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11 The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government¹

NICO STEYTLER

I. Introduction

“The supremacy of the constitution and the rule of law” are two foundational values of South Africa’s 1996 Constitution (s. 1(c)). An independent judiciary is thus set to play a major role in interpreting and enforcing the Constitution. With some significant federal elements in the Constitution, such as establishing provincial and local orders of government, the courts, with the Constitutional Court at the apex, are bound to give shape and texture to this system of government. Since 1995, the Constitutional Court as well as the Supreme Court of Appeal and High Court have asserted the supremacy of the Constitution and the separation of powers, establishing a jurisprudence that gives effect to the principle of limited government. However, in interpreting the federal arrangements, the Constitutional Court has not given full effect to the self-rule elements of provincial government. Instead, it has more often enforced local government’s constitutional “right to govern, on its own initiative, the local government affairs of its community” (s. 151(3)). Furthermore, while soft on the substantive content of provincial self-rule, it has scrupulously policed compliance with the procedural rules of intergovernmental relations. The Court’s jurisprudence has given further credence to the hourglass model of multi-level government; provinces are squeezed thin from the top by a dominant national government and from below by powerful metropolitan governments.

1 Helpful suggestions by my colleagues Jaap de Visser, Derek Powell, and the anonymous reviewers are much appreciated. This work is also based is upon research supported by the South African Research Chairs Initiative of the Department of Science and Technology and National Research Foundation.

II. Federal System

1. *The Broad Characteristics*

South Africa's 54 million people are diverse. Africans, comprising nine linguistic communities, constitute 80.2 per cent of the population, followed by Coloureds (a mixed-race category at 8.8 per cent), whites (8.4 per cent), and Indian or Asian (2.5 per cent).² A few million undocumented inhabitants (the precise number unknown), originating from neighbouring countries, notably Zimbabwe, should be added to the total. Eleven official languages are constitutionally recognized, and the percentage breakdown of the major language groups is IsiZulu (22.7); IsiXhosa (16); Afrikaans (13.5); English (9.6), Sepedi (9.1); Setswana (8); and Sesotho (7.6).³ Although the explicit intention was not to create ethnically based provinces, seven of the nine provinces have a linguistic majority. South Africa is regarded as a middle-income country at US\$12,900 GDP per capita in 2014; yet it shows one of the highest levels of income disparity (income Gini coefficient 0.69),⁴ with nearly half of the population living in poverty spread across urban and rural areas.

Following the demise of apartheid, the interim Constitution of 1993 established two orders of government – the national government and nine provinces. Although local government was recognized in the 1993 Constitution (mainly as a provincial competence), the 1996 Constitution elevated it to a “sphere” of government alongside the national and provincial governments (s. 40(1)).⁵

2 Statistics South Africa, *Stats in Brief 2014* (Pretoria: Statistics South Africa, 2014), table 2.3.

3 Statistics South Africa, *Census 2011: Census in Brief* (Pretoria: Statistics South Africa, 2012), 24, figure 2.3.

4 OECD, *OECD Economic Surveys: South Africa 2015*, 7, <http://www.treasury.gov.za/publications/other/OECD%20Economic%20Surveys%20South%20Africa%202015.pdf>.

5 For further background, see Nico Steytler, “Republic of South Africa,” in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, 311–46 (Montreal and Kingston: McGill-Queen’s University Press, 2005); Christina Murray, “Republic of South Africa,” in *Legislative, Executive, and Judicial Governance in Federal Countries*, ed. Katy le Roy and Cheryl Saunders, 258–88 (Montreal and Kingston: McGill-Queen’s University Press, 2006); and Jaap de Visser, “Republic of South Africa,” in *Local Government and Metropolitan Regions in Federal Systems*, ed. Nico Steytler, 267–97 (Montreal and Kingston: McGill-Queen’s University Press, 2009); Chris Tapscott, “Republic of South Africa: An Uncertain Path to Federal Democracy,”

The 1993 Constitution was a peace treaty between the African National Congress (ANC) and the white minority regime. The low-intensity civil war that commenced in 1960 was also taken to the black homeland governments, which were regarded as collaborators of the apartheid government. The formation of the nine provinces was a key compromise between the incumbent white regime and some homeland leaders, notably Chief Mangosuthu Buthelezi from KwaZulu, who championed a strong federal system for ethnic accommodation as well as limiting the power of the centre. However, the ANC demanded a strong centre in order to transform the society after three centuries of racial oppression. The outcome of the “negotiated revolution” was a weak form of federalism, showing strong unitary elements.⁶ Although there were four “independent” homelands (recognized as such only by South Africa) and six self-governing territories (giving effect to the grand apartheid design based on ethnicity), the formation of provinces in 1994 was a process of devolution; a largely centralized system, ultimately under the control of the white minority regime, devolved into nine provinces.

The peace negotiations were essentially the business of political parties, most notably the (white) National Party (NP) and the ANC. Because the result was a negotiated constitution, the ANC’s demand for a democratically based constitution was met with the undertaking that within two years a final constitution would be drafted by a democratically elected Constitutional Assembly. The NP’s fears that the gains it made at the negotiating table would be swept aside by an elected ANC majority were met by the condition that the new constitution had to comply with a number of negotiated constitutional principles, which included protection of the provincial system.

The 1996 Constitution’s hybrid federal system, eventually certified by the Constitutional Court as complying with the Constitutional Principles,⁷ has been in operation ever since, with no significant changes.

in *Political Parties and Civil Society in Federal Countries*, ed. Klaus Detterbeck, Wolfgang Renzsch, and John Kincaid, 199–226 (Don Mills, ON: Oxford University Press, 2015); Derek Powell, “Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations,” in *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, ed. Johanne Poirier, Cheryl Saunders, and John Kincaid, 305–49 (Don Mills, ON: Oxford University Press, 2015).

6 Ronald L. Watts, “Is the New South African Constitution Federal or Unitary?,” in *Birth of a Constitution*, ed. Bertus de Villiers (Cape Town: Juta, 1994), 75, 86.

7 In re: Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC) (“First Certification judgment”).

Giving effect to the self-rule elements of the hybrid federal system has entailed the subnational governments being responsible for 62 per cent of the total state expenditure; in the 2013/14 financial year, provinces (responsible for the wage bill of teachers and medical staff) expended 36 per cent and municipalities 26 per cent.⁸

Because the ANC never fully embraced the negotiated solution, the system has been under review since 2007.⁹ The other two members of the ruling ANC alliance – the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP) – are outspoken in criticizing the provinces and advocating their abolition. In contrast, the major opposition party, the Democratic Alliance, which captured the Western Cape province in 2009, and again, with an increased majority, in 2014, is a strong proponent of the provincial system. It not only seeks to exploit the opportunities provided by the current system, but also uses good governance in the Western Cape as the platform for its political campaign to capture other provinces.

Although the high level of maladministration and corruption prevalent in a number of provinces has not endeared them to the public or the national government, strong elites coagulated around such governments, thus making major constitutional reform unlikely.¹⁰ This was reflected in the ANC's 53rd National Conference resolution in December 2012 that effectively retained the provincial system by requiring that "provinces [should] be reformed, reduced and strengthened."¹¹ What is also on the cards is the continual growth of metropolitan government.¹² The formation in 2000 of six major metropolitan municipalities (increased to eight in 2011) has resulted in ever-increasing demands

8 National Treasury, *Budget Review 2014* (Pretoria: National Treasury, 2014), 93, and table 7.1.

9 ANC, "Legislature and Governance for a National Democratic Society," Policy Discussion Documents, ANC 52nd National Conference 2007, Umrabula Publication (Marshalltown: African National Congress, 2007). See further Nico Steytler "The Politics of Provinces and the Provincialisation of Politics," in *Law, Politics and Rights: Essays in Memory of Kader Asmal*, ed. Tiyanjana Maluwa, 191–214 (Leiden: Martinus Nijhoff, 2014).

10 Steytler, "Politics of Provinces and the Provincialisation of Politics."

11 ANC, Resolutions of 53rd National Conference: Legislatures and Governance, Resolution 4.2.1 (2012).

12 National Planning Commission, *National Development Plan: Our Future – Make It Work* (Pretoria: National Planning Commission, 2012), 435. See also De Visser "Republic of South Africa," 292.

for more functions at the expense of provinces. Over the last few years, the important provincial functions of transport and housing have been slowly assigned to the metropolitan councils.

With constitutional supremacy a core principle of the Constitution,¹³ the Constitutional Court's jurisdiction covers all aspects of the federal arrangement. As such, the Court has the power to invalidate legislation and executive action compelling the fulfilment of constitutional obligations (s. 2). Even though the system of multi-level government has operated for two decades, the Constitutional Court has not had a dominant hand in shaping the system; at best, its role can be described as middling.

2. Structural Features

The Constitution provides that "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated" (s. 40(1)). The "distinctive" characteristic reflects the measure of "self-rule" of provinces and local government; they have entrenched powers and functions and access to revenue sources. The Constitution provides detailed provisions for the functioning of provincial legislative and executive structures and procedures. It also envisages national legislation on provincial administration and financial management.¹⁴ As the constitutional provisions with regard to local government are more schematic, national legislation structures the establishment of municipalities and their internal organizations, functioning, and financial management.¹⁵

Following an integrative federal approach, the allocation of powers and functions to provinces and municipalities allows for an interwoven and complementary system. First, most provincial functions are

13 The establishment of constitutionalism in South Africa in 1994 finds resonance in the argument of Ran Hirschl (*Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* [Cambridge, MA: Harvard University Press, 2004], 99); judicial empowerment through the constitutionalization of judicial review and a bill of rights is often a "conscious strategy undertaken by threatened political elites seeking to preserve or enhance their hegemony by insulating policy-making from popular political pressures and supported by economic and judicial elites with compatible interests."

14 *Inter alia*, the Public Service Act, 1994, and the Public Finance Management Act, 1999.

15 See Municipal Structures Act, 1998; Municipal Systems Act, 2000; Municipal Finance Management Act, 2003; Municipal Property Rates Act, 2004; and Municipal Fiscal Powers and Functions Act, 2007.

concurrent with the national government, the principal functions being education, health, social welfare, housing, agriculture, and transport (sch. 4). Much more limited are exclusive provincial powers, which include ambulance services, liquor licences, provincial planning, provincial roads, and traffic control (sch. 5). The adoption of a provincial constitution, although within narrow parameters, is perhaps the only "true" exclusive power. Local government's constitutionally entrenched, but not exclusive, powers include electricity reticulation, water and sanitation, municipal public transport, municipal health services, municipal planning, and municipal roads and traffic (schs. 4B and 5B). The national legislative powers are almost supreme; not only does Parliament have all residual powers, but it may also trump competing concurrent provincial legislation through a qualified override clause (s. 146), as well as exclusive provincial legislation on more limited grounds (s. 44(2)). Both the national and provincial legislatures may regulate the entrenched local government powers (s. 155(7) and schs. 4B and 5B).

In the constitutional scheme, the national Parliament may assign any of its legislative powers (save very specific ones) to provinces and municipalities. Provinces may likewise assign any of their powers to municipalities. Municipalities, on the other hand, may claim the assignment of both national and provincial matters if such matters would most effectively be administered locally (s. 156(4)).

Although the definitions of the various functional areas are often opaque (e.g., the precise differences between national, provincial, and local health services), there is, in the main, agreement on the allocated functions. However, contestation occurs on the cut-off points between functional areas, appropriate allocation of some functions (e.g., housing and transport), and unfunded mandates.

Within the paradigm of constitutional supremacy, the Constitutional Court has the final word on the definition of functional areas. The national Parliament has also on occasion circumscribed the content of broad functional areas by, for example, defining provincial and local health responsibilities in the National Health Act, 2003.

Differing from the German constitutional model on which the South African system of "cooperative government" is based, the Constitution does not prescribe national framework legislation that must be complemented by provincial laws. It does, however, envisage national laws in the terrain of provincial and local governance, as indicated above. In the case of local government, however, both the national and provincial

governments may legislate regulatory frameworks for the exercise of local competences (ss. 155(6)(a) and 155(7)).

The Constitution contains specific provisions to deal with conflicting concurrent national and provincial laws by allowing a national law to trump a provincial law if certain broad conditions are met (s. 146). The override sets, however, a low hurdle for national legislation. First, for example, national legislation prevails if a matter “cannot be regulated effectively” by provinces individually (s. 146(2)(a)). Moreover, the interpretational guidance in the Constitution is equally broad. First, courts are guided by the principle that they must always prefer a reasonable interpretation of the conflicting legislation that would avoid the conflict above an interpretation that results in conflict (s. 150). Second, in considering a further override test, namely, whether national legislation is “necessary” to maintain national security, economic unity, and a common economic market, etc., courts must have “due regard to the approval or the rejection of the National Council of Provinces” (s. 146(4)), but there is no indication how such decision is to be used. Third, there is a built-in default position in favour of the national government; if a court cannot resolve the conflict, the national legislation prevails over the provincial legislation (s. 148). In case of a conflict, the law that does not prevail is not invalid but merely becomes inoperative.

Constitutional supremacy is also reflected in the amendment procedures. The Constitution may be amended only by a two-thirds majority of the National Assembly following a special procedure. In the case of the founding values in section 1, a three-quarters majority is required. Depending on the nature of the amendment, the National Council of Provinces (NCOP) (and thus the provinces) has an important veto (s. 74). Any amendment of section 1 and the Bill of Rights requires the consent of at least six of the nine provinces. Also, in respect of any amendment that affects the NCOP, or alters provincial boundaries, powers, functions, or institutions, at least six of the nine provinces must consent. Moreover, if the amendment affects only a specific province or provinces (such as a boundary change), the consent of the legislature(s) of those provinces is required. The two-thirds majority rule also applies to the amendment of provincial constitutions (s. 144).

Although there is no requirement of subjecting amendments to a popular referendum, the Constitutional Court has interpreted the legislative process as requiring adequate public participation. Indeed, the Court has invalidated legislation on the basis of insufficient public

participation,¹⁶ including a constitutional amendment that changed the boundaries of the provinces of KwaZulu-Natal and Eastern Cape.¹⁷

As the upper guardian of the Constitution, the Constitutional Court plays a pivotal role in interpreting the Constitution's federal elements when matters are brought to it. Provincial constitutions do not see the light of day unless the Constitutional Court has certified that they comply with the required constitutional prescripts (s. 144). Given the relative newness of the system and the limited litigation due to the near dominance of the ANC in the provinces, it is premature to map how the Court has altered the operation of the federal system; yet the trend has been favourable to local government but not to the provinces.

The NCOP is one of the pivotal institutions intended to effect an integrative federalism. As the name suggests, it is a council of provinces that participates in the national legislative process. The NCOP is thus described in the Constitution as representing "the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces" (s 42(4)). Owing some dues to its Bundesrat progenitor, each province is represented by a ten-member delegation: four are members of the provincial legislature (with the premier being the leader of the delegation) and six are indirectly elected by the provincial legislatures to serve at the legislatures' pleasure a term of five years. Coming almost as an afterthought, but a logical consequence of the recognition of local government as a sphere of government, organized local government has ten representatives in the NCOP, who may participate in proceedings when the interests of local government are at issue, but may not vote (s. 67).

III. Court System

1. Introduction

Coming from a long tradition of parliamentary supremacy, the advent of democratic rule in 1994 also meant a shift to constitutional

16 *Doctors for Life International v. Speaker of the National Assembly and Others*, 2006 (12) BCLR 1399 (CC).

17 *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*, 2007 (1) BCLR 47 (CC).

supremacy and the rule of law. Given that the "revolution" was negotiated, there was no breach of legal continuity; the laws in operation in 1994 continued to apply to the extent that they were compliant with the new constitutional dispensation. This, too, applied to the common law; it had to comply and be developed in conformity with the Bill of Rights.

The 1993 and 1996 Constitutions preserved the distinction between the High Court of general jurisdiction and the lower courts with limited jurisdiction. The Appellate Division, the highest court before 1994, now called the Supreme Court of Appeal (SCA), continued as the highest court in all matters other than constitutional. Final constitutional adjudication was reserved for the newly created Constitutional Court. The separate roles of the SCA and the Constitutional Court were necessitated by the apartheid past. With all judges from the apartheid era continuing in their positions, final interpretation of the new supreme Constitution could not be left in the hands of the SCA. The Constitutional Court was thus established, with only four of the eleven justices drawn from sitting judges. As court of final jurisdiction on constitutional matters, this Court has also the final word on the constitutional framework for multi-level government in South Africa. The Constitution thus makes specific provision that the Constitutional Court is the only court that can "decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers and functions of any of those organs of state" (s. 168(4)). The Constitution Seventeenth Amendment Act of 2012 has now unified the appellate structure by making the Constitutional Court the final arbiter also in non-constitutional matters.

The new constitutional order entrenched the judiciary as a national competence. No constitutional provision was made for provincial or local courts. A High Court division has been established for every province, with their jurisdictions coinciding with provincial boundaries. All the courts function in an integrated appellate system. There are appeals from the lower courts to the High Court, from the High Court to the Supreme Court of Appeal, and from there to the Constitutional Court. On constitutional matters, an appeal lies either directly to the Constitutional Court (with leave given in few cases) or via the Supreme Court of Appeal. Where the High Court invalidates a national or provincial law, or presidential conduct, as being unconstitutional, there is an "automatic" review by the Constitutional Court; unless the Court confirms the invalidity, the law or conduct stands (s. 167(5)).

As a trial court, the High Court proceedings are presided over by a single judge. In criminal cases, the judge is joined by two lay assessors. Lower court appeals to the High Court are heard by two or three judges. In the latter case, minority judgments can be delivered. In appeals to the Supreme Court of Appeal, criminal cases are heard by a three-judge bench, while other appeals require a five-judge bench. In the Constitutional Court, a minimum of eight of the eleven justices forms a quorum. All decisions appear under the name of the judges. Only the Constitutional Court has on rare occasions delivered its judgments *en banc*, without reference to the justice who wrote them. Those occasions were of high political significance such as the certifications of the 1996 Constitution¹⁸ and the provincial constitutions of KwaZulu-Natal¹⁹ and the Western Cape.²⁰ Dissenting judgments are possible and not infrequent. In the Constitutional Court's 2007 term, no fewer than in a third of the twenty-seven judgments contained dissenting opinions,²¹ with the percentage in the 2008 term being thirty-nine,²² remaining the same for the 2012 term.²³ This is a decrease from the 48 per cent of 2006 judgments with dissenting opinions, while the average for the previous decade was only 23 per cent. Judgments of the High Court and appellate courts are published as well as the dissenting opinions.

Rooted in the common-law system, the doctrine of precedent is applied firmly by the courts. The Constitutional Court has asserted this doctrine of *stare decisis* even with regard to judgments originating from the apartheid era, subject, of course, to not being in conflict with the Constitution. The High Court is bound by the decisions of the Supreme Court of Appeal and the Constitutional Court. Even the two appellate courts are bound by their own decisions unless they are satisfied that the previous decision was "clearly wrong."²⁴

18 In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC) para. 287 ("First Certification" judgment).

19 In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996, 1996 (11) BCLR 1419 (CC) ("KwaZulu-Natal Constitution").

20 In re: Certification of the Constitution of the Western Cape, 1997 (9) BCLR 1167 (CC).

21 Liza Chamberlain and Sha'ista Kazee, "Constitutional Court Statistics for the 2007 Term," *South African Journal on Human Rights* 26 (2010): 571, table 3.

22 Samantha Brener, Michael Eastman, and Jennifer Macleod, "Constitutional Court Statistics for the 2008 Term," *South African Journal on Human Rights* 27 (2011): 566, table 3.

23 Saflii.org.za (analysis of the 34 judgment in the 2012 term).

24 *Camps Bay Ratepayers and Residents Association v. Harrison*, 2011 (2) BCLR 121 (CC) para. 28. See further, see Jason Brickhill, "Precedent and the Constitutional Court," *Constitutional Court Review* 3 (2010): 79–110.

2. *Constitutional Status of Courts and Judicial Officers*

An entire chapter of the Constitution is devoted to the courts and the administration of justice. Having complied with the Constitutional Principles that there should be “a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness,”²⁵ the relationship between the courts and the other branches of government is clearly set.²⁶ The judicial authority is vested in the courts (s. 165(1)), comprising the courts mentioned above. The Constitution, though, provides for national legislation to further regulate the judicial system. As the judiciary is a national competency, provinces and municipalities play no role in their functioning, bar two exceptions. First, the provinces via the NCOP nominate four of its permanent delegates as members to the Judicial Service Commission (JSC). In addition, the premier of the province is a member of the JSC when it considers a matter relating to the High Court in that province. The second exception is the establishment of a “municipal” court. A municipality may pay for the salary of a nationally appointed magistrate, whose task is then to adjudicate the enforcement of municipal by-laws.

Central to the appointment of judges to the higher courts stands the Judicial Service Commission (JSC). It was created in 1994 as a clear break with the long-standing practice of executive appointments, under which the first black judge was appointed only in 1991.²⁷ In the new constitutional state, not only is the independence of the judiciary entrenched, but the process of appointment also is more transparent and less controlled by the executive. The JSC’s members comprise representatives from the judiciary (three, including the chief justice as chairperson), the minister of justice, the legal profession (four), law schools (one), the National Assembly (six, three of whom must be opposition MPs), NCOP delegates (four), presidential nominees (four),

25 Constitutional Principle VI Schedule 4 1993 Constitution.

26 In *National Society for the Prevention of Cruelty to Animals v. Minister of Agriculture, Forestry and Fisheries and Others (Licensed Animal Trainers Association and two amici curiae intervening)* 2013 (1) BCLR 1159 (CC), the Constitutional Court affirmed the importance of the principle of the separation of powers when it invalidated provisions in a 1935 law that gave magistrates the task of issuing licences for exhibiting and training performing animals, because it was an administrative function totally unrelated to the judicial function.

27 Yvonne Mokgoro, “Judicial Appointments,” *Advocate* (December 2010): 44.

and the judge-president and premier of a province where a matter concerns the High Court in that province.

Despite the overhaul of the appointment process, there is still a strong executive hand in appointments to the top curial positions. The president appoints the chief justice and his or her deputy after consultation with the JSC and the leaders of the political parties in the National Assembly. The president needs to consult the JSC with regard to the appointment of the president and deputy president of the Supreme Court of Appeal. When it comes to the nine justices of the Constitutional Court, the president appoints them from a list provided by the JSC (there must be three names more than the vacant positions). For the appointment of all other judges, the president must follow the JSC's advice. Giving effect to the constitutional imprimatur that "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed" (s. 174(2)), by July 2014 of the 243 judges, 63.4 per cent (147) were black and 32.5 per cent were women.²⁸ Furthermore, the tradition of appointing judges from the ranks of senior advocates only has been tempered; a number of attorneys (solicitors), magistrates, and a few law professors have been elevated to the bench.

The JSC's conduct has also come under criticism. Given the ANC's strong hand in the JSC's composition (at least twelve of twenty-three would be directly linked to the ruling party through the executive and the legislature), claims of political and biased appointments have been levelled. In 2011, the Cape Bar Council successfully challenged the JSC for not appointing an outstanding white candidate to the Western Cape High Court as being arbitrary and irrational.²⁹

The bedrock of the supremacy of the Constitution and the rule of law is the independence of the judiciary. The Constitution thus proclaims, "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice" (s. 165(2)). The independence of the judiciary is entrenched through the usual techniques. First, judges have tenure until reaching a specified age.

28 Nomthandazo Ntlama, "The Transformation of the South African Judiciary: A Measure to Weaken Its Capacity?," 9 table 3, New York Law School, <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/10/Ntlama.pdf>.

29 Cape Bar Council v. Judicial Service Commission and Another (Centre for Constitutional Rights and Another as Amici Curiae), 2012 (4) BCLR 406 (WC), upheld by the Supreme Court of Appeal in *Judicial Service Commission and Another v. Cape Bar Council and Another* 2012 (11) BCLR 1239 (SCA).

Before then, their removal requires a finding by the JSC that a judge suffers from incapacity, is grossly incompetent, or is guilty of gross misconduct. This finding must then be supported by a two-thirds vote in the National Assembly. Second, their salaries, allowances, and benefits may not be reduced. Third, after a long wrangle with the executive, the budget of the courts was placed under the control of the chief justice.³⁰

The judiciary's independent functioning has not gone uncontested. The first serious volley fired over the bow of the courts was the statement of the secretary-general of the ANC, Gwede Mantashe, that some courts were "counter revolutionaries," stymieing the national democratic revolution.³¹ These sentiments were echoed by senior ministers in the national executive. Even President Jacob Zuma weighed in against the Constitutional Court when he ordered a review of the judgments of that Court, stating that the courts cannot be regarded as always right when they produce dissenting opinions. Furthermore, the president's choice of the current chief justice, Mogoeng Mogoeng, was widely criticized because he was the least experienced judge on the Constitutional Court. In each case where the Constitutional Court imposed positive obligations on the state to fulfil socio-economic rights, the complaint by government has been that the judiciary was not respecting the separation of powers. These volleys were, no doubt, instigated by government being on the losing side most often³² and thus perceiving the Court as an obstacle to its governing.

30 Superior Courts Act, 2013.

31 See Sapa, "ANC Defends Mantashe's Remarks on Judges," Polityorg.za, 11 July 2008, <http://www.polity.org.za/article/anc-defends-mantashe-remarks-on-judges-2008-07-11>.

32 In the Constitutional Court's 2007 term, the Court found in favour of the government only in eight of eighteen cases (47 per cent) (Chamberlain and Kazee, "Constitutional Court Statistics 2007," table 7). The percentage of state success in 2008 was lower at 44 per cent (Brener, Eastman, and Macleod, "Constitutional Court Statistics 2008," 567). In 2011 alone the national executive lost a number of crucial decisions: invalidating the placement a special investigative unit (formerly known as the Directorate of Special Operation, called "the Scorpions," now renamed the Directorate of Priority Crime Investigations, called "the Hawks"), which fell under the jurisdiction of the largely autonomous National Prosecuting Authority, under the South African Police Service (and executive control) (*Glenister v. President of the Republic of South Africa and Others*, 2011 (7) BCLR 651 (CC)); the unconstitutional extension of Chief Justice Ngcobo's term of office (*Justice Alliance of SA v. President of the RSA and Two Similar Applications*, 2011 (10) BCLR 1017 (CC)); the invalidation by the SCA of the presidential appointment of the national director of

Matters came to a head when the North Gauteng High Court issued an interim order that the government could not allow the sitting president of Sudan, Omar al-Bashir, who was attending an African Union Summit in Johannesburg in June 2015, to leave South Africa, pending a determination whether South Africa should arrest him and hand him over to the International Criminal Court to face charges of genocide and war crimes. Not only did the government deliberately disobey the court order (see further below), but Cabinet ministers and the ANC unleashed a barrage of criticism against the judiciary.³³ Mantashe proclaimed that the courts were biased against the ruling party and that certain courts had “a negative attitude towards government.”³⁴ At the centre of the complaint was the accusation that the courts did not respect the separation of powers. Instead, they “overreached” into the domain of the executive.

The ANC’s attacks on the judiciary have raised grave concerns over the past few years. The first chief justice in the democratic South Africa, Arthur Chaskalson, warned that the attacks against the judiciary coming from senior politicians “undermine the constitutional order and pose a threat to our democracy.”³⁵ He admonished politicians who want to rein in the courts rather to direct their fury to the Constitution, which the courts interpret. Public outcry against political interference has been severe from some legal quarters. For example, a civil-society organization, Freedom under Law, under the leadership of former

public prosecutions (*Democratic Alliance v. President of the RSA and Others*, 2012 (3) BCLR 291 (SCA)). In 2014 some provisions of the South African Police Services Amendment Act, 2012, which sought to align the Act with the Court’s judgment in *Glenister* (see above), were also invalidated for failing to secure adequate independence for the Hawks (*Helen Suzman Foundation v. President of the Republic of South Africa and Others*; *Glenister v. President of the Republic of South Africa*, 2015 (1) BCLR 1 (CC)).

33 Editorial, “This Is a Country of Laws,” *City Press*, 21 June 2015.

34 “Gwede Mantashe Criticises Judiciary as Being Problematic,” ENCA, 23 June 2015, <https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic>.

35 Address on 29 January 2012, University of Cape Town. Arthur Chaskalson, “When Law Irks Power,” *Times Live*, 29 January 2012, <http://www.timeslive.co.za/2012/01/29/when-law-irks-power>. See also the concerns of former chief justice Sandile Ngcobo, “Sustaining Public Confidence in the Judiciary: An eEssential Condition for Realising the Judicial Role,” *South African Law Journal* 128 (2011): 5.

Constitutional Court judge, Johan Kriegler, has sought through legal challenges to overturn the JSC's overtly political decisions.³⁶

After the attacks on the judiciary following the al-Bashir debacle, the judiciary responded; under the leadership of the chief justice, senior judges convened in July 2015 and expressed their dismay at what they termed "general gratuitous criticism" by Cabinet ministers and the ANC. Chief Justice Mogoeng and a few senior judges then met in August with President Zuma and a coterie of Cabinet ministers to discuss judicial "overreach" and the separation of powers. From all accounts, the judiciary was not cowed; both sides agreed to respect the separation of powers, exercise caution when criticizing each other, and respect and comply with court orders.³⁷ This meeting was followed by another in November, this time between Zuma, Mogoeng, and the chairpersons of the two houses of Parliament, in order for the three arms of government to discuss matters of mutual concern. Whether the planned twice-yearly meetings will strengthen the separation of powers or undermine it is too early to tell.

3. Institutional Role of the Courts

The organization of the court system shows some specialization. Starting from the top, the Constitutional Court has the final say on constitutional matters and exclusive jurisdiction concerning, among other things, the validity of national legislation and certain intergovernmental disputes. The Supreme Court of Appeal had final appellate jurisdiction on all matters other than constitutional matters. This space was increasingly narrowed as the Constitutional Court decided what is and what is not constitutional. As noted above, the split in jurisdiction has ended; in terms of the Constitution Seventeenth Amendment Act of 2012, the Constitutional Court is also the final appellate court in any non-constitutional matter that "raises an arguable point of law of general importance."³⁸ The High Court in each province has general

36 *Hlope v. Premier of the Western Cape; Hlope v. Freedom under Law and Others* (Centre for Applied Legal Studies and Others as Amicus Curiae), 2012 (1) BCLR 1 (CC). A number of civil society organizations successfully challenged the unconstitutional extension of Chief Justice Ngcobo's tenure (*Justice Alliance of SA v. President of the RSA and Two Similar Applications*, 2011 (10 BCLR 1017 (CC)).

37 "'Historic' Meeting Falters on Separation of Powers," *Legalbrief*, 31 August 2015, <http://legalbrief.co.za/story/historic-meeting-falters-on-separation-of-powers-3/>.

38 See *Mbata v. University of Zululand* 2014 (2) BCLR 123 (CC).

original jurisdiction and appellate jurisdiction from its own ranks as well as from the magistrates' courts. The High Court's jurisdiction is limited by the specific jurisdiction of the Labour Court and the Labour Appeal Court (on labour matters), the Competition Appeal Court (on competition law), the Electoral Court, and the Land Claims Court (on land reform).

In line with common-law jurisdictions, such as the United States and Australia, South African courts, as a rule, entertain live disputes only. The establishment of the Constitutional Court has, however, introduced abstract review. Setting the tone, one of the Court's first tasks was assessing whether the 1996 Constitution complied with the Constitutional Principles set forth in the 1993 Constitution. The 1996 Constitution further embedded abstract review in three instances. First, the president may refuse to sign a bill into law if he or she has doubts about its constitutionality and then refer the matter to the Constitutional Court for an opinion.³⁹ A similar power is bestowed on premiers of provinces with regard to provincial bills.⁴⁰ Second, a third of the members of the National Assembly may place an act assented to by the president before the Constitutional Court to decide on its constitutionality (s. 89). A similar procedure applies to provincial legislatures where the support of only 20 per cent of the members is required (s. 120). The third instance is the duty of the Constitutional Court to certify whether a provincial constitution or amendment thereto complies with the national Constitution (s. 144).

The generous standing rules should also be mentioned. In human rights litigation (as well as other constitutional matters), public interest litigation is encouraged by the Constitution, permitting any person "acting in the public interest" to approach a court (s. 38(d)). Also, as can be gleaned from the case citations in this chapter, civil-society organizations often participate in litigation before the Constitutional Court as friends of the court (*amici curiae*).

Reflecting on the practice of the Constitutional Court (for the years in which tallies were kept), conflicts relating to governance issues, including disputes between organs of states, constitute a tiny minority of

39 See *Ex parte President of the Republic of South Africa: in re: Constitutionality of the Liquor Bill*, 2000 (1) BCLR 1 (CC) ("Liquor Bill").

40 See *Premier: Limpopo Province v. Speaker: Limpopo Provincial Legislature and Others*, 2011 (11) BCLR 1181 ("Limpopo I").

cases. In 2007, only one case dealt with a non-Bill of Rights provision of the Constitution. This pattern is also evident in the preceding years.⁴¹

4. Curial Procedures

The low number of federalism-related cases can be attributed to two factors. First, with eight of the nine provinces and all but one of the major cities under ANC control, intergovernmental disputes between ANC-controlled organs of state are usually resolved through intra-party directions or mediation. However, a divergent practice has emerged of late; the ANC-controlled Johannesburg Metropolitan Council challenged the ANC-governed Gauteng provincial government over the proper definition of “municipal planning” and won.⁴² The second factor is the principle of cooperative government that eschews the solution of intergovernmental disputes through litigation (s. 41(1)(h)(vi)). This obligation has teeth; a court may refer a dispute back to the litigants when it is satisfied that the parties did not make every reasonable effort to settle the dispute by means other than litigation (s. 42(2)).⁴³ Such other means, including mediation, are provided for, among others, in the Intergovernmental Relations Framework Act, 2005. In a dispute between district municipalities and the National Treasury about the entitlement of the former to an equitable share of the revenue raised nationally, the Court refused to hear the case, because the municipalities had failed to utilize an intergovernmental forum, the Budget Council, to settle the matter.⁴⁴ Consequently, federal issues are raised more often than not by private parties when they advance their cause. For example, a community concerned with the substantive issues regulated by the Communal Land Rights Act, 2009, challenged the validity of the law on a procedural ground that reflects a federal element; the correct legislative procedure was not followed in the NCOP, thereby depriving the provinces of their say in the legislative process.⁴⁵

41 Chamberlain and Kazez, “Constitutional Court Statistics for the 2007 Term,” 571.

42 *City of Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal*, 2010 (9) BCLR 859 (CC) (“Gauteng Development Tribunal”).

43 See, for example, *National Gambling Board v. Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC) (“National Gambling Board”); *Minister of Police and Others v. Premier of the Western Cape and Others*, 2013 (12) BCLR 1405 (CC).

44 *Uthekela District Municipality and Others v. President of the Republic of South Africa and Others*, 2002 (11) BCLR 1220 (CC).

45 *Tongoane and Others v. Minister of Agriculture and Land Affairs*, 2010 (8) BCLR 741 (CC).

The superior courts are equipped with wide discretion over remedies to enforce the Constitution. A court must declare invalid any law or conduct that is inconsistent with the Constitution. To mitigate the impact of such a declaration, a court has the discretion to “make any order that is just and equitable” (s. 172(1)). Such an order may include limiting the retrospective effect of a declaration of invalidity, or suspending such a declaration for a period of time on conditions it may stipulate. In practice, the Constitutional Court has invalidated a number of laws and in some instances suspended their invalidity for up to eighteen months so as to allow Parliament to remedy the constitutional defect. The courts may also issue a mandamus for the fulfilment of a constitutional obligation.

The courts operate very transparently. Court proceedings are open to the public, and courts are increasingly allowing television cameras into the courtroom, as glaringly illustrated by the 2014 murder trial of para-Olympian Oscar Pistorius, who was convicted of culpable homicide (similar to involuntary manslaughter in the United States). Judgments are delivered in public (and most often within a reasonable time), and those of the Constitutional Court and Supreme Court of Appeal are readily available on these courts’ websites.⁴⁶ The Constitutional Court also provides media releases on all its judgments. But litigation is, in general, prohibitively expensive. Despite a legal-aid system, which focuses mainly on criminal defence, access to justice is not readily available to the poor or even the middle class.

Former chief justice Ismael Mohamed wrote that in the absence of any physical force at their disposal, the courts’ “ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of the nation.”⁴⁷ Such esteem has been widespread, as Chief Justice Sandile Ngcobo confirmed: “Enforcement of court decisions and orders has not been an issue in this country.”⁴⁸ The problem has arisen in some divisions of the High Court where, for example, court orders that pensions should be paid out regularly were not executed, leading

46 For judgments of the Constitutional Court and Supreme Court of Appeal, see Constitutional Court of South Africa, www.constitutionalcourt.org.za, and Supreme Court of Appeal of South Africa, http://www.justice.gov.za/sca/judgments/judgem_sca_2012.html.

47 Ismael Mohamed, “The Role of the Judiciary in a Constitutional State,” *South African Law Journal* 115 (1999): 111, 112.

48 Ngcobo, “Sustaining Public Confidence in the Judiciary,” 5.

to successful class actions.⁴⁹ The first open defiance of a court order came, as noted above, when the national government let President al-Bashir leave the country, despite an interim order prohibiting that. In question was whether South Africa was obliged to execute a warrant for his arrest issued by the International Criminal Court on charges of genocide and war crimes. South Africa not only ratified the Rome Statute establishing the court, but it also domesticated the statute in legislation, in terms of which it was bound to execute the court's arrest warrants. A civil society organization obtained an interim order to prevent al-Bashir from leaving the country, but the national government facilitated his escape. The interim order was confirmed by the High Court, finding that the government was indeed obliged to execute the arrest, rejecting the government's argument that it acted in accordance with its diplomatic obligations towards the AU.⁵⁰ The circumstances of the case may be unique, but it came on the back of a long-running attack on the alleged "overreach" of the judiciary. The commitment by the president at his August meeting with Chief Justice Mogoeng to respect court orders may be a turning point, but the likely government response will be the appointment of more compliant judges so as to reduce possible conflicts with the executive.

5. *Judicial Culture*

Functioning on a common-law foundation, the judiciary played a major role in developing the legal system within the constraints of the apartheid legal order. In the 1980s, some social critics called for "moral" judges to resign their offices in an act of protest against an abhorrent system, but the dominant liberal view was that judges, given their relative but limited autonomy, could do more to blunt the hard edge of apartheid and repression through the ethical performance of their judicial duties than by resigning. Arguments based on the rule of law and human rights could, unlike in the Nazi courts, be validly raised and were occasionally successful. Former chief justice Ngcobo commented that the tradition of judicial integrity predates 1994.⁵¹ Despite many executive-minded judges, the

49 See *Jayiya v. MEC Welfare, Eastern Cape and Another*, 2004 (2) SA 611 (SCA); *MEC, Department of Welfare, Eastern Cape v. Kate*, 2006 (4) SA 478 (SCA).

50 *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Affairs*, 2015 (9) BLCR 108 (GP).

51 Ngcobo, "Sustaining Public Confidence in the Judiciary," 7. A fellow constitutional court judge, Yvonne Mokgoro, is less charitable and refers to the "few maverick" judges who used the law to restrain the apartheid state (Mokgoro, "Appointment of Judges," 44).

integrity of the bench as a whole made legal continuity with respect to the judiciary not a bridge too far in the post-apartheid South Africa. Legal continuity also pertained to pre-1994 laws; they continued to apply, provided they were compatible with the Constitution. In the common-law tradition, most judgments were carefully reasoned. The Constitutional Court has continued to excel in providing path-breaking judgments on the Bill of Rights that have been celebrated across the legal world, albeit not without criticism.

The role of the judiciary increased substantially under the Constitution. With the supremacy of a broadly worded constitution firmly entrenched, the post-1994 courts have become a significant check and balance on the executive and the legislature. Moreover, it has become the institution of last resort when politics fail. For example, when the opposition parties failed to get a motion of no confidence in the president tabled in the National Assembly, the Constitutional Court, by a vote of five to four, held that the rules of the National Assembly were inconsistent with the Constitution to the extent that they did not allow a political party or a member to enforce the right to table such a motion.⁵² While this leads to the judicialization of politics, it has also resulted in the politicization of the judiciary.⁵³ Within this environment, as Heinz Klug argues, the Constitutional Court has managed reasonably well the tension between “principled” reasoning on one hand and “institutional pragmatism” on the other.⁵⁴

The Constitutional Court as final interpreter of the Constitution has followed a purposive approach to interpretation. The purpose of a provision is gleaned from a number of sources, mainly from the language used and the context or scheme of the Constitution, with historical

52 *Masibuko v. Sisulu and Another*, 2013 (11) BCLR 1297 (CC). See also Oriani-Ambrosini, *MP v. Sisulu, MP, Speaker of the National Assembly*, 2013 (1) BCLR 14 (CC).

53 Herschl, *Towards Juristocracy*, 203. See C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

54 Heinz Klug, “Finding the Constitutional Court’s Place in South Africa’s Democracy: The Interaction of Principle and Institutional Pragmatism in the Court’s Decision Making,” *Constitutional Court Review* 3 (2010): 1–33. For a critique of the Court’s approach to one party dominance with respect to democracy, which has had a negative impact on “real” federalism emerging, see Sujit Choudhry, “‘He had a mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy,” *Constitutional Court Review* 2 (2009): 1–86. For a challenge on the premises of Choudhry’s argument, see Jonathan Klaaren, “Dominant Democracy in South Africa? A Response to Choudhry,” *Constitutional Court Review* 2 (2009): 87–96.

context being of subsidiary value. Consistent with this hermeneutical approach, the Constitutional Court viewed its task of interpreting the federal elements in a purposive manner; there were no different or additional, subject-specific principles of interpretation. In a decision dealing with the appropriate assignment of functions to provinces in terms of the interim Constitution, the Court said, in response to an argument that provincial powers should be construed restrictively, "In the interpretation of those schedules [listing provincial powers] there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively."⁵⁵

The Court's view that by such a purposeful reading (without any underlying presumption) the constitutional text will reveal itself, has resulted in a series of decisions that did not facilitate the ability of provinces to exercise a measure of self-governance.

IV. Federalism Jurisprudence

1. Introduction

In an assessment in 2005 of judicial behaviour in the context of the federal elements of the Constitution, I argued elsewhere that the Constitutional Court exhibited a pro-centre stance in the majority of cases that came before it, emphasizing the unitary language in the Constitution.⁵⁶ The explanation offered was that the Court's stance was driven primarily by two factors. First, the Court was concerned about national unity. After decades of the pernicious divide-and-rule of ethnic and racial groups, the first task was to forge a new nation through its state institutions. The second factor was the need for order. Where the provinces in particular proved to be singularly inept to provide services effectively and efficiently, the Court stepped in as the bulwark of order. In the sea of provincial ineptitude, favouring the centre was inevitable.

55 DVB Behuising (Pty) Limited v. North West Provincial Government and Another, 2000 (4) BCLR 347 (CC), para. 17.

56 Nico Steytler, "Judicial Neutrality in the Face of Ineptitude: The Constitutional Court and Multi-Level Government in South Africa," in *Judge Made Federalism*, ed. H.-P. Schneider, J. Kramer, and B. Caravito (Baden: Nomos Verlag, 2009), 27.

Since 2005, the Constitutional Court has not changed its tune appreciably, although the record is not always centre-prone. What has changed is that local government has come off the better in its scraps with provinces and the national government. Whether there is a decidedly pro-local and anti-provincial attitude is too early to say, but the complexity of overseeing a multi-level system is now coming to the fore, and the balancing of the powers of the three spheres of government is that much more challenging.

Regarding these centre-prone decisions, the Court's justification could be traced to a fundamental conception of the nature of the South African state. First, the proclamation in section 1 that South Africa is "one sovereign, democratic state" gives the Constitution a "unitary emphasis," the Court has said.⁵⁷ Yet the Constitution contains very definite federal elements of local and provincial self-rule, which the Court has sought to harmonize with the unitary emphasis through the notion of "cooperative government." In the words of the Constitutional Court, the Constitution embodies not "competitive federalism" but rather a "new philosophy" of "co-operative government."⁵⁸

In interpreting the Constitution's federal features, the Court's departure point is that provinces derive their powers and functions exclusively from the Constitution. In the first case on the exercise of concurrent powers (education) under the interim Constitution, minority political parties and the KwaZulu-Natal provincial government challenged the constitutionality of the National Education Policy Bill, 1995, on the ground that it would oblige provinces to adhere to national education policy.⁵⁹ The applicants placed much reliance on the U.S. Supreme Court majority opinion in *New York v. United States*,⁶⁰ which held that the U.S. Constitution did not confer on Congress the power to compel states to take particular actions. The Constitutional Court found this decision not relevant because of the differences in history and language of the two constitutions. In the United States, several sovereign states were brought together in a federation, surrendering only a part of their sovereignty to the federal government and retaining the remainder. In South Africa, on the other hand, the provinces were not sovereign states: "They were created by the Constitution and have only

57 First Certification, para. 287. See also Liquor Bill, para. 41.

58 *Ibid.*, para. 469.

59 In re: The National Educational Policy Bill, No. 83 of 1995, 1996 (4) BCLR 518 (CC).

60 *New York v. United States* 505 US 144 (1992).

those powers that are specifically conferred on them under the Constitution."⁶¹ Furthermore, the powers conferred on provinces were not exclusive but held concurrently with the national Parliament. The process of state formation through devolution of powers to provinces thus produced a result that was significantly different from what prevails in the United States.

Within the limited parameters set by the Constitution, a measure of self-rule is permissible. Although the Bill of Rights may impose uniform standards, total uniformity is not required. The Court thus rejected a claim that differing provincial legislation could give rise to an anti-discrimination challenge.⁶² A bookie taking bets at horse racing complained that he was discriminated against in KwaZulu-Natal because, in that province's gambling law, only a person in his or her personal capacity could obtain a betting licence, contrary to the position in all other provinces, where both a natural and a juridical person could ply the bookmaking trade. The Court found that because the gambling law was within the province's competence, it did not offend the right against unfair discrimination. Provincial differences were legitimate differentiation.

Provincial experimentation and innovation have not, however, been articulated expressly as a value worth pursuing. No reference has yet been made to the celebrated dictum of Justice Louis Brandeis in *New State Ice Co. v. Liebmann*: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."⁶³ One exception has been, but only so by implication, the *Treatment Action Campaign* case,⁶⁴ where provincial differences were used in legal reasoning without highlighting the value added of such experimentation. The Treatment Action Campaign (TAC), a civil-society organization, challenged the decision of the national government and eight provinces to limit access to an anti-HIV drug to prevent mother-to-baby infection to two pilot sites per province. TAC argued that this measure was inconsistent with the socio-economic right of access to health services (s. 26), because it was

61 National Educational Policy Bill, para. 23.

62 *Weare and Another v. Ndebele and Others*, 2009 (4) BCLR 370 (CC), para. 70.

63 285 U.S. 262, 311 (1932).

64 *Minister of Health and Others v. Treatment Action Campaign and Others* (1), 2002 (10) BCLR 1033 (CC), para. 93 ("Treatment Action Campaign").

unreasonable and the roll-out of the treatment to all clinics in provinces was within the provinces' available resources – the conditions on which the fulfilment of this right are predicated. Their argument was based principally on the conduct of one province (the Western Cape), which, within the same budget as the other provinces, provided the medicine in all its clinics. The Constitutional Court (and the High Court more explicitly⁶⁵) accepted the argument and found that the national government's efforts fell short of a reasonable standard and the province could afford to fulfil the positive obligation imposed by the right.⁶⁶

In shaping the Constitutional Court's federalism jurisprudence, supranational bodies have played no part. The Court has, more often in the earlier years, referred to American,⁶⁷ Canadian,⁶⁸ Indian,⁶⁹ German,⁷⁰ and Australian⁷¹ cases, but has emphasized the unique history and language of South Africa's constitutions. For example, in *The National Education Policy Bill* decision, referred to above, the Court thus cautioned, "Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution."⁷²

2. Specific Issues

Since the creation of South Africa's hybrid federal system, the Constitutional Court's point of departure is that the provinces' only source of authority is the Constitution. In the KwaZulu-Natal Provincial

65 Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (4) BCLR 356 (T).

66 Nico Steytler, "Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa," *Publius: The Journal of Federalism* 33, no. 1 (2003): 59–74.

67 KwaZulu-Natal Constitution, para. 24; Constitution of the Western Cape, para. 28; Treatment Action Campaign, para. 107; Matatiele Municipality and Others v. President of the Republic of South Africa and Others, 2007 (1) BCLR 47 (CC) para. 79 ("Matatiele Municipality").

68 Liquor Bill, para. 62; DVB Behuising, para. 36; Treatment Action Campaign, para. 110; Matatiele Municipality, para. 66.

69 DVB Behuising, para. 36; Treatment Action Campaign, para. 108.

70 Treatment Action Campaign, para. 109; Matatiele Municipality, para. 36.

71 KwaZulu-Natal Constitution, para. 24; DVB Behuising, para. 36;

72 National Educational Policy Bill, para. 23.

Constitution Certification case, that constitution was rejected because it gave the province powers not found in the Constitution. The Court described it as a case where the province sought to pull itself up by its own federal bootstraps. Any power or function has thus to be located within the four corners of the Constitution, which, of course, requires an interpretation of the broad constitutional language.

Arguably the most important exclusive provincial power is the adoption and amendment of a provincial constitution, the scope of which was forged in the last months before the first democratic election of 1994.⁷³ To bring the Inkatha Freedom Party into the negotiating process, a provision was inserted in the interim Constitution that a provincial constitution could be different from the national Constitution with regard to “legislative and executive structures and procedures.”⁷⁴ While the first provincial constitution drafted by the KwaZulu-Natal Legislature never attempted to comply with the provisions of the interim Constitution, and was easily rejected by the Constitutional Court, the Western Cape sought to remain within the parameters of the Constitution, even though it, too, pushed the constitutional envelope. The Western Cape’s draft constitution floundered principally on the interpretation of the elusive terms *legislative structures and procedures*. It not only set the number of seats of the provincial legislature but also established an electoral system that incorporated both a party list system and constituency-based presentation to produce proportional representation (the national Constitution, although it stipulates that the system should “result, in general in proportional representation” [s. 105(1)(d)], prescribes a pure party list electoral system). Averse to the idea that a province could establish its own form of PR, the Constitutional Court gave a restricted interpretation of “legislative structures and procedures” by confining them to “no more than a difference regarding the nature and the number of the elements constituting the legislative structure.”⁷⁵ The Court thus accepted the setting of the number of seats in the provincial legislature (as opposed to the constitutional requirement that the number must be set in terms of a formula prescribed by national legislation), but rejected the different electoral system. The latter conclusion,

73 See Nico Steytler and Johann Mettler, “Federalism and Peacemaking: A South African Case Study,” *Publius: The Journal of Federalism* 31 (2001): 93–106.

74 Section 143(1)(a) of the 1996 Constitution is a similar provision.

75 Western Cape Constitution, para. 48.

commentators argued, was not the only credible one the Court could have reached.⁷⁶

The interpretation of provinces' other "exclusive" competences (those listed in Schedule 5A) received equally parsimonious treatment. At issue was the functional area of "liquor licences" and a national Liquor Bill that sought to control the liquor industry, including providing for the national issuing of licences for manufacturing, distribution, and local retail. The national Parliament may intrude on "exclusive" provincial powers, provided that certain qualifications are met, such as if it is "necessary," inter alia, "to maintain national security, economic unity and essential national standards" (s. 44(2)). The question that the Court had to confront was whether all or any of the licences listed above fell in the provincial exclusive zone. The Court adopted a restrictive interpretation; any aspect of the liquor trade that had an extra-provincial dimension fell outside the ambit of provincial competences. Provincial exclusive powers apply "primarily to matters which may appropriately be regulated intra-provincially."⁷⁷ Intra-provincial matters are concerned with "activities that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone."⁷⁸ Excluded thus are matters with "a national dimension,"⁷⁹ which included all licences for manufacturing liquor (including all wine estates in the Western Cape), because such liquor may be destined to cross a provincial boundary. Only licences dealing with consumption within a province can be an exclusively provincial. The Court's reasoning was based on the need for "economic unity,"⁸⁰ which disallowed any regulatory spillage over a provincial boundary.

Other constitutional sources of provincial competences, apart from concurrent and exclusive powers, have also been met with a tight-fisted

76 Rassie Malherbe, "The Role of the Constitutional Court in the Development of Provincial Autonomy," *SA Public Law* 16, no. 2 (2001): 255; Christina Murray, "Provincial Constitution-Making in South Africa: The (Non)example of the Western Cape," *Jahrbuch des Öffentlichen Rechts der Gegenwart* 49 (2001): 481–512; Robert F. Williams, "Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments," *South Texas Law Review* 40 (1999): 625; Stu Woolman, "Provincial Constitutions," in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop, 21-1–21-25 (Cape Town: Juta).

77 Liquor Bill, para. 53.

78 *Ibid.*, para. 72.

79 *Ibid.*, para. 75.

80 *Ibid.*, para. 76.

Court, but dissenting voices are beginning to emerge.⁸¹ In *Premier: Limpopo Province v. Speaker: Limpopo Provincial Legislature and Others I*,⁸² the issue was the constitutionality of a provincial bill to regulate the provincial legislature's financial management. The bill would pass constitutional muster if the subject matter was "expressly assigned to the province by national legislation" or if it was a "matter for which a provision of the Constitution envisages the enactment of provincial legislation" (s. 104(1)(b)(iii) & (iv)). The provincial legislature maintained that the power was "expressly assigned" to provinces by the national Financial Management of Parliament Act, 2009, although the reference to provincial legislation was only in a schedule.⁸³ Focusing on the word *expressly*, the Court held that it "intended to remove any doubt about the nature and the extent of the powers of the provinces."⁸⁴ The Court maintained that "the constitutional scheme shows that the legislative authority of the provinces must be conveyed in clear terms."⁸⁵ In the Court's opinion, the provincial bill did not have a firm constitutional footing because the national act did not expressly assign the power to

81 In the early decision of *Executive Council of the Western Cape v. Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v. President of the Republic of South Africa and Others*, 1999 (12) BCLR 1360 (CC) the Constitutional Court did not support a generous interpretation of provincial powers over local government. The Western Cape and KwaZulu-Natal, both in opposition hands, contested the constitutionality of a national law, the Municipal Structures Act, 1998, which gave to the national government the power to establish metropolitan areas and district management areas, a power the two provinces claimed belonged to them in terms of section 155. The Court agreed that this power did not fall in the domain of the national government, but neither did it resort under provinces. The power should be exercised by the Municipal Demarcation Board, an independent constitutional institution. The Court found in favour of a provincial power only on a minor point. In terms of section 155(5), provinces determine the types of municipalities and not the national government, as the Act provided. See Jaap de Visser, "Provinces v Structures Act: Demarcation Board Walks Off with Spoils," *Local Government Law Bulletin* 1, no. 4 (1999): 1–3.

82 2011 (11) BCLR 1181 (CC) ("Limpopo I").

83 Six provinces drafted and adopted such legislation with the guidance of the National Treasury. That it was the intention of Parliament to assign such a power was also evident from the submission of the Speaker of Parliament to the Court (*Premier: Limpopo Province v. Speaker: Limpopo Provincial Legislature and Others*, 2012 (6) BCLR 583 (CC) ("Limpopo II").

84 *Limpopo I*, para. 23.

85 *Ibid.*, para. 35.

the provinces (despite the fact that there was a direct reference to provincial legislation in the act).⁸⁶

The same quest for clarity was applied to the second source of provincial powers, namely where legislation was “envisaged” by the Constitution. Although the Constitution does not use the word *expressly*, the majority, nevertheless, imposed such a requirement. Speaking for the Court, Chief Justice Ngcobo held, “Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied. Were it to be otherwise, the constitutional scheme for the allocation of legislative power would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces ... This is not what the drafters of our Constitution had in mind.”⁸⁷ This “clear line” scheme of the Constitution was contested in two dissenting opinions. Justice Edwin Cameron remarked that by the very nature of the Constitution’s drafting, clarity will remain “a chimera.”⁸⁸ Moreover, he continued, “as a matter of fundamental outlook, it would seem to me surprising if the Constitution did not envisage that provinces may legislate for the financial management of their own legislatures.”⁸⁹ The difference in judicial opinion was one of “fundamental outlook”; the majority adopted a parsimonious view of provincial space, while the dissents sought to breathe some life into “legitimate provincial autonomy.”

The Court’s parsimonious approach to provincial powers is perhaps explained by its experience of provincial dysfunctionality. In 2002, it took Mr Mashavha, who was entitled to a disability grant from the provincial government of Limpopo, more than two years to receive some but not all that was owed to him. His wife’s disability grant as well as his daughter’s child-support grant also were outstanding. He and his family, the Constitutional Court noted, were reliant on “the proper administration of the disability grant for their daily sustenance and wellbeing.”⁹⁰ Although “social

86 See Robert Williams and Nico Steytler, “Squeezing Out Provinces’ Legislative Competence in Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others I and II,” *South African Law Journal* 129, no. 4 (2012): 621–37.

87 Limpopo I, para. 52.

88 *Ibid.*, para. 121.

89 *Ibid.*, para. 124.

90 *Mashavha v. President of the Republic of South Africa and Others*, 2004 (12) BCLR 1243 (CC) para. 9.

welfare" is a national and provincial concurrent competency, Mashavha argued that the administration of the Social Security Act, 1992, in terms of which disability grants were dispensed, should never have been assigned to provinces when they were established in 1994 because such assignment could be done only if the provinces had the capacity to administer it. The argument was thus that if the administration of the Social Security Act was not assigned to the provinces, Mashavha would have received his grant from a more competent national department. The Constitutional Court agreed and invalidated the assignment of the Social Assistance Act to provinces ten years after the assignment. Before the fifteen-month period of suspension of invalidity lapsed, the South African Social Security Agency was established with the mandate to distribute all social grants. As the administration of grants was, along with education and health, the major expenditure item of provinces, the impact of the shift in responsibility on provinces was a massive loss in national transfers.

In 2013, a charge of incompetence was levelled against the national government. Civil society organizations requested the premier of the Western Cape to appoint a commission of inquiry into the abject failure of the national police (SAPS) to provide safety and security in Khayalitsha, a large black township of Cape Town. The Constitution provides for the appointment of such a provincial commission of inquiry into "any complaints of police inefficiency or a breakdown in relations between the police and any community" (s. 206(5)). When Premier Helen Zille, who is also the leader of the opposition Democratic Alliance, appointed a commission, the national minister of police contested her constitutional power to do so in a rare occurrence that the national government questioned a provincial competence largely because of provincial inactivity. Before the Constitutional Court, the national minister conceded the existence of such a power, but nevertheless contended that such a commission could not subpoena police officers because that would constitute controlling the national police force, a power that falls outside provincial competence. The Court first asserted a province's right to oversee the SAPS's activities in a province and then made short shrift of the minister's contention, finding that without subpoenaing powers, a commission of inquiry would not be able to fulfil its mandate.⁹¹ Because the case was driven largely by a political agenda against an

91 *Minister of Police and Others v. Premier of the Western Cape and Others*, 2013 (12) BCLR 1405 (CC) ("Minister of Police") para. 50.

opposition-held province rather than by a contested legal principle, the judgment does not signal a fundamental shift in the Court's approach to provincial powers. However, its significance lies in the fact that it was the province that sought to do something to ameliorate national government failure. The Court thus found that it was the duty of the premier to take reasonable steps "to shield the residents of Khayalitsha from an unrelenting invasion of their fundamental rights because of police inefficiency in combatting crime and the breakdown of relations between the police and the community."⁹² As "there is much to worry about when the [national] institutions that are meant to protect vulnerable residents fail, or are perceived to be failing," it was appropriate for the province to exact accountability in terms of its constitutional powers.⁹³ As will be argued below, the Court's positive approach to the province's efforts to assist in providing safety and security came in the face of national failure, a reversal of roles from the Mashavha case where the focus was on provincial failure.

When it came to interpreting local government's powers, the Constitutional Court showed a generosity of spirit at the expense of provincial powers. Contrary to the view of the majority in the *Limpopo* judgment, the Constitution is not a model of clarity when cut-off points between provincial and local government powers are in issue.⁹⁴ The local government's functional areas of health, roads, traffic, tourism, airports, and abattoirs are distinguished from similar provincial functional areas by the addition of the qualifier *local* to the former (e.g., *local tourism vis-à-vis provincial tourism*). Furthermore, many provincial functional areas are inclusive of a local government functional area. For example, included in the provincial power of "pollution control" is the local functional area of "air pollution." How are cut-off points to be determined?

The City of Johannesburg argued that the Gauteng provincial government had no final decision-making powers on matters related to land-use planning because this functional area fell in the local competence of "municipal planning." Gauteng replied that its Development Tribunal could decide matters of land use because it fell within the provincial functional areas of "regional planning" and "urban and rural development." The Constitutional Court sided firmly with the city, reiterating

92 *Ibid.*, para 51.

93 *Ibid.*, para 52.

94 See Nico Steytler and Yonatan Fessha, "Defining Local Government Powers and Functions," *South African Law Journal* 124 (2007): 320–38.

its view that competences must enable local government to exercise its functions “fully and effectively.”⁹⁵ As most local government functions could be included in the broader powers of national and provincial government, the Constitutional Court implicitly adopted the view that local government functions should be defined first, with the residue falling in the provincial or national domain.⁹⁶ Consequently, “municipal planning,” which includes all questions relating to the zoning of land and the establishment of townships, are to be decided by the municipality.⁹⁷

With “municipal planning” entrenched against provincial incursion, it could not be trumped by national legislation either. The fact that mining is an exclusive national competence does not mean, the Constitutional Court held, that a national mining licence trumps municipal land-use permission. Rather, dual approvals are required; without such land-use permission from a municipality, the mining licence cannot be exercised.⁹⁸

The Constitutional Court has also not hesitated to expand local government’s remit beyond what the Constitution prescribes. In a number of judgments on the state’s obligation to positively fulfil the implementation of socio-economic rights, the Court imposed duties on municipalities in areas falling outside their constitutional competences. In the area of housing (a concurrent national and provincial function), municipalities were ordered to assist national and provincial governments with the provision of emergency housing for the homeless⁹⁹ and

95 *City of Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal*, 2010 (9) BCLR 859 (CC) para. 49. See further Nico Steytler and Jaap de Visser, *Local Government Law of South Africa*, 4th update (Durban: LexisNexis Butterworth, 2011), 5–19.

96 This view was clearly expressed by the Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal*, 2010 (2) BCLR 157 (SCA) paras 35–6.

97 See also *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v. Lagoonbay Lifestyle Estate (Pty) Ltd and Others*, 2014 (2) BCLR 182 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v. Habitat Council and Others (City of Johannesburg Metropolitan Municipality as Amicus Curiae)*, 2014 (5) BCLR 591 (CC).

98 *Maccsands (Pty) Ltd v. City of Cape Town and Others (Chamber of Mines of South Africa and Another as Amici Curiae)*, 2012 (7) BCLR 690 (CC); *Minister of Mineral Resources v. Swartland Municipality and Others*, 2012 (7) BCLR 690 (CC).

99 *Government of the RSA and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

the vulnerable after eviction from state or private property.¹⁰⁰ These decisions were based on the constitutional obligation that rests on all spheres of government to realize the right of access to adequate housing (s. 26) and not on the listed municipal competences.

The other side of the parsimonious attitude toward provincial treatment is the generous approach to national competences in respect to national legislation that covers both the national and provincial governments. One such law is on the single public service for the national and provincial administrations (s. 197(1)). The Western Cape objected when the national Public Service Act, 1994, was amended in 1998 because it removed provincial discretion on creating new departments. While the province could not challenge the national competence to make a law on the provincial public service, it argued that such a power should be exercised in the light of the principles of cooperative government, including the principle that “all spheres of government must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government of another sphere” (s. 41(1)(g)). The Constitutional Court accepted this principle as judicially enforceable but found that the very intrusive provisions complained of did not offend this principle.¹⁰¹

In contrast to the Court’s stinginess with respect to the substance of provincial powers, it has given full effect to the provinces’ procedural rights to shared rule institutions. As noted above, the provinces through their representation in the NCOP form part of the national Parliament and have, although not an absolute veto, a significant voice in the passage of national legislation affecting provinces (s. 76). Further, a constitutional amendment that effects boundary changes must be passed by six of the nine provinces in the NCOP as well as with the consent of the affected provincial legislatures. The first notable case dealt with the latter issue. In order to eliminate municipalities that crossed provincial boundaries (because the latter followed apartheid-drawn magisterial districts), boundaries of seven provinces were amended by the Constitution Twelfth Amendment Act of 2005. Although the KwaZulu-Natal and Eastern Cape provincial legislatures voted for the amendment, the

100 *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae)*, 2012 (2) BCLR 150 (CC).

101 *Premier of the Province of the Western Cape v. President of the RSA*, 1999 (4) BCLR 382 (CC).

community of Matatiele (which was to be moved from KwaZulu-Natal to the Eastern Cape without its consent) contested the legitimacy of the vote because Matatiele was not properly consulted by the provincial legislature. The Constitutional Court agreed by asserting, first, the need for provincial consent for a boundary change and, second, the need for proper consultation on the basis of the constitutional principle of participatory democracy.¹⁰² The provisions of the constitutional amendment affecting KwaZulu-Natal and the Eastern Cape were thus declared invalid, because a procedural requirement for passing a valid law (proper public participation) was not complied with. However, Parliament and the two provinces were given eighteen months to rectify the legislative process. After due consultation with Matatiele, the KwaZulu-Natal legislature again voted for the boundary change, and the Constitution Thirteenth Amendment Act was validly passed in 2007 effecting the change.

The Court has also protected the provinces' procedural rights when Parliament considers legislation affecting provinces, by insisting that the correct legislative procedure be followed in the NCOP. Parliament regarded the Communal Land Rights Bill as a bill that did not affect provincial interests, a "tagging" decision made by the Speaker of the National Assembly and the chairperson of the NCOP.¹⁰³ Parliament argued that the bill dealt with "land," which is a national residual power, despite the fact that communal land rights by their very essence affect the provinces' concurrent function of "traditional leadership." As a result, the bill was passed following the so-called section 75 procedure. The NCOP delegates voted as individual members (not as provincial blocs), with a vote rejecting the bill having only delaying effect. If the bill was regarded as affecting provincial interests, then the provinces had to vote as provincial blocs, and a negative vote could be overcome only by a two-thirds majority in the National Assembly. The community of Tongoana, disapproving of the substance of the act, attacked the bill's procedural route, contending it affected the provinces. The Constitutional Court agreed with a generous interpretation of "provincial interests." It rejected the argument that provincial interests were synonymous with provincial competences and held that the test is more broadly drawn: "Any Bill whose provisions substantially

102 *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*, 2007 (1) BCLR 47 (CC).

103 Christina Murray and Richard Simeon, "'Tagging' Bills in Parliament: Section 75 or Section 76?," *South African Law Journal* 123 (2006): 232.

affect the interests of provinces must be enacted in accordance with the procedure stipulated in section 76."¹⁰⁴ Following the wrong route that undermined provincial participation in the law-making process rendered the law invalid.

Outside the legislative arena, the courts also safeguarded a province's right to participate in the Judicial Service Commission's proceedings where it affected a judge of the High Court in that province (s. 178(1)(k)). The premier of the Western Cape objected for not having been invited to participate in the proceedings of the JSC when it had to consider impeachment proceedings against the judge-president of the Western Cape High Court for allegedly trying improperly to influence two Constitutional Court justices. The Supreme Court sustained a High Court decision that set aside the relevant JSC proceedings, because a premier's right to participate was not confined to judicial appointments but extended to the conduct of judges of the High Court in that province.¹⁰⁵

The procedural requirement of cooperative government that all organs of state should "avoid legal proceedings against one another" (s. 41(1)(h)(iv)) was enforced against the national government when it sought to interdict the KwaZulu-Natal government from establishing a gambling monitoring regime in competition with a national system (gambling being a concurrent function). The Constitutional Court refused to entertain the application, because the parties displayed no effort to settle the matter amicably.¹⁰⁶

In summary, the Constitutional Court has confined provincial powers, to the clearest expressions in the Constitution. Provincial competences also are squeezed from below by an expansive view of municipalities' functions. Consequently, the Court has given further impetus to the construction of an hourglass federation, where provinces are squeezed thin between the national and local governments. At the same time, procedural rights have received full protection from the Court. It may well be that the courts are more comfortable enforcing procedural rules

104 *Tongoane v. Minister of Agriculture and Land Affairs*, 2010 (8) BCLR 741 (CC) para. 72.

105 *Hlophe v. Premier of the Western Cape Province; Hlophe v. Freedom Under Law and Other* 2012 (6) BCLR 567 (CC), read with *Democratic Alliance v. President of the RSA and Others*, 2012 (3) BCLR 291 (SCA). Because a number of Constitutional Court judges were involved in the complaint against the judge-president and could therefore not hear the case, the decision of the SCA was the final word on the matter.

106 National Gambling Board.

than dealing with substantive matters, particularly the complex issue of carving out a space for provincial self-government.

These developments have hardly raised a public eyebrow. With most provinces not fulfilling their constitutional mandate of service delivery of education, health, and housing, more public trust is placed in the national government to remedy the ills of the provinces. In most provinces, the public may well support the ANC's call for an overhaul of the provincial system and a reduction in the number of provinces.

3. Significance of the Courts

In assessing the courts' role in securing federally relevant goals and objectives, it should be borne in mind that the federal elements in South Africa's Constitution are not confined to the provincial institutions of self-rule and the shared rule in the National Council of Provinces. The Constitution establishes a system of multi-level government where local governments, and the large metropolitan governments in particular, play a major role in governance. The courts' performance should thus be assessed on how they have dealt with the entire system of multi-level government. On the positive side, the Constitutional Court has strengthened the hand of municipalities by interpreting their powers generously, not only vis-à-vis the provincial sphere of government, but also in competition with the national government. The latter government in exercising its broad residual powers cannot automatically override local autonomy. The supportive approach towards local government has not been apparent with respect to provincial self-rule. Although the Constitutional Court professed to be neither for nor against provinces, it did not assert provincial constitutional space when it could reasonably have done so. The niggardly approach to provinces has of late, however, prompted some dissenting voices seeking to give some flesh to the original Constitutional Principle of "legitimate provincial autonomy." Overall, the Court has supported the hourglass model of multi-level government: a strong supervisory national government, a development-oriented local government at the bottom, and, in the middle, a provincial order of government providing ever fewer services. But the hourglass is kept functioning by allowing the inter-governmental sands of procedural compliance to flow freely.

The Court's concern in the early years was, no doubt, with building a nation from the fractured past. It emphasized the unitary vision of the country when it rejected in 1996 the wayward attempt in the

KwaZulu-Natal provincial constitution to clamour for more federalism. It may also have been less than charitable to the Western Cape constitution with the province then under the hand of the New National Party exhibiting much of the old National Party in attitude. These isolationist forces no longer threaten the united vision of the South African nation, and the main opposition party has national ambitions. The second reason for a pro-centre stance was the perilous state of provincial governance. Little improvement on this score has been witnessed; some provinces have retrogressed, as indicated by the national interventions in Limpopo and other provinces in 2012.

Why then the support of local municipalities? First, local government as a necessity of government poses no centrifugal threat to the nation; to the contrary, the cities have been the melting pot where the new South African nation is taking shape. Second, despite the failure of many municipalities, particularly in rural areas, the large metros and cities are reasonably well governed; Johannesburg, Cape Town, Ethekwini (Durban), and Tshwane (Pretoria) are functioning adequately and hold the key to economic growth and poverty reduction. As to the question of why the judiciary supports procedural compliance, the answer may lie in the pragmatics of the judicial function, as suggested above.

The judicial contribution to multi-level government has to some degree supported federal objectives and goals. As the original purpose of ethnic/nationalist accommodation is no longer an overt concern, the focus shifts to development goals and limiting the centre's monopoly on power. Support for local government, particularly for the major metros having budgets in excess of the smaller provinces, contributes to development goals. Collectively provinces and local government (again with metros in the forefront) pose a counterweight to central dominance.

The Court's hourglass approach fits snugly with the national government and ANC policy. The ANC never embraced provinces, although it may now find it very difficult to unmake the provinces. Over the past five years, the debate has moved from the premise that provinces have served their initial purpose¹⁰⁷ and are therefore now expendable, to a more focused concern for greater functionality of perhaps fewer provinces. In the ANC's Policy Document of March 2012, there is a call "to reform, rationalize and strengthen provinces" by, among other

107 ANC, "Legislature and Governance for a National Democratic Society," 2007.

things, having “fewer provinces which are functional, effective, economically sustainable, integrate communities on a non-racial basis and do away with ethnic boundaries.”¹⁰⁸ As noted above, the outcome of the ANC National Conference in December 2012 was a cryptic statement: “Provinces [should] be reformed, reduced and strengthened.”¹⁰⁹ The conference further recommended the devolution of certain provincial functions to stronger municipalities (which include the metros). This reflects much of the national government’s view, articulated in the National Planning Commission’s *National Development Plan: Our Future – Make It Work*.¹¹⁰ Provinces are there to stay, but they must become part of the “capable state” that can tackle poverty and inequality, while an enhanced role is to be accorded to metros. This would include the devolution of more provincial powers to metros in the areas of housing, transport, and planning.

Although the Constitutional Court may be *ad idem* with the government on multi-level government, its independent stance and exercise of judicial powers in other areas of the Constitution do not always sit comfortably with the government. Although there are no moves afoot to clip the wings of the Constitutional Court (its powers have been enhanced when it assumed the function of the court of final appeal in all matters), changes to the bench may see judges being more deferential to Parliament and the executive. However, the Court’s value as an independent and fearless guardian of the Constitution is widely appreciated both inside and outside of government. Changes will not come easily.

To return to the initial question – does South Africa have a unitarist court in a hybrid federal system? – the answer is nuanced. In terms of a narrow conception of federalism, focusing alone on the provincial order of government, the Constitutional Court has certainly been unitarist. Using a broader definition of federalism that encompasses multi-level government, the answer is different, even though it may result in an hourglass federation. The Court’s strengthening of local government and procedural intergovernmental relations counterbalances its narrow “fundamental outlook” on the role of provinces. However, the consequence of this approach is that the Constitutional

108 ANC, Policy Discussion Document, March 2012, *Legislature and Governance*, 12.

109 ANC, Resolutions of 53rd National Conference: *Legislatures and Governance*, Resolution 4.2.1 (2012).

110 National Planning Commission, *Development Plan: Our Future*, 434–5.

Court has not breathed life into the constitutional space for provincial self-governance.

Given the looming reform of provinces and local government, the Court is bound in the short term to play at the side lines of the main game. The main actors shaping the system are the ANC (determining policy on provinces and local government), the government implementing the structure and the National Treasury giving budget effect to policy (and at times determining policy through budget choices). The Constitutional Court will, however, play a decisive role in changing the number and boundaries of provinces, demanding scrupulous compliance with procedures.

What would strengthen the courts' role in supporting or improving the functioning of multi-level government? Ironically, the provinces themselves could be the most important actors in contributing to a more sympathetic court. Although nation building is stumbling along, territorially based centrifugal and isolationist tendencies have evaporated. The capturing of the Western Cape by the DA in 2009 was not an attempt at isolation, but a platform for expansion to other provinces.¹¹¹ Nation building per se may thus no longer be a burning concern for the Court. The other ostensible reason for the Court's apathy towards provinces could be the continued poor performance of seven out of the nine provinces. Yet, in many instances, national departments fare no better than provincial ones. The South African Social Security Agency, which took over the distribution of social grants from provinces, has not been a shining example of efficiency and financial rectitude.¹¹² Yet the assumption remains that the national government does better. Although poor administration is a legitimate concern, it could also hide a deeper, underlying ideological view that sees centralization and uniformity as values in themselves and preferable to regional experimentation and innovation.

111 In the May 2014 national and provincial elections, the DA increased its percentage of the vote from 17 to 23 per cent nationally. More importantly, the ANC retained the most populous and wealthiest province, Gauteng, with a slender margin of 53 per cent. In the 2016 local government elections it may lose its majority in Gauteng's three metropolitan municipalities.

112 For example, in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others* (Corruption Watch and Another as *Amici Curiae*), 2014 (1) BCLR 1 (CC), the Constitutional Court set aside a massive tender award for the distribution of grants because of the defective management of the tender process.

The answer to both impediments lies with provinces themselves. If provinces show themselves not as dens of patronage and maladministration but as capable and effective instruments of governance and development, and if they add value through diversity, the courts might see the advantage of expanding the provinces' constitutional space. This is best illustrated in the contested appointment of the provincial commission of inquiry in the Western Cape to investigate the failure of the South African Police Service (SAPS) to provide safety and security in Khayalitsha,¹¹³ Given this failure, the Court asserted and protected the province's right (and duty) to call the SAPS to account in order to better protect its residents. The same argument applies to municipalities. A virtuous circle may then emerge: better subnational governance makes for better judgments.

113 *Minister of Police and Others v. Premier of the Western Cape*.