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Nico Steytler

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By Nico Steytler

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Forum of Federations
75 Albert Street, Suite 411
Ottawa, Ontario (Canada) K1P 5E7
Tel: (613) 244-3360
Fax: (613) 244-3372
forum@forumfed.org

Overview

The policy of apartheid was an attempt to territorialise the white / black racial cleavage through the creation of bantustans, confining black political aspirations to 13 percent of the country, while the remainder of the country continued under white minority dominance. This was to be done by fracturing blacks into ethnic-based territories. The failure of, and resistance to, apartheid resulted in the 'constitutional moment' from 1990 to 1996 where the two major protagonists, the white minority, represented by the National Party (NP) and the African National Congress (ANC) sought to unmake the political salience of these manufactured territorial cleavages; they created a new narrative of a non-racial, non-ethnicity society and thereby undercut the salience of territory. This project was violently resisted by politics whose very political base lay in territory – the Afrikaner right wing and Zulu nationalists. However, the non-racial, non-ethnic narrative was dominant, although allowances were made for very limited accommodation of ethnic-based territories.

After 25 years the unmaking of the salience of territorial cleavages has largely been successful; territorial politics based on race and ethnicity have largely withered away. Right-wing Afrikaners and Zulu nationalists' demands for an ethnic homeland have evaporated. Although ethnicity amongst the Africans has not disappeared, it is currently well catered for through a weak federal system. The non-territorial black/white divide, manifested by the continued inequality in wealth between the two racial groups, is still the dominant cleavage, which has led to the increasing questioning of the non-territorial compromise between the ANC and the NP over the protection of property rights.

The important lessons from the successful unmaking of territorial politics include: a common commitment to peace; the framing of the transition to democracy in non-racial terms; the willingness to make asymmetrical deals with obdurate ethnic entrepreneurs; the strategic use of ambiguity in agreements and temporizing final outcomes; the very limited use of foreigners in the negotiations; and the holding of elections both to structure the process as well as providing legitimacy to the end product – the constitutional settlement.

Background

The major political, economic and social cleavages in the South African society have been racial - black and white – with no clear territorial boundaries between the two groups. Of less political salience are ethno/linguistic cleavages within the two race groups. The cultural and linguistic division among whites – Afrikaners and English-speakers – was politically significant for most of the 20th century, but is now limited to a few fringe parties representing the far-right Afrikaners. Among the black group, an apartheid distinction was made, on the basis of race, between Africans, coloured and persons of Indian origin, a distinction still used by the new democratic government for the purposes of affirmative action policies. The coloured community predominated in the south and western parts of the country, while here is a high concentration of Indians in the urban area of Durban on the east coast. Among the Africans the nine linguistic groups - isiZulus, isiXhosa, Sepedi, Setswana, Sesotho, Xitsonga, SiSwati, TshiVenda, and IsiNdebele – all have strong territorial concentrations.

After 300 years of racial dominance and segregation by whites, the NP came to power in 1948, representing Afrikaners, and sought to find a territorial solution to consolidate and justify white dominance. Commencing in the 1960s, the constitutional transition of grand apartheid sought to locate and constrict black political demands to territorial enclaves amounting to no more than 13 percent of the land mass, while dreaming of having white numerical dominance in the remaining 87 percent.

The central tenant of grand apartheid was that South Africa was a country of ethnic minorities, an ideology that did not apply to whites. To secure white dominance, the black majority was to have only a right to self-determination through ethnically-based bantustans. In rejection of the NP's racial and ethnic vision of South Africa, the black majority, mainly led by the ANC, embarked in 1961 on an armed struggle to realise a unified South Africa, which 'belongs to all who live in it, black and white', in the words of the Freedom Charter, a 1955 policy statement, advanced by the ANC that presented an alternative vision for the future.¹

Grand apartheid was not federal but envisaged instead that each black ethnic group would transition into an independent country, while black workers would sell their labour to the white-owned mining and industrial complexes as temporary sojourners in the South African republic. A constitutional process commenced with the establishment of ten self-governing territories for each African ethnic group – the bantustans. As the end goal was territorial disaggregation, the federal element of shared rule never featured; it was all about self-rule. But, because the territories allocated for self-governance were far removed from the economic productive areas, the bantustans were entirely dependent on revenue transfers from the apartheid government. The first 'independent' homeland was the Transkei (1976), followed by Bophuthatswana (1979), Venda (1979), and the Ciskei (1981). None of these bantustans ever achieved international recognition of their 'independence'. The remaining six bantustans, so-called 'self-governing territories', did not progress to 'independence'. Chief Mangosothu Buthelezi, while accepting the self-governing status of KwaZulu, refused the end goal of independence, insisting to remain part of South Africa.



Map 1: Bantustans: 'independent' and self-governing territories, 1990

¹ See David Everatt, 'The Freedom Charter in historical perspective' in Nico Steytler (ed) *The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order* (Wyvern 1991) 21-43.

The bantustans had a formidable bureaucracy, if nothing else, providing the main form of employment in these areas. By 1990, 700 000 of all the 1.2 million civil servants in the whole of South Africa were employed in the ten bantustans, comprising 16 percent of the workforce in those areas.²

In terms of apartheid ideology, two race groups proved to be problematic - the coloured and Indian communities. The coloureds were a mixed race grouping sharing the main social characteristic with Afrikaners - language and religion – but politically white racism was paramount in determining their treatment so in the 1960s the ideology of apartheid produced the notion that the coloureds were ‘a nation in the making’, who, although having no exclusive territorial concentration, ought to have their own political destiny. A separate legislative body the Coloured Representative Council, was established and some, as yet undefined, form of weak federalism was foreseen. The Indians comprised a small minority, and attempts in the 1950s at repatriation floundered, so a small measure of local self-government was allowed for them.

As these non-territorial arrangements for coloureds and Indians were manifestly unviable, the next step was to draw whites, coloureds and Indians together into a consociational model of governance, but which excluded Africans. The Constitution of 1983 established three houses of Parliament, one for each race group, implementing a form of personalised federalism. Social services (education, health, social welfare) were provided on the basis of race. In all other matters, the three houses had to agree, all sitting separately, but if consensus could not be reached, the conflict was resolved by the Presidential Council in which the whites had an in-built majority. It was thus not the usual model of consociationalism where two or more groups have an equal say in decision-making, but a skewed one in terms of which white interests could, and did, trump those of the two ‘junior’ partners.

The establishment of the tri-cameral parliament added fuel to black resistance and led to the outbreak of wide-spread civil unrest, which was a low-intensity civil war that two declared states of emergency could not quell. By the late 1980s in the face of internal conflict, economic sanctions and international isolation, the edifice of apartheid was crumbling, and the government began talks with Nelson Mandela and the ANC in a bid to bridge the deep political chasm.

The period of constitutional engagement: 1990-1996

The fall of the Berlin Wall in November 1989 (graphically signalling the end of the Cold War), the collapse of communist regimes in Eastern Europe, and the end of proxy wars of the two superpowers, were dramatically seized upon by the NP.³ President FW de Klerk announced on 2 February 1990 the unbanning of the ANC and other liberation movements and the beginning of negotiations for a new South Africa. Although secret talks had been initiated before 1990 between the government and the ANC,⁴ the close link between the ANC and the South African Communist Party (SACP) was a stumbling block; the government could talk to the ‘nationalists’ in the ANC (Mandela and others), but balked at the spectre of its own making – the ungodly red peril manipulated from Moscow. With the Moscow-venom pulled from the SACP’s sting, the government could unban it alongside the ANC.

² Louis A Picard, *The State of the State: Institutional Transformation, Capacity and Political Change in South Africa* (Wits University Press 2005) 300.

³ See Dennis Cruywagen, *Brother in War and Peace: Constand and Abraham Viljoen and the Birth of the New South Africa* (Zebra Press 2014) 118.

⁴ See Willie Esterhuyze, *Endgame: Secret Talks and the End of Apartheid* (Tafelberg 2012).

The negotiations process was framed in an important way by a shared commitment to peace and a fear of a descent in a vortex of destruction,⁵ which animated all principal players at crucial moments. A second framing principle that quickly emerged was that race could no longer be an organising principle. Due to the apartheid past, a consociational solution where race or ethnic groups would qua groups find consensus, was simply not an option. Adopting the ANC's vision of non-racialism, all parties in the negotiations eventually abandoned race-based solutions. However, the historic racial cleavages were effectively still present in that some groups couched demands around language, culture and ethnicity, often with a territorial base. In this context, two separate visions of the state framed the negotiations: the one depicting an undivided unitary state, while the other sought to give territorial expression to linguistic, cultural, and ethnic polities.

The players

The NP, in power for 42 years, was no longer a purely Afrikaner party. In the 1989 general election for the tri-cameral parliament, it won 60 percent of the vote, while the Conservative Party, which had broken away from the NP in 1981 because of the latter's deviation from a petty apartheid, attracted nearly half of the Afrikaner voters (46 percent). The NP's constituency was mostly the urban, propertied classes of both linguistic groups.

The NP's vision of the future evolved during the negotiations. A race-based consociational model was mooted but soon found it to be unviable.⁶ Similarly, an attempt to focus on group rights, with the focus on culture and language, but this did not have much traction in urban settings. A cantonal system, suited to an urban environment, was also mooted, but it too failed because it was about preserving race-based privileges in the suburbs. In the final push, the NP abandoned the idea of protecting ethnic minorities, but sought to entrench the role of minority parties through power sharing arrangements. Although the NP proposed federalism, this would provide few direct advantages to it because its support base was geographically dispersed across the country. At best it could claim regional majorities only in the Western Cape and the Northern Cape—and even then only on the back of coloured votes. Thus federalism, at best, could provide only a limited check on a centre, which inevitably would be controlled by the ANC. The NP's more fundamental objective was the protection of key privileges of white constituency through safeguarding accumulated property, civil service jobs, and pensions.

The ANC, as the foremost liberation movement in South Africa, came to the negotiating table with a clear vision: a non-racial centrist state on its way to socialism. Although it did not win the armed struggle, it was armed with the moral imperative of non-racialism. Further, the principle of non-ethnicity was a counter to the apartheid strategy of divide-and-rule through the bantustans. Ethnicity was equated to 'the demon of tribalism', with many traditional leaders discredited for collaborating with the apartheid government.⁷ The ANC's vision of the state was thus one of a unified, centrist state which controlled the levers of state power to undo the ravages of apartheid. Consequently, it viewed federalism as a device to perpetuate grand apartheid and weaken a transformative central government.

⁵ Kader Asmal and Adrian Hadland, with Moira Levy, *Kader Asmal: Politics in My Blood – A Memoir* (Jacana Media 2011) 132.

⁶ See Anthony Butler, *Cyril Ramaphosa* (Jacana Media 2007) 280, quoting Roelf Meyer, the chief negotiator of the NP.

⁷ David Welsh, *The Rise and Fall of Apartheid* (Jonathan Ball Publishers 2009) 488.

Legitimate concerns about language, culture and ethnicity would be addressed on an individualized basis by a bill of rights, with an equality clause as its centre piece.⁸

The very fact that the ANC and the NP framed the negotiations on non-ethnic lines (because neither was ethnically based⁹) galvanised two sets of groups – right-wing Afrikaners and bantustan leaders - who found common ground in their opposition to the ANC and the NP and saw their future in territorial terms.

The right-wing Afrikaners, represented by the Conservative Party, were implacably opposed to the ANC whom they branded as communists, a view widely shared among the leadership of the South African Defence Force (SADF) and the South Africa Police (SAP), whose very reason d'être over the previous three decades was combatting the ANC and the SACP. On the far right there were also paramilitia formations, most notably the *Afrikaner Weerstandsbeweging* (Afrikaner Resistance Movement). However, even they abandoned race by replacing it by the politically more acceptable notions of language and culture; the Afrikaners' language (Afrikaans), identity and culture had to be protected and preserved. The goal became that of self-determination of minority groups, and the demand for a *volkstaat* (people's state) in an own territory. What made this grouping powerful was its support in the military and the police, as well as its willingness to resort to violent means.

Making common cause with the right-wing racists were the former beneficiaries of grand apartheid – some of the bantustan governing elites. While the leaders of 'independent' Transkei and Venda sided with the ANC, the rest feared the end of their power-base and thus coalesced around strong federal demands. The governments of Bophuthatswana and Ciskei had military forces, while KwaZulu had a police force. The governing party of the latter, the Inkatha Freedom Party (IFP) led by Chief Mangosuthu Buthelezi, was of particular importance because, unlike the other bantustan leaders, the IFP could claim broad support among traditional Zulu society. The IFP's demands were for a highly federalised country, hinting at a threat of secession. The KwaZulu legislature adopted in 1993 a draft Constitution for KwaZulu which provided for a confederal system of government, with KwaZulu having an own military force and a high-level of self-governance.¹⁰

Trajectory of the constitutional process

The transition from apartheid to democracy commenced in the late 1980s with secret meetings between the apartheid government and the ANC, followed by a number of peace-making agreements in 1990 and 1991. When negotiations about the future commenced, at the first formal meeting on 13 November 1991, called the Convention of a Democratic South Africa (CODESA I), participation was broadened to include all major political parties and the governments of South Africa, Ciskei, and Venda.¹¹ However much the inclusiveness of the process was projected, decisions merely required 'sufficient

⁸ See Heinz Klug, 'How the Centre Holds: Managing Claims for Regional and Ethnic Autonomy in a Democratic South Africa' in Yash Ghai (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press 2000) 102.

⁹ Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Settlement* (Jonathan Ball Publishers 1995) 179.

¹⁰ Stephan Ellman, 'Federalism Gone Awry: The Structure of Government in the KwaZulu/Natal Constitution' (1993) 9 (2) *South African Journal on Human Rights* 165.

¹¹ See Sifiso Mxoli Ndlovu, 'The ANC, CODESA, Substantive Negotiations and the Road to the First Democratic Elections' in South African Democracy Education Trust (eds), *The Road to Democracy in South Africa, Vol 6 [1990-1996] Part 2* (Unisa Press 2013).

consensus', a vague term which indicated that the two main protagonists – the ANC and the NP¹² - had to agree.¹³ The IFP did not sign the first step setting out the beginnings of a road map for negotiations (the Declaration of Intent) because Buthelezi felt affronted that he was not regarded as an equal negotiating partner with the NP and the ANC.

When Codesa was reconvened (CODESA II) in 1992, the NP was emboldened by an all-white 1992 referendum which gave 68.7 percent support for the NP to continue with negotiations for a new constitution, but without specifying any content. The negotiations deadlocked, however, on, among other matters, the process of adopting a constitution. The ANC insisted that it had to be done by an elected constitutional assembly, while the NP, at first, wanted that it be negotiated because it would then be in stronger bargaining position. Eventually it accepted an elected body, but demanded high majorities of 70 and 75 percent, depending on the matter. During this period, violence had continued unabated in Natal and on the Reef. When a group of Zulus migrant workers attacked a hostel on the Reef at Boipathong, leaving 42 dead, the ANC broke off formal negotiations on the ground that the government was complicit in the violence or did not do enough to control it, which was done with the intent to destabilise the negotiations.¹⁴

Back channel negotiations continued between the ANC and the NP and in September 1992 the ANC and the NP signed a Record of Understanding. The NP, in the light of Codesa II's failure, rethought and abandoned their position on group rights. The ANC, in turn, accepted a two-stage process of constitution-making: a negotiated interim constitution, which also contained a set of constitutional principles which would bind an elected constitutional assembly.¹⁵ Further, agreement was reached on power-sharing at the centre for a limited interim period.

This agreement was seen by Buthelezi as a betrayal by his old ally, the NP.¹⁶ He then turned to the racist Afrikaner right wing and other bantustan leaders, forming the Concerned South Africans Group (COSAG). The language of territorial politics increased; the right to self-determination was claimed by the Afrikaners, and the IFP talked of unilateral secession and the creation of a Zulu state.¹⁷

Based on the 'Record of Understanding', signed by the ANC and the NP, constitutional negotiations resumed in April 1993 in the form of the Multi-Party Negotiating Process (MPNP) with 26 parties present, including the Afrikaner right wing (grouped as the *Afrikaner Volksfront* (Afrikaner People's Front) and the IFP. The setting in July 1993 of the election date on 27 April 1994 gave urgency to the negotiations between the NP and the ANC, but also led to the walk-out by the *Afrikaner Volksfront* and the IFP. In a desperate attempt to get the IFP on board, the ANC agreed to the IFP's demand for international mediation on 'outstanding constitutional matters'.¹⁸

¹² For the purpose of this paper, the NP and the apartheid government are treated as synonymous, and referred to as the NP.

¹³ Butler (n 6) 292.

¹⁴ *ibid.*

¹⁵ *ibid.* 302.

¹⁶ Jabulani Sithole, 'The Inkatha Freedom Party and the Multiparty Negotiations' in South African Democracy Education Trust (eds) *The Road to Democracy in South Africa Vol 6 [1990-1996] Part 2* (Unisa Press 2013) 870; Sparks, *Tomorrow is Another Country* (n 9) 143.

¹⁷ Butler (n 6) 302; Sithole (n 16) 871.

¹⁸ Welsh (n 7) 511.

The ANC/NP deal: The interim Constitution of December 1993

The ANC and the NP negotiated an interim constitution, which was eventually adopted on 20 December 1993, ironically, by apartheid's tri-cameral parliament as the NP insisted on legal continuity. The primary objective of the interim Constitution was to address the black/white cleavage; it had to provide for black majority rule, yet safeguard white interests. This was done by focusing on co-government, a weak form of federalism, constitutionally protected individual rights (including language and cultural rights), an independent judiciary, and the protection of accrued wealth (property, pensions, civil service jobs), and a process of reconciliation. The latter element later found expression in the Truth and Reconciliation Commission which could give individual pardons for past atrocities. on the basis of full disclosure.

First, for the first five years a government of national unity would operate; any party with 20 percent of the votes could nominate a deputy president and with five percent support was entitled to a cabinet position.

Second, provinces were to be established, each with an elected legislature and executive to which the co-governance mechanism also applied. The legislatures were given a substantial list of legislative competences, but they were all concurrent with the national Parliament and thus subject to potential national laws. The functional areas included: agriculture, education (excluding tertiary education), environment, health services, welfare services, housing, language, public transport, limited policing, roads, trade and industrial promotion, and urban and rural development. In cases of conflict with a national law a low threshold 'override' clause applied in favour of the centre; national legislation would prevail, for example 'on any matter that cannot be regulated effectively by provincial legislation'.¹⁹ The powers were little more than what the four provinces exercised before the advent of the 1983 tricameral constitution.

A guiding principle for demarcating the new provinces was that they could not reflect the ethnic-based bantustans. A small committee of experts was mandated to determine the number of provinces and their boundaries in accordance with a set of criteria, which included economic feasibility, functionality, geography, and community accommodation. Within the allotted six weeks nine provinces and their boundaries were recommended, following largely the Development Bank of South Africa's 'economic' or 'developmental' regions. Linking boundaries to 'economic/development' thus avoided any reference to an ethnic base. Also, although in seven of the nine provinces there were linguistic majorities, the names stayed clear of any ethnic reference. The new provinces were a combination of history and geography: the Cape Province was split into the Eastern Cape, Western Cape and Northern Cape; the Transvaal province was dismembered into North-West, Northern Transvaal, Eastern Transvaal and Pretoria-Witwatersrand-Vereniging; and the two 'old' provinces, untouched by demarcation, retained their old colonial names of the Orange Free State and Natal. All the boundaries were not cast in stone; in the case of given local expressions of support in a referendum, the boundaries with regard to specified areas could be amended. Moreover, the Northern Cape could be disestablished and the Eastern Cape split into two.²⁰

Third, in the absence of group rights and group protection, a supreme constitution would provide individual security through an enforceable bill of rights, which included rights against discrimination

¹⁹ Interim Constitution of South Africa (Interim Constitution), s 126(3).

²⁰ Interim Constitution, s 124(2) read with sch 1(2).

on the basis of race, language and ethnicity. Such rights would be protected by an independent judiciary, with a powerful Constitutional Court at the apex. Fourth, accrued wealth would be protected through an entrenched property clause (providing for just compensation in cases of a state taking), security of pensions, and the continuation of civil service jobs after the transition to a majority government.²¹ Fifth, through a process of truth and reconciliation indemnity for the apartheid security forces was secured.

Self-determination and a volkstaat: Bringing the right-wing Afrikaners on board

While the ANC and the NP were negotiating their compromises, the ANC was fearful of the Afrikaner right-wing's ability to unleash violence that could wreck the transition to democracy. The *Afrikaner Volksfront* (AVF), formed in May 1993 and comprising 40 Afrikaner organisations, was led by General Constand Viljoen, the retired chief of the Defence Force. The AVF claimed that it could muster a volunteer army of over 50 000 trained former SADF members, and could rely on disaffected sections of the SADF.²² In contrast, the ANC was less concerned about the IFP, which they thought they could crush militarily.²³ Starting in August 1993, the ANC, led by Mandela, engaged in secret negotiations with Viljoen.²⁴ Foreign players in the persons of the US ambassador to South Africa, Princeton Lyman²⁵ and the British ambassador, Robin Renwick²⁶ played a limited but valuable facilitation role in this process.

During January and February 1994, the ANC brokered a deal with a group within the *Afrikaner Volksfront*, led by Viljoen, which entailed two crucial concessions: the recognition of the right to self-determination, and the possibility of expressing this right in an own territory, a *volkstaat*, should there be sufficient support for it. This agreement was reduced to the first amendment to the interim Constitution which was signed into law on 3 March 1994.²⁷

A 20 member *Volkstaatraad* (People's State Council) would be established from among those elected members of Parliament who supported the idea of a *volkstaat*. The aim of the *Volkstaatraad* was to provide a 'constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat'.²⁸ The Council's mandate was to investigate the feasibility of a *volkstaat*, including boundaries, powers and functions, and its relationship to the national and provincial governments, and make recommendations to the Constitutional Assembly for the possible establishment of the *volkstaat*. In this regard, the established provincial boundaries were not to be a bar to the creation of a *volkstaat*. A further concession was that there would be two ballots papers – one for the national legislature and the other for the provincial legislatures. The results of the provincial ballot could then be used to test right-wing support for a *volkstaat*.

These concessions were also cemented in the Constitutional Principles. If a *volkstaat* was established before the adoption of the final Constitution, its continuation had to be entrenched in the latter.²⁹

²¹ Welsh (n 7) 526; Asmal and Hadland, with Levy (n 5) 126.

²² Cruywagen (n 3) 138.

²³ *ibid* 140.

²⁴ *ibid* 167.

²⁵ *ibid* 206.

²⁶ **Robin Renwick**, *Mission to South Africa: Diary of a Revolution* (Jonathan Ball 2015).

²⁷ Constitution of the Republic of South Africa Amendment Act 2 of 1994 (Act 2 of 1994).

²⁸ Interim Constitution, s 184(B), added by Act 2 of 1994, s 9.

²⁹ Constitutional Principle XXXIV(3), added by Act 2 of 1994, s 13.

Given the uncertainty of the establishing a *volkstaat*, a very watered down right of self-determination was enshrined in the Constitutional Principles:

- (1) This Schedule [the Constitutional Principles] and the recognition of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within a framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way.
- (2) The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.³⁰

This Constitutional Principle set the parameters of the right to self-determination very narrowly. First, it did not entail the right to secession; it was to be exercised within the ambit of the South African people's right to self-determination. Second, it was a *notion* of right, not the right itself. Third, any recognition need not be territorially based. Fourth, there had to be substantial support from the community sharing a common cultural and language heritage.

These constitutional provisions were sufficient for Viljoen to break away from the *Afrikaner Volksfront*, to establish his own party, the *Vryheidsfront* (Freedom Front), and registered it for the election moments before the registration deadline of 10 March 1994.³¹ Despite the constitutional text, implementing the deal, the Freedom Front still insisted that a tri-party agreement between it, the ANC and the government/NP, reflecting the constitutional amendment, be signed by their respective leaders to cement a personal commitment to the deal. The agreement was eventually signed by Mbeki, De Klerk, and Viljoen on 23 April 1994, four days before the election.³²

Recognizing Zulu nationalism: Bringing the Inkatha Freedom Party on board

Both the ANC and the NP sought to bring Buthelezi and his party to participate in the election. Natal was by then a veritable killing field as the IFP (clandestinely assisted by the SADF and the SAP) fought ANC supporters across the province as well as on the Reef.³³ Buthelezi would not budge and insisted on international mediation on outstanding constitutional issue between the IFP and the main protagonists. Mandela eventually agreed in exchange for the IFP undertaking to register provisionally as a party contesting the election, which it did an hour or so before the Freedom Front.³⁴

At the same time as accommodating the right-wing demands in the first amendment to the Constitution, a sop was thrown by the ANC and NP to the IFP by strengthening the federal elements in the Constitution. These federal provisions did not form part of a comprehensive agreement with the IFP, aimed at securing the latter's electoral participation. They were a concession by the ANC and the NP in the hope that the IFP may come to the party. Some foreign influence may have contributed

³⁰ Constitutional Principle XXXIV(1) and (2), added by Act 2 of 1994, s 13.

³¹ Cruywagen (n 3) 187.

³² *ibid* 210; the agreement is reproduced in Cruywagen (n 3) appendix II 233-35.

³³ See Mary de Haas, 'Violence in Natal and Zululand: The 1990s' in South African Democracy Education Trust (eds) *The Road to Democracy in South Africa, Vol.6 [1990-1996] Part 2* (Unisa Press 2013).

³⁴ Welsh (n 7) 511; Cruywagen (n 3) 187.

to this ‘peace offer’; US Ambassador Lyman may have played a role in ANC’s rapprochement, having repeatedly sought to persuade the ANC to address Buthelezi’s demands for federalism.³⁵

The strengthened federal provisions entailed the following: First, the only exclusive provincial power, that of the drafting of a provincial constitution, was initially very narrow in scope; the provincial constitution had to be consistent with the interim Constitution. The amendment allowed provinces, however, to devise ‘legislative and executive structures and procedures different from those provided in the Constitution’.³⁶ Second, a number of functional areas were added to the concurrent list: airports, consumer protection, provincial sport, soil conservation, and ‘indigenous law and customary law’.³⁷ The inclusion of ‘indigenous law and customary law’ was significant because for the first time the link between ethnicity and provinces was made. Third, original, albeit limited, fiscal powers were introduced. In the original text, any provincial tax had to be authorized by national legislation, reflecting a financing model in terms of which provinces would be dependent on transfers from revenue raised nationally. The amendment gave provinces exclusive taxing powers on ‘casinos, gambling, wagering and lotteries, and betting’,³⁸ an important source of the ‘independent’ bantustans’ meagre own revenue. Fourth, a further Constitutional Principle was added: in the final Constitution, provincial powers and functions ‘shall not be substantially less than or inferior to those provided in [the interim] Constitution’,³⁹ thus affirming the permanent nature of the concessions. Finally, in an amendment aimed specifically at the IFP, there was a name change: Natal became “KwaZulu/Natal”,⁴⁰ the forward slash signifying that the name could go either way in the future.⁴¹ This symbolic move placed for the first time an ethnic label to a province, breaching the non-ethnic principle for subnational governments.

These amendments did not entice Buthelezi to participate in the election and he obdurately insisted on international mediation of constitutional matters.⁴² In April the NP and ANC relented. Henry Kissinger, the former US Secretary of State, and Lord Carrington, the British diplomat who oversaw the negotiations for a democratic Zimbabwe, were engaged but their mandate had not yet been agreed upon when they stepped off the plane in South Africa. The IFP was insisting that the election date be placed on the agenda, a demand the ANC and the NP refused to agree to; both were anxious to bring the transition period to finality. This stalemate sent the two eminent diplomats packing within two days of their arrival. As Cyril Ramaphosa, the chief ANC negotiator, said, ‘if we fall in the trap of mediating the election date, the entire process could have been scuttled’.⁴³ Another foreigner, the Kenyan theologian and old friend of Buthelezi, Washington Okumu, apparently convinced him that staying out of the elections would simply lead the IFP into the political wilderness and more bloodshed would follow.⁴⁴ A week before the election day Buthelezi stepped back from the brink, accepted Mandela’s proposal for the constitutional recognition of the Zulu monarch,⁴⁵ and agreed to participate in the election, gaining an ostensibly insignificant amendment to the Constitution. A provincial constitution could provide for ‘the institution, role authority and status of a traditional monarch in the province’,

³⁵ Welsh (n 7) 491.

³⁶ Act 2 of 1994, s 7.

³⁷ *ibid* 14.

³⁸ Act 2 of 1994, s 4.

³⁹ Constitutional Principle XVIII(2), Act 2 of 1994, s 13.

⁴⁰ Act 2 of 1994, s 1.

⁴¹ In the final Constitution the name became hyphenated: ‘KwaZulu-Natal’, indicating a joining together of two parts.

⁴² Welsh (n 7) 510.

⁴³ Quoted in Sparks, *Tomorrow is Another Country* (n 9) 174.

⁴⁴ Welsh (n 7) 516.

⁴⁵ Sparks, *Tomorrow is Another Country* (n 9) 173.

and in the case of KwaZulu/Natal, there must be a provision for the 'Zulu monarch'.⁴⁶ The recognition of a traditional monarch, lying at the apex of an ethnicity culture and identity, would give those provinces with a majority ethnic group, a distinct ethnic colour. In the case of KwaZulu/Natal the reference to the Zulu monarch made that province unmistakably Zulu. Moreover, this was not a transitional arrangement; the provision in a provincial constitution relating to 'the institution, role authority and status of a traditional monarch' was cemented in the Constitutional Principles.⁴⁷ The agreement with Buthelezi further included that the IFP issues with the 1993 Constitution were to be addressed by international mediation.⁴⁸

The Constitution of 1996

The miraculously peaceful election on 27-29 April 1994 swept the ANC into power with 62,6 percent of the vote. The National Party garnered 20,4 percent, the IFP 10,5, and the Freedom Front (FF) 2,2. The NP was thus entitled to a deputy presidency and the IFP to two ministerial posts in the Government of National Unity. The IFP's support was primarily located in the most populous province of KwaZulu/Natal, where it got 50.3 percent of the vote. Evidence suggests, however, that the ANC chose not to contest the fairness of the balloting process in KwaZulu/Natal, despite strong evidence of irregularities such as ballot box stuffing, which favoured the IFP, in order to have the IFP part of the new governance regime.⁴⁹ The FF's overall support of 424 555 votes on the national ballot and over 640 000 on the provincial ballots was spread across the provinces, with no more than six percent in any province. While the IFP won the governance of a province, the seven elected FF MPs could not find any territory where there was 'substantial proven support within the community' for a *volkstaat*. While white support for the NP was diluted across the country, it could only capture the Western Cape with the support of coloured voters.

In KwaZulu/Natal the IFP, in a show of hubris, immediately commenced a process of drafting a provincial constitution, aiming to establish a truly federal dispensation, including its own police force and constitutional court. On the face of it, the adopted provincial constitution, cynically supported by the ANC to achieve two-thirds support in the provincial legislature, conflicted sharply with the interim Constitution. As the Constitutional Court had to certify that the provincial constitution was consistent with the interim Constitution, the KwaZulu/Natal constitution floundered spectacularly before the new apex court.⁵⁰

With the distribution of political power crystalized, the Constitutional Assembly proceeded with negotiating the final Constitution. The ANC was shy of the required two thirds majority to go it alone, so compromises with the NP or the IFP were required. The NP was, however, under the cosh; if they failed to reach agreement, the Constitution, approved by a simple majority, would be submitted to a referendum where only 60 percent support was required for final approval. The IFP, although taking up cabinet posts, withdrew from the CA on the grounds that that the ANC reneged on a promise to submit constitutional disputes to international mediation. However, before exiting the CA, the IFP

⁴⁶ Constitution of the Republic of South Africa Second Amendment Act 3 of 1994 (Act 3 of 1994), s 1.

⁴⁷ Act 3 of 1994, s 2, amending Constitutional Principle XIII.

⁴⁸ Welsh (n 7) 516.

⁴⁹ See Peter Harris, *Birth - The Conspiracy to Stop the '94 Election* (Umuzi 2010); Welsh (n 7) 556.

⁵⁰ *In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996* [1996] (11) BCLR 1419 (CC). The Constitutional Court also failed to certify on the first round a Western Cape provincial constitution, through a narrow reading of the new Constitution, which was similar to the interim Constitution on this point (*In re: Certification of the Constitution of the Western Cape* [1997] (9) BCLR 1167 (CC)).

submitted a detailed proposal for a fully fledged American-styled federation, drafted by Buthelezi's close confidant and adviser, the American-born Mario Ambrosini.

Negotiating from a position of strength the ANC sought to reclaim some ground that it lost in the negotiations. The powers of the provinces were overall reduced, despite the fact that, in compliance with the Constitutional Principles an 'anorexic' list of exclusive powers were added to the concurrent ones.⁵¹ One of the areas of loss was their control of local government. In the interim Constitution local government was a competence of provinces. In the final Constitution local government was elevated to a 'sphere of government' alongside the national and provincial governments, and its original constitutional powers effectively hollowed out some provincial powers.⁵² The result has been referred to as South Africa's 'hour-glass federation': the provinces are squeezed thin between a powerful local government (led by the metropolitan municipalities) from the bottom and a dominant national government from the top.⁵³

The asymmetrical provisions to placate the Afrikaner right wing and the Zulu nationalists disappeared. The interim Constitution's requirement of the mandatory recognition of the Zulu monarch was absorbed in a generalised provision that a province may give recognition to a traditional monarch in a provincial constitution.⁵⁴ The *Volkstaat*'s quest for a *volkstaat* proved quixotic; there was no identifiable area where right-wing Afrikaners could muster substantial support. The ANC's calculated risk was vindicated. The FF's next glimmer of hope was the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. However, the mere fact that this Commission also included religious communities, constrained the Commission from performing any protective role for territorially-based ethnic communities.⁵⁵ All that remained of the original deal was the inclusion of the very circumscribed 'notion' of the right to self-determination.⁵⁶

The peace-making constitution-building process that ensued after the unbanning of the ANC in 1990 proved to be very effective; after a period of six years a stable, legitimate, and highly regarded constitutional dispensation was established which dealt decisively with the political salience of territorial cleavages of the time.

The outcome

In celebrating two decades of democracy in 2014, a remarkable feature has been the withering away of the politics of territory. All major parties are national parties. Right-wing Afrikaner territorial claims have evaporated, KwaZulu-Natal is now firmly supportive of the ANC and its centrist ideology. The provincial system has not spawned territorially-based political parties, yet it provides a safety net for

⁵¹ The Constitutional Court, having to certify that the Constitution was in accordance with the Constitutional Principles, found that provincial powers were substantially less than in the interim Constitution, *In re: Certification of the Constitutional Text 1996* [1996] (10) BCLR 1253 (CC). With a few minor amendments, which did not significantly increase provincial powers, the final text was approved, *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, [1997] (1) BCLR 1 (CC).

⁵² Nico Steytler and Jaap de Visser, *Local Government Law of South Africa* (LexisNexis 2007) ch 1.

⁵³ Nico Steytler, 'National, Provincial, and Local Relations: An Uncomfortable *Menage à trois*' in Harvey Lazar and Christian Leuprecht (eds), *Sphere of Government: Comparative Studies of Cities in Multilevel Governance Systems* (McGill-Queen's University Press 2007) 229-56.

⁵⁴ Nico Steytler and Johann Mettler, 'Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy' (2001) 31 (4) *Publius: Journal for Federalism* 93, 99.

⁵⁵ *ibid* 100-01.

⁵⁶ Constitution of 1996, s 235.

residual ethnic interests. However, the black/white cleavage remains endemic so that the economic compromise remains open to question.

The search for a territorial *volkstaat* evaporated soon after its articulation. Already by 1996 the dream of an Afrikaner homeland was shown to be a mirage. By 2003 Allister Sparks, a veteran political commentator, could declare that the separatist movement was dead.⁵⁷ It did not, however, mean the end of fringe groups clinging to the idea, some resorting to violence. After a ten year trial, 19 *Boeremag* members (Boer Force) were sentenced in October 2013 to between 10 and 48 years' imprisonment for conspiring to overthrow the ANC government in the early 2000s. The Afrikaner settlement of Orania, established on the banks of the Orange River in 1990, has attracted over the next 25 years no more than a thousand adherents. The *volkstaat* dream has become more modest and local; in the capital city of Tshwane (Pretoria) a small group of Afrikaners at Kleinfontein, around a thousand souls, seeks some level of local self-government within the larger municipality. The Freedom Front (now styled Freedom Front Plus after incorporated other fringe Afrikaner parties) attracted less than 0.9 percent of the national vote in 2014, obtaining only four seats in Parliament.

The failure to install the Zulu monarch in KwaZulu-Natal, foreshadowed the demise of Zulu nationalism under the tutelage of the IFP. From the start, there was no unified Zulu political grouping. The Zulu community was divided between ANC-supporters in the urban areas and rural, traditionalists IFP-supporters. From the outset the ANC drove a wedge between King Zwelentini and Buthelezi. The 1994 election results further indicated that the IFP 'managed' only half of the vote in the province. Ever since then the party has been in decline. In 1999 the IFP lost its majority (41.9 percent), but was still the largest party, followed by the ANC (39.4 percent), and the two parties formed a coalition provincial government. By the 2004, the ANC was the dominant party (46.9 percent) and it formed the government without the participation of the IFP. By 2009 the ANC, now under the leadership of Jacob Zuma, who, with his four wives, is more of a Zulu traditionalist than Buthelezi, was victorious with 63 percent of the vote against the IFP's 22. The 2014 election was almost the death knell of the IFP; while the ANC maintain its support level at 64.5 percent, the main national opposition party, the Democratic Alliance, superseded the IFP as the official opposition with 12.9 percent to the IFP's 10.9 percent of the vote.⁵⁸

The ascendancy of Zuma in the ANC has provoked fears of the 'Zulufication' of the national executive. More than a quarter of all ANC members now hail from KwaZulu-Natal.⁵⁹ Former President Thabo Mbeki has also warned against the rising phenomenon of tribalism, referring to appointment of 'homeboys' by ministers (the largest proportion coming from KZN),⁶⁰ although Mbeki's administrations were accused of favouring Xhosa-speakers – the so-called 'Xhosa Nostra'. The ANC has, however, over its long history managed to rise above ethnic politics in its ranks by being inclusive in both its appeal and practice. Nevertheless, this brings the question of the role of provinces and ethnic mobilization or accommodation to the fore.

⁵⁷ Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Jonathan Ball Publishers 2003) 4.

⁵⁸ The IFP's traditional support base was also eroded by the splintering off of the National Freedom Party which attracted 7.3 percent of the provincial vote.

⁵⁹ Susan Booysen, 'KZN ANC – King-making and Zulufication in the Time of Zuma' (*SABC News*, 6 November 2012) <www.sabc.co.za/news/a/b0ed2a004d5a17f9aed0ffe570eb4ca2/KZN-ANC-%E2%80%93-King-making-and-Zulufication-in-the-time-of-Zuma-20120611> accessed 28 January 2015.

⁶⁰ City Press, 'Thabo Mbeki tackles tribalism', (*News 24*, 14 January 2014) <www.news24.com/Archives/City-Press/Thabo-Mbeki-tackles-tribalism-20150429> accessed 28 January 2015.

The nine provinces were established immediately after the 1994 election, each with its own administration. In six provinces this entailed the absorption of the ten existing Bantustan administrations, including their incapacity, inefficiency and corruption. The result has been that the majority of provinces have not added much value to governance over the past 20 years, and some have shown signs of state failure. The ANC, which only reluctantly embraced the idea of devolution, soon questioned whether provinces were any longer necessary because they have served their role in the transition to democracy. At its 2007 national conference, three options were presented: abolish the provinces, keep the status quo, or reduce their number and refine their functions. At the next ANC national conference in 2012, the answer was that ‘provinces [should] be reformed, reduced and strengthened’.⁶¹ Significantly, the option of abolition has fallen by the wayside. I have argued that the support for province no longer comes from its earlier adherents – the NP and the IFP – but from the ANC itself; local political elites have captured the lucrative provincial expenditure responsibilities (disposing of 43,5 percent of national budget, compared to the 47,5 percent of the national government⁶²), and have in effect provincialized the once centrist ANC.⁶³ The urge within the ANC to reduce the number of provinces is primarily aimed at eliminating the Western Cape, which has entrenched opposition rule through the support of the coloureds, the majority population group in that province.⁶⁴ It was further contended by Yonatan Fessha that the provincial system serves an ethnic equilibrium as it placates ‘the demon of tribalism’;⁶⁵ with language majorities in seven of the nine provinces, it provides the major ethnic groups access to government largesse. As ethnicity was never overtly the rationale for the provinces, they nevertheless reflect below the surface a diluted ‘watermark’ of ethnic federalism.

Lessons learned

The South African constitutional settlement – the miracle of a negotiated revolution that brought three centuries of colonial and white political dominance to an end - has its obvious lessons: a common commitment to peace; the development of trust between the main protagonists; the use of back channels of communications when negotiations deadlocked or broke off; and the willingness to negotiate in the face of violence. For Kader Asmal, a member of the ANC Constitutional Committee and later cabinet member, the commitment to peace was the most important, as he observed: ‘Where there is a commitment to peace, there is *always* a way.’⁶⁶

The lessons emanating from resolving territorial politics are no less instructive. When the interim Constitution was agreed upon principally between the ANC and the NP, they avoided framing the provinces in linguistic/ethnic terms; the weak form of federalism eschewed any reference to ethnicity. However, this framework did not foreclose their willingness to accommodate the two spoilers with explicit ethnic-territorial agendas – the right-wing Afrikaners and Buthelezi’s IFP - in an asymmetrical system. Effecting a divide among the right-wing Afrikaners, and enticing a significant group, the Freedom Front, to join the election were the result of the Mandela magic, shrewd negotiations, facilitation by foreign individuals at key moments, and calculated risk. The ANC agreed to the unthinkable – an ethnic Afrikaner territory in the form of a *volkstaat*. But it was a calculated risk, in

⁶¹ ANC, ‘53rd National Conference Resolutions: Legislatures and Governance’ (December 2012) Resolution 4(2)(1).

⁶² National Treasury, *Budget Review 2014* (National Treasury 2014) 94.

⁶³ Nico Steytler, ‘The Politics of Provinces and the Provincialisation of Politics’ in Tiyanjana Maluwa (ed), *Law, Politics and Rights: Essays in Memory of Kader Asmal* (Brill/Nijhoff 2014) 191-214.

⁶⁴ *ibid.*

⁶⁵ See Yonatan Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Ashgate 2010).

⁶⁶ Asmal and Hadland, with Levy (n 5) 132 (emphasis in the original).

which the ANC was confident of the outcome because it bound the Freedom Front into a democratic process to seeking a mandate and location for the *volkestaat*. The strategy was an open-ended process which allowed the quest for a *volkestaat* to play itself out. As everyone else but the Freedom Front could see, it was quixotic from the start.

Dealing with the Zulu nationalism of the IFP and an obdurate Buthelezi, a not entirely dissimilar strategy was followed which resulted in the partially asymmetrical constitutional accommodation of March 1994. The weak federal arrangements were symmetrically strengthened for all provinces, while limited asymmetrical accommodation of ethnicity was countenanced. Going against the grain of the ANC ideology of non-ethnicity, the bantustan name KwaZulu was added to the colonial Natal. Moreover, the provinces were given the concurrent competence over customary law, which was most developed in KwaZulu/Natal. It is important to note that the negotiating process preceding the March 1994 amendments was made in the absence of the IFP as a direct negotiating party. The result was that the enlargement of the provincial powers did not bind the IFP into the election, but it had the important effect of undercutting some of the IFP's federal demands. When direct negotiations with the IFP did commence on the eve of the April election, it was largely a symbolic, asymmetrical gesture of recognizing the Zulu monarch for KwaZulu/Natal. Although the very notion of recognizing a monarch in a republican form of government is a contradiction in terms, this political system was applied supplely enough to accommodate a localised political solution.

What drove the innovative strategies for, and solutions to, territorial politics was a common desire for peace. The deal the ANC struck with the Freedom Front was driven by both the ANC's fear of the potential destructive force the right wing could command to scupper the democratic transition, and Viljoen's aversion to unleash a civil war. Peace also was also a key factor in Buthelezi's joining the elections. But peace on the ground was conditional on progress towards full democracy; negotiations continued against the backdrop of violence. Although the overall approach was that the process towards democratisation could not be upheld by the side issues of lesser players, the potential for violence by the spoilers gave urgency in the negotiations and the willingness to negotiate quite fundamentally. It was the rigidity of the election date that allowed the impossible to happen. Seven days before the election date Buthelezi joined in, the interim Constitution was amended two days later, and the IFP logo was glued to 80 million printed ballot papers.

When De Klerk announced the unbanning of the ANC on 2 February 1990, it was not conceivable that the first democratic election would be held four years later, followed by a final constitution two years hence. The election date of 27 April 1994 was only fixed nine months before the event. However, the process culminating in that event had in the main evolved in a planned manner. Hard at work were the main protagonists devising a road map, starting with the cessation of hostilities in the first accords in 1990, to the election date. Given that the main areas of contention between the ANC and the NP dominated negotiations, there was no road map for the territorial issues. Only as an add on, raised by the spoilers' capacity to unleash violence, were these major issues dealt with in the six months before the election.

The participation of the FF and the IFP illustrates best the limited role of international actors played in managing the process. Indirectly, the end of the Cold War prompted the process towards democratisation, but there was no direct involvement in the process itself or for any one of the main protagonists. There were international funds and advisers for some parties, including experts on minority rights advising the right wing and the IFP. The ambassadors of the US and Britain played a useful facilitative role at key moments at an interpersonal level. The only attempt at direct intervention

was when Buthelezi demanded international mediation, but Henry Kissinger and Lord Carrington returned empty handed. On the whole, the process was managed and completed without the help of outsiders,⁶⁷ which has the important benefit of South Africans owning the process and the products, seeing themselves as the makers of ‘the small miracle’. However, South African negotiators drew much on foreign experience and experts on particular aspects of the constitutions. The German model of federalism based on the principle of *Bundestreue* was important for the ANC agreeing to the provincial system in the interim Constitution and the Bundestag was the basic model for the National Council of Provinces in the 1996 Constitution.

In the search for compromises (all of which were per definition reluctantly made) the legal text of agreements was often couched in ambiguity in key areas. Textual ambiguity worked in two ways. First, the ambiguous or open text provided both the principal protagonists with sufficient language to convince their followers that ‘we got what we wanted’, an important face-saving exercise. Second, ambiguity also allowed the parties to calculate that the open text may swing their way by anticipated future dynamics. A further important negotiating device was temporizing, allowing the temporary compliance with the requirements of the occasion, but avoiding a final commitment.

On the agreement by the ANC and the NP of the interim Constitution in November 1993, Joe Slovo, a key ANC negotiator, is quoted saying that the agreement would not be ‘*remotely* a federation... We’ve managed to give them devolution without losing control.’⁶⁸ Earlier Roelf Meyer, the chief NP negotiator, claimed that ‘we have a regional dispensation with all the hallmarks of federalism.’⁶⁹ Both could subjectively be correct if each understood federalism in their own particular way, but this is not likely. David Welsh, the eminent historian, commented that ‘underpinning the “sufficient consensus” was the illusion of agreement between the ANC and the NP concerning provincial powers whose actual extent was shrouded in vagueness.’⁷⁰ He further conjectures that Meyer probably believed that the text established a ‘proto-federal Constitution’ and that once the provinces were established, they would use their limited space to press for more powers in the Constitutional Assembly.⁷¹ As Welsh astutely notes, ‘federal systems create political subsystems at the regional level, and then, in time tends to federalise national parties’, a fact that the NP may then have thought could benefit it NP and not the ANC.⁷² In temporizing on the extent of provincial powers by leaving it to the Constitutional Assembly, the opposite occurred; the ANC managed to reduce the powers of provinces to become little more than administrations. We have argued elsewhere that the use of ambiguity in ‘federal solutions’ is a dominant pattern followed in most ‘federal’ dispensations in Africa, giving rise to the notion of ‘fragile federalism’ – ambiguous provisions that are in practice decidedly skewed in favour of the centre resulting in weak subnational governments.⁷³

Temporizing and ambiguity was the name of the game that the ANC played with Viljoen. No final decision was made on a *volkstaat* but left it to the future depending on actual support for the idea and following an agreed constitutional process. The only concrete measure Viljoen could extract from the ANC was entrenching the principle of self-determination for cultural/linguistic groups. As quoted

⁶⁷ Sparks, *Tomorrow is Another Country* (n 9) 151.

⁶⁸ Quoted in Welsh (n 7) 508 (emphasis in the original).

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.* 495.

⁷³ Nico Steytler and Jaap de Visser, ‘“Fragile Federalism” and the Dynamics of Devolution’ in Francesco Palermo and Elisabeth Alber (eds), *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (Brill/Nijhoff 2015) 79-101.

above, the text expressing the principle is so ambiguously worded and circumscribed, that it has no constitutional purchase and remains an empty promise. The seasoned journalist, Dennis Cruywagen, more cynically concludes that the ANC never had any intention of granting Viljoen his *volkstaat*; this goal was from the beginning to trap the general into participating in the election and turning his back on armed resistance.⁷⁴

Referendums and elections played a definitive role in achieving democratisation. The referendum among white voters emboldened De Klerk to continue with the process of negotiations towards majority rule. However, the NP's negotiating positions was constrained by the agreement in the interim Constitution that should the Constitutional Assembly fail to pass the text by a two-thirds majority, the text approved by a simple majority would be submitted to a referendum requiring only 60 percent support. And the 1994 election results indicated that the ANC could go it alone.

The 1994 election was key to the success of the process of democratisation. First, setting the date in July 1993, and cementing it in the political process and popular expectations, meant that the negotiating process for the interim Constitution had a finite time frame. Second, it gave urgency to get the spoilers on board and also for them to make hard decisions. Viljoen had to decide whether to embark on a bloody civil war or register the Freedom Front for the election, which was done moments before the final registration date for political parties expired. While the date for joining the election was flexible, the election date was not. With a week to go before the 27 April election, Buthelezi buckled and joined the election process. The election not only ushered in majority rule, but also provided a popular mandate for the Constitutional Assembly. As Kader Asmal strongly asserted, without such a mandate the Constitution would have no legitimacy.⁷⁵

Elections also run risks of upsetting political compromises. In the violence-steeped KwaZulu/Natal, the ANC must have strategized that keeping Buthelezi and the IFP in the governance fold was key to peace in that province. Squeaking in with barely ten percent of the vote nationally ensured Buthelezi a cabinet position in the Government of National Unity. Losing the highly contested KwaZulu/Natal legislature to the ANC, would have rendered the IFP a bystander in the Zulu Kingdom. When the IFP garnered a bare 50 percent of the vote, the ANC did not allow its party's provincial leaders to contest the fairness of the elections despite clear evidence of irregular voting practices and ballot box stuffing. For the sake of peace, the ANC leadership allowed the IFP to elect the premier of the province.

In conclusion, looking back with the hindsight of 27 years, it is clear that the constitution-making process and products did solve the problem of territorial politics. The political salience of territorial cleavages, in the form of the Afrikaner right-wing and Zulu nationalist, has withered away. However, as Sparks remarked already in 1995, '[t]hrough ethno-nationalism may not again become the driving force in South African politics, it is a devil to be watched'.⁷⁶ The ever present danger of 'the demon of tribalism' or ethnic mobilisation has to some extent been undercut by the provincial system that provides oblique accommodation to linguistic/ethnic communities, although chauvinistic politics at the centre may undo this function. The black/white cleavage, however, remains the dominant one. With wealth distribution still highly unequal in favour of whites, black political demands are that the political transition must now be followed by an economic revolution, in which the ANC/NP compromise on property rights may not have a place.

⁷⁴ Cruywagen (n 3) 208.

⁷⁵ Asmal and Hadland, with Levy (n 5) 129.

⁷⁶ Sparks, *Tomorrow is Another Country* (n 9) 180.

AUTHOR

Nico Steytler is the South African Research Chair in Multilevel Government, Law and Policy at the Dullah Omar Institute of Constitutional Law, Governance and Human Rights at the University of Western Cape. He researches multilevel government in South Africa, elsewhere in Africa, and further afield.

CONTRIBUTING ORGANIZATIONS

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Forum of Federations
75 Albert Street, Suite 411 Ottawa, Ontario
Canada K1P 5E7

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