Bringing the Central Government Closer to Citizens

By Gordon DiGiacomo

Introduction

South Africa's transition to democratic rule was among the most successful in the developing world. Its constitution and the process by which it was formulated have received considerable international attention and praise. Since the adoption of the constitution, South Africa's political and legal institutions have proven to be stable and effective mechanisms to address the legacy of apartheid and colonialism. Although there is much to do, and although only twenty years have passed since black majority rule came to the country, it seems clear that constitutional democracy is establishing deep roots in South Africa's soil.

Nevertheless, it is desirable and appropriate that the political institutions be subject to careful analysis with a view to making South Africa's political culture more deeply democratic. That is generally what this paper is about. More specifically, it is about federalism and democracy in South Africa. Its central contention is that the country's constitutional democracy will be strengthened if reforms to the local and provincial governments are accompanied by reforms to the institutions of the federal government as well. The paper is animated by a fundamental concern regarding the relationship between the central government and the citizen. Since two levels of government come between the central level and the South African citizen, the Canadian citizen, the Nigerian citizen, the Australian citizen, etc., the possibility of that level becoming remote and unresponsive is very real.

The paper opens with a brief discussion on decentralization and democracy. After defining the term, decentralization, it sets out the major benefits that it brings to democracy and then points to some of the problems that it poses for democratic government. I do not deny that decentralization has the potential to advance democratization. In principle, it is a strategy with considerable merit. However, in the application, it has proven to be somewhat problematic not only in South Africa but in a number of other countries, such as the Philippines and Indonesia.[1]

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[1] For a discussion of decentralization in these two countries, see P. Hutchcroft, "Dreams of Redemption: Localist Strategies of Political Reform in the Philippines," in S. Williams, (ed.), Social Difference and Constitutionalism in Pan-Asia, (Cambridge Books Online, Cambridge University Press, 2014), http://dx.doi.org/10.1017/CBO9781139567312.006; E. Pisani, "Indonesia in Pieces: The Downside of Decentralization," Foreign Affairs, July/August, 2014, retrieved on April 9, 2015 from http://www.foreignaffairs.com/articles/141481/elizabeth-pisani/indonesia-in-pieces; and International Crisis Group, "Indonesia: Defying the State," Update Briefing, Asia Briefing No. 138, August 30, 2012, http://www.crisisgroup.org/en/regions/asia/south-east-

The second section focuses on the relationship between federalism and democracy in South Africa. The perspective is informed by (a) research on the relationship between federalism and democracy; (b) the realities of the country's politics, particularly during the constitutional negotiations; and (c) my understanding of federalism in other countries.

In recent years, we have witnessed conflicting trends in federalism thinking. On the one hand, federal arrangements are becoming increasingly popular around the world (although not in Africa, as the legal scholar, Adem Kassie Abebe, has made clear).[2] On the other hand, serious critiques of federalism have been undertaken by a number of scholars. For instance, the late, eminent scholar of democracy, Juan Linz, wrote: "Although there are writers who suggest so, federal states are not necessarily more democratic. To federalize might or might not be a step in the direction of democracy."[3] Thus, the question arises: is federalism enriching South African democracy and, if so, is it enriching it in a substantial or marginal way? These are very difficult questions to answer. My intent is two-fold: to show where the democratic content of South African federalism appears to be lacking and to discuss ways of bringing the central government closer to the citizens of South Africa.

Decentralization

Decentralization in the context of this paper refers to the granting of power, authority and resources to sub-national governments, that is, the provincial and local governments. Particularly notable about South Africa's constitutional order is the importance attached to local government. The introduction of a robust local government system was seen by black communities and the constitutional framers as a way to "correct the socio-politico-economic injustices and segregation that obtained through apartheid."[4] Section 152 identifies the objects of local government as being to provide democratic and accountable government for local communities; to ensure the provision of services to

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asia/indonesia/b138-indonesia-defying-the-state.aspx.

2   He writes, for instance: "Despite the fact that most African states demonstrate high levels of linguistic, ethnic and religious diversity, governments have generally been reluctant and even hostile to the idea of establishing a federal form of government." See A.K. Abebe, "Umpiring Federalism in Africa: Institutional Mosaic and Innovations," African Studies Quarterly, Vol. 13, No. 4, Winter 2013, p. 53.

3   Quoted in D. Treisman, The Architecture of Government: Rethinking Political Decentralization, (New York: Cambridge University Press, 2007), p. 267.

4   John-Mary Kauzya, "Political Decentralization in Africa: Experiences of Uganda, Rwanda, and South Africa," in G. Shabbir Cheema, D. Rondinelli, (eds.), Decentralizing Governance: Emerging Concepts and Practices, (Washington, DC: Brookings Institution, 2007), p. 83.

communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organizations in the matters of local government. To achieve these objectives local governments have been given significant powers and responsibilities.

In the abstract, the empowerment of local government has much to commend itself. Local government can strengthen democracy in a variety of ways. For instance, the dispersion of real power throughout the country makes it difficult for excessively powerful central or provincial governments to emerge and govern in an authoritarian fashion. Decentralization enables governments to act as counterweights to each other and, if there is a degree of competition among them, citizens may experience more responsive government. In this regard, Daniel Weinstock makes the point that decentralization "increases the number of political levers available to citizens, and thus increases the likelihood of the development of active citizenship...."[5] It also increases the possibility that a group, that may see its demands rejected by one level or one government, will be at least partially satisfied when it approaches another.

Because they are smaller, local governments are more 'user friendly'. In other words, it may be easier for citizens to access and influence local politicians and local government offices than those associated with the provincial or central governments. By their very size, local governments may be more amenable to political participation.

Strong local and provincial governments may be especially advantageous to minority groups. Groups that might be a minority nationally but constitute a majority locally or provincially would have the opportunity to exercise political power in ways that would be closed to them if meaningful political power resided only at the central government level.

On the other hand, relying on the local governments to provide for the democratic deepening of the state is a faulty strategy. To do so is to detract attention away from the democratic obligations of the senior levels, i.e., the national and provincial spheres, both of which are extremely important in the lives of citizens.   Neither is exempt from the duty to encourage citizen involvement in policy-making. A government that does neglect its democratic duties is likely to become aloof. Indeed, qualitative research undertaken by Freedom House suggests that citizens of South Africa do perceive not only the

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5   D. Weinstock, "Towards a Normative Theory of Federalism," International Social Science Journal, Vol. 53, 2001, p. 76.

national and provincial levels but also the local as being distant and unresponsive.[6] A few years earlier, the author of an article on participation and democracy in South Africa wrote: "...while many citizens are interested in politics and governance, many also find these difficult to understand, feel their views and concerns are not sufficiently taken into account by elected representatives, and ultimately, do not think they can have an impact on collective decision-making."[7] Clearly, political actors have much work to do in this area.

Some scholars question the assumed relationship between decentralization and democracy. Fidelx Kulipossa, for instance, concludes from his research that "...the data reveal no direct or causal relationship between them" and that "Decentralisation does not intrinsically foster democracy, participation, and empowerment at the local level...."[8] Several conditions have to be present in order for decentralization to be associated with democracy, which tend to vary in importance depending on the researcher.

Specific problems with decentralization have been pointed out by G. Shabbir Cheema:[9]

In some cases, authoritarian local leaders get elected and rule undemocratically....In some democracies with a federal system of government, such as Brazil, there are serious tensions between human rights agendas and the policies of the federal and state – and even local – governments. For example, political decentralization in Estonia and Latvia led to the exclusion of Russians – almost 40 percent of the population in Estonia – through language and citizenship laws. Other dangers of decentralization are that it can increase geographic inequalities due to the different resource bases of subnational units; it may lead to redundancy and inefficiency because of the lack of clear delineation of authority and responsibilities; and it may lead to more divisions among the society based on ethnicity.

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6 S. Booysen, Twenty Years of South African Democracy: Citizen Views of Human Rights, Governance and the Political System, (New York: Freedom House, 2013), pp. 2-3. Retrieved from https://freedomhouse.org/sites/default/files/Twenty%20Years%20of%20South%20African%20Democracy.pdf, May 10, 2015. A number of scholars and observers have been critical of sub-national governments and the way they have addressed the citizen participation issue and of the central government's change in its approach to local governments. See, for example, P. Heller, "Democratic Deepening in India and South Africa," Journal of Asian and African Studies, Vol. 44, No. 1, 2009; A Siddle, T. Koelble, *supra*, note 6; T. Koelble, A. Siddle, "Institutional Complexity and Unanticipated Consequences: The Failure of Decentralization in South Africa," Democratization,Vol. 21, No. 6, 2014; L.A. Picard, T. Mogale, Comparative Assessment of Decentralization in Africa: South Africa Desk Study, report prepared for the US Agency for International Development, May 2010.

7 K. Lefko-Everett, "Participation and Democracy," in N. Misra-Dexter, J. February, (eds.), Testing Democracy: Which Way is South Africa Going?, (Cape Town: Idasa, 2010), p. 166.

8 F. Kulipossa, "Decentralisation and Democracy in Developing Countries," Development in Practice, Vol. 14, No. 6, November 2004, p.778. For another general critique of decentralization, see D. Treisman, *supra,* note 3.

9 G. Shabbir Cheema, "Devolution and Accountability: Learning from Good Practices," in G. Shabbir Cheema, D. Rondinelli, (eds.), Decentralizing Governance: Emerging Concepts and Practices, (Washington, DC: Brookings Institution, 2007), p. 172.

Central governments ought not rely on the subnational governments to deepen democracy. They, too, need to be active in this effort, by ensuring the democratic content of their institutions and their policy-making processes. A good example of how a federal agency can do the latter effectively was discussed by Tomas Koontz in his study of federalism and forestry policy in the U.S.[10] Koontz sought to determine if level of government matters in terms of forest policy outcomes. His units of analysis were four pairs of forests; each pair consisted of a federally managed forest and a state-run forest. Three sets of policy outputs were considered: economic benefits derived from the timber, environmental protection outputs, and citizen participation patterns. He concluded that there were clear differences in the outputs of the federally run forests and the state-run forests. While the latter produced greater revenues from the timber, the federal forest managers exhibited greater concern with environmental protection efforts and citizen participation. Koontz writes:[11]

> State officials...face fewer constraints on their ability to pursue activities such as timber sales that yield substantial, direct economic benefits. State forest agency mandates emphasize timber as a source of profit or revenue rather than as just one of many equally valued resources. State planning documents provide officials with greater freedom to pursue economic development without significant public input.

Through the kind of practices described by Koontz central governments stay in touch with citizens.

Federalism and Democracy in South Africa

The primary task of this section is briefly to scan the structures of federalism in South Africa with a view to identifying their democratic content or lack thereof. I begin with a definition of federalism.

I consider federalism to be at once a mechanism for unification, a system of governance, and a way of structuring the state. A division of law-making powers exists between the central (or federal) government and territorially based constituent governments. The powers of each of these levels of government are constitutionally protected and each level enjoys a direct relationship with citizens. In addition, and admittedly this is a contested idea, the central government retains a degree of dominance

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10 T. Koontz, <u>Federalism in the Forest: National versus State Natural Resource Policy</u>, (Washington, DC: Georgetown University Press, 2002).

11 <u>Ibid.</u>, pp. 189-190.

or authority over the constituent units.[12] How much dominance depends on the historical, social and political realities of the country.

In what follows I will touch on the National Council of Provinces; the electoral system; and the intergovernmental relations structures. In addition, I will offer a concise discussion of deliberative democracy, a concept that holds out the promise of closer links between citizens and their central government.

National Council of Provinces

Like almost all federal countries, South Africa has a second chamber to represent the interests of the provinces in national policy-making. Each of the country's nine provinces sends ten representatives to the National Council of Provinces (NCOP). The selection process generally follows the German model in that the members are appointed by the provincial governments. Four of the ten members are members of the provincial executive and six are appointed by the provincial legislature.

A proposed bill that affects the provinces can only come into effect with the approval of both the National Assembly and NCOP. The Council can veto legislation affecting provinces but the National Assembly can over-ride the veto with a two-thirds majority vote. For bills that fall outside of the provinces' exclusive and concurrent powers, NCOP has only a suspensive veto; that is, it can only delay passage of the bill. The Council may not initiate or prepare money bills.

Significantly, s. 72 (1b) of the South African constitution requires NCOP to "conduct its business in an open manner, and hold its sittings, and those of its committees, in public...." In addition, the constitution (s. 72 (1a)) requires it to "facilitate public involvement in the legislative and other processes of the Council and its committees...." And under s. 72 (2) the Council "may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

As Table 1 below shows, eight of twenty-two federal countries select the members of their second chamber via direct election by citizens. In six second chambers members are elected by provincial/state assemblies.

Table 1

Method of Selection of Members of Second Chambers in Federal Countries*

Country	Method of Selection	Notes

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12 For this reason, I have no problem using the term, "levels of government."

Argentina	Direct election by citizens	In 1999, changed selection method, from election by state legislatures to election by the people
Australia	Direct election by citizens	
Austria	Elected by state legislatures	
Belgium	Combination of direct election by citizens, indirect election by linguistic councils, and appointment by senators	40 of 71 members directly elected by citizens
Brazil	Direct election by citizens	
Canada	Appointment by prime minister	
Democratic Republic of the Congo	Elected by provincial assemblies	
Ethiopia	Elected by state assemblies	
Germany	Appointment by provincial governments	
India	Elected by state legislatures	
Italy	Direct election by citizens	
Malaysia	Combination of appointment and election by state legislatures	44 members appointed by king and 26 elected by state legislatures
Mexico	Direct election by citizens	
Nigeria	Direct election by citizens	
Pakistan	Elected by provincial assemblies	
Russia	Combination of election by constituent unit legislatures and appointment by governor	
South Africa	Appointment by provincial executives and legislatures	
Spain	Combination of direct election and appointment by governments of Autonomous Communities	About 80% directly elected
South Sudan	Appointed by the President	Currently consists of 20 members appointed by the President plus 30 former members of Sudan's Council of States
Sudan	Elected by state legislatures	
Switzerland	Direct election by citizens	
United States	Direct election by citizens	

*Venezuela is a federal republic but is without a second chamber. Some consider Tanzania and the Union of the Comoros to be federal states but, like Venezuela, they do not have a second chamber.

Sources: U.S. Central Intelligence Agency, The World Factbook, www.cia.gov/library/publications/the-world-factbook/, retrieved May 31, 2015; R. Watts, Comparing Federal Systems, 2nd edition, (Montreal & Kingston: McGill-Queen's University Press, 1999); R. Watts,

The Table raises an important point pertaining to the composition of the second chamber. The way that representatives make it to that chamber will bear on who they feel accountable to. Those who are directly elected by voters are likely to feel a greater sense of accountability to voters than those who are elected by regional legislatures. They will feel increased pressure to attend to the needs and priorities of the voters. This method, therefore, has the potential to enhance the democratic legitimacy of the second chamber. However, since second chambers in federal countries exist to safeguard and promote the interests of provinces or states in national policy-making, it is appropriate that the provincial governments have a say in determining the composition of the second chamber.

In either case, the influence of party politics is strong. Legal scholar Adem Kassie Abebe suggests that, particularly in countries where a political party dominates at both the federal and provincial levels, like South Africa, "state officials may be willing to tolerate federal incursions due to party loyalty and the disproportional influence that the highest echelons of the party wield."[13] In Australia, the complaint is that the Senate does not really provide a territorial voice because Senators tend to vote in party blocks. Senate defenders in Australia argue that territorial considerations are discussed "behind the scenes in party-caucus meetings."[14]

Second chambers like NCOP raise another important point: which institutions best protect the interests of provincial governments, the political or the judicial? Those who espouse the political safeguards approach to federalism argue that the representation of the constituent units at the central government level, through such institutions as NCOP, is sufficient to advance the interests of those units and check the encroachments of the federal government. Thus, as Abebe points out, some scholars suggest that high courts should reject federalism disputes.[15]

On the other hand, some scholars support the judicial safeguards approach to federal arrangements. In this approach, the high courts have a robust role to play in adjudicating federalism

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13 A.K. Abebe, "Umpiring Federalism in Africa: Institutional Mosaic and Innovations," <u>African Studies Quarterly</u>, Vol. 13, No. 4, Winter 2013, p. 60.

14 M. Russell, "What Are Second Chambers For?," <u>Parliamentary Affairs</u>, Vol. 54, No. 3, July 2001, p. 445.

15 A.K. Abebe, "Umpiring Federalism in Africa,"..., p. 55.

disputes. This does not mean that political institutions have no function in resolving federal-provincial disputes, only that the role of the courts is decisive. In Canada and the US, for example, the Supreme Courts are the final arbiters of federalism disputes and their judgments stand.

In South Africa, the constitution tries to navigate a middle ground and, in so doing, has made it somewhat difficult for the provinces to assert themselves. With respect to the political safeguards, as indicated previously, a federal bill affecting the provinces requires the approval of NCOP, as well as the National Assembly. But this veto power of NCOP is not available for other bills. In addition, the National Assembly can over-ride an NCOP veto with a two-thirds majority vote. Abebe concludes:[16]

> "...the National Assembly can ultimately ignore the decisions of the Council of Provinces. The role and legislative powers of the upper chambers in...South Africa are therefore substantially different from the role of the U.S. Senate. In these circumstances, the political process cannot be expected to protect adequately the interests of the states.

Turning to judicial safeguards, Chapter 3 of the constitution lays out several principles for the conduct of co-operative government three of which discourage recourse to the courts. Section 41 (1) (h) (vi) calls upon all spheres of government to "co-operate with one another in mutual trust and good faith by...avoiding legal proceedings against one another." Section 41 (3) states: "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." Section 41(4) empowers the courts to refer a dispute back to the organs of state if they are not satisfied that the requirements of section 41(3) have been met. The obvious effect is to discourage the use of the judiciary, even as the constitution empowers the National Assembly to overrule NCOP.

With respect to the selection of Councillors, the appointment method used in South Africa is not unjustifiable. As the provinces' institution in the national policy-making architecture, it is reasonable that they should be the ones to determine who sits in the Council. Further, an appointment process is used in Germany, one of the most economically and politically successful and stable nations on earth.

However, this paper takes the position that the democratic deepening of South Africa requires another selection method, direct election by citizens as used, for instance, in the US, Switzerland, Brazil, Australia, Nigeria, and Spain (for 80 per cent of the membership). Inevitably, an elected NCOP

16 Ibid., p. 60.

will loosen the grip of the provincial governments on the Councillors.   This does not mean that Councillors should ignore the views of the provincial governments. Rather, it means that a Councillor will be able to base his/her opinions and preferences on multiple factors, i.e., the views of citizens, the views of the Councillor's political party, and the Councillor's views of what is in the national interest, in addition to the preferences of the provincial government.

Electoral System

Strictly speaking, a country's electoral system is not generally considered to be a federalism institution. However, as suggested in the Introduction, the underlying theme of this paper is the relationship between the central government and citizens. Neither democracy nor authentic federalism is served if the electoral system does not help to bridge the distance in that relationship.

While the constitution does not prescribe the country's electoral system, s. 46 does require that the system "results, in general, in proportional representation." Not surprisingly, therefore, the country's legislators opted for a List Proportional Representation (List PR) system. Essentially, this system necessitates that the proportion of votes a party gets be roughly the same as the proportion of seats that it gets. Parties compile lists of candidates by preference and these candidates will get into the Assembly, depending on where they fall on the list. Voters vote only for a political party. If a party gets 30 per cent of the popular vote, it will be awarded 30 per cent of the seats.

In South Africa, half of the 400 members of the National Assembly are elected from the nine provinces, with the parties supplying provincial candidate lists. The remaining 200 members are elected from the national lists that compensate for any disproportionality in the distribution of provincial seats.[17] According to the Electoral Task Team, created in 2002 to review the country's electoral system and headed by Dr. Frederik van Zyl Slabbert, the system allows for multi-member constituencies, i.e., the provinces, thus establishing a link between representatives and geographic areas.[18]

However, the majority of the Electoral Task Team's members argued that the so-called

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17 For an analysis of the South African system, see A. Gouws, P. Mitchell, "South Africa: One Party Dominance Despite Perfect Proportionality," in M. Gallagher, P. Mitchell, (eds.), The Politics of Electoral Systems, (Oxford: Oxford University Press, 2005).

18 Electoral Task Team, Report of the Electoral Task Team, (Cape Town: Electoral Task Team, 2003), p. 21, http://www.unisa.ac.za/news/wp-content/uploads/2013/04/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf; retrieved June 5, 2015. Lawrence Hamilton is critical of this arrangement, stating: "...the link is random, only determined following the election process and few if any representatives seem to take it seriously – they do not reside in or feel that it is necessary to visit citizens who live in the areas they are supposed to represent." See L. Hamilton, Are South Africans Free?, (London, UK: Bloomsbury Academic, 2014), p. 77 (fn. 36).

constituencies were much too large to bring about close links between the voters and the MP. It therefore recommended that sixty-nine constituencies be established and that 300 members come from those constituencies. The government decided not to implement the recommendations of the Electoral Task Team.

The List PR system is one of several electoral systems available to electoral designers. It is one of two systems that fall under the Proportional Representation family, the other being the Single Transferable Vote (STV). This method is a multi-member, constituency-based system that is popular among political scientists but is used in only three countries, Australia (for the Senate), Malta, and Ireland, plus several sub-national governments. More than one candidate from a political party is able to run in STV and voters are permitted to rank the candidates. To get elected, candidates must reach a certain quota. The unique aspect of STV is that a successful candidate's ballots that exceed the quota are reviewed and distributed to the other candidates checked on the ballot.

The Plurality family contains perhaps the simplest of electoral systems. The most popular member of this family is the constituency-based First-Past-The-Post (FPTP) system used in about a quarter of all countries including fifteen in Africa. In FPTP the candidate with the most votes wins, even if he/she did not win a majority of the votes. Constituencies are represented by only one member.

Under the Majoritarian family are two systems, the Two-Round System (TRS) and the Alternative Vote (AV). The latter is very similar to FPTP except that it allows voters to rank the candidates. To win a candidate must garner a majority of the votes in the constituency. The system is not a popular one, used only in Australia (for the House of Representatives), Fiji, and New Guinea. The TRS, best known for its use in France, operates under the same principle as AV but instead of ranking candidates on a ballot, voters go to the polls a second time to choose among the top contenders.

The final electoral system family is the Mixed family consisting of the Mixed-Member Proportional (MMP) system and the Mixed-Member Parallel system. In these cases, two electoral systems are used, the List PR system and usually the FPTP method. The objective is to reap the advantages of proportional systems and plurality systems. Germany is among the countries that use the Mixed-Member Proportional system and Japan is an example of a country that uses the Mixed-Member Parallel method.

Undoubtedly, the List PR system has several advantages. In her study of electoral systems, Pippa Norris identified a significant one. Norris looked at how countries using Plurality/Majoritarian

systems, PR systems, and Mixed systems fared on four democracy indices. She concludes: "Irrespective of the indicator used, the results confirm that countries using list PR electoral systems consistently rate as significantly the most democratic...."[19] The reason is that PR systems "provide lower hurdles for smaller parties and hence for those representing specific regional, linguistic, or national minority communities."[20]

However, List PR has a couple of significant disadvantages, namely, weak links between elected legislators and their constituents and excessive entrenchment of power within party headquarters and in the hands of the senior party leaderships. Both are results of who puts together the party lists. Often it is done by party elites, not local constituency associations. Thus, "voters have no opportunity to determine the identity of the persons who will represent them and no identifiable representative for their town, district or village, nor can they easily reject an individual representative if they feel that he or she has performed poorly in office."[21] In addition, "A candidate's position on the party list, and therefore his or her likelihood of success, is dependent on currying favour with party bosses, whose relationship with the electorate is of secondary importance."[22]

To resolve the problems with List PR it is recommended here that South Africa change its electoral system for the National Assembly to Mixed-Member Proportional. As noted, this system combines the features of a Plurality or Majoritarian system with a Proportional Representation system, thus enabling a jurisdiction to capture the benefits of both. A Mixed-Member Proportional system will retain the proportionality benefit and at the same time foster stronger links between Members and their constituents, enabling them to easily access federal politicians and let them know directly of their issues.

Intergovernmental Relations

Intergovernmental relations has been defined by one South African scholar as "a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral

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19 P. Norris, Driving Democracy: Do Power-Sharing Institutions Work?, (New York: Cambridge University Press, 2008), p. 117.

20 Ibid., p. 106.

21 A. Reynolds, et al., Electoral System Design: The New International IDEA Handbook, (Stockholm: International Institute for Democracy and Electoral Assistance, 2005), p. 71.

22 Ibid.

co-operation within and among the three spheres of government."[23] The jurisdictional overlaps make it necessary for the spheres of government to establish institutions and processes to facilitate dialogue, resolve conflict, ensure policy co-ordination, and confirm roles and responsibilities. An interesting comment by Bertus de Villiers suggests that the system of intergovernmental relations "recognizes that the national government has a responsibility to each citizen, *regardless of the constitutional allocation of powers*, to ensure that certain minimum standards and safeguards are in place throughout the country."[24] [emphasis added]. Such a view of central government power would likely be strongly challenged by some scholars and practitioners of federalism.

The constitutional grounding for the intergovernmental structures and processes lies in Chapter 3 of the constitution. It refers to the spheres of government as being "distinctive, interdependent and interrelated." Section 41 lists several principles for co-operative government and intergovernmental relations including the requirement that the spheres of government "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere...." Further, governments are called to assist one another, consult with one another, co-ordinate their actions with one another, and avoid legal proceedings against one another. "The essence of cooperative government," de Villiers writes, "is that a partnership between the spheres of government is pursued, rather than an adversarial relationship."[25]

As required by the constitution, the South African government passed the Intergovernmental Relations Framework Act, 2005, which facilitates cooperation among the governments.[26] Among the intergovernmental structures that have emerged as a result of the Act are the President's Coordinating Council, several MINMECs (for Ministers and Members of the Executive Council), the Fiscal and Financial Commission, and a number of other statutory and non-statutory bodies.

One prominent feature of intergovernmental relations in federal countries is the intergovernmental agreement (IGA). Intergovernmental agreements are essentially a means to achieve

23 L. Malan, "Intergovernmental Relations and Co-operative Government in South Africa: The Ten-Year Review," Politeia, Vol. 24, No. 2, 2005, p. 228.

24 B. de Villiers, The Future of Provinces in South Africa – The Debate Continues, Policy Paper No. 2, KAS Johannesburg, October 2007, pp. 11-12.

25 Ibid., p. 13.

26 Ibid.

co-ordination in federal countries. They are signed documents under which two or more governments of the same country agree to certain undertakings. They serve a range of purposes, from changing a constitution to building a bridge. According to Jeffrey Parker, "In the more than two dozen federal and confederal systems, there are hundreds of intergovernmental agreements pertaining to virtually all aspects of government activities."[27]   By including only national agreements, Parker actually underestimated the number. In Canada, there are over a thousand IGAs of all types, both bilateral and multilateral. The table below shows the number of formal, written, national accords created in six federal countries.

Table 2

Summary of Intergovernmental Agreements in Six Federal States

Country	Time Period	No. of Agreements
Australia	1945-87, 1990-2008	78
Canada	1945-2008	92
Germany	1950-1995	40 (80)*
South Africa	1996-2008	0
Switzerland	1945-2005	15
United States	1945-2008	8

*Germany has two types of intergovernmental agreement, only one of which has been compiled in a database, i.e., the 40 IGAs involving only the länder. Parker assumed that an equal number involving the federal government as well have been signed, bringing the possible total to 80.

Source: J. Parker, Comparative Federalism and Intergovernmental Agreements: Analyzing Australia, Canada, Germany, South Africa, Switzerland and the United States, (New York: Routledge, 2015), p. 35.

From the perspective of this paper, what is interesting is the number of IGAs signed by South African governments, zero! The figure suggests a degree of informality in intergovernmental relations in South Africa not present in other federal states, an observation also made in a document issued by the Department of Provincial and Local Government. It states:[28]

> MECS do not always table important MinMEC decisions to their executive for approval (or even noting). Not only does it undercut the executive authority of the Executive Council, but it also creates confusion about whether a policy has really been adopted by a government.

27 J. Parker, Comparative Federalism and Intergovernmental Agreements: Analyzing Australia, Canada, Germany, South Africa, Switzerland and the United States, (New York: Routledge, 2015), p. 2.

28 Department of Provincial and Local Government, Republic of South Africa, 15 Year Review Report on the State of Intergovernmental Relations in South Africa, March 13, 2008, retrieved June 10, 2015, http://www.thepresidency.gov.za/docs/reports/15year_review/governance/igr.pdf

Moreover it opens national government to continuous claims of unfunded mandates. There are few mechanisms at provincial level to follow up MinMEC recommendations and inadequate consultation with provincial Executive Councils.

The co-operative governance that the constitution seeks and the political actors try to practice is highly commendable. One of the dangers of federal systems is the lack of policy coherence that can result when governments pursue their own agendas without incorporating the objectives and interests of the other governments. Further, co-operation seems like a principle that one would have a hard time opposing. After all, who can be against co-operation? The problem arises when co-operation becomes collusion; that is, when governments collude to achieve their own interests rather than citizen interests or, as the Canadian political scientist, Gerald Baier, put it, "when governments co-operate too well."[29]

Political competition enlivens democracies. They do not benefit when governments over-stress harmony and intergovernmental peace. A study on South African decentralization by Picard and Mogale for the US government alluded to this point. In the view of the authors, "...more than anything else, 'cooperative governance' strips South Africa of the richness of dialogue, debate, and difference which is at the heart of democratic governance."[30]

South Africa is not alone in having to address this issue. In Canada, scholars have long decried the executive federalism that government elites tend to practice. In executive federalism, or what South Africans might call co-operative governance, political and administrative elites meet not only to consult one another but also to arrive at decisions. In an oft-quoted comment, a highly respected Canadian political scientist, Donald Smiley, levelled these charges against executive federalism:[31]

> First, it contributes to undue secrecy in the conduct of the public's business. Second, it contributes to an unduly low level of citizen participation in public affairs. Third, it weakens and dilutes the accountability of governments in their respective legislatures and to the wider public. Fourth, it frustrates a number of matters of crucial public concern from coming on the public agenda and being dealt with by the public authorities.

What political actors need to seek is a balance between co-operative and competitive governance and to

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29 G. Baier, "Judicial Review and Canadian Federalism," in H. Bakvis, G. Skogstad, (eds.), Canadian Federalism: Performance, Effectiveness, and Legitimacy, (Don Mills, ON: Oxford University Press, 2002), p. 35.

30 L. Picard, T. Mogale, Comparative Assessment of Decentralization in Africa: South Africa Desk Study, prepared for the US Agency for International Development, May 2010, p. 19.

31 D. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults," in R. Simeon, (ed.), Confrontation and Collaboration: Intergovernmental Relations in Canada Today, (Toronto: Institute of Public Administration of Canada, 1979), pp. 105-106.

establish institutional processes that will counteract the tendency to move too far in either direction. One option is to charge a committee of NCOP with the responsibility to monitor federal-provincial interactions. It would have the authority to call political and administrative officials to appear before the committee to respond to Councillors' questions and concerns, and to study formal and informal agreements between the central government and the provincial governments and perhaps even the local governments.

Deliberative Democracy

The purpose of the following discussion is simply to point to some effective ways by which the central government can stimulate citizen participation in its decision-making. As stressed earlier, the encouragement of an active citizenry is not the job of only the local governments. The central government, too, must be involved. When it is, it brings itself closer to citizens.

In the various forms of deliberative democracy, citizens actively participate in public dialogue with their fellow citizens about matters of national (or provincial or local) concern. Political decisions are arrived at through a process of public reasoning and discussion to which each citizen participating in the deliberative mechanism can freely contribute but is equally willing to hear and consider opposing views.[32]

Deliberative democracy can take a variety of forms and all of them can be used by all levels of government.[33] The oldest form is the court room jury where the peers of the alleged perpetrator consider the guilt or innocence of the perpetrator.[34] The stakes in these instances can be extremely high; nevertheless, society relies on the opinion of ordinary citizens. Another form that has been used for many years is the town-hall meeting, used by many states in the American north-east. Here, residents of municipalities deliberate together and make decisions on local issues.

Several countries make use of citizens' juries, planning cells, consensus conferences, and citizen parliaments. In citizens' juries, utilized in, for instance, the UK, Spain, and Australia, twelve to twenty-

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32 I. O'Flynn, <u>Deliberative Democracy and Divided Societies</u>, (Edinburgh: Edinburgh University Press, 2006), p. 7.

33 Most of this discussion has been drawn from Z. Chappell, <u>Deliberative Democracy: A Critical Introduction</u>, (New York: Palgrave MacMillan, 2012), pp. 142-153.

34 N. Urbinati, M. Warren, "The Concept of Representation in Contemporary Democratic Theory," <u>The Annual Review of Political Science</u>, Vol. 11, 2008, p. 405.

four participants, selected to be a representative sample of the population, meet over a period of four to five days to discuss a particular issue. The juries, several of which may be run concurrently, make use of experts and facilitators. Planning cells, which originated in Germany, are similar to the citizens' juries. Consensus conferences were developed in Denmark to stimulate debate on new technologies. A two-stage deliberative process makes use of academics, experts and representatives of stakeholder groups to come up with a report for public decision-makers. An example of a citizen parliament occurred in 2009 in Australia where 150 citizens were brought together to come up with recommendations for reforming the Australian system of government.

Other deliberative democracy methods include deliberative polls, participatory budgeting, and citizen assemblies. It is to the latter that I now turn.

British Columbia (BC) was the first of two Canadian provinces, the other being Ontario, to establish a Citizens' Assembly (CA) on Electoral Reform. It consisted of 160 citizens, near-randomly chosen, and it convened for over eleven months in 2004. It was asked to assess the province's First-Past-The-Post electoral system and recommend a new system if it believed it necessary. It used three criteria to assess the electoral systems: effective local representation, proportionality, and maximizing voter choice. The provincial government, like the Ontario government, committed itself beforehand to putting its recommendation to a referendum and then implementing the referendum result. The provincial election commission provided the Assembly with 26,500 randomly selected names, each of whom was invited to attend a selection meeting. Of these, 964 attended. CA members were drawn by lot, with one man and one woman from each of the province's seventy-nine constituencies. Because no Aboriginal Canadians were drawn, the Chair of the Assembly used his powers to select two Aboriginal Canadians.[35]

The CA divided its work into three phases: a learning phase, during which members learned about the various electoral systems; a public hearing phase, during which CA members attended fifty public hearings across the province; and a deliberation phase, during which the members voted overwhelmingly to recommend a Single Transferable Vote system to the provincial government.

In 2006 the government of Ontario established the Ontario Citizens' Assembly on Electoral

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35 This information on the BC Assembly is taken from M.E. Warren, H. Pearse, "Introduction: Democratic Renewal and Deliberative Democracy," in M.E. Warren, H. Pearse, (eds.), Designing Deliberative Democracy: The British Columbia Citizens' Assembly, (Cambridge, UK: Cambridge University Press, 2008).

Reform. It was charged with examining Ontario's electoral system, First-Past-the-Post, to determine if it should be replaced. It was requested to assess electoral systems against eight criteria: legitimacy, fairness of representation, voter choice, effective parties, stable and effective government, effective parliament, strong voter participation, and accountability.[36] It was to submit its report in the spring of 2007 and the Assembly was to consist of a diverse group of Ontarians, 103 in total, one from each of the provincial constituencies, 52 females and 51 males, and at least one Aboriginal citizen. The Assembly process was led by a former Ontario court judge, and a staff that consisted of an Executive Director, an Academic Director, and several teacher-facilitators.

As with the BC Assembly, the work of the Ontario Assembly was divided into three phases, the learning phase, which ran from September 2006 to November 2006, the consultation phase, which ran November 2006 to January 2007, and the deliberation phase, which lasted from February to April 2007. During the latter phase, the Assembly members narrowed their acceptable options, Mixed-Member Proportional and the Single Transferable Vote. In the final vote, the members recommended the Mixed-Member Proportional system for Ontario by a substantial margin.

In a subsequent analysis of the Citizens' Assembly, the Academic Director made some important observations on the work of these fora. "What is apparent from all of them," he wrote, "is that citizens have the capacity to deliberate on complex issues. They are able and eager to learn." He observed further that the members were able to set aside partisan differences. However, he also noted that the process worked well partly because the members did not have set positions on the issue being decided. "How a citizens' assembly would function on a matter where opinions were entrenched is not known."[37]

In his analysis of the BC Citizens' Assembly, John Ferejohn draws a conclusion that can be extended to the Ontario Assembly as well. He argues that the CA model shows that it is possible to construct a democratic institution that demonstrates independence and impartiality, that has democratic legitimacy, and that is able to develop a high level of technical competence. There is a role for ordinary citizens to exercise the power to propose outside of the elite processes. "It offers a way for a democracy to consider and revise its fundamental laws: framework laws that a people need to see as

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36 The members of the Assembly subsequently added a ninth criterion, simplicity and practicality.

37 J. Rose, "The Ontario Citizens' Assembly on Electoral Reform," Canadian Parliamentary Review, Autumn 2007, p. 15.

'their own'."[38]

Conclusion

The concern of this paper has been the relationship between the central government of South Africa and its citizens. The discussion focused considerably on the institutions of federalism, namely, the National Council of Provinces, the electoral system, and the processes of intergovernmental relations. The recommendations that resulted from the discussion are, first, to change the method of selecting NCOP members to direct election; secondly, to change the country's electoral system to Mixed-Member Proportional; and thirdly, to empower NCOP to monitor federal-provincial interactions. The final section offered a brief discussion of deliberative democracy and the forms it takes, the purpose being to show ways by which the central government can bring itself closer to citizens. Together, these proposals can demonstrate that there is no inconsistency or conflict between a centralized federalism and a democratic deepening in South Africa.

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[38]   J. Ferejohn, "Conclusion: The Citizens' Assembly Model," in M.E. Warren, H. Pearse, (eds.), <u>Designing Deliberative Democracy: The British Columbia Citizens' Assembly</u>..., p. 213.