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Travaux de Science Politique
Political Science Working Paper Series

**Federalism in South Africa -
Can it work?**

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N° 41 (2009)

Editeur responsable

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Federalism in South Africa - Can it work?

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Résumé

Après l'arrêt du régime de l' « apartheid », l'Afrique du Sud a introduit un ordre politique territorial contesté, avec de solides éléments fédéraux. Cet ordre est aujourd'hui, une fois de plus, soumis à de nombreuses discussions et il faudra voir si la structure fédérale pourra être maintenue. Cet article analyse les raisons pour lesquelles cet ordre territorial existant est perçu comme un échec. L'argument principal est que la manière dont le fédéralisme a été institutionnalisé et pratiqué pendant la dernière décennie n'a pas permis de profiter des effets positifs qui sont généralement attribués à des ordres fédéraux. Une protection insuffisante des provinces dans la constitution et la politique centralisatrice du parti dominant, l'ANC, a établi un ordre fédéral permettant au gouvernement central de déterminer une politique à tous les niveaux territoriaux et, de cette façon, d'empêcher le déploiement de forces dans les provinces qui pourraient démontrer la viabilité d'un ordre fédéral. Les doutes dans le débat actuel sur l'ordre fédéral territorial sont, par conséquent, basés sur de fausses hypothèses : le fédéralisme n'a jamais eu l'opportunité de démontrer son potentiel pour créer un ordre viable et démocratique.

Mots-clefs : fédéralisme, Afrique du Sud, institutionnalisme économique

Abstract

South Africa has, after the break with the "apartheid" – regime, introduced a contested territorial political order with strong federal elements. This order is today, once again, under serious discussion and it remains to be seen if the federal structure can be maintained. The article analyzes the reasons for this perceived failure of the existing territorial order. The main argument is that the way federalism was institutionalised and practiced throughout the last decade did not allow to profit from the positive effects that are usually ascribed to federal orders. Insufficient protection of provinces in the constitution and the centralising politics of the dominant party, the ANC, established a federal order allowing the central government to determine policymaking at all territorial levels thereby hindering to unfold the forces within provinces that could demonstrate the viability of a federal order. The doubts in the current debate about the federal territorial order are therefore based on wrong assumptions: federalism had never had a chance to demonstrate its potential for creating a viable economic and democratic order.

Keywords: federalism, South Africa, economic institutionalism

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Federalism in South Africa - Can it work?

After its peaceful revolution in the beginning of the 1990s, constitution-builders in South Africa were confronted with the problem to find an efficient and self-enforcing order that could deal with virulent race cleavages, economic poverty and strong regional asymmetries in living conditions. The constitutional debate focused on the question whether South Africa should opt for a federal or unitary order. This was mainly due to the conflict between the "new" majoritarian political elite represented by the African National Congress (ANC) and the "old" elite of the Whites as well as the ethnic group of the Kwa-Zulu. The latter insisted on a political arrangement that could protect minorities, i.e. a federal order. The ANC favoured clearly a unitarian and centralised order in order to create equal living conditions throughout the country. A compromise became possible after the ANC discovered - referring above all to the German example² - that federalism seemed to be compatible with a relatively centralised political order (Simeon and Murray, 2008, p. 9).

Today, South Africa is according to its constitution "one, sovereign, democratic state" (Art. 1). Nevertheless, interpretations about its territorial governance structure vary. Some speak clearly of a federal state (see Lodge (2003); Inman and Rubinfeld (2005)), others of a "multi-level, quasi-federal regime" (Simeon and Murray, 2008: 3), again others of a "decentralised unitary state" (Momonialt, 2002).

Fact is that the Constitution of 1996 subdivides the political order into three "distinctive, interdependent and interrelated" levels of government (Art. 40), that there is recognition of "intergovernmental relations" (Art. 41) and the principle of "cooperative government" (Art. 41) as well as a bicameral system with a National Council of Provinces (NCOP) supposed to bring in provincial interests into the national sphere of government (Art. 42). In addition we find provincial parliaments elected by the population in the nine provinces that constitute the South African republic as well as elected municipal governments. Provinces have the right to write their own Constitution, though only one province did so.

After 12 years of experimenting with this structure, South Africa seems to be at the crossroads again. In a recent "White Paper" (ANC, 2007), the ANC that holds a two-third majority in Parliament and therefore according to the constitution the power to manipulate the territorial structure at its will, discussed its dissatisfaction with the existing territorial structure and agreed to focus on three possible scenarios to reform the existing structure (see also Simeon and Murray, 2008): one would be the maintenance of the multi-level structure but with a possible shift of powers to the municipal level thereby weakening provincial governments; the second proposition also wants to maintain the three-layered structure but to reduce the number of provinces; the last proposal is the most radical in claiming to abolish the provinces altogether but maintaining a two-level structure of municipalities and the central government.

The article endeavours to analyse the reasons for this perceived failure of the existing territorial order. The main argument is that the way federalism was

2 Germany belongs to the "administrative" type of federalism in the terminology of Hueglin and Fenna, which is characterised by a functional division of powers between central and regional (plus municipal) government. Usually this means that strategic decisions are taken on the federal level with "voice" or "veto" of sub governments and that sub governments and municipal governments execute federal laws. The degree of "autonomy" of sub governments can vary between countries belonging to this type of federalism (see for this Hueglin and Fenna, 2006)

institutionalised and practiced throughout the last decade did not allow to profit from the “dividends” of efficiency that are usually ascribed to decentralised federal orders. Insufficient protection of provinces in the constitution and the centralising politics of the dominant ANC established a federal order that allowed the central government to determine policymaking at all territorial levels. This was not only a question of the political power of the ANC, as Inman and Rubinfeld suggest (Inman and Rubinfeld, 2005) but seemed - at least for a transition period - also functional in the context of provinces that in part were set up from the scratch and had widely different starting conditions. Strong decentralisation under these conditions would have meant considerable conflict between provinces and very likely continuing asymmetries. On the other hand it did not allow to unfold the forces within provinces that could demonstrate the viability of a federal order. The doubts of the ANC about the territorial order are therefore based on wrong assumptions: federalism had never had a chance to demonstrate its potential for creating a viable economic and democratic order.

The next chapter discusses concepts from the economic theory of federalism that attempt to demonstrate under what conditions federalism can become a viable economic and democratic order. These insights are used to analyse the South African case. The analysis demonstrates to what extent South Africa has failed to establish such a viable territorial order. This is done by looking, first, at the existing distribution of “property rights” in terms of competences, revenue distribution and intergovernmental relations. The second part assesses to what extent South Africa has found “self-enforcing” institutional solutions with regard to its territorial order, meaning to what extent actors do not have reason to question the existing “contract” and abide by existing rules. Lessons are drawn in chapter four followed by conclusions.

1 The analytical model

The territorial order chosen by South African elites was, as discussed above, a political compromise in which the ANC gave up its resistance against any decentralised order. This became easier when it became convince that the acceptance of a multi-layered territorial structure promised above all two things: higher efficiency and more democratic accountability. This conviction was based on lessons from the economic theory of (fiscal) federalism and decentralisation.

Decentralisation according to the economic theory of federalism has obvious advantages in comparison to a more centralised order. This is reflected for example in the famous “decentralisation theorem” (Oates, 1972) which claims that decentralisation to sub governmental levels would result in superior Pareto-efficient solutions or in the “fiscal equivalence principle” (Olson, 1969) that proposes an optimising division of functions among territorial authorities according to the principle of internalisation of costs and benefits within one political and geographical unit. Generally speaking, it is assumed that sub governments can better than central government adapt public services to preferences of their constituencies because - among other things - information flows between the electorate and politicians at this level are better. This in turn strengthens democratic accountability. In addition, decentralisation allows for competition and “voting by feet” (Tiebout, 1956) leading to more efficiency in public services and a sound fiscal behaviour. Finally, innovation in decentralised and competitive systems is more likely which raises adaptive capacities of such territorial orders (Oates, 2006).

Recently more encompassing economic models of “federal” and “decentralised” orders respectively have gained ground, which focus more systematically on the interplay of central and sub governments and general conditions of efficient and sustainable territorial orders.

One can mention Weingast’s “*market-preserving federalism*” approach (Weingast, 1995) which is designed to protect the market sphere from “perverse” political structures transgressing the rights of private actors. Only a decentralised federal order can give such protection though it must fulfill certain criteria. The main theoretical innovation was that Weingast treated decentralised orders in terms of “opportunism” of territorial actors. Perverse effects arise if one has no institutional mechanisms at hand that can forego such opportunism. This means it needs both the protection of the authority sphere of sub governments by guaranteeing areas of competence and revenues and of the central government which should not suffer from opportunistic behaviour of sub governments, for example by overspending or deficit-making.

In his more recent work on “self-enforcing federalism”, Weingast argues together with de Figueiredo (2005; 2007) that a sustainable federal order must not only have mechanisms that prevent the central government from “overawing” sub governments and sub governments from “free-riding” on collective goods, but also take care that actors do not develop selfish interests to disrespect the “contract” once an efficient equilibrium is found in the federation. If this is achieved, one can speak of a “self-enforcing” federal order that is not anymore contested by selfish moves of territorial actors. The basic elements of the model are the same as in the “market-preserving federalism” model but the respect of the contract is an important element added to the original model that helps to explain when federal orders may remain stable.

Rodden et al. (2003), Filippov et al. (2004), Braun (2005) and Wibbels (2005) are furthermore investigating into the kind of political mechanisms that explain perverse incentives and institutional constraints that can help to achieve a self-enforcing federal order. Party systems, the division of powers on the federal level, budget constraints, informal norms or “rationalising devices” play a role here.

1.1 Principles for a functioning, efficient and stable territorial order

From this “*second generation*” of economic theory of federalism and decentralisation (Iaryczower et al., 2004) one can derive a number of *principles* that should be respected if one wants to establish a functioning, efficient and stable territorial order (see also Braun, 2007).

1. Avoid predatory behaviour of the central government or, in other words, avoid incentives for the federal government to use its authority and resources to encroach upon rights and revenues of sub governments in such a way that their autonomy in decision-making is seriously jeopardised. Central government needs sufficient resources and authority to fulfill its function of delivering public goods with a national-wide scope, of combatting negative externalities of sub government action and of making use of economies of scale. There must be sufficient institutional constraints, however, that the central government does not “take the money and run” (de Figueiredo and Weingast, 2007).
2. Avoid free-riding of sub governments in form of rent-seeking. Rent-seeking means to abstain from acquiring income by a contribution to the productive development of a country and instead to look for revenues by influencing the revenue distribution of a country in one’s own favour without a particular effort

thus profiting from productive behaviour of other actors. Such a behaviour is considered as being unproductive (Olson, 1982).

3. Finally, one must avoid disincentives for productive behaviour of subgovernments. Subgovernments that simply abstain from productive behaviour because the system produces disincentives (like high marginal tax rates) may undermine the fiscal viability of a federation and should be taken into account.

Examples of incentives that put these principles in danger are if there exist strong vertical asymmetries in financial powers which gives the central government the opportunity to use its "power of the purse" to make member states accept its policy preferences. Mismatches between expenditure assignments of sub governments and available resources can also lead to strong asymmetrical powers of the central government because it contributes to financial dependence of sub governments. Such dependence is aggravated if member states do not have "fiscal sovereignty" (property rights over one or more growth taxes) or at least "fiscal flexibility" (i.e. the right to vary tax rates or the tax base). Fiscal dependence creates incentives to behave in an opportunistic way: either by cheating or rent-seeking, for example by concluding individual contracts with the federal government that help to find a way out of existing financial problems but which create opportunities for predatory behaviour of the federal government.

How can one avoid such perverse incentives and design a territorial order to the principles formulated above?

1.2 Incentive structures to reduce or eliminate opportunist behaviour

This question refers to the incentive structures underlying a territorial order and institutional constraints.

Weingast proposes a number of conditions that could help to *reduce* or *eliminate* opportunism:³

- "Market-preserving" (and efficient) territorial orders should respect a "delineated sphere of autonomy of sub governments" (Weingast, 1995). This can be seen as a basic condition to develop self-conscious territorial actors at the regional and local level. Only if sub governments have a designated area of their own this leads to responsible and (democratic) accountable behaviour. In addition, this limits the sphere of influence of the central government and reduces the possibility for predatory behaviour.⁴

3 A federal order can be sustained over time because actors have no interest in searching for other and more profitable pay-offs. Such an interest in maintaining the existing order can be based on two rationales: the costs that are involved in changing the existing order are higher than expected benefits; the pay-off institutionalised in the existing order represents the highest preference of the various actors.

4 Weingast's model is strongly influenced by the "dual" or inter-state model as we find it in the USA. In these models a separation of authority takes place within the different policy fields giving responsibilities to either the central government or to sub governments. Except for the fact that nothing is said about the number and significance of such designated areas, this forgets that in all federal countries the problem of concurrent areas arises, where competences are blurred or where it is more efficient to have shared responsibilities. In these concurrent areas, one can assume, it also needs guarantees that sub governments cannot be overawed by the central government and - in order to have sustainable cooperation - it also needs protection from opportunist behaviour of sub governments, which might for example have a veto and block all collective decisions at their will. The discussion

- It is of particular importance that sub governments have authority to develop economic policies to develop their regions. Such authority is conducive to the development of regions, own profile and ultimately to competition between sub governments.
- To this can be added, though it is not explicitly mentioned by Weingast, that sub governments need one form of tax autonomy, that they can generate and spend own resources. Only then sub governments can become credible and responsible actors to their electorate and can competition work.

These conditions are conducive to the establishment of self-conscious and capable sub governments, a *conditio sine qua non* for a sustainable or self-enforcing federal order.

In sum, an efficient territorial order can be achieved if the three principles - avoidance of predatory behaviour of the centre, avoidance of rent-seeking by sub governments, incentives for productive behaviour of sub governments - are fulfilled. This conceptual framework will be applied to the South African case in order to assess to what extent the territorial order fails to satisfy these principles and lacks sufficient incentives to make the order self-enforcing.

2 The territorial order of South Africa

The discussion of the territorial order of South Africa has two parts: The first part deals with the distribution of property rights concerning competences and revenues. The second part focuses upon participation rights of sub governments both in intergovernmental relations between executive authorities and in central government legislation. I will demonstrate that the constitution has foreseen an important role for provinces but has insufficiently protected provinces from "predatory behaviour" of the central government. This is why the administrative type of federalism that has been conceived along the lines of German federalism has turned into a centralised federation in which member states lack - in contrast to German member states - veto power. The dominant party system is the driving mechanism for centralisation.

2.1 Distribution of property rights

2.1.1 Competences

Though South Africa has given provinces in the constitution explicit recognition as genuine political entities with the right to adopt their own constitutions, one notices a lack of own competences of provinces on the one hand and a constrained room for manoeuvre on the other.

The number and significance of competences granted exclusively to sub governments is minimal. Provinces deal with abattoirs, provincial planning, cultural matters, recreation, roads and sport, and veterinary matters. But even in this case the autonomy of provinces to exercise their constitutional rights is curtailed as the central government may intervene at any time on the grounds of "national security, economic unity and the common market, the promotion of equal opportunity and equal access to government services, or the protection of the

of such concurrent areas will play an important role in our analysis of South Africa.

environment”, which gives indeed ample room for interpretation for the central government.⁵ In budgetary terms these competences are insignificant.

Most of provincial competences are shared with the central government, notably public services in the domain of health, education, transport and welfare. How provinces are protected in these areas will be discussed below in the section on intergovernmental relations.

With regard to competence distribution between municipalities and provinces, there exist in addition a number of overlaps and ambiguities about the “right to decide”.⁶ For example, both territorial levels are responsible for cultural matters and health and it is not always clear who should indeed do what in these areas (Department, 2005).

One additional point deserves mentioning: If one compares the way federal states within the type of “administrative federalism” distribute “rights to decide” and “rights to act”, two possibilities seem to prevail: either sub governments decide to transfer the “right to decide” to the federal level and maintain strong implementation rights (for example Switzerland) or by winning veto-powers at the federal level and giving up rights to act (Germany). As South Africa took Germany as an example, one would therefore expect that the latter option was chosen. According to the Constitution, however - though reality turns out different as we will discuss below - provinces have constitutional veto-powers at the federal level similar to the German member states but they also have the right to adopt own implementation laws, something which Germany does not know but which is well used in Switzerland. Provinces can therefore in principle modify central government laws according to regional circumstances. There are two important restrictions in this respect, however: One, room for interpretation is only there if the national law has the statute of a framework law only setting general outlines of regulation. Two, any provincial legislation can be overruled on the base of articles 146-147 (see footnote above). There are therefore sufficient powers for the central government to maintain national harmonisation if need be.

In sum, provinces do only have a limited and non-prestigious number of delineated authority areas and must share powers in most of those policy areas that have electoral importance. As we will demonstrate below, their role in co-deciding in concurrent areas is limited. By contrast, provinces can use implementation rights though, again, this can be overruled by the central government for a large number of reasons. Finally, one should note that economic regulatory powers are not decentralised as demanded in the model of “market preserving federalism”. The conclusion concerning the distribution of competences is therefore simple: provinces lack a sufficiently delineated area of competence that could be the base for the development of own policies and democratically legitimated powers.

2.1.2 Revenues

The fiscal federal system in operation today is clearly centralised. This is true for revenue competences, the grant and equalisation system and for borrowing. One can briefly summarise the main components in the following way:

5 This is found in article 146-147 which enumerates all the reasons when national legislation might prevail over provincial legislation. This not only holds with regard to own competences for provinces but also for implementation legislation of sub governments in concurrent areas.

6 We distinguish between the “right to decide” indicating formal decision-making powers in a policy field and the “right to act” which is given to the actor that implements and decides upon the way of implementing (Braun, 2000).

(1) The central government has authority over all growth *taxes* but it is obliged to give provinces and municipalities (via the provinces) an “equitable share” of these revenues. Collection is done by the national South African Revenue Services and not by sub governments. Provincial governments have a few taxes of their own (like motorcar licence fees, casino and horseracing taxes, hospital fees), which, however, make up only 4% of their total revenues. They are entitled to raise a surcharge on the income tax and fuel services but have never used this option. The bulk of money provinces receive are unconditional revenue grants out of the central government revenue fund. Local governments use several taxes (property tax, levies on business, user charges on provision of electricity and water) to cover almost 90% of their resources. The other 10% are paid by the central government revenue fund according to a number of fixed criteria. Local governments are therefore more independent than provincial governments. In total, central government received 51.2% of revenues in 2006 and provinces 42.3%. 6.3% are distributed to municipalities.

(2) *Unconditional grants* have two objectives: they finance expenditures of provinces in shared tasks and contribute to an equalisation of living conditions and resources among provinces.

Concerning the first point, such revenues are paid in relation to the tasks that provinces (and municipalities) have to execute. They are supposed to cover the expenditures for these tasks. As the central government uses its rights to legislate in these areas in an extensive way, the following problem arises: as the distribution of revenue grants is calculated - among other things - on the base of such shared areas, little room is left for provinces to use money for the development of own policies in areas where it maintains room for formulation and implementation. Today, 74% of provincial revenues are spent on social services and 57% are bound to expenses on salaries.

The second purpose of unconditional grants is equalisation. The principle which is applied to distribute centrally administered revenues is “equity”. In order to determine the entitlement of provinces, demographic distribution and the degree of poverty plays a role. Every 3 years the distribution of these revenue grants is calculated by the *Financial and Fiscal Commission* (FFC), an independent body of experts nominated by the president on the base of a number of criteria. A formula composed of different parts is used to find “objective” criteria of distribution (Wehner, 2000, p. 63).⁷ The FFC recommends but policy makers decide. This usually happens in the so-called “*Budget Council*”,⁸ which was set up according to the “Intergovernmental Fiscal Relations Act” of 1997. The Budget Council unites the national minister of the treasury and the provincial ministers of finance. It must by constitution take the recommendations of the FFC into account and it proposes the final budget (the so-called “revenue division”) to the cabinet on the national level. It was in this council, for example, that it was decided to introduce a deduction from the total revenue before it is distributed among provinces. This “top-slicing”

7 The components are a “national standard grant”, which is supposed to finance a minimum of services in education and health; a “spillover” component takes care of services that have effects on other provinces (e.g. medical training and specialised health services); a “fiscal capacity equalisation grant” should complement provincial tax powers to equalise for varying fiscal capacities, above all concerning their tax base); creation of own tax room is taken into account; the “institutional grant” covers running administrative costs; the “basic grant” finances the institutions necessary “to fulfill provincial constitutional obligations according to their own priorities” (Wehner, 2000, p. 64).

8 In addition, there is a “*Budget Forum*” that brings together the national and provincial ministers of finance and five representatives of the local government as well as one representative nominated by each provincial-local government organisation. In this Forum all financial matters concerning the distribution of revenues to local government are discussed.

diminishes in turn the total amount of money that can be distributed as an unconditional grant to provinces. For this purpose national government debt is taken into account as well as probable wage increases for civil servants (that have a uniform salary at the national and provincial level), and costs for social pensions. In 2000, a "contingency reserve" was introduced and maintained until today that should serve as an emergency fund. The amount reserved for this purpose is subject to interpretation. All in all, the sum of money distributed to provinces should cover their expenses for basic services and to perform their functions in an adequate way. In general, it is highlighted that provinces have a manageable degree of uncertainty concerning their revenue income as revenue grants are fixed and stable for three years. Finally, it should be mentioned that the central government has the right to stop transfers to a province in case of "serious material breach of measures" mentioned in the constitution (see Amendment of section 216 of Act. 108 in 2001).

Next to unconditional grants are *conditional grants*, which the national government seems to use to an increasing degree (Department, 2005). Such grants are designed to stimulate activities of provinces according to policy objectives defined by the central government. About 10% of total transfer money is spent for conditional grants with varying success as we will discuss below.

(3) Last but not least there are the *borrowing rights* of provinces. To constrain borrowing rights of sub governments is seen as one of the fundamental mechanisms to restrain opportunism (Rodden et al., 2003). It seems that the opportunities of provinces in South Africa to lend money are indeed limited. The "Borrowing Powers of Provincial Governments Act" of 1996 gave provinces the right to lend money on the capital market for capital investment and for bridging purposes (restricted to one year) but in fact provinces decided until 2002 to not use this instrument. Instead they relied on implicit borrowing like overdrafting bank accounts or withholding pay progressions for public servants. Since 2002 provinces do borrow on their own accounts and - officially - without any possibility of bail out by the central government.⁹ Provinces can give out bonds and also loan money from the central government. It is the FFC who has to make recommendations on this occasion about the amount of loans that seem reasonable. The Budget Council has in this case the role of a "*Loan Coordinating Committee*". It analyses the borrowing requirements of provinces "after taking into account estimates of the aggregate demand for capital market funds during that year" (Borrowing Powers of Provincial Act 1996). The Committee can refuse the demands of provinces and determines in any case the total amount of money which can be borrowed by a provincial government. A further restriction is that at no time outstanding loans may exceed half a percent of expected loan requirements of a province. In short, provinces cannot borrow on their own account but need the consent of all provinces and the national minister of treasury being present in the Loan Coordinating Committee.

9 This is defined in the "Borrowing Powers of Provinces Act" of 1996: "no guarantee shall be furnished by the national government in respect of the fulfilment of a financial commitment incurred or to be incurred by a provincial government pursuant to the raising of bridging finance or conclusion of a loan denominated in rand". If, however, a loan has been made in foreign currency, the central government may decide to give a guarantee. This needs a national Exchequer Act. Foreign loans need, however, approval of the national Minister of Finance and discussion in the Loan Coordinating Committee.

2.2 Intergovernmental Relations

There are two principle ways sub governments can compensate to some extent if they lack delineated areas of authority or own implementation rights: They can have voice or veto in concurrent areas, i.e. within the executive arena and/or within the national parliament, i.e. the legislative arena. Can South African provinces compensate their weak property rights in these arena's?

South Africa has opted for the German model of "administrative federalism" with a functional division of powers in terms of policy formulation and implementation and, at least for the German model, considerable rights of co-determination in policy formulation.

In concurrent policy areas in which one form or other of coordination is essential, it needs a definition of decision-making competences and roles of both the central government and sub governments. How are decisions taken? Who dominates? Who is responsible for implementation? What is the power distribution in implementation?

One can use some additional heuristics to analyse the "coordination game" in concurrent areas and determine opportunities of the centre to overawe or of provinces to free-ride. In our opinion, there are three possibilities to organise authority relations in concurrent areas: sub governments enter into coordination as "peers", as "principals" or as "agents".

- If sub governments are the "*principals*", they define the conditions of the "contract" and central government is more or less the executive agent. This is for example the role of the European Commission in the European Union.
- As "*agents*", member states become lower administrative bodies that are supposed to execute but which do not have any influence on strategic decisions. Agents may have considerable "operational autonomy" but they do not participate in strategic decisions. This would be typical in a system of territorial division of powers that apply a form of "*administrative decentralisation*", i.e. the transfer of responsibilities for planning, management and financing of certain public services to lower territorial levels with the intention of raising efficiency levels in the provision of public services.
- If sub governments become "*peers*", they are recognised as political entities with own juridical personality and democratic legitimacy and are on equal foot with the central government. They participate in the formulation of concurrent policies. The conclusion of contracts binds all peers, however, once an agreement has been found. There is a low degree of operational autonomy.

It is clear that, based on the thoughts of the "second generation" of economic theory, both the model of sub governments as principals and agents jeopardise a self-enforcing territorial order: the status of sub governments as principals can lead to selfish behaviour and jeopardise central policy-making; sub governments as agents are in constant danger of transgression by the central government. The German case comes nearest to the "peer" model and seems on first sight compatible with a self-enforcing order. Germany's cooperative relationships suffer, however, from another problem, i.e. the so-called "joint decision trap" meaning that decision-making output is suboptimal because of the use of veto-powers of sub governments. At least in the case of (almost) unanimity in decision-making as in Germany, self-enforcing federalism can become a victim of opportunist behaviour of sub governments in cooperative decision-making. Coordination is taken hostage by individual interests.

How can we classify intergovernmental relations (IGR) in South Africa? To summarise our findings in a short way: The constitution foresees in mutual

recognition, non-transgression and subsidiarity of territorial actors. There is, in addition, a sophisticated system of collaboration in all relevant concurrent policy areas. However, this constitutional protection and these opportunity structures were not sufficient to restrain central government from overruling provinces and from centralising territorial coordination.

2.2.1 Constitutional protection

In the constitution the territorial authority system is described as a "single, unified system" that has to function though by "collaborating rather than competing". Collaboration or "*co-operative government*" means two things: it means to "respect the constitutional status, institutions, powers, and functions of government in the other spheres" and act "in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere" on the one hand and it means to "cooperate with each other in mutual trust and good faith" through "fostering friendly relations," ensuring communication and coordination, and avoiding taking territorial disputes to court.¹⁰

These conceptions of the territorial distribution of powers reveal two interesting points:

- On the one hand one finds clearly the willingness - expressed in the notion of the "single, unified system" - to achieve a strong harmonisation of public services throughout South Africa and not variety or divergence. "*Unity*" is the main notion in the discourse on territorial decision-making and not decentralisation. This resembles the discourse in Germany. Unity is the focal point of political discussions and territorial layering is only allowed to create more effectiveness, efficiency and democratic unity but not to allow for more heterogeneity.
- On the other hand, unity is not conceived in terms of hierarchy. It must be achieved by coordination. At least in constitutional terms the particular status of each territorial unit is guaranteed and the possibility of conflicts, of deviant and contrasting opinions is recognised. This seems to acknowledge relatively autonomous political units like they exist in Germany. These units must, however, not shirk. All provinces are supposed to maintain "loyalty to the federation".

This, of course, is not enough - like in the case of the central government - to avoid opportunism but these "constitutional ideas" offer some protection, especially when it comes to the settlement of conflicts in the Constitutional Court. However, accepting mutual friendly relationships obliges all actors to resort as less as possible to a settlement by the Constitutional Court. Instead, conflicts should be discussed and resolved within the various intergovernmental relation institutions.

While the obligation to collaborate and to cooperate in "good faith" can be seen as a mechanism to avoid "opportunism" by provincial and municipal governments, the obligation to "respect" the "integrity" of provinces and municipalities and to not "encroach" upon their integrity is a warning sign for the central government. This is reiterated in article 146 of the constitution where the notion of subsidiarity appears. This article deals with the prevalence of national law compared to provincial or municipal law. It is stipulated that national law prevails in matters in which provinces and municipalities cannot "effectively" regulate on their own or in case there are national concerns like "economic unity" or "national security" as well as

¹⁰ "Co-operative government means that national policy must be sensitive to local and provincial needs and concerns and must not ignore or ride roughshod over them. It also means that municipalities and, particularly, provinces should not act alone or in isolation; they must be deeply integrated into the national political process" Department, 2005, : 42).

problems of spill-over, equality and environment. Such stipulations are, of course, open to wide interpretations and can usually be used as "implied powers" by the central government to take most concurrent matters into its hands.¹¹ There is one hurdle to be taken by the central government if it wants to overrule provincial legislation: it is subject to the burden of proof that indeed provinces or municipalities cannot effectively fulfill this function or that one of the other reasons hold. Sub governments can take such a decision to the Constitutional Court.

These "constitutional imperatives" work as in the case of "cooperation in mutual trust": they are not self-enforcing devices that would restrain the central government from trying to overawe provinces but they are obstacles and work as "transaction costs" (finding the right argumentation, lobbying for public legitimacy and standing a case in the Courts). In this sense they can be regarded as "opportunism-reducing" mechanisms.

One sees therefore that South Africa has tried - at least in the constitution - to restrain opportunism by all territorial actors but such principles may not be enough to withhold especially the central government from overawing. They in particular do not stipulate who should have decision-making rights in intergovernmental relations.

2.2.2 Intergovernmental institutions

South Africa has developed a quite complex system of intergovernmental relations (IGR). In fact, this system is so omnipresent that some observers say that it is here, within the executive administrative arena, that relevant matters in fiscal federalism and other matters are decided.

The IGR system has been a field under permanent reconstruction. Learning processes have taken place (see above all Department, 2005). In the beginning several bodies were too large for example and ineffective in their operation. This has been changed. The "Intergovernmental Relations Framework Act" in 2005 can be seen as the final act of this learning process. Herein, a statutory framework is developed with regard to the practice of IGR and conflict settlement.

Since 1999, there is a "*President's Coordinating Council*" (PCC), a political body composed of the president, the deputy president, the Minister in the Presidency, the Minister of Provincial and Local Government, the Ministers of Finance and of Public Administration as well as Provincial Premiers. The organisation of municipalities can be invited but has no statutory place. The task of the PCC is the coordination between the territorial levels. It should use "integrated approaches to planning, implementation and the allocation of resources" and take care of "formulation, coordination and implementation". It is a consultative body to the president and has no statutory powers of its own. The president, who chairs the commission can bring the proposals of the PCC into the parliament which has to take the final decisions.

The "*Forum of South Africa's Directors-General*" (FOSAD) is a body that unites national and provincial top-level bureaucracy. It is organised along the lines of "clusters" uniting several ministries along functional lines.

¹¹ Germany is an example of this: There we find comparable "implied powers" for the central government based on notions like "equal" and later "equitable living conditions" or "economic unity", which have been used to declare most concurrent areas in the constitution as areas of national legislation.

In addition, there are 15 “ministerial forums”, so-called MinMECs, in which sectoral ministers of the national government and provinces meet to coordinate.¹² Such MinMECs are created in concurrent areas. Their function is also purely consultative and serves to inform and advise the responsible national minister in the concurrent area. MinMECs report to the PCC. For a long time, only the “Budget Council” and the “Education Council” had a statutory position as MinMECs. Since the 2005 law, all ministerial forums must ask for formalisation and respect rules defined in the law.

Other intergovernmental forums exist on the provincial level in order to coordinate policies with municipalities.

To what extent do these procedures give provinces sufficient voice or veto? Are they protected from transgression of the central government in coordination? Can opportunism of provinces by vetoing be avoided?

First of all, one notices that the guiding ideas in the constitution, i.e. to develop a “cooperative intergovernmental system”, is respected in institution building. Provinces are participating in consultative bodies on the highest level - political (PCC) and administrative (FOSAD) - and again in all policy areas that are concurrent. This gives them “voice” but not formalised influence or a veto position. Nothing is said about voting procedures and the way decisions are taken in the PCC, FOSAD or MinMECs, which is not astonishing, as the function of all these bodies is purely consultative. It is the president (in the PCC) and the national minister (in MinMECs) who decide if they take up the advice and in what way.

The influence of provinces in IGR is therefore rather indirect and there is no guarantee that provinces are actually heard. But the fact that such bodies are institutionalised indicates that the national government does - for reasons of effectiveness mostly - take the voice of provinces into account.

If divergences of opinion appear in these forums, all actors are obliged to first find amicable agreements and not to resort to the Constitutional Court. These forums have therefore the function of opinion-building and of measuring the degree of conflict in certain matters as well as to find solutions for collective action problems. They equip the national government with information it needs to decide on matters in concurrent areas. And the central government may build its policies on collectively agreed upon recommendations of such bodies but it is not obliged to do so. If there is opposition during the discussion process, the national minister can decide to neglect the opposition and nevertheless proceed with legislation or to continue discussions to find an agreement. It is at his or her discretion. It would need a strong and united front of provinces to force the minister to negotiate or accept propositions of provinces. Such collective action is, however, not very likely. There does not exist a common organisation of provinces like the municipalities have created and interests of provinces are strongly heterogeneous.

To this one can add the observation that administrators from the provinces do often not consider themselves as representatives of the provinces but as “agents” of the national administration that indeed give help to develop a smooth administrative system Simeon and Murray (2001). So even if provinces would have a stronger voice, it would probably not be used to defend specific provincial interests.

There are no mechanisms for provinces to intervene or veto if the national government decides to deal with concurrent matters in a unilateral way. In this case, only the NCOP can act as the last defender of provinces’ rights.

¹² A representative of municipalities can participate if it concerns matters of municipalities.

2.2.3 Voice and Veto in the Legislative Arena

Cooperation at the executive level between ministers and administrators is one way to exercise influence in concurrent areas for provinces. Another level is the legislative process on the federal level. It is here where national laws are finally enacted. Veto-power at this level can give lower level governments significant powers to protect themselves from transgression. The more "divided" powers are at the federal level, the more the status quo is protected and the more encroaching behaviour becomes difficult for the central government (see for this Filippov et al., 2004). Even if therefore the president or national ministers have prepared a legislative act and would deviate significantly from the interests of provinces, it does not mean that provinces are overruled. The bicameral system South Africa has introduced seems to offer a "veto-point" (Immergut, 1992) for provinces.

There are different ways to organise voice or veto of regional governments in bicameral systems. As South Africa has taken Germany as the example to follow, one would expect that the bicameral system is based on the "council" and not the "senate" model (Hueglin and Fenna, 2006). In the council model of Germany, governments are represented in the second chamber, the Bundesrat. They are bound by an imperative mandate of their government when voting. There are two kind of laws in Germany: all laws are subject to a vote in the Bundesrat but in matters that do not directly touch upon prerogatives of the member states, the veto of the Bundesrat can be overruled. If, however, the matter touches upon provincial prerogatives, no overruling is possible and the Bill is rejected. This grants a strong formal veto-power to German member states.

If one takes a look at the South African system, one notices that it has indeed gone in the direction of the German system. There is a second chamber, the *National Council of Provinces* (NCOP), that has legislative rights. But the working within the NCOP is more flexible than in Germany and leaves explicit room for both party and territorial interests.

First of all, the constitutional task of the NCOP is to participate in national law making and to "provide a forum for public debate of provincial issues". Each of the 9 provinces sends a delegation to the NCOP with the premier as the head of the delegation, 6 representatives elected by provincial parliament (minority parties must be represented) and 3 special representatives. There are three types of legislations:

1. In matters not affecting directly the provinces, representatives in the NCOP are free to vote which mostly means that they vote according to partisan affiliation. If the majority is against the law, the National Assembly can simply overrule.
2. If a law proposal affects directly provincial matters, each provincial delegation casts one vote. If a majority of provinces rejects the law (5 out of 9), a conciliation procedure takes place. If no consensus is found, the National Assembly can - in contrast to Germany - overrule the NCOP by a two - third majority. Among the Bills that are treated under this statutory scheme is the "Money Bill", meaning the division of revenues among provinces. The discussion of this division is, in fact, one of the most important activities of the NCOP.
3. If, however, constitutional amendments are demanded - and this resembles Germany - it needs the consent of the NCOP. In this case the NCOP can block decisions by a 6 to 3 majority and no over-ruling is possible.

There are differences with Germany but overall South Africa has embraced the "council model". The difference with Germany is that it is not the provincial government but the provincial legislature that elects representatives. NCOP

representatives are therefore in the first instance responsible to the legislature while in Germany it is the regional government that decides on voting behaviour. Another difference with Germany is the freedom of representatives to vote without restrictions in matters non-pertinent to provinces. If territorial interests are not touched upon, party interests are therefore supposed to prevail. The category of laws which touch upon regional interests but which do not need constitutional revision does not exist in Germany. The voting procedure chosen in this case seems far-going as a majority of provinces can veto legislation and only a two-third majority of the National Assembly can overrule. Provinces have absolute veto-power in constitutional matters if they find a majority of 6 out of 9 provinces.

In sum, these voting procedures seem to be a fair protection of the interests of provinces on the national level. Despite of this formal protection, it seems, however, that provinces do not use their veto-power in any effective way. Why?

- The link between the provincial parliaments that delegate representatives to the NCOP seems to be weak. Representatives seem to be isolated. Many elected representatives in provincial parliaments seem not to misunderstand the importance of the NCOP and are not well informed about discussions in the national legislation. Representatives on the other hand seem to have difficulties to bridge the gap between their role in the national parliament and their responsibility to provincial parliaments (Department, 2005, : 49).
- Representatives are not only isolated from their legislative but also from provincial executives cooperating in the IGR system. Both systems - the executive one and the legislative one - seem to be disconnected (Department (2005, : 48)). The role the NCOP seems to have concerning the working of executives is more the "monitoring" of its activities than the coordination with the executive representatives. They should represent the "democratic side" of "cooperative government", controlling the administration in its implications for the citizens. Provincial interests are therefore based on two motors that are not coordinated.
- Also, it is reported that there seem to be serious information deficits that add to the difficulties of using provincial veto-powers in the NCOP: Draft bills from the National Assembly come in late and leave little time to discuss matters with provincial parliaments or executives and to decide (Department, 2005, : 53-54). This contributes further to the isolated position of representatives from the provinces.
- Even if territorial interests of provinces seem to be underrepresented on the national level, the NCOP could in principle work, as in Germany, as an additional veto point of opposition parties and contribute in this way to the "fragmentation of government" that promises to constrain the centre (see Filippov et al. 2004). However, the NCOP is very seldom used by opposition parties to combat decisions of the national government. This is the result of the dominant party system we find in South Africa (Butler, 2006; Lane and Ersson, 2008). In most provinces the ANC is the ruling party¹³ and this contributes to a national orientation of most NCOP representatives. Those parties that are more regionally anchored as the Democratic Alliance and the Inkatha Freedom Party are too weak to defend their interests in the NCOP and could not, even if they would unite forces, veto national legislation as they only have 2 votes.¹⁴ This situation

13 In fact it is as follows (see Department of Provincial and Local Governments 2005: 47): The ANC is the dominant party in 7 out of 9 provinces. Only in KwaZulu-Natal and in Western Cape the ANC must share its dominance with another party (both have 2 seats of the 6 seats in total).

14 And even these votes must be defended against a strong opposition of the ANC within these provinces. Each province must cast one vote and find an agreement among their delegation that represents as good as possible all relevant parties of the provincial legislation

has not changed with the recent split of the ANC and the creation of the "Congress of the people" (COPE), which has cost the ANC the two-third majority in parliament. In the National Assembly, a coalition of all opposition parties could block constitutional changes. In the NCOP power distribution has not been changed by the elections in 2009.

- It is revealing how the NCOP is perceived by its members. As an illustration one can quote the chairperson of the NCOP who declared that the NCOP serves to "sensitise" the national government to provincial interest and helps to overcome "parochial" mentality among provinces by being in contact with national policies (Simeon and Murray, 2008). The task of the NCOP should be to present "provincial perspectives" and "building bridges". In other words, the NCOP is not a legislative body that can use a veto in order to forward the interests of provinces against the centre.

As a result, it is not astonishing that it is noticed that the NCOP has serious "internal credibility deficits" (it is not recognised as important by the political elites) and "external credibility deficits" (the public does not see it as an important democratic body)(Department, 2005, : pp. 41-2).

In sum, the NCOP cannot be considered to be a veto point for provinces. This seems to be not only, as it is suggested in the Report by the Department of Provincial and Local Governments, a transitory matter. One does not see at the moment that provinces can overcome their role as agents and create a coherent identity of their own, which could strengthen the NCOP. At the moment it is, despite of its formal rights, a weak actor and the influence provincial executives have in the IGR system seem to be more important. But even there, we have seen, a strong veto-potential of provinces does not exist.

3 Assessment

If we take the three "dangers" of stable and efficient federal orders sketched above, the description of the territorial order of South Africa clearly reveals the danger of predatory behaviour of the centre as the most imminent one. On the other hand, the room for manoeuvre of provinces is so curtailed that it leaves little space for rent-seeking or free-riding. Both features - a strong and interventionist centre and the reduced space of action of provinces - contribute to the third "danger", i.e. the lack of productive behaviour of provinces. Such a territorial order cannot be self-enforcing.

3.1 The power of the centre to overawe is far-going

Despite of constitutional restrictions - like the imperative to respect the statute of territorial entities and to not encroach upon the rights of others - the power of the centre has continually expanded. Restrictions have therefore not been self-enforcing. Constitution builders have not taken into account the imminent danger of a dominant party system (Giliomee and Simkins, 1999), which is driven by the ANC, a party that since the beginning defended a rather centralising stance and politics of harmonisation and equalisation. The failure to foresee the dynamics that such a party system engenders is clearly to be seen in the constitutional article on the change of the territorial order: it is possible to change the existing order with a two-third majority in parliament, a majority the ANC had for a long time and which it just narrowly lost. The new separated faction of the ANC organised within the

Congress of the People has sufficient overlapping policy stances with the ANC to find a two-third majority if need be. This explains the far-going proposals of the ANC concerning the reorganisation of the territorial order quoted above: the ANC has the power to change the order at its will.

Other federations have restricted the centre in this sense: both Germany and India have declared the federal structure as a structure that cannot be changed by parliament. The legitimacy of the centre to fulfill a dominant function in territorial order is moreover to be seen in the decision to give it the "remaining competencies", something which only Canada had introduced in the beginning of its federation while all other "coming together" federal states (Linz, 1999) have given these rights to the constituent states as a recognition of their status as the founders of the federal state. South Africa is, of course, not a "coming together" federal order but was rebuilt by partly reinstating a number of existing provinces and by creating new ones. In this sense it has been a "designed" territorial order which has been conceived top-down and not bottom up. This makes it understandable that the ANC would not grant superior legitimacy to those provinces that were part of the ancient order of power nor to provinces that were created from the scratch. From this results, however, that the legitimacy of provinces to speak at equal terms with the centre was seriously constrained.

These "building conditions" also set through in the development of powers in the use of competences. As indicated, provinces did obtain exclusive competence domains which followed the logic of a federal order but these competences were limited in number and significance and had blurred boundaries with similar competences of municipalities. The bulk of competences of provinces is in concurrent areas and it is here that the central government has gradually increased its influence in a very ample way, by defining priorities, standards, and procedures often in a very detailed manner, therefore leaving small room for manoeuvre to provinces.

The use of the powers of the centre can be easily explained: In the beginning, provincial governments were most of the time weak as they lacked experience and were struggling to develop their political powers. One can consider the situation after the constitution was accepted in 1996 as a power vacuum the central government had to fill. Policies had to be quickly developed in such relevant fields as health, education and welfare. The central government used the to develop policy strategies in these fields. This advantage of the "agenda-setter" was in the consecutive periods never abandoned and concurrent policies have - though coordination takes place in the manifold intergovernmental bodies - been a field for the central government to determine to a large extent strategies, benchmarks and outputs. Revealing in this sense is the refusal of the central government to accept the propositions of the FFC to embark on a policy of more revenue decentralisation. Decentralisation was considered ineffective and this opinion has influenced also the policy stance in concurrent legislation. There are no serious obstacles for the centre to restrain its actions in concurrent policies:

- Recommendations of intergovernmental bodies can be overruled if necessary
- The NCOP has until now not developed as the spearhead of regional interests and does not protect provinces from overawing
- The "right to act" of provinces, their implementation powers, can be overruled by using the "implied powers" in articles 146-7 of the constitution. These implied powers can also be used in the case legislation of provinces in their own legislative areas seems to contradict such rules as economic unity, equality or environmental sustainability.

The power to overawe is also be found in revenue matters. Almost all revenues - certainly the most important ones - are under control or under competence of the

centre. Own resources of the provinces are spectacularly low, in contrast to municipalities which generate 90% of their revenues. The centre can influence the policies of provinces by conditional grants and this to a significant degree. These grants do not only come with conditions attached but non-compliance can also be sanctioned by demanding the money back. This is different with the "equitable share" provinces receive out of the centrally administered revenue funds. These funds mix up revenues that provinces need to execute policies that were agreed upon within the IGR system and they are used to equalise living conditions among provinces. In this way they are very important to contribute to a gradual creation of equitable living conditions throughout the country. Possibilities of the centre to overawe are still there: Not only has it been possible to deduce a certain amount of the money that should in principle flow into the revenue funds for general purposes, the block grant for implementation is in addition linked to programmes and instructions. They have in this sense more the character of a conditional grant even if the provinces had opportunity to bring in their voice in the set up of programmes. Provinces are therefore not free how to use the money. The more detailed the instructions are the less possibilities there are to fill in own interpretations by implementation law - that can, in the end, also be overruled as indicated above. Given the dominant position of the centre in IGR this seems to indicate another venue of overawing provinces.

In contrast to conditional grants, however, the centre has the disadvantage that it cannot sanction non-compliance. This seems to be the only flaw in the system: If provinces do not meet up to the plans agreed upon, there are no possibilities to sanction by asking back the money or curtailing money. There are other pressures of course, by discussing within intergovernmental bodies for example. It turns out, however, that this possibility of non-compliance, which - for various reasons - is taking place to a considerable degree, has rendered the system quite ineffective. There are constant complaints of the centre about this point. The possibility to sanction provinces later in the process of revenue distribution seems also limited. Not only are revenues fixed for three years, they are also bound to formulas that cannot be changed at random and applied individually to one or other province.

Though there are therefore limits to overawing at least regarding this point, it does of course not question the overall capacity of the centre to influence revenue distribution. This is also demonstrated by the already mentioned defiance of the FFC recommendation in 1998 to transfer more substantial resources to provinces. The centre has the power and right to not listen to the FFC. This limits such a device of "rationalisation" seriously (see also below)

Last but not least, one can mention that the ANC, as the main centre of power, has always defended a unitarian philosophy. Its ideology was never adapted to federal thinking. Actually, it did not need to be as there was no significant party opposition on the level of provinces. The ANC was and is the governing party in 7 out of 9 provinces. This sustained the unitarian ideological stance and the willingness to "rule" from the center, top-down.

Despite, therefore, of constitutional restrictions, there are few limits set for the centre to abstain from predatory behaviour. There are limitations in the use of revenues for own purposes as the distribution process demands the respect of certain formulas that cannot at random be changed. The centre can therefore not just "take the money and run" (de Figueiredo and Weingast, 2007). But it can influence how the money should be spent by provinces, both by conditional grants and by the revenues given as block grants. The power to do so is, however, again not unlimited as non-compliance cannot sufficiently be sanctioned. On the other hand, the centre has without any doubt overwhelming powers in determining general strategies and policies. The only opposing actor, the NCOP, has important

constitutional veto-powers but it is, for various reasons, not able to use these powers. The decision-making system at the federal level is therefore clearly in the hands of the centre, and this means of the dominant party, the ANC. One of the important reasons why provinces are not using their powers to a more important degree is the structuration of both executive and legislative relations by the ANC. Most actors in the system are in one way or other affiliated to the ANC and have therefore few incentives to oppose the decisions that are taken at the centre of power on the central level (see below).

3.2 The opportunism of provinces and incentives to be productive

The powers of the centre to overawe provinces work as a disincentive to be productive. They do not, however, eliminate opportunism though rent-seeking in form of excessive borrowing seems to be reasonably controlled. The territorial order in South Africa - this is our main hypothesis - suffers above all from a lack of electoral accountability of the provincial political elite. Opportunism is part of a principal-agent relationship that seem to define power relationships between territorial levels.

All the various points mentioned above - a very restricted area of own influence in constitutionally guaranteed policy areas; unclear and therefore contested competences by overlap of policy areas with municipality authorities; voice but not veto powers in concurrent areas and a tendency to regulate these areas by national programmes; the limited amount of own revenues, the right to levy a surcharge on income taxes not used; the dependence on equitable shares nationally distributed without allowing for short term variation and ad-hoc problems; the dependence on conditional grants; the determination of public service official payments on the national level; the limited room to borrow own money without approval by the Loan Coordination Council - demonstrate that there is extremely little room for provinces to develop own policies and invest on own terms. Even if one finds occasional innovative behaviour as is mentioned regarding Gauteng's management of the budget, this concerns innovation in order to increase efficiency but does not indicate own initiatives in substantial policy areas. The room for manoeuvre of most provinces, especially the poorer ones with important social and health problems, is so limited that most expenditures cannot be directed to other purposes than welfare payments, health and education.

This curtailment of powers of provinces results in provinces barely using their legislative powers (Simeon and Murray 2001).

Provincial legislative attention is "taken up with carrying out mandates". There is "little room to initiate new activities". Simeon and Murray (2008) go so far in saying that "legislating at the provincial level is not the primary job of legislatures". If provinces want to have an influence of their own they must make it prevail on the national level, either in IGR or in the NCOP. We have seen, however, that in the case of executive cooperation, provinces have voice but their influence depends on the goodwill of the national government. The only way to strengthen the influence of provinces would be to unite forces among provinces and act as a collective actor. This, however, has not happened until now. Provinces do not have their own association as municipalities have. The heterogeneity of social and economic structures of provinces makes collective action quite improbable. The NCOP has formal powers to protect provinces in important matters that demand a constitutional amendment but this power has not led until now to a serious questioning of the policies of the centre. As said, even in the NCOP party politics prevail and this gives the dominant party, the ANC, sufficient power to forecome

the use of veto's in the NCOP. In other words, provinces lack mostly what constitutes a democratic political body, the development of own policies by an act of own legislation.

The consequences are that provincial executives and legislators cannot sufficiently point to their own policies in difference to other provinces or the centre. For the elector, the contours of own provincial government does not become visible and for the provincial political elite, electoral accountability gets lost.¹⁵

This way of seeing things is confirmed by provinces not using their right to levy a surcharge on income taxes and - with the exception of two provinces which launched a process and one that was in fact granted - to adopt a constitution of their own.¹⁶ And it comes back, when provinces complain that they have not enough fiscal discretion to develop own opportunities: In addition, electoral accountability is reduced by block grants; blame avoidance is easily done. Above all because the room to determine own policies in concurrent areas that are most sensible to votes is reduced by dominance of central government in determining policies.¹⁷

"In 2004, one Premier noted that, in his view, provinces were being reduced to agencies for poverty alleviation and purveyors of social grants and health services, as opposed to being catalysts for economic growth" (Department, 2005, 31)

All this, the report of the Department of Provincial and Local Government says, contradicts the philosophy of "decentralisation".

If one would indeed look at the points of strengths of decentralisation as mentioned in the beginning, it would become clear that South Africa has not, despite of other intentions, created a system that can unfold such fruitful decentralisation. Innovative capacities are curtailed, the possibilities of provincial government to adapt their policies to the specific conditions in each province are limited, electoral accountability cannot unfold and, this is a point not stressed until now, competition, the essential element of decentralisation, cannot work under conditions of South Africa. The reasons for this are structural: differences between the provinces are so large that the erection of a competitive system would lead to unfair competition in which perhaps three provinces would have a chance to prosper but the six others would increasingly depend on central government money. We will come back to this point in the last section of this article. Decentralisation can therefore not unfold its merits under the conditions given in South Africa.

15 To this one can add the lack of a bureaucracy of its own in provinces. Provinces have difficulties in finding top-level senior public officials. With regard to a career in the public service, there is more prestige to be found at the national level. This creates problems for productive behaviour of provinces as it lacks the dedication of own bureaucrats to foster a region.

16 Concerning the second point one might add that the national constitution is already quite prescriptive concerning the set up of government, general objectives etc., which does probably not leave much room and incentive for provinces to adopt a constitution of their own.

17 In fact, except for the lack of using own taxing powers, provinces have little leeway to influence the distribution of general revenues on the base of "equitable shares" calculated on the base of a standard formula that is designed to compensate general expenses of provinces in concurrent tasks and to equilibrate economic and social differences between provinces but not to take particular demands in provinces into account and this on a short term base. Equitable shares are supposed to be stable and are fixed for three years to give provinces a base for calculation. On the other side this limits a flexible use of money. To this one can add the conditional grants that are completely determined by the centre. Overall this leaves few room for manoeuvre.

Instead of establishing a decentralised territorial order with democratically accountable provincial governments, South Africa has developed a territorial structure based on “delegation” (Braun and Gilardi, 2005). “Administrative decentralisation” instead of “political decentralisation” has taken place.¹⁸

It is justified to consider the territorial structure as a “delegation game” or as a “principal-agent relationship” because the electorate in the provinces does not have the role as the main principal that the provincial and executive must serve. Instead it is the loyalty to the central government which seems to dominate the rationale action of provinces. The self-perception of ANC members in the provincial elite as integral parts of the national party and of provincial administrators as part of the national public service reinforces this loyalty. Other indicators are the mentioned lack of own legislation, the predominant “centralised” discourse and the preponderance of national aims and strategies in intergovernmental relations. Cooperation in intergovernmental relations is not, as in Germany, a way of letting two principals or “peers” talk to each other and negotiate outcomes, cooperation in South African intergovernmental relations are thought as institutional devices to make action of provinces congruent to national purposes. Provinces have “operational autonomy” as long as it does not conflict with national objectives or result in negative externalities of other provinces.

Provinces and the centre speak therefore not as principals to each other but in terms of principal and agent. This has consequences: There is a clear command line even if command may be used in the last instance, which runs from top to bottom. Provinces as agents lack the authority to contest the centre in any serious way. Above all, efficiency in such a delegation relationship depends on “contracts” or in other words, how well the principal is able to avoid moral hazard inflicted by the agent. The discussions about inefficiency that one finds in South Africa are all complaints about “incomplete contracts”, about provinces that do not fulfil the agreements made in intergovernmental bodies. Inefficiencies are not caused by provincial governments that seek rents because they must fear that otherwise electoral punishment will follow. They are caused by provincial governments that shirk from national programmes because they lack the means to fulfil the “contract”, because instructions are unclear or because there are more urgent needs on the provincial level. The main problem for the centre is therefore how to build “complete contracts” that can prevent shirking of provinces in this sense. The introduction of output-oriented monitoring and other new public management devices in 1999 was one way to go into this direction. The constant tinkering about stricter and more binding rules and regulations is another. Both, the sharpening of rules or contracts and the shirking of provinces are typical for incomplete contracts in principal-agent relationships.

In this way, South Africa has established a quite different type of “administrative federalism” as Germany has: in Germany the main problem are joint decision traps because the member states have veto in the formulation of policies even if they are the responsible agents for executing them. In South Africa provinces lack the veto-

¹⁸ Political decentralisation is designed to create next to administrative units that can act relatively independently democratically elected governments that are accountable to their electorate. In addition, political decentralisation fosters the creation of regional self-conscious civil society and people. Administrative decentralisation by contrast is a design that seeks a raised level of efficiency in the delivery of public services by making use of the informational advantages that the proximity of decentralised administrative units entail and by profiting from labour division. The main point we develop here is that in a territorial order based on political decentralisation accountability of decentralised units is in first instance to the regional “public” while it is the central government in administrative decentralisation.

power and have only shirking at their disposal to adapt national rules and regulations to their circumstances.¹⁹

3.3 Countervailing mechanisms

The main deficiency of South Africa's territorial order, in terms of a self-enforcing order, is its lack of constraints to predatory behaviour of the central government with consequences for productive behaviour of provinces. Are there any mechanisms that could work as countervailing principles to the powers of the centre to overawe?

The literature on "political mechanisms" of self-enforcing federalism has revealed a number of possible mechanisms that are conducive to restraining the central government: one can mention here - among others - two variables linked to the working of the political system (*political fragmentation* at the national level (Bednar et al., 2001) and *integrated parties* (Filippov et al., 2004: 190-225) and mechanisms directly linked to intergovernmental relations - *horizontal cooperation* between states to strengthen collective action (Braun, 2005), *norms* like subsidiarity or mutual respect (Scharpf, 1988), and the "*rationalisation*" of policy-making by way of differentiating between problem-solving and distributional questions (Benz et al., 1992).

3.3.1 Role of integrated parties

Filippov et al. (2004) see "integrated parties" as a special type of parties that succeed in establishing a viable interaction between the national and regional wings of a party in which no side can overawe the other. If such an interaction exists, both levels can take the territorial interests of the other side into account. If the integrated party is the government party this means that central government can be restrained to overawe and regional governments can be constrained to free-ride.

The preceding analysis has made clear that in fact, South Africa, does not have such integrated parties with a moderating influence on territorial powers. The ANC can be considered as an integrated party if one refers to the close linkages among the national, provincial and local level of the party. But, as in Germany, it is the national section of the party that dominates party policies even if there may be deviant views in provinces. Provincial elections are coordinated with national elections and provincial candidates appear on a closed party list during elections. This maintains the control of the centre on the provincial level of the party. Party careers are not decided in the provinces by demonstrating own initiatives but by loyalty to the general aims of the party.

Given the predominance of the ANC in the South African party system everything depends on its willingness to respect the original "contract" agreed upon during constitutional negotiations. Up to now, party policies of the ANC have pointed into the other direction, into a strengthening of the centre and one cannot expect, also given the recent reform proposals discussed above, that this will change in the near future.

The only way indeed to overcome the distorted power structure in the party system is a possible split within the ANC, which has taken place with the creation of COPE

¹⁹ The dynamics are in both cases completely different: in Germany the results are often suboptimal but inclusive policies, in South Africa the results are suboptimal because of incomplete contracts. This is the price South Africa pays for not having introduced a territorial structure that allows for political decentralisation.

though the split seems not to be based on differences in policy vision but more on personal rent-seeking. The foundation of the “Congress of the People”, divides the powers of the ANC and will reduce at least the powers of the ANC to change the territorial structure with a two-third majority. One cannot, however, expect too much federalising influence of this split, given the policy affinities between the “Congress” and the ANC. The split of the ANC seems, however, the only way to overcome the serious flaw in the set up of the territorial structure of South Africa.

3.3.2 Divided government

We can be brief about this point. The rationale Filippov et al. raise concerning this point is that a divided government at the national level, especially if member states have the possibility to veto, has a restraining influence on aspirations of the centre to overawe. Given the predominant party system and the failure of provinces to use their veto power within the NCOP such a division of powers does not exist and no moderating influence can be found in this respect. The only balancing force one can recognise as constraining is the Supreme Court. The provinces can go to the Court but even here they are seriously hampered by the constitutional obligation to first seek for “amicable” solutions within the confines of intergovernmental relations.

3.3.3 Horizontal cooperation

Member states can strengthen their powers by coordinating their policies vis-à-vis the national government. This can serve as a restraining mechanism for the centre. As described above, there are no organisational efforts until now to develop horizontal relationships to a more significant degree. The heterogeneity of interests and strong asymmetries in economical and social conditions make collusion difficult. This works to the advantage of the centre.

3.3.4 Norms

Norms can protect regional governments if they serve as a commonly agreed upon point of reference in political discussions and if they are respected by both the centre and regional governments.

Again, it seems that such norms cannot unfold under circumstances in South Africa. Since the beginning the ANC has spoken against regional protection. Simeon and Murray (2001) point out that the ANC always had a limited acceptance of the idea of federalism and that this was equally true for a large part in the population and the political elite in general. The system of “apartheid”, with its separating devices, including territorial separation, has had a delegitimising effect on the political discourse about federalism and decentralisation. The dominant perceptual framework, of the ANC, Simeon and Murray contend, remains South Africa as a single unitary system. Provinces are seen “as subordinate institutions at best” (Simeon and Murray, 2001, 88).

The inscription of subsidiarity in the constitution (Art. 146) was a political compromise at this point of time but one finds seldom the notion of subsidiarity as a reference point in the political discourse. All activities undertaken by way of unconditional and conditional grants demonstrate that the centre considers equalisation and harmonisation as far more important principles of action. The notion of subsidiarity is in this way no protection for provinces. The only moderating effect it has is that the national government must prove before the Supreme Court why national legislation should prevail.

Though subsidiarity has been inscribed into the constitution, another principle points to the contrary, i.e. the residual powers of the centre. Though this does not justify an intrusion on the principle of subsidiarity, it nevertheless strengthens the legitimacy of the centre as the “principal” in the territorial order of South Africa.

3.3.5 Rationalisation of policy-making

Finally, the literature discusses another mechanism or institutional device that is more and more used in “regulatory states” (Majone, 1997), i.e. “independent agencies” that can credibly restrain governments’ actions and have a binding effect on this and future governments. Such institutional devices are also well-known in federalism and especially with regard to the management of fiscal relations in federalism. Australia has certainly been the innovator in this sense with its “Commonwealth Grants Commission” (CGC) (Braun, 2007), an independent advisory body with no statutory powers but an enormous influence on equalisation decisions. Its influence is based on its credibility and scientific expertise on the one hand and institutional protection on the other. It would need the consent of States and the federal government to abolish the CGC. Recommendations are most of the time followed.

South Africa has chosen for a similar institutional device, the “Fiscal and Finance Commission” (FFC) with the intention to deprive the centre of arbitrary decisions on the distribution of revenues. What are the powers of the FCC to constrain the centre in this respect?

Constitutionally, the FCC has a quite independent and influential position. It makes recommendations to Parliament, provincial legislatures, and any other authorities determined by national legislation (section 220) (Wehner, 2000). The commission is subject only to the Constitution and the law, and must be impartial. The commissioners are appointed by the president, and include a chairperson and a deputy chairperson who are full-time members, nine persons nominated by the provinces, two persons nominated by organized local government, and nine other persons (section 221).²⁰

Its powers are advisory. It is the national government that makes the final proposal and the final “division of revenue” must be approved by both Houses. The responsible actor within the national government, the Treasury, must comment on the recommendations of the FFC and explain why it deviates. Such deviation occurs. Especially after the first recommendations in 1997 and 1998 the national government decided - this was indicated above - to neglect important propositions by the FFC in favour of future financing of provinces.²¹ The Finance Minister simply found the propositions too much in favour of decentralisation and claimed a better understanding of the negative practical implications the propositions of the FFC would have.

20 The number was reduced in 2004 with the Second amendment Act 2001. section 221. Finding agreements within such a large commission was extremely difficult. Since then the total number is 9. Provinces may only propose 3 persons, local governments 2. Decisions are taken by the president. The provinces are therefore obliged to find an agreement on their representatives. In a sense, this is an advantage as it forces to overcome individual interests and start coordination. On the other hand, the low number of representatives reduces the influence of the provinces.

21 The FFC had proposed to raise the share of revenues of provinces should be raised continually because of demographic developments and responsibilities for health and education. Increasing shares should be financed out of a reduction of arms payments, something which has never occurred.

This attitude demonstrates again that such rationalising mechanisms like the FFC are not sufficiently protected from overawing and can therefore not serve as a countervailing mechanism in the South African context.

Taken together, all countervailing mechanisms that have been raised in the literature on self-enforcing federalism with regard to constraining the powers of the centre, seem not to work in South Africa. Some of them may have a tempering influencing or can postpone decisions. In the end, however, the centre can prevail.

4 Conclusions

There is no need in wrapping up the various mechanisms that make visible to what extent the centre can overawe in the South African territorial structure and how much provinces are constrained. The findings can, in a more concise manner, be summarised in the following way:

The main conclusion of the preceding analysis is that South Africa has not sufficiently exploited the merits of a decentralised structure as it was originally conceived in the constitution. The main problem was since the beginning that the political compromise satisfied mainly the "federal" forces that were in the minority but barely the pretensions of the new majority, organised within the ANC. The constitutional constraints that were the result of the compromise have not proven as self-enforcing, i.e. to respect the powers of the provinces and strengthen their autonomy and their productivity. Instead, the dominant party system together with insufficient countervailing mechanisms has led to a process of continuing centralisation. These tendencies were reinforced by fundamental decisions in the constitution about competence and revenue distribution that were since the beginning weakening the potential of provinces to develop their own profile and gain real powers of self-development.

As a result, the promises of decentralisation as outlined by public choice theory could not unfold. Above all two essential elements were not developing: democratic accountable governments at the provincial level (political decentralisation) and competition between provinces. Instead the inherent dynamics of centralisation have allowed for "administrative decentralisation", which can have some advantages for the management of complex policy areas but which is subject to the deficiencies typical for delegation or principal-agent relations. Such deficiencies can be found in South Africa. The ongoing discussions about reforming the territorial structure concern the failure to develop efficient decentralised structures. Solutions are searched for in developing more complete contracts but not in developing a viable political decentralisation.

As it seems more and more difficult to improve efficiency within existing structures, more radical proposals of the ANC to diminish powers of provinces even further or to even establish provinces altogether, are only the logical consequence of the path of administrative decentralisation that South Africa is following. Instead of finding ever more rules and regulations to refine the "contract" with the provinces, it seems easier to reduce the territorial structure to only two levels, municipalities and central government.

The alternative would be, of course, to give political decentralisation a chance and strengthen the powers of provinces, both in respect of competences and revenues. Only then the merits of decentralisation as developed in theory could have a chance to unfold. Democratically elected governments accountable to their own electorate

in provinces could make a difference because it would give these governments a chance to develop own strategies of adaptation, improvement and innovation.

It is, however, clear that this option can only become feasible, if the dominant party system ceases to exist. The creation of the "Congress of the People" could be a chance in this sense though it is by no means sure that the Congress will differ with regard to territorial politics from the ANC and pursue a more federal strategy.

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