Chapter 21
Provincial Constitutions

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1 Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'), ss 142–145. See also Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution'), s 160. IC s 160, Adoption of Provincial Constitutions, read as follows:

(1) The provincial legislature shall be entitled to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members. (2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration of a provincial constitution. (3) A provincial constitution shall not be inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may — provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal. [*Sub-s. (3) substituted by s. 8 (a)* of Act 2 of 1994 and amended by s. 1 of Act 3 of 1994.] (4) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3), subject to the proviso to that subsection. [*Sub-s. (4) substituted by s. 8 (b)* of Act 2 of 1994.] (5) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provincial constitution is not inconsistent with the said provisions, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

142. A provincial legislature may pass a Constitution for its province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

Contents of provincial constitutions

143 (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this constitution, but may provide for —

(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or

(b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial Constitution or constitutional amendment in terms of paragraphs *(a)* or *(b)* of subsection (1) —

(a) must comply with the values in s 1 and with Chapter 3; and

(b) may not confer on the province any power or function that falls-

(i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Certification of provincial constitutions

144 (1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the Constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial Constitution or constitutional amendment becomes law until the Constitutional Court has certified —

(a) that the text has been passed in accordance with section 142; and

(b) that the whole text complies with section 143.

Signing, publication and safekeeping of provincial constitutions

45. (1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national Government Gazette and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Other conflicts

147. (1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to *(a)* a matter concerning which this Constitution specifically

2 See also IC s 160(1). A provincial constitution adopted before the commencement of the Final Constitution had to comply with the requirements of the Interim Constitution. See Item 13 of Schedule 6 of the Final Constitution.

requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; *(b)* national legislative intervention in terms of section 44(2), the national legislation prevails over the provision of the provincial constitution; or *(c)* a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

21.1 Introduction

FC ss 142 and 143 grant each province a constitution-making legislative competence. This competence appears to extend the legislative competence conferred on a provincial legislature by FC s 104.[3] However, the judgments of the Constitutional Court in provincial constitution certification cases suggest that this textually distinct competence may be only notionally different than the legislative competence conferred on the provinces by other sections of the Final Constitution. Put pithily, FC ss 142 and 143 do not create a meaningfully independent basis for the exercise of power by the provinces. Unless the Constitutional Court alters fundamentally its reading of the apposite provisions of the Final Constitution or those provisions are amended, provincial constitutions will never amount to anything more than window-dressing.[4]

3 For more on the legislative competence of the provinces, see V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15; T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

4 Provincial constitutions, as currently conceived, can only serve to limit the exercise of provincial power. Provincial legislation or executive conduct in a province without a provincial constitution is measured only against the Final Constitution. Provincial legislation or executive conduct in a *province* with a provincial constitution would have to satisfy the requirements of both the provincial constitution and the Final Constitution. This potential contraction of the space for action suggests that it is not in the interest of any of the 8 provinces without a constitution to bother promulgating one.

One interlocutor, Professor Robert Williams, wondered whether this assessment of the possibilities for provincial constitutions was not overly pessimistic and whether it failed to take account of the Constitutional Court's recognition that a province could extend its own Bill of Rights beyond the minimum floor established by Final Constitution. Communication with RF Williams, Rutgers University (11 March 2005). Professor Williams misconceives my point. The additional rights enshrined in a provincial constitution will, potentially, subject state action — and private action — to additional constraints. Viewed through the prism of provincial legislature authority, it is hard to see why a province would employ a relatively static document — a provincial constitution — to do its bidding when it can realize the very same ends through normal legislation. The rest of this chapter functions as my considered response to Professor Williams' ruminations. As we shall see, FC s 143's consistency requirement sets an extraordinarily high bar for provisions that differ materially from those found in the Final Constitution. Moreover, a province has no authority to pass a constitution that arrogates to the province powers for which it has no pre-existing competence in terms of the Final Constitution. Second, we have no independent set of provincial judiciaries that might develop a more progressive rights-based jurisprudence — grounded in a provincial document — than that found in the national judiciary. Third, South African politics is already beset by problems of unfunded mandates and limited provincial administrative capacity. Just where would the provincial resources — fiscal and human — be found to make a meaningful dent in social domains left untouched by the Final Constitution? Fourth, to the extent that any new provincial initiative conflicts with nationally set imperatives, the provincial initiatives will have a rough go of it. In strictly legal terms, FC s 147 tells us that conflicts between provisions of a provincial constitution and national legislation and/or the Final Constitution will be resolved in favour of the national law. In purely political terms, the ANC's national executive still calls the shots.

The Constitutional Court is neither solely nor even primarily culpable for the superfluity of provincial constitutions. Responsibility must be properly apportioned. History, party politics, the electoral system, and, finally, the constitutional text have all conspired to blunt federalist ambitions within the provinces.

The historical moment stretching from CODESA and the MPNF, onto the Interim Constitution and the 1994 elections, through the Constitutional Assembly ('CA') to the certification process for the Final Constitution represented the high-water mark for provincial possibilities. Brinkmanship by the Inkatha Freedom Party ('IFP') from CODESA through the drafting of the Interim Constitution forced the African National Congress ('ANC') to embrace constitutional principles for the drafting of the Final Constitution that accorded far more power to the provinces than they would have otherwise been inclined to provide. Indeed, the Constitutional Court refused to certify the first draft of the Final Constitution in large part because the draft failed to satisfy the minimum conditions for provincial power set out in the Constitutional Principles ('CPs'). But the IFP overplayed its hand. By refusing to participate in the negotiations around the drafting of the Interim Constitution and the Final Constitution, the IFP surrendered what little control they might have had over how the relationship between national government and provincial government would be structured. So although the

Constitutional Court 'found the provincial powers in the first draft . . . insufficient and sent back the text' so that these powers might be increased, the IFP lacked the ability to influence the re-drafting process.[5] The Constitutional Assembly quite consciously limited its brief to curing the text of the defects identified by the Constitutional Court. As Carmel Rickard notes, once the Constitutional Court had certified the amended text the IFP's goose was cooked:

> [A]s a mechanism to increase provincial powers in the final constitutional text, the CPs (on which Inkatha had pinned some hope) had become a spent force; the CA, which at

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Perhaps the differences in our positions are differences in emphasis and I am guilty of overemphasizing the differences. But I think Professor Williams' own writings tend to support my assessment. Professor Wiliams claims, as a general matter, that 'it is a set of political choices as to whether to take advantage of available subnational constitutional space.' Communication with Professor Williams, Rutgers University (11 March 2005). At the same time, he himself notes that when one measures

> in legal terms the quantity of subnational constitutional space . . . the United States and Switzerland, at one end, represent[s] a very high quantity of subnational constitutional space . . . The other end of this quantitative continuum might be represented, for example, by South Africa, in which the subnational constitutionmaking space is relatively restricted, with most of the structure of the subnational units (provinces) being contained or 'embodied' within the national constitution itself.

See RF William & GA Tarr 'Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons' in GA Tarr, RF Williams & J Marko (eds) *Federalism, Sub-national Constitutions and Minority Rights* (2000) 3, 5. I simply fail to see how such limited legal space, married to a highly centralized closed list proportional representation system thoroughly dominated by one party, can provide any cause for optimism.

5 C Rickard 'The Certification of the Constitution of South Africa' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 224, 283. For two first-rate accounts of the federalist debates in both sets of constitutional negotiations, see K Govender 'Federal Features of the Interim Constitution' (1996) 111 *Revue d'Etudes Constitutionelles* 77; N Haysom 'Federal Features of the Final Constitution' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 504.

> least to some extent was fuelled by the impetus of negotiation, had completed its work; in Parliament, where the federalists are hopelessly outnumbered, the dictating force is, increasingly, power politics and no longer, as in the past, consideration for negotiation partners or pressure to finalise a mutually agreeable text.[6]

The IFP's failed political strategy not only torpedoed its overweening, overreaching provincial constitution. It sabotaged any possibility that South Africa would opt for a political system with robust provincial powers. Our political system, grounded firmly in a closed-list proportional representation electoral scheme, concentrates power in political parties. The party chooses the candidates that appear on its lists. As a result, power moves inexorably from the periphery to the centre, or if you prefer, from the bottom to the top. Whatever your preferred locution, the ANC's control of the national government and all nine provincial governments turns the ANC's National Executive Committee into the ultimate arbiter of all political disputes. The consequent absence of political independence in the provinces diminishes the likelihood that any province will bother to draft a provincial constitution that might test the limits of the text or previous certification judgments.[7]

That we have but one written provincial constitution may not be such a bad thing. Indeed, the proposition that we have but one written provincial constitution is not entirely correct. As the Constitutional Court has noted, Chapter 6 of Final Constitution lays out a detailed blueprint of provincial structures, processes and powers. This blueprint is the functional equivalent of a provincial constitution. Whether this general blueprint — married to the 'unwritten' constitution sourced in each set of provincial statutes — is an adequate substitute for nine stand-alone provincial constitutions is an inquiry that lies beyond the scope of this chapter.

21.2 The content of a provincial constitution

(a) The basic architecture of the FC ss 142 and 143

6 Rickard (supra) at 283–284.

7 This conclusion may strike some as overly speculative. But only two provinces have attempted to draft a provincial constitution. Both provinces — the Western Cape and Kwa-Zulu Natal — were controlled at the time of the drafting of the provincial constitutions by parties other than the ANC. All nine provinces are currently under ANC control. A true test of provincial autonomy — and perhaps of provincial constitution-making power — will only occur when provinces possess the political independence and the political will to test the centre.

Kwa-Zulu Natal is taking another stab at drafting a provincial constitution. Three drafts — by the ANC, the IFP and the DA — are currently on the table. See Draft Constitution of Kwa-Zulu Natal, 2004, Kwa-Zulu Natal Provincial Gazette No 6300, Notice A (10 November 2004). The desire to accord some form of permanent recognition for the King appears to be driving this project. Although the IFP has, historically, identified itself as the party of the Zulu people, the ANC has close political ties with the reigning King. Thus both parties have a horse in this race. Whether the significant differences in the ANC and IFP drafts can be overcome is another matter. Neither party has the votes necessary to pass the provincial constitution on its own. However, the ANC has suggested that if agreement cannot be reached on constitutional recognition of the King, then legislation designed to achieve the same ends will be passed by a simple majority. Interview with Professor W Freedman, University of Kwa-Zulu Natal (15 March 2005). (I am indebted to Professor Freedman for his patient explanation of KZN constitutional politics.) The ANC's fallback position underscores the largely symbolic purpose of the provincial constitutional, its limited practical consequences and the relatively equal status of a provincial constitution and provincial legislation with respect to conflicts with national legislation or the Final Constitution. See § 21.5, infra, on conflicts between provincial constitutions, subsequent amendments to the Final Constitution and national legislation.

In *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996*, the Constitutional Court confirmed that FC ss 142 and 143 guarantee that a province has the power to design a constitution that regulates the structures, responsibilities and relationships of organs of provincial government.[8] In *Ex Parte Speaker of the Provincial Legislature of the Western Cape: In re Certification of the Constitution of the Western Cape, 1997*[9] the Constitutional Court placed the following gloss on provincial constitution-making powers:

> [T]he power is a significant one, enabling a province to regulate its governance in its own fashion, subject to the provisions of [FC] 143. It includes organising the provincial government, regulating, distributing and circumscribing the functions of its different departments, and prescribing the manner in which the powers it derives from the [FC] are to be exercised. It also includes powers incidental to such competences and making provision for or regulating other powers of the type normally found in a Constitution that are not inconsistent with the [FC] or the power relationship it establishes.[10]

The *First Certification of the Constitution of the Province of the Western Cape* Court is, however, quick to add that provinces need not enact a provincial constitution. The Court notes that:

> [C]hapter 6 provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executive.[11]

It seems fair to ask how 'significant a power' provincial constitution-making can, in fact, be, when Chapter 6 of the Final Constitution provides a '*complete blueprint for the regulation of government within provinces.*'[12] FC s 143 provides a partial answer to this question.[13]

According to FC s 143, a provincial constitution cannot be inconsistent with the Final Constitution. As we shall see, the Constitutional Court's construction of this rule has proved the primary inhibitor of provincial constitution-making power.

There are two exceptions to FC s 143's general rule. Under FC s 143(1)*(a)*, a provincial constitution may create legislative or executive structures and procedures that differ from those provided for in the Final Constitution. Under FC s 143(1)*(b)*, a provincial constitution may provide for a traditional monarch.

These two exceptions are, themselves, subject to the following two provisos. First, according to FC s 143(2)*(a)*, any provision in a provincial constitution authorized by FC ss 143(1)*(a)* and *(b)* that differs from a comparable provision in the Final Constitution must comport with FC s 1 and FC ss 40 and 41.[14]

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8 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 4 ('*Certification of the Constitution of the Province of KwaZulu-Natal*').

9 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 8 ('*First Certification of the Constitution of the Province of the Western Cape*').

10 See *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 36.

Second, according to FC s 143(2)*(b)*, no provision in a provincial constitution may confer on a province more powers than it already possesses under the Final Constitution.[15]

(b) The requirement of legislative competence

The Constitutional Court has given this second proviso both a narrow reading and an expansive reading. The *Certification of the Constitution of the Province of KwaZulu-Natal* Court held that a provincial constitution could not contain provisions on any matters upon which the Final Constitution does not already give the province the

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11 *First Certification of the Constitution of the Province of the Western Cape* (1997) (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 15. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 350 ('What is contemplated by [FC] 142 and 143 is not a provincial constitution suitable to an independent or confederal State but one dealing with the governance of a province whose powers are derived from the [Final Constitution].') See also RF Williams 'Comparative Sub-national Constitutional Law: South Africa's Provincial Experiments' (1999) 40 *South Texas LR* 625, 642, 635 ('To this extent, the new South African Constitution serves both as a national and a provincial constitution. It is therefore, much less 'incomplete' than the American and some other federal constitutions. . . . . In the American federal system, there are few national requirements governing the structure and relationship of state government institutions. States are not even . . . required to have constitutions. The American states remain relatively free to devise and change governmental institutions as their citizens see fit.') I M Rautenbach and E F J Malherbe write that: '[I]n contrast, the American, Australian, Canadian and German Constitutions do not contain such provisions and every state of the federation must have its own Constitution in order to function effectively.' *Constitutional Law* (3rd Edition, 1999) 271. With respect, Professors Rautenbach and Malherbe overstate two distinct propositions: *(a)* the extent to which other national constitutions contain provisions comparable to FC ss 142 and 143; and *(b)* whether every state or province in these federations require their own constitution to function effectively. The German Basic Law, in articles 28, 30 and 31, does set out parameters for Lander constitutions similar to those found in FC ss 142, 143 and 147. At the same time, it is not clear that the Lander constitutions contribute meaningfully to governance. See U Karpen 'Subnational Constitutionalism in Germany' Center for the Study of State Constitutions Conference on 'Federalism and Subnational Constitutions: Design and Reform' (2004) available at http://www-camlaw.rutgers.edu/statecon, (accessed on 5 February 2005). The Canadian Constitution permits written provincial constitutions. Only one province — British Columbia — has one. See C Sharman 'The Strange Case of a Provincial Constitution: The British Columbia Constitution Act' (1980) 27 *Canadian J of Political Science* 1. Even this provincial constitution has a status not substantially different from that of an ordinary statute. Yet, by all accounts, the provinces in Canada — aided by a detailed list of enumerated powers in the federal constitution — possess a significant degree of autonomy. The absence — or presence — of a provincial constitutions would appear to have no palpable effect on the ability of a province to function effectively. See N Wiseman 'Clarifying Provincial Constitutions' (1999) 6 *National J of Constitutional Law* 269; E Forsey 'Powers of the National and Provincial Governments' *How Canadians Govern Themselves* (5th Edition, 2003).

12 *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 15 (emphasis added).

13 See C Saunders 'Constitutional Arrangements of Federal Systems' (1995) 25 *Publius* 1; C Saunders 'Legacies of Luck: Australia's Constitution and National Identity in the 1990s' (1999) 15 *SAJHR* 328. Professor Saunders observes that in those jurisdictions where the states/provinces predate the creation of the federation, very few direct controls of sub-national Constitutions exist. Section 106 of the Australian Constitution, for example, recognizes the continued validity of the constitution of each state. This observation is of limited value. First, the simple fact of pre-existing state constitutions seems to have had little influence on Australian High Court doctrine regarding the relationship between the national and sub-national spheres of government. Australian constitutional law is tilted decidedly in favour of the federal government. See *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129. The federal structure of the Australian Constitution can, perhaps, be read to allow the states to contest those actions of the national government that 'threaten the existence of the state government institutions or their

power to legislate.[16] So, for example, a provincial constitution may purport to arrogate powers to the province by repeating verbatim averments in the Final Constitution. However, to the extent that the Final Constitution does not actually grant the provinces the power to exercise authority over such matters — say, because they fall within the purview of another sphere of government —

identically worded provisions in a provincial constitution that purport to grant the province such authority cannot be certified.[17]

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capacity to function.' C Saunders 'The Relationship Between National and Sub-national Constitutions' (1999) 1, 11 available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5112_2.pdf, (accessed on 29 November 2004). Second, no more than a handful of existing nations are made up of pre-existing sub-national units that were actually independent entities already in possession of written and entrenched constitutions that governed their internal affairs. For example, the British North America Act of 1867, s 3, created one dominion of Canada out of its several provincial parts. But those provincial parts were never truly autonomous. Moreover, these pre-existing Canadian provinces were granted only those powers enumerated in the British North America Act. The federal government retained all residual powers. That distribution of power is repeated in the Constitution Act of 1982. See P Hogg 'Peace, Order and Good Government' *Constitutional Law of Canada* (4th Edition, 2001) Chapter 17. Canadian constitutional and political history serves as a cautionary note to those who would make too much of the text. Canadian provinces can flex their muscles today because they have a long history of doing so. More recently, the crisis Quebecois contributed to the mobilization of regional interests elsewhere that, in turn, led to the increased exercise of political independence in other provinces.

So while the *National Education Policy Bill* Court correctly notes that the drafters of the Final Constitution did not contemplate independent or confederal states, that intent is hardly dispositive. See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('*National Education Policy Bill*')('Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.') Moreover, the *National Education Policy Bill* Court's comparative constitutional history lesson does not do the work claimed on its behalf. Whatever the status of the 13 former colonies between 1776 and 1791 — the period between the Declaration of Independence and the ratification of the US Constitution — the American Civil War put paid to any notion that state sovereignty entails a correlative right of succession. Many students of South African history would likewise claim that a number of provinces were, at one time, independent states, without claiming that they still possess some residual right of succession.

14 Requirements in a national Constitution that subnational constitutions must comply with certain principles or values are not uncommon. Article 28 of the Federal Republic of Germany's Basic Law reads: 'The constitutional order of the Lander must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of the Basic Law'. Article 28 not only sets general normative limits in the Lander's constitutional autonomy, it ties the understanding of those norms to the Basic Law. In so doing, the Basic Law — and its interpretation by the Constitutional Court — is made the measure of the provisions in a Lander's constitution. Moreover, while article 30 states that 'all government powers not expressly granted in the Basic Law are matters for the Lander,' article 31 holds that '[f]ederal law takes precedence over Land law.' Because the federal government in practice is the dominant political partner, article 30's grant of residual power to the Lander means very little. Articles 28 and 31, read together, ensure that that a provision in the Basic Law will trump a comparable, but conflicting, provision in a Land constitution. See Karpen (supra) at para 13. The federal constitutions in Brazil, Spain, Austria, Russia, Ethiopia and Australia impose similar constraints on sub-national constitutions.

The United States remains a partial, but meaningful, exception to this rule. Although the US Constitution places few express constraints on federal power, many provisions presuppose 'the separate and independent existence' of the states. *National League of Cities v Usery* 426 US 833, 845 (1976)('*National League*'). Moreover, unlike article 30 of the German Basic Law, the residual power clause in the US Constitution retains its teeth. The Tenth Amendment of the US Constitution

The *First Certification of the Constitution of the Western Cape* Court, on the other hand, held that it was permissible for a provincial constitution to contain certain kinds of provisions not expressly contemplated by the extant legislative competence of the province.[18] Such matters range from qualifications for membership in provincial legislatures to the creation of procedures that would enable members of the provincial legislature to seek abstract review of a piece of provincial legislation.[19]

The *First Certification of the Constitution of the Western Cape* Court explains its willingness to depart from the *Certification of the Constitution of the Province of KwaZulu-Natal* Court's strict construction of FC s 143(2) as follows. The proposed Constitution of the Province of KwaZulu-Natal ('KZN text') repeated phrases from the

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reads: 'The powers not reserved to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' Over time, the Tenth Amendment — read with other 'tacit postulates' of state power found in the US Constitution — has been interpreted to mean that Congress may not exercise power in a fashion that impairs a state's integrity or its ability to function effectively in the federal system. See *Nevada v Hall* 440 US 410, 433 (1979)(That general statement echoes South Africa's own understanding of the principles of co-operative governance.) Debates over the exact contours of state sovereignty — and what federal government action is inconsistent with such sovereignty — have roiled constitutional waters for the last 70 years. Before 1936, American courts regularly struck down federal legislation that attempted to ensure better working conditions for women, children and the poor on the grounds that said legislation violated state or local government sovereignty. After *Carter v Carter Coal Company,* four decades passed in which the US Supreme Court did not invalidate a single federal statute on such grounds. 298 US 238 (1936). Many thought the Tenth Amendment had lost its value as an independent check on federal power. But in 1976, the Supreme Court, in *National League*, held that the Tenth Amendment prevented the national government from making federal minimum wage law applicable to state and local government employees. The Tenth Amendment was back in business. Then a range of cases litigated in the 1980s cut back the effect of *National League*. In *Garcia v San Antonio Metropolitan Transit Authority*, the Supreme Court held that if Congress, acting pursuant to the Commerce Clause power, regulated the states, the Supreme Court would view such regulation in the same manner as regulation of a private party. 469 US 528 (1985)('*Garcia*'). *Garcia* remained good law for all of seven years. The Supreme Court's 'new federalism' once again prevents the federal government from coercing states into creating or promoting federal regulatory schemes. See, eg, *New York v United States* 505 US 144 (1992); *Arden v Maine* 527 US 706 (1999).

Extant South African case law on legislative competence suggests that our own federalism doctrines could follow a similar trajectory. See *DVB Behuising (Pty) Limited v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347(CC)('*DVB Behuising*') at para 17 (Constitutional Court holds that '[i]n the interpretation of the schedules [governing legislative competence] 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.') See also *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC)('*Liquor Bill*'); V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15 (Bronstein suggests that the functional approach of the Constitutional Court to competence questions is best captured by the language of Constitutional Principle XX1.1: 'The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.')

Perhaps more germane for our analysis of South African provincial constitutions is the relative status of US state constitutions vis-à-vis the US federal constitution. Neither the 'certification' process nor the canons of interpretation for US state constitutions constrict subnational constitutional space to quite the same degree as South Africa's Final Constitution.

The US Constitution enables the US Congress — and the President — to place some conditions on US state constitutions. Article IV, s 3, reads, in relevant part: 'New States may be admitted by the Congress into this Union.' Article IV, s 4, reads, in relevant part: 'The United States shall guarantee to every State in this Union a Republican Form of Government.' Should a state constitution 'contain provisions of which Congress or the President disapprove', they can force the state to alter the offending provision before consenting to the enabling legislation granting their

Final Constitution Court that 'had nothing to do with provincial powers or competence.'[20] The proposed Constitution of the Province of Western Cape ('WC text') repeated phrases from the Final Constitution Court that 'directly affect governance within the province.'[21]

(c) The limits of difference: Structures and procedures and powers

FC s 143(1)*(a)* allows a provincial constitution to provide for 'legislative or executive structures and procedures that differ from those provided for in' the Final

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admission. See RF Williams & GA Tarr 'Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons' in GA Tarr, RF Williams & J Marko (eds) *Federalism, Sub-national Constitutions and Minority Rights* (2000) 3, 5. But this power is of limited duration. For example, as Professors Williams and Tarr note, Congress was able to dictate the terms of constitutions that 'southern states adopted in the aftermath of the Civil War' by 'requiring an acceptable constitution as a condition for 'readmission' to the Union.' (The irony, if course, was that the Union had not recognized the secession.) Ibid at 6. These states soon disowned these documents and supplanted them with constitutions designed to entrench white political power. However, neither Congress nor the President sought to use Article IV, s 4 to thwart the obvious threat such changes posed to the US Constitution's commitment to republican government. Ibid. See also JVE Ely Jr *An Uncertain Tradition: Constitutionalism and the History of the South* (1989). The initial power over admittance does not grant Congress or the courts the authority to supervise and to certify, on an ongoing basis, the consistency of a state constitution with the US Constitution. That said, other provisions of the US Constitution do constrain subnational constitutional space. Under the Supremacy Clause, Williams and Tarr write, 'national law is superior to state law, so that in cases of conflict, valid national enactments — be they constitutional provisions, statutes or administrative regulations — prevail over state constitutional provisions.' Williams & Tarr (supra) at 7.

With respect to the interpretation of a state constitution, it is the state's highest court, and no federal court, not even the US Supreme Court, that is the ultimate arbiter of its meaning. See, eg, *Michigan v Long* 463 US 1032 (1983)(Where an adequate and independent state ground for a decision exists, US Supreme Court exercises no appellate jurisdiction); *Murdoch v Memphis* 87 US 590 (1874). See also R Althouse 'How to Build a Separate Sphere: State Courts and Federal Power' (1987) 100 *Harvard LR* 1485 (Adequate and independent state ground doctrine protects the autonomy of states at the same time that it ensures supremacy and uniformity of federal law). When it comes to the content of the state constitutions, state constitutions can provide more rights than the US Constitution. See *Pruneyard Shopping Centre v Robbins* 447 US 74 (1980)(State constitution may provide more rights, and those rights may constitute adequate and independent grounds of a state court decision so long as they do not impair the exercise of a right guaranteed in the US Constitution.) See also W Brennan 'State Constitutions and the Protection of Individual Rights' (1997) 90 *Harvard LR* 489. They cannot, as a practical matter, provide less. Were a state court to interpret its own constitution as providing fewer rights than the federal constitution, it would still have to 'enforce the higher federal standards' because those standards are the supreme law of the land. R F Williams 'American State Constitutional Law' Center for the Study of State Constitutions Conference on 'Federalism and Sub-national Constitutions: Design and Reform' (2004) available at http://www-camlaw.rutgers.edu/statecon, (accessed on 5 February 2005).

15 See *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 8. See also *Minister of the Interior v Harris* 1952 (4) SA 769 (A), 790 (Court, in striking down the Separate Representation of Voters Act, held that 'No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method.')

16 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 24.

17 *Certification of the Constitution of the Province of the KwaZulu-Natal* (supra) at para 26. For example, because the creation of a court system does not fall within the purview of the provinces, provinces cannot meaningfully protect the right to a fair trial. Similarly, since a province has no authority to call for a state of emergency, the provincial constitution cannot purport to regulate the conditions for a state of emergency. So while the language of the two constitutions with regard to

Constitution. The *First Certification of the Constitution of the Western Cape* Court held that this limited exception to the consistency principle goes to the form of provincial legislative or executive structures and procedures, and not their substance.

'Form as structure' captures the 'composition and organization of a province's institutions.'[22] The WC text changed the numbers of members in both the Western Cape legislature and the Western Cape executive from those prescribed by the Final Constitution. Since these alterations went solely to form of the institutions and had no effect on the kind of power they exercise, the Constitutional Court found the changes to be unobjectionable.[23]

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these provisions might be perfectly consistent, or even identical, the purpose of the provisions is not. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at paras 349–350 citing *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 5:

> [I]n the proceedings for the certification of the KwaZulu-Natal Constitution, we . . . said: '. . . whatever meaning is ascribed to 'structures and procedures' they do not relate to the fundamental nature and substance of the democratic State created by the interim Constitution nor to the substance of the legislative or executive powers of the national Parliament or Government or those of the provinces.' We also make clear in that judgment that a provincial legislature manifestly does not have the power, through adopting a constitution, to alter the power relationship between itself and the national level of government, or to usurp powers which are not vested in it under the IC. It follows that . . . [FC] 143(2) is no different in substance from IC 160(3). It is true that in . . . [FC] 143(2)*(a)* there is a directive that provincial constitutions must comply with . . . [FC] chapter 3 and the values in . . . [FC] 1, but in the context of . . . [FC] 142 and 143 this does not mean that what is contemplated is a constitution in which these values must be separately identified. What it does mean is simply that nothing in a provincial constitution may conflict with . . . [FC] chap 3 or the values in . . . [FC] 1. It makes clear that the inconsistency referred to in . . . [FC] 143(1) extends to such matters and that they do not fall within the exemption made in . . . [FC] 143(1)*(a)*. In the result, what is contemplated by . . . [FC] 142 and 143 is not a provincial constitution suitable to an independent or confederal State but one dealing with the governance of a province whose powers are derived from the . . . [FC]. On that analysis there is no real departure from the power of constitution-making which a provincial government enjoys in terms of IC 160. That power, properly analysed, is a power subject to the same limitations and the same potential which we have identified in . . . [FC] 142 and 143.

See also *Executive Council, Western Cape Legislature, & Others v Government of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 62 (Supports proposition that any attempt to make Parliament's legislative authority subject to the will of a province is unconstitutional.)

18 See *First Certification of the Constitution of the Province of the Western Cape* (supra) at para 36. See also Iain Currie & Johan De Waal *The New Constitutional & Administrative Law* (2001) 205.

19 See *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 24–25, and 51.

20 Ibid at para 22.

21 Ibid.

22 *First Certificate of the Constitution of the Province of the Western Cape* (supra) at para 16.

23 Ibid at paras 51 and 59–61.

'Form as procedure' captures 'the manner in which [provinces] exercise their powers.'[24] The WC text allowed members of the Western Cape legislature to seek abstract review of a piece of provincial legislation. Since these provisions had no effect on the substance of provincial legislation, but merely regulated the process by which legislation is vetted and passed, the Constitutional Court found the modifications to be innocuous.[25]

But neither 'form as structure' nor 'form as procedure' is infinitely elastic. The *First Certification of the Constitution of the Province of the Western Cape* Court refused to certify the WC text because the WC text attempted to substitute a geographic multi-member constituency system for the closed-list proportional representation system set out in the Final Constitution. The province contended that a variation in the electoral system was a matter of form. The Court did not view this mutation as simply incidental to the province's constitution-making powers. Though the Court's reasoning remains somewhat opaque, the judgment must stand for the proposition that the manner in which votes in elections are converted into the seats of representatives goes to the heart — the substance — of the power exercised by the legislature.[26] But why, exactly, is abstract review of legislation a matter of procedure and the electoral system a matter of power? Or better still, why is an increase in the number of legislators a matter of form, but the manner of selection a matter of substance?

The Court's first answer is that 'the choice of electoral system has a material

bearing on the degree of correspondence between votes cast and seats won.'[27] Well, on those terms, the increase in the number of legislators also has a 'material bearing on the degree of correspondence between votes cast and seats won.' Increase the number of seats in a provincial legislature and the degree of correspondence between votes cast and seats won also increases. The Court's first answer proffers a distinction without a difference.

The Court's second answer is that the electoral system is not a legislative or an executive structure: a change to the number of MPLs does change the legislative structure; a change in the electoral system does not change the legislative structure. This is an unadulterated boot-strapping exercise. The change in the electoral system is held not to alter 'the nature or the number of . . . constitutent elements' in a legislative structure because the extension of the terms 'nature' or 'constituent elements' — for the purposes of FC s 143 analysis — embraces only numbers, seats,

24 Ibid at para 16.

25 Ibid at paras 24–26.

26 Ibid at para 48 ('When [FC] 143(1)*(a)* permits a provincial Constitution to provide for a provincial legislative structure different from that provided for in [FC] chap 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of [FC] 143(1)*(a)*.')

27 *First Certificate of the Constitution of the Province of the Western Cape* (supra) at para 45.

or posts. So, *ipso facto*, a change in the electoral system cannot be a change in the legislative structure.[28]

This test may, as the *First Certification of the Constitution of the Province of the Western Cape* Court asserts, have the virtue of being clear.[29] Whether the test amounts to much more than a tautology is another matter. What the Court really seems to want to say — but has a hard time saying straight out — is that the selection of representatives — and thus the issue of who governs whom — is too inextricably bound up with actual substantive outcomes to be treated as mere window dressing.[30]

(d) Consistency clauses

The crafty drafters of the Constitution of KwaZulu-Natal ('KZN text') sought to circumvent IC 160(3)'s consistency requirement by including two consistency requirements of their own. Chapter 1, s 1(9) of the KZN text stated that

> This Constitution, to the extent that it is not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, shall be the supreme law of the Province.

Chapter 4, s 1(1) of the KZN text read, in relevant part:

> Any provision of this Constitution . . . including the allocation of powers and functions, but excluding the provisions relating to legislative and executive structures and procedures as set out in s 160(3) of the Constitution of the Republic of South Africa Act 200 of 1993, which is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993, shall have no force and effect.

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28 The Court's logic is reflected in the following passage:

> When [FC] 143(1)*(a)* permits a provincial constitution to provide for a provincial legislative structure different from that provided for in [FC] chapter 6, it permits no more than a difference regarding the nature and number of the elements constituting the legislative structure. An electoral system not only does not constitute one of these elements but also has no effect on the nature or the number of such elements. It is accordingly not encompassed within the permissive provisions of [FC] 143(1)*(a)*.

Ibid at para 48.

29 Ibid at para 49.

30 The Court's rejection of a system of 'geographic multi-member constituencies' suggests that members of the Court had not forgotten how instrumental the gerrymandering of geographic constituencies had been in creating the requisite political environment for apartheid. However, the Constitutional Court's subsequent judgment in *United Democratic Movement v President of the Republic of South Africa (No 2)* reflects its reluctance to make pronouncements on the link between electoral systems and substantive outcomes. 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM*'). The *UDM* Court rightly noted that the political institutions of a multi-party democracy can take many forms commensurate with the general dictates of the Final Constitution. (FC ss 46 (1) and 105 (1), governing the composition of and election to the National Assembly and provincial legislatures, respectively, require electoral systems that 'result, in general, in proportional representation.') The *UDM* Court could finesse the more treacherous question as to whether the floor-crossing legislation met the minimum requirements for the kind of democracy contemplated by the Final Constitution because Parliament had failed to satisfy the technical timing requirements for floor-crossing legislation. See also *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 5 ('Whatever meaning is ascribed to "structures and procedures," they do not relate to the *fundamental nature and substance of the democratic State* created by the interim Constitution nor to the *substance* of the legislative or executive powers of the national Parliament or Government or those of the provinces.' (Emphasis added).)

The Constitutional Court rejected these attempts both to pre-empt the Constitutional Court's assessment of *all* the provisions of the KZN text and to ensure that any constitutionally suspect provisions in the KZN text did not prevent certification. In short, the Constitutional Court held that it was obliged to evaluate every provision of the provincial constitutional text, and that IC s 160 prevented the Court from certifying anything except a complete and a compliant constitutional text.[31] Ironically, even if that the rest of the KZN text had been consistent with the Interim Constitution, these clauses themselves would have prevented certification because they conflicted with the desiderata of IC s 160(4).

(e) Suspensive clauses

Another clever, if defective, dodge by the authors of the KZN text took the form of two suspensive clauses. Chapter 4, s 1(2) of the KZN text stated that Chapters 5 and 8 of the KZN text would come into effect *(a)* 'only when the interim Constitution is replaced by the Final Constitution'; *(b)* 'only to the extent that their provisions are consistent with the Final Constitution'; and only if the powers of KZN are 'not . . . substantially reduced' by the provisions of the Final Constitution. Chapter 14, s 2(12), read, in relevant part:

> The provisions of this Constitution shall have no force and effect if and to the extent that they are not consistent with the constitution referred to in chapter 5 of the Constitution of the Republic of South Africa Act 200 of 1993, provided that the powers and functions of this Province with regard to its legislative authority and its power to pass a constitution are consistent with the constitution referred to in chapter 5 of the Constitution of the Republic of South Africa Act 200 of 1993, and further provided that such powers are not substantially inferior to those provided for in the Constitution of the Republic of South Africa Act 200 of 1993.

Chapter 14, s 2(12) was not, strictly speaking, a suspensive clause. It bears more than a passing resemblance to the consistency clauses in the KZN text. What turns this clause into a suspensive clause is the proviso that the KZN text must be consistent with the provisions of the Final Constitution. Given that the Final Constitution itself had yet to be certified, final certification of the KZN text was effectively suspended. These two suspensive clauses, along with the clauses they alleged suspended, were held to be constitutionally infirm on three distinct grounds.

First, the KZN text could not make its certification contingent upon the content of the Final Constitution. IC s 160 only empowered a provincial legislature to adopt a constitution consistent with the constitutional order governed by the Interim Constitution. IC 160 could not govern — nor did it make provision for — the certification process under the Final Constitution. To the extent that the KZN text was contingent upon the content of the Final Constitution, it could not be certified. Second, the text of the suspended provisions — found in Chapters 5 and 10, Chapter 6, s 2(1) and Chapter 13 — were patently inconsistent with the Interim Constitution and could not be certified under the Interim Constitution. Third, the KZN text suspended numerous provisions for a period of six months from commencement of the KZN Constitution. The enactment of these provisions was made contingent upon the outcome of various future votes within the provincial legislature and the House of Traditional Leaders.[32] The Constitutional Court held that satisfaction of IC s 160 required 'a constitutional text that has been adopted; not one that *might* be adopted

31 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 36–38.

or *might* be repudiated dependent on decisions still to be taken.'[33] Once again, the Constitutional Court held that IC s 160 prevented the Court from certifying anything except a complete and compliant constitutional text. The suspensive clauses, like the consistency clauses before them, made the KZN text anything but final.

21.3 Certification of a provincial constitutional text

FC s 144 attempts to create greater certainty in provincial law.[34] It does so in the

following manner. FC s 144(2)*(b)* precludes the Constitutional Court from certifying a provincial constitution in a piecemeal fashion. It must certify the entire document or nothing at all.[35] Once certified by the Constitutional Court, the exercise of provincial power in terms of the provisional constitution is not vulnerable to constitutional challenge on the grounds that the provincial constitution *in toto* is invalid.[36] However, as FC 147 makes abundantly clear, the Final Constitution contemplates the possibility that subsequent amendments to the Final Constitution and both extant and future pieces of national legislation may conflict with a provision of a provincial constitution.[37] The problem — apparently unnoticed by the Constitutional Court and commentators alike — is that FC s 147 contemplates conflicts between extant national legislation and a provincial constitution. As I note below, such a conflict, if resolved in favour of the national legislation would render a provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution is certified.[38]

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32 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 45 ('Chapters 1 and 3, and certain provisions of chapter 9, were suspended for a period of six months from the commencement of the KZN Constitution, and will not come into force if during that period a resolution to that effect is passed by 40% of the members of the provincial Legislature; at the same time it is provided that chapter 8 and certain provisions of chapters 9, 12 and 13 will have no force and effect unless they are approved during that period by the provincial Legislature by two-thirds of all its members after consideration of the relevant provisions by a Constitutional Commission; and certain other provisions of chapter 9 only if, in addition, the House of Traditional Leaders has been consulted.')

33 Ibid at para 46 (Emphasis added).

34 Ibid at paras 11 and 37.

35 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 10.

36 IC s 160(5) barred expressly any court from enquiring into the validity of a provision of a provincial constitution once that provincial constitution had been certified. Such a provision does not appear in the Final Constitution. The lack of consistency between the Interim Constitution and the Final Constitution in this regard could have created two distinct legal regimes for provincial constitutions. Provincial constitutions certified under the Interim Constitution would have been immunized entirely — at least in the abstract — from constitutional challenges as to the validity of all those provisions certified under the Interim Constitution. Provincial constitutions certified under the Final Constitution are not so immunized. Fortunately, no provincial constitutions were certified under the Interim Constitution. No inconsistency in treatment can arise.

37 See § 21.5 infra, on conflicts between provincial constitutions, subsequent amendments to the Final Constitution and national legislation.

21.4 Provincial constitution certification cases

(a) Certification of the Constitution of the Province of KwaZulu-Natal[39]

The KZN text, as we have already seen, was fatally flawed.[40]

The KZN text's greatest offence was to attempt to structure relationships and to assign powers that fell well beyond the competence of a provincial constitution. Chapter 1, s 1(1) described KwaZulu as a 'self-governing province'. Chapter 1, s 1(5) revised the relationship between the province and the national government. Chapter 1, s 1(8) asserted that the KZN text set out the basis of interaction between the province and the rest of the Republic. Chapter 5 conferred certain exclusive powers on the province and vested other exclusive powers in the national government. As the *Certification of the Constitution of the Province of KwaZulu-Natal* Court noted, 'the provinces are the recipients and not the source of power' and 'no provision in the Interim Constitution . . . empowers a province to regulate its own status' or 'its

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38 See § 21.5 infra, on how such a conflict can be squared with the certification requirements of consistency and finality.

39 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC). *Certification of the Constitution of the Province of KwaZulu-Natal* was brought under the Interim Constitution, s 160. However, the Court's reasoning applies to certification cases brought under the Final Constitution. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 350 (Court stated that the constitution-making power of a province under the Final Constitution was subject to the same limitations as it had been under the Interim Constitution.) For an illuminating account of the political machinations behind the KZN text, see G Devenish 'The Making and Significance of the Draft Kwazulu-Natal Constitution' (1995) 9 *Yearbook of South African Law* 3.

40 So flawed was the KZN text that the *Certification of the Constitution of the Province of KwaZulu-Natal* Court felt obliged, at the end of its judgment, to note that the grounds upon which the Court refused certification did not exhaust the grounds for such refusal. It wrote:

> Our analysis has been directed to the flaws relating to what we have categorised as the usurpation of national powers, the consistency clauses and the suspensive conditions. It is necessary to emphasise that our discussion does not purport to be an all-embracing one, for to have done so would have been supererogatory, given the widely flawed nature of the provincial constitution. It should therefore not be seen as definitive, either in regard to the three categories we have identified or in other respects. Should the KZN Legislature decide to adopt a new or amended provincial constitution, and in the interest of avoiding disputes over the future certification of a replacement, account will no doubt be taken of the detailed objections lodged this time and on which we pass no judgment now.

Certification of the Constitution of the Province of KwaZulu-Natal (supra) at para 47. See also Certification *of the Constitution of the Province of KwaZulu-Natal* (supra) at para 35 (After identifying some of the many ways in which the KZN text usurped national power, the Court wrote: 'We have not attempted to detail all the offending provisions. It is not necessary to do so.')

relationship to the national government.'[41] These provisions violated, with a vengeance, the consistency requirement of IC s 160.[42]

The KZN text's other major sin, as discussed at length above, were its efforts to circumvent the Constitutional Court's certification process through consistency clauses[43] and suspensive clauses.[44] In short, the inclusion of suspensive clauses and consistency clauses defeated the ends of 'finality and certainty' that the Interim Constitution's certification process was designed to achieve.[45]

Finally, the KZN text contained provisions within its Bill of Rights on the right to a fair trial and states of emergency.[46] These provisions neither fall within FC s 143(1) *(a)* or *(b)*'s exceptions nor comply with FC s 143's consistency requirement.

(b) First certification of the Constitution of the Province of the Western Cape

The Constitution of the Western Cape ('WC text') fared far better than the KZN text. Nevertheless, the Constitutional Court declined to certify the WC text on three separate grounds. First, the geographic multi-member constituencies endorsed by the provincial constitution could neither be squared with the closed list proportional representation system found in the Final Constitution nor saved by the legislative structure exception found within FC s 143(1)*(a)*.[47] Second, the WC text's insistence that the Judge President of the High Court of the Western Cape perform certain ceremonial functions and administer various oaths of office was inconsistent with the Final Constitution's requirement that that the President of the Constitutional Court

41 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 14 - 16. See also *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 Of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC)('Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.')

42 *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 14–35. The Court described each of these violations as a usurpation of national powers. However, it should be clear from our discussion of the requirement of legislative competence that not every assertion of a novel legislative competence in a provincial constitution constitutes a usurpation of national government prerogatives. See § 21.2*(b)* supra.

43 See § 21.2*(d)* supra.

44 See § 21.2*(e)* supra.

45 The Constitutional Court rejected the KZN text because the suspensive conditions and consistency clauses in the provincial constitutional text barred (or at least attempted to bar) the 'Court from testing any provision in the provincial Constitution against the requirements of [IC s] 160(3)' and prevented the Court from finding that any of the provincial constitution's provisions were either consistent or inconsistent with the Interim Constitution. *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 36.

46 See *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at paras 17–31.

47 For a more detailed discussion of the Constitutional Court's objection to geographic multi-member constituencies, see § 21.2*(c)* supra.

discharge these same duties.[48] Third, WC text s 46(3) did not simply restate the Final Constitution's bar on paid work by MECs: it went on to grant the provincial legislature the power to promulgate legislation governing the meaning of paid work. The Constitutional Court held that ethical concerns about unpaid work by MECs did not fall within FC s 143(1)*(a)*'s executive structure or procedure exception.[49] The Constitutional Court then found that FC s 136(2) proscribed paid work by MECs, that 'paid work' could only have one meaning and that any debate over the meaning of 'paid work' would have to be decided by the courts. The WC text's assertion that the province could weigh in on the meaning of 'paid work' created the possibility that each province would arrive at a different conclusion about the meaning of 'paid work'. The Constitutional Court held that because 'paid work' under the Final Constitution could have only one meaning, any potential for deviation from that univocal — but still undetermined — definition created the conditions for inconsistency.[50]

This final argument over 'paid work' is not particularly coherent. It is not clear that only one meaning can be attached to 'paid work' — compensation takes many forms. It is not clear that FC s 136(2) bars parties other than the courts from giving content to the term 'paid work'. It is hard to understand how the Constitutional Court can assert simultaneously that that there is but one definition for paid work and that the courts alone are empowered to resolve disputes about the meaning of 'paid work'. There is either one meaning or there isn't. If only the courts have the power to decide the meaning of 'paid work', how would a

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dispute ever arise? Normally, one would expect some disagreement between state actors over the correct understanding of a term of art like 'paid work' to give rise to a dispute. One would expect that disagreement to arise, in part, out of legislation that gives the term content. Moreover, FC s 136(2) does not say that determining the extension of the term 'paid work' by MECs is the prerogative of national government or the object of super-ordinate legislation promulgated by Parliament.

What may actually drive the *Western Cape* Court's conclusion is not FC s 143(1)*(a)* or FC s 136(2), but FC s 143(1)*(b)* and FC s 136(1). The refusal to allow the provincial government to pass such legislation makes some sense if viewed in the context of legislative competence. Neither FC Schedule 4 nor FC Schedule 5 speaks to codes of ethics or conditions of employment. Thus, FC s 143(1)*(b)* offers no safe harbour for a provision of a provincial constitution that engages the meaning of 'paid work'. FC s 136(1) makes legislation on the ethical conduct of MECs the prerogative of national government. It seems reasonable to assume — from the text alone — that national legislation will engage the meaning of 'paid work' in the context of a code of ethics.[51] But FC s 136(2) does not demand that national legislation do so. This textual silence around the content of super-ordinate national legislation on a code of ethics and whether the meaning of 'paid work' is to be addressed in the legislation contemplated by FC s 136(1) means that FC s 143's consistency requirement is not expressly violated.

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48 See *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 52–56.

49 Ibid at para 65.

50 Ibid at para 66.

The three 'defects' in the WC text identified by the *Western Cape* Court were easily remedied. The amended WC text was submitted for certification without opposition and duly certified.[52]

21.5 Conflicts between provincial constitutions and national legislation or the final constitution

FC s 147 contemplates the possibility of conflicts between certified provincial constitutions and *(a)* subsequent amendments to the Final Constitution; *(b)* superordinate national legislation *(c)* national override legislation and *(d)* national legislation in areas of concurrent legislative competence. Such conflicts are dealt with at length elsewhere in this work.[53] It is worth noting that FC s 147 limits,

even if it does not quite defeat, the Constitutional Court's efforts to guarantee that the certification of a provincial constitution is both final and certain.[54]

As I suggested above, a strong reading of FC s 147 would make a provincial constitution's certification contingent upon its consistency with the extant national legislation identified in categories *(b)*, *(c)* and *(d)*.[55] Any such conflict resolved in favour of the national legislation would render the provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution was certified. Any provision of a provincial constitution that will be stillborn at the moment of birth hardly satisfies the general conditions of finality and certainty said to govern this process.

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51 The Executive Members Ethics Act 82 of 1998, s 2(1), contemplates the prohibition of other paid work by MECs in the context of a code of ethics: 'The President must . . . publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECS must comply in performing their official responsibilities. (2) The code of ethics must — *(b)* include provisions prohibiting Cabinet members, Deputy Ministers and MECS from — (i) undertaking any other paid work.' See the Draft Code of Ethics for Members of Cabinet, Deputy Ministers, and Members of Executive Councils (National Council of Provinces, 16 May 2000)(The code has not yet been promulgated).

52 *Certification of the Amended Text of the Constitution of the Western Cape 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC)('*Second Certification of the Constitution of the Province of the Western Cape*'). For a brief account of the drafting history of the WC text, see D Brand 'The Western Cape Provincial Constitution' (2000) 31 *Rutgers LJ* 961.

53 See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 16.

54 Recall that one of the primary grounds for rejecting the KZN text was the presence of clauses that made it 'impossible' to determine whether a given provision in the provincial constitution was 'inconsistent with provisions of the interim Constitution.' Such a result, the Constitutional Court said, could not be tolerated because it would defeat '[t]he objectives of finality and certainty.' *Certification of the Constitution of the Province of KwaZulu-Natal* (supra) at para 36. At the same time, the *Certification of the Constitution of the Province of KwaZulu-Natal* Court states that:

If the conflict is resolved in favour of one of the conflicting laws the other is not invalidated, 'it is subordinated and, to the extent of the conflict, rendered inoperative'. A law so subordinated is not nullified; 'it remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails (and) (i)f the inconsistency falls away the law would then have to be implemented in all respects.

Two good reasons explanations exist, however, for why the Constitutional Court has not remarked upon this possibility and why no one ought to be particularly vexed by the interaction between FC s 147 and FC ss 142, 143 and 144. First, as a strictly technical matter, certification of a provincial constitution or a provincial constitutional amendment only requires that they not be inconsistent with the Final Constitution. Certification does not require consistency with national legislation. Second, were the Constitutional Court to treat provisions of a provincial constitution that could be inconsistent with national legislation in the same manner as it has treated suspensive clauses and consistency clauses in a

provincial constitution, it would make the certification process inordinately more complicated. Provincial constitutions would have to be tested against the text of the Final Constitution and the texts of existing pieces of national legislation. FC s 147 should be read, therefore, as recognizing the potential for such conflicts with national legislation, but wisely disaggregating such assessments from the certification process.[56]

Ibid at para 9 citing Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 16 and 19. Even if a provision in a provincial constitution cannot be invalidated in terms of FC s 147, a result in favour of the national government under FC s 147 would have the effect of rendering inoperative a provision of a provincial constitution. See also Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 272 ('[FC] 147 does not encroach upon the legitimate political autonomy of the provinces. It does no more than preserve the relationship between the [FC] and provincial constitutions. It makes clear that a provincial constitution cannot alter the power relationship established by the [FC], that it cannot increase the powers vested in the provincial government under the [FC] and that it cannot reduce or otherwise seek to modify the powers vested in Parliament by the [FC]. In doing so it gives effect to CP IV which states: 'The Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of government.' The provisions of [FC] 147 do not in our view encroach upon the legitimate autonomy of the provinces.')

55 See § 21.3 supra.

56 FC ss 149 and 150 lend some support to this proposition. FC s 150 provides a canon of interpretation for conflicts between national legislation and a provincial constitution. It reads: 'When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.' So until a real conflict arises, we should not anticipate one. FC s 149 suggests that there is a signal difference between a conflict that renders a provision inoperative, and a conflict that renders a provision invalid. FC s 149 reads: 'A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.' Thus a provision of a provincial constitution that falls before a piece of national legislation does not offend the Final Constitution. It is, therefore, not inconsistent with the Final Constitution for the purposes of certification analysis. It is merely inoperative. Some might argue that the status of a provincial constitutional provision that remains dormant for the duration of a conflict with national legislation bears a striking similarity to the status of the KZN text suspensive provisions that ran afoul of the IC's consistency requirement. The answer, I think, is that such a hypothetical provision would not offend the Final Constitution. Suspensive conditions do.