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Authorizing Subnational Constitutions in Transitional Federal States

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Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution

*Jonathan L. Marshfield**

ABSTRACT

Not all federal systems permit their constituent units to adopt constitutions. This Article considers whether, and under what circumstances, subnational constitutions tend to contribute to the volatility or stability of their respective federal systems. By examining the role that subnational constitutions played in South Africa's celebrated democratization, this Article observes that a transitional federal state can increase its flexibility and adaptability by merely authorizing subnational constitutions. The Article concludes that federal systems, particularly those undergoing fundamental change, can be better equipped to manage regime-threatening conflicts and perpetuate a democratic political culture if they permit constituent units to adopt constitutions.

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I. INTRODUCTION

To make peace with an enemy one must work with that enemy, and that enemy becomes one's partner.

—Nelson Mandela¹

Scholars of subnational constitutional law tend to focus on the significance of subnational constitutions as independent sources of law.² In the United States of America, for example, state constitutions are frequently celebrated as an alternative source of justiciable substantive rights.³ Comparative studies also emphasize

1. NELSON MANDELA, *LONG WALK TO FREEDOM* 533 (1994) (referring to Nelson Mandela's relationship with the last apartheid-era president, F.W. de Klerk—particularly with respect to their shared receipt of the 1993 Nobel Peace Prize).

2. See, e.g., Ronald Watts, *Provinces, States, Länder and Cantons: Content and Variations Among Subnational Constitutions of the World*, in *SUBNATIONAL CONSTITUTIONAL GOVERNANCE* 11, 11 (1999) (offering a survey of the legal status of subnational constitutions in South Africa, the United States of America, Switzerland, and Germany); James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 *RUTGERS L.J.* 1059, 1059–61 (1989) (emphasizing the need for comparative study of subnational constitutions across various federal systems).

3. See, e.g., Stewart G. Pollock, Assoc. J., Sup. Ct. N.J., *State Constitutions as Separate Sources of Fundamental Rights*, Address at the S.I. Newhouse Center for Law and Justice in Newark, N.J. (Apr. 27, 1983), in 35 *RUTGERS L. REV.* 707, 710–13 (1983) (discussing three theories of state constitutional interpretation in view of the relationship between state constitutions and the Federal Constitution). Justice Brennan is widely credited with the “rediscovery” of broader state protections for individual rights, which has come to be known as the “new judicial federalism.” See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489, 503 (1977) (“[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.”); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 *N.Y.U. L. REV.* 535, 548–53 (1986) (expanding on same observations); see also G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 *NOTRE DAME L. REV.* 1097, 1099–1106 (1997) (providing a historical account of the new judicial federalism). For a quintessential example of Justice Brennan's observations, see *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970), where the Alaska Supreme Court held that the Alaska Constitution guarantees a broader right to trial-by-jury than the Federal Constitution. In that case, the Supreme Court of Alaska forcefully and eloquently stated:

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

the substantive content of subnational constitutions,⁴ usually focusing on obscure asymmetries between subnational units⁵ or unique distributions of power between central and regional government.⁶ That perspective is important. It is primarily a legal inquiry, however, aimed at drawing attention to subnational constitutions as alterative sources of law.⁷

Curiously, scholars have largely ignored the threshold question of whether particular federal systems should or should not authorize subnational constitutions. Despite the variety of arrangements that exist regarding the authority of subnational units to adopt constitutions,⁸ few studies have investigated the circumstances under which those arrangements contribute to the stability or volatility of their respective federations.

4. E.g., Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625, 650–51 (1999), reprinted at 63 J. OF CONTEMPORARY ROMAN DUTCH L. 367, 385–86 (2000) (arguing for the possibility that provincial constitutions in South Africa may provide greater substantive protections than South Africa's National Constitution); Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Lander and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3 (G. Alan Tarr et al. eds., 2004) (analyzing the substantive legal space afforded subnational constitutions in different federal systems).

5. E.g., Robert Agranoff, *Asymmetrical and Symmetrical Federalism in Spain: An Examination of Intergovernmental Policy*, in EVALUATING FEDERAL SYSTEMS 61 (Bertus de Villiers ed., 1994) (evaluating the asymmetrical structural arrangements in Spain).

6. E.g., Ronald L. Watts, *States, Provinces, Landers, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941 (2000) (examining the various structural arrangements in which subnational constitutions tend to appear).

7. E.g., Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 310–21, 325 (1999) (surveying the developing judicial interpretations of Germany's subnational constitutions on the issue of social welfare); Watts, *supra* note 6, at 953–58 (surveying the diversity of substantive provisions that appear in subnational constitutions and specifically noting that within South Africa's system the provinces are permitted to draft constitutions that recognize a traditional monarch).

8. India's federal arrangement, for example, devolves significant substantive powers to its constituent states but prohibits the states from adopting constitutions. See INDIA CONST. arts. 3, 168–212 (describing the competence of India's states and the authority of the federal government to abolish states or remove their governments); see also Daniel J. Elazar, *State Constitutional Design in the United States and Other Federal Systems*, 12 PUBLIUS J. FEDERALISM, no. 1, at 1, 9 (1982) (describing India's structural arrangement). Conversely, the United States of America has required states to adopt constitutions before admitting them into the Union. See U.S. CONST. art. IV, § 3, cl. 1 (authorizing Congress to admit new states into the Union); Julien C. Monnet, *Violations by a State of the Conditions of Its Enabling Act*, 10 COLUM. L. REV. 591 (1910) (discussing Congress's constitutional requirements for applicant states). South Africa's federal system presents an interesting variation on those two extremes because it *permits*, but does not require, provinces to adopt constitutions. S. AFR. CONST. 1996 § 142.

Nevertheless, South Africa's remarkable transition from apartheid to democracy suggests that federal systems, particularly those experiencing fundamental political change, can benefit from *merely authorizing* subnational constitutions. Subnational constitutions are, at best, a nominal source of substantive law in South Africa.⁹ Indeed, only one of the nine provinces, the Western Cape, has successfully adopted a constitution, and its content was rather unremarkable.¹⁰ However, since 1993, South Africa's various constitutional arrangements have permitted the provinces to adopt constitutions.

In accordance with that allocane, the province of KwaZulu-Natal (KZN) produced an extravagant draft-constitution during South Africa's national constitutional negotiations in 1996.¹¹ Although the constitution itself never became operative law,¹² the KZN constitution-making process was instrumental in South Africa's successful transition to democracy because it played an essential role in dissolving the regime-threatening conflict between the Inkatha Freedom Party (IFP) and the African National Congress (ANC).¹³ Further, the availability of subnational constitutions within South

9. See *infra* Part II (discussing South Africa's constitutional structure and the limited significance of provincial constitutions therein). See generally Stuart Woolman, *Provincial Constitutions*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 21-i (Stuart Woolman et al. eds., 2d ed. 2006) (discussing the legal status of provincial constitutions within South Africa's structural framework and concluding that provincial constitutions "will never amount to more than window dressing"). Nevertheless, provincial constitutions were a highly controversial issue during South Africa's transformation, and their availability, rather than their substance, proved useful during the transition. See Dirk Brand, *The Western Cape Constitution*, 31 RUTGERS L.J. 961, 961 (2000) (discussing the debate over whether provinces should have their own constitutions).

10. See *infra* Part II.B (discussing the Western Cape Constitution); see also Brand, *supra* note 9, at 961 (discussing the Western Cape Constitution's content and the attendant drafting process). The other eight provinces operate under the "default" provisions of the National Constitution. See S. AFR. CONST. 1996 §§ 104–141.

11. See *infra* Part IV (discussing the 1996 KZN Constitution).

12. See *infra* Part IV; see also *infra* Part II (describing the procedures for adopting a provincial constitution). Although the KZN parliament approved the draft constitution, South Africa's National Constitution requires that provincial texts be certified by the Constitutional Court before they become operative. S. AFR. CONST. 1996 § 144. Because various portions of the KZN document usurped national powers, the Constitutional Court declined to certify the text. *In re Certification of the Const. of the Prov. of KwaZulu-Natal (KZN Certification)*, 1996 (11) BCLR 1419 (CC) at 54–55 (S. Afr.).

13. See Suzanne Daley, *South African Democracy Stumbles on Old Rivalry*, N.Y. TIMES, Jan. 7, 1996; BRONWEN MANBY, HUMAN RIGHTS WATCH, "TRADITIONAL" DICTATORSHIP—ONE PARTY STATE IN KWAZULU HOMELAND THREATENS TRANSITION TO DEMOCRACY (Sept. 1993), available at <http://hrw.org/reports/1993/southafrica2/#6> [hereinafter TRADITIONAL DICTATORSHIP]; see also *infra* Part III (discussing the nature and significance of the conflict between the ANC and the IFP). See generally ANTHEA JEFFERY, *THE NATAL STORY: 16 YEARS OF CONFLICT* 213–676 (1997) (documenting, in detail, the low grade civil war between the ANC and the IFP).

Africa's federal system proved to be a vital bargaining tool during the delicately negotiated transition to democracy.

The South African narrative reveals that the availability of subnational constitutions can dramatically affect a federal system's flexibility and adaptability. Specifically, federal states that authorize subnational constitutions can increase the array of political compromises available to disputing parties and can accommodate various layers of constructive political interaction. That increased elasticity and utility can be particularly valuable for a transitional federal state, where successful regime change often depends on the system's ability to institutionalize regime-threatening conflicts and assimilate marginalized factions. In short, South Africa's experience illustrates that transitional federal systems are better equipped to manage regime-threatening conflicts¹⁴ and perpetuate a democratic political culture¹⁵ if they permit constituent units to adopt constitutions.

This Article examines South Africa's federal structure and the role that subnational constitutions played in successfully managing the infamous conflict between the IFP and the ANC. Part II is a brief legal analysis of South Africa's constitutional framework with an emphasis on the nominal importance of subnational constitutions as *sources* of law. Part III provides an account of the low-grade civil war that occurred between the ANC and the IFP—the central conflict that threatened the country's transition to democracy. Part IV uncovers the details of the subnational constitution-making that accompanied the ANC/IFP conflict. Part V considers the ways in which the availability of subnational constitutions helped to manage the ANC/IFP conflict and facilitate successful transition at the national level. Finally, Part VI discusses the role that subnational constitution-making played in the political socialization of both the ANC and the IFP.

II. THE LEGAL STATUS OF PROVINCIAL CONSTITUTIONS IN SOUTH AFRICA

South Africa's current structural framework originated with the 1993 Interim Constitution (IC).¹⁶ The IC demarcated nine

14. See discussion *infra* Part V.

15. See discussion *infra* Part I.

16. The IC was negotiated between the South African government and a coalition of liberation organizations—the most significant of which was the ANC. The IC established a bicameral legislature consisting of the National Assembly and the Senate. S. AFR. (Interim) CONST. 1993 § 36; see also LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 257–58 (3d ed. 2001) (discussing the content and nature of the IC). The IC also created the Constitutional Assembly, which was a unique body that consisted of both chambers sitting jointly for the purpose of drafting the permanent

subnational units, termed provinces,¹⁷ and established executive¹⁸ and legislative¹⁹ branches in each province. It also authorized the provinces to adopt their own constitutions by a two-thirds majority of the provincial legislature.²⁰ However, the provinces were designed to function effectively without constitutions and the IC provided “full particulars” on all necessary provincial government institutions.²¹ In 1996, the National Constitution (NC) replaced the IC²² and, with minor exceptions, reaffirmed the IC’s constitutional structure.²³

A. *The Provinces’ Limited “Constitutional Space”*²⁴

South Africa is a devolutionary federal system.²⁵ A unitary state theoretically preceded any subnational units, and that state

national constitution. S. AFR. (Interim) CONST. 1993 § 68; *see also* I.M. RAUTENBACH & E.F.J. MALHERBE, CONSTITUTIONAL LAW 18 (4th ed. 2004) (providing a concise summary of the legal arrangements during the transition to democracy); Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 69–77 (1999) (providing a thorough review of the drafting process). *See generally* Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse Into South Africa’s Journey Towards Democracy*, 13 ARIZ. J. INT’L & COMP. L. 463, 479–83 (1996) (discussing the general history and structure of the IC).

For an exhaustive review of subnational constitutions throughout South Africa’s history and a legal analysis of South Africa’s current structural framework, *see* Rassie Malherbe & Dirk Brand, *South Africa: Sub-National Constitutional Law*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONSTITUTIONAL LAW, SUB-NATIONAL CONSTITUTIONAL LAW 1, at 1, 13–23, 75–116 (André Alen et al. eds., 2001).

17. S. AFR. (Interim) CONST. 1993 § 124(1).

18. *Id.* § 144(1).

19. *Id.* § 125(1).

20. *Id.* § 160.

21. RAUTENBACH & MALHERBE, *supra* note 16, at 244 & n.22; *see In re Certification of the Const. of the Western Cape* 1997 (9) BCLR 1167 (CC) at 24 (S. Afr.) (“[The National Constitution] provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executives.”).

22. *In re Certification of the Amended Text of the Const. of the Republic of S. Afr.*, 1997 (1) BCLR 1 (CC) para. 205 (S. Afr.). The permanent National Constitution became effective on February 4, 1996. *See* RAUTENBACH & MALHERBE, *supra* note 16, at 18 (discussing the legal relationship between the IC and the NC).

23. *See* RAUTENBACH & MALHERBE, *supra* note 16, at 241–72 (providing a legal analysis of South Africa’s current structural framework in respect of provincial government and constitutional competence).

24. The term “provincial constitutional space” is intended to adopt the concept of “subnational constitutional space” as developed in Williams & Tarr, *supra* note 4, at 15–16. In that article, the term “subnational constitutional space” refers to the substantive competency of subnational units within their respective federal systems. *Id.* That is, the substantive areas that subnational polities have the authority to include in their constitutions.

25. Scholars frequently refer to two models of federal systems: integrative federalism and devolutionary federalism. *See, e.g.*, Williams, *supra* note 4, at 640 (setting forth Koen Lenaerts’ description of the two models). Koen Lenaerts has distinguished those two models as follows:

subsequently instituted the provinces.²⁶ The provinces are creatures of the national government and have only those powers specifically conferred on them by the NC.²⁷ Thus, the constitutional competency of the provinces is limited to the NC's express delegation of authority.²⁸ Stated differently, provincial "constitutional space" is circumscribed rather than plenary.

To ensure that provincial constitutions do not contain ultra vires content, they must be certified by the national Constitutional Court (Court) before they can become law.²⁹ Certification involves a two-step legal analysis. First, the Court evaluates every provision to ensure that the entire document is within one of the enumerated provincial competencies.³⁰ Second, the Court must certify that no provision is inconsistent with any provision of the NC.³¹

There are three provincial constitutional competencies.³² First, a provincial constitution may include any provision that would fall

Integrative federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government with direct operation on the people inside its sphere of powers is pursued under respect of the powers of the component entities, at least to the extent that the use by the latter of these powers does not revert into divisiveness

Devolutionary federalism, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary State among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal concern is to organize diversity in unity.

Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 206 (1990).

26. Indeed, Section 1 of the NC declares that "[t]he Republic of South Africa is one, sovereign, democratic state." S. AFR. CONST. 1996 § 1. In *In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, the Constitutional Court stated: "In the result, what is contemplated by [the NC] 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 NC." 1997 (1) BCLR 1 (CC) para. 350 (S. Afr.). Thus, it is clear that South Africa's federal system is devolutionary in nature.

27. See *KZN Certification*, 1996 (11) BCLR 1419 (CC) at 23 (S. Afr.) ("It is clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic. After all, the provinces are the recipients and not the source of power.").

28. *Id.*; see also Malherbe & Brand, *supra* note 16, at 65-67 (examining the status of the provinces within South Africa's constitutional order).

29. S. AFR. CONST. 1996 § 144. The permanent NC was subject to a similar certification process. *In re Certification of the Amended Text of the Const. of the Republic of S. Afr.*, (1) BCLR 1 para. 1.

30. S. AFR. CONST. 1996 § 143(2)(b).

31. *Id.* § 143(1); see also *KZN Certification*, (11) BCLR 1419 at 17-18 (articulating the certification analysis); RAUTENBACH & MALHERBE, *supra* note 16, at 245 (same).

32. See RAUTENBACH & MALHERBE, *supra* note 16, at 244-47 (discussing provincial constitutional competencies); Malherbe & Brand, *supra* note 16, at 86-88 (same); Woolman, *supra* note 9, at 21-5 to -14 (same).

within the province's legislative authority.³³ Second, a provincial constitution may establish "executive and legislative structures and procedures" that differ from the default provisions of the NC.³⁴ Finally, provincial constitutions may provide for "the institution, role, authority and status of a traditional monarch."³⁵

Provincial government's legislative authority is defined in Schedules 4 and 5 of the NC. Schedule 4 lists areas of concurrent national and provincial legislative competence, with the most notable being traditional leadership, trade, tourism, housing, and education.³⁶ Schedule 5 lists twelve rather insignificant areas of exclusive provincial competency.³⁷ Thus, because the provinces can legislate in respect of traditional leadership under Schedule 4, government structure and procedure is the only constitutional competence that is not also within a province's legislative authority.

That overlap between constitutional and legislative competency is significant because of the NC's conflict of law rules. The NC provides specific rules with respect to how conflicts between national

33. That competency is implied by Section 143 of South Africa's Constitution, which prohibits provincial constitutions from enlarging the substantive competencies of the provinces beyond those enumerated in Section 104. S. AFR. CONST. 1996 §§ 104, 143. Furthermore, the Court stated in *KZN Certification* that

[f]or purposes of section [143] there is a different and perhaps even more fundamental inconsistency, namely where the provincial legislature purports to embody in its constitution, whether in its bill of rights or elsewhere, matters in respect whereof it has no power to legislate pursuant to the provisions of section 126 or any other provision of the interim Constitution.

KZN Certification, (11) BCLR 1419 at 31. Commentators have also assumed that provincial constitutions may contain any provision that would be within the province's legislative authority. See Woolman, *supra* note 9, at 21-9 to -10.

34. S. AFR. CONST. 1996 § 143(1)(a); see also *KZN Certification*, (11) BCLR 1419 at 15 (discussing the "limits" of structure and procedure); Woolman, *supra* note 9, at 21-11 to -12 (same).

35. S. AFR. CONST. 1996 § 143(1)(b).

36. See RAUTENBACH & MALHERBE, *supra* note 16, at 246-50 (discussing the legislative competencies of the provinces).

37. Those areas include maintenance of roads, registration of animals, public cleaning services, maintenance of parks, and other similar competencies. S. AFR. CONST. 1996 sched. 5, pt. A. The province's exclusive competency is not unqualified. Under Section 44(2) of the South Africa Constitution, the national government may legislate on areas enumerated in Schedule 5 when "necessary":

- a. to maintain national security;
- b. to maintain economic unity;
- c. to maintain essential national standards;
- d. to establish minimum standards required for the rendering of services; or
- e. to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

Id. § 44(2).

and provincial laws should be resolved,³⁸ with national law superseding provincial law in almost all situations.³⁹ Section 147 equates provincial constitutions with provincial legislation for purposes of resolving conflicts between national and provincial law.⁴⁰ Section 147, however, does not implicate provisions relating to government structure and procedure.⁴¹ With that one exception, therefore, provincial constitutions are no more insulated from national preemption than provincial legislation, and the bounds of a province's *constitutional* space are dependant largely on the existence of preemptory national legislation.⁴²

An additional, and perhaps more significant, limitation on the competency of the provinces is their ability to tax.⁴³ Under Chapter 3 of the NC, provinces are precluded from assessing any sales,

38. *Id.* §§ 146–150.

39. See Woolman, *supra* note 9, at 21-18 to -19. Under the conflict-of-law provisions, national legislation prevails if the matter being regulated cannot be regulated effectively at the regional level or if it is more efficient to regulate the matter nationally. S. AFR. CONST. 1996 § 146(2).

40. S. AFR. CONST. 1996 § 147.

41. Indeed, in *Premier of the Province of the Western Cape v Electoral Commission*, the Court held that actions taken by the Western Cape were not invalidated by conflicting national legislation. 1999 (11) BCLR 1209 (CC) at 9 (S. Afr.). In that case, the Western Cape Constitution had enlarged the number of legislative seats in the provincial legislature. *Id.* at 3–4. The Court held those provisions to be valid notwithstanding national legislation to the contrary. *Id.* at 3, 8–9. The power to constitutionalize structure and procedure is not without substantive significance. An interesting question is whether the Court would certify a provision that increases the majority necessary to amend a provincial constitution. A creative provincial legislature could increase the majority required to amend a provincial constitution above the minimum two-thirds established by the NC. Because a constitution can contain any provision relating to the legislative competencies, a provincial legislature could insulate certain legislative actions from future alteration by placing them in the constitution. Indeed, the Western Cape Constitution contains a list of “Directive Principles of Provincial Policy.” Brand, *supra* note 9, at 970. Those principles are intended to be used by the provincial government as “a point of reference to determine their policy objectives and priorities.” *Id.* It has also been suggested that the Court would consider those principles as an interpretive tool in evaluating provincial executive or legislative action. *Id.* Thus, one provincial legislature could arguably constitutionalize its policies for compliance by subsequent legislatures and increase the majority necessary to amend those policies.

42. The provinces have litigated to protect their legislative competence from national encroachment but have been unsuccessful. In *National Gambling Board v Premier of KwaZulu-Natal*, KZN brought suit because of national legislation that conflicted with provincial legislation, which was enacted pursuant to Schedule 4. 2002 (2) BCLR 156 at 11 (CC). The Court ruled that KZN had a constitutional obligation to co-operate with national legislation and promulgate compatible provincial regulations. *Id.* at 28–30. In *In re The National Education Policy Bill*, the Court held that national legislation regulating education prevailed notwithstanding the province's concurrent authority to regulate education under Schedule 4. 1996 (4) BCLR 518 (CC) at 36–37 (S. Afr.).

43. See Malherbe & Brand, *supra* note 16, at 57 (discussing the taxing powers of the provinces). The provinces may issue debt, however, subject to regulation by the national legislature. *Id.*

property, income, or value-added tax.⁴⁴ The provinces, however, are entitled to an equitable share of the national tax revenue.⁴⁵ Distribution of the equitable share is determined by national legislation.⁴⁶ The NC provides that the equitable share must be sufficient for the provinces to provide “basic services” and perform the functions allocated to them under *national* law.⁴⁷ Thus, the provinces are not entitled to additional funding for expenses created by provincial law, and their ability to raise independent revenue is severely limited.⁴⁸

B. *The Western Cape Constitution*

Only one of the nine provinces, the Western Cape, has successfully adopted a constitution. The Western Cape Constitution was originally passed by the Western Cape Parliament in February 1997⁴⁹ and was submitted to the Court for certification in September of that year.⁵⁰ In its judgment, the Court noted that the legislature had adopted the constitution in accordance with the NC’s strictures.⁵¹ However, the Court refused to certify the constitution because it contained *ultra vires* content.⁵²

Specifically, the Western Cape Constitution purported to alter the electoral system.⁵³ It divided the Western Cape into various

44. S. AFR. CONST. 1996 § 228(1)(a).

45. *Id.* § 227(1)(a).

46. *Id.* § 214; *see also* Intergovernmental Fiscal Relations Act 97 of 1997 (implementing the directives of S. AFR. CONST. 1996. § 214). Not surprisingly, the “equitable share” has become the primary source of revenue for the provinces. *See* David Pottie, *Provincial Government in South Africa Since 1994*, in *PROVINCIAL GOVERNMENT IN SOUTH AFRICA* 38, 45 (2000), available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4883_2.pdf (evaluating the financial sustainability of the provinces); Richard Simeon, *Considerations on the Design of Federations: The South African Constitution in Comparative Context* 14–15 (Univ. of Toronto, Working Paper 1998 (2)), available at http://www.iigr.ca/pdf/publications/145_Considerations_on_the_De.pdf (discussing the province’s financial limitations).

47. S. AFR. CONST. 1996 § 227(1)(a).

48. *See id.* § 228(2).

49. Brand, *supra* note 9, at 966.

50. *See In re Certification of the Const. of the Western Cape* 1997 (9) BCLR 1167 (CC) at 10 (S. Afr.); Brand, *supra* note 9, at 966–67 (discussing the Court’s initial judgment).

51. *In re Certification of the Const. of the Western Cape* (9) BCLR 1167 at 10 (“The legislature of the province of the Western Cape duly adopted a constitutional text in accordance with section 142 of the Constitution and its Speaker, as required by section 144(1), submitted the text to this Court for certification that it complies with section 143.”).

52. *Id.* at 55–58.

53. *See* Brand, *supra* note 9, at 966–67 (discussing this element of the Western Cape Constitution); Malherbe & Brand, *supra* note 16, at 99–100 (same); Woolman, *supra* note 9, at 21–17 (same). The Court identified three elements of the Western Cape Constitution that could not be certified. *See* Malherbe & Brand, *supra* note 16, at

geographic regions and allocated provincial parliamentary seats to each region based on population.⁵⁴ That system was clearly at odds with national law, which allocated provincial parliamentary seats based on the popular vote of the province's entire constituency.⁵⁵

The Western Cape argued that a provincial constitution can alter the electoral system because, under the NC, the provinces can provide for "structures and procedures" that differ from the NC's default provisions.⁵⁶ The Court rejected that argument and held that "structures and procedures" does not encompass provisions that alter "the fundamental nature and substance of the democratic state."⁵⁷

Nevertheless, the Western Cape Parliament amended the constitution to comply with the Court's ruling,⁵⁸ and the Court subsequently certified the amended draft.⁵⁹ The Western Cape Constitution became operative on January 16, 1998.⁶⁰

C. Individual Rights and Provincial Constitutions

Some commentators suggest that provincial constitutions may develop into an additional source of legally enforceable individual rights.⁶¹ Indeed, the 1996 KZN draft constitution contained an extravagant bill of rights.⁶² Although the Court refused to certify the 1996 KZN bill of rights,⁶³ the Court nevertheless stated in its judgment:

A provincial bill of rights could (in respect of matters falling within the province's powers) place greater limitations on the province's powers or confer greater rights on individuals than does the [National]

98. However, the document's fatal flaw was its modification of the electoral system. *Id.*

54. Brand, *supra* note 9, at 967.

55. See S. AFR. CONST. 1996 § 105 (describing the election of provincial representatives).

56. Brand, *supra* note 9, at 966-67; Malherbe & Brand, *supra* note 16, at 99.

57. The court also noted:

We would emphasise [sic], however, that 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.

In re Certification of the Const. of the Western Cape (9) BCLR 1167 at 19 (quoting *KZN Certification* 1996 (11) BCLR 1419 (CC) at 15 (S. Afr.)).

58. Brand, *supra* note 9, at 966.

59. See *Certification of the Amended Text of the Const. of the Western Cape* 1997 (12) BCLR 1653 (CC) at 4-5 (S. Afr.).

60. Brand, *supra* note 9, at 966.

61. Williams, *supra* note 4, at 650-62.

62. See *KZN Certification* (11) BCLR 1419 at 35-40 (analyzing the provisions of the bill of rights).

63. *Id.* at 39-42.

Constitution, and it could even confer rights on individuals which do not exist in the [National] Constitution.⁶⁴

However, the Court reiterated that a provincial bill of rights must not be “inconsistent” with the NC⁶⁵ and “cannot operate in respect of matters which fall outside of its legislative or executive competence.”⁶⁶ The Court also noted that certification of a provincial bill of rights requires the additional consideration of whether the provincial right “has the effect of eliminating or limiting a right protected in the [National] Constitution.”⁶⁷

Thus, a provincial bill of rights can operate only within areas that are not already addressed by the NC’s bill of rights or preempted by national legislation. In view of the NC’s exhaustive list of individual protections and the ever-growing body of national legislation, there appears to be little remaining “space” for meaningful provincial rights.⁶⁸ Furthermore, although theoretical possibilities do exist,⁶⁹ provincial constitutions do not currently

64. *Id.* at 30–31.

65. *Id.* at 31.

66. *Id.* at 27.

67. *Id.* at 33. That analysis is interesting when compared against the state action requirement associated with the Federal Bill of Rights in the United States. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (deciding validity of racially-based, restrictive covenants on other grounds but stating, “the principle has become firmly embedded in our constitutional law that the action inhibited . . . is only such action as may fairly be said to be that of the States.”). In contrast, South Africa’s NC provides protections that are not dependant on state action to be enforceable. See S. AFR. CONST. 1996 § 8(2) (“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”); *id.* § 9(4) (“No person may unfairly discriminate directly or indirectly against anyone.”). See generally RAUTENBACH & MALHERBE, *supra* note 16, at 310–14 (discussing application of South Africa’s Bill of Rights against private individuals). Thus, there exists the possibility that a provincial right, when exercised by an individual, could infringe a national constitutional right of another individual. The absence of a state action requirement in those situations creates a legal conflict between the two individuals who both claim valid legal rights. The Court therefore articulated a test to resolve such conflicts. According to the Court, two rights provisions “are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time.” *KZN Certification* (11) BCLR 1419 at 32. In those cases, the provincial right must yield to the national right. *Id.* at 35–36.

68. Indeed, in *KZN Certification*, the Court stated, “In view of the comprehensive nature of the rights in Chapter 3 of the [IC] it may transpire that the ambit of a provincial bill of rights is a very limited one, but this is not a matter on which we are called upon to express any view at this stage.” *KZN Certification* (11) BCLR 1419 at 33–34; accord *Woolman*, *supra* note 9, at 21-2 n.2 (responding to the suggestion that provincial constitutions may develop into significant sources of individual rights).

69. Commentators point to creative ways that provincial constitutions still can strengthen individual liberties. Under the test established in the 1996 *KZN Certification* case, a provincial right is invalid if it simultaneously restricts a right contained in the national bill of rights. However, a provincial right may be valid if enforced only against the government because there is no concomitant infringement of

provide any additional protections. The Western Cape and KZN are the only provinces to have enacted constitutions.⁷⁰ As already noted, however, the Court refused to certify the KZN constitution,⁷¹ and KZN still operates under the NC's default provisions. The Western Cape Constitution was certified in 1997⁷² but does not contain a bill of rights.⁷³ That constitution, however, did vary from the NC's default provisions by increasing the number of provincial parliamentary seats from thirty-nine to forty-two,⁷⁴ and the Court has subsequently upheld that variation notwithstanding conflicting national legislation.⁷⁵ That minor aberration appears to be the only substantive contribution of the Western Cape Constitution because the remainder of the document essentially mirrors the NC.⁷⁶ No other provinces besides the Western Cape and KZN have attempted to draft a constitution.

an individual liberty. See Anna Annandale et al., *Analysis of Constitutional Proposals for the Province of Kwa-Zulu-Natal* paras. 121–126 (Apr. 15, 2005) (on file with author). For example, in 2005, the KZN Legislature began drafting another provincial constitution. Bheki ka Mncube, *Constitutional Showdown*, WITNESS (Pietermaritzburg, S. Afr.), Jan. 24, 2005. The 2004 IFP draft-constitution contained a provision that declared, "Every consumer has the right to operate in a market place [sic] where . . . contractual arrangements . . . are not altered or worsened by . . . practices in restraint of trade." PROVINCE OF KWAZULU NATAL CONST. (Inkatha Freedom Party Draft) 2004 § 8(3), available at <http://www.ifp.org.za/Constitution/provKZNconstitution.htm>. However, the NC contains a guarantee that reasonable restraints of trade are enforceable in contract. S. AFR. CONST. 1996 § 22. Thus, the IFP draft purported to confer greater contracting rights to employees, but it simultaneously limited an employer's right to conclude and enforce such agreements. See Annandale et al., *supra* note 69, para. 141 (concluding that such a provision would not be certified by the Court). If the same provision is applied against only the government, then that conflict does not arise because the national bill of rights benefits only natural persons. *Id.* para. 121. In other words, provinces may enlarge individual rights "if the bearer of the duties concomitant to that right is the State" and not another natural person. *Id.* In that way, a provincial bill of rights could still become a valuable tool in restricting state action even if it is unenforceable in the private sector. *Id.* para. 25. The 2004 KZN draft constitution was short lived, however, and it failed to receive the majority necessary to leave committee. See *KZN Draft not Adopted*, MERCURY (Durban, S. Afr.), June 1, 2005; see also *infra* note 255 (discussing the 2004 KZN constitutional process more fully).

70. RAUTENBACH & MALHERBE, *supra* note 16, at 245.

71. *KZN Certification* (11) BCLR 1419 at 54–56.

72. *Certification of the Amended Text of the Const. of the Western Cape 1997* (12) BCLR 1653 (CC) at 3–4 (S. Afr.).

73. See Brand, *supra* note 9, at 970 (recounting the content of the Western Cape Constitution).

74. *Id.* at 967–68.

75. *Premier of the Prov. of the Western Cape v Electoral Comm'n 1999* (11) BCLR 1209 (CC) at 8–9 (S. Afr.); see *supra* note 41 (discussing the Electoral Commission case more fully).

76. The only other provisions at variation from the NC related to the province's official language and a set of broad policy directives intended to guide future legislatures. See Brand, *supra* note 9, at 969–70 (discussing those provisions); see also *supra* note 41 (same).

In sum, South Africa's structural framework is tilted heavily in favor of the national government and allocates very little constitutional space to the provinces. Additionally, as a descriptive matter, provincial constitutions have not become a significant source of substantive law. Rather, the provinces are analogous to regional administrative agencies of the national government⁷⁷—delivering services that are financed primarily by national funds and developing almost no independent constitutional law.⁷⁸

Nevertheless, since 1993, the South African Constitution has guaranteed the provinces the right to adopt constitutions. That allowance proved instrumental during South Africa's transition to democracy because of its influence on the ANC/IFP conflict.

III. THE CONFLICT BETWEEN THE INKATHA FREEDOM PARTY AND THE AFRICAN NATIONAL CONGRESS

South African history is a paradox. If apartheid was one of the twentieth century's great evils, the transition to democracy was one of the great achievements of this century.⁷⁹ By the late 1980s, the ruling Afrikaners were increasingly aware that change was

77. The current operation of provincial government is often dictated by national policies and legislation and limited by the province's inability to raise independent revenue. See Pottie, *supra* note 46, at 43–45 (providing a detailed empirical evaluation of the viability of provincial governments in South Africa); Simeon, *supra* note 46, at 15 (“At the moment, there is an enormous mismatch between revenues and responsibilities—and provinces raise only four percent of their operating revenue.”); see also *Minister of Health v Treatment of Action Campaign (2)* 2002 (10) BCLR 1075 (CC) at 2–3 (S. Afr.) (holding that provinces must take reasonable steps to implement socio-economic rights guaranteed by the national constitution). Further, under South Africa's party based electoral system, national party leaders nominate provincial representatives. Pottie, *supra* note 46, at 45–46. Thus, the provincial representatives are largely puppets for the broader policy decisions of the national parties.

78. See generally TOM LODGE, *POLITICS IN SOUTH AFRICA* 33–43 (2002) (providing a detailed explanation of the fiscal limitations on provincial government that impact its ability to make substantive law).

79. See Peter N. Bouckaert, Note, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375, 375 (1997) (characterizing South Africa's transition to democracy as “one of the greatest political achievements of this century” because of its relatively peaceful nature). For a systematic summary of the legal issues associated with the transition to democracy, see Anthia Jansen van Rensburg, *The Government of National Unity (1994–1996): Its Influence on South African Party Politics*, POLITEIA, 2001 no. 2, at 38. See also Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 59–63 (2000) (providing a concise description of the transition to democracy).

inevitable.⁸⁰ On February 2, 1990, President F. W. de Klerk announced the lifting of all bans on the ANC and other liberation organizations.⁸¹ Nine days later, de Klerk released ANC President Nelson Mandela from prison.⁸²

Although the Afrikaaners recognized the certain end of apartheid, there was violent disagreement among the liberation groups as to the nature of the new constitutional order.⁸³ The most significant conflict was between the IFP, an ethnic-based organization with strong regional support in KZN,⁸⁴ and the ANC, the largest and most influential liberation organization with broad multi-ethnic support.⁸⁵ At the center of the conflict was the future political identity of the Zulu people.⁸⁶ The IFP was founded to protect

80. THOMPSON, *supra* note 16, 241–47. Apartheid was the product of three decades of rule by the white Afrikaaners. *Id.* at 187. The National Party was the political party responsible for the institution of apartheid when it took power in 1948. *Id.* Over the course of three decades the apartheid regime systematically disenfranchised black South Africans and committed grave human rights violations. *See generally id.* at 187–264 (discussing the history of the apartheid regime from inception to demise). However, by the late 1980s domestic unrest and international sanctions had effectively undermined the apartheid regime. *Id.* at 221, 241–47.

81. *See* RAUTENBACH & MALHERBE, *supra* note 16, at 17 (describing the 1990 unbanning of the resistance organizations as the turning point in the liberation movement). The ANC and other political organizations were banned in 1960 after a series of mass demonstrations. THOMPSON, *supra* note 16, at 210.

82. THOMPSON, *supra* note 16, at 247.

83. *Id.* at 247–52; *see also* Mangasuthu Buthelezi, *A Bird's Eye View of the Historical and Political Divides Between the IFP and the ANC*, KWAZULU-NATAL BRIEFING, 1997, at 6, 15 (Helen Suzman Found., Cape Town, S. Afr.) (articulating the core divide between the ANC and the IFP as relating to the “post political dynamics of post-liberation”); Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 449–56 (1996). The ANC itself was deeply divided in 1990 when Nelson Mandela was released from prison. THOMPSON, *supra* note 16, at 250. Although united in opposition to apartheid, the 700,000 ANC members came from, among other backgrounds, the Communist Party, trade unions, and foreign military service. *Id.*

84. Wilson, *supra* note 83, at 442–43 (describing the significance and nature of the ANC/IFP conflict); *see* THOMPSON, *supra* note 16, at 259 (“[The IFP] probably had the support of a majority of the Zulu people who, in all, amounted to 22 percent of the population of South Africa.”).

85. The ANC's support base is best gauged by its success in the 1994 elections where it received 62.65% of the national popular vote. *See* THOMPSON, *supra* note 16, at 264 (discussing the ANC's constituency and the election results); *id.* at 259–61 (describing the conflict between the ANC and the IFP as a major threat to the peace process); Bouckaert, *supra* note 79, at 409 n.215 (similarly describing this conflict as a threat to the peace process). *See generally* JEFFERY, *supra* note 13, at 213–676 (documenting, in detail, the low-grade civil war between the ANC and the IFP).

86. *See* SIBUSISIWE DLAMINI, YOUTH AND IDENTITY POLITICS IN SOUTH AFRICA 1990–1994, at 83–84 (2005) (describing the IFP and ANC's competing visions of political identity); Shula Marks, “*The Dog That Did Not Bark, or Why Natal Did Not Take Off*”: *Ethnicity & Democracy in South Africa—KwaZulu-Natal*, in ETHNICITY AND DEMOCRACY IN AFRICA 183, 194 (Bruce Berman et al. eds., 2004) (“Increasingly, the political battle between Inkatha and the ANC . . . was framed as an ideological struggle over what it meant to be ‘Zulu.’”); Wilson, *supra* note 83, at 442–49 (providing a

Zulu culture and tradition,⁸⁷ and its constituency was almost entirely Zulu.⁸⁸ The ANC, however, was a multi-ethnic organization that emphasized African nationalism, not ethnic identity.⁸⁹ Violence between the two organizations, most of which occurred within KZN, rose to anarchic proportions between 1990 and 1994⁹⁰ and placed South Africa's hopes for democracy in jeopardy.⁹¹

comprehensive summary of the IFP's ethnic associations and agenda). It is widely suggested that the IFP did not provide genuine representation of Zulu interests, but rather, used "Zuluness" as a means of mobilizing a support base. See Wilson, *supra* note 83, at 449–56. This school of thought focuses on the dangers of politicizing ethnicity—the disproportionate power of political elites and the disenfranchised body politic. *Id.* However, regardless of the validity of those concerns, there is no dispute that the issue that divided the ANC and the IFP was one of political identity. Whether that issue was manufactured by political elites or the result of the people's genuine concerns is irrelevant to this Article's observation that a violent conflict existed and threatened the transition to democracy.

87. DLAMINI, *supra* note 86, at 54–55 (providing a concise history of the IFP).

88. *Id.*

89. See *id.* at 84 ("Operating alongside this Inkatha Zulu identity was the ANC version of a non-racial/ethnic democratic South Africa."); see also MANDELA, *supra* note 1, at 87 ("[O]ur creed was the creation of one nation out of many tribes, the overthrow of white supremacy, and the establishment of a truly democratic form of government."); Buthelezi, *supra* note 83, at 14–18 (providing the IFP's perspective on the division); *The Clash that had to Come: African Nationalism and the "Problem" of Traditional Authority*, KWAZULU-NATAL BRIEFING, 1996, at 11 (Helen Suzman Found., Cape Town, S. Afr.) [hereinafter *The Clash that had to Come*] (providing a detailed description of the IFP and ANC's competing visions of ethnicity in the new constitutional order). On February 25, 1990, Nelson Mandela gave a historic speech in the city of Durban that outlined the essential difference between the ANC and the IFP. See Nelson Mandela, President, African Nat'l Cong., Address to Rally in Durban (Feb. 25, 1990), available at <http://www.anc.org.za/ancdocs/history/mandela/1990/sp900225-1.html>. Additionally, the ANC's most famous and influential declaration of its identity occurred in 1955, in *The Freedom Charter*. *The Freedom Charter*, Adopted at the Congress of the People, Kliptown, June 26, 1955, available at <http://www.anc.org.za/ancdocs/history/charter.html> (last visited Feb. 9, 2008); see also MANDELA, *supra* note 1, at 151–53 (discussing and reprinting portions of *The Freedom Charter*); Mark S. Kende, *The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 625–26 (2004) (discussing the significance of *The Freedom Charter*).

90. JEFFERY, *supra* note 13, at 1–2; see also Bouckaert, *supra* note 79, at 409 n.215. See generally JEFFERY, *supra* note 13 (providing a definitive treatise on the "strife province" and the KZN conflict, consisting of almost one-thousand pages documenting the details of political violence between the ANC and the IFP).

91. See TRADITIONAL DICTATORSHIP, *supra* note 13; Daley, *supra* note 13; Bouckaert, *supra* note 79, at 409 n.215. Adding to the rift between the parties during this period were confirmed suspicions that the government had been covertly funding and training IFP militants. COURTNEY JUNG, THEN I WAS BLACK: SOUTH AFRICAN POLITICAL IDENTITIES IN TRANSITION 76 (2000). Those suspicions were later confirmed by the Goldstone Commission and served to bolster the ANC's position that the IFP had been compromised as a liberation organization and had become a tool in the government's divide and conquer tactics. See *id.* at 76–77; Bouckaert, *supra* note 79, at 409 n.215.

A. *The Historical Division between the ANC and the IFP*

In the mid-nineteenth century, the British created the "native reserve" of Zululand.⁹² Zululand was comprised of various noncontiguous territories within the larger region of Natal.⁹³ Under apartheid, the Afrikaaner government incorporated many of the British reserves into "Bantu Homelands."⁹⁴ The Afrikaaners intended the Homelands to become, at least in theory, independent states within the territories of South Africa.⁹⁵ In 1951, the government established "KwaZulu" as a homeland for the Zulu people,⁹⁶ and in 1971, KwaZulu was recognized as a "self-governing territory" under the Bantu Homelands Constitution Act.⁹⁷ The KwaZulu Legislative Assembly was established in 1972, and KwaZulu was granted further powers of self-government in 1977.⁹⁸

1. The IFP's Genesis as an Ethnic Organization

The IFP was originally created because of the balkanization of Zululand. In 1920, Zulu King Solomon kaDinizulu established an organization known simply as "Inkatha."⁹⁹ The King's vision was to counteract British fragmentation of Zululand by preserving Zulu culture and tradition.¹⁰⁰ That organization collapsed after a few years but was revived in 1975 as "Inkatha YaKwaZulu" by Zulu Chief

92. Wilson, *supra* note 83, at 447.

93. *Id.* at 444-45.

94. See Catherine M. Coles, *Land Reform for Post-Apartheid South Africa*, 20 B.C. ENVTL. AFF. L. REV. 699, 716-18 (1993) (tracing the various legislation that established the homelands).

95. The Homelands were part of the government's strategy to disenfranchise black South Africans. *Id.* The government created the Homelands for the purpose of stripping Africans of their South African citizenship. See *id.* The Bantu Citizenship Act 26 of 1970 required all black South Africans to become citizens of one of the homelands. *Id.*; see also THOMPSON, *supra* note 16, at 190-92 (discussing the government's strategy of disenfranchisement).

96. Bantu Authorities Act 68 of 1951; see THOMPSON, *supra* note 16, at 191 (discussing the government's division of territories into "homelands"). KwaZulu was inhabited predominantly by the Zulu people and was by far the largest and most homogenous of the apartheid-era homelands. THOMPSON, *supra* note 16, at 191. The province of Natal, however, was home to significant numbers of European and Indian South Africans. *Id.* at 96-100.

97. TRADITIONAL DICTATORSHIP, *supra* note 13.

98. *Id.*

99. *Id.*; see also Kenneth D. Kaunda, *The First Shall Be the Last: The African National Congress and the Inkatha Freedom Party Dispute*, 37 ST. LOUIS U. L.J. 841, 845 (1993) (discussing the history of the IFP). "Inkatha" is the name of a traditional Zulu headband. Kaunda, *supra* note 99, at 845. Multiple pieces of straw and grass are woven together into a circular band. *Id.* The headband is used to support heavy loads traditionally carried on the head. *Id.* Strength in unity is the obvious symbolism of the headband. *Id.*

100. TRADITIONAL DICTATORSHIP, *supra* note 13.

Mangosuthu Buthelezi.¹⁰¹ The stated purpose of the new organization was to “promote and encourage the development of the people of KwaZulu, spiritually, economically, educationally and politically.”¹⁰² Even under Chief Buthelezi, however, membership was initially limited to Zulus,¹⁰³ and the IFP represented the “political embodiment of Zuluness.”¹⁰⁴ During apartheid, the IFP became the dominant political party within the KwaZulu homeland, and the IFP exercised unilateral control over the KwaZulu Legislative Assembly.¹⁰⁵

2. The ANC’s Cross-Ethnic Ideology

In contrast, the ANC was formed in 1912 for the purpose of resisting European oppression by “creat[ing] one [African] nation out of many tribes.”¹⁰⁶ ANC founder Pixley ka Isaka Seme was a Zulu South African who was educated in England and the United States.¹⁰⁷ His experiences abroad led him to believe that African nationalism was essential to successful change in South Africa.¹⁰⁸ The establishment of the ANC Youth League in 1944 was a turning point in the resistance movement.¹⁰⁹ The Youth League orchestrated a series of mass civil disobedience campaigns that were aimed at undermining the government’s oppressive legislation.¹¹⁰ In 1961, in response to a powerful series of those demonstrations, the government banned the ANC, forcing many of its leaders into exile.¹¹¹ In 1962, Nelson Mandela and other prominent resistance leaders were arrested for acts of terrorism.¹¹²

101. Kaunda, *supra* note 99, at 845.

102. TRADITIONAL DICTATORSHIP, *supra* note 13.

103. JEFFERY, *supra* note 13, at 23.

104. JUNG, *supra* note 91, at 49–50. In 1974, Chief Buthelezi declared, “[A]ll members of the Zulu nation are automatically members of Inkatha if they are Zulus. There may be people who are inactive members as no one escapes being a member as long as he or she is a member of the Zulu nation.” *Id.* at 50.

105. TRADITIONAL DICTATORSHIP, *supra* note 13.

106. MANDELA, *supra* note 1, at 87. The ANC was initially called the Native National Congress but was renamed the “African National Congress” in 1923. A COUNTRY STUDY: SOUTH AFRICA (Rita M. Byres ed., 1997), available at <http://lcweb2.loc.gov/frd/cs/zatoc.html>.

107. Pixley ka Isaka Seme, 1882–1951, <http://www.sahistory.org.za/pages/people/bios/seme,p.htm> (last visited Feb. 8, 2008).

108. *Id.*

109. Lenox S. Hinds, *The Gross Violations of Human Rights of the Apartheid Regime Under International Law*, 1 RUTGERS RACE & L. REV. 231, 277 n.225 (1999); see also MANDELA, *supra* note 1, at 86–88 (discussing the formation of the Youth League).

110. See Jenkins, *supra* note 16, at 477–79 (providing a concise account of the ANC’s history and strategies).

111. *Id.* at 478.

112. Tama Koss, *South Africa’s Truth and Reconciliation Commission*, 14 FLA. J. INT’L L. 517, 521 (2002).

3. The 1979 Rift between the IFP and the ANC

After 1961, the IFP gained significant support within South Africa because of the ban on the ANC.¹¹³ The ANC, in contrast, struggled to organize domestically but gained considerable international recognition because of its exiled leaders' international activism.¹¹⁴ Thus, the two parties appeared to be perfect cohorts in the fight against apartheid.¹¹⁵ In 1979, they met in London¹¹⁶ in an attempt solidify cooperation. The result, however, was a fatal rift.¹¹⁷

At the 1979 meeting, the parties were divided over issues of strategy.¹¹⁸ Chief Buthelezi opposed violent resistance in South Africa and insisted upon negotiating with the government.¹¹⁹ He viewed violent revolution as "suicidal" because of the government's military strength.¹²⁰ Furthermore, he considered economic advantage and political liberation to be of equal importance for black South Africans.¹²¹ In his view, poverty and political liberation should be addressed simultaneously. His strategy was to produce a disciplined, black working class that could negotiate a new democratic constitution with the apartheid government.¹²² Chief Buthelezi, therefore, was a staunch proponent of individual economic opportunity and market capitalism. He opposed blanket sanctions on

113. MANDELA, *supra* note 1, at 501.

114. JEFFERY, *supra* note 13, at 32. The ANC was recognized by the United Nations and the Organization of African Unity. See generally Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Every Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1514-16, 1520 (1996).

115. JEFFERY, *supra* note 13, at 32.

116. JUNG, *supra* note 91, at 67. See generally JEFFERY, *supra* note 13, at 32-37 (discussing the circumstances of the 1979 London meeting).

117. Before 1979, the rift between the IFP and ANC had been ambiguous. JUNG, *supra* note 91, at 67; MANDELA, *supra* note 1, at 501. When Chief Buthelezi created the IFP in 1975, he was an active member of the ANC youth league and had received implicit support from ANC leadership for the creation of a Zulu cultural organization. MANDELA, *supra* note 1, at 501; Kaunda, *supra* note 99, at 845. Furthermore, Chief Buthelezi was a tiresome advocate of Nelson Mandela's release. *Id.* He refused to negotiate with the government until the release of political prisoners. *Id.* However, the 1979 London meeting is "widely regarded as signalling the final split between the" ANC and the IFP. JEFFERY, *supra* note 13, at 32.

118. See generally JEFFERY, *supra* note 13, at 15-26 (discussing the differing liberation strategies of the ANC and the IFP).

119. *Id.* at 24.

120. *Id.* In 1978, Chief Buthelezi gave an address to *Time* magazine in which he stated, "We cannot afford voluntarily to precipitate a holocaust in this country. We are not afraid to die for our freedom, but we cannot assist the racist regime to make our unarmed people cannon fodder." M.G. Buthelezi, President, Inkatha Freedom Party, Address Before the Time Magazine News Tour: What Foreigners Must Know (Mar. 20, 1978), in M.G. BUTHELEZI, *POWER IS OURS* 129, 135 (1979).

121. JEFFERY, *supra* note 13, at 25-26.

122. *Id.* at 24-26.

foreign investment and supported investment that would provide economic opportunities for black South Africans.¹²³

The ANC, however, was in favor of economic sanctions and violent liberation.¹²⁴ It became clear at the 1979 meeting that the ANC expected the IFP to act as a surrogate for its liberation strategies. Chief Buthelezi, despite the common goal and commingled history¹²⁵ of the two parties, refused that invitation.¹²⁶ The ANC responded by recruiting other domestic organizations¹²⁷ and violently opposing Chief Buthelezi's cooperation with the government.¹²⁸ Consequently, the ANC regained the support of the majority of black South Africans, and the IFP was reduced to a minority organization that drew its support from the predominately Zulu region of KZN.¹²⁹ Violence between the two parties culminated in the early 1990s with an average of 1,500 deaths per year between 1990 and 1994.¹³⁰

B. *The Ideological Division between the ANC and the IFP*

In addition to historical disagreement over liberation strategies, the ANC and IFP also had distinct visions of how post-apartheid South Africa should be structured.¹³¹ The IFP was a predictable advocate of federalism because its constituency was concentrated

123. *Id.* at 25–26.

124. *See id.* at 15–21 (discussing the ANC's liberation strategies).

125. *See supra* note 7 (discussing this history).

126. *See* JEFFERY, *supra* note 13, at 32 (“Chief Buthelezi had, by 1979, developed his own agenda for power, based on increasing collaboration with Pretoria, and thus refused to accept the ANC's leadership of the liberation struggle.”).

127. The United Democratic Front (UDF) was created as a result of the 1979 London meeting. *Id.* at 36. It was a conglomerate of organizations that served as a surrogate for the ANC while the ANC was banned. *See id.* at 685 (quoting finding of the Goldstone Commission that the UDF was “a legalized front for the ANC”). In 1983, the UDF issued a public statement saying that it was prepared “to affiliate with most bodies, except Inkatha.” *Id.* at 135.

128. The most notorious example of the conflict stemming from the 1979 London meeting occurred in the township of KwaMashu in 1980. *Id.* at 131. The ANC organized a series of school boycotts, and the IFP opposed the boycott as destroying the education and work of Africans. *Id.* However, supporters of the boycott attacked school buses and enforced the strike through violence. *Id.* at 132–33. The KwaMashu strikes set the stage for the territorial conflicts that subsequently ensued between the IFP and the ANC for control of KwaZulu-Natal. *Id.* at 135.

129. Wilson, *supra* note 83, at 449–50.

130. *See* JEFFERY, *supra* note 13, at 1–2 (providing a table of the number of people killed in violence in the KZN region from 1976 through 1996).

131. *See* Woolman, *supra* note 9, at 21-2 to -5 (discussing the IFP and ANC's structural disagreements with respect to the new constitutional order); *see also* JEFFERY, *supra* note 13, at 158 (suggesting that the IFP's “regional project” was a threat to the ANC-lead path of transformation).

within one geographical region—KZN.¹³² The ANC, however, supported a strong unitary government because of its emphasis on African nationalism and its nation-wide support.¹³³ As the transition from apartheid began to unfold, the ANC emerged as the most powerful liberation organization, and it entered into several bilateral agreements with the government regarding the new constitutional order.¹³⁴ The IFP, on the other hand, was increasingly marginalized at the national level and thus attempted to leverage a federalist structure by consolidating its power within KZN.¹³⁵

132. See JEFFERY, *supra* note 13, at 385 (quoting IFP representative as saying federalism would “provide the distribution of power necessary for future stability”); Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 1990–96 (1996) (disussing the IFP’s Zulu heritage and support); Wilson, *supra* note 83, at 449–50 (explaining the pragmatic rather than ideological reasons for the IFP’s support of federalism). The preservation of the Zulu nation lends itself to a federalist structure because the Zulu people are a minority at the national level but are heavily concentrated within the territory of KZN. JEFFERY, *supra* note 13, at 385–86. Unlike other federal republics such as the United States, the IFP did not have any cohorts in their federalism plot. *Id.* At times during the constitutional process, the white right and the IFP were aligned. See THOMPSON, *supra* note 16, at 259–61 (discussing the alliance between the IFP and the white right). That coalition was based on the hopes of a “Volkstaat,” *i.e.* a white Homeland, and an independent KwaZulu Kingdom. *Id.* The white right was not concentrated in any particular province or territory, however. *Id.*

133. JEFFERY, *supra* note 13, at 385.

134. The most memorable of those bilateral agreements occurred in May 1990, just months after the ANC was unbanned and Nelson Mandela was released from prison. It was later termed the Groote Schuur Minute. See Emily McCarthy, *South Africa’s Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 194–95 (1997) (discussing the Groote Schuur Minute). The Groote Schuur Minute committed the ANC and the South African government to “the resolution of the existing climate of violence and intimidation from whatever quarters as well a commitment to stability and to a peaceful process of negotiations.” Groote Schuur Minute, May 4, 1990, Minutes and Accords Between the ANC and the South African Government, available at <http://www.anc.org.za/ancdocs/history/minutes.html>. Other notable bilateral agreements between the ANC and the government were the Pretoria Minute, August 6, 1990; the D.F. Malan Accord, February 12, 1991; and the Record of Understanding, September 25, 1992. *Id.* Additionally, as early as 1988, the ANC had assumed a unilateral stance in regards to liberation. THOMPSON, *supra* note 16, at 245. Mandela was reported as sending a memorandum to the South African government in 1988 which stated: “I now consider it necessary in the national interest for the African National Congress and the government to meet urgently to negotiate an effective political settlement.” *Id.*

135. See Gerhard Maré, *Playing his Last Card? Buthelezi’s Regional Option*, 8 S. AFR. REP. No. 3-4, 31 (1993), available at <http://www.africafiles.org/article.asp?ID=4640> (identifying the “bald political logic” that animated the IFP’s regional inclinations); Wilson, *supra* note 83, at 449–50 (noting the massive political mobilization undertaken in order to maintain regional power). However, Chief Buthelezi repeatedly asserted admirable ideological reasons for his “regional project.” Maré, *supra* note 135, at 31. Throughout the apartheid era, Chief Buthelezi refused to accept independence for KwaZulu because independence for the homelands was a government strategy aimed at stripping blacks of their South African citizenship. JEFFERY, *supra* note 13, at 21–22. Additionally, Chief Buthelezi was a strong supporter of regional economics. He believed that “regional consolidation” was the best

Subnational constitutions were a primary device of the IFP in that regard.¹³⁶ In addition to the 1996 KZN constitution,¹³⁷ the IFP facilitated the drafting of two other provincial constitutions.¹³⁸ The ANC viewed both of those documents as bold challenges to its liberation strategies and its bilateral negotiations with the government.¹³⁹

1. The IFP's 1986 Indaba Constitution

In 1986, Chief Buthelezi organized a series of negotiations that became known as the KwaZulu "Indaba."¹⁴⁰ The "Indaba" was a multi-racial gathering of conservative economic and political parties.

means for liberating black South Africans, both economically and politically. Maré, *supra* note 135. Ultimately, however, the IFP was faced with the political reality that the rift with ANC had resulted in diminished national support for the IFP, which in turn forced the IFP into the only political space remaining—the region of KZN. *Id.*

136. Subnational constitutions are not a necessary element of federalism. See Elazar, *supra* note 8, 1–9 (discussing the relationship between subnational constitutions and federal arrangements). However, the KZN narrative would seem to suggest that subnational constitution-making during political transition can influence the ultimate nature of a state's federal arrangement. Indeed, the IFP's three regional constitutions during the transition from apartheid undoubtedly contributed to South Africa's final federal structure. Thus, the KZN experience adds a curious twist to the already anomalous relationship between subnational constitutions and federal systems.

137. See *infra* Part IV (discussing the 1996 KZN Constitution in detail).

138. See JEFFERY, *supra* note 13, at 157–58 (discussing the 1986 "Indaba" Constitution); *id.* at 375–76 (discussing the 1992 KwaZulu Constitution).

139. *Id.* at 158, 277; Press Release, ANC, Statement on the KwaZulu/Natal Constitution (Dec. 1, 1992), available at <http://www.anc.org.za/ancdocs/pr/1992/pr1201a.html>. In that statement, issued the same day that the 1992 KwaZulu constitution was published, the ANC stated:

The step taken by the KwaZulu Legislative Assembly, which is wholly dominated by the Inkatha Freedom Party, constitutes a very drastic departure from the constitutional process that the country has thus far being following. This unilateral action has implications beyond the borders of the KwaZulu Bantustan, indeed the legislative assembly states the measure applies to both KwaZulu and Natal.

Press Release, ANC, *supra*; see also ANC Statement on the IFP Constitutional Proposals (Dec. 3, 1992), available at <http://www.anc.org.za/ancdocs/pr/1992/pr1203.html> (outlining the ANC's precise disagreements with the 1992 KwaZulu Constitution and concluding that "the content of the IFP's proposals, the process it proposes for realising them, as well as their express final objective, ride roughshod over the negotiation process now under way").

140. See JEFFERY, *supra* note 13, at 75 (describing the Indaba). See generally Edward A. Lynch, *The KwaZulu/Natal Indaba: A Federalist Proposal for South Africa*, 17 PUBLIUS: J. FEDERALISM 231 (1987) (providing a detailed description of the Indaba negotiations and the content of the resultant constitution). "Indaba" is a Zulu word that is used to refer to a serious negotiation. Lynch, *supra* note 140, at 232. Its traditional usage is to reference "an assembly of the chiefs." *Id.*

Participants included the Natal Provincial Administration,¹⁴¹ the IFP, and representatives of South Africa's Indian population.¹⁴² The ANC¹⁴³ refused to participate, but the ruling National Party (NP) attended as an "observer."¹⁴⁴ The Indaba produced a draft-constitution for the combined region of KZN and proposed one multi-racial provincial legislature.

The document called for universal franchise yet suggested a bicameral legislature with members of one chamber elected to represent each of the four major racial communities. The other chamber would be elected by the adult franchise at large.¹⁴⁵ The document also called for a federation of South African States, of which KZN would be the first constituent, and included a universal bill of human rights.¹⁴⁶ The document's bold claims received support from 82% of the delegates, and the Indaba called for a provincial referendum to determine the views of the people from both KwaZulu and Natal.¹⁴⁷ The referendum never took place, however, and the government rejected the constitution.¹⁴⁸

The ANC—which had been engaged in bilateral, unpublicized meetings with the government since July 1984¹⁴⁹—also rejected the Indaba Constitution. The ANC viewed the Indaba as an impediment to the liberation movement because it entrenched racial distinctions in the representative order and was therefore inapposite to a

141. The Natal Provincial Administration was the white local government body that had jurisdiction over the province of Natal. The Indaba was formally convened by both the KwaZulu and Natal governments. JEFFERY, *supra* note 13, at 75.

142. *Id.* at 75.

143. Although the ANC was officially banned during this period, its surrogate, the UDF, refused to participate despite receiving a formal invitation. *See supra* note 127 (discussing the UDF); *see also* Lynch, *supra* note 140, at 233 (mentioning the UDF's participation). The ANC also issued various statements regarding the Indaba via exiled leaders and other alliance organizations, such as the South African Communist Party. JEFFERY, *supra* note 13, at 158.

144. JEFFERY, *supra* note 13, at 75; Lynch, *supra* note 140, at 233–34.

145. The configuration of the proposed legislature was complex. The first chamber, although intended to represent the adult franchise at large, was further divided into fifteen districts. Lynch, *supra* note 140, at 237–38. The proposed districts would have resulted in the IFP receiving over seventy of the one-hundred available seats. *Id.* at 238. The second chamber would have consisted of fifty total seats with ten being allocated to each of the following ethnic groups: Afrikaans, Asian, English, and African. *Id.* The remaining ten seats would be allocated to voters who wished to vote without ethnic affiliation. *Id.*

146. *See id.* at 236. The Bill of Rights was modeled after the United States Constitution's Bill of Rights. *Id.* It was a progressive statement of individual liberties and stood in stark contrast to the laws of apartheid. *Id.*

147. JEFFERY, *supra* note 13, at 75, 157.

148. Lynch, *supra* note 140, at 242–44.

149. *See* Bouckaert, *supra* note 79, at 384–85 (discussing the secret negotiations between Mandela and the government); *see also* Hendrik W. van der Merwe, *Facilitation Between the Apartheid Establishment and the African National Congress in Exile*, 11 EMORY INT'L L. REV. 13 (1997) (discussing the negotiations between the government and other exiled ANC leaders).

democratic society.¹⁵⁰ The ANC also objected on strategic grounds, stating that until apartheid was categorically broken there was no value in negotiating constitutional arrangements.¹⁵¹ According to the ANC, the Indaba constitution was Inkatha's vision of the new South Africa and not the will of the people at large.¹⁵²

The ANC's greatest fear, however, was that the Indaba proposal would provide an "alternative, negotiated path to the transformation of South Africa" that would erode support for the ANC's violent liberation strategies.¹⁵³ The ANC viewed the Indaba as a direct attack on its liberation agenda and its ongoing negotiations with the government.¹⁵⁴ Consequently, the failed Indaba Constitution was followed by "war-like" outbreaks of violence within KZN.¹⁵⁵

2. The 1992 KwaZulu Constitution

After the Indaba, the IFP became obsessed with regional autonomy.¹⁵⁶ By the late 1980s, the ANC had emerged as the dominant liberation party.¹⁵⁷ Its strategic attacks on governed infrastructure had successfully strong-armed the government into negotiating an end to the ANC's military activity.¹⁵⁸ In 1988, the government confirmed that it had been meeting with imprisoned ANC leadership, and in 1990 Nelson Mandela was released from prison. A series of bilateral agreements were subsequently negotiated between the ANC and the government.¹⁵⁹ The most notable was the September 1992 Record of Understanding. That

150. Lynch, *supra* note 140, at 243.

151. *Id.*

152. See JEFFERY, *supra* note 13, at 158 (quoting the ANC as stating: "[The Indaba] is the [IFP] . . . solution and not that of the people of Natal, let alone of the entire country.").

153. *Id.*

154. *Id.*

155. *Id.* at 159.

156. See Maré, *supra* note 135 (quoting Chief Buthelezi as saying, "My answer is that KwaZulu will never be broken up, will never be destroyed. . . . The KwaZulu Police will not therefore be integrated with the South African Police.").

157. *Id.*; see also THOMPSON, *supra* note 16, at 244 (discussing the interactions in the 1980s that the ANC had with other groups as the ANC was seen as the "most popular and most effective of the banned black political organizations").

158. See THOMPSON, *supra* note 16, at 211–13, 243–45 (noting several of the ANC's confrontations with the government and the subsequent negotiations). In 1961, the ANC created "Umkhonto we Sizwe" (Spear of the Nation), which was the military wing of the ANC. MANDELA, *supra* note 1, at 239. The impetus for Umkhonto we Sizwe was the 1960 Sharpeville Massacre, in which the South African Defense Force shot and killed sixty unarmed protestors. *Id.* at 206–08. The creation of Umkhonto we Sizwe signified the end of the ANC's non-violent resistance. Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 73 (1997).

159. See Bouckaert, *supra* note 79, at 393–95 (discussing the bilateral agreements between the ANC and the government); see also *supra* note 134 (same).

agreement formally committed the ANC and the NP to a democratically elected transitional government.¹⁶⁰

The IFP was not party to the Record of Understanding, and after the ANC's unbanning in 1990, the IFP was increasingly marginalized at the national level.¹⁶¹ The IFP nevertheless retained strong support within KZN. Consequently, the IFP adopted a strategy of brinkmanship with respect to the national transition process.¹⁶² It appeared willing to thrust the country into civil war, rather than accept bilateral agreements between the ANC and the government.¹⁶³ The IFP asserted that the transition to democracy should be based on all-inclusive, multilateral agreements.

In December 1992, the KwaZulu Legislative Assembly drafted another provincial constitution.¹⁶⁴ Every member of the 1992 KwaZulu Legislative Assembly was from the IFP,¹⁶⁵ and the constitution was representative of the IFP's brinkmanship strategies. The plain purpose of the draft constitution was to separate KwaZulu from the rapidly progressing national constitutional process. The preamble to the 1992 draft stated:

Whereas the Kwazulu Government intends to adopt the Constitution of the State of KwaZulu/Natal with the understanding that with its final ratification the Constitution will become the supreme law of the land and shall stand as such regardless and in spite of whatever course the negotiations at central level will happen to take.¹⁶⁶

Furthermore, Chief Buthelezi publicly championed the 1992 constitution as a means of preventing the "degeneration" of the

160. JEFFERY, *supra* note 13, at 371-72.

161. See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 22 (2003) (concluding that "the fact remains that the ANC-NP coalition provided the framework for nearly all the negotiations of South Africa's transition."). The IFP violently opposed the Record of Understanding. JEFFERY, *supra* note 13, at 371-72. Chief Buthelezi declared that the Record of Understanding represented the ANC's hegemonic mentality and would "lead to the victory of revolutionaries over institutionalized South African influences and democratic forces." *Id.* at 371 (quoting statement of Chief Buthelezi).

162. See Maré, *supra* note 135 ("Inkatha's strength as a national actor is primarily that of a spoiler.").

163. The IFP's "underlying strategy was to cause so much carnage and mayhem that the elections would have to be postponed." JEFFERY, *supra* note 13, at 419. Conscious of that tactic, the government, on the eve of the first democratic election in 1994, issued a state of emergency in KZN. *Id.*

164. *Id.* at 375-76. For a thorough evaluation of the content and context of the 1992 constitution, see Stephen Ellmann, *Federalism Awry: The Structure of Government in the KwaZulu/Natal Constitution*, 9 S. AFRICAN J. ON HUM. RTS. 165 (1993).

165. ROB AMATO, UNDERSTANDING THE NEW CONSTITUTION 50-56 (1994). The KwaZulu Legislative Assembly had not held elections for seven years prior to 1992. *Id.*

166. *Id.* at 56.

national political process into bilateral negotiations between the ANC and the government.¹⁶⁷

The substance of the 1992 document was very similar to the Indaba Constitution. It called for the sovereignty of KZN and a federation of South African States.¹⁶⁸ However, the 1992 draft purported to create a “state militia” and prohibited the stationing of “federal” armed forces within KZN absent the provincial government’s approval.¹⁶⁹ That provision, although consistent with extreme federalist ideology, appears to have been a covert threat to the ANC.¹⁷⁰ The constitution also purported to establish a provincial constitutional court and included a bill of rights.¹⁷¹

The ANC’s response to the 1992 constitution was insightful. In a statement released the same day that the IFP published the constitution, the ANC noted: “The step taken by the KwaZulu Legislative Assembly, which is wholly dominated by the Inkatha Freedom Party, constitutes a very drastic departure from the constitutional process that the country has thus far being following. This unilateral action has implications beyond the borders of the KwaZulu Bantustan. . . .”¹⁷² Both the ANC and the IFP clearly understood that the KwaZulu constitution was a means by which the IFP was interjecting into the national constitutional process. The constitution’s publication was followed by outbursts of violence across KZN.¹⁷³

C. The 1994 Election

The ANC/IFP conflict reached its climax during the weeks preceding the country’s first democratic election in 1994.¹⁷⁴ Although

167. See TRADITIONAL DICTATORSHIP, *supra* note 13 (quoting IFP representative as saying “the new constitution will stand in force, regardless of the direction taken by the constitutional process of South Africa.”); see also JEFFERY, *supra* note 13, at 376 (“If it were ratified the constitution would become supreme law in the area, in spite of whatever course the negotiations at central level might take.”).

168. JEFFERY, *supra* note 13, at 375; Ellmann, *supra* note 164, at 168–69.

169. Ellmann, *supra* note 164, at 170–71.

170. See AMATO, *supra* note 165, at 72 (noting that there were reports that the IFP was indeed training troops to defend the KwaZulu Legislative Assembly that passed the constitution).

171. *Id.* at 50–56; Ellmann, *supra* note 164, at 169.

172. Press Release, ANC, *supra* note 139. The South African government immediately opposed the KwaZulu Constitution and also recognized its bold challenge to the ANC-NP negotiated transition. JEFFERY, *supra* note 13, at 276–77.

173. JEFFERY, *supra* note 13, at 376.

174. Violence in KZN rose to anarchic proportions. See generally TRADITIONAL DICTATORSHIP, *supra* note 13 (discussing the violence before and after the 1994 election); Rupert Taylor, *Justice Denied: Political Violence in KwaZulu-Natal After 1994* (Ctr. for the Study of Violence & Reconciliation, Violence & Transition Series, 2002), available at <http://www.csvr.org.za/docs/politicalviolence/justicedenied.pdf> (same).

the ANC and the government had agreed that a general election should be held,¹⁷⁵ the IFP refused to participate, demanding greater independence for KZN and constitutional recognition for the Zulu Monarch.¹⁷⁶ The IFP appeared determined to sabotage the election by destabilizing KZN unless those demands were met.¹⁷⁷ The ANC, on the other hand, remained committed to a strong central government and refused to compromise the democratic nature of the national constitution by granting *ex officio* recognition to the Zulu Monarch.¹⁷⁸

However, a week before the election, the IFP agreed to participate.¹⁷⁹ The IFP's participation was partially attributable to a creative compromise whereby the ANC agreed to amend the national constitution, which authorized the provinces to adopt constitutions, to *require* a constitution for KZN that would recognize the Zulu Monarch.¹⁸⁰ That concession appeased the IFP because it guaranteed a degree of independence for KZN and constitutional recognition for

175. See *infra* note 257 and accompanying text.

176. See THOMPSON, *supra* note 16, at 261–62 (noting the IFP's massive demonstration in Johannesburg which resulted in the death of many IFP members); van Rensburg, *supra* note 79, at 45.

177. THOMPSON, *supra* note 16, at 259–61; Bill Keller, *Zulu and Afrikaner Leaders Rally the Wrathful*, N.Y. TIMES, Jan. 30, 1994. See generally Maré, *supra* note 135 (mentioning this potential destabilization).

178. MANDELA, *supra* note 1, at 535–37; see also wa Mutua, *supra* note 158, at 98 (discussing the ideological conflict between the IFP and the ANC regarding the Monarch and Zulu heritage in the “New South Africa”).

179. THOMPSON, *supra* note 16, at 262.

180. That historical compromise became known as the “Skekuza agreement.” See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION* 162 (2000) (discussing the circumstances of the agreement). It occurred on April 19, 1994. *Id.* In 1995, an IFP spokesperson declared that “were it not for the [Skekuza agreement] we would not, and should not, be sitting in this [government].” JEFFERY, *supra* note 13, at 611.

The agreement was memorialized in a “memorandum of agreement,” which contained its essential terms and the exact language that later would be used to amend the IC. The memorandum stated:

Section 160 of the Constitution is hereby amended by the substitution for the proviso to subsection (3) of the following proviso:

Provided that a provincial constitution may—(a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and, (b) 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.

Joint Statement Between President Mandela, F.W. de Klerk, & M. Buthelezi (Apr. 19, 1994), available at <http://www.anc.org.za/ancdocs/pr/1994/pr0419>.

The interim national constitution was subsequently amended to input the above language. Constitution of the Republic of South Africa Amendment Act 2 of 1994 s. 8(a); Constitution of the Republic of South Africa Second Amendment Act 3 of 1994 s. 1; see also S. AFR. (Interim) CONST. 1993 § 160(3)(b) (containing amended language).

the Monarch, albeit in the form of a future provincial constitution. With the IFP's participation, the 1994 elections proceeded without significant disturbance and marked the birth of South Africa's democracy.

IV. THE 1996 KZN CONSTITUTION-MAKING PROCESS

A. *The National Catalyst for the KZN Constitution*

After the celebrated democratic election of April 1994,¹⁸¹ the newly elected national government immediately began the process of drafting a permanent constitution that would replace the IC.¹⁸² The Constitutional Assembly was established in June of 1994 and was charged with drafting the new constitution.¹⁸³ The Constitutional Assembly was initially celebrated as an all-inclusive body because the IFP was an active participant.¹⁸⁴ However, the IFP hastily withdrew from the constitutional talks, alleging, among other things, that the proposed national constitution severely reduced the powers of the provinces.¹⁸⁵

181. See *infra* Part V.A. (discussing the 1994 election). The 1994 election was South Africa's first democratic, multi-racial election. See THOMPSON, *supra* note 16, at 263–64 (recounting the results and events of the 1994 election).

182. See Sarkin, *supra* note 16, at 67–87 (giving a thorough explanation of the legal nature of the IC and the legal documents that formed the basis for the negotiated transition to democracy); *supra* text accompanying note 16 (discussing the relationship between the IC and the final NC).

183. Sarkin, *supra* note 16, at 68–69 (noting that most significantly, the Constitutional Assembly had representatives from all political parties that had received national parliamentary seats following the 1994 election); see *supra* text accompanying note 16 (explaining the nature of the Constitutional Assembly and its mandate).

184. The IFP won 10.5% of the national vote, which equated to forty-three seats in the 490-seat Constitutional Assembly. JEFFERY, *supra* note 13, at 445; see also THOMPSON, *supra* note 16, at 264 (noting that the ANC won 62.65% of the vote and 252 seats); see also S. AFR. (Interim) CONST. 1993 § 68 (describing the nature of the Constitutional Assembly).

185. The IFP initially left the Constitutional Assembly in mid-February 1995. JEFFERY, *supra* note 13, at 610–14. However, it returned to the Constitutional Assembly in early March on the condition that the disputed issue of provincial authority be submitted to international mediation within a month. *Id.* at 611. When that deadline passed, the IFP again withdrew. *Id.* After the first draft of the final national constitution was published and rejected by the Constitutional Court, the IFP again returned to the Constitutional Assembly for a brief period. *Id.* at 615. However, the IFP quickly withdrew, and the Constitutional Assembly's final vote regarding the NC took place without the IFP. *Id.* at 616.

Immediately after its withdrawal from the Constitutional Assembly,¹⁸⁶ the IFP initiated the drafting of a provincial constitution for KZN. As had been the case in 1992, the IFP viewed the KZN constitution as a “surrogate for its participation in the [national] constitutional deliberations,”¹⁸⁷ and it intended to use the provincial constitution-making process as a platform for its opposition to the Constitutional Assembly.¹⁸⁸

Although that strategy was familiar to the IFP,¹⁸⁹ the dynamics of the drafting process would be vastly different from prior IFP initiatives. The 1994 election had resulted in a multiparty KZN parliament.¹⁹⁰ More important, although the IFP won forty-one of the eighty-one parliamentary seats, the ANC won twenty-six seats.¹⁹¹ A provincial constitution, therefore, would require the IFP to cooperate with the ANC and other minority parties in order to secure the two-thirds majority required by the IC (fifty-four votes).¹⁹² Further, South Africa’s newly-adopted IC expressly authorized

186. The IFP’s final ultimatum for the Constitutional Assembly expired at the end of March, 1995, at which point it left the Assembly. *Id.* at 611. It began the KZN drafting process in April 1995. *Id.*

187. George E. Devenish, *The Making and Significance of the Draft Kwazulu-Natal Constitution*, 1999 Y.B. AFRICAN L. 47, 505.

188. See *KwaZulu-Natal’s New Constitution: No Losers . . . Any Winners?*, (Helen Suzman Found., Univ. of Natal, Durban), Mar. 1996, at 1, 2 [hereinafter *KZN’s New Constitution*] (stating that provincial constitutions would “provide the institutional basis for the expression of provincial autonomy”); Ralph Lawrence, *Where There’s Political Will, There Might Be a Way: Subnational Constitutions and the Birth of Democracy in South Africa*, in *SUBNATIONAL CONSTITUTIONAL GOVERNANCE* 87, 90 (Gretchen Carpenter ed., 1999).

The [IFP’s] plans afoot were running in tandem with the process at the national level to transform the Interim Constitution into a final version by 1996. . . . [D]eliberations in KwaZulu-Natal over the terms of a provincial constitution were being used as a bargaining ploy to wrest greater powers for the provinces in the national document.

In a special news conference where the IFP addressed its boycott of the Constitutional Assembly, Chief Buthelezi stated, “Our provincial constitution . . . must contain a very clear statement outlining and detailing once and for all the demand for autonomy of the people of this region.” JEFFERY, *supra* note 13, at 617.

189. See *supra* text accompanying notes 164–73 (discussing the 1992 KwaZulu Constitution and its relationship to the national negotiations between the ANC and the South African government).

190. Seven parties were represented, compared to the 1992 KwaZulu legislature that was entirely comprised of IFP representatives. The other six parties were the ANC, the African Christian Democratic Party (ACDP), the Minority Front (MF), the National Party, the Democratic Party (DP), and the Pan African Congress (PAC). Independent Electoral Commission, *Elections ’94*, <http://www.elections.org.za/Elections94.asp> (last visited Feb. 9, 2008).

191. *Id.* (providing the complete results of the provincial election in 1994: forty-one seats for the IFP (50.61%); twenty-six seats for the ANC (32.09 %); nine seats for the NP (11%); two seats for the DP; one seat for the ACDP; one seat for the MF; and one seat for the PAC).

192. JEFFERY, *supra* note 13, at 618.

subnational constitutions and established procedures for their enactment—one of which was certification by the Constitutional Court.¹⁹³ Thus, unlike prior IFP drafting initiatives, which were entirely *ultra vires*, the 1996 KZN constitution would occur within the processes and institutions delineated by the national constitution.

Escalating violence within KZN added to the urgency of the KZN constitutional process.¹⁹⁴ The province experienced a reprieve after the signing of the April 19, 1994 Memorandum of Agreement.¹⁹⁵ The IFP had peacefully participated in the election, and President Mandela offered Chief Buthelezi a position in the executive cabinet as a gesture of good faith.¹⁹⁶ However, the IFP's boycott of the Constitutional Assembly reignited the ANC/IFP conflict and threatened to undermine the legitimacy of the final NC.¹⁹⁷ Consequently, the ANC and the NP hoped that an all-inclusive provincial constitution would stabilize KZN and restore a degree of legitimacy to the national deliberations.¹⁹⁸ Indeed, the direct nexus between the KZN constitution-making process and the broader ANC/IFP conflict was undeniable. As one observer eloquently noted: "[I]t always remained the case that the fundamental differences expressed in words across the stately Provincial Chamber in Pietermaritzburg, might be expressed as rifle fire across a valley in another part of the province."¹⁹⁹

B. *The Constitutional Negotiations*

The KZN Legislature initiated the drafting process in April 1995 by creating a constitutional committee to be chaired by IFP representative Arthur Konigkramer.²⁰⁰ The job of the committee was to approve a draft constitution by a two-thirds majority and present it

193. *Id.*

194. *Id.* at 662-63; Devenish, *supra* note 187, at 511.

195. JEFFERY, *supra* note 13, at 445, 499.

196. *See id.* at 447 (explaining that Chief Buthelezi served as the Minister of Home Affairs).

197. *See id.* at 637 (discussing the increased political violence during the IFP's absence from the Constitutional Assembly); *id.* at 531 (quoting ANC Secretary General as saying, "If we [the ANC] allow the constitution to be written through any body other than the Constitutional Assembly . . . we run the risk of bequeathing to future generations in this country an illegitimate and undemocratic constitution.").

198. Indeed, the ANC leadership expressed hope that the provincial constitution-making process "would pave the way for the IFP's return to the Constitutional Assembly, in time to participate in the adoption of the final constitution." *Id.* at 533 (quoting Secretary General of the ANC, Cyril Ramaphosa). Furthermore, the national leadership of both the IFP and the ANC were in constant contact with their provincial representatives. Devenish, *supra* note 187, at 506 n.17.

199. *KZN's New Constitution*, *supra* note 188, at 8.

200. *Id.* at 2.

to the legislature by March 11, 1996.²⁰¹ If the legislature also approved the document by a two-thirds majority, the document could be submitted to the Court for certification.²⁰² The political configuration of the committee was such that the IFP could get a two-thirds majority only if it gathered the support of the ANC or the remaining minority parties.²⁰³ The IFP was therefore barred from any unilateral action.

In August 1995, the committee produced a "Working Document on Constitutional Principles," which became known as the Fernhill Agreement.²⁰⁴ The Fernhill Agreement was approved by a two-thirds majority, including the ANC, and involved a great deal of compromise by all parties.²⁰⁵ Both the ANC and the IFP celebrated the document as all-inclusive and emphasized the spirit of cooperation with which it had been negotiated.²⁰⁶

Nonetheless, the IFP's national leadership removed Kronigkramer from the committee because he had acted without a mandate.²⁰⁷ Kronigkramer was replaced by Mike Tarr, and the Fernhill Agreement was replaced with the "Green Paper."²⁰⁸ The Green Paper was significantly more secessionist than the Fernhill Agreement, and it embodied the IFP's desire to establish greater authority for the provinces than was conceived under the proposed national constitution.²⁰⁹ The ANC responded immediately by calling the Green Paper an attack on the supremacy of the proposed national constitution.²¹⁰ Consequently, the IFP began to suspect that the ANC would stall the drafting process until after the completion of the permanent national constitution.²¹¹ Thus, the IFP abandoned

201. *Id.* at 8.

202. See S. AFR. (Interim) CONST. 1993 § 160 (describing the procedures by which a provincial legislature could draft a provincial constitution).

203. van Rensburg, *supra* note 79, at 45.

204. *KZN's New Constitution*, *supra* note 188, at 2.

205. *Id.* at 2-3.

206. *Id.*; JEFFERY, *supra* note 13, at 537. However, the document was decidedly in conflict with the IC because it declared broad powers for the province. *KZN's New Constitution*, *supra* note 188, at 3.

207. JEFFERY, *supra* note 13, at 537-38; *KZN's New Constitution*, *supra* note 188, at 3; see also Press Release, ANC, Statement on IFP National Caucus (Sept. 17, 1995), available at <http://www.anc.org.za/ancdocs/pr/1995/pr0917a.html> (discussing the IFP's loss of direction and the attack on Kronigkramer).

208. *KZN's New Constitution*, *supra* note 188, at 3-5.

209. *Id.* at 4-5. Indeed, the Green Paper contained "Constitutional Principles." The second Principle stated, "The Constitution shall express the aspirations of the Province to achieve a substantially greater degree of autonomy and self-rule within the parameters of a united South Africa once the national constitutional framework so allows." *Id.* at 5. Thus, the IFP's substitution of the Green Paper for the Fernhill Agreement evidences the IFP's intent to use the provincial process as a surrogate for participation in the Constitutional Assembly.

210. JEFFERY, *supra* note 13, at 538-39.

211. *KZN's New Constitution*, *supra* note 188, at 6.

attempts at drafting an all-inclusive document and tried to circumvent ANC participation by procuring the support of the minority parties.²¹²

The IFP faced a formidable challenge, however, because the minority parties represented a wide range of interests and none was anxious to alienate the ANC.²¹³ Faced with that challenge, the IFP resorted to the unilateral politics of the past.²¹⁴ In an effort to subvert the two-thirds majority necessary to pass a constitutional amendment, the IFP proposed a new provincial government institution called the "Council of State."²¹⁵ The Council would ratify actions taken by the provincial executive cabinet and thereby bypass the legislature. If a member of the cabinet dissented, only then would the matter be presented to the legislature. Additionally, the Council would be comprised of two representatives from each of the three political parties with the largest number of seats in parliament—the IFP, ANC, and NP.²¹⁶

The Council of State was the IFP's attempt at circumventing the minority parties by eliciting the support of the NP, which stood the most to gain from the Council of State. The IFP hoped to lure the NP into supporting its proposed constitution in exchange for equal voting strength through the Council of State.²¹⁷ However, the Council of State succeeded only in breeding resentment towards the IFP by the minority parties, who refused to vote for its creation.²¹⁸ Additionally, the ANC refused to participate in a process that would be dictated by the NP and the IFP.²¹⁹ Thus, the ANC threatened the NP by stating that, if necessary, it would adopt the same exclusionary tactics in the national Constitutional Assembly.²²⁰ The NP quickly abandoned its alliance with the IFP because of the superior interests that were at stake in the national constitutional deliberations.²²¹

Nevertheless, the committee published a draft constitution on February 7, 1996, in the hope that public input would resolve the

212. *Id.*

213. *Id.* at 6, 9; see also JEFFERY, *supra* note 13, at 540 (discussing the minority parties' unwillingness to alienate the ANC).

214. The IFP had also suggested that it would call a new election in KZN so that it could get the necessary majority to exclude the ANC. JEFFERY, *supra* note 13, at 618; *KZN's New Constitution*, *supra* note 188, at 6.

215. See generally *KZN's New Constitution*, *supra* note 188, at 6–7 (describing the nature of the Council of State).

216. *Id.*; see also Independent Electoral Commission, *supra* note 191 (showing the identities of the three largest parties).

217. *KZN's New Constitution*, *supra* note 188, at 6; van Rensburg, *supra* note 79, at 46–47.

218. *KZN's New Constitution*, *supra* note 188, at 6.

219. JEFFERY, *supra* note 13, at 538.

220. *Id.*

221. *Id.* at 538–39.

political stalemate.²²² The committee held public meetings and received over 227 public submissions.²²³ The draft constitution was also submitted to two legal experts for an evaluation as to whether it would be certified by the Court.²²⁴ The substance of the document was extravagant.²²⁵ It "gave expression to a desire for both cogent provincial autonomy and asymmetry for KwaZulu-Natal."²²⁶ It contained a universal bill of rights, called for the autonomy of the province, and attempted to regulate the relationship of the province vis-à-vis the national government.²²⁷ The legal experts identified those constitutional flaws and recommended that the document be revised.²²⁸

The committee therefore returned to the negotiating table. The ANC claimed that it was eager to proceed but had concerns about the document's radical claim of provincial autonomy.²²⁹ At that point, several minority parties withdrew from the committee, alleging that their demands had been perpetually overlooked.²³⁰ The IFP was therefore forced to find agreement with the NP and the ANC. The three parties could not reach an agreement, however, and talks ended on March 11, 1996.²³¹ The IFP tried to elicit the support of the minority parties in one last attempt to table the constitution on the March 11 deadline.²³² The IFP was able to gain the support of only the Minority Front.²³³ However, the IFP-Minority Front coalition still did not equate to the necessary two-thirds majority. Additionally, the Minority Front was not willing to oppose the ANC.²³⁴ Thus, the Minority Front stood between the IFP and the ANC, offering support to each if both parties would in turn support each other.²³⁵

Consequently, on March 14, the ANC agreed to re-enter the negotiations,²³⁶ and at 8:00 a.m. on March 15, a draft constitution

222. *KZN's New Constitution*, *supra* note 188, at 7-8.

223. *See id.* at 7 (noting that four public meetings were held).

224. *See id.* at 7 (discussing the legal experts' conclusions); van Rensburg, *supra* note 79, at 47-48.

225. *See Devenish*, *supra* note 187, at 507-08 (discussing the language of the Constitution).

226. *Id.* at 505.

227. *Id.*

228. *KZN's New Constitution*, *supra* note 188, at 7.

229. *Id.* at 8.

230. *Id.* at 8-9.

231. *Id.* at 9.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.* at 9-10 (discussing the maneuverings of the MF leadership during the breakdown period). The Minority Front leader, Amichand Rajbansi, visited Nelson Mandela during this time and also met with other national ANC leaders in Cape Town. *Id.* at 10.

236. *Id.* at 10.

was passed unanimously by the committee.²³⁷ The ANC, operating under directives from its national leadership, made significant concessions and deviated from its previous position by agreeing to various contentious clauses relating to provincial autonomy.²³⁸ The provincial legislature unanimously approved the draft document, and the document was submitted to the Court for certification on March 25, 1996.²³⁹

C. *The Content of the KZN Constitution and the Constitutional Court's Certification Judgment*

The content of the constitution embodied the IFP's opposition to the Constitutional Assembly. Chapter 1 of the constitution declared:

This Constitution sets out the basis for the interaction between the Province of KwaZulu Natal and the rest of the Republic of South Africa, in order to expand the powers and functions of this Province, so as to enable its people to enjoy greater self-determination within a united federal framework.²⁴⁰

Chapter 1 also stated that "the relationship between the Province and the national government shall be based on the principles of federal partnership, parity and mutual respect."²⁴¹ Those declarations ran directly contra to both the IC and the concurrent proposals of the Constitutional Assembly.²⁴² The document created a provincial constitutional court,²⁴³ contained an elaborate bill of rights,²⁴⁴ and endowed traditional leaders with automatic representation in local government.²⁴⁵ Finally, the constitution purported to define the competence of the provincial legislature by declaring various categories of exclusive provincial authority, including taxation.²⁴⁶

On September 6, 1996, the Court issued its certification decision.²⁴⁷ The Court unanimously and unequivocally ruled that the document was "fatally flawed" for numerous reasons.²⁴⁸ The Court

237. *Id.*

238. *Id.*

239. *KZN Certification* 1996 (11) BCLR 1419 (CC) ¶ 2 (S. Afr.); *see also KMZ's New Constitution*, *supra* note 188, at 10 (noting that the Constitution had been submitted).

240. PROVINCE OF KWAZULU NATAL CONST. 1996 ch. 1. § 1(8).

241. *Id.* ch. 1, § 1(5).

242. Section 1(1) of the IC provides: "The Republic of South Africa shall be one, sovereign state." S. AFR. (Interim) CONST. 1993 § 1(1). Section 1 of the final NC provides: "The Republic of South Africa is one, sovereign, democratic state." S. AFR. CONST. 1996 § 1.

243. PROVINCE OF KWAZULU NATAL CONST. 1996 ch. 8.

244. *Id.* ch. 3.

245. *Id.* ch. 12, § 3(5)(1).

246. *Id.* ch. 5, § 1(2).

247. *KZN Certification* 1996 (11) BCLR 1419 (CC) (S. Afr.).

248. *Id.* ¶ 13.

ruled that various provisions attempted to usurp national powers and were therefore inconsistent with the IC.²⁴⁹ In particular, the Court made reference to portions of the bill of rights,²⁵⁰ the establishment of a constitutional court,²⁵¹ and the enlargement of provincial legislative authority.²⁵² The Court emphasized that “[u]nlike 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.”²⁵³ The Court concluded its judgment by stating, “It is necessary to emphasize 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.”²⁵⁴ The Court’s decision rendered the constitution inoperative.²⁵⁵ However, the value of the KZN constitution was enduring because of processes that it induced and the flexibility that it provided within South Africa’s federal structure. Those virtues will now be considered.

249. *Id.* ¶¶ 13–18.

250. *Id.* ¶ 31.

251. *Id.* ¶ 33.

252. *Id.* ¶ 15.

253. *Id.* ¶ 14 (quoting *In re The Nat’l Educ. Bill No. 83 of 1995* 1996 (4) BCLR 518 (CC) para. 23 (S. Afr.)). That language clearly reaffirmed the “devolutionary” nature of South Africa’s federal systems. See *supra* notes 24–28 and accompanying text (discussing the devolutionary system); see also Williams, *supra* note 4, at 642.

254. *KZN Certification* (11) BCLR 1419 ¶ 47.

255. It should be noted that KZN initiated one other attempt at a provincial constitution in 2004. See Sibonelo Msomi, *Premier Calls for a KZN Constitution*, WITNESS (Pietermartizburg, S. Afr.), May 20, 2004. The Legislature did not vote on the proposed 2004 draft, however, and KZN still operates under the default provisions of the NC. See *KZN Draft Constitution Not Adopted*, MERCURY (Durban, S. Afr.), June 1, 2005. The 2004 constitutional process was interesting because it was initiated by the ANC, which, for the first time, secured a majority in the KZN Legislature after the 2004 election. See Independent Electoral Commission, *National & Provincial Elections 2004*, <http://www.election.org.za/Election2004Static.asp?radResult=50&sel Province=4> (last visited Feb. 9, 2008) (providing a list of the election results). The ANC received 46.98% of the vote, and the IFP received 36.82%. *Id.* Thus, the ANC initiated the drafting of a provincial constitution in an attempt to exert its majority status. The IFP ultimately sabotaged the process by refusing to participate, thus eliminating the possibility of the legislature getting the required two-thirds majority. *KZN Draft Constitution Not Adopted*, *supra* note 255. Unlike prior constitution-making attempts, the 2004 process was not accompanied by any political violence. Bheki ka Mncube, *KZN “No Longer Strife Province,”* WITNESS (Pietermartizburg, S. Afr.), Dec. 3, 2004.

V. REGIME-THREATENING CONFLICTS AND SUBNATIONAL CONSTITUTIONS

Successful political change requires transitional government systems that can accommodate regime-threatening conflicts.²⁵⁶ In 1991, Donald Horowitz recognized that successful change in South Africa would require opposing parties to be channeled into legitimate processes and institutions where they could negotiate the nature of the new constitutional order.²⁵⁷ Horowitz emphasized that peaceful

256. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 5 (2000) (“[P]rocesses and institutions provide . . . a means, in effect, to civilize the bitter political conflicts which [tend] to degenerate into violent confrontation.”). Klug provides a fascinating account of South Africa’s political transition, focusing on the role of the Constitutional Court as a transitional government institution. *Id.* at 14-15. Klug notes that the Court played a fundamental role in South Africa’s transition because it provided “a space in which . . . irreconcilable conflicts [could] be temporarily if not permanently mediated, allowing political contestants to embrace democratic procedures and outcomes.” *Id.* at 14. Thus, “even those parties who walked out of the negotiations, such as the Inkatha Freedom Party, have accepted the Court’s interpretation of their claims.” *Id.* However, although Klug references the IFP’s subnational constitution making, he does not credit that process as a contributing factor in South Africa’s successful transition. *Id.* at 102. Rather, Klug’s claim is that the IFP’s acquiescence to the Court’s mediation of political conflict evinced the arrival of “constitutionalism” within South Africa. *Id.* at 14. The claim of this Article is perhaps more preliminary—the subnational constitution-making process provided a means for “constitutionalism” to develop within South Africa and created an opportunity for the Court to mediate the ANC/IFP conflict. Nevertheless, Klug’s theoretical observations are sound—transitional governments must be able to manage regime-threatening conflicts. *Id.* at 4. The Court was one essential institution in South Africa’s experience; subnational constitutions were another.

257. DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 33-34 (1991). Horowitz reasoned that once that dialogue begins within the confines of legitimate institutions and processes, the parties have implicitly endorsed those institutions and are confronted with the high costs of abandoning them. *Id.* Horowitz’s paradigm is consistent with theories of “transitional constitutionalism.” See generally Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2076 (1997) (discussing transitional constitutionalism). Transitional constitutionalism emphasizes the many functions of law during periods of political transformation. *Id.*; see also Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 *CHI. J. INT’L L.* 663, 667-68 (2006) (discussing the practical value of constitution-making during political change). Ruti Teitel has noted that constitution-making is “inextricably enmeshed in transformative politics.” Teitel, *supra* note 257, at 2076. Additionally, other scholars have observed that constitution-making during political transition is a “process or a forum for negotiation amid conflict and division.” Samuels, *supra* note 257, at 668.

In particular, Heinz Klug has noted that constitutional processes can facilitate successful political change by providing legal structure to political debate and disagreement. KLUG, *supra* note 256, at 14; see also Ashley Crossland, *Constituting Democracy: Law, Globalism, and South Africa’s Political Reconstruction by Heinz Klug*, 25 *MELB. U. L. REV.* 859, 859-64 (providing a helpful distillation of Klug’s observations). By so doing, transitional constitutional systems manage conflict and thus facilitate successful regime change. KLUG, *supra* note 256, at 14. According to Klug, constitutional processes must be able to suspend violence that threatens to

change required a flexible government system that could divert regime-threatening conflicts into legitimate institutions and processes.²⁵⁸

In retrospect, Horowitz's observations were prophetic. South Africa's transitional government system successfully managed the ANC/IFP conflict. Subnational constitutions were integral to that transition. In two separate instances, the availability of subnational constitutions within South Africa's federal structure provided the ANC and the IFP with the increased political flexibility necessary to maintain dialogue within the system's strictures. Those two instances will be considered in turn.

A. *Managing Conflict by Increasing Political Flexibility at the National Level*

Authorizing subnational units to adopt constitutions can promote stability by increasing political flexibility at the *national* level. Political actors may be able to make concessions in the form of a regional constitution that they could not make at the national level. Conversely, minority political parties may be able to exact guarantees in a subnational constitution that they would not have the political clout to leverage at the national level. Thus, subnational constitutions increase a system's ability to accommodate societal conflicts because they enlarge the array of solutions available to negotiating parties. The KZN experience is illustrative of that general principle.

In 1993, South Africa's transitional government established a timeline for political change and set April 26-29 as the dates for the country's first democratic election.²⁵⁹ However, on February 12, the deadline for registration to participate in the election, the IFP failed to register.²⁶⁰ Both the ANC and the NP realized that "it would be disastrous" if the IFP did not participate in the election.²⁶¹ The legitimacy of the new constitutional order required participation from

consume a transitional society. *Id.* Klug notes that "constitutional indeterminacy plays a pivotal role in integrating competing forces." *Id.* at 7. Successful political transition, according to Klug, requires legal systems that are indeterminate and simultaneously definite in respect of the universe of viable political options. *Id.* at 7-8. The indeterminacy of law facilitates political interaction, while the definitive nature of political options provides order to the dialogue. *Id.*

258. HOROWITZ, *supra* note 257, at 33-34. Horowitz suggested several structural arrangements that were not adopted in South Africa. *See, e.g., id.* at 204-05 (arguing for a separately elected president). However, Horowitz's underlying theoretical premise—that political institutions can be valuable tools in managing regime-threatening conflicts—deserves recognition.

259. THOMPSON, *supra* note 16, at 259-64.

260. *Id.* at 259.

261. *Id.* at 260.

all major constituencies.²⁶² If the election proceeded without the IFP, the new government would undoubtedly face violent resistance when it tried to assert its authority within KZN.²⁶³ The IFP, however, refused to participate unless the new constitutional order would recognize the Zulu Monarch and grant more autonomy to the provinces.²⁶⁴

The ANC, on the other hand, remained committed to a purely democratic national constitution and would not provide ex officio recognition of the Zulu Monarch.²⁶⁵ Nevertheless, the ANC realized that without the IFP's participation, the national constitution would lack legitimacy within KZN and likely thrust South Africa into civil war.²⁶⁶ The ANC met with the IFP several times in an attempt to gain IFP participation in the election, but the IFP's hegemonic demands could not be satisfied.²⁶⁷ Finally, just one week before the election, the ANC was able to elicit the IFP's participation.²⁶⁸ In exchange for the IFP's involvement in the election, the ANC and the NP agreed to amend the IC.²⁶⁹

The amendments had two significant provisions, both of which related to the constitutional powers of the provinces.²⁷⁰ First, provinces could create, via their constitutions, executive and legislative structures and procedures that differed from the "default"

262. *Id.*

263. Indeed, the IFP's violent intentions were codified in its 1992 constitution, which called for the creation of a provincial militia. That constitution also included a provision stating that "federal" troops could not be stationed within the territory of KZN absent the consent of the KZN legislature. *See supra* text accompanying notes 167-70. There were also reports of IFP troops in training during that period. *See AMATO, supra* note 165, at 72.

264. JUNG, *supra* note 91, at 77-78; MANDELA, *supra* note 1, at 535-36; THOMPSON, *supra* note 16, at 259-62.

265. MANDELA, *supra* note 1, at 536. Prior to meeting with the IFP in 1994, Mandela told reporters, "I will go down on my knees to beg those who want to drag our country into bloodshed and to persuade them not to do so." THOMPSON, *supra* note 16, at 260.

266. THOMPSON, *supra* note 16, at 261-62. The country's fragile state was illustrated on March 28, 1994, when the thousands of IFP supporters staged a demonstration in Johannesburg. *Id.* The mob brandished spears and "knoburries" and marched towards the ANC headquarters at the "Shell House." *Id.* at 261. When the crowd reached the Shell House, ANC security forces opened fire, killing more than fifty people and injuring many more. *Id.*; *see also* MANDELA, *supra* note 1, at 537 (discussing the significance of the Shell House killings).

267. *See* THOMPSON, *supra* note 16, at 259-61 (discussing these attempted negotiations).

268. *Id.* The IFP initially rejected the ANC's offer. The NP and ANC determined to go ahead with the election despite the absence of the IFP. The government, however, prepared to subdue the IFP by force. A state of emergency was declared in KZN, and troops were relocated to KZN. *See id.* at 261 (noting the escalation of the violence).

269. *See supra* note 180 and accompanying text.

270. *See id.* (containing text of amendments).

provisions of the national constitution. Second, provincial constitutions could 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.”²⁷¹ The memorandum also included an agreement to submit to international mediation for all “outstanding issues.”²⁷²

The structural creativity of that agreement is spectacular and clearly evinces the political flexibility that subnational constitutions can create within federal systems. The ANC, although not willing to formally recognize the Zulu monarch in the national constitution, used the national constitution to mandate that KZN draft a provincial constitution that would recognize the Zulu monarch.²⁷³ The amendment created an asymmetry between the provinces that pleased the IFP. The IFP could now look to the *national* constitution to guarantee protection for the Zulu monarch—a substantial political victory.²⁷⁴ On the other hand, the ANC had conceded nothing of substance, yet. A provincial constitution would still be required to go through the provincial legislature where the ANC would have at least some representation. Furthermore, even if the IFP could define the role of the Monarch unilaterally at the provincial level, the document would still have to be certified by the Court²⁷⁵—a significant safeguard for the ANC.

Thus, the availability of subnational constitutions within South Africa’s structural framework enabled the IFP and the ANC to arrive at a mutually acceptable agreement. That increased institutional elasticity helped to lure the IFP into the election and secured the universal legitimacy of South Africa’s first democratically elected government. Subnational constitutions provided a unique solution that revealed to the IFP and the ANC that the new regime was elastic enough to accommodate them both and represented a key

271. Joint Statement Between President Mandela, F.W. de Klerk, & M. Buthelezi, *supra* note 180.

272. *Id.*

273. This creates an interesting manipulation of constitutional “space.” It is an asymmetrical amendment. That is, it applies only to KZN. Furthermore, it is not permissive “space.” It is a mandate that the provincial constitution accommodate the monarch; this mandate raises the interesting question of whether a KZN constitution that did not accommodate the monarch would be found to be “inconsistent” with the IC and thus un-certifiable by the Court.

274. The IFP has frequently appealed to the April 19 Memorandum of Agreement as the ANC’s guarantee that the province would have a constitution. *See, e.g.,* Bheki ka Mncube, *ANC Bitter of IFP Walkout*, WITNESS (Pietermartizburg, S. Afr.), May 16, 2005 (quoting IFP representative as stating, “[t]he issue of recognition of the Zulu Monarch is not a political battle, but a duty and obligation as dictated by the Sikhukhuze declaration [that paved the way for the IFP participation in the 1994 general election] and the country’s 1996 constitution.”) (alteration in original).

275. S. AFR. (Interim) CONST. 1993 § 160(4).

experience in successful political transformation.²⁷⁶ The 1994 election proceeded with astonishing tranquility.²⁷⁷ Most importantly, however, the new regime was implicitly ratified by all major constituencies.

B. *Managing Conflict by Providing Alternative Political Forums*

South Africa offers one further example of the utility of subnational constitutions in managing political conflicts. Scholars have observed that democratization requires “participatory processes”²⁷⁸ that “encourage non-violent resolution of conflict.”²⁷⁹ In particular, “participation in the constitution-making process is essential in transitional justice because of the need to ensure that previously excluded groups will not feel that the new rules have been imposed by the main power holders but have instead emerged through a participatory process.”²⁸⁰ Thus, successful political change requires structural arrangements that will encourage participation even by dissenting factions. Transitional government systems must prevent political alienation by providing alternative opportunities for legitimate participation.

The KZN experience illustrates the utility of subnational constitutions in that regard. As already noted, after the 1994 election, the newly elected government began the process of revising the IC so that a final and permanent constitution could be ratified.²⁸¹ In February 1995, the IFP took the position that, based on the April 19 agreement, the Constitutional Assembly could not continue in the drafting process without submitting to international mediation.²⁸² The ANC denied that the April 19 agreement required international mediation of that nature. The IFP then walked out of the Constitutional Assembly claiming that it had been tricked into

276. See Aeyal Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 58 (2004) (“Participation, the sense of sharing in the endeavor, and the actual creation of a constitution, can affect the reconciliation process and serve as building blocks of transitional justice.”).

277. THOMPSON, *supra* note 16, at 263.

278. Samuels, *supra* note 257, at 670.

279. *Id.* at 665.

280. Gross, *supra* note 276, at 58.

281. JEFFERY, *supra* note 13, at 531; THOMPSON, *supra* note 16, at 269–70.

282. JEFFERY, *supra* note 13, at 531.

participation in the election.²⁸³ The Constitutional Assembly completed the NC without IFP participation.²⁸⁴

The period immediately following the IFP withdrawal was incredibly violent in KZN.²⁸⁵ Chief Buthelezi called upon IFP supporters to “fight for freedom”²⁸⁶ and “rise and resist.”²⁸⁷ The ANC’s response was swift and unflinching: the future legitimacy of the constitution depended upon compliance with the procedures outlined by the IC and, therefore, no party could be permitted to “strong arm” the drafting process.²⁸⁸ The threat of civil war was again on the horizon.²⁸⁹

However, the IFP immediately exercised the constitutional right to draft a provincial constitution for KZN that it had secured through the April 19 agreement. The IFP considered the provincial constitutional process to be a “surrogate for its participation in the constitutional deliberations of the Constitutional Assembly”²⁹⁰ and undertook to use the provincial constitution as a means of indirectly participating in the national constitutional debate. Following more than a year of negotiation and increased violence, the two parties unanimously agreed to a draft constitution on March 15, 1996.²⁹¹ Notwithstanding the subsequent rejection of the constitution by the Court, violence in the region dramatically and permanently subsided since that date.²⁹²

283. *Id.* The IFP specifically cited to the agreement’s terms on international mediation, claiming that issues relating to the authority of the provinces should be mediated. *Id.* The IFP claimed that its participation in the election had been premised upon international mediation. *Id.* The ANC, however, was emboldened by the election results and considered it the duty of the government to continue with the drafting process. *Id.* at 531.

284. *Id.* at 536; *see also* Devenish, *supra* note 187, at 513 (indicating that the final constitution was certified by the Court in 1996); *see In re Certification of the Amended Text of the Const. of the Republic of S. Afr.* 1997 (1) BCLR 1 (CC) (certifying the final constitution).

285. JEFFERY, *supra* note 13, at 531.

286. *Id.*

287. *Id.*

288. *See id.* at 531 (“If we [the ANC] allow the constitution to be written through any body other than the Constitutional Assembly . . . we run the risk of bequeathing to future generations in this country an illegitimate and undemocratic constitution.”).

289. *Id.* at 537. The ANC, during this period, uncovered a secret IFP document outlining twenty points to provincial autonomy, which further enflamed the violence. *Id.*

290. Devenish, *supra* note 187, at 505; *see also* JEFFERY, *supra* note 13, at 617–18 (recording Buthelezi as saying that it was the primary responsibility of the IFP to promote federalism and for that reason “[o]ur provincial constitution must contain a very clear statement outlining and detailing once and for all the demand for autonomy of the people of this region”).

291. Devenish, *supra* note 187, at 503.

292. *See* Marks, *supra* note 86, at 183 (“One of the most paradoxical features of the ‘new’ South Africa has been the virtual disappearance of political violence associated with the Inkatha Freedom Party.”); Bheki ka Mncube, *KZN No Longer the Strife Province*, WITNESS (Pietermartizburg, S. Afr.), December 3, 2004.

The significance of those events must not be overlooked. The federal structure created by the IC provided an alternative *yet legitimate* forum for the IFP to participate in political transformation²⁹³—the drafting of a provincial constitution. Absent that legitimate forum, the IFP would have had no choice but to surrender or violently oppose the new government. The provincial constitution served as a political safety valve because it ensured that fallout at the national level did not completely alienate the IFP from the institutions of the new regime.²⁹⁴ The availability of a provincial constitution-making process enabled the IFP to abstain *and* participate at the same time. In that sense, it ensured that the ANC/IFP conflict remained within legitimate processes and institutions. After walking out of the national deliberations, the IFP focused all of its political energy on drafting a provincial constitution, eventually resulting in a peaceful settlement with the ANC.

Conversely, the presence of a surrogate *subnational* constitutional process emboldened the ANC to resist the brinkmanship tactics of the IFP at the *national* level. The ANC could not afford full-scale civil war. The legitimacy of the NC required some form of participation from all of the regions within South Africa. However, the ANC also could not give in to the IFP's substantive demands at the national level because that too would undermine the legitimacy of the NC.²⁹⁵ Thus, the provincial constitution allowed the ANC to remain consistent at the national level and flexible at the provincial level.

Those dynamics almost certainly explain why the provincial ANC representatives agreed to a document that was in obvious conflict with the ANC's national policy.²⁹⁶ President Mandela and other national leaders were fully aware of the national significance of the KZN constitution.²⁹⁷ In fact, both Mandela and De Klerk put

293. See *supra* note 188 and accompanying text (discussing the IFP's clear intention to utilize the provincial constitution-making process as an alternative to participation in the national deliberations).

294. Indeed, the IFP Secretary General at the time of the KZN drafting process stated that the "promulgation of a provincial constitution . . . would provide the institutional basis for the expression of provincial autonomy." *KZN's New Constitution*, *supra* note 188, at 2. Thus, it seems that the IFP actually had a contemporaneous understanding of the "institutional" role of the provincial constitution-making process within South Africa's larger federal system.

295. See *supra* note 288 and accompanying text (discussing this attempt to "strong arm" the drafting process).

296. The ANC formally appeared before the Court during the certification hearing and opposed certification. *KZN Certification* 1996 (11) BCLR 1419 (CC) ¶ 3 (S. Afr.); Devenish, *supra* note 187, at 511–512.

297. Devenish, *supra* note 187, at 511 n.47; see also *id.* at 506 n.17 ("President Mandela, Deputy President F W de Klerk and the IFP President Mangosuthu Buthelezi were continuously in telephonic communication with the negotiators in the process."). Furthermore, renowned national negotiator, Pravin Gordhan, was sent to

direct pressure on their respective parties to reach a compromise at all costs.²⁹⁸ Consequently, an agreement was reached at the provincial level, the violence subsided,²⁹⁹ and the legitimacy of the national constitution was not questioned.³⁰⁰

It is interesting that an early draft of the IC required provincial constitutions to be approved by the Constitutional Assembly.³⁰¹ The IFP adamantly opposed that qualification on provincial autonomy and was successful in having it removed from the IC.³⁰² It was replaced with the requirement that provincial constitutions be certified by the Court.³⁰³ Had the IC not been amended to create a provincial drafting process that was insulated from the Constitutional Assembly, the IFP may also have boycotted the provincial process. The insulated provincial drafting process allowed the IFP to attack the credibility of the Constitutional Assembly without boycotting the entirety of the new regime. A slight alternation in South Africa's constitutional structure may have resulted in an entirely different outcome and, more importantly, complete alienation of the IFP from the transitional negotiations. That plausible scenario illustrates the structural presence of subnational constitutional allowances and the elasticity that they can create within federal systems.

C. Mitigating Considerations

Lessons from the history of the KZN experience underscore the utility of subnational constitutions in managing conflict. There are, however, factors that perhaps mitigate the utility of subnational constitutions in other federal arrangements. For instance, the IFP was not only a minority party but a regional party. Minority parties with less geographical centralization may not be as successful in procuring concessions from central authorities, and subnational constitutions may be inappropriate for subnational entities that are

KZN to facilitate an agreement. *Id.* at 506; *KZN's New Constitution*, *supra* note 188, at 10.

298. See *KZN's New Constitution*, *supra* note 188, at 10 (detailing the national interests involved in securing an all-inclusive provincial constitution).

299. Devenish, *supra* note 187, at 511.

300. Indeed, in a recent attempt to draft a new constitution for the KZN, the IFP submitted a proposed draft. That draft constitution contained the following language: "Subject to the Constitution of the Republic of South Africa, this Constitution shall be the supreme law of the Province . . ." PROVINCE OF KWAZULU NATAL (Inkatha Freedom Party Draft) CONST. 2004 § 8(3), available at <http://www.ifp.org.za/Constitution/provKZNconstitution.htm>.

301. SPITZ & CHASKALSON, *supra* note 180, at 161 (2000).

302. *Id.* at 161-162.

303. *Id.*

not geographically centralized.³⁰⁴ Additionally, the IFP was never capable of completely overthrowing the national government by force. That fact emboldened the ANC to call the bluff of the IFP when it threatened secession.³⁰⁵ In a different federal system, where both parties have an equal claim to national power, there is a reduced likelihood that one party would accept a subnational constitutional accommodation.

The South African experience does, however, reveal the institutional utility of subnational constitutions. They provide alternative political forums and, therefore, provide means of legitimate dissent during political transformation. Furthermore, they create greater political flexibility. Parties can make concessions for the sake of peace at the regional level that they cannot afford to make at the national level. Constitution makers should take note of the significant impact that subnational constitutions can have on transitional politics. Subnational constitutions can provide powerful alternatives in the contentious process of political transformation, where creative solutions to conflicts can often mean the difference between war and peace.

VI. SUBNATIONAL CONSTITUTION-MAKING AND THE TRANSFORMATION OF POLITICAL CULTURE

Successful political transformation, such as that experienced by South Africa, requires not only flexible political institutions but also an adjustment in political culture.³⁰⁶ Citizens, leaders, and organizations must learn to participate appropriately in the new political dispensation.³⁰⁷ However, the transformation of political culture must be a reflexive process. That is, a new regime must

304. For example, countries such as the Netherlands that employ consociationalism—a form of federalism that divides power into non-territorial subnational constituencies—may have less use for subnational constitutions during transition. See Charles E. Ehrlich, *Democratic Alternatives to Ethnic Conflict: Consociationalism and Neoseparatism*, 26 BROOK. J. INT'L L. 447, 457–58 (discussing Lebanon's failed attempt at establishing a consociationalist system).

305. Bouckaert, *supra* note 79, at 396; see MANDELA, *supra* note 1, at 616 (stating the ANC was committed to proceeding with the election even if the IFP failed to participate).

306. Samuels, *supra* note 257, at 667.

307. Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1894–95 (1998) (“[R]adical political transformation depends on . . . a move away from old habits and obsolete self-images for purposes of evolution towards a new collective self-identity suited to the emergent political and institutional order.”); Samuels, *supra* note 257, at 667 (“Initiating changes to the political culture of a society is one of the most difficult aspects of any post-conflict transition. It requires substantial changes to behavior as well as to expectations and norms.”).

disseminate a political culture that will perpetuate itself; simultaneously, the system must be able to accommodate the political realities of the existent society.³⁰⁸ The South African experience illustrates that subnational constitutions can facilitate that reflexive process by inducing political socialization and accommodating a layered political identity that is suited to the realities of African society.

A. *Liberal Democracy and the Realities of African Society*

Subnational constitutions have unique value in Africa. There is a long-standing recognition that Africa struggles to maintain stable democracies.³⁰⁹ A significant shortcoming of liberal democracy in Africa is its "exaggerated focus on the autonomous individual."³¹⁰ Liberal democracy is centered on the rights and responsibilities of individuals.³¹¹ Citizenship is the most prized political status in liberal democracy because it carries the promise of the full plethora of legally protected rights, as well as the opportunity for full political participation.³¹² The political legitimacy of a liberal democracy is derived from the individual citizen's exercise of his or her political autonomy via the franchise.³¹³ Consequently, the political and constitutional culture of most liberal democracies centers on the individual,³¹⁴ and written constitutions are viewed as a means of

308. See FRANCIS B. NYAMNJOH, *AFRICA'S MEDIA, DEMOCRACY AND THE POLITICS OF BELONGING* 25–28 (2005) (discussing the need for democratic regimes to adapt to the realities of their respective societies).

309. *Id.* at 25–26 ("Implementing liberal democracy in Africa has been like trying to force onto the body of a full-figured person, rich in all the cultural indicators of health with which Africans are familiar, a dress made to fit the slim, de-fleshed Hollywood consumer model of a Barbie-doll entertainment icon.")

310. *Id.* at 22; see also Adrien Katherine Wing, *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 306–07 (1993) (discussing the competing priorities that are resident in democratic African countries).

311. See Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1056–60 (1994) (discussing constitutionalism and the separation of the self and other).

312. *Id.*

313. In fact, liberal democracies are often skeptical of the political mobilization of communities, such as religious organizations and interest groups, which are viewed as a manipulation of the will of the people. See, e.g., William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993) (discussing the dangers of political mobilization by religious affiliation).

314. See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE—EVIDENCE* § 5.3.3 (2002) ("In a liberal democracy, autonomy is or at least approaches an ultimate value."). See generally GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988) (examining the nature and value of autonomy and analyzing various practical moral issues).

accommodating a diversity of *individuals* within one constitutional society.³¹⁵

That framework is far too “parochial” for Africa’s dynamic sense of community.³¹⁶ Africans view themselves vis-à-vis a multitude of communal relationships and expect recognition and political representation not only as individuals, but as “cultural, religious and regional communities.”³¹⁷ The success of democracy in Africa, therefore, may depend upon a “marriage or coexistence between individual aspirations and community interests, since Africans continue to emphasize relationships and solidarities over the illusion of autonomy.”³¹⁸ Stated differently:

For democracy to succeed in [the African] context, it must recognize the fact that most Africans are primarily patriotic to their home village, to which state and country in the modern sense are only secondary. It is in acknowledging and providing for the reality of individuals who straddle different forms of identity, and belonging, and who are willing or forced to be both ‘citizens’ and ‘subjects,’ that democracy stands its greatest chance in Africa.³¹⁹

That multi-layered approach to political identity cannot exist without some mechanism for recognizing subnational units and identities. If political identity in Africa is layered, governance and constitution-making must also be layered. Because written constitutions are tools in the crafting of political identity,³²⁰ African countries struggle to accommodate the various layers of political identity in one central document.³²¹ Thus, African countries must provide legitimate instruments for subnational communities to express and codify their political identities. Subnational constitutions and the subnational constitution-making process can make that possible.

315. See Rosenfeld, *supra* note 311, at 1060 (describing constitutionalism as a means of accommodating diverse individuals and grounded upon philosophical theories of individual autonomy).

316. NYAMNJOH, *supra* note 308, at 21.

317. *Id.* See generally *The Clash That Had To Come*, *supra* note 89 (discussing South Africa’s dilemma regarding the role of traditional leadership in government).

318. NYAMNJOH, *supra* note 308, at 26.

319. *Id.*

320. See Rosenfeld, *supra* note 311, at 1060 (“Constitution making, moreover, can be regarded as an attempt to . . . forge a common identity rooted in a common text.”).

321. See, e.g., Christina Murray & Catherine Maywald, *Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203, 1217–30 (2007) (discussing subnational constitution-making in Sudan).

B. *The KZN Constitution and the Layered Political Identity of Zulu South Africans*

KZN presents a superb illustration of the multiple layers of African political identity.³²² The fundamental source of disagreement between the ANC and IFP was political identity.³²³ The ANC was always grounded in a broad, all-inclusive theory of African nationalism that transcended tribal and hereditary loyalties.³²⁴ The ANC had no intention of eliminating traditional structures, but it also had no desire to incorporate them into the political culture of the new South Africa.³²⁵ For the ANC, traditional leadership and democratic government were separate and distinct spheres.³²⁶

The IFP, however, was fundamentally concerned with the political identity of the Zulu people. Strong provincial powers were attractive to the IFP because they would create a means for the Zulu people to protect their political identity.³²⁷ A strong central government was threatening to the IFP because it would not recognize subnational communities. The IFP saw a centralized government as a death toll for the Zulu Monarch and broader cultural sentiments of Zuluness.³²⁸ For the IFP, the new political culture needed to recognize more than individual "South Africans," it had to recognize *Zulu* South Africans.³²⁹ Provincial powers and the authority to draft provincial constitutions were important to the IFP because they were a means of legitimating the layered political identity of Zulu South Africans.³³⁰

322. The differences between the ANC and the IFP represent the classic distinctions between the modern citizen of a liberal democracy and the traditional African subject. For a helpful extrapolation of those differences in relation to political identity in post-apartheid South Africa, see DLAMINI, *supra* note 86, at 83–84.

323. *Id.*; see *supra* note 85 (discussing the contention that the IFP's concern for Zulu identity was disingenuous). See generally *The Clash that had to Come*, *supra* note 89 (describing the IFP and ANC's competing visions).

324. See *The Clash that had to Come*, *supra* note 89 (discussing the ANC's theory).

325. See DLAMINI, *supra* note 86, at 84 ("[A] pressing issue for the ANC, then, was how to deal with ethnic rights in the face of an imagined non-ethnic community.").

326. See *The Clash that had to Come*, *supra* note 89, at 11 (providing a detailed description of the IFP and ANC's competing visions of ethnicity in the new constitutional order).

327. *Id.* at 54–55. This took the form of advocating for the recognition of traditional leadership in the new constitutional order. *Id.* The role of the "chiefs" and the Zulu monarch has been the centerpiece of the IFP's platform. *Id.*

328. See JEFFERY, *supra* note 13, at 607 (quoting Chief Buthelezi as saying, "[The ANC] is [an] evil at work which wants to destroy amakhosi [traditional leaders] and the autonomy of traditional communities to enable the central government in Pretoria to control every level of government and exercise its political influence right across the land").

329. *Id.* at 604–09.

330. *Id.* at 617–22.

The April 19 agreement illustrates the importance of political identity to the IFP and the utility of subnational constitutions in memorializing political identity. The primary significance of the agreement was that it ensured that the Zulu Monarch would have a place in the new political dispensation. The details of how the Monarch would be accommodated were yet to be determined, but the IFP had elicited a constitutional guarantee that the traditional leadership of the Zulu people would be incorporated into the new constitutional order. As has already been mentioned, that concession was only viable through the mechanism of a subnational constitution because the ANC could not afford to make such a concession via the NC.³³¹ Because the substantive content of provincial constitutions was otherwise very limited by the NC, the KZN constitution became, primarily, a means of symbolically memorializing Zulu political identity.³³²

C. Political Socialization in Transitional African States

Although democratic systems must evolve to accommodate the realities of African society, those societies must also change and embrace certain democratic principles. Citizens and institutions must recalibrate their political identity so they can participate appropriately in the new constitutional order.³³³ The success of a new constitutional order depends on whether a society is able to abandon, at least to a degree, an old political identity and assume a new constitutional status.³³⁴ Citizens must, for example, value and trust the franchise—a counterintuitive notion for patriarchal and communal societies. Thus, political transformation requires citizens and institutions to be politically socialized.

331. See *supra* Part IV.A (discussing the accommodation of a subnational constitution for the KZN).

332. Interestingly, the province has not secured a constitution so far. However, the anomalous relationship between traditional leadership and democracy continues to be the main impediment to the adoption of a provincial constitution. In KZN's most recent attempt to adopt a provincial constitution, the status of the monarch was a contentious issue. See Bheki ka Mncube, *Monarchy to Dominate KZN Constitution Talks*, WITNESS (Pietermartizburg, S. Afr.), May 3, 2005. Ultimately, after multiple public hearings and various committee meetings, the IFP boycotted the ANC-led process because of issues relating to traditional leadership. See Bheki ka Mncube, *IFP Walks Out of Constitutional Committee*, WITNESS (Pietermartizburg, S. Afr.), Apr. 12, 2005; Bheki ka Mncube, *Monarchy to Dominate KZN Constitution Talks*, WITNESS (Pietermartizburg, S. Afr.), May 3, 2004; see also *supra* note 255 (discussing the 2004 KZN constitution).

333. Rosenfeld, *supra* note 307, at 1895–96.

334. *Id.* at 1895.

Political socialization "is the process of induction into a political culture."³³⁵ It involves the training of citizens in respect of the mechanics, values, and "authoritative outputs" of a political system.³³⁶ In second- or third-generation government systems, political socialization usually occurs as part of the individual maturation process.³³⁷ In those societies, schools, family and religious associations, political parties, and local communities are the primary disseminators of political culture.³³⁸

However, socialization during periods of political transition occurs under exigent circumstances.³³⁹ Transitional societies must acclimate an entire generation of adult leaders and citizens almost instantaneously. Additionally, in transitional societies, pre-existing institutions may actually impede socialization if they reinforce attitudes and principles that undermine the new political order.³⁴⁰

Africa compounds the difficulties associated with disseminating political culture because of disparities in education, limited access to information, and a general lack of resources.³⁴¹ Thus, in young African democracies, government is not only a provider of essential

335. Gabriel A. Almond, *A Functional Approach to Comparative Politics*, in *APPROACHES TO THE STUDY OF POLITICS* 209, 233 (Bernard Susser ed., 1992); see also Peter J. Cannon, *The Third Balkan War and Political Disunity: Creating a Confederated Cantonal Constitutional System*, 5 J. TRANSNAT'L L. & POL'Y 373, 406 (1996) ("Political socialization occurs by perpetuating cultures and institutions over a temporal continuum which tends to induct a person into a 'citizenship' role.").

336. Almond, *supra* note 335, at 233.

337. See *id.* at 232-33 (describing the political socialization process in terms of an individual's natural maturation); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 ("The survival of our constitutional polity ultimately depends on the proper cultivation of children's hearts and minds.").

338. Almond, *supra* note 335, at 232-34.

339. Rosenfeld, *supra* note 307, at 1892 ("[T]o the extent . . . that successful constitution-making depends on replacing an incompatible pre-constitutional identity with a more congenial collective self-image, the new constitutional framework could prove too destabilizing to allow the polity to rally sufficiently around the requisite common identity.").

340. South Africa's experience with traditional leadership and customary law presents a perfect example in that regard. The conflict has been summarized thusly:

The terms of democratic discourse which [will] henceforth dominate South African politics [are] hostile to the hereditary, patriarchal and personal principles of traditional leadership. Even where traditional leadership could make some claim to be responsible for the communities they administer, this [is] not on the basis of electoral competition, which again violate[s] the democratic standards of the new South Africa.

The Clash that had to Come, *supra* note 89, at 11. Institutions of traditional leadership therefore present an impediment to the fundamental assumptions and guarantees of liberal democracy. *Id.*

341. See NYAMNJOH, *supra* note 308, at 22-23 ("Remote from the information superhighway or the global village and peripheral to the centralized activities of their own government, rural inhabitants of Africa are susceptible to manipulation by reactionary and revolutionary elites alike.").

services but also the primary instrument of political socialization. Consequently, the success of transitional African democracies depends on whether those governments can find creative ways to educate citizens on the values and mechanics of democratic governance.

Subnational constitution-making can bring democratic principles to a regional level and induce valuable political participation from citizens. Transitional governments that permit or require regional units to engage in constitution-making can elicit political participation from citizens and institutions that would not otherwise have an opportunity or an interest in government. Additionally, as illustrated in South Africa, subnational constitution-making can facilitate constructive involvement even of dissenting political groups.³⁴² Most important, however, the value of subnational constitution-making in those instances is not the resultant document but the interaction and participation that the *possibility* of a constitution can induce.

D. *Political Socialization and the KZN Constitution-Making Process*

The move from apartheid to democracy thrust South Africans into an entirely new political culture that was characterized by equality, liberty, and republican government. The success of that new dispensation, however, would depend on whether the citizenry and leadership would assume their new role in society.³⁴³ It was imperative that the transitional system train citizens and leaders to participate appropriately in a democratic society.³⁴⁴

South Africa's political parties, for example, were constituted around the political landscape of the apartheid regime. The ANC was primarily a liberation party, the IFP was an apartheid-era ethnic and cultural party, and the NP was an almost exclusively white-based party.³⁴⁵ For democracy to function, those entities would need to reconstitute themselves in accordance with the new political system. It was necessary for them to develop platforms and identities that furthered democracy, rather than frustrate the new regime by perpetuating the vestiges of apartheid. The KZN constitution-making process facilitated that socialization by bringing the institutions and procedures of constitutional democracy to KZN

342. See *supra* Part IV.B (discussing the KZN constitution-making process as an instrument of dissent for the IFP).

343. See *supra* Part V.B; see also Rosenfeld, *supra* note 307, at 1894–95 (discussing that radical political transformation requires a move towards a new collective self-identity).

344. Rosenfeld, *supra* note 307, at 1894–95.

345. See Jenkins, *supra* note 16, at 476–79, 483–84 (discussing the constituencies and platforms of the IFP, NP, and ANC).

notwithstanding the IFP's withdrawal from the national constitution-making process.

The KZN constitutional process facilitated the transformation of the IFP from a hegemonic, ethnically based organization into a bone fide opposition political party.³⁴⁶ The IFP's withdrawal from the Constitutional Assembly seriously threatened the legitimacy of the national constitution-making process. The IFP retained the ability to destabilize KZN and appeared determined to do so because of dissatisfaction with the ANC's unwillingness to submit to international mediation. As long as the IFP remained on the "outside" of the transitional government, the transition to a stable democracy would be threatened—or, at the very least, the legitimacy of the new dispensation would be undermined within KZN.³⁴⁷

The IFP knew that the IC severely limited the province's "constitutional space"³⁴⁸ and that the substance of the KZN draft constitution would be in violation of the IC. However, the IC provided procedures by which a province could adopt a constitution and submit it to the Court, regardless of its substantive content.³⁴⁹ Those institutional allowances provided a legitimate venue from which the IFP could protest and even challenge the national process without directly attacking its legitimacy.

More important, the IFP implicitly endorsed the new constitutional order by choosing to protest in that way. The IC's allowance for subnational constitutions ensured that even when the IFP was outside of the national debate, it was still using a legitimate constitutional apparatus. In drafting a provincial constitution, the IFP was acting through representatives elected in accordance with procedures established by the IC.³⁵⁰ Further, in submitting the document to the Court, the IFP implicitly recognized the Court's authority and, by extension, the legitimacy of the constitution creating the Court. Thus, the IFP was assimilated into the new constitutional regime, at least in part, by its participation in the KZN drafting process.³⁵¹

346. See LODGE, *supra* note 78, at 156 (discussing some of the contemporary and legitimate policy disagreements between the ANC and IFP).

347. See *supra* Part V.B.

348. See Williams & Tarr, *supra* note 24, at 15–16 (defining the term "constitutional space"); see also *supra* Part I.A (discussing the same).

349. S. AFR. (Interim) CONST. 1993 § 160.

350. The IFP did threaten to dissolve the provincial legislature and to hold a new election if the constitution was not approved by the ANC, but it never acted on that threat. JEFFERY, *supra* note 13, at 617.

351. The significance of this observation becomes clear when one focuses on the distinction between substance and process. The IFP knew and intended the *substance* of the KZN constitution to be ultra vires and declared invalid by the Court. Indeed, the IFP's chief motivation was to draft a constitution that embodied its opposition to the national deliberations. However, the *process* by which the constitution was drafted was dictated entirely by the IC, and the IFP complied with those procedures, even to

The 1996 drafting process was also valuable because it mirrored the national drafting process, thus exposing the IFP and its constituency to the ideas and mechanisms of constitutional democracy. During both the national deliberations³⁵² and the initial stages of the provincial constitution-making process, the IFP demonstrated that it was ill-prepared to function in the new regime.³⁵³ It exhibited an inappropriate hegemonic mentality, refusing to accept compromise solutions and threatening to resort to violence unless its demands were met.³⁵⁴ That mentality was understandable, however, because the IFP had no experience with multi-party governance.³⁵⁵ Under apartheid, it had never been necessary for the IFP to engage in coalition building, bargaining, or political compromise.

However, the 1996 KZN drafting process forced the IFP to confront the political realities of the new order. The KZN parliament was a multi-party institution that represented the interests of all citizens of KZN, irrespective of ethnic origin. Consequently, the IFP did not have the majority vote necessary to adopt a constitution unilaterally.³⁵⁶ The intense political maneuvering that occurred during the drafting process was invaluable training for the IFP because it forced the IFP to reckon with the realities of the new order.³⁵⁷ Indeed, the IFP now fashions itself as a multi-ethnic political party and has tried to articulate a policy-based platform in opposition to the ANC.³⁵⁸ By all accounts, the IFP has been successfully assimilated into the constitutional order. The KZN

the point that they submitted the text to the Court knowing it would be voided. The key observation from the South African experience is that South Africa's transitional federal structure created processes and institutions whereby dissenting groups could dissent and participate at the same time. That accommodation created the possibility that the IFP would be assimilated into the new order, ironically, by its act of dissent.

352. See *supra* Part III.A (discussing the IFP withdrawal from the Constitutional Assembly).

353. See *supra* notes 209–17 and accompanying text (discussing the IFP's sabotage of the Fernhill Agreement and the IFP's inability to develop a coalition with the minority parties).

354. *Id.*

355. See MANDELA, *supra* note 1, at 576 (discussing how, during apartheid, the IFP was the only recognized black political party within South Africa and KZN, the only black political party that was not banned during apartheid); see also TRADITIONAL DICTATORSHIP, *supra* note 13, at 3 (discussing how IFP was the only political party to gain representation in the parliament of the KwaZulu homeland); *supra* notes 112–14 and accompanying text (discussing the IFP's popularity under apartheid).

356. See *supra* note 191 (providing the complete results of the 1994 provincial election, with the IFP holding the most seats but not having a simple or super majority).

357. In fact, the ANC noted at the end of the negotiations that the constitutional process proved “once and for all that the two rival parties could co-operate.” JEFFERY, *supra* note 13, at 540.

358. See LODGE, *supra* note 78, at 156 (discussing some of the contemporary and legitimate policy disagreements between the ANC and IFP).

constitution-making process was an essential instrument in that assimilation.

VII. CONCLUSION

The availability of subnational constitutions has immense utility within unstable and transitional federal states. The KZN narrative illustrates that authorizing subnational units to adopt constitutions can increase the elasticity of the overall federal system. Specifically, the South African experience demonstrates that federal systems are better equipped to manage regime-threatening conflicts if they permit constituent units to adopt constitutions. Additionally, subnational constitution-making processes can contribute to the dissemination of political culture by facilitating constructive political interaction. South Africa's miraculous transition to democracy bears testament to the unique virtues of authorizing subnational constitutions within transitional and unstable federal states—a lesson that should inform contemporary constitution-making and transitional governments.