final constitution provided for a national commission but not provincial commissions, and the latter were abolished in 1997 by the Abolition of Public Administration Commissions Act No 48 of 1997.
41. Firfield, Ibid, p.387.

functions today – for example, education, health, and housing policies – was developed in this period. Through these policy and law reforms provincial functional responsibilities were defined more precisely over time. These processes were led by national Ministries responsible for concurrent sectors, but were highly consultative, with national government and provinces working together on policy development through political and technical intergovernmental forums established for that purpose in each concurrent sector.

(b)   Key issues of substance and process that arose in the transition

The provincial demarcation process was too rushed for genuinely inclusive public participation. There was considerable interest in the issue. Arguably, this reduced the legitimacy of the second-tier, which was already controversial. However, the overwhelming imperative was meeting the date for the elections and this consideration determined the pace. Many boundaries were contested. As was characteristic of the negotiations process, the major parties postponed the issue until after the elections. This took the form of a provision in the interim constitution allowing for a referendum to re-determine sensitive boundaries. The issue was never adequately resolved and under the final constitution many provincial boundaries cut across municipal boundaries.

Government attempted to resolve the matter by redrawing certain provincial boundaries, but by then there were vested local interests and long periods of violence and public protest followed the amendments. In the case of one of these cross-boundary municipalities, Merafong, which spanned the North West Province and the Gauteng province, the constitution was amended to redraw the provincial boundaries to include the municipality in the North West. The community was enraged because it wanted to form part of the Gauteng on the grounds that service delivery was better there. This led to years of legal action against the state, often violent protests, school disruptions and boycotts of the 2006 local elections. After the 2009 national and provincial elections, national government again amended the constitution, this time to incorporate the municipality into Gauteng.[42]

A second major issue is that economic disparities between provinces are enormous. In the provinces which encompass the former homelands limited institutional capacity intersects with high rates of poverty and inequality. Regional economic equalization has never been adequately addressed and is a big problem today. The perception is that the areas that suffered most from apartheid (the homelands and rural areas) continue to suffer the most under the democratic government. Most of these provinces also suffer severe capacity shortages and generally they perform poorly compared to provinces with strong urban cores. This duality undermines the legitimacy of the second tier and has led to calls within the ruling ANC to abolish provincial government.

42. The *Constitution 12th Amendment Act* of 2005 read with the *Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23* of 2005 redrew several provincial borders to abolish cross-boundary municipalities. The *Constitution 16th Amendment Act* of 2009 read with the *Cross-Boundary Municipalities Laws Repeal and Related Matters Act 8* of 2009 reversed the original decision with regard to Merafong municipality.

3. The establishment of local government (1993-2000)

(a) What the transition involved and how it was managed

Under apartheid, local government was a statutory creation and consisted of white municipalities and separate local authorities for the black population, spatially fragmented and institutionally separated along racial lines. In all, there were over 1200 local structures. In the 1980's a powerful civic movement emerged in municipalities as part of the broader mass democratic movement. Its strategy was to render local authorities ungovernable through direct action and by withholding payment for services. Civil and political violence in many black townships was endemic.

The local government transition was complex, took place over many years, and had already commenced in particular municipalities by the time the political negotiations in 1993 had got underway. These early "local level pacts" were important laboratories for experiments for local transition, and the results greatly influenced the course of the transition and subsequently policy on local government under the democratic order. It involved: (a) a separate negotiated settlement on the transition to fully democratic local government which fed into the multi-party negotiations and the interim constitution that ensued, (b) the formation of transitional local councils (c) negotiating a new constitutional dispensation for local government in the final constitution, (d) demarcating new municipalities and re-organization, and (e) developing a new policy and legislation framework to implement the constitutions.

The political objectives of the transition were to abolish racial local government, integrate settlement under one local authority and tax base, establish a new system of local democratic government, and extend basic services to neglected black communities.

The transition was planned to progress in phases and the entire process was regulated by the local government transition act, which remained in force until the new system came into effect in 2000. There were three phases:

Pre-interim phase (1993-1995)

This phase started in 1993, with the negotiated settlement on the transition path of local government and concluded with the election of transitional local councils in 1995. The path for local government transition was agreed to in a separate negotiation process which ran parallel to the multi-party negotiations on a new constitution.[43]

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43. The Local Government Negotiating Forum was established in 22 March 1993. "The Forum was composed of 60 representatives half of them drawn from statutory bodies and the other half from non-statutory bodies (principally the South African National Civic Association which was aligned to the ANC." Steytler and De Visser, *Local Government Law of South Africa* (LexisNexis, Issue 2, August 2009), p.1-11. For a detailed account of this aspect of the political negotiations see Fanie Cloete, *"Local Government Transformation in South Africa,"* in ed Bertus De Villiers, Ibid, p.294.

The outcomes of this process were the chapter on local government in the interim constitution and the local government transition act.[44] Local government was given a high degree of political autonomy, but remained an area of provincial legislative competence and the transition act was endorsed as the blueprint for future local government reform. Local "governments of national unity" were established and the interim constitution established specific measures to ensure "consensus-seeking" local politics: "Firstly, a budget was to be adopted by a council with the support of two-thirds of all its members. Secondly, the councils had to elect, on the basis of proportional representation, an executive committee which had to endeavour to exercise its powers and perform its functions on the basis of consensus amongst its members."[45]

The transition act provided for negotiating forums to establish local transitional structures and nominate its members. The Act provided for provincial commissions to demarcate the boundaries of the transitional urban, rural and metropolitan municipalities. The outcome of this demarcation process was 842 municipalities. Transitional councils were elected in 1995/6, with safeguards for the representation of minority communities. After 1994, this phase was led by the national minister responsible for local government and his provincial counterparts who administered the transition act, with the ministry of finance and its provincial counterparts playing key roles.

The interim phase (1995-2000)

This phase started with the election of transitional local councils and concluded with the first fully democratic local elections under the 1996 constitution. It coincided with the adoption of the final constitution, which elevated local government into a sphere of government in its own right with constitutionally protected competences set out in schedules to the constitution. Local government was given a mandate to promote social cohesion, drive local economic development, and meet basic needs.

The constitution mandated the national parliament to enact national legislation to provide for the demarcation, structures, core systems and finances of municipalities. This phase involved formulating a new national policy framework for local government (1998), which remains in force, and enacting the legislation to implement the constitution. Legislation on demarcation and municipal structures was enacted in 1998, municipal internal systems in 2001, and municipal finances only in 2003/04. Demarcation was undertaken by a constitutionally protected demarcation board with its own statutory powers to determine the boundaries of municipalities. The outcome was 284 metropolitan, district and local municipalities (later reduced to 283). The first elections to the new system were held in 2000.

This phase was led by the national ministry responsible for local government. The ministry appointed a political team to draft local government policy headed by the chairperson of the committee of parliament responsible for

44. The Local Government Transition Act 2009 of 1993.
45. Steytler and De Visser, Ibid, p.1-13.

the sector. The political group was supported by a technical working group of national, provincial and local officials. Although the formulation of policy and legislation was a line function responsibility it was coordinated through a dedicated intergovernmental process called the local government MinMEC (the name is an amalgam of Minister (Min) and Member the Provincial Executive Council (MEC)). This political structure was chaired by the national minister and oversaw the various actions that were required at every level of government to establish local government. All three spheres of government were represented. Administrative support was provided by the national department to the ministry.

The final phase (2000-)

In the original plan this phase commenced after the 2000 elections (and the second national-provincial elections in 1999). There were still many outstanding matters relating to earlier phases of establishment, however, and these were finalized in this phase. These matters included the allocation of powers and functions between district and local municipalities, intergovernmental grants, and the regulatory frameworks for municipal property rates, financial management and administrative and planning systems.

Key provisions of each of these pieces of legislation were phased-in. The phase was co-led by the ministries responsible for local government and finance under the second democratic government. In both of these sectors, the intergovernmental processes established in the interim phase remained in operation, and had become established as routine practices by then.

4.   The establishment of the intergovernmental system (1993-2005)

Cooperative government was based on the three spheres of government having shared and interlocking responsibilities in most areas of service delivery. The general scheme of cooperative federalism is that the national order makes national policy for the country, which the other two orders implement in their respective functional domains. Policy-making, planning, budgeting, and implementation actions of the three orders thus have to be coordinated. Hence, sound intergovernmental relations between the three orders are essential for effective government in the country.

The final constitution required national legislation to establish the general framework for intergovernmental relations and intergovernmental fiscal relations, including procedures to resolve intergovernmental disputes. The intergovernmental system was established through a process of evolution and legislative prescription over almost a decade following the adoption of the new constitution.

Intergovernmental coordination processes evolved quickly. Most national ministries responsible for concurrent provincial functions established intergovernmental forums to coordinate policy and law reform in their sectors. The national ministry for finance enacted legislation to establish

intergovernmental forums to coordinate national-provincial fiscal matters in legislation. Most other sector forums were non-statutory until 2005.

A conscious policy decision was taken to allow intergovernmental relations to mature and settle in before the general framework required by the constitution was enacted. This legislation was only enacted in 2005, and formalized the key intergovernmental structures in all three orders. The national ministry responsible for intergovernmental relations led the process to formulate and implement this legislation. The content of the legislation was negotiated by the three orders in two all-in conferences of their respective executive authorities.

The constitution required national legislation to establish the institutions of intergovernmental fiscal relations. For example, legislation to regulate the division of national revenue between the three orders, provide common standards for financial management and budgeting, and regulate the tax and borrowing powers of sub-national governments. This body of legislation was enacted over a period of several years as part of a comprehensive fiscal and budget reform process linked to a macro-economic stabilization policy and was led by the national ministry for finance, working with its provincial counterparts. In its own right, this involved a massive transition, which sought to modernize the public budget by introducing a medium term expenditure framework, new transparency and compliance measures, standardized reporting and budget formats, and internationally accepted accounting and auditing practices.

The finance ministry introduced capacity-building grants to assist the provincial and local orders to restructure and implement the legislation and provided technical support. National financial management legislation in particular was phased-in: provincial legislation was introduced in 1998 and municipal legislation in 2003, with the latter piloted in the largest urban municipalities before being extended to all municipalities.

C. Some lessons learned

This section distils some lessons (in the author's view) from the South African transition.

In this author's view the South African experience was highly country-specific and the lessons which emerged should be approached with a great deal of caution by other countries undergoing transition.

1.   Compromise based on principled but pragmatic political leadership

Why did South Africa succeed in negotiating an end to conflict when the record shows that transition failure is a more common outcome of elite pacts than durable peace? Certainly the negotiated settlement was largely an elite pact between the ruling national party and the ANC. (The key deals were struck in private bilateral deal-making between the two parties, not the multi-party forums, and progress in the latter was registered when there was "sufficient consensus" between them). Governments of unity were established in all three orders, but this was not the only major factor: indeed the National Party withdrew from the Government of National Unity in 1996.

In my opinion three factors which contributed to the successful outcome stand out above others: First, the major parties were committed to finding a solution and believed they could find one under even the most adverse circumstances. This meant they kept informal channels open when formal negotiations had deadlocked. It also meant they were prepared to compromise when that was in the interests of the country.

Second, agreement between the two main parties formed a strong axis to the negotiations which made it difficult for spoilers to gain traction. As long as the main parties agreed, the process could move forward, even if details had to be postponed to the future.

Third, despite the strong axis, the main parties kept the door open to the parties that had withdrawn from negotiations, for example, by making compromises to bring the Inkatha Freedom Party (IFP) into the elections on the eve of the first elections. These factors helped to establish direction, purpose and a democratic culture in the country that ensured continuance and stability even after the Government of National Unity collapsed. The new national consensus formed by the negotiations and the 1994 elections also infused later efforts to establish federal government and helped to overcome the difficulties presented by, for example, territorial integration.

2.   The transition to cooperative federalism was steered by strong but inclusive national leadership

A strong role for national government in the restructuring and reorganization of the state was explicit in the interim constitution.

After the 1994 elections, the ANC now had a powerful electoral mandate to reconstruct and develop the country (nearly 2/3 majority in parliament and control of seven of the nine provinces). These two factors explain national government's assertive leadership role in the transition to cooperative federalism, and why national policy goals gained traction over implementation processes the further the country moved beyond 1994. Because the jobs of public servants were protected for five years, the ANC was forced to rely on the civil service to implement the constitution and government policy, in particular on the experienced and highly skilled white civil service. This explains the prominence of technocratic and specialized processes to establish cooperative federalism.

Strong but inclusive political and administrative leadership from national government was essential to steer the complex change processes, sustain momentum, and overcome resistance. Continuous political dialogue between the ANC and the IFP during the first term of democratic government and the inclusion of the latter in the Government of National Unity helped to restore peace in KwaZulu Natal.

Implementation also required strong national leadership. Sub-national governments needed support and financial resources which only the national order could provide. In the early stages national departments provided invaluable legal and administrative skills to support the provinces and municipalities to establish their institutions. Lawyers from national departments, for example, would often assist provinces to draft legislation and resolve legal disputes. Administrators helped with the establishment of organizational structures. National ministries also developed numerous guidelines and standard laws for the provincial and local orders on virtually every aspect of their functions.

Inclusive intergovernmental processes further helped to build consensus and overcome vested political interests that could have threatened the overall transition. By working together, officials from the different orders also got to know each other and in time began to establish personal networks and work practices that transcended pre-existing political and other divisions. Joint working teams also helped to overcome common problems through peer effort. Formal challenges in the courts to restructuring initiatives during the establishment of provinces were few.

3.   Implementation was embedded in public service operations

More important than a grand overall transition plan was the fact that the key processes of implementation were embedded in the core plans, budgets and functions of government departments at all levels.

This allowed for organized long term planning – often across terms of government – and administrative continuity. Government organs actually used these implementation processes to gear up to perform their functions as governments. Virtually every aspect of implementation also formed part of a national policy or legislative reform process coordinated through

intergovernmental processes. This meant there was no disjuncture between implementation-related activities and core government business. These processes provided the leadership and the opportunity for collaboration and created a mutual learning process.

Implementation processes were generally well constructed – building capacity and legitimacy for change was as important an outcome as getting the policy or legislation enacted. The point here is that processes of implementation were in themselves acts of building state-effectiveness and legitimacy, not merely means to an end. It is important in the immediate aftermath of conflict for politicians and administrators to get stuck into the normal routines of running a country.

Various special purpose coordinating structures were created, but only in the later stages was a single structure (the TCW) given the task to coordinate the implementation of the constitution. A single all inclusive process for the entire transition would have been both impractical and inefficient, because implementation was staggered and high degrees of departmental specialization were required. A single coordinating process would have been too remote, generalist and inflexible to adapt to the very different contexts that prevailed in each sector of change. The Working Group, however, did play a valuable role to provide a birds-eye view of the implementation of the constitution, record the implementation process and prepare digestible reports for the political organs of government.

4. Building a basic, let alone an effective, state is complex and takes time

There is a vast difference between implementing structural and policy reforms and state effectiveness. Many provinces and municipalities even today lack the capacity to discharge their constitutional functions effectively. National policies thus often created unrealistic expectations which could not be met in practice. Some are still struggling with problems they inherited during the amalgamation of the homeland structures, such as a pernicious work culture, internal political divisions, and deep-rooted corruption and patronage. In 2006, government admitted that the process to transform local government had been too ambitious.

One of the weaknesses of the South African transition is that capacity-building was ad hoc and unsystematic, and capacity support was often provided in kind, off budget and too late. This meant it was difficult to target capacity building interventions strategically and to measure what was achieved. A second was the absence of reliable data and information relating to the civil service (actual numbers of civil servants, vacancies, competencies, and so forth) and general progress with the transition in particular provinces and municipalities. Reports from the latter were often of a poor quality and generally not based on accurate data. Data relating to performance and expenditure greatly improved over time but, in hindsight, it is apparent that too little attention was given to

establishing capacity-building and monitoring and evaluation capability and strategies in the early stages of the transition process as part of the process to design institutions.

The transition to the new system was a huge undertaking to overhaul the entire state machinery. It was much more complex, time-consuming and much messier than many would have foreseen at the time.

5.   Transformation fatigue set in quickly.

Long term implementation processes spanning several terms of government were also difficult to manage because the champions came and went as political and career fortunes changed. This resulted in a loss of institutional memory in government. Processes were often poorly recorded, which meant that later reforms often did not have access to the thinking of the earlier phases. Even with the best intentions, prioritization also took place only in the broadest sense. This is because it was difficult to plan priorities far into the future and to insulate that prioritization scheme from political pressures. For example, national ministers reacting to real political pressures often pushed for particular reforms to be fast-tracked before they were ready for implementation according to the plans.

The most effective transition was probably the fiscal reforms managed by the ministry of finance. A formidable ministry of finance was a great asset, but it also led to tendencies to use the budget to make policy. More important than a dogmatic order of priority for long term reforms was flexible, adaptable and networked politicians and officials with the will and reasoning to work problems out pragmatically. If anything defined both the political and institutional transition in South Africa it was those qualities of individual and collective leadership.

6.   Governments of "local unity" offered opportunities to build new political community across social and political divides
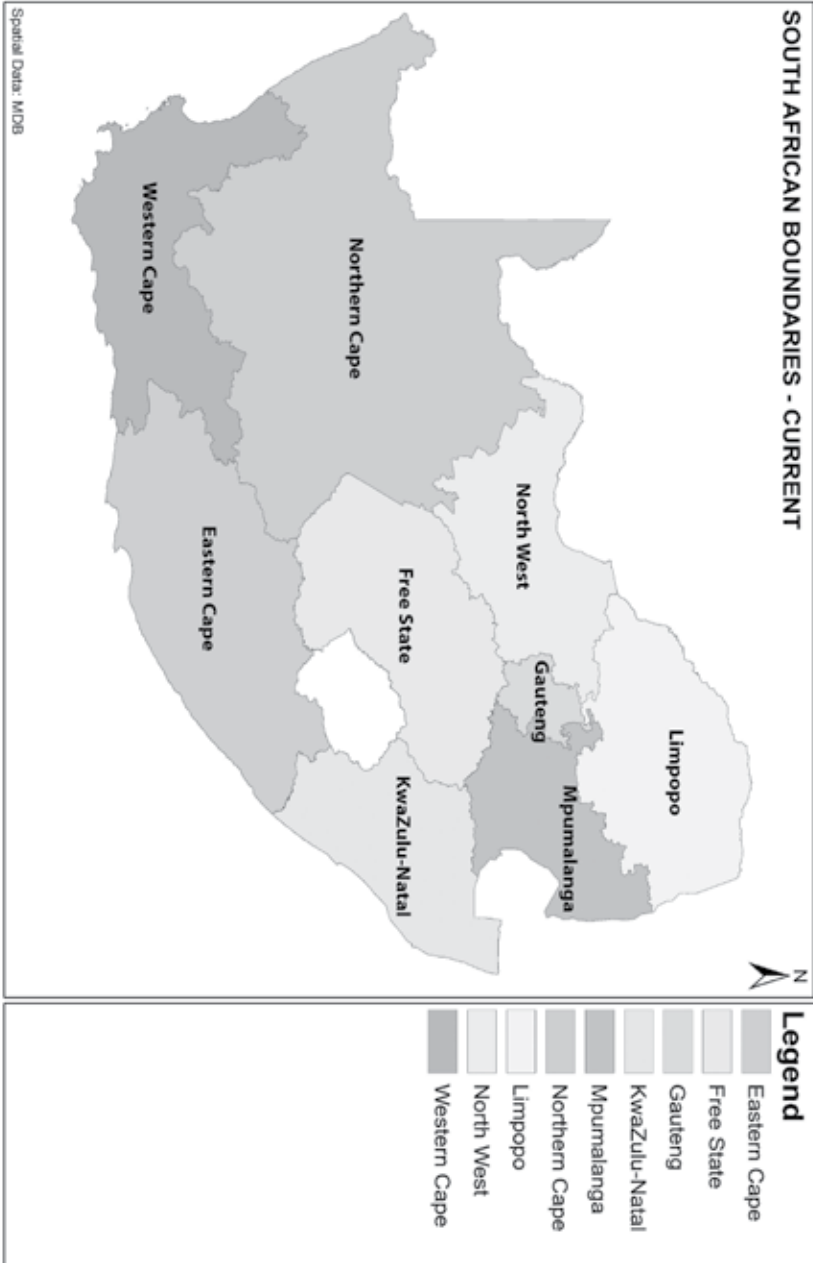
Local government had a special place in the political transition and enjoys a prominent role in the new order. The earliest negotiated political settlements between the powerful civic movements and the apartheid government were struck in some big cities long before the national elite agreement was concluded. These local agreements were centred on addressing the plight of black townships but had a much wider reach because they gave rise to informal methods of co-governance that became the blueprint for the country.

These pioneering experiments had a powerful influence on the course of the national negotiations process. More broadly, they showed that bargaining between local elites and co-governance on local issues were not only a necessary condition for security and stability after conflict but entirely possible even within the context of a national negotiations process. In other words, local pacts could be made without harming the national elite pact-making processes.
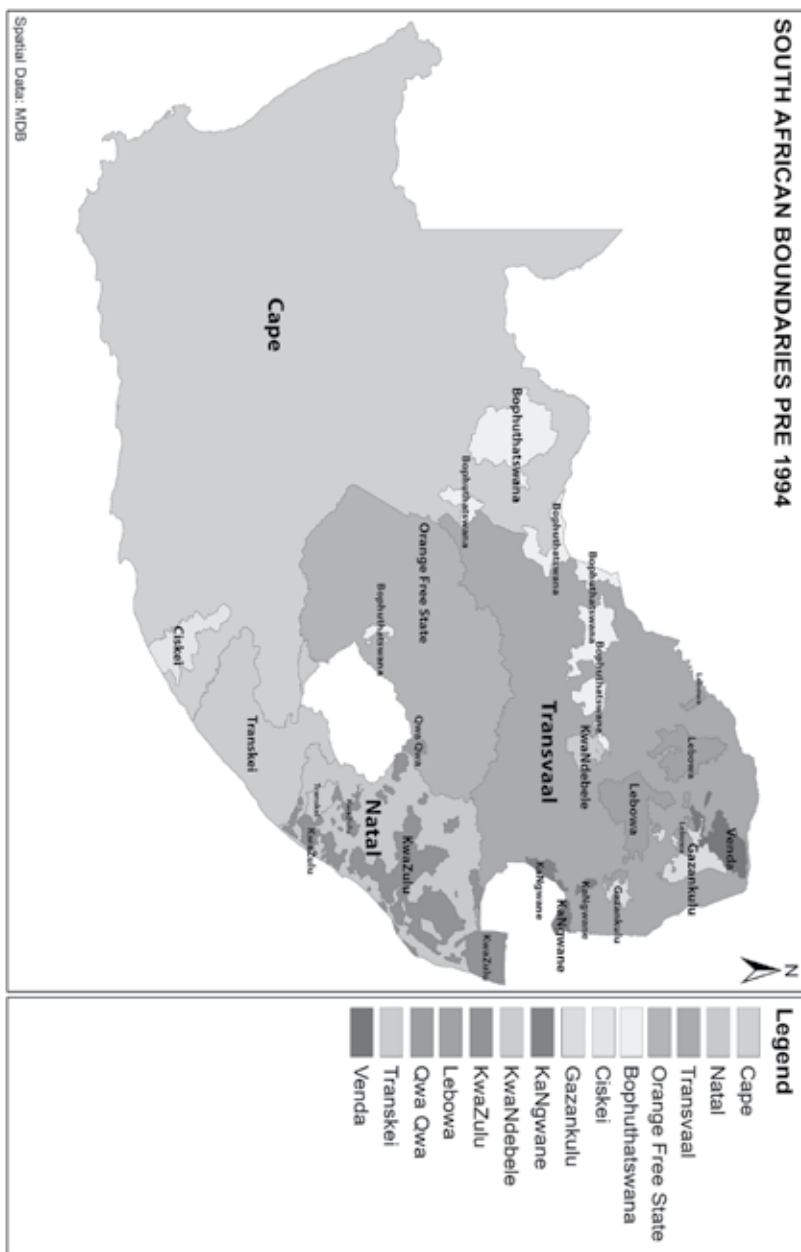
The local agreements gave rise to local forms of unity government centred on establishing consensus-seeking and new forms of political community in deeply divided communities. These outlived the national power-sharing arrangements. Indeed, in KwaZulu Natal (KZN) province these institutions have survived to this day although the mayoral winner takes all form of executive government has become the norm across the country. It is worth noting that there are far fewer public protests in KZN than in other provinces, and it experienced less of the xenophobic violence in 2008 than elsewhere. This suggests that the retention of local governments of unity may have played a key part in building peace and preventing the recurrence of conflict in that province.

The problems we have today with local government arose in the step up to the new system in 2000. The assumption was that local government was ready to become the service delivery arm of the state and a winner-takes-all executive system was the right path to that goal. In so doing, we lost sight of the reality that, perhaps, in a divided society, building new forms of local community, not efficiency, is the key step in building the peace and preventing violent conflict.

Annex A: Maps showing current and pre-1994 boundaries

Annex A: Maps showing current and pre-1994 boundaries

SOUTH AFRICAN BOUNDARIES PRE 1994

Spatial Data: MDB

Cape

Bophuthatswana

Orange Free State

Ciskei

Transkei

Qwa Qwa

Natal

KwaZulu

Transvaal

KwaNdebele

Lebowa

Gazankulu

Venda

KaNgwane

Legend

- Cape
- Natal
- Transvaal
- Orange Free State
- Bophuthatswana
- Ciskei
- Gazankulu
- KaNgwane
- KwaNdebele
- KwaZulu
- Lebowa
- Qwa Qwa
- Transkei
- Venda

Annex B: Timeline of the negotiations and constitution-making processes (1990-1996)

Year	Negotiations milestone[1]
1990	Groote Schuur Summit: First bi-lateral Summit between the ANC and the then Government.[2] Pretoria Minute: Addressed the unilateral suspension of the armed struggle. D F Malan Accord: The Accord reiterated the parties' (ANC and NP government) commitment to the Pretoria Minute and prescribed the suspension of MK's activities.
1991	National Peace Accord: The main objectives were to deal with the causes and phenomenon of political violence.[3] CODESA 1:[4] First formal negotiations with 19 political parties/organisations participating.[5]
1992	CODESA 2: Formal negotiations deadlocked on the formulation of a new constitution and on proposals regarding a constitution-making body and the core principles for a constitution.[6] Record of Understanding: An agreement between the NP and the ANC which laid the basis for the resumption of the negotiation process.[7]
1993	The Local Government Negotiation Forum: The Forum influenced the framework for the Local Government Transition Act which made provision for the transformation of local government. Multi-party Negotiating Process (MPNP): 26 participating parties comprising political groupings, national and homeland government representatives and traditional leaders reconvened to negotiate a future dispensation for South Africa's Interim Constitution.[8]
1994	Transitional Executive Council (TEC): A multi-party Council set up to promote the preparations for and transition to a democratic order. It operated alongside the then existing tricameral parliament.[9] Elections:[10] First democratic election.[11] First democratically elected President: Mr. Nelson R. Mandela inaugurated as the first democratically elected President.[12] Constitutional Assembly: The Constitutional Assembly had to work within particular parameters, namely: a two-thirds majority for the adoption of the text, compliance with 34 constitutional principles agreed to in the Interim Constitution, and the adoption of a new constitution within two years.
1995	Local Government elections[13]

1996:	1996 Constitution: After 2 years of negotiations the Constitutional Assembly adopted the new constitution.[14] Certification by Constitutional Court. [15]
10 December 1996	Promulgation of the South African Constitution. This concluded South Africa's negotiation process which formally started in 1991.

Source: Compiled by the Directorate: Research, dplg, 2008. This timeline and the notations in the footnotes are extracted and reproduced with the permission of the Director: Research, Department of Cooperative Governance and Traditional Affairs, Mr A Donkers, who compiled the information.

(Endnotes)

1. A number of books have been published in which the South African transition process is described, see Sparks, A; 1996: Tomorrow Is Another Country: The Inside Story of South Africa's Road to Change, University Of Chicago Press; Heunis, J; 2007: The inner circle: Recollections from the last days of white rule, Jonathan Ball Publishers; Constitutional Assembly, 1996: The Making of the Constitution: The Story of the Constitutional Assembly, May 1994 to December 1996, ABC Press, Cape Town.

2. Groote Schuur Minute was the first of substantive agreements between the NP and the ANC. It facilitated the release of political prisoners, the return of exiles, and the amendment of security legislation

3. National Peace Accord: Representatives of twenty-seven political parties, interest groups, and the national and homeland governments signed the National Peace Accord. The main objectives of the Accord were to deal effectively with the causes and phenomenon of political violence and intimidation, as well as to facilitate socio-economic reconstruction and development. From an institutional point of view, at the national level the National Peace Committee (NPC), the National Peace Secretariat (NPS) and the Commission of inquiry regarding the prevention of public violence and intimidation (the Goldstone Commission) were established. The main characteristic of the peace structures was their multi-party composition and non-partisan leadership. These structures paved the way for the agreement later in the process to form a multiracial council, later called the Transitional Executive Council (TEC), to serve as temporary executive authority until democratic elections could be held.

4. The first plenary session of the Convention for a Democratic South Africa (CODESA) began on December 21 1991, at the World Trade Centre in Johannesburg. Chief Justice Michael Corbett opened the Convention

with Judges Petrus Shabort and Ismail Mohamed presiding. About 228 delegates from nineteen political parties attended and pledged their commitment to negotiations by signing the Declaration of Intent.

CODESA 1: Declaration of Intent

Signatories to the Declaration committed themselves, inter *alia to:*

- Bring about an undivided South Africa;
- Work to heal the divisions of the past; and
- Set in motion the process of drawing up and establishing a constitution that would ensure a united, democratic, non-racial and non-sexist South Africa with a Constitution as the supreme law, and a multi-party democracy.

   After the negotiating parties had agreed and signed the declaration of intent, five working groups were elected to deal with specific issues. These groups were mandated to investigate the establishment of:

- The new constitution;
- The setting up of the interim government;
- The future of the homelands;
- Time period for the implementation of the changes; and
- The electoral system.

   19 political parties / organizations / governments participated. Absent from the Convention were the Pan Africanist Congress (PAC), the Conservative Party and Azanian People's Organisation (AZAPO). Later in the negotiations the Inkatha Freedom Party (IFP) withdrew in protest at the exclusion of the representatives of the Zulu King Goodwill Zwelithini and the KwaZulu homeland.

   CODESA 1 played a significant role in laying the foundation for multi-racial discussions. It was agreed that the next session (CODESA 2) would begin in March 1992.

5. Participants in CODESA 1:

> Ciskei Government;
> Democratic Party;
> Dikwankwetla Party;
> Inkatha Freedom Party;
> African National Congress;
> Bophuthatswana Government;
> Inyandza National Movement;
> Intando Yesizwe Party;
> Labour Party of South Africa;
> Natal/Tvl Indian Congress;
> National Party;
> National People's Party;
> Solidarity;
> South African Communist Party;

Transkei Government;
United People's Front;
Venda Government;
Ximoko Progressive Party;
South African Government.

6. Formal negotiations deadlocked. Two months before CODESA 2, the five working groups began their discussions and met for two days a week. Most significant issues that could not be resolved by the working groups during the discussions were carried over to CODESA 2. However even then the parties failed to reach a consensus on two major issues, that is, the interim government and the constitution. As a result, the Management Committee declared a deadlock on these issues.

    Deadlock: Working Group 2, was tasked with the formulation of a new constitution and also had to make proposals on a constitution-making body and the core principles for a constitution. There was agreement that South Africa would have a non-racial, non-sexist and democratic government.

    The debate deadlocked on the percentage required for the constituent assembly to take decisions. The NP proposed a 70 percent majority for the constituent assembly to take decisions and 75 percent for decisions relating to the constitution such as the bill of rights. The ANC proposed as an alternate a 66.7 percent or two-thirds majority on all constitutional matters.

    No agreement could be reached on the constitutional principles or an appropriate body / process to draft a constitution. CODESA 2 never reconvened.

7. Formal negotiations resumed: After the CODESA deadlock, F.W. De Klerk and Nelson Mandela exchanged memoranda and the NP considerably softened its demands. By August 1992, the ANC had agreed to establish a 'channel bilateral' for maintaining quiet dialogue, nominating Cyril Ramaphosa to hold talks with the NP's Roelf Meyer. They made considerable progress and on 26 September Mandela and De Klerk held a summit to sign the Record of Understanding. The agreement reached focused on the identification of steps to be taken to address issues raised in earlier memoranda and took note of various opposing viewpoints on the relevant issues and obstacles. The Record of Understanding furthermore included the agreements on issues such as:

    • The need for a democratic constitutional assembly/constitution-making body;

    • The release of prisoners; and

    • The right of all parties and organisations to participate in peaceful mass action.

8. The Multi-party Negotiating Process (MPNP) agreed that from the date of the election (27 April 1994) South Africa would function for a period of 2 years (which was the time provided for the negotiating and writing of a final constitution) under an interim constitution, the Constitution of the Republic of South Africa, 1993, Act 200 of 1993. The negotiating MPNP parties designed the Interim Constitution as a bridge between the old order and the new, to regulate the governance of the country under a government of national unity while a popularly mandated Constitutional Assembly (CA) drafted a new constitution. The Interim Constitution also served to mark out the transitional steps to be taken.

9. See the Transitional Executive Council Act, 1993, Act No. 151 of 1993.

10. 27 April 1994.

11. 1994 Election Results for the National Assembly:

Party	% Votes	Seats
African National Congress	62.65	252
National Party	20.39	82
Inkatha Freedom Party	10.54	43
Freedom Front	2.17	9
Democratic Party	1.73	7
Pan Africanist Congress	1.25	5
African Christian Democratic Party	0.45	2

Source: Independent Electoral Commission; 1994: Report of the Independent Electoral Commission: The South African Elections of April 1994; for a detailed electronic version of the results see Independent Electoral Commission; undated: "National Election '94" in Elections '94", http://www.elections.org.za/Elections94.asp.

12. 10 May 1994.

13. 1 Nov 1995. These elections ended apartheid local government rule. 40% of local seats were filled by proportional representation, 30% by whites-only towns, and 30% by black townships.

14. 8 May 1996.

15. 4 December 1996.

Annex C: Key Milestones in the evolution of South Africa's intergovernmental system

Source: The Department of Provincial and Local Government, "The Implementation of the Intergovernmental Relations Framework Act," Inaugural Report: 2005/06-2006/07 (Pretoria: the dplg, 2008).

Year	Milestone
1993	Interim Constitution adopted
	Local Government Transition Act passed, setting out a three-phase transition process for local government. Commencement of the first, pre-interim phase: Metropolitan transitional councils, local transitional councils, transitional representative councils, transitional rural and district councils were created to replace apartheid structures.
1994	First democratic elections for national and provincial governments.
	Integration of old provincial administrations and homelands into the nine newly created provincial governments commences.
	Public Service Act of 1994 passed, creating a single civil service for national and provincial governments: 35 national departments, offices and services, and nine new provincial administrations were created.
	First intergovernmental forum established in August 1994.
1995	First local government elections.
	Establishment of two-tier transitional local government arrangements in the cities. The second interim phase of the transition commenced.
1996	Final constitution adopted
	National Council of Provinces established
	MinMECs begin operating as informal intergovernmental forums
	The Borrowing Powers of Provincial Government Act (Act 48 of 1996) promulgated.

1997	The Intergovernmental Fiscal Relations Act (Act 97 of 1997) promulgated establishing intergovernmental processes for the budget (the Budget Council for provincial governments and Budget Forum for local government) and outlined the process for sharing nationally collected revenues across the three spheres.
	Organized Local Government Act (Act 52 of 1997) promulgated, providing for the recognition of national and provincial organizations to represent the various categories of municipalities in intergovernmental relations.
	Financial and Fiscal Commission Act (Act 99 of 1997) promulgated establishing this constitutional structure.
	Introduction of the Medium Term Budget Policy Statement
1998	White Paper on Local Government, setting out a vision for developmental local government.
	Municipal Demarcation Act promulgated, setting out the criteria and procedures for the redefinition of municipal boundaries, creating wall-to-wall local government.
	Municipal Structures Act (Act 117 of 1989) promulgated, establishing three categories of municipality (metros, local and district municipalities) and the structures within them.
	Medium term Expenditure Framework introduced.
1999	Introduction of the cabinet cluster system, promoting horizontal cooperation between national departments and vertical cooperation with provincial departments.
	President Coordinating Council emerges as successor to the Intergovernmental Forum. It is chaired by the President and comprises all nine provincial premiers, key national ministers, and organized local government. It is supported by a technical forum of national and provincial Directors-General.
	Public Finance Management Act (Act 1 of 1999) promulgated, establishing treasury, budget and financial management rules for national and provincial departments.
	Publication of the first annual National Treasury Intergovernmental Fiscal Review.

2000	First annual Division of Revenue Act promulgated, setting out the division of revenue between the three spheres
	Second democratic local elections, but the first under the new system. The final phase of local transition begins. The number of municipalities is now reduced from 843 to 284.
	The Municipal Systems Act (Act 32 of 2000) promulgated, outlining the powers and functions, planning processes, delegations, performance management and raising of revenue in municipalities.
2001	Municipal Planning and Performance Management Regulations 2001 promulgated, establishing indicators for municipal performance and criteria for municipal integrated development plans.
	Provincial Tax Regulation Process Act (Act 53 of 2001) promulgated.
2002	Gazetting of the division of powers and functions between district and local municipalities with effect from 1 July 2003.
	The Municipal Finance Management Act (Act 56 of 2003) promulgated, aiming to modernize local government budgeting and financial management.
2004	Municipal Property Rates Act (Act 6 of 2004) promulgated, guiding the imposition of a new property rates system.
	A new budget and reporting format for provincial governments, aligned with both GFS and IPSAS, was introduced, based on a new standard charter of accounts.
2005	The Intergovernmental Relations Framework Act (Act 13 of 2005) promulgated, providing an enabling institutional framework for intergovernmental relations and dispute settlement measures.
2006	Third local government elections
	Abolition of Regional Services Council (RSC) levies: a local government tax on payroll and business turnover.
	Practitioners toolkit on intergovernmental relations published by national government.
2007	Municipal Fiscal Powers and Functions Act (Act 12 of 2007) promulgated.

NOTES

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