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**Provincial Governance and Development – Review of the
South African Experience**

Introduction

Thank you for the opportunity to present a review of the South African experience of provincial government since 1994.

I agree with Brutus Madlala that we should not be led by expedience in this debate. We have to be open about our motivations. And we must remember that most transitions from authoritarian rule to democracy have failed. So fooling ourselves will not help.

I found Professor Ayee's presentation very instructive. Using the example of Ghana, he said the regions have not worked well because they did not fulfill their functions. Yet despite this, there has been an increasing proliferation of regions.

Why? Both these developments are linked by what he called “patronage”. Our name for “patronage” is “cadre deployment”. It involves putting people into positions because they are owed a political favour, or because they are the friend or relative of a powerful politician. They are not appointed because they are capable of fulfilling the function. And when the powerful politicians need more positions to hand out, they create new regions or provinces. And they then deploy people into the positions for the wrong reasons, and the regions then fail to fulfill their functions; and then, in order to stay in power the politicians must continue to create positions, and so the downward spiral continues.

Patronage and cadre deployment are some of the greatest threats that any emerging democracy faces.

Let me go back to the genesis of the provincial system of government at the dawn of the new South Africa.

Our Constitutional Settlement

During the apartheid era, commentators predicted Armageddon in South Africa. Mounting repression and an escalating racial civil

war seemed to be the unfolding logic of our history. When, instead, we made a peaceful transition to full democracy, the same commentators proclaimed that a "miracle" had happened.

But it was not a miracle that delivered us from the evil of apartheid. It was something less spectacular, but much more profound. It was a combination of courage, common sense, and hard work, displayed individually and collectively by great leaders and their followers.

These attributes rescued South Africa. After President de Klerk's brave speech in February 1990 and Nelson Mandela's heroic magnanimity, representatives of the people of South Africa – all the people – sat down and negotiated the details of the constitutional democracy in which we now live. That was the moment our leading political thinkers, from Colin Eglin to Cyril Ramaphosa and Pravin Gordhan, came into their own. They proposed principled and practical solutions to our seemingly intractable problems – and they reached agreement. The CODESA negotiations were tough and tiring, but ultimately sensible. Of course there were compromises on all sides. How could it be otherwise? But in the end, everyone was reasonably satisfied with the outcomes – and I have learned that in politics you rarely do

better than that.

The outcome was a good constitution that set out the architecture of what David Welsh calls a “unitary system of government with federal figleaves”. And crucially, there was the commitment from all parties to honour and respect that constitution. It is impossible to exaggerate the importance of this. Whether a constitution lives or dies depends, more than anything else, on that commitment.

A recent study of every constitution promulgated since 1789 found that the average life-span of a constitution is just 17 years. Many constitutions die in infancy: 7% of constitutions do not reach the age of two. In Africa, a full 15% of constitutions perish in their first year.¹

So what makes a constitution endure?

Firstly, constitutions which emerge, as ours did, as the result of inclusive negotiations, tend to last longer.

¹ Tom Ginsburg, Zachary Elkins and James Melton, 2008. ‘The Lifespan of Written Constitutions’, paper prepared for the World Justice Forum, Vienna July 2-5, 2008.

Secondly, constitutions which are specific and comprehensive, as our one is, tend to outlive those that are vague and open to contradictory interpretations.

Thirdly, constitutions which can reasonably be amended, as our one can, tend to survive longer than those that are either too rigid or easily changed. But this cannot mean they should simply be cast aside, as though they were just an expedient requirement of history. That is a very great risk.

This comparative research gives us cause for optimism that our constitutional democracy may yet endure. But there is an additional element which is crucial to the survival of a constitution. It requires the kind of leadership for which Presidents de Klerk and Mandela made South Africa famous. As another important recent study of constitutional longevity puts it:

“Well-designed institutions are necessary but not sufficient. The rule of law also requires leaders who can credibly commit to self-constraint, agents who can be trusted to abide by the law as well as enforce it, and reasons for most of the population, both the

powerful elites and the general mass, to believe they will benefit from the existence of the rule of law.”²

In other words, a constitution’s survival depends not just on the circumstances of its birth, but on those charged with upholding it. And when we look at why constitutions and constitutionalism generally fail, this is where the greatest risk lies.

A key lesson the world has learnt in the past century, is that liberation movements make bad democratic governments. The reason for this is that liberation movements aim to seize power and equate their victory with freedom. The idea that the limitation and dispersal of power is the source of real freedom contradicts this approach. This explains why the democratic record of liberation movements on our continent is not good. As the scholar Marina Ottaway warned in the early 1990s: nowhere in Africa has a liberation movement spawned a truly democratic regime.³

We must try to be the first.

² Margeret Levi and Brad Epperly, ‘Principled Principals in the Founding Moments of the Rule of Law’, paper prepared for the World Justice Forum, July 2-5 2008.

³ Marina Ottaway, 1991 ‘Liberation Movements and Transition to Democracy: the Case of the ANC’, *Journal of Modern African Studies*, 29, 1.

During apartheid South Africans had plenty of opportunity to learn how important checks and balances on power are. At that time, the whites-only parliament was sovereign. This enabled it to impose its will on everyone else, and over-ride the minimal checks and balances that existed. The four provinces were mere administrative units of the central state, mechanisms of control – rather than devolution of power.

The Importance of Dispersing Power

And so our constitutional negotiators understood that the diffusion of power throughout the polity, was essential to prevent too much power being concentrated in too few hands.

The constitution describes three "spheres" of government: central, provincial and municipal. The use of language is important here. It speaks about a "sphere" of government not a "tier" of government. "Tier" implies hierarchy and descending command. "Sphere" implies equality and co-operation. And the constitution spells out where power over various competencies is exercised and how the concept of co-operative governance and concurrency should work.

It is probably true to say that South Africa would not have had a negotiated settlement unless there was agreement on the provinces. They were probably the single most protracted point in all the deliberations.

In the end common sense triumphed on the matter of the provinces, and we ended up with a system of provincial governance, that could, at least in theory, check over-centralised power, as well as power abuse, bring government closer to the people, and work co-operatively with the local and national spheres.

The Threat to the Provinces

Our provincial boundaries were not imposed upon us by any outside power or by any colonial ruler (as unfortunately the boundaries of our country were). We, all South Africans, agreed on them ourselves. It was a democratic outcome. Our Commission for the Demarcation and Delimitation of Provinces consulted the public and did a good job in drawing up the provincial borders based on history, administration, finance, convenience, demographics, culture and language. South Africans, with very few exceptions, soon accepted the demarcation of the provinces. After 16 years of democracy, there is no public outcry for them to

be redrawn.

And yet there have, for years, been ominous noises against the provinces, even comparing them with the Bantustans. The document released after the ruling party's National General Council in 2005, said it wanted "all South Africans to live in the same country and territory, not in a balkanised South Africa, not in a constellation of TBVC 'states', not in a confederation of autonomous and independent provinces and not in a Volkstaat". Of course, no-one wants an apartheid, or Bantustan state. This is an illogical argument.

The next move came in January 2007 after a Cabinet Lekgotla mandated the Minister of Provincial and Local Government to initiate a review of Provincial government. But little happened and the issue languished on the backburner.

It was in May 2009 – after the ANC lost a province at the ballot box – that the issue acquired renewed urgency.

In June of 2009, Mr Sicelo Shiceka, the Co-operative Governance Minister, said that the ANC Government would decide on the

future of the provinces by March 2010. At a media briefing he asked: "Do we need provinces?" South Africa is one country, he said...and "nobody is expected to be out of tune".

The ANC discussion paper on governance produced for its National General Council this year is the clearest indication yet of its intentions. It accepts that the creation of provinces “contributed to a smooth political transition”, but adds: “However, their role remains uncertain.” It also insists that “the unitary state remains the ANC’s philosophical orientation and point of departure. Therefore, any consideration with regards to the provinces must be guided by this.”

This kind of statements make it appear as if the ANC has made up its mind about provinces already.

All indications are that the ANC has made up its mind about the future of the Provinces. The only question is whether it wants to reduce their number or abolish them altogether. Either way, it has one objective in mind: to oust the DA from power by undemocratic means.

The Performance of the Provinces

In the discussion paper the question is asked, rhetorically, “Have provinces improved the lives of our people in each province qualitatively and have they addressed the key socio-economic challenges facing communities in each province?”

Of course it is true that some provinces and many local governments have not functioned optimally. The question to ask is WHY NOT? It will take serious research and analysis to come up with an accurate answer, which is the key to finding the right solution. But, as I will demonstrate, the sub-optimal functioning of some provinces is a useful pretext centralise control, just as the poor quality of some journalism is a useful pretext to try and control the media.

The spurious nature of the reasoning reveals the real intentions. Let’s review them here. I have identified six:

First, as I have mentioned, the ruling party suggests that the provinces are a relic of apartheid. This is deeply ironic. As far as I remember, there was no Limpopo, Mpumalanga or Gauteng during apartheid. And instead of nine independent provinces, there were only four administrative arms of national government. It was a

highly-centralised unitary state, conducive to the power abuse so characteristic of apartheid. So the question that must be asked is this: By scrapping our provinces, or reducing their powers, or centralizing control, who exactly wants to bring back apartheid?

The second argument is that the three sphere system of government is complicated and often leads to over-lapping roles, long-winded decision taking and inefficiency. There is some latent sympathy for this argument among the general public. There are people who believe that removing the provincial sphere, would streamline government, reduce costs and improve efficiency. This belief is generally unfounded. There are Ministries, departments, projects and parastatals under central government control that are more corrupt and inefficient than almost anything governed under concurrent provincial powers. Just think of the Department of Home Affairs or Correctional Services, the SABC and Eskom. And, conversely, there are excellent examples where co-operative governance has worked very well between all three spheres. Managing preparations for the 2010 World Cup is, by and large, a case in point. The key reason for this is that there was sufficient political will to achieve results, sufficient competence through the appointment of personnel who are "fit-for-purpose" to undertake the jobs they are required to do, immutable deadlines, and

accountability to independent structures.

Where there is a lack of political will, co-operative governance is very difficult. The refusal to grant housing accreditation to the City of Cape Town, or the cynical transfer of provincial land from the Western Cape to the National Government on the day before the April 2009 election is the kind of action that prevents co-operative governance from working. It is also deliberate. It has nothing to do with dealing with inefficiency or lack of capacity. It undermines the letter and spirit of the constitution. So we cannot blame our three-sphere constitutional system for the problem power abuse has created. If anything, these actions only serve to illustrate yet again, how vulnerable democratic systems are to power abuse.

Democracy requires good faith and respect for the rule of law in order to work.

Thirdly, the argument goes that there would be less corruption if there were fewer spheres of government. This is untrue.

Corruption is not bound by borders or size. It can be rife in a tiny rural municipality or in a centralised government department, or across several departments as exemplified by the Arms Deal.

Corruption proliferates when there is a lack of accountability and transparency, and insufficient checks and balances. In fact, highly centralised systems tend more towards corruption than those that diffuse power throughout the polity and build in effective oversight. And of course, the greatest check on corruption is the willingness of voters to hold their representatives to account through the ballot box. Only when politicians are really frightened of voters is it really possible to hold corrupt politicians accountable.

Fourthly, there is an argument that costs would be saved by scrapping or merging provinces. But this saving would be insubstantial, if indeed it amounts to any at all.

The services provided by the provinces would have to be continued through decentralised arms of the central state, so there would be no savings in administration and infrastructure. Probably the only savings would be in the legislatures themselves, about 2% of total provincial costs, but even here it is likely that most of the legislators (whose support would have to be bought if the ANC were to prevent an internal revolt) would be re-deployed to other positions in the state.

A fifth argument the ANC uses against the provinces is the large disparity in income and economic opportunities in the different regions. This is true. It is also true that there is a lack of efficiency in most rural provinces. But it is false that these problems would be better addressed by central government.

The equitable share formula enables the national government to distribute resources according to developmental priorities is designed to offset with these disparities. In fact, the formula significantly advantages the rural provinces, even as urbanisation is drawing more and more people into the cities, where people receive services for which the state makes payment elsewhere.

A sixth argument is that the provinces are inefficient. But, again, there are remedies available if a particular province is failing. Clause 100 of the constitution sets out the options available to the national executive to intervene in any province that is not fulfilling its obligations or maintaining essential standards. This includes a complete central take-over of provincial functions, where it can be demonstrated that provincial governments have failed. It is telling that this has never been done before. If the provinces were so inefficient, why has not one ever been put under administration?

These six proffered reasons are designed to cloak the real intentions of centralizing power and preventing another party from governing and using its record in one sphere of government to win power in another.

I have raised this issue directly in discussion with President Zuma. I have asked him to see the DA's victory in the Western Cape as an opportunity for South Africa rather than a threat. Let us test our policy approaches, in South Africa's interests. I have assured him of the provincial government's complete commitment and loyalty to the constitution and its objectives.

The peaceful transfer of power through the ballot box, albeit it in one province, has sent the best possible signal to the world that our democracy can work. No individual or party can claim the monopoly on policy solutions for South Africa's pressing problems. It would be in the interests of every South African to let the government of the Western Cape use its provincial powers to pioneer alternatives that can be tested and, if successful, applied to the benefit of all.

In the Western Cape, our approach to government is different. We are focused on job creation through growth. We don't deploy

cadres, we try to apply the principles of “fitness for purpose.” We are passing a law to hold school principals directly accountable for school performance. We are passing a law prohibiting employees of the state from doing business with the state. We are introducing legislation to exercise greater oversight of the police. We have stripped away all the ostentatious symbols of power such as blue lights on ministerial vehicles. We have also put a cap on what Ministers can spend on cars and cut out all lavish perks and parties. We are opening up tender processes for public scrutiny.

In the debate over the future of the provinces, it is crucial that citizens and commentators alike do not simply swallow false or deceptive reasoning about the future of the provinces. The most rudimentary research will demonstrate that the reasons currently being advanced are weak (at best) or spurious (at worst).

It is unfortunate that so many people do not see the impact that scrapping the provinces, reducing their number, or their power, will have on our democracy. I believe it will do even more damage than a media tribunal or a protection of information bill. This is because it will demonstrate what the ruling party is willing to do when it loses power at the ballot box. And if the ANC is willing to

scrap provinces to prevent another party from governing at provincial level, what will it do to retain power at national level?

Conclusion

Ultimately, democracy depends upon the chance to change governments. The rotation of power at local and provincial government levels gives us the opportunity of maturing our democracy. If it is possible only for one party to rule everywhere, then our democracy is doomed. We will repeat the tragic history that our constitution's founding fathers worked so hard to avoid.

Thank you