

THE ASSIGNMENT OF RESPONSIBILITIES FOR THE PERFORMANCE OF  
PUBLIC FUNCTIONS TO LEVELS OR SPHERES OF GOVERNMENT IN  
SOUTH AFRICA

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*SOLI DEO GLORIA*

## **SUMMARY**

The thesis is focused on the question of how responsibilities for the performance of public functions are assigned to levels or spheres of government. The term “public function” refers to the activities performed by governments in order to satisfy identified community needs. There is a paucity of validated knowledge concerning the particular phenomenon, and the purpose of the study is to make a research based contribution in this connection. Because of the exploratory nature of the study particular attention is paid to the orientation of the research in Public Administration terms, as well as to research design.

A study of the assignment of responsibilities in a selection of foreign countries was undertaken, and the findings are recorded and evaluated. The conclusion reached is that in none of the countries studied a clear, comprehensive demarcation of governmental responsibilities has been achieved.

Regarding South Africa, the thesis encompasses a historical overview, followed by separate analytical examinations of the arrangements set in place by the 1993 (“interim”) and the 1996 (“final”) Constitutions. In the pre-democratic era (1910 to 1994), ideological considerations patently played a prominent role. The treatment of the assignment question by the 1993 Constitution is found to have had substantial shortcomings, especially with regard to conceptual and technical aspects, the realisation of assignment principles, and the substance of assigned responsibilities. In the author’s opinion a satisfactory deployment of responsibilities was not achieved. The 1996 Constitution improved the assignment scheme, notably through the better realisation of assignment principles, the introduction of exclusive powers for the provinces, and in dealing with the municipal domain. However, the 1996 Constitution also did not achieve a credible and clear-cut assignment of responsibilities.

In assessing the degree to which a scientific approach to the assignment question is in evidence, the finding is that such an approach has not been established. A

theoretical assignment model, following a Public Administration approach, is then presented. The model covers language, classification, assignment principles, and methodology. The thesis concludes with a reflection on the research, as well as on the practicalities of achieving improvement in the assignment of responsibilities.

#### Key terms

Division of powers; government functions; government organisation; government powers; intergovernmental relations; levels of government; local government; provincial functions; provincial powers; vertical separation of powers; South African Constitution; spheres of government.

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# **THE ASSIGNMENT OF RESPONSIBILITIES FOR THE PERFORMANCE OF PUBLIC FUNCTIONS TO LEVELS OR SPHERES OF GOVERNMENT IN SOUTH AFRICA**

## **CHAPTER 1: GENERAL INTRODUCTION**

### **1.1 Introduction**

It may be assumed with safety that in the vast majority of states more than one level or sphere of government has been found necessary for the performance of public functions. By the term “public function” is meant broadly the activities performed by a national or subnational government in order to satisfy an identified community need. (The term and the underlying concept is looked at more closely in chapter 3 of the thesis.) The plurality of governments in a state has far-reaching implications for its system of government and administration. A key question which arises is how responsibilities for the performance of public functions are, or perhaps should be, assigned or distributed amongst the various levels or spheres of government. As will become apparent as the thesis unfolds a substantial problem presents itself in this connection: despite the rather obvious importance and the implications of the assignment of public function responsibilities to levels or spheres of government, there is a paucity of scientific knowledge concerning the phenomenon. This is evident from the research record, the available literature, as well as from the limited treatment accorded the particular subject in academic curricula, three matters which are reported on in chapter 2 of the thesis. In essence the present study is an endeavour to respond to what is perceived as a decidedly problematic situation, and in the process to make a research based contribution to the body of knowledge which is Public Administration.

The importance of the assignment question, already referred to above, is addressed in the following section. This is followed by short sections dealing with some salient points in relation to the study, viz the demarcation of the field of study, the originality of the study, and the approach followed with the study. There follows a section in which the structure of the thesis is surveyed, with a concise indication of the content of each of the

remaining chapters. A summary concludes the chapter and leads into the next chapter, which contains the scientific orientation of the study.

## **1.2 Importance of the assignment question**

The assignment of responsibilities for the performance of public functions is tantamount to the distribution of political power in the state and is consequently a matter of fundamental importance in every country. That this is so, was borne out recently in South Africa by the proposals, debate and argument which the assignment question elicited in relation to the “powers” of the provinces in the widely reported process of putting together an “interim” (1993) and a “final” (1996) constitution for the country. On each occasion the assignment scheme enacted into law was a compromise of political give-and-take, rather than a conclusive agreement based on a scientifically guided investigation. The assignment question continues to crop up in the ongoing national debate on government and administration.

The assignment of responsibilities to the national and subnational levels of government serves to set in place a basic structure for representative government, and the exercise of political power at or in the respective levels or spheres. The content and the limits of governmental authority, as well as the power relationships between governments at or in the various levels or spheres, are determined, thus providing clarity as to the legally permissible role of each government. In the process, the task of governing the country is divided and the portions spread vertically and horizontally throughout the country. As the assignment of responsibilities is accompanied by the fixing of accountability, the locus of accountability in respect of any particular public function can be determined, and the process of enforcing accountability facilitated. The assignment of responsibilities affects to a substantial degree the efficiency and effectiveness which can be achieved by those mandated to govern, as well as the extent to which they will be perceived to give value for revenue collected from individuals and institutions. Finally, and significantly, an employment structure is provided for the recruitment, development and advancement of those with the talent and inclination to represent and to govern.

From the viewpoint of the public at large - assuming that the state is a democratic one - the assignment of responsibilities for the performance of public functions is important as a determining influence on public attitudes to government. Public acceptance and, ideally, public appreciation of the structures and functions of government will be enhanced to the extent that there is a general perception that political power has been effectively harnessed in the service of the community, and that the distribution of power amongst the various levels or spheres of government is sensible in terms of the kinds of needs to be satisfied at each level or in each sphere. With a tiered system of government, it is reasonable to expect that essentially local, essentially regional, and essentially national concerns will be accommodated by the appropriate assignment of responsibilities to the respective levels or spheres of government. How the assignment is done can affect, either positively or negatively, the general perception amongst the public of the relative closeness or remoteness, accessibility or inaccessibility, responsiveness or unresponsiveness of government. It will also go a long way towards determining the degree of interest shown by the public in public affairs, as well as their willingness to participate actively in the system of government and administration.

Another major aspect to be noted in looking at the importance of the assignment of public function responsibilities, is the effect of such assignment on the structures and processes of public administration. The assignment decided upon provides the basis for the design of organisation structures and the determination of post establishments at or in the various levels or spheres of government. It also determines the need for and the nature of intergovernmental arrangements, especially as far as the delegation of authority, control or supervision, and reporting are concerned. In financial administration the assignment scheme gives direction to the linking of the possible sources of revenue to the various levels or spheres of government, as well as to the sharing of revenue between levels or spheres of government where this is indicated. It determines the size and shape of national, regional and local budgets, and provides the basis for auditing the performance of the various authorities in terms of value for money considerations. As far as human resource management is concerned, the assignment of responsibilities determines the deployment of public servants throughout the country, either as members of a single public service or of a plurality of public services. It further determines to a substantial degree the occupational and skills profiles of the public servants required at or in the various levels or spheres of government, depending for

instance on whether a particular function, or aspect of a function, is concerned essentially with policy making, regulation and control, or service provision. For the individual seeking to build a career in public service it provides an occupationally focused, function related framework of employment opportunities in which personal development and advancement can take place.

In whatever context the matter is viewed, and particularly with regard to the aspirations of political parties, the expectations of the public, and the requirements of public administration, the assignment of responsibilities for the performance of public functions is of the greatest importance to a country, providing the *raison d'être* for the authorities instituted at or in the various levels or spheres of government, and giving direction and coherence to the manifold activities in the public domain of the state. It is not surprising therefore to find that this question lies at the heart of the constitutions adopted by states.

### **1.3 Demarcation of the field of study**

The study focuses on the assignment question as manifested in South Africa, dating from the establishment of the South African state in 1910. In order to contextualise the assignment question over a wider front, a study was also done of the assignment schemes of a selection of other countries (*vide* chapter 4 of the thesis), but essentially the study has to do with the assignment of public function responsibilities in South Africa. It is necessary to emphasise this point in order to make it clear that any findings or proposals emanating from the study will not necessarily apply, or apply to the same extent or in the same way, in any other country.

The study does not deal with the question of the adoption of functions as *public* functions *per se*, that is to say with an examination or rationalisation of what the government sector should, or should not, take upon itself. A comprehensive study concerning this matter was done some years ago in South Africa (Loxton 1993). The study also does not deal with the assignment of responsibilities for the performance of public functions *at* or *within* a level or sphere of government, that is to say with the assignment of responsibilities to particular ministries, departments, services or offices. An intra-level or intra-sphere examination of the distribution of responsibilities between the institutions

making up a particular level or sphere of government would probably be of limited academic value because of the discretion usually enjoyed by heads of government in matching specific blocks of governmental responsibility with the available human resources at cabinet level, and which could have an effect on the functional demarcation of departments and other governmental institutions.

#### **1.4 Originality of the study**

As will be apparent from the literature review essayed in chapter 2 of the thesis, which in addition to the discipline of Public Administration, also focused on relevant literature in the discipline of constitutional law and in the field of federalism, there is no existing, defined, or generally acknowledged body of knowledge dealing specifically and systematically with the assignment question as conceptualised in the present study.

As far as could be ascertained, no master's dissertation or doctoral thesis dealing in a comprehensive manner with the subject matter of the present thesis, has previously been undertaken at any South African university. There is also no record of any comparable research undertaken by any other local research establishment. Substantial work regarding the assignment of public functions to levels of government was, however, done in-house by the former Commission for Administration during 1993, with a view to making a contribution to the multiparty negotiating process then underway. The Commission did not publish a report on its work, but its input to the negotiating process is a matter of public record. The work in question, in which the author was closely involved, is examined in chapter 6 of the thesis.

#### **1.5 Approach followed**

The assignment question has in general been approached from a Public Administration perspective. In this connection it needs to be borne in mind that in addition to public administrationists, constitutional lawyers and political scientists have a legitimate professional interest in the deployment of governmental powers and functions within the state, albeit from their own disciplinary perspectives (*vide* the synopsis of the literature

review in section 2.6.5 of the thesis). It is conceivable, therefore, that a constitutional lawyer or a political scientist would approach what the author refers to as “the assignment question” in a different manner, probably using different terminology, and would formulate findings and proposals in a way which would be relevant within the bounds of his or her own discipline.

Following a Public Administration approach entails at the outset that cognisance be taken of the political aspect of the assignment question. In view of its direct link to the distribution of political power in the state, the assignment of responsibilities for the performance of public functions will inevitably attract the attention of political parties and factions. When and where any aspect of an assignment scheme is in dispute, it would seem that, ultimately, it can be resolved only by political means, that is to say by the strongest party asserting its will, or by the parties involved negotiating a compromise. The present study has, notwithstanding, been embarked upon on the assumption that while the substance of assignment questions ultimately has to be resolved by political means - which could entail a constitutional amendment - it is possible to approach the assignment of responsibilities in an objective and logical manner within the discipline of Public Administration and, in so doing, to contribute substantially to informed and defensible decision making at political level.

What the following of a Public Administration approach entails is elaborated more fully in chapter 9 of the thesis dealing with a theoretical model for the assignment of public function responsibilities.

In view of the patently under-researched status of the assignment phenomenon, which has the effect *inter alia* of imparting an exploratory character to the study, it was considered essential to orientate the assignment question appropriately in scientific terms, and to pay particular attention to the design of the research project (*vide* chapters 2 and 3 respectively of the thesis). The author has thus endeavoured to follow a reasonably scientific approach in doing the study with the objective of setting in place a propositional base which hopefully can serve as an aid in promoting a better understanding of the assignment phenomenon.



## 1.6 Structure of the thesis

The thesis consists of ten chapters in all, including the introductory and concluding chapters. The content of the chapters following this, the introductory chapter, is summarised below.

*Chapter 2: Scientific orientation:* The chapter endeavours to orientate the study in scientific terms. Public Administration as a discrete body of knowledge is brought into focus and the content of this body of knowledge is examined briefly. A problem statement regarding the assignment question is developed, followed by a formulation of the purpose of the study. This is to make a research based contribution regarding the assignment of public function responsibilities to the body of knowledge constituting Public Administration. To this end some pertinent research questions are identified. The chapter concludes with a literature review, which in addition to encompassing the discipline of Public Administration, also touches upon the disciplines of Constitutional Law and Political Science.

*Chapter 3: Research design:* Because of the under-researched nature of the assignment question particular attention was paid to research design, following an approach generally applied in the social sciences. The chapter is structured into sections dealing respectively with the unit of analysis, the conceptualisation of the research problem, the operationalisation of the study, the nature of the study, research paradigms, sources of data, the collection and presentation of data, and the analysis and interpretation of data.

*Chapter 4: Assignment of responsibilities in other countries:* Chapter 4 contains the findings of a broadly comparative study of the assignment of responsibilities for the performance of public functions in a selection of other countries, together with some critical comment. This part of the study was considered to be necessary in order to contextualise the assignment phenomenon over a wider front. The countries chosen were Australia, Belgium, Germany, Spain, and the United Kingdom. These countries were selected as being of particular interest within the ambit of the present study, as explained in the introduction to the chapter.

*Chapter 5: Assignment of responsibilities in South Africa: historical overview:*

Landmark developments since the establishment of the Union of South Africa in 1910 up to the commencement of the multi-party negotiations which culminated in the interim Constitution of 1993 are described, analysed and evaluated. The chapter records the initial system of government which was set in place in 1910 and the changes which were effected over a period of 84 years prior to the implementation of the first democratic constitution; it then proceeds to examine the ways in which public function responsibilities were assigned within the various systems of government. The chapter concludes with a general critique of the assignment of responsibilities in the pre-democratic era.

*Chapter 6: Assignment of responsibilities: 1993 Constitution:* This chapter provides at the outset a brief overview of the Multiparty Negotiating Process which culminated in the adoption of the country's first democratic constitution, generally referred to as the "interim" Constitution. An important feature of the negotiations was the development of a set of constitutional principles which were to be applied in the drafting of a new constitution; a substantial number of these principles were directly relevant to the assignment of responsibilities. The relevant principles are examined and evaluated. A section of the chapter deals with the input of the erstwhile Commission for Administration to the negotiating process; a contribution which is significant in the context of the thesis. The assignment scheme introduced by the Constitution is described and subjected to close and critical examination.

*Chapter 7: Assignment of responsibilities: 1996 Constitution:* The examination, analysis and evaluation of the so-called "final" Constitution is structured in essentially the same manner as the previous chapter, which deals with the 1993 Constitution. As the Constitutional Court was required to certify that all the provisions of the Constitution complied with the constitutional principles which had been adopted in 1993, the certification actions of the Court are examined and commented on. The Constitution is particularly noteworthy for the emphasis which it places on co-operative government, and this matter is therefore also highlighted.

*Chapter 8: Summary, analysis and interpretation of research findings:* Chapter 8 consists of two main parts, viz a summary of the research findings, and an analysis and

interpretation of the findings. The summary provides a digest of the literature review, the assignment of responsibilities in other countries, the history of the assignment question in South Africa prior to 1994, the 1993 Constitution, and the 1996 Constitution. In the second main part of the chapter, an assessment is made of the extent to which the assignment of responsibilities for the performance of public functions can be said to constitute a scientific endeavour. To be able to make a credible assessment, a purpose-specific set of criteria was developed, against which the research findings are weighed.

*Chapter 9: A theoretical model for the assignment of responsibilities:* In this chapter a provisional theoretical model is presented as a possible aid to the accountable assignment of public function responsibilities to levels or spheres of government. For purposes of modelling, a number of simplifying assumptions are made, while it is emphasised that a Public Administration approach to the assignment question is followed. Key elements of the model are language usage, classification, assignment principles, and methodology; these are elucidated in separate sections of the chapter.

*Chapter 10: Reflection:* The brief concluding chapter returns to the problem identified in the very first paragraph of the thesis, as well as to the purpose of the study as indicated there. It reflects on the results achieved with the research by focusing on, and providing answers to, the research questions which were identified in chapter 2 of the thesis as an aid in giving direction and focus to the study. There is also brief reflection on the practicalities of achieving substantial improvement in the assignment of responsibilities to the three spheres of government in South Africa.

## **1.7 Conclusion**

This chapter has served to identify a problematic situation with regard to the assignment of public function responsibilities, to which the present study is a response, and to emphasise the importance of the assignment question. It also demarcates the field of study, notes the originality of the study, and comments briefly on the approach followed. In addition it surveys the structure of the thesis and provides a concise indication of the content of each of the remaining chapters of the thesis. The next step

is to endeavour to orientate the assignment question in scientific terms, an objective which is pursued in the ensuing chapter.

## **CHAPTER 2: SCIENTIFIC ORIENTATION**

### **2.1 Introduction**

In an endeavour to achieve an acceptable degree of validity with the present study, it is necessary to orientate the work with some care in scientific terms. This is necessary especially because – as will be evident from this and the following chapter – the phenomenon in question has not yet found a substantial place within the compass of Public Administration, the topic of the thesis is under-researched, and the literature bearing on the phenomenon is sketchy.

In this chapter, Public Administration as a discrete body of knowledge concerned with the ontological reality of public institutions and their activities, is brought into focus. This is followed by the introduction and discussion of the research problem, culminating in a formal statement of the problem. On the basis of the problem statement a number of research questions are formulated with the purpose of providing direction to the collection of data. The chapter then proceeds to a review of pertinent literature, and ends with a concluding statement.

### **2.2 Public Administration in focus**

Amongst public administrationists in South Africa – both academics and professional practitioners – there would appear to be a high degree of unanimity concerning what could be called a macro-paradigm for understanding and dealing with the phenomenon of public institutions and their activities. In this broad framework a distinction is made between the ongoing, actual activities of public institutions, on the one hand, and the systematic study of those institutions and their activities, on the other. Marais distinguishes between public institutions and their activities (which he somewhat confusingly calls “the civil service”) and the study of this reality, which in his view constitutes the science of Public Administration. He remarks laconically that the reality exists whether it is studied or not. (Marais 1993:118-119.) Wessels notes essentially

the same reality, which he typifies as a *first-order* reality, and which he identifies as public administration, using lower case initials in the spelling of the term. This first-order reality is studied by the researcher in Public Administration, for which term Wessels employs capital initials. He conceives of Public Administration as a body of knowledge, made up of valid scientific statements. (Wessels 1999a:365, 369.) Pauw (1999:9) avers in succinct terms that Public Administration is the scientific study of public administration. The picture emerging from these writings by three South African academics is clear: there is a particular reality or practice, and a science based on that reality or practice. The first mentioned is *public administration*, and the second *Public Administration*. In the author's time as a public servant it was customary to think and talk about one's day to day activities as "practice", and of what one was taught at university as "theory". Pauw (1999:10) – who was himself a public servant – acknowledges this usage.

For purposes of the study, the public administration / Public Administration scheme, as noted above, is accepted as a useful ordering framework. It is accepted further that Public Administration as a science falls predominantly in the category of the human or social sciences. For purposes of scientific orientation it seems necessary to make and state this acceptance or assumption explicitly as the categorisation is not necessarily self-evident. In the author's experience a great deal of the activities of public institutions consists in the application of knowledge and techniques forming part of other sciences, for instance the natural sciences and the law sciences. The postulate that there is a simple distinction to be made between the major categories of science is probably debatable in taxonomic terms. However, judging by the structure of academic departments generally current in universities, as well as by the reality of separate research institutions for the natural and the social sciences, it seems reasonable to accept that Public Administration belongs with the social sciences. Methodologically viewed, there has been recent confirmation in the literature of Public Administration that social science methods are applicable to its study (Wessels 1999b:382).

On the basis of the foregoing assumptions as to the nature and scientific locus of Public Administration, the approaches and methodology of the social sciences have been adopted for present purposes. The comprehensive and systematic treatment of these

matters by Mouton (1996) is acknowledged specifically as the basic set of research guidelines giving direction to the present work.

To return to Wessels's conception of Public Administration as a body of knowledge made up of valid scientific statements (*vide supra*) a question which arises is the following: Can we demarcate this body of knowledge and demonstrate its contents? A further question, specifically relevant to this study, presents itself: Has the subject of the present study found its proper place within the body of knowledge which is Public Administration and, if so, to what extent? These questions are addressed below.

There is an ongoing debate in South Africa about the proper content of Public Administration as a body of knowledge, or as an academic discipline to be taught at university. The debate has been ongoing for some years amongst local academics, and has become known as "the paradigmatic debate" – *vide* for example Botes (1987) and Schwella (1999). The content question also featured prominently in the so-called Mount Grace Resolution adopted in 1991 (McLennan & Fitzgerald 1991:23). Schwella (1999:333) has called the debate "a continuing struggle". To attempt to review this debate, or even to join it, would divert the present argument far beyond the immediate need to demarcate a body of scientific knowledge relevant to the study. A practical approach in the author's view would be to note what university departments of Public Administration actually include within their curricula. Of course, an assumption has to be made, viz that a department's curriculum represents its understanding of what constitutes the body of knowledge with which it is concerned. This would appear to be a reasonable assumption to make. A further assumption which can be made, is that one can limit the scrutiny of the curriculum to its undergraduate part, on the grounds that a university department would want to acquaint its students at undergraduate level with the full reach of the particular discipline, even if certain aspects are only touched upon or dealt with in a superficial, introductory manner. How else could a graduated student be said to have majored in a particular subject? The making of assumptions within a particular context is acceptable in scientific work (Mouton 1996:14). The Public Administration components of two local universities, viz the Department of Public Administration and Management of the University of South Africa (UNISA) and the School of Public Management and Administration of the University of Pretoria (UP),

have been selected for scrutiny. The two universities happen to be the oldest in the country offering Public Administration as a major subject of study.

On the basis of the published curricula for undergraduate studies of the two universities (UNISA 2004b; UP 2004b), the following picture emerges: Although there are differences in the structure of the curriculum, as well as differences in the structure and content of particular subject modules, there is obviously a large measure of agreement between the two universities as to what a well-rounded study of Public Administration should encompass. The following are focal points in the Public Administration curricula of both universities:

- ?? Overview of public administration as a composite of activities originating in the Constitution, as the basic plan for the government and administration of the country;
  - ?? theory of Public Administration;
  - ?? policy studies;
  - ?? public human resource management;
  - ?? public financial administration;
  - ?? organisation studies;
  - ?? accountability, ethics, and administrative justice;
  - ?? public management (skills); and
  - ?? the functional role of the state in society.
- (UNISA 2004b:374-375; UP 2004b:111-112.)

As regards the last mentioned focus – the functional role of the state in society - UNISA (2004b:374-375) makes provision for separate optional subject modules dealing with protection services, the creation of wealth, welfare and social services, culture and education, and environmental affairs. UP (2004b:111) has a single, compulsory module dealing with the role of the state, accentuating its developmental role and its protective role respectively, and encompassing virtually the same functional areas as the UNISA modules taken together, although the treatment is necessarily more concise.

There are some apparent differences: UNISA (2004b:375) links financial administration to its module on public policy, UP (2004b:112) subsumes financial administration under a module dealing with public sector economics. UP (2004b:112) provides a module on



information management, UNISA does not. UNISA (2004b:374) provides modules on the structuring and functioning of public services, and the foundations of Public Administration (including the generic functions of policy making, planning, personnel provision and utilisation, and funding and logistics). Although UP does not provide corresponding courses under the same names, the particular aspects are subsumed under the various courses which do form part of its curriculum (Roux 2004). UNISA (2004b:375) also provides an optional module on comparative public administration, government and politics, and one on public administration dynamics, with specific reference to transformation and transactional dynamics. At UP the undergraduate student has to enrol for all twelve Public Administration modules set out in the regulations when specialising in public management for the B Admin degree (UP 2004b:63); at UNISA a measure of module selection is permitted in compiling a course of study with Public Administration as a major subject (UNISA 2004b:374-375). In summary, although there are some differences at the fringes – so to speak – there is clearly a large area of focused scientific interest concerning Public Administration, with an associated accumulation of generally accepted knowledge, which the two universities would appear to have in common.

As regards other universities and, until the end of 2003, technikons offering Public Administration as a subject, it was not considered necessary for present purposes to examine their respective Public Administration curricula. With due respect to the institutions concerned, it is unlikely that the curriculum of an institution offering comprehensive subject content in Public Administration, would differ substantially from the combined curriculum reach of UNISA and UP. It may be mentioned that a survey of 21 universities and 15 technikons offering Public Administration as a subject, which was conducted by the School of Public Management and Administration of the University of Pretoria for the United States Agency for International Development in 1999, came to the conclusion that, as regards curricula, it appeared that all institutions cover the same focus areas of Public Administration, except where some universities and technikons tend to focus more on particular sub-fields of Public Administration such as local government administration, policy analysis, and development management (UP 1999:1B).

A further, insightful, perspective on the content of Public Administration as a body of knowledge, is provided by the proposed unit standards of the Standards Generating Body for Public Administration and Management instituted by the South African Qualifications Authority. The Standards Generating Body has identified eleven categories of unit standards in the particular field, viz policy analysis and management; development management; public organisational development and management; managing public service delivery; human resources management; financial management and procurement; information, knowledge, communication and technology; public management ethics; public administration and management history, theory and research; disaster studies; and intergovernmental relations. (SGB 2006.) There is evidently a large measure of agreement between these categories and the combined content of the university curricula dealt with *supra*.

The purpose of the foregoing examination and discussion of university curricula is, as stated at the outset, to demarcate a body of knowledge which reasonably could be said to constitute, however imperfectly, the science of Public Administration. In the author's view each of the two universities could fairly claim that its undergraduate curriculum in Public Administration represents its understanding of the body of knowledge (science) with which it is concerned, and which is the base and the focus of its research and teaching. Writing about research within the social domain, Mouton (1996:14) puts forward the view that a science consists of different kinds of components, such as factual and descriptive statements, explanatory hypotheses, laws and models, various kinds of assumptions and postulates, and usually implicitly held beliefs and values. This scientifically broadminded view would to the author seem to be an eminently acceptable one, also when applied to Public Administration. It is not to be expected that every part or element of a particular body of knowledge – in the present case, Public Administration - when assessed at a particular point in time, would evince the same degree of "scientificness", or be equally acceptable to all scientists active in the particular field. On this point, Mouton (1996:16) mentions that scientific knowledge consists of statements with varying degrees of substantiation or empirical support, and which do not have the same epistemic (knowledge) status. Again, the applicability of the approach to Public Administration is evident. However, there would appear to be nothing in the approach to hinder the continuing development of a social science – such as Public Administration - with increasing degrees of substantiation and empirical

support for its key propositions. The author comes to the conclusion that researchers and students of Public Administration can with justification assert its status as a science and continue to work at its further development as a science – an endeavour which would appear to be obligatory for all serious proponents of the discipline.

The second question which was raised above, viz “Has the object of the present study found its proper place within the body of knowledge which is Public Administration and, if so, to what extent?” - can now be addressed. Again, the search for an answer is focused on the respective curricula of UNISA and UP which, taken together, in the author’s postulated argument are broadly representative of the existing body of knowledge which is Public Administration.

The respective responsibilities of the various levels (or spheres) of government for the provision of services are dealt with by both universities at an early stage of their undergraduate programmes in Public Administration. At UNISA the matter is dealt with in the published study guide for subject module PUB 102-9 (*Openbare dienste: strukturering en funksionering*) (Wessels 2000:27-36); at UP – which does not publish study guides – the matter is, according to the responsible lecturer, covered in its subject module PAD 151 (*Constitutional framework for public administration*) (Van Dijk 2004). In both instances the location of the matter within the respective curricula would to the author appear to be appropriate – the assignment of responsibilities to levels or spheres of government is indeed a fundamental (constitutional) aspect of government and administration, and it is fitting that beginning students in Public Administration should, as part of their basic orientation in the subject, be introduced to the various levels or spheres of government and be made aware of their respective responsibilities for the performance of public functions.

According to Van Dijk (2004) the treatment of the matter in question at undergraduate level at UP is essentially descriptive; no attempt is made to look at the assignment of responsibilities in an analytical or critical manner. The attention of students is invited to what the text and the relevant schedules of the Constitution stipulate regarding the responsibilities of the various levels or spheres of government, without embarking on a detailed examination of these responsibilities. In the UNISA study guide referred to above, an essentially descriptive approach is also followed. However, the particular

part of the study guide culminates in the posing of a key question, viz “*Op watter owerheidsvlak moet ‘n diens gelewer word?*” The discussion of the question is brief, consisting of 24 printed lines. Reference is made to the phenomenon that responsibility for many public services is shared between the three levels of government to a greater or lesser extent, as well as to a rule (subsidiarity) which could be applied in this connection. A concise explication of the subsidiarity rule is provided. (Wessels 2000:27-34.) The subject matter of the present thesis is directly linked to the question briefly posed in the UNISA study guide referred to.

Regarding studies at postgraduate level, it was ascertained from a professor attached to the UP School of Public Management and Administration that at this level the assignment of responsibilities to levels or spheres of government would probably be subsumed under the subject module “Intergovernmental relations” (Roux 2004). The University offers such a module as an elective module at the so-called “pre-masters” level (UP 2004a:12). It could not be established to what extent the particular aspect is dealt with in an analytical or critical manner within the parameters of the module referred to. In the author’s experience it is possible to study or investigate intergovernmental relations while taking the basic assignment of responsibilities to governments as a given. Turning to UNISA, this university does not make provision for a subject module at postgraduate level in Public Administration under the title “intergovernmental relations”. Of the postgraduate subject modules which are offered, none would, on the basis of its title, appear to include intergovernmental relations as a distinct subject. A professor attached to the University’s Department of Public Administration and Management confirmed that intergovernmental relations is not dealt with as a distinct subject at postgraduate level (Wessels 2004). As indicated *supra*, the Standards Generating Body for Public Administration and Management has identified a category of unit standards relating to intergovernmental relations. The information concerning these unit standards available on the particular website, does not contain a specific reference to knowledge or competence regarding the assignment of responsibilities to levels or spheres of government.

To summarise, the assignment of responsibilities for the performance of public functions to levels or spheres of government would appear to have its place in the developing body of knowledge which is Public Administration. It is to be found at the point where

the study of Public Administration turns to the question, which in any country is a fundamental one, of how responsibilities for the performance of public functions - or the provision of public services – is distributed amongst levels or spheres of government. It can reasonably be assumed that this question, together with its underlying phenomenon, can, like so many other questions in the social domain, be addressed with varying degrees of scientific intensity. As to the extent to which the assignment of responsibilities is dealt with in university curricula of Public Administration in South Africa, it would seem, on the basis of the sources consulted and the enquiries made, that the particular question is not at present accorded substantial, in-depth treatment. Apart from a brief mention in a UNISA study guide no evidence could be found of an analytical or otherwise essentially scientific approach in dealing with the question.

### **2.3 Problem statement**

The phenomenon forming the object of the present study, viz the assignment of responsibilities for the performance of public functions to levels or spheres of government, is manifest over a particularly wide front. States in general (*vide* the comprehensive reference work on constitutions edited by Blaustein and Flanz 1971) evince a structure consisting of two or more levels or spheres, and formally assign, in their constitutions and other laws, responsibilities for the performance of public functions to their respective levels or spheres of government.

As to the importance of the assignment of responsibilities, of this there can be little doubt. This subject is dealt with more fully in the introductory chapter of the thesis, where the following main points are made:

- (a) In the negotiations leading up to the adoption of the first democratic constitution in South Africa in 1993, the assignment of responsibilities to the provinces was a major issue.
- (b) The assignment of responsibilities determines the formal deployment of institutionalised political power throughout the state and sets in place a structure of governmental accountability.

(c) The pattern of assigned responsibilities has a determining influence on the public's acceptance and perception of the structures and programmes of government, on the degree of interest shown by the public in public affairs, and on the willingness of people to participate actively in the system of government and administration.

(d) The assignment of responsibilities determines the structures and to a large extent also the processes of public administration. Among a multitude of dependent variables the following are key: the design of organisation structures, the determination of post establishments, intergovernmental arrangements and relations, the sharing of revenue, the size and features of budgets, the deployment of public servants throughout the country, and the occupational or skills profiles required at or in the various levels or spheres of government.

Despite the world-wide manifestation of the phenomenon, and its obvious importance within the domain of government and administration, the assignment of responsibilities has received relatively little recognition and attention in the study of Public Administration in South Africa. It is reasonable to expect that a topic of such importance would occupy a substantial place in the curricula of university departments or schools of Public Administration or Public Management. However, at the present time this would appear not to be the case – *vide* the brief discussion of the curricula of two leading universities in the preceding section.

The fact that the subject matter of the thesis does not at present feature prominently in the Public Administration curricula in South Africa poses something of a problem for the study. According to Mc Curdy and Cleary (quoted in Wessels 1999a:367) one of the criteria for deciding whether an issue is a "core" issue within the field of Public Administration, is whether the topic or issue under study is central to Public Administration; in practical terms whether the general subject warrants at least a few pages of treatment in leading text books on Public Administration. Such leading text books will be surveyed as part of the literature review (*vide* section 2.6.2 *infra*). However, if Mc Curdy and Cleary are right, one could argue that the general topic, if indeed it is important, should also feature commensurately in university curricula. This

is patently not the case – certainly not as far as South African universities are concerned.

In the circumstances, one may well ask whether there is a problem in existence with sufficient substance to require research, and specifically whether the present study is worthwhile. To be worthwhile within the particular field the research should at least be relevant. Wessels (1999a:378) touches on the question of relevance and expresses the opinion that if research results do not form part of the debate within a specific subject, it is perhaps an indication of a lack of relevance of the work for the specific subject. The question of the debate, if any, concerning the assignment of responsibilities to subnational governments will be addressed in the review of literature (*vide* section 2.6.2 *infra*).

Having noted the reported observations on the questions of the importance and relevance of research work within a particular field of study, the author is nonetheless convinced of the importance and relevance of the assignment question to the study of Public Administration (*vide* the motivation provided in the introductory chapter and the summary of its main points *supra*). The problem may not be the lack of importance or relevance of the thesis topic, but the very fact that a matter which *is* important and relevant has not yet found its proper place in Public Administration curricula or, as will be apparent from the literature review (*vide* section 2.6.2 *infra*) is not adequately or properly dealt with in the literature of Public Administration. Taking a positive view, it could be argued that there is a substantial need to be supplied within the developing body of knowledge constituting Public Administration, and that supplying the need presents a challenge to researchers.

As will be apparent from an examination of the available research record (*vide* section 2.6.1 *infra*) the object of the present study has for all intents and purposes not been researched previously in South Africa. Whether the in-house work done by the erstwhile Commission for Administration preceding the adoption of the 1993 Constitution, and which is described and examined in section 6.4 of the thesis, could be regarded as a research project, is a moot point. However, it was not reported as such.

In summary, the problem to be addressed in the present study consists in essence of a phenomenon – the assignment of responsibilities to levels or spheres of government - which is manifest in the systems of government of all countries which provide for more than one level or sphere of government, but in respect of which a body of *scientific* knowledge has not yet emerged. This paucity of scientific knowledge is evident from the available literature (*vide* section 2.6 *infra*) and is confirmed by the apparent lack of substantial treatment of the particular subject in academic curricula, as pointed out *supra*. From a scientific point of view this is a puzzling and unsatisfactory state of affairs, given the fact that the assignment of responsibilities to a large extent determines the structure and the functioning of the system of government and administration in a country. The implications of assigning responsibilities in one way rather than another would appear to be far-reaching and, if this is indeed the case, the assignment question is surely one deserving of proper scientific attention.

Confronted with a situation in which a significant phenomenon in the governmental domain of the societal world is not well documented in scientific terms, the scientific response is to attempt to remedy the situation by subjecting the phenomenon to research and, in so doing, getting to “know it better” in scientific terms. In Mouton’s formulation (1996:8-2) an “epistemic interest” in the matter is engendered, and such an interest can be satisfied only by means of research properly focused and conducted. Writing about research in Public Administration, Wessels (1999a:365) refers to the objective of contributing valid scientific statements about public administration, and thus adding to the body of knowledge which is Public Administration. It is submitted that the present study is focused on this objective.

## **2.4 Purpose of the present study**

Against the background of the problem statement in the preceding section, the general purpose of the present study can be stated as follows: to make a research based contribution to the body of knowledge constituting Public Administration and specifically concerning the assignment of responsibilities for the performance of public functions to levels or spheres of government in South Africa.



## 2.5 Research questions

In considering how the stated purpose of the study as stated above, can best be accomplished it would seem helpful to reflect upon and then to formulate the key questions to which the study should endeavour to provide answers. This will ensure that the object of study is adequately covered and provide the necessary direction and focus to the research. Some key questions to be answered are set out below.

*What is the position as regards relevant literature?* The study should establish to what extent the available literature bearing on Public Administration, and related fields of study like Political Science and Constitutional Law, has addressed the question of the assignment of responsibilities to levels or spheres of government. Because of the substantial and far-reaching implications of the assignment of responsibilities for the practice of public administration, it is particularly important to ascertain the extent to which assignment matters have found a place in the body of knowledge known as Public Administration.

*What recognition does the assignment question enjoy in academic circles?* The fact that the assignment of responsibilities has been accepted as an appropriate topic for the present doctoral research constitutes recognition in itself of the importance of the matter. However, it can be assumed that the true proof of the recognition of a matter as forming part of a body of scientific knowledge is to be found in its inclusion in the curricula of the appropriate academic departments. It is considered necessary therefore to survey, as part of the study, the curriculum content of the subject Public Administration at South African universities. (This question has been dealt with in section 2.3 *supra*.)

*What does the research record show?* It goes without saying that the study should ascertain the extent and the nature of research into the assignment question previously undertaken in South Africa. While any relevant research done in other countries could be of value to the present study, a comprehensive global survey is considered to be beyond the bounds of the present research project. The assumption is made that if relevant and significant research has been done it will be reflected or referred to in the literature to be surveyed.

*How do other countries assign responsibilities?* The assignment of responsibilities to levels or spheres of government is virtually a universal phenomenon. The authoritative reference work on the constitutions of the countries of the world (Blaustein and Flanz: 1971 (with periodic supplements)) shows that the vast majority of countries function with more than one level or sphere of government, and that their constitutions accordingly assign responsibilities to the national and subnational levels or spheres of government respectively. It is considered necessary, as part of the present research, that a study be made of the assignment schemes of a sample of other countries, in order to extend the frame of reference and to ascertain to what extent universal regularities and common themes are perhaps to be discerned.

*How have responsibilities been assigned in South Africa?* It lies at the heart of the present research project to establish how responsibilities have been assigned to levels or spheres of government in South Africa, commencing with the establishment of the South African state in 1910. This calls for a detailed examination based essentially on the successive constitutions which have been adopted and implemented over the years, such constitutions falling into two broad categories, viz the racially based constitutions operative prior to 1994 and the democratically based constitutions operative since then.

*Where do we stand in scientific terms with the assignment of responsibilities?* Having surveyed the literature, and having examined the actual assignment of responsibilities in South Africa and a number of other countries, the question may well be asked to what extent the assignment of responsibilities has achieved scientific respectability.

*Can a model be constructed for the assignment of responsibilities to levels or spheres of government in South Africa?* Exploratory research along the lines envisaged in the study may provide sufficient theoretical insights to make it possible to propose a basis on which the assignment of responsibilities in South Africa can be done in an orderly and accountable manner. Recognition of this possibility is seen as an important factor in focusing the research effort.

## 2.6 Literature review

In surveying literature with a bearing on the study, a broad distinction was made between the available research record and published books and journals. The research record was taken to include post-graduate dissertations and theses presented at South African universities, the published reports of research institutes and other bodies which have produced research reports, and in-house work done by the erstwhile Commission for Administration. In reviewing books and journals it was found to be useful to focus in turn on two major disciplines, viz Public Administration and Constitutional Law, and one specialised body of literature, viz that dealing with federalism.

### 2.6.1 The research record

With the assistance of the UNISA main library, electronic searches were conducted in the Nexus database of current and completed research in South Africa, as well as in the Index of South African theses and dissertations, with a view to ascertaining whether research relevant to the subject of the present study has previously been done or embarked upon in South Africa. The key terms used were “South African Constitution”, “government powers”, “function”, “government”, “provincial government”, “decentralisation”, “powers”, “local government”, “federal”, “federalism”, “provincial powers”, “division of powers”, and “provincial functions”. A total of 50 research records were identified in this way.

No doctoral thesis or master’s dissertation dealing with the assignment of responsibilities to levels or spheres of government was found. A LLM dissertation by Potgieter (1996) deals with provincial powers from a federal perspective but does not address the research problem as elucidated in section 2.3 *supra*, or purport to have a purpose similar to that of the present study as stated in section 2.4 *supra*.

Although not identified in the electronic searches which were conducted, there is a South African doctoral thesis of which the author is aware, which deals with public functions largely as conceptualised for purposes of this thesis (*vide* section 3.3.3 of the thesis), although it does not employ the same term throughout to connote the key

concept. The thesis bears the title “A criteriological approach to the functional structure of central government administration in South Africa” (Loxton 1993). Loxton’s work is similar to the present thesis in dealing with public functions in a comprehensive and analytical manner, but differs fundamentally in being focused differently, viz on the question concerning which activities or services should rationally be undertaken or rendered by government, rather than being left to other sectors of society. As is evident from the reference to central government in the title of the thesis, Loxton’s work is not concerned with the distribution of functions between levels or spheres of government.

As far as other research is concerned, there is a record in the Nexus database of research undertaken at the University of Cape Town, and completed in 2002, under the general title “Co-operative government in South Africa: a study of the design and implementation of South Africa’s new system of multi-sphered government”, together with an indication of an intention to publish a report on the research (Nexus project 978143). Professor Murray, who headed the research programme, was approached with a view to obtaining a copy of the report referred to, but it appeared that no such report has been published.

The Nexus database shows that the Human Sciences Research Council (HSRC) conducted a substantial programme on federalism round about the time of the finalisation and adoption of the 1996 Constitution. The outcome of the programme was a monograph series on the theory and application of federalism. Volume 1 of the series consists of a general overview of federalism by a prominent author on the subject (Elazar 1995), followed by contributions on federalism as experienced in a number of countries (Switzerland, India, Nigeria, and Spain). Elazar’s overview was perused and found to be exactly that - an overview of a mode of political association - but focused particularly on the United States. He does not deal with the assignment of responsibilities for the performance of public functions in a comprehensive way, referring only in passing to the distribution of “the great constitutional powers”. Elazar refers specifically to commerce, and especially interstate commerce, and mentions the increasing involvement of the states in matters of foreign commerce. All in all, the HSRC monograph series does not constitute a directly relevant source of research materials for present purposes.

A substantial, relevant research endeavour which is not recorded in the available databases, but with which the author was closely associated, was one undertaken by the erstwhile Commission for Administration in 1993. This work was done with the purpose *inter alia* of making a professional contribution to the constitutional development process regarding the assignment of responsibilities for the performance of functions, or aspects of functions, to governments within a three-tiered governmental structure, as envisaged by the negotiating parties. The design and execution of this programme, as well as its outcome - in the form of the input made to the Multiparty Negotiating Process - is dealt with in section 6.4 of the thesis.

## **2.6.2 Public Administration**

There is a vast literature on Public Administration and therefore a practical limit to the number of publications which could be perused for purposes of the study, and be commented on in the thesis. On the other hand, the fact that the subject of the thesis is dealt with from a Public Administration perspective required that a substantial sample of Public Administration literature be examined. It was decided to include in the review most of the works published locally, as well as a number of books published in other countries, which were selected in an essentially pragmatic way. The review is arranged under two headings, viz "local publications" and "foreign publications".

### **2.6.2.1 Survey of local publications**

The seminal, general work on Public Administration published in South Africa is Cloete's *Inleiding tot die Publieke Administrasie* (Cloete 1967). The book did not examine the vertical separation of powers between levels of government or - in the wording of the thesis - the assignment of responsibilities for the performance of public functions to levels of government. The same finding applies to Cloete's updated introductory text, with the title *Public Administration and Management*, which was published in 1994. Another well-known general text of Cloete's is his *Central, regional and local government institutions of South Africa*, of which the latest revised edition was published in 1992. It could have been expected that this work would have contained a section dealing with the vertical separation of powers regarding public functions between

the various levels or spheres of government; it does not, although there are references in passing at various points in the text to the interfaces between levels of government, and to the exercising of control over the subnational levels of government. The book is descriptive, not analytical or polemical, true to the author's stated intention of providing a basic reference work to assist members of the public, students and politicians who " ... wish to be informed about the public institutions and their activities" (foreword by the author).

Notable amongst the other general textbooks on Public Administration published in South Africa are those of Bayat and Meyer (1994), Botes, Brynard, Fourie and Roux (1996), and Du Toit and Van der Waldd (1999). Neither of the first two of these books deals with the vertical separation or division of powers between levels or spheres of government. Du Toit and Van der Waldd provide a brief description of how work is divided between three levels of government, illustrated with some examples. Their treatment of the matter is, however, limited to putting forward a broad and somewhat obvious view that the national level of government has power over matters of national interest, while the provincial and local levels of government have powers over matters which can best be dealt with at the respective levels. (Du Toit & Van der Waldd 1999:192-193). There is no attempt at analysis or any discussion of principles or criteria which could be applied in determining the vertical separation of powers.

A number of more specialised books on Public Administration published in South Africa, viz those of Gildenhuis (1988), Hanekom, Rowland and Bain (1990), Hanekom and Thornhill (1993), Van der Waldd en Helmbold (1995), and Cloete (1996) were also perused as part of the research.

Gildenhuis (1988) provides a record of the proceedings at the so-named Winelands Conference of 1987, which was arranged to celebrate the centenary of the recognition of Public Administration as an academic discipline in its own right. The topic of the present thesis was not raised or dealt with at the Conference. In the book of Hanekom, Rowland and Bain (1990), which purports to deal with key aspects of Public Administration, the separation or division of powers between levels of government is not identified as such a key aspect. The work of Hanekom and Thornhill (1993), which focuses on public administration in contemporary society, also does not refer to the

matter. Van der Waldt en Helmbold (1995) write about the “new public administration” in the context of the adoption of the 1993 Constitution. They identify constitutional principle XVI (“Government shall be structured at national, provincial and local levels”) as one of five principles which are particularly important from a public administration perspective (Van der Waldt & Helmbold 1995:27), but do not examine the actual assignment of responsibilities within the structure of government as stipulated in the 1993 Constitution. Cloete (1996:52-57) briefly describes the role of a “hierarchy of legislatures”, but does not deal with the vertical separation or division of legislative and concomitant executive powers.

An electronically facilitated survey of articles within the domain of Public Administration did not produce a single article which deals in a comprehensive and critical way with the assignment of responsibilities for the performance of public functions. An article by the author published in 1998, which does deal with the subject, is not recorded in the Index of South African Periodicals. The particular article takes a critical look at the assignment of public functions, and conditions governing their performance, as stipulated in the 1996 Constitution. The conclusion reached is that the matter is not dealt with in a satisfactory manner by the Constitution, which in other respects is considered to be an exemplary one. The opinion is expressed that a satisfactory ordering of public functions is achievable, and the view advanced that a significant contribution to this end can be made from within the discipline of Public Administration. (Robson 1998a.)

In summary, it would appear that scant attention is paid to the assignment of responsibilities for the performance of public functions to levels or spheres of government in the available South African literature on Public Administration. There is no record of any systematic examination of the phenomenon, or of any theoretical insights concerning the matter, or of any recognition of its importance - other than the author's own venture into print in 1998 - on which the present thesis can build.

#### **2.6.2.2 Survey of foreign publications**

Even though the following survey of foreign publications is necessarily concise, it is deemed to be essential and fitting to include a substantial reference to the watershed

article published by Woodrow Wilson in 1887 (reprinted in Gildenhuis 1988:7-20) which, if not the first article ever published on Public Administration, was certainly one of the most influential.

Within the confines of a single journal article, and presumably with a great deal of convincing to do, the future President of the United States could not have been expected to deal at length with the separation of powers, whether the focus be the horizontal or the vertical separation of powers. His article does, however, contain a key passage dealing with the separation of powers which is so insightful and relevant to the subject of the present study, that it is quoted in full:

“There is, indeed, one point at which administrative studies trench on constitutional ground - or at least upon what seems constitutional ground. The study of administration, philosophically viewed, is closely connected with the study of the proper distribution of constitutional authority. To be efficient it must discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials; the best way of dividing authority without hampering it, and responsibility without obscuring it. And this question of the distribution of authority, when taken into the sphere of the higher, the originating functions of government, is obviously a central constitutional question. If administrative study can discover the best principles upon which to base such distribution, it will have done constitutional study an invaluable service. Montesquieu did not, I am convinced, say the last word on this head “ (Wilson 1887, in Gildenhuis 1988:14).

The reference to Montesquieu may seem to suggest that Wilson had in mind the *horizontal* separation of powers, but it is altogether possible that he was also referring to the *vertical* separation of powers. His remarks are certainly apposite to the subject of the present study.

The foreign published books on public administration selected for perusal, are sixteen in number and cover a period of some fifty-six years, starting with the work of Finer published in 1950, and ending with the book by Greene published in 2005.



Chapter 2 of book 1 of Finer's primer (1950) is titled "The separation of powers". In this chapter the author takes a critical look at the doctrine of the *horizontal* separation of powers between the legislative, executive and judicial components of government, as propounded by Montesquieu, but does not deal with the vertical separation of powers between levels of government. In another part of the work (chapter 4 of book III) Finer analyses the relationship between the central government and the local authorities in the United Kingdom, and finds that at the time (1950) the local authorities were in essence agencies of the national administration. This being the case, it is in Finer's view important to determine the degree of central control to which a service should be subjected. He proposes three basic criteria which point to centralisation, viz

- ?? that the service is of national and not local importance;
- ?? that all citizens should enjoy similar standards of service; and
- ?? that the service cannot be greatly improved without aggregating units of administration. (Finer 1950:108.)

Although dealing with a country specific situation obtaining at the time, Finer's insights on the centralisation / decentralisation question have some relevance to the subject matter of the thesis.

Van Poelje (1953) discusses the advantages and disadvantages of centralisation and decentralisation and deals with certain forms of decentralisation, viz territorial decentralisation and decentralisation on the basis of services (*desentralisatie volgens diensten*), but includes nothing pertinent to the subject of this thesis. In editing a book on ideas and issues in public administration, Waldo (1953) mentions in the preface that one principle (*sic*) followed in compiling the readings was coverage of the subjects embraced in most general courses in Public Administration. Significantly, none of the 19 chapters deals with the separation of powers between levels of government. According to another preface (Rowat 1961), the author sees his book as representing an attempt to present contending points of view on controversial issues in all the major areas of public administration. Forty issues, arranged under nine headings and featuring arguments for and against a certain position, are presented. The division or separation of powers between levels of government does not find a place in Rowat's array of controversial issues.

One of the 53 chapters in a comprehensive collection of readings on public administration published in 1966 (Golembiewski, Gibson & Cornog 1966) has some bearing on the subject matter of the thesis. In chapter 37, written by J D Millett, reference is made to the situation which has arisen in the United States where the federal government's role in the system of government has increased immensely relative to that of the states, including its extensive involvement (*inter alia* by means of grants-in-aid) in programmes conducted by the state and local governments. A critical examination of the assignment of responsibilities to the various levels of government is, however, not attempted. The increasing role of the higher levels of government is also highlighted in the well-known textbook by Dimock and Dimock (1969). Chapter 6 is eloquent on the complexity and confusion regarding government responsibilities which have arisen since the end of the 19<sup>th</sup> century, as the federal and state governments intervened more and more in state and local responsibilities. Mention is made of the resulting huge demands which are made on people in public administration who are tasked with functioning within a complex system. Hodgson (1969) refers broadly to three levels of government, listing some local government services but having virtually nothing to say about the national and regional levels. The author makes the point that the different levels do not always have exclusive jurisdiction in their various fields of activity. (Hodgson 1969:17-18.) No attempt is made to deal analytically or normatively with the question of which responsibilities properly belong at each level.

Caiden (1971), writing on the dynamics of public administration, has cause to devote a chapter (chapter 6) to the identification and elucidation of public functions, distinguishing between "traditional functions", "nation building functions", "economic management functions", "social welfare functions", and "environmental control functions". He does not, however, deal with the vertical separation of powers or responsibilities in relation to these functions. Self (1977) devotes a chapter (chapter 2) of his book to an examination of "the organisation of government" and within the chapter, a section to the "allocation of functions". His concern is with the practical utility of four competing principles of organisation, propounded especially by Gulick, in determining the functional demarcation of government departments, viz the purpose served, the processes employed, the persons or things dealt with, and the area covered (Self 1977:55). The Gulick principles are a hardy perennial in organisation theory but are not

directly applicable in discourse on the vertical separation of powers within a tiered structure of government.

Henry's (1975) general textbook contains a chapter (chapter 11) dealing with intergovernmental administration. Focusing exclusively on the United States, he finds that the concept, structure and practice of federal relations in the United States have been in "turmoil" since the inception of the federation. He proceeds to deal with the turmoil and the extraordinarily complex system which has evolved. He does not, however, deal with the fundamental question of the appropriate assignment of responsibilities to the national and subnational governments. Although also presented as a general work on public administration, the book by Simon, Thompson and Smithburg (1991) – the latest edition of a book first published in 1950 – constitutes an approach to public administration which differs markedly from the more conventional approaches. The authors treat the domain of public administration from an organisation behavioural point of view. In 561 pages they do not raise the question of the vertical separation of powers between levels of government.

Cox, Buck and Morgan (1994) present five distinct perspectives on public administration, viz normative foundations, public administration as management, public administration as organisation theory, public administration as planned change, and public administration as politics. They state that their aim in writing the book was to re-examine, expand, and build upon the theoretical and historical foundations that define the study of public administration. (Cox *et al.* 1994:2-4.) The book does not deal with the vertical separation of powers and functions amongst levels of government. Heady (2001) provides a comparative perspective on public administration in a book which, according to the preface, is the sixth and updated edition of a book first published in 1966. The author uses "bureaucracy" as the focal point for purposes of making comparisons between countries. He views bureaucracy as an institution defined in terms of three basic or pivotal characteristics, viz (1) hierarchy, (2) differentiation or specialisation, and (3) qualification or competence. He is especially concerned with the higher civil and, where appropriate, military bureaucracies. (Heady 2001:75-78.) The book does not include a comparison of schemes for the assignment of public function responsibilities between levels or spheres of government.

Editing a book on the foundations of contemporary public administration, Osborne (2002:vii-ix) organises the contributions of the selected authors under four headings, viz the background to public administration and management, critiques of the public sector and of public administration, the “new public management”, and an analysis of the “new public management”. According to one of the contributors, “new public management” arose *circa* 1976 and usually embraces seven “doctrinal components”; these are listed as hands-on professional management, explicit standards and measures of performance, greater emphasis on output controls, a shift to disaggregation of units in the public sector, a shift to greater competition in the public sector, stress on private sector styles of management, and stress on greater discipline and parsimony in resource use (Hood 2002:186-187). The book does not contain contributions directly relevant to the subject of the thesis.

A handbook of public administration edited by Guy Peters and Pierre (2003) is, as the name suggests, a voluminous publication running to 640 pages, with over fifty contributors. The book is structured in fourteen sections covering a wide field, from “public management: old and new” and “human resource management”; through “politics and administration” and “administration and society”; to “accountability” and “intergovernmental relations” (Guy Peters & Pierre 2003:v-ix). It is the last mentioned of the fourteen sections which, on the face of it, may have relevance for the present study. The introduction to the section identifies the division of powers and functions as one of the dimensions of intergovernmental relations (Painter 2003:591). The three contributions making up the section deal respectively with co-ordination (Wollmann 2003:594-606), instruments of intergovernmental management (Radin 2003:607-618), and multi-level governance (Smith 2003:619-628). However, none of the contributors addresses the question of how the public functions, or aspects of public functions, to be performed at the various levels of government are to be determined.

The most recent general textbook on Public Administration included in the sample of the discipline’s literature is that of Greene (2005). In the preface to the book the author states that the purpose of the book is to fill the need for a concise, introductory textbook for masters of Public Administration students who lack background in Public Administration and Political Science; and further that it is written at a level appropriate to both undergraduate and graduate students. The closest the book comes to dealing with

the subject of the present thesis is in two brief sections focusing on intergovernmental relations (Greene 2005:19-22, 101-103). The author does not, however, examine the deployment of public function responsibilities over the various levels of government.

In summary, the survey of a selection of foreign published works dealing with Public Administration in a more or less comprehensive way leads to a finding similar to that in respect of comparable South African literature (*vide* section 2.6.2 *supra*), viz that there is little evidence of a developed body of knowledge concerning the assignment question within the field of Public Administration on which the present thesis can build.

### **2.6.2.3 Evaluation**

Judged on the sample of literature dealing with Public Administration, the vertical separation of powers between national and subnational governments does not emerge as a major issue or one enjoying substantial recognition within the particular science. On the other hand, the references in the literature to complexity and confusion (Dimock & Dimock 1969), and even turmoil (Henry 1975), in relation to the respective responsibilities of national and subnational governments, tend to confirm the position taken in this thesis that it is an important matter. There is reason to surmise that Woodrow Wilson, the “father” of Public Administration, might have regarded it in that light.

### **2.6.3 Constitutional law**

Moving to the field of constitutional law, five books on constitutional law published in South Africa were consulted, viz those of Wiechers (1985), Basson and Viljoen (1988), Rautenbach and Malherbe (1994), Basson (1995), and Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (1996). A number of articles written by local experts on public or constitutional law were also examined as part of the research.

#### **2.6.3.1 Survey of local publications**

In the book by Wiechers (1985), the public functions assigned to subnational levels of government for performance are referred to and described but without critical

examination or analysis. The matters for which the then provincial councils were competent to adopt ordinances, are set out quite comprehensively (Wiechers 1985:407-415). The finding is generally the same as regards the book by Basson and Viljoen. They do not deal with the public function responsibilities of the subnational governments in a comprehensive or analytical manner. They do highlight the distinction between “general affairs” and “own affairs” as stipulated in the 1983 Constitution, but the treatment is descriptive, not analytic. There is a brief reference to matters on which the provincial councils could pass ordinances, but again no analysis. Services which local authorities were authorised to render, are listed. (Basson & Viljoen 1988:145-146, 288, 298.)

Following the adoption of the 1993 Constitution, Basson published a comprehensive section by section commentary on this, the first fully democratic Constitution. He quotes but does not deal analytically with the functional areas of legislative competence assigned to the provinces; and makes the observation that the provinces are not given autonomous powers with regard to their designated areas of legislative competence. (Basson 1995:198-201.) He notes the constitutionally inferior position of local government in relation to central and provincial government, and remarks that local governments would have no functions and powers at all if these were not awarded to them by national or provincial legislation (Basson 1995:242).

The books by Rautenbach and Malherbe (1994) and Chaskalson *et al.* (1996) were also published subsequent to the adoption of the 1993 Constitution.

Rautenbach and Malherbe use the term “*owerheidsfunksie*” with much the same connotation as that given to the term “public function” in this thesis (Rautenbach & Malherbe 1994:54; section 3.3.3 of the thesis). They discuss briefly and in general terms the question of which “*owerheidsfunksies*” should be performed at each level of government, noting the importance in this connection of historical, geographic, economic, and administrative factors. Also important in their view are the nature and distribution of the population, the size of the state, and ideological considerations. They venture the view that it may be possible to determine in a relatively objective way where each function can be performed in the most efficient manner. They mention that “in public administration” different criteria are developed for the allocation of functions to

the various levels of government, and refer to Self in this regard. However, Self (1977: chapter 2) does not deal with the allocation of functions to *levels* of government; his concern is with the functional demarcation of departments at the national level of government. Somewhat surprisingly, Rautenbach and Malherbe do not mention the so-called “subsidiarity principle” (*vide* section 3.3.3 of the thesis).

The book by Chaskalson *et al.* (1996) is essentially a manual for lawyers, dealing with constitutional law in South Africa and focused in the main on the 1993 Constitution. Well over half the book is devoted to the elucidation and interpretation of fundamental rights as set out in chapter 3 of the 1993 Constitution. There are brief references to the constitutional provisions concerning the legislative authority of the national legislature (p. 3-1) and the provincial legislatures (p. 4-1), but no treatment of the phenomenon of public functions *per se*, or any discussion as to where responsibility for the performance of particular functions could or should be placed. The manual contains a chapter (chapter 5) on “federalism”, but this does not deal with the theory or practice of federalism; it is an examination and interpretation of the provisions of the 1993 Constitution which regulate the exercise of the legislative, and the associated executive authority, given by the Constitution to the national and the provincial spheres of government respectively.

The adoption of the 1993 Constitution and subsequently the 1996 Constitution, gave rise to a large number of journal articles written by local experts in public or constitutional law. Because of the close link between the Constitution and the subject matter of the thesis, a selection of these articles - based on the perceived relevance of their titles and the introductory paragraphs - was perused as part of the research. No article was found which addresses in a fundamental way the assignment of responsibilities for the performance of public functions, or which postulates or suggests a particular rationale or model for such assignment. When the authors do deal with the assignment question – also referred to as the division of powers – they are interested in or concerned about aspects such as the following:

?? The extent and limits of provincial powers (without examining the actual functions to which the powers relate) (Carpenter 1994:229-230; Malherbe 2001:255-285; Erasmus 1994:407-429);

- ?? the importance of maintaining national unity (Botha 1994:241-242; Erasmus 1994:422);
- ?? the constitutional principles dealing with the assignment of powers (Beukes 1994:393-406);
- ?? the phenomenon of concurrent powers for the national and the provincial governments; the resolution of related jurisdictional disputes, including especially the role of the Constitutional Court; and the implied need for co-operative government (Erasmus 1994:416-418; Malherbe 2001:255-285; Malherbe 2002:547; Steytler 2001:241-254);
- ?? the manifestation in legal terms of the subsidiarity principle in the new constitutional dispensation (Du Plessis 2000:201; De Visser 2002:240);
- ?? the problem of unfunded mandates, that is to say making the provinces responsible for a particular public function without providing the necessary means for them to perform the function (Malherbe 2002:541-548);
- ?? the new constitutional status of local government, with legislative and executive powers recognised – for the first time – in the Constitution (De Visser 2002:223-243); and
- ?? commenting on specific court decisions regarding disputes between the national and the provincial governments (Carnelly 1999; 2002).

One question which the public law experts do not examine is which public functions, or aspects of public functions, properly belong to the respective levels or spheres of government – in other words *who does what*, or *who should do what*. Their concern is with the exercise of power in relation to given matters, rather than with the substance of the given matters. The authors generally do not remark on the vagueness with, or problematical way in which public functions, or aspects of public functions, are formulated in the Constitution, and which could be an important causative factor in the jurisdictional disputes brought before the courts – *vide* for examples of such disputes Malherbe (2001) and Carnelly (1999; 2002).

For a general evaluation from a legal point of view of the structure and functioning of the present scheme for the assignment of responsibilities to spheres of government, the article by Steytler (2001) is noteworthy. He highlights the present state of domination of the legislative domain by the national government, and the concomitant relative



inactivity of the provincial legislatures (Steytler 2001:242-246) – a finding which accords with that of Pottie (2001:42-43). Steytler is critical of the Constitutional Court which in his view has, by emphasising the concept of co-operative government, tended not to favour the provinces in deciding jurisdictional disputes, and which has therefore not arrested the drift towards centralisation. He also notes an emerging tendency for key decisions regarding legislation in the concurrent category to be taken at joint political executive level (national / provincial), that is to say outside the functioning of the provincial legislatures. (Steytler 2001:254.) The latter finding is echoed by Carnelly (2002:199). The question may well be asked to what extent these tendencies may be ascribable to weaknesses inherent in the assignment scheme adopted for the country.

### **2.6.3.2 Evaluation**

It is apparent that writers on public or constitutional law are intensely interested in the vertical separation of powers within a country's governmental structure, but in their own peculiar way, viz by being focused on the power relationships set up by a constitution between the national government and the subnational governments. This follows from the established epistemological content of the discipline. A leading textbook on constitutional law describes constitutional law as encompassing the totality of binding rules with regard to the division or exercise of governmental authority ("*owerheidsgesag*"). Constitutional law determines in whom the governmental authority in the state vests and what the reach of that authority is. By means of constitutional law two types of relationship are regulated, viz (a) the mutual relationship of the institutions which are the bearers of governmental authority in the state; and (b) the relationship between the institutions of state and the subjects of the state (or between the state as a legal *persona* and the subjects) to the extent that such relationship rests on authority. (Wiechers 1985:4.)

The conclusion to be drawn, is that constitutional lawyers are interested not so much in the actual public functions, or aspects of public functions, for which levels or spheres of government are made responsible, but in the legal rules which govern the powers assigned to the various governments, which include the fundamental power to perform public functions, or aspects of public functions. Whether a subnational level or sphere of government is made responsible for public functions a, b and c, or x, y and z, or

whatever, is a matter to be determined through an essentially political process by constitutional assemblies and legislatures; for lawyers schooled in the content and the interpretation of the Constitution the actual distribution of public functions would appear to be a given.

#### **2.6.4 Federalism**

The literature on federalism has a degree of relevance for the present study. It is necessary at the outset to pose the question, What is federalism? The definitions of two eminent authors on the subject are quoted below:

“Federal government exists ... when the powers of government ... are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere” (Wheare 1963:35).

“Federalism is the mode of political association and organisation that unites separate polities within a more comprehensive political system in such a way as to allow each to maintain its own fundamental political integrity” (Elazar 1995:1).

As federalism is not the subject of the present study, these definitions are not subjected to critical examination or elaboration here. The author can, however, venture the opinion that these definitions do not find a satisfactory fit when applied to South Africa. Neither the substantial division of powers referred to by Wheare, nor the maintenance by constituent polities of their fundamental political integrity referred to by Elazar, is a feature of the South African constitutional dispensation. As will be apparent from the critical examination of the 1993 and the 1996 Constitutions contained in chapters 6 and 7 respectively of the thesis, there is no *division of power* between the spheres of government in South Africa. Even the “exclusive” powers in relation to certain matters given by the 1996 Constitution to the provinces, are subject to intervention by the national government in certain circumstances. What writers on federalism have to say concerning the vertical separation of powers is nevertheless relevant to the study. A sample of foreign and local publications are examined in the following sections.

#### 2.6.4.1 Survey of foreign publications

Wheare's definition quoted above, clearly implies a vertical separation of powers within a country's structure of government, with some matters falling under the jurisdiction of the national government and some matters under the jurisdiction of the subnational governments. He does not go into the substance of the matters – or public functions, or aspects of public functions - which properly belong with the national and subnational governments respectively. In his discussion of the “division of powers”, Wheare makes two points which have a degree of relevance to the present study:

- ?? The simplest solution for the division of powers is to have one list of matters which fall under the jurisdiction of the national government, leaving the rest to the subnational governments, or *vice versa*, with such a list being exclusive.
- ?? In practice, however, concurrent powers (for the national and subnational governments) in relation to some matters would appear to be unavoidable for certain reasons identified by him. One of these reasons is the perceived difficulty to allocate certain matters exclusively to one level of government. Wheare goes on to suggest that concurrent powers could be assigned as a transitional measure.

(Wheare 1963:77-79.)

It is also worth noting that Wheare (1963:40-42) identifies a number of factors which could produce a desire in subnational units to be autonomous for certain purposes, viz previous existence as distinct entities, a divergence of economic interests, geographic factors, differences of nationality, language, race, or religion, and dissimilarity of social institutions. Although the author does not say so, these factors could provide some clues as to matters which should be placed under the jurisdiction of subnational governments.

Riker (1964:53) provides a comprehensive categorisation of what he calls “functional areas of government action” but does not propose a model for the assignment of responsibility for matters falling within such functional areas to the national and subnational governments respectively. He does provide a historical overview of how the actual powers of the two levels of government in the United States have changed, in

the light of Presidential actions, legislation adopted by Congress, and decisions of the Supreme Court (Riker 1964:51-84). The circumstances and arguments recorded by Riker may be useful in identifying criteria to be used when applying the subsidiarity principle – *vide* section 3.3.3 of the thesis. From a subsidiarity perspective, the question to be asked is, “What constitutes a ‘good reason’ for assigning responsibility for a particular function to a higher level of government, rather than assigning it to a lower level?”

Although going back into history to point to early manifestations of federalism, Friedrich – like Riker – is focused principally on the United States. In his view the modern federal state was “discovered” in America in the late 18<sup>th</sup> century with the drafting of the Constitution of the United States. He notes that in the American model the federal government exercises only the powers assigned to it, while the constituent states hold the residual powers. The intention was to restrict the powers of the federal sphere; however, in the course of time the federal powers have expanded steadily. Writing as far back as 1968, Friedrich comes to the conclusion that “... more and more the states appear as administrative subdivisions of the nation”. (Friedrich 1968:3-6, 17-18, 24.) One may well ask whether such a development was not to be expected, in the light of the very rudimentary treatment (by modern standards) of the assignment of powers in the Constitution of 1787. Friedrich does not provide a model for the separation of powers between the federal and the state governments in relation to the performance of particular public functions.

Elazar (1987, 1995) provides a penetrating analysis of federalism as a mode of political association, identifying federalism as one of three basic models of government (the others being what he calls the centre-periphery model and the hierarchical model). He deals with numerous aspects, such as the ambiguities inherent in federal arrangements (in seeking to perpetuate both union and non-centralisation); the basic elements of federal relationships; the variety of political systems which evince federal characteristics (including the South African system); the principles of federalism; and elements which serve to maintain federal principles. Echoing Friedrich, he states that modern federation as a system was invented in America with the adoption of the Constitution of the United States in 1787. He has an insightful observation regarding unity and diversity, which in his view are not opposites; unity should be contrasted with disunity

and diversity with homogeneity (Elazar 1987:39, 64). Elazar does not deal with the assignment of responsibilities for the performance of public functions. Commenting on the situation in the United States, he refers in passing to “... the contemporary distribution of the great constitutional powers”. He mentions commerce, and especially interstate commerce, as well as the increasing involvement of the states in matters of foreign commerce. He also refers to the field of human rights – noting the role of the Supreme Court – and to the promotion of the general welfare. (Elazar 1995:56-57.) There is, however, no systematic examination of the separation of powers in relation to particular public functions.

The publications of two authorities on the federal systems of their own countries were included in the research.

Laufer's (1991) work deals comprehensively with the federal system of Germany, including the evolution of federalism in Germany, the origins of the present system, the key aspects of the system, and the need for reform. He devotes a section of his book (section 3.4) to both the division and the intertwinement (*verflechtung*) of functions between the federation and the *Länder*. His treatment of the division of functions is descriptive, not analytic; he does not examine the division of powers critically or present a rationale for assigning functions to one level of government rather than another. Although Laufer mentions the subsidiarity principle in a few places in his book, and provides a definition of the principle in the lexicon appended to his book – *vide* also section 3.3.3 of the thesis - he does not refer to the principle in his discussion of the division of powers. One of his main findings is particularly noteworthy, viz that the Basic Law presumption regarding the primary legislative competence of the *Länder* has been largely reversed by developments, with the exercise of state powers and the performance of state functions having become in a high degree matters for the federal organs. This is especially evident with respect to legislation, where the federation plays the dominant role, and the *Länder* parliaments, as legislative organs, have been reduced largely to inactivity (*Untätigkeit*). However, the *Länder* provide the major part of the country's administration, being charged with the execution of both federal and *Länder* laws. Laufer emphasises the thick net of functional intertwinement which has developed between the federation and the *Länder*, and warns that the degree of intertwinement is gradually working against the constitutionally intended division of

powers. (Laufer 1991:91-94.) Seen against this background, it is not surprising that co-operation between the federation and the *Länder* has become a matter of great importance, and Laufer devotes a chapter (chapter 7) of his book to what he calls *Politikverflechtung im kooperativen Föderalismus*.

In his comprehensive analysis of and comment on constitutional development in Belgium, Senelle (1990) avers that the allocation of competences between the national authority, on the one hand, and the community and regional authorities, on the other hand, has been governed by four principles, viz

- (a) the decrees adopted by the community and the regional authorities have the same force in law as the national laws;
- (b) the communities and the regions have exclusive competences;
- (c) the communities and the regions have only the competences vested in them by the Constitution, or pursuant thereto; and
- (d) the authority competent to legislate on a matter is also responsible for the implementation of the legislation, and *vice versa* (Senelle refers to this principle as the “principle of verticality”) (Senelle 1990:40).

In another part of his book Senelle deals with what he calls the “principle of residuary competence”. Because, in his view, it is impossible to specify every matter for which either the national authority or the subnational authorities will have legislative competence, it is necessary to provide for residuary competence in respect of such matters, and to specify the authority with which the residuary competence will lie (Senelle 1990:155-156).

Senelle's four basic principles, as well as his principle of residuary competence, are focused generally on the requirements of constitutional law rather than on providing a basis for determining which public functions, or aspects of public functions, belong with each of the various levels or spheres of government (or authorities as he calls them). However, the principle of exclusivity – postulated by Senelle at (b) above – does have relevance for present purposes by requiring that a public function, or aspect of a public function, once the responsibility for its performance has been assigned to a level or sphere of government, should fall within the exclusive purview of the particular level or

sphere. Whether a government competent to legislate on a matter should *in principle* also implement or administer the legislation – as postulated by Senelle in (d) above – is debatable; practical considerations may in certain circumstances point to a departure from such a “principle” - which in any case would seem to be a rule or guideline rather than a principle.

Like Laufer, Senelle does not propose a rationale for the assignment of functions to one level or sphere of government rather than another. He does deal quite comprehensively with the actual competences of the communities and the regions but the treatment is essentially descriptive (Senelle 1990:43-125).

Senelle has made a contribution to the “language” of the allocation of competences which is noteworthy. He puts forward the following terms:

“shared exclusive competences” – where one aspect of a matter is assigned to one level of authority and another aspect of the same matter is reserved exclusively for another level of authority;

“limited concurrent competence” – where a competence is assigned subject to compliance with minimum standards, or general or sectoral conditions, laid down by the national authority. Senelle includes so-called “outline legislation”, where the national authority makes only “general regulations”, leaving some legislative space to the subnational authorities, within the connotation of “limited concurrent competence”; and

“parallel competence” – where power in a given area of competence is exercised cumulatively and in parallel at various levels of authority whose legal rules stand in no hierarchical relationship to one another.

(Senelle 1990:81, 86-87, 134.)

It can be foreseen that in model development regarding the assignment of responsibilities for the performance of public functions it will be necessary to employ appropriate terminology. Although one may, or may not, accept Senelle’s terms or his definitions, his recognition of the *need* for dedicated terminology, is deserving of acknowledgement.

#### 2.6.4.2 Survey of local publications

Moving on to South African publications on federalism, Kriek (1992a) points out that federal states can be created on different bases, although the most common base is the *territorial* one. Two of the other possible bases mentioned by him are –

- ?? *corporate units*, where distinct cultural communities inhabit specific localities, each community attending to its own domestic interests, but co-operating with one another in matters of common concern; and
- ?? *person-orientated units*, where distinct cultural communities are intermingled within the same geographic area and public functions are divided between two categories, viz those which can be “personalised” - with reference especially to lifestyle, culture, and language - and those which cannot. (This is an obvious reference to the Belgium system of government.) (Kriek 1992a:19-24.)

The possibility of proceeding from different conceptual bases in building a structure of government is presumably not necessarily relevant only to states which are formally described as federations, and Kriek’s categories are therefore of interest to the present study. The particular foundation on which a state’s governmental structure is erected, could obviously have a substantial influence on the manner in which responsibilities for the performance of public functions are deployed.

Kriek deals briefly with what he calls the “division of functions between levels of authority”. He identifies a number of broad “domains”, such as foreign affairs, defence, economic affairs, and so on (eleven in total), and notes that within these broad domains more detail can be worked out. He proceeds to describe some of the domains in detail, indicating the (public) functions of which they are constituted. Kriek argues that when functions are described in the way he suggests, it should be possible to bestow responsibilities for a particular domain exclusively on one or jointly on several levels of government, “... depending on which level is best equipped for the particular function”. He also deals with what he calls “techniques” for formally setting out the public function responsibilities of the central and the middle-tier governments. (Kriek 1992a:25-28.) Kriek does not get to grips with the question of the basis on which decisions ought to be



taken as to the public functions, or aspects of public functions, for which the various levels of government will be responsible.

Another South African author deals with “the division of powers in a federation” (chapter heading) and states at the outset that that he is focusing on the vertical division of powers between levels of authority (Wessels 1992: footnote). Wessels refers to Kriek – *vide supra* – concerning principles and techniques for the division of powers, but does not himself take a critical look at how particular public functions, to which the powers relate, are assigned to levels of authority, or propose a rationale for the assignment. He surveys the assignment schemes of four countries which are regarded as federations (the United States of America, India, Switzerland, and Canada) but his treatment of the subject is descriptive rather than analytical or critical of *what* is assigned or *why* it is assigned. (Wessels 1992:9-19.) Although Wessels refers to the division of powers as “the central principle of federalism”, he is concerned essentially with the *power relationship* between the central government and the subnational governments. Like other writers on federalism, he refers to the complexity of assignment schemes - and the concomitant need for co-ordination mechanisms - and emphasises the importance of residual powers in determining the relative positions of power of the national and subnational governments in a federation (Wessels 1992:5-6, 9).

De Villiers (1996) emphasises the importance of a country's constitution providing legal certainty as far as possible as to which level of government is responsible for a particular function. As in the case of other writers on federalism he does not go into the allocation of particular functions. He mentions that in South Africa the national government and the provincial governments have concurrent powers over 31 “items”, while the provinces have exclusive power over 12 “items” (the reference is to the functional areas listed in schedules 4 and 5 respectively of the 1996 Constitution). He gives some examples of functional areas in each category, but does not examine the rationale for placing items in the two categories. He is critical of concurrent powers because such powers cause confusion as to which level of government is responsible for a particular function and encourage the conclusion of intergovernmental agreements, which in turn reduce transparency and increase public uncertainty. He also points out that such agreements have no constitutional basis, which means that the constitutionality of regulations and proclamations arising from them could be challenged. De Villiers nonetheless holds the

view that no constitution can provide an exact allocation of every single (public) function, a circumstance which gives rise to the need for co-operation amongst the national government and the provincial governments. (De Villiers 1996:6-7, 9, 37.)

At the time of the Multiparty Negotiating Process, which culminated in the drafting of the 1993 Constitution, an international conference on federalism was held in South Africa under the auspices of the Human Sciences Research Council. The contributions made at the conference by numerous foreign experts were published the following year (De Villiers 1994). The question of the assignment of responsibilities for the performance of public functions, or aspects of public functions, to one level or sphere of government rather than another, was not dealt with at the conference. However, some of the observations made and views expressed at the conference are of interest and value to the present study and are acknowledged in the following paragraphs.

Watts (1994:8) identifies a number of key concepts, including “federal political systems”. He uses the term to refer to the *genus* of political organisation which provides for the combination of shared rule and self-rule within a country. Following Elazar (1987, 1995) he enumerates a number of species encompassed by the genus, including *federation*, *confederation*, *federacy*, *associated statehood*, *unions*, *leagues*, *constitutional regionalisation*, and *constitutional home-rule*. As indicated in the discussion of his work *supra*, Elazar holds the view that discourse on federalism should not be restricted to federations as such, of which the United States of America is held by him and other writers on federalism to be the model, but should also embrace political (governmental) systems which evince federal characteristics – like that of South Africa for example. This insight has value for the present study in suggesting the applicability of political factors which could influence decisions regarding the question which level or sphere of government should be responsible for what, in countries other than acknowledged federations – again like South Africa for example.

The question of symmetry versus asymmetry in relation to the assignment of powers to subnational governments attracted a great deal of attention at the 1993 conference. Five of the chapters in the book under review (De Villiers 1994) deal with this question, focusing on developments and experiences in Australia, Spain, Germany, and Canada. According to Mullins and Saunders “symmetry” means that the relationship

between subnational units of government to the centre is essentially the same for each unit, with equal representation and predominantly equal division of power. There is an absence of special forms of representation, protection, or autonomy for individual units. “Asymmetry” again, has reference to the extent to which individual units of government evidence such special forms. (Mullins & Saunders 1994:43.) Going by the contribution of Agranoff (1994) on Spain, and that of Gagnon (1994) on Canada, there would seem to be a natural tendency to favour a symmetrical allocation of powers to subnational governments, with a proponent of an asymmetrical allocation being saddled with the onus of having to make his or her case.

Some other noteworthy contributions at the conference, with a degree of relevance for the present study, are as follows:

- ?? Russell (1994:35) warns against “over-writing” a constitution by listing federal and provincial powers in too much detail.
- ?? Boase (1994:92) provides a concise description of a consociational system as a form of federation, viz as a device to moderate the bluntness of majoritarian democracy in culturally and linguistically divided societies – to protect minorities from majorities.
- ?? Both Moreno, writing about Spain, and Peeters, commenting on developments in Belgium, remark on the phenomenon that in both countries the division of powers or decentralisation is not the result of a once-off decision or political agreement, but is proceeding in an inductive or evolutionary manner. Peeters also remarks that developments in Belgium are not based on any scientific method. (Moreno 1994:171; Peeters 1994:206.)

The most recent local publication with relevance for the subject of the thesis is the book – and more specifically certain chapters of the book – on intergovernmental relations in South Africa, edited by Levy and Tapscott (2001).

An important issue touched upon in the introductory chapter of the book, written by the editors, is that of concurrent powers, a feature of both the 1993 and the 1996 Constitutions. The editors express concern about the particular mechanism, but are not as outspokenly critical of the mechanism as is De Villiers – *vide* comment on De Villiers’s 1996 publication *supra*. Levy and Tapscott point out there is still - five years

after the adoption of the 1996 Constitution - uncertainty over the precise responsibilities of the different levels of the “administrative echelon”, and express the view that due to the ambiguities of concurrent responsibilities it is not always clear whether the provinces are merely the implementers of national policy, or whether they can shape their own identities. According to another contributor to the book (Murray) the (responsibility) boundaries between the spheres of government have been described as “soft”, and it is these soft boundaries with overlapping responsibilities which make proper intergovernmental relations essential. Murray deals with the way in which the 1996 Constitution sets out the powers of the national and the provincial governments, but does not examine the powers (or more specifically the matters to which they relate) in any detail. She observes that the list of concurrent powers (schedule 4 of the Constitution) contrasts “starkly” with the scant list of exclusive provincial powers (schedule 5 of the Constitution). She also notes that there is very little provincial legislation in the concurrent areas and that national legislation governs the particular matters. (Murray 2001:67-69.)

In a contribution to the same publication, Haysom, who was closely involved in the Multiparty Negotiating Process, reports on a fundamental choice which the constitution makers had to make: either to attempt to compile two exhaustive lists of national and provincial powers respectively, or to rather “constitutionalise the logic, the formulae” which would serve to express the legitimate interests of different levels of government in a multitude of functional areas affecting social life. They opted for the latter approach, and thus wrote a single list of concurrent powers into the Constitution. This approach necessarily had to be linked to a mechanism designed to allocate pre-eminence, and subordination, to one or other level of government in the event of a conflict of legislative or executive authority. As the direct outcome of the approach followed, limited exclusive powers were eventually allocated to the provinces in the final (1996) constitution. (Haysom 2001:47-48.) Haysom’s observations and insights concerning the constitution making process are referred to again in chapter 7 of the thesis dealing with the 1996 Constitution.

In their introductory chapter, Levy and Tapscott also pick up the theme of asymmetrical allocation of powers to subnational governments – *vide* the references *supra* to the substantial treatment accorded this subject at the conference on federalism held in

South Africa in 1993. Given the disparities in governing and administrative capacities which they find to exist between the various provinces, they venture the view that where provinces or municipalities lack adequate capacity, competences could be assigned to them incrementally. (Levy & Tapscott 2001:20.) This would imply the existence of an asymmetrical situation as to the powers of the various subnational governments, at least for a time.

In common with other publications surveyed in this section, the book edited by Levy and Tapscott does not contain any attempt at a comprehensive analysis of the nature or substance of public functions, or any proposals or model for the assignment of particular functions, or aspects of public functions, to the various spheres of government. There is a notable reference to a finding by a group of experts, convened by the Consultative Business Movement at the time of the multi-party negotiations, that more than one level of government might be involved in a particular functional area and that, as a consequence, function allocation could not be done according to available federal models, which mostly rely on mutually exclusive lists of powers with, perhaps, a short list of areas of joint responsibility (Haysom 2001:46). What is evident from the parts of the book referred to, is that (a) the division of powers between the national and the subnational spheres of government was a major issue dealt with in the constitution making process; (b) that the determination of a comprehensive and precise division of powers was given up as being impracticable; (c) that the mechanism of concurrent powers was seen as providing the solution to the problem of dividing powers; and that (d) in the absence of a precise division of powers, intergovernmental relations, and especially co-operative government, has assumed great importance in South Africa.

#### **2.6.4.3 Evaluation**

Although the sample of literature examined is admittedly limited in extent it is fairly representative of insights and viewpoints on federalism. It would seem that, generally, writers on federalism are not strongly focused on public functions *per se*, at least not to the extent of looking critically at which public functions are assigned to what level or sphere of government, or of developing models for such assignment. They are concerned essentially with the constitutional accommodation of political power within the

state and the role which federalism as a theory can play in achieving an accommodation acceptable to both national and subnational polities.

There would seem to be a consensus that the form of government established for the United States of America in 1787 is the quintessential model of the federal form of government. However, a leading expert like Elazar has made a major contribution by widening the federalism debate to encompass not only “true” federations – *a la* the United States – but also to include forms of government which display federal features. This approach opens the way to discuss federalism in relation to the governmental structure of a country like South Africa, without having to get involved in a rather futile argument as to whether it is a federation or a union, or mainly one rather than the other.

Although not providing a developed theory or a detailed model for the assignment of particular public functions to one level of government rather than another, the federalism literature does cover some pertinent aspects which need to be noted and which could be of value in developing an assignment theory or model. Included amongst these are the following:

- ?? There are different bases for the division of powers for the performance of public functions which can be applied, for instance territorial, corporate territorial, person-oriented, or consociational;
- ?? the asymmetrical assignment of powers to subnational governments is an option which may be desirable in certain circumstances;
- ?? the allocation of residual power is an important factor to be considered in designing an assignment scheme;
- ?? there are signs of a nascent methodical (scientific) approach to the assignment question, evidenced by the attention paid to ways of listing the powers of different levels of government, suggestions regarding terminology, and the postulating of some principles (including the subsidiarity principle), which could be followed in the division of powers between levels of government; and
- ?? at least one warning as to the perceived dysfunctionality of “over-writing” a constitution in setting out the responsibilities of the various governments in a country.

A matter of considerable importance to the present study is the view expressed by several writers that the division of powers between levels of government, and especially the allocation of exclusive powers to subnational governments, is an extraordinarily difficult matter to determine. The main reason for the perceived difficulty would appear to be the fact that in respect of many major public functions, more than one level of government is involved, or desires to be involved, in the performance of the function, a situation militating against a precise division of powers. The mechanism of concurrent powers, by which the same powers are allocated to the national and the regional governments, coupled to rules for determining pre-eminence in the event of conflicting legislation, has been invented as one solution to the problem. However, the mechanism is seen as a problematic one: it allegedly leads to confusion and uncertainty about governmental responsibilities, and is also criticised on the ground that it tends to remove the regulation of the respective powers of governments from the ambit of the constitution, and to leave jurisdictional questions to be resolved by means of interaction between the political executives concerned. The research also suggests that in countries where concurrent powers are provided for constitutionally, the national government comes to dominate the legislative domain.

There is considerable evidence in the literature on federalism that the division of responsibilities for the performance of public functions gives rise to complexity and an intertwinement of responsibilities within the structure of government of a country. This phenomenon leads to a premium being placed on intergovernmental relations, generally marked by a need to co-ordinate activities as well as a willingness on the part of governments to co-operate with one another in good faith.

The literature on federalism is also valuable in putting forward certain key political factors which could have a substantial influence on the division of powers between levels of government. These include a fundamental argument that democracy can best be promoted by a federal form of government, *inter alia* by bringing government as close as possible to the people, without watering down the need for national unity and loyalty to the nation and state as a whole (the German author Laufer (1991:86, 94) writes of “*Bundestreue*” and “*Bürger Nähe*”). A federal approach also serves to cultivate a political awareness of the factors which induce a desire in subnational units to be autonomous in certain areas (Wheare 1963:40-42), and which could translate into guidelines for the

allocation of powers to the lower levels of government. It would seem that the application of a federal approach might encourage acceptance in political circles that responsibilities should not be assigned to a higher level of government when they can be discharged as well or better at a lower level (subsidiarity principle).

Finally, there is evidence in the literature on federalism that the division of powers between levels and spheres of government need not – and arguably, should not – be a once-off action by constitution makers following a process of political negotiation. Few will dispute that the only thing certain in government – as in virtually all areas of life in society – is that there will be change, including change in the needs of society and in conceptions of the ways in which those needs can best be supplied by the institutions of government. It would seem to make sense that the division of powers between governments – or more accurately, the assignment of responsibilities for the performance of public functions – should be seen not only as a fundamental but also as a dynamic feature of the state machinery, which needs to be reviewed from time to time.

### **2.6.5 Synopsis**

In embarking on the present research project it was accepted that there were three established fields of scientific interest the literature of which may contain materials relevant to the subject of the study, the three fields being Public Administration, Constitutional Law (as a component of Public Law), and Political Science. In the latter case it was especially the concept of federalism which provided a potentially important focus. To review the literature of three major disciplines in a search for writings relevant to a specific research project, is no easy task. The only way in which the literature review could be kept within manageable bounds was to select a limited number of publications for detailed examination. Given the vast volume of publications making up the three bodies of literature, as well as their wide reach and evident diversity, it was apparent that an attempt to apply established sampling methods in the selection of publications would be a futile exercise. It is highly doubtful whether acknowledged criteria for representativeness could have been satisfied even if the samples drawn were huge in scope. More importantly, there was a real danger that random sampling could result in important findings or insights being missed. Publications were therefore



selected in a pragmatic way, based *inter alia* on the status of authors within a field, as well as on the titles of publications.

The literature of Public Administration was found not to include a substantial body of knowledge dealing with the assignment of responsibilities for the performance of public functions to levels or spheres of government. It would seem that the assignment question is not a major issue attracting the attention of authors within the particular field. There are, however, especially in the writings of American authors, references to complexity, confusion, and even turmoil regarding the assignment of responsibilities, which would perhaps suggest that public administrationists should pay more attention to the subject. The article published by Woodrow Wilson as far back as 1887 would seem to suggest that this highly respected pioneer in the scientific study of public administration might have supported this view.

Moving to the publications of constitutional and public law experts, it was found that these writers are intensely interested in the vertical separation of powers between levels of government within a state, but in their own peculiar way. They would appear to be focused essentially on the legal rules which govern the institution and functioning of legislative and executive institutions concerned with the administration of the state, as well as on the role which judicial institutions have to play in this connection. How exactly responsibilities for the performance of public functions are divided between levels and spheres of government, would seem to be for them largely a given. Their attention is of course attracted when there is conflict, or looming conflict, in the discharge by the respective governments of their assigned responsibilities. Their professional response in such circumstances is to examine, apply and interpret the Constitution and other law in relation to the particular case, as well as to examine critically the decisions of a court which may have been required to adjudicate in the case.

As regards the literature on federalism, as assessed in relation to the subject of the present study, it would seem that writers in this field are not strongly or critically focused on the substance of the assignments as such, but are concerned essentially with the accommodation of political power within the state, which *inter alia* would be evidenced by the assignment of public functions to the national and subnational levels of

government respectively. Elazar's widening of the reach of federal discourse to include all forms of government which display federal features, is particularly noteworthy. Of the three bodies of literature surveyed, that on federalism has relatively greater relevance and value for the present study than the available literature on public administration and constitutional law respectively. This is not so much because the publications provide a developed theory or model for the assignment of functions to levels or spheres of government – which they do not - but rather because the available literature can be of value in delineating a framework of principles, approaches, influential factors, and experiences which need to be considered in any serious attempt at developing an assignment theory or model. Somewhat more space has therefore been devoted to reporting on and evaluating this part of the literature survey than to dealing with the literature of Public Administration and Constitutional Law respectively.

## **2.7 Conclusion**

This chapter has sought to orientate the study in scientific terms. The reason for doing so, was the realisation at an early stage of the research that the particular subject of study was not well established within the domain of Public Administration, and did not appear to be regarded as a core issue.

Public Administration is well established as a science within the broad category of the social sciences, although there is an ongoing debate about its proper content. It can be accepted that the methods of the social sciences are generally applicable to it, a feature which of course serves to facilitate the planning and conduct of research within the field. Public Administration constitutes a distinct body of knowledge, the boundaries of which can be discerned in an approximate and practical way by noting the curriculum content given to the subject at leading universities. Being based on the activities of public, and more especially government institutions, the particular body of knowledge ought to include valid scientific statements about the assignment of responsibilities for the performance of public functions to levels or spheres of government within the state. However, at the present time the assignment question has not found a substantial place within the domain of Public Administration; at best it can be said that it is touched upon.

There is evidently considerable scope for research into the topic with the aim of adding to the established body of Public Administration knowledge in the particular respect.

To the extent that research is often the result of a problem becoming manifest within a particular societal domain, engendering what the metascientist refers to as an epistemic interest in a matter, it has been necessary to reflect on the nature and extent of the problem to be addressed in this thesis. In succinct terms, the problem is simply this: Despite the obvious importance of the assignment of responsibilities to levels or spheres of government, with far-reaching implications for the system of government and administration, and despite the relevance of the question for practically all countries, a body of scientific knowledge dealing specifically with it, has not emerged. This being the case, the present study finds its purpose in an endeavour to make a research based contribution regarding an important matter to the body of knowledge constituting Public Administration. In pursuing this goal a number of key questions have been identified which need to be addressed (*vide* section 2.5 *supra*).

The review of relevant literature which is demanded of any serious research effort was expanded to include two major disciplines other than Public Administration, viz Constitutional Law and Political Science. Because of the vast volume of literature generated over the years by the three disciplines, only limited samples in each field could be examined. The review has confirmed the under-researched and, one could say, under-debated status of the assignment question. What has also emerged is that scholars in each of the three disciplines have their own peculiar interest in the division of powers between or the assignment of responsibilities to levels or spheres of government, something which needs to be borne in mind in studying and evaluating their approaches and propositions. Although no developed theory or model dealing specifically with the assignment of responsibilities was found in the literature examined, the review did bring forward a number of insights which could be of value in developing an assignment theory or model.

Given the paucity of research based knowledge about the assignment question within Public Administration, and the stated purpose of the present study to make a contribution in this respect, the need to design with care a research project which could

generate useful information and insights is evident. Supplying this need is the subject of the ensuing chapter of the thesis.

## CHAPTER 3: RESEARCH DESIGN

### 3.1 Introduction

Having spent some time on searching for relevant literature, and after checking the available records of previous research, it became apparent that the assignment of responsibilities to governments for the performance of public functions was a phenomenon which was under-researched, or largely unresearched. It was also established by means of a survey of the curricula of South African universities that the particular subject did not yet occupy a substantial place within the body of knowledge which is Public Administration. Nevertheless, there can be little doubt about the importance and the implications of the assignment question for the system of government and public administration (*vide* section 1.2 of the thesis). The present study therefore took on the nature of a pioneering venture aimed at exploring the particular phenomenon and hopefully achieving a better understanding of it. With this perspective on the study, it was realised that particular attention would have to be paid to the design of the research project. This chapter, which is more substantial than it would have been if the object of the study was better known in scientific terms, is the result. A full explication of the research design will hopefully enhance the usefulness of the work for others who may have or may develop an interest in the assignment question, and assist them in evaluating the findings and recommendations.

The chapter is structured in a way which should be familiar to social scientists. Because of the exploratory nature of the work, particular emphasis is placed on the identification of the unit of analysis, the conceptualisation of the research problem, the operationalisation of the project, and the nature of the study.

### 3.2 Unit of analysis

The first step in developing a research design is, of course, to determine what it is that is to be explored, described, analysed, and possibly explained. Mouton (1996:47) refers to certain categories of entities that can be subjected to research, and mentions that these entities can also be referred to as “units of analysis”. Wessels (1999a:369-371) also employs the latter term – which he has adopted from Babbie’s earlier (1992) work – in dealing with categorisations of the social world analysed by researchers. The term “unit of analysis” would appear to enjoy wide acceptance and was considered the appropriate one to use in identifying the object of the present study.

Mouton (1996:47) identifies seven categories of social entities – or units of analysis – viz individuals, collectives, organisations, institutions, actions, interventions, and cultural objects. His categorisation is very similar to that of Babbie, as set out by Wessels (1999a:369-370). Moving into the domain of Public Administration, Wessels (1999a:371) expresses the opinion that “interventions” and “organisations” would probably feature very strongly as units of analysis in Public Administration. On the basis of his experience in government organisation and policy development, the author would agree up to a point with this finding, but wishes to express a reservation concerning a particular feature of the categorisations of Babbie and Mouton, viz the setting up of separate categories for “institutions” and “organisations”. Such a distinction is not sustainable, and would not, in his opinion, satisfy the taxonomic requirement of mutual exclusivity. A more useful approach would be to regard organisation as an attribute of institutions, and not to view “organisations” as a separate category or unit of analysis. However, a lengthy discussion of the matter is not justified within the structure of the thesis.

If one regards the governmental component of the state as a giant institution – and the author would argue that it can so be regarded – it could be said that the unit of analysis relevant to the present study is that of “institutions”, and more specifically the organisational aspect of the state as institution. Even more specifically, one could say that the study is focused on the *macro-organisational* aspect of the governmental component of the state as an institution. The study is after all concerned with what the

major components of government within the state, viz the national government and the various subnational governments, are required to do or, as indicated in the title of the thesis, the responsibilities assigned to them for the performance of public functions. On the face of it, this is an organisational matter, and an organisational matter is inseparably linked to the particular institution which is in need of organisation. On the basis of this reasoning, the unit of analysis relevant to the present study would be that of “institutions”. However, the matter requires more reflection.

Before any institution – including the institution of government – is established, or any organisational elaboration or refinement of the institution is embarked upon, there needs to be clarity concerning *what* the institution, or any particular part of the institution, is required to do – which, in relation to the institution of government, is the subject of the thesis. In the present context, the “what is to be done” question is a *policy* question – so for that matter are the associated questions of how, by whom, with what, and when the “what” is to be achieved. As pointed out by a South African author many years ago this, fundamentally, is what policy and policy making is all about (Cloete 1967:57). Seen in this light, the study could be said to be focused on decisions of a directive nature which in a logical sequence would precede the establishment of the institution of government and its further organisational refinement. Such decisions can only be seen as policy decisions, and it could therefore be argued that in the case of the present study, the relevant unit of analysis is the one having to do with policy and policy making. In his treatment of the categorisation of social entities Mouton indicates that “interventions” can include programmes, policies and systems (Mouton 1996:50). This would appear to be an acceptable interpretation; policy making in the government domain can readily be viewed as a form of intervention in the functioning of society. Following Mouton – and also Cloete - it could thus be concluded that the relevant unit of analysis for the present study is “interventions”. In the author’s view, the assignment question is essentially a policy matter and he is therefore comfortable with the identification of “interventions” as the relevant and appropriate unit of analysis in the present instance.

Settling on a particular unit of analysis is not seen as academic hair-splitting. Identifying one unit of analysis rather than another could have a bearing on the orientation of the researcher towards his or her investigation and as a consequence influence the amount

of attention which he or she will pay to certain aspects in carrying out the research and in formulating the research findings and proposals.

### 3.3 Conceptualisation

Public Administration can be described as a *conceptual* science. In the author's experience it is not focused on concrete objects in the natural or physical world, but on representations and abstractions of certain institutions and certain activities within the social domain which play a substantial role in the functioning of society and which influence the level of well-being experienced in society. Public Administration is rife with concepts such as "policy", "planning", "organisation", "control", "function", "process", "accountability" – and many more. The Shorter Oxford Dictionary defines the word "concept" in general terms as follows: "An idea of a class of objects, a general notion". For purposes of scientific discourse a more precise definition would obviously be helpful.

#### 3.3.1 The nature and function of concepts

Mouton observes that concepts are the primary "building blocks" of scientific knowledge, and suggests that concepts may be defined as the most elementary symbolic constructions by means of which people classify or categorise reality. He goes on to refer to a concept as "a symbol of meaning". (Mouton 1996:181.) Writing about the concept "public administration", Pauw (1999:9-25) emphasises the need to differentiate in scientific discourse between three verbal tools, viz "word", "concept", and "term". In his view a concept is a *thinking tool*, and constitutes a single meaning which can be expressed in different words. A word on the other hand is a *language tool*, and may have different meanings. A term consists of one or more words with a fixed meaning in a specific, usually technical discourse. (Pauw 1999:11-12.) For purposes of the present study, Pauw's explication of the scientist's verbal "tools of the trade" is acceptable and practically useful. The words "word", "concept" and "term" are therefore employed in the thesis, generally, in accordance with Pauw's guidelines. It is to be noted that Pauw and Mouton are essentially in agreement as to the *function* of a concept in scientific discourse, viz to stand for or symbolise a meaning.



It is accepted that in any discourse concepts are of necessity referred to or represented by means of words or terms, such as “policy”, “planning”, and “organisation”. In *scientific* discourse it would, following Pauw, be appropriate to use the word “term” when referring to a key concept. To explicate a concept - to make clear what one is referring to - it is necessary to give a particular term a specific meaning, in other words to define it in a certain way. This in turn requires some attention to the logic of definition.

According to an introductory work on logic a definition states the meaning of a term, but there are different senses of the word “meaning”. The authors emphasise the special importance of defining *general* or *class* terms, which are terms which are applicable to more than one object. To understand the meaning of a general or class term is to know how to apply it correctly, and in this connection they differentiate between a term’s *denotative* and *connotative* meanings. In short, the *denotative* meaning consists of all the objects to which the term may be applied correctly; the *connotative* meaning consists of the totality of attributes shared by all and only those objects. They illustrate the distinction by reference to the general term “skyscraper”: The *connotative* meaning of the term consists of the attributes common and peculiar to all buildings over a certain height, while the *denotative* meaning has reference to all existing buildings, identifiable by name or location, to which the term can be applied correctly. (Copi & Cohen 1990:141-142.) To illustrate by means of an example taken from the discipline of Public Administration, one would define the term “policy” connotatively by listing all the general or common attributes which policies possess, and denotatively by reference to specific policies which have those attributes, like foreign policy, education policy, health policy, and so on.

### **3.3.2 Conceptual orientation of project**

Having thrown some light on what is meant by a concept and how it functions in scientific discourse, the conceptualisation of the present study can be attended to. Following the formulation of a research problem, the conceptualisation of the problem is the next major step to be taken in conducting research within the social domain (Mouton 1996:63-66). Conceptualisation involves essentially two activities, viz –

- (a) the clarification or analysis of key concepts in the problem statement; and
- (b) relating the problem to a broader conceptual framework or context (Mouton:1996:66).

Conceptual clarification should lead to a statement or statements indicating the meaning of a key concept in a particular context, that is to say, to its *definition*. Key concepts are usually those referring to the key features of the phenomenon to be studied. If standard definitions are available, these should be used; if not, the researcher has to ensure that the meanings of key concepts are clearly specified. (Mouton 1996:66.)

The phenomenon forming the object of the present study and the problems associated with it, have been identified and discussed in section 2.3 of the thesis. The study is concerned, in a South African context, with the responsibilities entrusted to the various levels or spheres of government for the performance of public functions. The phenomenon is captured in the full title of the thesis and it is proposed to use this wording as a basic problem statement for purposes of conceptualisation. Any key concepts not apparent in the problem statement, but which are linked in a meaningful way to concepts already evident in the problem statement, should of course also be identified and defined.

The orientating research done as part of the present study – *vide* especially sections 2.2 (Public Administration in focus) and 2.6 (literature review) of the thesis – did not produce anything resembling a complete conceptual framework dealing specifically with the assignment of responsibilities for the performance of public functions to levels or spheres of government. No other directly applicable research – research which focuses on the assignment question as a whole – could be found. The Public Administration curricula of South African universities do not at present provide for substantial, in depth treatment of the matter, although a reference and brief explication of the so-called subsidiarity principle was encountered. Public Administration literature virtually ignores the assignment question, while in the literature of Constitutional Law the public functions, or aspects of public functions – often referred to as “matters” – for which levels or spheres of government are responsible, would appear to be a given. Great interest in the responsibilities of governments is to be found in the literature dealing with federalism, but viewed specifically in the light of the distribution of (governmental) power

within the state; there is no apparent interest in analysing public functions *per se*, or in taking a normative line by suggesting how the distribution of responsibilities for the performance of public functions, or aspects of public functions, could or ought to be done.

### **3.3.3 Analysis, clarification and definition of key concepts**

A number of key concepts relating to the assignment question are analysed, clarified and defined below.

#### **“Assignment”**

The word “assignment” is employed for purposes of the study as the noun form of the verb “assign”. The appropriate meaning of the word “assign”, as given in the Shorter Oxford dictionary, is “the action of appointing as a share, allotment”. Used as a term in the context of the present study, “assignment” refers to the allotment of responsibility as a share of the totality of governmental responsibility in the country. The assumption needs to be made that governmental authority can be conceived of as a whole, a whole which can be and commonly is apportioned and shared amongst whatever levels or spheres of government are or have been instituted. As will be apparent from the thesis, assignment in the particular context can be problematic; and where appropriate reference is made in the text to the “assignment question” in order to convey the problematic nature of the subject.

The assignment of responsibilities to governments is essentially a constitutional matter. So, for instance, the 1996 Constitution effectively determines the responsibilities of the three spheres of government - national, provincial, and local - by stipulating the matters in respect of which the legislatures in the various spheres of government may make laws, and by vesting associated executive authority in the national and subnational political executive bodies. This is a simplified view of a rather complex scheme. There are a number of constitutional provisions, qualifications, and safeguards which serve to refine and determine the actual distribution of legislative and executive powers in the country. However, it is considered that these matters do not require detailed examination at this point.

The 1996 Constitution employs a variety of technical expressions like, for instance, the “vesting of legislative authority” in section 43, the “conferring of power” in section 44(1)(a), the “assignment of powers” in section 44(1)(a)(iii), the “vesting of executive authority” in section 85(1), and the “assignment of the administration of a matter” in section 156(4), in dealing with the ways in which responsibilities are or can be located in the various spheres of government. To facilitate discussion and argument the single term “assignment” is used in the thesis to cover all these modalities.

### “Responsibility”

The Shorter Oxford dictionary defines the word “responsibility” *inter alia* as a “charge, trust, or duty for which one is responsible”; and the word “responsible” *inter alia* as “answerable, accountable (to another for something); liable to be called to account”. The word as generally defined, can readily be adopted as a *term* for purposes of technical discourse on a relevant aspect of public administration as well as in the study of Public Administration. Governments – at whatever level or in whatever sphere – are indeed given a charge, trust or duty which they are required to discharge or perform, and in a democracy are answerable and accountable to, and liable to be called to account by the elected representatives of the citizens for the manner in which they discharge their assigned responsibilities. “Responsibility” is evidently a key concept within the conceptual framework of the present study, and bears the connotative meaning of a charge, trust or duty assigned to a government and for which it is answerable or accountable to the elected representatives of the people for which it has been instituted to serve as a government.

In the title of the thesis, which also serves in a technical sense as a problem statement for purposes of elucidating the particular conceptual framework, and at many places in the text of the thesis, the plural form of the term “responsibility” is used. Where appropriate according to context, the term “responsibilities” encompasses both the *legislative* and the *executive* responsibilities of governments. When it is necessary to refer to the one or the other, the terms “legislative responsibilities” or “executive responsibilities” are used. The term “executive responsibilities” includes the

responsibilities discharged at both the political executive level (typically by ministers) and the administrative level (typically by officials).

In developing a conceptual framework for the assignment question, it is necessary to make the assumption that the assignment of a responsibility to a government, or an individual member of a government, would be meaningless unless the government or member of government is given appropriate and adequate power or authority to discharge the particular responsibility. This would appear to be axiomatic – even in everyday life. One cannot make the gardener responsible for mowing the lawn, but withhold from him the authority to use the lawnmower; again, one cannot charge a teacher with the responsibility of teaching a class of learners, but withhold from her the authority to interact with the class, or to direct them to do the work which she indicates. Conceptually and practically viewed, responsibility goes hand-in-hand with the power or authority to act. These latter concepts are deserving of some attention at this point.

#### “Power” and “authority”

A public administration dictionary offers the following definitions:

“authority”: the ability of a person or group to get organisations or individuals to act in a certain manner when they would not otherwise do so, and at the same time to have them accept the control as legitimate (Fox & Meyer 1995:10);

“power”: the ability (potential or actual) of one actor (who could be an individual, group, government or state) to bring about an outcome in a relationship with another political actor in a way which is contrary to the latter’s desires (Fox & Meyer 1995:99).

Another public administration dictionary (Chandler and Plano 1988) provides a definition of “authority” but not one for “power”, bringing the power concept into the picture in their discussion of the concept “authority”. “Authority” they define as the right to invoke compliance by subordinates on the basis of formal position and control over rewards and sanctions. Authority in their view is institutionalised power; power has to do with the ability to coerce compliant behaviour. They go on to point out that without authority, power relationships develop according to status, knowledge, and informal

characteristics. Authority, however, is based on legitimate foundations that formally establish structure and position within an organisation. (Chandler & Plano 1988:122.)

Turning to general usage dictionaries, the connotative meanings of the words “power” and “authority” are noticeably similar. The Shorter Oxford dictionary, for example, includes, *inter alia*, the following meanings:

“power”: Possession of control or command over others; dominion; government, sway; authority over. Legal ability, capacity, or authority to act, especially delegated authority;

“authority”: Power or right to enforce obedience. Derived or delegated power.

One could conclude that the two words are virtually synonymous, or that the underlying concept to which the words refer, is essentially one and the same. However, for purposes of discourse in Public Administration the use of both “power” and “authority” as relevant terms would appear to be unavoidable and, indeed, necessary. This being the case, the achievement and maintenance of some consistency in the use of the two terms is obviously desirable.

The term “power”, often combined with the term “function”, features extensively in South African public law, both in the Constitution and in other statutes. In the 1996 Constitution reference is made *inter alia* to the powers and functions of the President (section 84), the powers and functions of ministers (section 91), and the powers and functions of (provincial) premiers (section 127). To take an example from ordinary law: The Public Finance Management Act, 1999, refers *inter alia* to the functions and powers of the National Treasury (section 6) and the functions and powers of a provincial treasury (section 18). When it comes to the competence to pass and implement legislation, the 1996 Constitution uses the terms “legislative authority” and “executive authority” respectively – *vide* sections 44(1) and 85(1) in relation to the national government, and sections 104(1) and 125 (1) in relation to the provincial governments. To complicate matters regarding the use of the terms “power” and “authority”, the Constitution stipulates in section 44(1) that “ - - - The national legislative *authority* as vested in Parliament - (a) confers on the National Assembly the *power* - - - (to pass

legislation) (author's emphases). Similar wording is used in relation to the provincial legislatures (1996 Constitution: section 104(1)). It would seem that the two terms could just as well have been used the other way round, or that one term could have been used throughout.

Public administrationists - a term employed here to signify both those directly involved in public administration and those who study and teach Public Administration - have little choice but to note the use of the terms "power" and "authority" in public law, and to ensure that their references to these terms as they appear in laws are accurate. Public administrationists should also have no problem with the usage of the term "power" in the literature of Political Science or Political Studies, where the various aspects of the phenomenon of power in society – who has it, where it comes from, how it is obtained, how it should be exercised – are fundamental questions. As far as public administration specifically is concerned, it would seem that the appropriate term to use is "authority" rather than "power". In this connection it can be postulated that at a fundamental level the Constitution is the means by which an *authority to act* is given by the people to the institutions and office holders charged with the *responsibility to act*. Authority is a formalised, specified, qualified, and limited competency. Seen in this light, the concept differs somewhat from the concept of power, which would seem to symbolise a capability or potency to act which in certain circumstances could extend beyond - or challenge - formalisation, specification, qualification, or limitation. Put another way, authority could be regarded as power harnessed effectively within and for the proper purposes of a democratic system of government. It is in this sense that the concept is used in the conceptual framework.

In the author's opinion, the authority concept, as clarified above, fits in well with the general conceptual framework of Public Administration. It also has an essential function to perform within the specific conceptual framework of the present study, viz as the indispensable companion to the concept of responsibility.

#### "Public function"

The concept of a public function is central to the conceptual framework of the present study. Care and precision needs to be applied in using the term "public function" as it is

amenable to more than one definition and could be applied to various entities, activities and occurrences. In the thesis it is used in a specific technical sense, which is elucidated in the following paragraphs.

The word “function”, from which the term “public function” is derived, has many and varied meanings: the Shorter Oxford dictionary lists 6 meanings. Two of these are particularly relevant for present purposes:

- (a) “The special kind of activity proper to anything; the mode of action by which it fulfils its purpose”;
- (b) “the kind of action proper to a person as belonging to a class, especially to the holder of any office”.

The first meaning quoted relates to an impersonal “anything”, which could therefore also be an institution of government. The second meaning relates to a person or an individual, which could include a political office holder or an appointed official.

Moving into the public administration domain, a glossary of public administration terms reflects the same dual meaning of the term “function”, and serves to support the relevance of the two meanings to the present work. The glossary offers the following definition:

“Activity / work to be performed by an institution (for example a health clinic) or a functionary (for example the governmental function performed by a minister or the administrative function performed by a higher graded official)” (Cloete 1995:33).

A public administration dictionary (Fox & Meyer 1995:52) gives only the institutional meaning, defining “functions” as follows:

“Public purposes served by governmental activities (education, highways, public welfare, etc.)”.

The functions mentioned in the problem statement are those suggested in the quoted dictionary and glossary definitions as the actions or activities of institutions, rather than the actions or activities of persons. The focus of the study is on the activities



undertaken or which are directly controlled by governments, at various levels or in various spheres of government. As the activities of private institutions are excluded, it is appropriate to add the qualifying word “public”, and so to arrive at the key term “public function”. An approximation of the sense in which the term is used in the thesis could be obtained by paraphrasing the relevant Shorter Oxford dictionary definition quoted above, to read “... the special kind of activity proper to a public institution; ... by which it fulfils its purpose”. Cloete’s definition, quoted above, is appropriate for present purposes if it is accepted that the “institution” referred to is a public institution.

The South African literature on Public Administration is replete with usages of the term “function”. In a general work on public administration and management (Cloete 1994), the author devotes the first part of the book to an overview of what are referred to as legislative, governmental, judicial, and administrative functions; this is followed by a part dealing with what are referred to as administrative / managerial functions; and a concluding part dealing with what the author identifies as auxiliary functions, instrumental functions, and functional activities (also called “line functions”). In another comprehensive work on public administration published locally (Botes, Brynard, Fourie & Roux 1996), the authors use the term “function” extensively in describing the roles to be performed by political office holders and bodies, various other bodies, and certain officials - *vide* for example pages 114 to 118 (President), 94 to 95 (National Assembly), 170 to 171 (Human Rights Commission), 406 (advisory councils and commissions), 237 to 238 (town treasurers), and 318 (Auditor General). In discussing the so-called “generic approach” to the study of Public Administration, the authors employ the term to identify sets of activities common to all public institutions, which they then go on to refer to as “processes” (Botes *et al.* 1996:297-302). Another South African author has produced a work with the title “The personnel function” (Andrews 1988). In a doctoral thesis (Loxton 1993) reference is made to the “functions of government” (p.xiii), the executive functions of government (p.xv), as well as to the “functions of the state” (p.xiv, 360). Against this background of the extensive and varying use of the term “function” in South African Public Administration literature, it is imperative that the term “public function” as employed in the present study be defined as clearly as possible.

In an article by the author on public functions and the Constitution, the term “public function” was taken to mean “... a complex, logically inclusive composite of activities

undertaken by a public institution under the control of government and directed at the satisfaction of a particular need of the community, or part of the community” (Robson 1998a:24). On further reflection, this definition is considered to be somewhat vague in referring to “a public institution under government control”. Governments – and more specifically government departments as institutions of executive government – are the primary institutions charged with the performance of public functions; only by extension do other institutions – controlled by government – come into the picture. The outstanding examples of such other institutions are the so-called “public entities”, which are regulated by chapter 6 of the Public Finance Management Act 1 of 1999, and which are listed in schedules 2 and 3 of the Act. Another shortcoming of the definition is the suggestion that a public function is performed by a single public institution. This may well be the case, the control of the currency by the Reserve Bank being a case in point; but it is also possible that a number of institutions may participate in the performance of a public function, an example being the promotion of health. The definition of the term “public function” is therefore adjusted to read as follows: “A complex, logically inclusive composite of activities undertaken by one or more government departments, or other public institutions, and which is directed at the satisfaction of a particular need of the community, or part of the community”. The way in which and the extent to which a public function is a complex, logically inclusive composite of activities will become clearer as the thesis unfolds. However, simply stated, a public function is something which a government department or other form of public institution does, a programme it carries out, or a service which it renders. In more formal language, a public function – like the promotion of health or the provision of education – is *performed*. This is in line with the established style of South African legal drafting, as even a cursory perusal of the statute book will show.

### “Government”

Fox and Meyer (1995:55) define “government” as a body of persons and institutions who make and apply all enforceable decisions for a society. Cloete (1995:34) offers the following definition: “The highest institution staffed by political office bearers in a state, province or municipality, for example, (a) the cabinet consisting of the president and ministers is the government-of-the-day of the Republic of South Africa; ... Also the act of governing”. These definitions are not specific enough for purposes of the present study,

and it is therefore necessary to develop a purpose-specific definition derived from general usage of the words “govern’ and “government”.

According to the Shorter Oxford dictionary, to govern means *inter alia* to “rule with authority”. This is exactly the concept which is relevant to the research. Staying with the same dictionary and the same concept, the term “government” is employed with the meaning *inter alia* of “the body of persons charged with the duty of governing”. In Public Administration, and in other disciplines like Constitutional Law and Political Science, it is common to differentiate “governing bodies” into two parts, viz a (usually elected) legislative body which makes laws and authorises programmes of activities aimed at the satisfaction of the needs of the community, and a political executive body which administers laws and executes the programmes referred to. In the conceptual framework of the study, a “government” consists of both a legislative body and a political executive body. When the term is not qualified, it refers to the totality of a government, that is to say to all persons involved in both legislative and executive actions. When it is necessary to make a distinction, the qualified terms “legislative government” or “executive government” are used. The associated terms “legislative authority” and “executive authority” are used where appropriate. Executive governments consist of political office holders supported by appointed officials. When it is necessary to refer to the one and not the other, an appropriate distinction needs to be made.

#### “Levels and spheres of government”

The conceptual framework incorporates two ordering categories in dealing with the various governments within a state, viz “levels” and “spheres”. The term “level of government” implies a hierarchical ordering consisting typically, from top to bottom, of a national government, a number of provincial, state or regional governments, and a number of local governments. The term is encountered frequently in the literature surveyed for purposes of the research (Friedrich 1968:3; Kriek 1992a:25; Wessels 1992:37; Venter 2000:244). The term is also found within the domain of South African constitutional law, the most recent and prominent manifestation being the references to levels of government in the constitutional principles which were adopted as part of the 1993 Constitution – *vide* principles XVI, XVII and XIX. The use of the term in relation to

governments has a generally accepted connotation of one government being either superordinate or subordinate to another. In the conceptual framework presented here the term is, indeed, used with this connotation. It would appear that the drafters of the 1996 Constitution developed an aversion to the term precisely because of the connotation of superordination or subordination which it contains.

The 1996 Constitution dispensed with the term “levels of government” and replaced it with the term “spheres of government”; the country thus has a national, a provincial, and a local sphere of government. Writing about the change, an author avers that the change was motivated by a desire to move away from the hierarchical concept and to replace it with one that would connote an equality of status amongst the various categories of government (Bhabha 1997:13). It is enlightening to read the new term in conjunction with chapter 3 of the Constitution, which deals with co-operative government. However, in the author’s view the assertion of a constitutional equality between the national, provincial and local governments is debatable. The Constitution contains various provisions which point rather unmistakably to the provincial governments being subordinate to the national government, and the local governments being subordinate to the respective provincial governments – *vide* for example the provisions dealing with legislative powers (1996 Constitution: sections 44, 104, 146, 156), and those dealing with supervisory powers (1996 Constitution: sections 100, 139).

Nevertheless, the term “sphere of government” is indispensable for purposes of the conceptual framework – not only because it is constitutionally established in South Africa, but also because of its utility in dealing with systems of government which are not only hierarchically ordered, but also in other ways, ostensibly due to the importance attached to factors other than the geographical or the territorial. The Belgian system of government, with its dual focus on both geographic entities *and* culturally determined communities, is a classic case in point. The term can also be applied in referring to the “general affairs” and “own affairs” constitutional dichotomy introduced into South Africa by the 1983 Constitution, and arguably also in referring to the array of ethnically based self-governing and so-called “independent” states which existed within South Africa’s national borders prior to the implementation of the first inclusive democratic constitution (1993 Constitution) in 1994.

### “Subsidiarity”

A concept found in the literature survey – *vide* section 2.6 of the thesis – which is of particular significance in the context of the present study is that of subsidiarity, usually encountered in the form of the “subsidiarity principle”. Indeed, it can be said that the concept is an essential component of the conceptual framework. The word “subsidiarity” is not always found in dictionaries. Even as authoritative a work as the Shorter Oxford dictionary does not contain an entry for the word; the same applies to the Concise Oxford dictionary of current English. A useable general definition for present purposes is offered by Webster’s international dictionary of the English language, and is quoted in full: “A theory in sociology: functions which subordinate or local organisations perform effectively belong more properly to them than to a dominant central organisation”. This general wording can be adjusted readily to fit the disciplines of Political Science and Public Administration by substituting the plural and singular forms of the word “government” for the plural and singular forms of the word “organisation” respectively.

In an University of South Africa study guide for undergraduate students in Public Administration, with the title “*Openbare dienste: strukturering en funksionering: enigste studiegids vir PUB 102-9*”, the author deals with subsidiarity in the form of a *rule*. Quoting Loxton (1993:80) it is stated that the rule of subsidiarity entails that there is no valid reason for a higher institution to provide a public service which can be provided satisfactorily by smaller or lower institutions. The point is made that when the subsidiarity rule is applied, the government level which is closest to the particular community need, will be responsible for its satisfaction. (Wessels 2000:33-34.) In a comprehensive work on the federal system of government in Germany, it is stated that the crux of the subsidiarity principle is that “... *übergeordnete Gemeinschaften nur solche Aufgaben wahrnehmen sollen, die nachgeordnete kleine Gemeinschaften nicht ebenso gut oder besser erfüllen können*” (Laufer 1991:262). It is to be noted that in this instance the criterion stipulated for the devolution of a duty or task (“*aufgaben*”), viz *equally good or better* performance, is more precise than the one given in Webster’s Dictionary, viz *effective* performance, or the one given in the Unisa study guide, viz *satisfactory* performance.

The importance of subsidiarity as a concept in examining the assignment of responsibilities to levels or spheres of government is self-evident. The concept is virtually indispensable in developing a theoretical assignment model – *vide* chapter 9 of the thesis. It is therefore postulated as an important component of the conceptual framework directly relevant to the study. Where in the thesis the subsidiarity principle is employed, Laufer's *equally good or better* criterion is implied.

#### **3.3.4 The broader conceptual framework or context**

In section 3.3.2 *supra* it was indicated that the conceptualisation of a research problem consists of two steps, viz (1) the analysis and clarification of key concepts, and (2) relating the research problem to a broader conceptual framework or context. Having attended to the analysis and clarification of key concepts in the preceding section, it is now necessary to look at the broader conceptual framework or context.

As far as the study of Public Administration is concerned, the conceptual framework relevant to the specific research problem, as developed and elucidated in the previous section, is not seen as being problematical in any way, in other words the smaller, demarcated framework can be accommodated readily within the broader general conceptual framework of Public Administration. Whether the research problem is a problem of policy or a problem of institutional organisation – *vide* section 3.2 *supra* – or a combination of the two, is a significant question to pose, but it is not one which can take the problem outside the bounds of the discipline; Public Administration of course encompasses both these fields. Again, if Public Administration is viewed in terms of a number of generic functions, both policy making and organising are recognised as two of the main such functions (Cloete 1994: chapters 5, 6). Some comment on the use of terms is, however, called for.

The Constitution does not employ the term “public function”. In dealing with public functions entrusted to the subnational spheres of government the Constitution refers to “matters” falling within “functional areas”, which are listed in schedules to the Constitution (1996 Constitution: section 104(1)(b), section 156, schedules 4 and 5). There is a rough concordance between a functional area as referred to in the Constitution and a public function as defined in the previous section but, as will be apparent from the thesis, the area of agreement has its bounds. While the

constitutional language is presumably adequate when laws have to be made – it can be assumed that all laws deal with one or more matters, and that a matter can be associated with a functional area – it does not facilitate precision in specifying what exactly the various spheres of government are actually responsible for. Such precision could be promoted by identifying the public functions, or aspects of public functions, which are the responsibility of the various governments. An intriguing question arises: should uniformity in the use of terminology be pursued, or is this an instance where two disciplines – Constitutional Law and Public Administration – should use the terminology which best suits their respective purposes? Providing a definitive answer to this question is a matter which is considered to lie beyond the scope of the thesis.

As indicated in the preceding section, the term “function” appears quite often in South African Public Administration literature, but with different connotative meanings depending on context. One of these meanings corresponds to the meaning given to the term “public function” in elucidating the conceptual framework relevant to the present study. It is proposed that the qualified term “public function” be used when it is the intention to refer to the activities of government departments and other public institutions directed at the satisfaction of community needs or, in other words, to their programmes and services. It is realised that there is a risk of the uninformed interpreting the term as a reference to a social event (function) to which the public is invited! Appropriately trained and experienced public administrationists would of course not make this mistake. It should be borne in mind that the focus here is on a *defined term* used in a specific technical context, and not on a combination of *words* which could have various meanings.

In the author’s experience there is a tendency amongst political office holders and appointed officials to speak about the “powers” which subnational governments have, or do not have, or should have, when they actually mean the community directed activities which such governments are authorised, not authorised, or should be authorised to carry out. Strictly speaking, the powers (and the associated functions) of subnational governments refer to their competence to make and administer laws, and to authorise and execute programmes of activities (as reflected in budgetary appropriations). The actual public functions, or aspects of public functions – or “matters within functional areas” as the Constitution would have it – in respect of which subnational governments

have the powers (and functions) referred to, is a separate issue. The list of public functions or functional areas could be long or short, well deliberated or hastily drawn up, scientific or unscientific, without altering the basic (constitutional) role of the various governments. The rationale for determining which public functions, or aspects of public functions, should be the responsibility of the various spheres of government is the main focus of the present research. Greater accuracy and consistency in discussing the matters in question could contribute to the advancement of both the practice of public administration and its scientific study.

While power may be a *key* concept within the disciplines of Constitutional Law and Political Science, it would not appear to be such a concept in the case of Public Administration. Accepting that public administration takes place within a legal framework determined through a political process, it is suggested that discourse in Public Administration *per se* can take place without the employment of the power concept, except where it is necessary to quote a law or a publication, or to refer specifically to a political factor or a political development. What in the author's view can be postulated as a key concept in Public Administration is *authority*, which is inseparably linked to a *responsibility* lawfully assigned to a government or an individual role-player within government - *vide* definitions of the terms "authority" and "responsibility" in the preceding section.

### 3.4 Operationalisation

Following the conceptualisation of a research problem, the scientific endeavour has to be operationalised into a research project capable of being carried out in practical terms. According to Mouton it is imperative in a scientific investigation to establish linkages between relevant concepts and the phenomenon which is the object of the investigation, and this is done through a process of operationalisation. In his view, operationalisation consists of the construction of a set of operations or measures that link the research problem to the world. (Mouton 1996:66.) Goode (1984:29) defines operationalisation as the process of measuring a concept with a specific indicator, but this definition would seem to be a rather narrow one, one which implies that the researcher is working solely within a *quantitative* paradigm – *vide* section 3.6 *infra*.



Mouton (1996:124) emphasises the close link between conceptualisation and operationalisation, which he attributes to the intrinsic relationship between the connotation and denotation of concepts – what they *mean* and what they *refer* to. In section 3.3.1 *supra* it is stated – following Copi and Cohen (1990) – that the connotative meaning of a term consists of the totality of attributes shared by all the objects to which the term refers, while its denotative meaning consists of the objects to which it may be applied correctly. In short, it could be said that before embarking on the empirical study of a phenomenon one needs to theorise meaningfully about what is to be studied; this is done by identifying key concepts relating to the phenomenon and defining them connotatively, that is to say determining what they *mean*. Having done this, the next step is to identify actual manifestations of the concepts in the real world, in other words that which the concepts *refer* to (denote), and subject these manifestations to systematic study. For purposes of the study it is then necessary, in Mouton's formulation, “... to construct a set of operations or measures that link the research problem to the world” (Mouton 1996:66). It is to be noted that Mouton's formulation allows for the application of a *qualitative* or a *quantitative* approach, or both – *vide* discussion of these approaches in section 3.6 *infra*.

The approach followed in the present study is essentially a qualitative one. This is so because, as indicated in the following section, the study is necessarily of an exploratory nature. It is possible that an exploratory study may lead to the putting forward of an explanatory hypothesis capable of being tested – Copi and Cohen (1990:400) emphasise the necessity of scientific explanations being testable – but to start with, no such hypothesis is available for testing. This being the case, the immediate deduction of propositions from a hypothesis which are capable of being quantified by observation and measurement in the real world, had to be ruled out in the present instance.

To return to the question of the operationalisation of the research project: the central concept to be linked to the real world is clearly that of a public function. All the other concepts implied in the problem statement (*vide* section 2.3 of the thesis) and explicated in the conceptual framework relevant to the research problem (*vide* section 3.3 *supra*), such as assignment, responsibility, and government, have meaning in the context of the study only in relation to public functions. It is therefore public functions as they

appear in the real world – the ontological aspect of public functions – which are to be subjected to empirical study. However, it is to be noted in the context of the present study, that public functions “appear in the real world” as words or phrases in laws, schedules to laws, and in other pertinent documents. It is not the actual, observable activities of the employees of departments and other public institutions, which can be subjected to study, but the symbolic representations (in words and phrases) of these activities as they appear in laws and related documents. In the introduction to section 3.3 *supra* it is stated that Public Administration is focused on representations and abstractions of certain institutions and certain activities, rather than on concrete, observable objects. Focusing on the representation and abstraction of public functions as specified above, is therefore considered to be a legitimate approach within the domain of Public Administration as a science. An empirical study of public functions by means of the identification, observation and description of the myriad actual activities which make up such functions would, of course, be practically impossible.

Taking “public function” as the central concept of the study, the operationalisation of the research project entailed the carrying out of the following - to use Mouton’s expression - set of operations:

(a) *A study of the assignment of responsibilities for the performance of public functions in a sample of countries other than South Africa.* This operation was considered to be necessary in order to contextualise the particular phenomenon over a wider front, and in so doing provide a background against which the assignment question as it has manifested itself in South Africa, could be examined.

As the statistical population of countries which can be studied is large (well in excess of 150) it could be argued that a sample of countries should have been determined by the application of objective sampling methods. However, as the individual entities are whole countries, with diverse cultures and ideological orientations, and often complex constitutional histories, it is unlikely that a satisfactory sample could have been obtained in this manner, or possible that the sample would have had to be so large in order to satisfy the requirement of representativeness, that it would have overwhelmed the research project and detrimentally affected its balance and focus. It was therefore decided to select for study a number of countries whose assignment schemes could, for

reasons indicated in the particular chapter of the thesis, be of value in looking at the assignment of responsibilities in South Africa.

To derive as much benefit as possible from this part of the research it was considered necessary to bring into focus the broad structure of government in a country, highlighting the levels or spheres of government which have been instituted, and then to note how responsibilities for the performance of public functions have been distributed between the various levels or spheres.

It was to be expected that the term “public function” as such may not appear in source documents (*vide* section 3.7 below) – but the assumption was made that that it would be possible to identify the equivalent terms, that is to say terms which connote the same concept.

As “public function” is a second order concept - an abstraction from and a representation of directly observable activities - there is an obvious interest in *how* public functions are dealt with in source documents, that is to say in the language used and, assuming that the public functions indicated are numerous, how they are arranged or ordered in such documents. It was also of importance in this part of the research to establish what, if any, formal assignment criteria are in evidence. The examination of the assignment modes of the selected countries was to culminate in a critical evaluation of the way in which the assignment question is dealt with.

(b) *A historical overview of the assignment of responsibilities in South Africa.* While no attempt was to be made to trace the history of the assignment of responsibilities in other countries, it was considered to be essential for purposes of the study to do so in the case of South Africa. The country focus of the study is South Africa and it is therefore appropriate that the thesis should deal with the assignment phenomenon as it has manifested itself in South Africa since its establishment as a discrete country in 1910. In looking at the history of South Africa, and in order to better understand the developments which have taken place, it seemed appropriate to distinguish between the pre-democratic and the democratic eras. The watershed between the two eras is the Constitution adopted in 1993 and implemented in 1994. Making this distinction is appropriate and significant in relation to virtually all aspects of government – certainly

also to the assignment of responsibilities for the performance of public functions to levels or spheres of government. This part of the research therefore covered the period from the establishment of the Union of South Africa in 1910 up to the implementation of the 1993 Constitution.

Apart from its time dimension, the historical overview was to be structured in much the same way as the examination of the assignment phenomenon in the selected other countries. It would therefore –

- ?? trace the levels or spheres of government instituted in the country prior to 1994;
- ?? note how responsibilities were distributed between levels or spheres of government in terms of successive Constitutions and other enactments; and
- ?? critically examine the technical aspects of assignment, including the language used in source documents, the ordering of public functions in such documents, and the assignment criteria which were applied.

The historical overview was to culminate in a summary and overall assessment of the assignment of responsibilities in the pre-democratic period extending over 84 years.

(c) *An analysis and evaluation of contemporary constitutional developments in South Africa.* South Africa experienced the adoption of two founding laws within the space of three years, viz the so-called “interim” Constitution in 1993 and the so-called “final” Constitution in 1996. The constitution development process was a planned and generally accepted one. The 1993 Constitution was the product of a multiparty negotiating process, aimed at bringing the country onto a democratic footing as quickly as possible, while allowing time for a formally constituted constitutional assembly to draft the actual or “final” Constitution. At the heart of both Constitutions – and this presumably applies to all constitutions – is the institution of subnational governments, and the stipulation of the public functions, or aspects of public functions, for which the various governments – national and subnational – will be responsible. It was appropriate that the assignment question, as reflected in the two Constitutions, be examined in detail and evaluated.

From a scientific point of view the 1993 Constitution is of particular interest because of the adoption of a set of constitutional principles, which the drafters of the Constitution then followed, and which, significantly, were to be honoured by the Constitutional Assembly in the drafting of the “final” Constitution (1993 Constitution: section 71). Some of these principles deal specifically with the assignment of responsibilities for the performance of public functions, and need to be thoroughly analysed and evaluated. It is further of interest that one of the grounds on which the Constitutional Court initially refused to certify the draft of the “final” Constitution as conforming to the constitutional principles was the diminution, in the finding of the Court, of the powers given to the provinces in the 1993 Constitution (CC 1996a: para. 481-482). Again, the significance of this judgement, and the drafting changes made as a result of the judgement, need to be examined and evaluated in relation to the assignment question.

It is considered to be appropriate that separate chapters of the thesis be devoted to the assignment of responsibilities as determined by the Constitutions of 1993 and 1996 respectively.

(d) *Summary, analysis and interpretation of research findings.* It was accepted that the operations indicated in subparagraphs (a) to (c) above would generate a substantial volume of research findings. These findings would encompass -

- ?? particulars of and critical comment on the assignment schemes of a selection of foreign countries;
- ?? comprehensive information on the assignment of responsibilities to governments in South Africa in the pre-democratic era, covering a period of 84 years from the establishment of the Union of South Africa in 1910 up to the implementation of the first democratic Constitution in 1994, together with analysis and critical comment; and
- ?? description, analysis and critical comment on the assignment schemes contained in the South African Constitutions of 1993 and 1996.

To the aforementioned empirical findings would be added the information obtained by means of the literature review contained in section 2.6 of the thesis, as well as the findings regarding the place and treatment of the assignment question in the Public

Administration curricula of South African universities, which are reported on in section 2.2 of the thesis.

The next major operation in carrying out the research project was to be the compilation of an overall summary, analysis and interpretation of the research findings. The objective was a dual one: firstly, to arrive at an integrated view and understanding of the assignment of responsibilities for the performance of public functions as a widespread phenomenon with far-reaching implications for public administration; and secondly, to assess the state of the assignment of responsibilities in objective scientific terms. An important part of the exercise would be to move beyond description and criticism and to seek to *understand* assignment schemes and practices. To this end it would be necessary to identify, if possible, the postulates, principles, criteria, and any other directive influences which explain, however imperfectly, the way in which responsibilities for the performance of public functions are assigned.

(e) *Theory building.* It was intended that the operationalisation of the research project should culminate in the putting forward of a model, which may be no more than a tentative one, to serve as a guide for the assignment of responsibilities for the performance of public functions in South Africa. The model would of course be linked to the research findings and provide, to the extent possible, a scientific platform on which assignment issues could be considered and resolved. It was to be expected that the model would place considerable emphasis on the language of public functions – on the terminology to be used – as well as on the principles to be followed, and the criteria to be applied.

### **3.5 Nature and scope of the study**

The nature and scope of the present study are determined essentially by pertinent aspects which have been dealt with in chapter 2, viz the problem statement (section 2.3), the stated purpose of the study which follows from the problem statement (section 2.4), the set of research questions which have been formulated with a view to giving more precise direction to the research (section 2.5), and the review of relevant literature (section 2.6).

Evidently, the specific object of the study has received scant attention in the literature of Public Administration, while its treatment in the literature of Constitutional Law, and of Political Science would appear to be determined by the respective, peculiar concerns of constitutional lawyers (the formal, legal relations between levels and spheres of government) and of political scientists (the distribution of power within the state). The present study has its own particular focus, viz the *rationale* according to which responsibilities for the performance of public functions, or parts of public functions, are assigned to one level or sphere of government rather than another. No substantial literature dealing with this specific matter could be found. The article published by the author in 1998 is very much an isolated contribution to the literature. The conclusion must be drawn that the object of study of the thesis is under-researched.

As pointed out in section 2.3 of the thesis the assignment question, as conceptualised in section 3.3 *supra*, has not achieved substantial treatment in syllabuses and curricula of university departments of Public Administration. On the assumption, however tentative, that the academic recognition and content given to a subject is a reflection, however imperfect, of its evolved “theory”, it must be recorded that there is no developed theory of assignment to be discerned at the present time, and that the assignment question does not yet occupy a substantial place within the body of knowledge which is Public Administration.

In his general work on research in the social sciences, Mouton deals with the kinds of studies which can be undertaken, and provides a matrix in which four possible kinds of study are demarcated, depending on the state of current knowledge of the subject and the kind of knowledge which is sought. The four kinds of study arrived at by Mouton are as follows:

- ?? Exploratory (little existing knowledge; descriptive objective);
- ?? replicatory (well-developed body of knowledge; descriptive objective);
- ?? hypothesis generating (little existing knowledge; explanatory objective); and
- ?? theory testing (well-developed body of knowledge; explanatory objective) (Mouton 1996:102-104).

The four kinds of study do not appear to be mutually exclusive, and Mouton does not suggest that they are. Indeed, it is not impossible to conceive of a particular study containing elements of all four kinds of study. However, Mouton's matrix does provide a useful frame of reference for reflecting on the nature of a study which is to be embarked upon, and for envisioning what the study could reasonably be expected to produce.

In the absence of a developed body of pertinent scientific knowledge, the present study can obviously not be aimed at replicating previous research, and also has no theory or theories to test. It has to be of an exploratory nature, combined with the possibility of generating some hypotheses or hypothetical insights. At this point, it is appropriate to note what the general purpose of scientific research is. Copi and Cohen (1990: 418-419) emphasise that the scientist strives to understand phenomena, and point out that the scientist does not only want to know what the facts are, but also to explain them, and in the process to devise theories. Mouton (1996: 46) agrees that the aim of research is to understand, and states that understanding is to be achieved by describing, explaining and evaluating phenomena. It is understood that in an essentially exploratory study such as the present one, the research will commence with the identification and description of the pertinent phenomena, which could be followed by their classification. Copi and Cohen (1990: 461) point out that classification and description are really the same process.) The study could end there, but also move beyond the basic recording, description and classification of the phenomena to encompass also the putting forward of some tentative explanation of the phenomena, in other words the generation of one or more hypotheses concerning the object of study. From the outset it was the intention to channel the study along these lines.

Although the study includes a survey of literature spanning a comparatively broad front, by both South African and non South African authors, and also examines in some detail assignment practices not only in South Africa but also in a selection of other countries, it is essentially a South African venture and its results, or any part of its results, will not necessarily have validity for or be exportable to any other country.



### 3.6 Research paradigms

In dealing with the methodological dimension of social research, Mouton refers to “methodological paradigms” and mentions three examples, viz the *quantitative*, the *qualitative* and the *participatory action* paradigms. In his view, paradigms in the research context are not merely collections of methods and techniques, but also include assumptions and values regarding their use under specific circumstances or, in other words, the philosophies underlying the use of certain methods and techniques. (Mouton 1996:36-37.) Mouton raises the so-called conflict between the quantitative and qualitative paradigms (suggesting that participative action can be subsumed under the latter) and argues in favour of the compatibility of the two major paradigms, indicating that the choice between their utilisation in a particular research project is to be determined by the nature of the research problem (Mouton 1996:38-40).

Moving to the field of Public Administration, Wessels (1999b:382-384) confirms the applicability of social science methods in the discipline, and identifies the same three macro-research methods (or paradigms) referred to by Mouton, viz the quantitative, the qualitative, and the participatory. As also suggested by Mouton – *vide* preceding paragraph – he finds that participatory action research is more related to qualitative than to quantitative research (Wessels 1999b:408).

The distinctive features of the three research paradigms can be summarised as follows:

(a) *Quantitative*: This approach is commonly referred to as “mainstream” social research, and is accepted by perhaps the majority of social scientists as the framework within which to work. Observation of a research object must have as its outcome exact measured quantities on which generalisations can be based. (Wessels 1999b:386-387.)

(b) *Qualitative*: This approach is concerned with how the social world is interpreted, understood and experienced. Qualitative research aims to produce rounded understandings on the basis of contextual and detailed data (Mason, quoted by Wessels 1999b:390).

(c) *Participative*: In this approach, research is not directed *at* people but is undertaken *with* people. The aim is not to formulate universally true laws, but situation-specific insights, in order to bring some or other change or healing to that particular situation (Wessels 1999b:392-393).

The quantitative research paradigm could not be applied meaningfully in the present project. Because of the lack of uniformity in the structure of assignment schemes and in the language used, there would have been little point in trying to count the number of public functions – usually to be found in the form of entries in constitutions and other laws – for which responsibility has been assigned to governments in South Africa over the years, or currently to governments in the selected sample of other countries. Nor could any statistical analysis be carried out on such numbers in any meaningful way. It may have been possible to compile a questionnaire about the assignment question and distribute it to a number of academics and practitioners for completion, and then to analyse and quantify their responses, but it is highly unlikely that such an exercise would have been worthwhile. As pointed out in section 2.2 of the thesis the assignment question, *as demarcated for purposes of the study*, does not feature prominently in academic circles. As regards practitioners, there is no obvious “population” of practitioners available, who are acquainted with the totality of the assignment question, from which a satisfactory sample could be drawn. It goes without saying that there are practitioners with expert knowledge of the deployment of their own functions, or perhaps of related groups of functions, but what is required in this instance is an acquaintance with the assignment question as a whole.

The major research paradigm applicable to the research project is the qualitative one. As indicated in the previous section of this chapter, the research project is essentially of an exploratory nature. The objective is to get to know more about the assignment of responsibilities as a phenomenon, to endeavour to establish a body of valid knowledge about the phenomenon, and to interpret the phenomenon to the extent that there can be meaningful interpretation. By following this approach, it is hoped to promote greater understanding of an important – but under-researched – aspect of government and administration. Whatever insights can be gained are to be utilised in developing a theoretical model for the assignment of responsibilities, however tentative such a model

may turn out to be. To proceed in this way, is to apply the qualitative research paradigm.

There is also a substantial volume of participatory research which can be brought to bear on the research problem. In the months leading up to the adoption of the first democratic Constitution in 1993, the author was in charge of a major project aimed *inter alia* at formulating an input of the then Commission for Administration to the Multiparty Negotiating Process, concerning the assignment of responsibilities for the performance of public functions under a new constitutional dispensation. The work, which was both analytical and creative, was done by a team of people with expertise in organisational matters, with the assistance and co-operation of officials in a large number of departments. Assessed against the distinctive features of the participative approach – *vide* subparagraph (c) above – it certainly can be said to have produced “situation-specific insights”, and to have been directed at accomplishing change and even “healing” (of a fragmented and dysfunctional apartheid inspired governmental structure). How this work was done, and what it produced, is reported on in chapter 6 of the thesis.

### **3.7 Sources of data**

The sources of data for the empirical part of the research were as follows:

(a) In respect of the assignment of responsibilities in four of the selected foreign countries, the respective Constitutions, with some supplementation from relevant literature, together with the Scotland Act 1998 in respect of developments in the United Kingdom;

(b) in respect of the historical overview of the assignment of responsibilities for the performance of public functions to governments in South Africa -

?? the Constitutions of 1909, 1961 and 1983;

?? a large number of relevant statutes, other than the successive national constitutions, adopted during the period covered by the overview, and dealing with the structures

of government and the assignment of responsibilities to the governments instituted;  
and

?? a number of books published by South African authors in the fields of Public Administration and Constitutional Law, dealing inter alia with the responsibilities assigned to various governments;

(c) in respect of the assignment of responsibilities in terms of the 1993 Constitution –

?? the 1993 Constitution;

?? relevant documents of the Multiparty Negotiating Process, which culminated in the drafting of the constitutional text which was adopted in 1993, as indexed and saved in the National Archives Repository;

?? documents of the erstwhile Commission for Administration relating to the Commission's input to the Multiparty Negotiating Process concerning the assignment of responsibilities for the performance of public functions to levels or spheres of government under a new dispensation; and

?? notes written and directions given by the author as the person planning and overseeing the project which was focused on the development of the Commission's input to the Multiparty Negotiating Process; and

?? relevant literature.

(d) in respect of the assignment of responsibilities in terms of the 1996 Constitution -

?? the 1996 Constitution;

?? the certification judgements (two) of the Constitutional Court concerning compliance of the draft constitutional text with the constitutional principles laid down by the ("interim") 1993 Constitution;

?? relevant documents of the Constitutional Assembly, which drafted the "final" constitutional text, as indexed and saved in the National Archives Repository; and

?? relevant literature.

(e) in respect of the development of a theoretical model for the assignment of responsibilities to governments -

- ?? the published and unpublished documents covered in the literature survey reported on in section 2.6 of the thesis;
- ?? the 1993 Constitution, including the schedule of the Constitution in which the constitutional principles are contained;
- ?? the 1996 Constitution;
- ?? the findings of the research as reported on in chapters 4 to 8 of the thesis;
- ?? documents of the erstwhile Commission for Administration; and
- ?? relevant materials forming part of the personal papers of the author.

All sources used in writing the thesis are, of course, reflected in the alphabetical list of sources appended to the thesis. The purpose of the foregoing exposition of sources is to set out in a clear way the key sources which were used in carrying out the various parts of the research project, and in compiling the corresponding chapters of the thesis. It was considered necessary that such an exposition should be included in the thesis in order that the referral base underpinning the outcome of the research may be known and be accessible to whoever may have an interest in the particular object of study.

### **3.8 Collection and presentation of data**

In line with the exploratory nature of the research, data collection took place almost exclusively by means of the study of relevant documents and the analysis of their contents. The only exception to this procedure was the garnering of information concerning the curricula content of the subject Public Administration from members of the teaching staff of the Department of Public Administration and Management of the University of South Africa and of the School for Public Management and Administration of the University of Pretoria; this information has been incorporated into section 2.2 of the thesis. For the reasons indicated in section 3.6 *supra* no attempt was made to collect data by means of a questionnaire. The practical manifestation of public functions is such (*vide* the operationalisation of the concept in section 3.4 above) that no direct observation was possible.

Data collected in respect of the major parts of the research are presented in the applicable chapters of the thesis.

### **3.9 Analysis and interpretation of data**

Each chapter includes a critical evaluation of the situation as portrayed by the data collected regarding the particular aspect. Chapter 8 presents an overall summary, analysis and interpretation of the research findings. Moving on from what has been established regarding the existing state of affairs, chapter 9 presents for consideration a theoretical model for the assignment of responsibilities for the performance of public functions to spheres of government in South Africa. Chapter 10 provides an assessment of what has been accomplished with the research, with the assessment based on the research questions formulated as part of the scientific orientation of the project contained in chapter 2.

### **3.10 Conclusion**

The preceding sections of the chapter seek to document a scientific basis and a practical plan for exploring what is considered to be an important phenomenon within the broad domain of government and public administration, viz the assignment of responsibilities to governments for the performance of public functions. In practical terms the research consisted of a set of major operations arising from the systematic operationalisation of the project as described in section 3.4 above. These major operations are reported on in the ensuing chapters, commencing with a study of the assignment schemes of a sample of countries, other than South Africa.

## **CHAPTER 4: ASSIGNMENT OF RESPONSIBILITIES IN A SELECTION OF FOREIGN COUNTRIES**

### **4.1 Introduction**

In this chapter the findings are presented of an examination of the ways in which a number of countries assign responsibilities for the performance of public functions to levels or spheres of government.

The countries selected for study are Australia, Belgium, Germany, Spain, and the United Kingdom. In respect of the United Kingdom the focus is specifically on the recent devolution of functions and powers to Scotland. Australia was selected because it was established as a state more or less at the same time as South Africa, and the two states were both constituted from former colonies of the erstwhile British Empire. Belgium is of particular interest to a South African student of government organisation because of the way in which the linguistic-cultural groups making up the population have been accommodated in the system of government. Germany warranted inclusion for the compelling reason that it reportedly served to a significant degree as the model for the development of South Africa's present constitution. Spain is important to the study because of the application in its constitution of the principles of voluntarism and asymmetry in determining the powers and functions of its autonomous communities. The United Kingdom was chosen as a focal point because of the topicality of the developments there and the perceived special challenges faced by the architects of devolution in modifying a closely knit, unitary system of government which had been in existence for almost 300 years.

The chapter looks at the patterns or schemes of assignment operative in the five countries included in the study. The research has not traced the evolution of the assignment of responsibilities in each country, or covered whatever ongoing debate there may be in the various countries concerning the assignment question. The study has for the most part focused on the current constitutional texts, and more particularly

those parts of such texts dealing with the structure of government and the assignment of responsibilities to the various levels or spheres of government within the overall structure. It is not practical to capture within this chapter every nuance of the assignment scheme in each of the targeted countries, that is to say every qualification or proviso, every prescribed procedure or condition, or every arrangement between levels or spheres of government for the co-ordinated discharge of their respective responsibilities. Specific public functions – such as agriculture, education, or health – have not been examined; this would be an enormous task extending well beyond the scope of the thesis, and is in any case not necessary for the achievement of the objective of this chapter, viz to elucidate how the assignment of responsibilities is dealt with in other countries.

## **4.2 Australia**

A federal state to be known as the Commonwealth of Australia was established by the Commonwealth of Australia Act adopted by the British Parliament in 1900. The Commonwealth, which was to embrace a number of British colonies existing at the time, as well as any other colonies or territories which may be admitted at a future date, was formally proclaimed in September 1900 and came into existence on 1 January 1901. (Rydon 1991:63.)

On the establishment of the Commonwealth the constitution of each of the former colonies continued in force, but was made subject to the Constitution of the Commonwealth (hereinafter referred to in this section as “the Constitution”). Each constituent state retained the competence to amend its constitution in accordance with the provisions of such constitution (Australia Constitution: section 106). As a consequence, the Constitution does not contain stipulations as to the structures of the constituent states, treating these as a given and referring to them in passing where necessary – *vide* for example section 9 dealing with methods for the election of senators. The Constitution does of course set out the composition, functions and powers of the federal institutions - *vide* for instance chapter I (Parliament) and chapter II (Executive Government).



On even a cursory examination of the Constitution, it is apparent that the Commonwealth is based on a federal model. Section 51 of the Constitution sets out the matters with respect to which the federal parliament shall have power to make laws, but does not specify matters falling under the legislative authority of the states. By implication the residuary legislative power within the system of government vests in the states; they are free to make laws in regard to any matter not falling under the assigned legislative authority of the federal parliament - an essentially federal approach. The Constitution (section 108) provides that until such time as the federal parliament has made a law dealing with a matter assigned to it, a law of a former colony relating to such a matter shall continue in force in the particular state, and the state shall have the power to alter or repeal the law. The possibility of conflict between a federal law and a state law is eliminated by a provision in the Constitution (section 109) which stipulates that where a law of a state is inconsistent with a law of the Commonwealth, the federal law shall prevail and the state law, to the extent of the inconsistency, shall be invalid.

The continuing legislative authority of the constituent states referred to in the preceding paragraph, did not apply to three matters which from the commencement of the Commonwealth were placed under the exclusive legislative authority of the federal parliament (Australia Constitution: section 52). These matters are as follows:

- (a) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
- (b) matters relating to any department of the public service the control of which is by the Constitution transferred to the executive government of the Commonwealth; and
- (c) other matters declared by the Constitution to be within the exclusive power of the federal parliament.

The Constitution contains no general, connotative definition of the type or class of matter which belongs appropriately under the legislative (and associated executive) authority of the federal government or of the governments of the constituent states. Such matters are defined (identified) in a denotative manner, that is to say by listing. As indicated above, the list is contained in section 51 of the Constitution. The list, which is appended to the thesis as annexure 1 and contains 39 entries, is a largely

unstructured one; there is no subdivision into broad categories of related items, although in some parts of the list preceding and succeeding items do appear to bear some relationship to one another - vide for example items xxi and xxii dealing with marriage and divorce respectively, and items xxxii to xxxiv dealing with railways. The items in the list are not presented in alphabetical order, and there is no reason to suspect that the sequence of listing conveys any particular meaning or intent.

Included in the list of matters in respect of which the federal parliament is competent to legislate are matters referred to it by the parliament or parliaments of any state or states, with the proviso that any such law shall apply only to states by whose parliaments the particular matter was referred, or which afterwards adopt the law (Australia Constitution: section 51(xxxvii)). According to note 12 of the editorial notes contained in the publication consulted, six of the states, over a period stretching from 1915 to 1966, adopted 24 Acts which referred matters to the federal parliament in terms of the particular provision in the Constitution. Most of these Acts have since either expired or been repealed; only five were still in force in 1991. (Rydon 1991:61-62.)

Some major public functions not included in the list of matters with respect to which the federal parliament is empowered to make laws are the promotion of agriculture, the provision of education, and the regulation of local government. These are therefore matters falling within the residuary legislative (and executive) competence of the states.

Compared to some of the other states included in the sample of states surveyed in this chapter – Belgium and Germany being prime examples – the assignment of responsibilities for public functions in the Australian constitutional scheme is readily accessible and straightforward. Although the list of matters entrusted to the federal parliament is a long and poorly organised one, there can be little uncertainty as to the extent of the legislative powers of the federal parliament. As indicated above, any law operative in a state relating to a matter in the particular category which is inconsistent with a federal law, will be invalid to the extent of the inconsistency. There is no onus on the federal parliament to satisfy any criterion or set of criteria in exercising its legislative powers with respect to matters falling within its legislative competence.

### 4.3 Belgium

A key feature of the Belgium Constitution (hereinafter referred to in this section as “the Constitution”) is the dualistic ordering of the state into both communities (*gemeenschappen*) and regions (*gewesten*) (Constitution: article 1). The communities recognised in the Constitution are not local concentrations of citizens but constitutionally acknowledged population groups, although in practice the population groups do tend to be concentrated in certain regions and municipalities. There are three such communities, viz the Flemish Community, the French Community, and the German-speaking Community (Belgium Constitution: article 2). There are also three regions, viz the Flemish Region, the Walloon Region and the Brussels Region (Belgium Constitution: article 3). The fact that the communities are mentioned first in the Constitution is probably indicative of the fundamental importance which the Constitution - as borne out in subsequent articles - attaches to the three communities in matters of the state, of government, and of administration.

The Constitution proceeds to stipulate (article 4) that the country encompasses four language territories (*taalgebieden*), viz the Dutch language territory, the French language territory, the bilingual (Dutch / French) territory of Brussels-Capital, and the German language territory. The Dutch speaking and French speaking communities make up the bulk of the Belgian population, with German speakers constituting a relatively small minority. Senelle (1990:12) puts the total population at 9,947 million of which 57,6% inhabit the Dutch language territory, 32,6% the French language territory, and 9,8% the bilingual Brussels-Capital territory. Only 70 000 persons - less than 1% of the total population - were living in the German language territory at the time. Every municipality (*gemeente*) of the country forms part of one of the language territories (Belgium Constitution: article 4).

The boundaries of the four language territories are entrenched in the Constitution in a manner which requires substantial agreement between the two major language groups (Dutch and French) for any change to be effected. A law sanctioning such change has to be adopted in the national parliament with a majority of votes of the members belonging to each language group in each of the two houses, provided that the majority of the members of each language group is present, and provided further that the total of

the “yes” votes cast in both language groups constitutes at least two thirds of the votes exercised (Belgium Constitution: article 4). This special majority is required in numerous other places in the Constitution where the fundamental interests of the Dutch-speaking and the French-speaking groups as the major “stakeholders” in the state are at issue - *vide* for example articles 5, 35, 39, 115, 121, 123, 127, and 137.

The boundaries of the regions and of the language territories correspond to a large degree, but are not co-extensive. There is an exact fit between the boundaries of the Brussels Region and the bilingual language territory of Brussels-Capital. The outer boundaries of the Flemish Region follow those of the Dutch language territory, but with the co-extensive Brussels Region and bilingual territory of Brussels-Capital excluded from both the Flemish Region and the Dutch language territory. The Walloon Region includes both the French language territory and the German language territory within its boundaries. The way in which the various boundaries are drawn is less confusing when presented graphically. Senelle (1990:3) obligingly provides a “constitutional map” of the country, which is appended to the thesis as annexure 2.

The Flemish Region and the Walloon Region are each divided into five provinces, which can be sub-divided by means of a law (Belgium Constitution: articles 5-6). These subdivisions are presumably the municipalities as the very next article of the Constitution (article 7), which deals with changes to borders, refers inclusively to the state, the provinces, and the municipalities: *“De grenzen van de Staat, van de provincies en van de gemeenten kunnen niet worden gewijzigd of gecorrigeerd dan krachtens een wet”*.

The array of governments in Belgium encompasses the national, the community, the regional, the provincial, and the municipal authorities. The Constitution provides for the setting up of legislative and associated executive bodies for respectively the national, the community, and the regional authorities, and specifies how these are to be elected or chosen, and generally what their functions and powers will be - *vide* chapters I and III of title III of the Constitution, dealing with the federal parliament and the federal executive government, and chapter IV of title III, dealing with the legislative and executive bodies of the communities and the regions. The Constitution devotes a chapter (chapter VIII, title III) to provincial and municipal institutions, but provides little by way of detail concerning their composition, functions and powers, stipulating that

such institutions are to be regulated by law. The envisaged regulating law must ensure the application of certain principles, which are set out in the Constitution. Provision is made for the community or the regional councils to regulate the organisation and the exercise of administrative supervision for purposes of the implementation of a law adopted by special majority (*vide supra*). (Belgium Constitution: article 162.)

While the Constitution mandates separate sets of legislative and executive bodies for each community and each region, it provides that the Council of the Flemish Community and the Council of the French Community, and their executive governments, may exercise the powers relating to respectively the Flemish and Walloon Regions. Such an arrangement has to be sanctioned by a federal law adopted with a special majority (Belgium Constitution: article 137). The special majority is the one already referred to *supra*, and is obviously required in order to ensure that there is substantial consensus between the two major language groups regarding the amalgamation of authorities. The Flemish community has opted for such an amalgamated arrangement, with the result that the Council of the Flemish Community (formally designated *Vlaamse Raad*) and its executive government exercise both community and regional powers. The French community and the Walloon Region are served by separate institutions of legislative and executive government.

Against the foregoing brief description of the structure of government in Belgium, the assignment of responsibilities for the performance of public functions can be examined.

True to the professed federal character of the state, the federal government is vested with competence only in relation to those matters which the Constitution, or laws adopted in terms of the Constitution, expressly assign to it. The communities and the regions are vested with competence in relation to all remaining matters, subject to the conditions and in the manner determined by federal law, such a law having to be adopted with a special majority. (Belgium Constitution: article 35.)

The Constitution stipulates in article 38 that each community shall have the powers assigned to it by the Constitution or by laws adopted in terms of the Constitution. The powers referred to are set out in articles 127 and 128 of the Constitution in respect of the Flemish Council and the Council of the French Community, and in article 130 in respect

of the Council of the German speaking Community. The powers assigned relate to the following matters:

- (a) cultural matters;
- (b) education, excluding the determination of the commencement and the termination of compulsory schooling, minimum conditions for the issuing of diplomas, and pension matters;
- (c) co-operation between the communities as well as international co-operation with regard to cultural matters and education; and
- (d) matters bound up with the well-being of individual persons (the so-called *persoonsgebonden aangelegenheden*).

The Flemish Council and the Council of the French Community are authorised by the Constitution to regulate the use of languages with regard to specified matters in the Dutch language territory and the French language territory respectively, with certain exclusions (Belgium Constitution: article 129).

As to what constitutes cultural matters and *persoonsgebonden* matters respectively, the Constitution stipulates that these are to be determined by federal law, adopted in respect of both the Flemish community and the French community with a special majority (Belgium Constitution: articles 127-128, 130).

Senelle (1990:64-65) provides details of matters which have been determined as cultural matters by federal law, viz -

- (a) defence and promotion of the language;
- (b) promotion and training of researchers;
- (c) the fine arts;
- (d) the cultural heritage, museums and other scientific institutions;
- (e) libraries, record libraries and similar services;
- (f) radio and television broadcasting;
- (g) subsidies for the press;
- (h) youth policy;
- (i) continuing education and cultural promotion;

- (j) physical education, sports and open-air activities;
- (k) leisure and tourism;
- (l) pre-school education and day-care facilities;
- (m) post educational and para-scholastic training;
- (n) artistic training;
- (o) intellectual, moral and social training;
- (p) social advancement courses; and
- (q) occupational and vocational training, with certain exceptions.

There is no connotative definition of cultural matters - merely a list. With the exception of occupational and vocational training, no inclusive or exclusive stipulations or qualifications are attached to the cultural matters as listed. It would seem therefore that cultural matters as a category fit relatively easily into the Belgian model of community self-government. It is noteworthy that education is not shown as a cultural matter, but listed separately; however, its separate treatment should probably be seen as an acknowledgement of its special importance rather than as a denial of its cultural nature.

As regards *persoonsgebonden* matters, there is again no connotative definition in federal law; such matters also being determined denotatively (listed). According to Senelle (1990:68-69) *persoonsgebonden* matters can be grouped under two headings, as follows:

(a) Concerning health policy:

- ?? the policy on health care dispensed in and outside hospitals and clinics, with a number of important exceptions;
- ?? health education and preventive medicine activities and services, with the exception of prophylactic measures at national level.

(b) Concerning personal aid:

- ?? family policy;
- ?? social assistance policy, with substantial exceptions;
- ?? policy for the reception and integration of immigrants;

- ?? policy on the handicapped, including training, rehabilitation and vocational retraining, with certain exceptions;
- ?? policy on the elderly, with certain exceptions;
- ?? care and protection of minors, with a number of exceptions; and
- ?? social assistance to prisoners, with a view to their social rehabilitation.

Where matters are determined as *persoonsgebonden* but with certain exceptions, the exceptions relate mainly to funding, minimum allowances, uniform or minimum national standards, and the equitable dispensing of just treatment (Senelle 1990:68-69) - aspects which the federal legislators presumably regard as matters which can be dealt with effectively only at the national (federal) level of government. The specification of numerous exceptions in assigning *persoonsgebonden* matters to the community councils is indicative of an assignment category relatively more problematic than the cultural matters category.

As regards the regions, the Constitution provides for the regional legislative and executive bodies to regulate those matters determined by federal law, excluding matters assigned to the community authorities. According to Senelle (1990:74-125) ten major divisions of regional competence have been identified in federal law, viz -

- (a) town and country planning;
- (b) the environment;
- (c) rural development and nature conservation;
- (d) housing;
- (e) water policy;
- (f) economic matters;
- (g) energy policy;
- (h) subordinate matters;
- (i) employment policy; and
- (j) public works and transport.

Each major division consists of a number of stipulated matters - ranging from two to ten per division - with a total of 43 such matters (Senelle 1990:74-125).



As in the case of cultural and *persoonsgebonden* matters, so also in the case of regional matters the form of definition is denotative; no general (connotative) definition or distinguishing criterion, or set of criteria, as to what constitutes a regional matter, is in evidence. The formulation also does not follow any discernible pattern. In some instances, a matter is indicated by a single word or phrase; in others a matter is specified in some detail. In some instances, the assignment of a matter is qualified by indicating which aspects are specifically included; in others, by indicating which aspects are specifically excluded; in still others, the assignment is made subject to compliance with national or European standards or national policy.

As mentioned *supra* the Constitution requires that the law regulating provincial and municipal institutions must ensure the application of certain principles (Belgium Constitution: article 162). Three of the stipulated principles have a bearing on the assignment of responsibilities and are quoted in full:

*“De wet verzekert de toepassing van de volgende beginselen:*

1. ...
2. *de bevoegdheid van de provincieraden en van de gemeenteraden voor alles wat van provinciaal en gemeentelijk belang is, behoudens goedkeuring van hun handelingen in de gevallen en op de wijze bij de wet bepaald;*
3. *de decentralisatie van bevoegdheden naar die provincialen en gemeentelijke instellingen;*
4. ...
5. ...
6. *het optreden van de toezichthoudende overheid of van de federale wetgevende macht om te beletten dat de wet wordt geschonden of het algemeen belang geskaad.”*

The regulating law in question has not been examined; it presumably provides particulars of the matters to be dealt with by the provincial and municipal councils. For present purposes it is sufficient to note that while there is a constitutional injunction requiring the decentralisation of powers to provinces and municipalities, coupled to a somewhat tautological but unspecified requirement that the provinces and the municipalities deal with all matters of provincial or municipal interest, the reservation of

certain powers of approval and of intervention to the higher authorities places the provinces and the municipalities in a subordinate position to such authorities. To ascertain the exact nature and the extent of the responsibilities given to the provincial and local authorities for the performance of public functions would require further detailed research.

The Constitution anticipates the possibility of conflicts of power and of interests arising within the system of government. Title III, chapter V of the Constitution stipulates how conflicts in three areas are to be prevented or dealt with: firstly, conflicts of competence between laws (federal government), decrees (community and regional governments), and rules (regional governments); secondly, conflicts of interest between legislative bodies; and thirdly, conflicts of interest between executive bodies. An arbitration court is established to resolve conflicts between laws, decrees and rules, and to rule on laws, decrees and rules which transgress specified articles of the Constitution.

The Constitution as such does not provide specifically for co-operation between the various authorities, but special legislation has been adopted with a view to the promotion of intergovernmental co-operation (Senelle 1990:150-155). The legislation in question provides for the state, the communities and the regions to conclude co-operation agreements on a voluntary basis relating in particular to the joint creation and management of common services and institutions, the joint exercise of sole competences, and the development of common initiatives. Provision is also made for the cross-representation of the national authority, the community authorities and the regional authorities on the decision-making and management bodies of national, community and regional institutions. These provisions are significant in the context of the assignment of responsibilities to governments, pointing to the apparent difficulty of achieving a mutually exclusive demarcation of competences between the various levels and spheres of government.

In conclusion, two features of the scheme for the assignment of responsibilities in Belgium need to be specially noted. These are, firstly, the evident complexity of the scheme, attributable in large part to the adoption of a dual basis of assignment - community / regional - and, secondly, the extent and the intensity of the recognition

given to cultural diversity - based essentially on language - in devising an acceptable system of government. The two features would appear to be closely linked: complexity in constitutional arrangements - and by implication in government and administration - is, judged on the Belgian model, probably unavoidable if cultural diversity existing within the same state is to be accommodated meaningfully in the formal deployment of legislative and executive authority for the performance of public functions.

#### 4.4 Germany

Germany is a federation at present consisting of sixteen states or *Länder*. The *Grundgesetz* adopted in 1949 by the parliaments of a number of then existing *Länder* (FPIO 1989:3-4) serves as the country's constitution (hereinafter referred to in this section as "the Basic Law"). Although the Basic Law applies to all *Länder* which have formally acceded to it (Basic Law: article 23), it did not bring the *Länder* into existence; the Basic Law was in fact created by and made applicable to the *Länder* by the voluntary action of the *Länder* themselves, and with the approval at the time of the country's military governors (FPIO 1989:3-4). As a consequence the *Länder* are regarded as having their own sovereignty which is not derived from the Federation (FPIO 1989:10). This perceived status of the *Länder* is borne out by the provisions of the Basic Law dealing with the organs of government of the Federal Republic. Although the Basic Law deals comprehensively with the composition, functions and powers of the federal legislative and executive authorities - the federal parliament (*Bundestag*), the federal council (*Bundesrat*), the federal president, and the federal government - it has relatively little to say about *Land* authorities. Its provisions in this connection are nevertheless noteworthy and are examined in the following paragraphs.

The Basic Law stipulates that the constitutional order in the *Länder* shall conform to the principles of a republican, democratic and social state governed by the rule of law (article 28(1)), as well as to the basic rights guaranteed to the German people (article 28(3)). It refers in passing to lower tiers of government within the *Länder*, viz the counties (*Kreise*) and the municipalities (*Gemeinden*), in a stipulation which requires people to be represented by bodies chosen by "general, direct, free, equal and secret elections" (article 28(1)). The Basic Law then proceeds to guarantee to the

municipalities the right to regulate, on their own responsibility, all local affairs within the limits of the laws. It is stipulated further that associations of municipalities also have the right of self-government according to the laws. (Basic Law: article 28(2).) For the rest the Basic Law is silent as to the nature and the composition of the institutions of government of a *Land*, or of the subordinate authorities within a *Land*. In the government publication already referred to it is stated that each *Land* has an elected parliament, a government elected by its parliament, and its own administrative authorities. Mention is made of the right of self-government enjoyed by the communes (municipalities) which, it is stated, is exercised primarily by the elected town council. It is stated further that the counties - comprising several communes (municipalities) - also have elected parliaments and the right of self-government. It is noted in the publication that the counties together with the communes (municipalities) constitute the lowest tier of government. (FPIO 1989:11.)

True to the professed federal character of the state, the Basic Law confers residuary competence on the *Länder*. Article 30 states that " ... Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*". The federal authorities shall thus govern by exception, so to speak. This typically federal approach is reinforced by a stipulation that the *Länder* shall have the right to legislate in so far as the Basic Law does not confer legislative powers on the Federation (article 70(1)). However, as will be apparent on further examination of the Basic Law, the overtly federal foundation of the state has not prevented the federal government from achieving a position of dominance in the legislative domain.

For the assignment of legislative authority to the Federation and the *Länder* respectively, a relatively complex scheme is set out in the Basic Law. Having placed residuary legislative authority with the *Länder*, the Basic Law then proceeds to establish three categories of matters in respect of which legislation can be adopted by the Federation and the *Länder*, and to assign specific matters to each category. The three categories are examined in the following paragraphs.

In respect of certain matters the Federation has the exclusive power to legislate. These matters are listed in article 73 of the Basic Law, and comprise -

- (1) foreign affairs and defence, including protection of the civilian population;
- (2) citizenship in the Federation;
- (3) freedom of movement, passports, immigration, emigration and extradition;
- (4) currency, money and coinage, weights and measures, and the determination of standards of time;
- (5) the unity of the customs and trading area, treaties respecting commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;
- (6) air transport;
- (6)(a) the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance and operation of tracks belonging to federal railways as well as the imposition of charges for the use of such tracks;
- (7) postal and telecommunication services;
- (8) the legal relations of persons employed by the Federation and federal corporations under public law;
- (9) industrial property rights, copyrights and publishing;
- (10) co-operation between the Federation and the *Länder* concerning -
  - (a) criminal police work,
  - (b) protection of the free democratic basic order, existence, and security of the Federation or of a *Land* (protection of the constitution), and
  - (c) protection against activities within the federal territory which, by the use of force or by the preparations for the use of force, endanger the external interests of the Federal Republic of Germany, as well as the establishment of a Federal Criminal Police Office and international action to combat crime; and
- (11) statistics for federal purposes.

The second category in the assignment scheme is one encompassing matters in respect of which the Federation and the *Länder* have *concurrent* powers to legislate. These matters are listed in articles 74 and 74a of the Basic Law. The list has been amended and expanded over the years; in 2003 it comprised some 29 items. It covers a wide array of public functions, including civic matters, the justice system, social matters,

welfare matters, and economic regulation and protection. The full list is appended to the thesis as annexure 3.

The third category in the assignment scheme encompasses matters in respect of which the Federation has the power to adopt what is referred to as “framework” legislation. Framework legislation may only in exceptional cases contain detailed and directly applicable regulations. (Basic Law: article 75(1)-(2).) The intention presumably is that in respect of identified matters the Federation should not regulate in a detailed manner but restrict itself to the stipulation of principles and basic parameters, leaving room for the *Länder* to adopt their own legislation regulating such matters in greater detail, while remaining within the limits set by the framework law. Should the Federation enact framework legislation, the *Länder* are obligated to enact the required *Land* legislation within a reasonable period prescribed by law (Basic Law: article 75(3)). By 2003 the following matters had been listed in the Basic Law (article 75(1)) as matters in respect of which the Federation could adopt framework legislation:

- (1) The legal relations of persons in the public service of the *Länder*, municipalities or other corporate bodies under public law;
- (1)(a) the general principles respecting higher education;
- (2) the general legal relations of the press;
- (3) hunting, nature conservation and landscape management;
- (4) land distribution, regional planning and the management of water resources;
- (5) matters relating to the registration of residence or domicile and to identity cards;  
and
- (6) measures to prevent expatriation of German cultural assets.

Of the three categories of matters in the German assignment scheme, the category of concurrent powers would appear to be especially problematic, and justifies closer examination. With both the Federation and the *Länder* empowered to legislate on certain matters, it is obviously necessary to have clarity as to the circumstances in and extent to which each can legislate in relation to such matters. The Basic Law supplies this need by stipulating certain ground rules which are to apply in the exercise of powers of concurrent legislation. These rules are as follows:

- (a) The *Länder* have the competence to legislate in the area of concurrent legislation as long and in so far as the Federation has not made use of its legislative competence in that area (Basic Law: article 72(1)).
- (b) The Federation has the right to legislate in the area of concurrent legislation if and in so far as the establishment of equivalent living conditions throughout the federal territory, or the maintenance of legal and economic unity in the national interest, requires legislative regulation by the Federation (Basic Law: article 72(2)).
- (c) Should the necessity for federal legislative regulation as envisaged by article 72(2) no longer exist, it can be determined by means of a federal law that such regulation can be replaced by *Land* legislation (Basic Law: article 72(3)).
- (c) Federal law takes precedence over *Land* law (Basic Law: article 31). (This general constitutional injunction is presumably qualified by a requirement that the federal law must satisfy the test of constitutionality, especially in regard to the exercise of concurrent powers.)

The wording of article 72(2) of the Basic Law, which limits the Federation's right to legislate in the area of concurrent legislation – *vide* subparagraph (b) in the preceding paragraph – is an amended formulation introduced in October 1994 (Flanz 1995: ix, xi). The date of the amendment is significant as the German model of concurrent powers was applied in the drafting of South Africa's 1993 Constitution – implemented on 27 April 1994 – and largely retained in the drafting of the 1996 Constitution. It is insightful to note how the limitation was worded at the time of the adoption of the 1993 Constitution in South Africa.

Prior to its amendment in October 1994, article 72(2) of the Basic Law provided that the Federation could legislate in the area of concurrent legislation where –

- (a) a matter cannot be effectively regulated by the legislation of individual *Länder*, or

- (b) regulation by a *Land* might prejudice the interests of other *Länder* or the country as a whole; or
- (c) the maintenance of legal and economic unity, especially uniform living conditions beyond the territory of any one *Land*, calls for federal legislation.

By the amendment of article 72(2) in October 1994 the limitations referred to in the foregoing subparagraphs (a) and (b) were dispensed with, while the limitation referred to in subparagraph (c) was in essence retained. On the face of it, the amendment serves to further limit the role of the Federation in the area of concurrent legislation, although it would seem that the relatively wide formulations employed – “establishment of equivalent living conditions” and “maintenance of legal and economic unity” – still provide the Federation with considerable latitude for the adoption of legislation in the area in question.

The Basic Law is unusual in the clear constitutional distinction it draws between the making of laws and the execution of laws. Article 83 stipulates that the *Länder* shall implement federal legislation in their own right in so far as the Basic Law does not provide or permit otherwise. Where the implementation of federal laws is left to the *Länder*, provision is made for the federal government to issue general administrative rules and to conduct direct supervision through inspections carried out by designated commissioners (Basic Law: article 84). The ordering of administration between the Federation and the *Länder* is typically federalist; the federal government is competent to administer only those matters specifically assigned to it, all other matters fall within the administrative competence of the *Länder*.

Against the background of a complex assignment scheme, the performance of public functions in Germany would appear to have resolved itself over the years into a situation in which, broadly speaking, the Federation determines policy (makes laws) and the *Länder* execute policy (administer laws). There are however substantial exceptions; the official publication already referred to identifies especially culture, education, and public safety as fields in which the *Länder* have considerable jurisdiction (FPIO 1989:10). The key factor in the general course of development would appear to have been the rise to dominance of the Federation in the area of concurrent legislation (Laufer 1991:117). It is to be noted in this respect that, as pointed out *supra*, the Federation



has first option to legislate in relation to matters falling within the concurrent powers category. The Federation would appear to have exercised this option fully. The Federation's role has been strengthened by a decision of the Federal Constitutional Court that any question as to whether there is a need for federal regulation falls to be decided by the federal legislators (Laufer 1991:117). It remains to be seen whether the amended article 72(2) of the Basic Law will substantially alter the legislative relationship between the Federation and the *Länder*.

The concept of concurrent legislative powers is examined further in chapters 6 and 7 of the thesis, dealing respectively with the 1993 and the 1996 Constitutions adopted in South Africa.

As indicated *supra*, no details are provided in the Basic Law as to the powers assigned to the local level of government, made up of counties and municipalities. A guaranteed right is given to the municipalities to regulate, on their own responsibility, all the affairs of the local community, but the right is qualified by a requirement that such regulation is to take place within the limits of the laws (Basic Law: article 28(2)). "Limits of the laws" is taken to refer to provisions and stipulations contained in laws of both the Federation and the *Länder*. To ascertain exactly what powers are exercised by counties and municipalities in Germany it would be necessary to identify and peruse all relevant statutes of the Federation and the sixteen *Länder*.

The Basic Law does not provide a general definition or criterion, or set of criteria, for determining which responsibilities properly belong with the Federation and the *Länder* respectively. The provision made for concurrent legislative powers, together with the stipulated rules for their exercise, presents its own peculiar problems of interpretation and accessibility. Throughout the Basic Law the matters concerning which laws can be made are listed denotatively and in no particular order. Matters are identified mostly as nominal subjects – for example "foreign affairs", "defence", and "citizenship" – with only a few instances of the employment of function style formulations – for example "operation of railways", "registration of births, deaths and marriages", and "promotion of agricultural production and forestry".

## 4.5 Spain

Spain is a hereditary monarchy with its system of government and administration arranged in three basic tiers, viz national, provincial and municipal (*vide infra* regarding the possible establishment of autonomous communities). The Spain Constitution (hereinafter referred to in this section as “the Constitution”), sets out comprehensively the functions and powers of the King (title II), the *Cortes Generales* or national parliament (title III) and the national political executive (title IV). The constitutional provisions concerning the provinces and the municipalities are, by contrast, notably sparse. The Constitution stipulates (article 137) as a general principle - but rather vaguely - that the municipalities and the provinces “ ... enjoy autonomy for the management of their respective interests”. Chapter II of title VIII of the Constitution, under the heading “Concerning local administration”, contains two articles dealing with the municipalities and the provinces respectively. These are examined below.

Article 140, dealing with the municipalities, stipulates that the municipalities shall enjoy “full juridical personality”; that their government and administration is the responsibility of their own city governments which are made up of mayors and councilmen; that the councilmen shall be elected by the residents; and that the mayors shall be elected by either the councilmen or by the residents. There is no indication in the Constitution of the public functions or aspects of public functions falling within the competence of the municipalities. In the absence of such an indication it is assumed that municipal competences are established by laws and regulations emanating from the national level of government, or possibly from the autonomous communities (*vide infra*), with the residuary legislative competence vesting in the national parliament.

Article 141 of the Constitution contains provisions relating to the provinces. According to the available English translation of the article, a province is “ ... a local entity with its own juridical personality determined by the collection of municipalities and territorial division for the fulfilment of the activities of the State” (*sic*). The article goes on to stipulate that the government and “autonomous” administration of the provinces shall be entrusted to “deputations or corporations” of a representative nature. In other parts of the Constitution the terms “deputation” and “corporation” in relation to provincial government are used interchangeably (*vide* for example article 143.2). In the absence

of any reference to an electoral process it would seem that the deputation or corporation of a province is a body nominated by the elected councils of the constituent municipalities. It would seem further that the boundaries of the provinces are determined so as to be suitable for the rendering of state services on a regional basis - *vide* the reference *supra* to “... territorial division for the fulfilment of the activities of the State”. As in the case of the municipalities, no detail is provided as to the specific competences of the provinces; however, there is a reference in article 142 to the functions which “the law” - presumably a national law or possibly decrees or regulations of the autonomous communities (*vide infra*) - attributes to the respective corporations. Again, the deduction is made that the residuary legislative competence vests in the national parliament.

In addition to the basic three-tiered structure of government the Constitution makes provision for adjacent provinces with common historical, cultural, and economic characteristics to accede to self-government by constituting themselves into an autonomous community (Spain Constitution: article 143.1). The initiative to bring about an autonomous community is to be taken by the deputations of the provinces concerned and the constituent municipalities. For an initiative to proceed it must enjoy the support of two-thirds of the municipalities in each of the provinces concerned, and the supporting municipalities must represent the majority of the electorate in the province (Spain Constitution: article 143.2). The next step is the drafting of a statute for the autonomous community, a task to be taken in hand by an assembly consisting of the deputations of the provinces concerned and the deputies and senators elected to represent those provinces in the national parliament. The draft of the statute is forwarded to the national parliament for enactment into law. (Spain Constitution: article 146.) It is to be noted that provinces which satisfy the basic criteria for constituting themselves into an autonomous community, are not obliged to do so; it is an option which they may choose to exercise. The principle at issue here, is that of *voluntarism*.

The Constitution lists 22 matters in respect of which an autonomous community may assume competence, including the organisation of its institutions of self-government (Spain Constitution: article 148.1). An extract of the article referred to is appended to the thesis as annexure 4. The matters in question are listed in no particular order. In some instances a function or activity is indicated, as for example the “promotion of

sports and adequate utilisation of leisure”; mostly, however, nominal subjects are listed, as for example “public works”, “railways and highways”, and “ports of refuge”. There is no connotative definition of what properly constitutes a matter to be placed under the authority of an autonomous community, or any criterion or set of criteria for identifying such a matter. From the wording of article 148.1 - “The Autonomous Communities *may* (author’s emphasis) assume competences in the following matters: ... “ - it is evident that an autonomous community is not legally obligated to assume competence in respect of all the matters listed; the matters for which it will in fact assume competence will be as determined in its founding statute. The list of matters contained in article 148.1 can therefore be said to constitute a menu of competences from which the founders of an autonomous community are at liberty to make a selection. By implication the competences assigned to an autonomous community may differ from one such community to another. From an assignment perspective the application of the principle of *asymmetry* is apparent.

The Constitution goes on to provide that an autonomous community may, after a period of five years has elapsed since its founding, expand its competences. The expansion of its competences is to be effected by the “reform” of its founding statute (Spain Constitution: article 148.2). Having listed the matters in respect of which an autonomous community may initially assume competence (article 148.1), the Constitution changes to a completely different style of drafting in dealing with the expansion of competences. It lists the matters in respect of which the state has exclusive competence and then stipulates that matters not attributed expressly to the state may pertain to the autonomous communities by virtue of their respective statutes. Authority over matters not assumed by an autonomous community vests in the state. (Spain Constitution: articles 149.1, 149.3) A copy of the list of matters falling within the exclusive competence of the state is appended to the thesis as annexure 5. The defects noted in relation to the list of initial matters for which an autonomous community may assume competence - *vide* preceding paragraph - is again in evidence: no particular order is discernible in the listing, there is no consistency in the listing of matters as either functions or nominal subjects, and there is no general definition or criterion or set of criteria for determining what rightly belongs with the various levels or spheres of government.

The Constitution provides for a “fast-tracking” process whereby an autonomous community can be established with the immediate assumption of competence for matters potentially assignable to such a community, that is to say without waiting for a period of five years to elapse before competence regarding additional matters is assumed. This requires the support of three-quarters (rather than two-thirds) of the municipalities of each province, and ratification of the initiative by means of a referendum amongst the electorate of each province. (Spain Constitution: article 151.1.)

From the perspective of the present study, the general scheme adopted in the Spain Constitution for the assignment of responsibilities to the various levels and spheres of government can be criticised on two grounds. Firstly, virtually no indication is given of the matters to be dealt with by the provinces and the municipalities, a shortcoming which tends to create the impression that these levels of government are considered to be of lesser importance. The provincial and municipal competences are presumably contained in various laws and regulations of the national government (and possibly also of the autonomous communities) and, this being the case, it will be necessary to peruse all such laws and regulations in order to build a picture of the public functions, or aspects of public functions, which are to be performed by the provincial and municipal authorities respectively. This is a situation which may tend to work against the achievement of a satisfactory degree of transparency and accountability in government and administration. Secondly, the basis on which the competences of the autonomous communities are to be determined, and more especially the additional competences to which such communities can aspire, tends to obfuscate rather than to clarify the division of responsibilities. There is no indication of the specific matters for which an autonomous community can assume responsibility in addition to those appearing in the basic list, but instead a list is provided of matters falling within the exclusive competence of the national state, together with an indication that whatever has not been listed, could become the responsibility of an autonomous community through the amendment of its statute. The employment of what could be called a mechanism of dual denotation - partly positive (matters included) and partly negative (matters excluded) - for purposes of determining the full scope of an autonomous community's competences, could be regarded as a convoluted way of proceeding where accessibility ought to be an important consideration. A concomitant difficulty is the impossibility of ascertaining by

way of a perusal only of the Constitution what the full potential scope of the competences of an autonomous community is.

#### **4.6 United Kingdom**

Significant changes regarding the exercise of governmental powers at subnational level occurred in the United Kingdom in 1998 with the adoption of the Scotland Act 1998, and the Government of Wales Act 1998. Popularly referred to as “devolution” or “home rule” the arrangements set in place by the two Acts modified to a substantial degree the centralised form of government which had been in existence in the United Kingdom for centuries. The changes introduced were more far reaching in the case of Scotland than in the case of Wales. The Scotland Act 1998 (hereinafter referred to as the Scotland Act) established a parliament in Scotland with original legislative powers (Scotland Act: sections 1, 28). In Wales the key new institution of government introduced was the Assembly which, although an elected body, will not exercise original legislative powers but act essentially as a subnational executive government, exercising powers transferred to it by the national government (Government of Wales Act 1998: sections 21-22).

The developments regarding Wales are of limited relevance to the subject of the present study and are therefore not examined further.

The Scotland Act set in place the Scottish Parliament to make laws for Scotland (sections 1(1), 27(1)), and the Scottish Executive, consisting of a first minister and other ministers (section 44) to perform those functions of a minister of the Crown (of the United Kingdom) which are conferred upon them in so far as they are “exercisable within devolved competence” (sections 52-53). The Acts which originally constituted the United Kingdom - the Union with Scotland Act 1706 and the Union with England Act 1707 - continue to have effect, but subject to the Scotland Act (section 37).

The assignment of legislative responsibilities to the Scottish Parliament is effected in the following manner: The new parliament is empowered to make laws, to be known as Acts of the Scottish Parliament, but only to the extent of its legislative competence

(Scotland Act: sections 28(1), 29(1)). A number of restrictions are placed on the legislative competence of the Scottish Parliament (Scotland Act: section 29(2)), and amongst these is a restriction on the making of laws in relation to “reserved matters”, such matters being reserved to the legislative competence of the Parliament of the United Kingdom. Reserved matters are grouped into two broad categories, viz “general reservations” and “specific reservations”, stipulated in parts I and II respectively of schedule 5 of the Act.

The matters falling in the “general” category of reserved matters are as follows:

- (a) Certain matters concerning the Crown and other constitutional features;
- (b) the registration and funding of political parties;
- (c) foreign affairs, including international trade, development assistance and co-operation;
- (d) the civil service;
- (e) defence; and
- (f) treason.

A number of qualifications are attached to the general reservations made, with the treatment of the subject complicated by the attachment of further qualifications to some of the primary qualifications (Scotland Act: schedule 5, part I), making it difficult to establish to what extent certain matters falling in the “general” category are actually reserved or not reserved.

The “specific” reservations encompass a host of matters grouped under 11 main heads and 67 sub-heads, covering 25 pages of print (Scotland Act: schedule 5, part II). The 11 main heads are as follows:

- (a) Financial and economic matters;
- (b) home affairs;
- (c) trade and industry;
- (d) energy;
- (e) transport;
- (f) social security;

- (g) regulation of the professions;
- (h) employment;
- (i) health and medicines;
- (j) media and culture; and
- (k) miscellaneous.

In describing the items under each sub-head of the 11 main heads of reserved matters various styles of presentation are employed, for instance -

- (a) a short descriptive statement, further elaborated by a concatenation of matters specifically included;
- (b) a short descriptive statement, followed by an indication of exceptions (matters specifically excluded);
- (c) a short descriptive statement, without an indication of any inclusions or exceptions;
- (d) no descriptive statement, but a reference to existing Acts or parts of existing Acts;
- (e) a combination of the foregoing; and
- (f) in some cases a repetition of the wording of the sub-head, as in -

"B11. Extradition

Extradition".

Despite the detail provided, part II of schedule 5 presents a formidable challenge to the researcher wishing to establish the actual scope of the law-making powers of the Scottish Parliament. The problem goes beyond the somewhat convoluted presentation and qualification of reserved matters. The major difficulty lies in the fact that the Act does not stipulate what the Scottish Parliament *may* legislate on, but instead what it *may not* legislate on. The matters actually within the legislative competence of the Scottish Parliament presumably fall within the space surrounding and intervening between the 11 categories with their 67 sub-categories of matters reserved to the Parliament of the United Kingdom. The exception to this essentially negative treatment of the subject is to be found in the exceptions indicated at places in the list of reservations, where the statement of an exception to a reservation has the effect of



serving as a positive indication of a matter or aspect of a matter on which the Scottish Parliament may actually legislate. (To illustrate, using a hypothetical example: You may not legislate on trees, except oak trees; therefore you may legislate on oak trees.) To ascertain the true extent of the legislative powers of the Scottish Parliament would require a systematic study going far beyond the provisions of the Scotland Act, encompassing the whole of the existing body of United Kingdom law, as well as some speculative work concerning what could constitute appropriate areas for legislative intervention in a democratic society, and which are not already covered by national legislation.

On the face of it, and somewhat surprisingly, a “federal” model would seem to have been applied in the assignment of responsibilities between the national and the subnational level: the matters in respect of which the Parliament of the United Kingdom may legislate have been specified (reserved), leaving all unspecified matters within the legislative competence of the Scottish Parliament. The residuary power thus seemingly resides in the subnational government. However, on closer examination of the Scotland Act it will be found that this is not the case. Section 27(7) of the Act stipulates that the power given to the Scottish Parliament to make laws does not affect the power of the Parliament of the United Kingdom to also make laws for Scotland. The supremacy of the national parliament is therefore maintained, and is all-inclusive. In effect the Scottish Parliament is empowered to legislate by leave of the Parliament of the United Kingdom, leading to the conclusion that, fundamentally, residuary power continues to vest in the national legislature.

#### **4.7 Evaluation**

Based on the sample of five countries selected for examination, there would appear to be a general consensus concerning certain public functions which must be performed at the highest level of government: these are defence, foreign affairs, and public finance. For the rest there is no general uniformity evident as to the way in which the assignment of responsibilities to levels or spheres of government is dealt with in the constitutional arrangements of the five countries. The general finding is that each country tends to assign responsibilities to subnational levels or spheres of government in its own peculiar

manner. (There is a noteworthy degree of similarity between the German and South African assignment schemes in regard to the concept of concurrent powers, but South Africa was not included in the present sample, its approaches to the assignment of responsibilities being dealt with extensively in chapters 5, 6, and 7 of the thesis.)

The ways in which responsibilities are assigned in the various constitutional texts are generally remarkable for their complexity rather than their accessibility. To obtain a full and accurate picture of the assignment of responsibilities in a country requires a concerted effort on the part of the researcher. The following are some prime examples of the complexity evident in constitutional arrangements: In the case of one of the countries studied - Belgium - a dual basis of division is applied, viz cultural and regional-hierarchical, resulting in a complex matrix of authorities, functions, and powers. The complexity can of course be ascribed in large part to the importance attached to the need to recognise in a meaningful manner the linguistic-cultural composition of the population, and to provide for each group to govern itself to the greatest extent compatible with national unity. Complexity would appear to be the price to pay for the differentiated arrangements. The employment of the concept of concurrent powers - as found in the German constitution - coupled to rules for determining legislative primacy, may serve to facilitate the task of legal drafters, but by its very nature does not serve to provide a clear, unambiguous picture of where the legislative domains of the respective levels of government begin and end. Concurrent powers may also tend to disguise the fact that in practice such powers will most likely be exercised predominantly by the national government. Complexity in constitutional texts can be illustrated further by citing the use of negative denotation for purposes of ordering responsibilities between levels or spheres of government, as encountered for instance in Spain and the United Kingdom. The practice of stating not what a subnational government may legislate on but what is excluded from its legislative competence, tends to work against a ready understanding of the extent of the subnational government's actual legislative competence.

Taxonomically, the treatment of the assignment question is generally poor. There is little by way of connotative definition to be found, that is to say an indicative basis for determining the matters or classes of matters to be entrusted to the various levels or spheres of government within the state, is generally lacking. The preferred approach is

to provide lists of matters without any attempt to set up categories of related matters or to arrange matters in any particular order - not even alphabetically. The language used in alluding to matters is lacking in precision and consistency. References are mostly to nominal subjects (education, health, etc.) rather than to public functions *per se* (provision of education, promotion of health, etc.) There is also little evidence of any systematic attempt to identify and define aspects or constituent parts of a public function (such as for example the formulation and adoption of legislation, the provision of services, and control) and to indicate which aspect belongs with a particular level or sphere of government.

Ideally - and admittedly an ideal situation may be difficult to obtain in practice - a country's constitutional framework should clearly demarcate the respective domains of legislative and executive authority of each level or sphere of government. The present research leads to the finding that in none of the countries studied, such a comprehensive, clear, definitive demarcation of responsibilities has been achieved. The statutory provisions dealing with the assignment of responsibilities are often replete with exclusions and qualifications - generally tending to assert the authority of the national government *vis-a-vis* subnational levels or spheres of government. The difficulty of achieving a precise demarcation of responsibilities is formally recognised by constitutional stipulations providing for the resolution of domain disputes by the courts - for example in the cases of Australia, Belgium and Germany.

A common failing in regard to the assignment of responsibilities is evident in the case of local government, where the constitutional provisions are notably sparse, and local government is generally left to be regulated by laws enacted by higher levels or spheres of government. On the assumption that to the ordinary citizens of a country the actions and omissions of their local government are particularly important in determining the quality of their lives, the largely dismissive way in which the various constitutions treat the responsibilities of local government, can be regarded as a major shortcoming. It would not be unreasonable to argue that all levels or spheres of government that are formally (constitutionally) recognised in a country should, by virtue of such recognition, be viewed and treated as essential cogs in the total system of government and administration, and that their respective responsibilities should be set out with equal care in the constitutional framework. A holistic approach to the assignment question,

covering the responsibilities of all levels or spheres of government, and the interrelationships between assigned responsibilities, would appear to be called for if a satisfactory and defensible assignment of responsibilities within a state is to be achieved.

Although the research into the assignment schemes of other countries was of limited extent, some observations can be made concerning the realisation in practice of federal and unitary models of state organisation. In theory, a federal model of state organisation is one in which certain specified functions and powers are assigned to the national government, leaving all other functions and powers to be performed and exercised by the subnational governments, including functions and powers in respect of possible fields of government intervention not yet identified (usually referred to as residuary powers). A unitary model would employ the opposite approach to the deployment of functions and powers: here the functions and powers of the subnational entities would be specified, leaving all other functions and powers, including residuary powers, with the national government. On the basis of the study undertaken, and strictly from the perspective of the assignment of responsibilities to levels or spheres of government, the classification of each of the five states as either a federation or a union would be problematical. The possible exception is Australia, which would appear to be essentially federal, although the large number of matters assigned to the national government needs to be noted. Frequently there is a specification of responsibilities in respect of both the national and the subnational levels or spheres of government, with a substantial degree of linkage, featuring many inclusions, exclusions and qualifications. Each state's arrangements would appear to be *sui generis*, with both federal and unitary approaches discernible, and such approaches mixed in various ways. Unstudied references to (or formal declarations identifying) states as either federations or unions may not be borne out by the manner in which responsibilities are actually deployed amongst levels or spheres of government.

#### **4.8 Conclusion**

In this chapter the research undertaken into the manner in which a sample of countries assign responsibilities for the performance of public functions has been reported on.

Throughout, the study was based mainly on the founding statutory instruments – the constitutions of Australia, Belgium, Germany, and Spain and, in the case of the United Kingdom, the Scotland Act 1998 – in which institutions of government are set up and functions and powers allocated to them. The appropriate parts of these basic legal texts have been examined, analysed, described, and commented on critically. Some comment of experts was included, but only where it was considered necessary in order to bring out certain features of an assignment scheme more fully or clearly than the particular constitution itself conveys.

The overall picture which emerges from the study is that each country has adopted its own peculiar approach to the assignment of responsibilities. The various assignment schemes generally display a marked degree of complexity while, from a taxonomic perspective, the treatment of the assignment question in legal texts leaves much to be desired. In all five countries the perfunctory treatment accorded the local level or sphere of government in the constitutional domain is particularly notable, and difficult to reconcile with the substantial impact which a local government can have on the quality of life of its community. On the basis of the study, it is necessary to proceed with caution in classifying a state as either a federation or a union; more typically a country's scheme for the assignment of responsibilities tends to evince both federal and unitary characteristics.

Against the background provided in this chapter of assignment schemes operative in a selection of other countries, the assignment of public function responsibilities in South Africa can be attended to, commencing with a historical overview; this is presented in the next chapter.

## **CHAPTER 5: ASSIGNMENT OF RESPONSIBILITIES IN SOUTH AFRICA: HISTORICAL OVERVIEW**

### **5.1 Introduction**

The purpose of this chapter is to provide a historical overview of the assignment of responsibilities for the performance of public functions to levels or spheres of government in South Africa, from the time of the establishment of the Union of South Africa in 1910 up to the implementation of the first fully inclusive, democratic constitution in 1994. The history to be dealt with is a relatively complex one, with the explanation of the complexity to be found largely in the differentiated treatment of the various population groups in South Africa prior to 1994. The chapter commences by noting the racially and ideologically determined background to the institution and development of governmental structures in South Africa. It proceeds to an examination of the forms and salient features of governments instituted during the review period, distinguishing between what is regarded as the core system of government and certain racially focused supplementary systems which emerged from about the middle of the last century. The chapter then examines the way in which responsibilities were assigned to levels or spheres of government during the review period. This is followed by a general evaluation of the assignment of responsibilities prior to 1994. Finally, a conclusion is drawn regarding the research.

### **5.2 Background**

The South African state was brought into being in 1910 in terms of section 4 of the South Africa Act 1909, an Act passed by the British Parliament and assented to by the British monarch (Wiechers 1985:199-200). The Act (hereinafter referred to as the 1909 Constitution) provided for the unification of four British colonies, viz the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony, into the Union of South Africa. On the establishment of the Union the aforementioned colonies became the provinces of the Union, with retention of their boundaries and names, except in the

case of the Orange River Colony which was renamed the Orange Free State. The combined territory of the former colonies constituted the territory of the new state. (1909 Constitution: sections 4, 6.)

From the outset the new state could at best be seen as a partial democracy, qualified as to the participation of various racially defined groups of citizens in the parliamentary system of government. The 1909 Constitution stipulated that Parliament may by law prescribe the qualifications of voters, with a proviso in respect of the province of the Cape of Good Hope, viz that persons eligible to vote under the laws of the former colony, could not be disqualified on grounds of race or colour unless the Bill purporting to do so be passed by a two-thirds majority of a joint sitting of both houses of Parliament (section 35(1)). The Constitution also prohibited the disenfranchisement of any person registered to vote in any province by reason only of a disqualification based on race or colour (section 35(2)).

Significantly, the 1909 Constitution did not extend the right to vote to those persons who at the time of the establishment of the Union were excluded from the franchise on the grounds of race or colour. In effect, Black, Coloured and Indian persons were disqualified from voting in the Transvaal and the Orange Free State. Black persons could vote in the Cape of Good Hope and Natal, but the qualification requirements were such as to severely restrict their numbers (Cloete 1992:31, 225; Wiechers 1985:299). In 1935 there were, according to Cloete (1992:225), 10 628 Black persons registered as voters in the Cape of Good Hope and one in Natal. Coloured and Indian persons could vote in the Cape of Good Hope and Natal, provided that in the case of Indian persons in Natal, they had gained the right to vote prior to 1896 (Cloete 1992:225). Over the years a number of legislative measures were adopted which had the effect - as far as elections to Parliament were concerned - of disenfranchising persons who were not members of the White population group (Cloete 1992:32-33). By 1970, as a result of the unfolding of the apartheid policy, all population groups other than the White group had been formally disqualified from participating in parliamentary elections (Cloete 1992:32-33; Wiechers 1985:299-300).

Synoptically stated, the position in South Africa prior to 1994 was that only citizens of European extraction - who by 1950 had been designated formally as "Whites"

(Population Registration Act 30 of 1950) - could be said to have enjoyed an entitlement to full democratic participation in the South African system of government, on the basis of the right to vote in parliamentary elections, to be elected to Parliament and, in the final analysis, to determine the political make-up of the national government. The other population groups - designated formally by or in terms of the Population Registration Act 30 of 1950 as "Blacks", "Coloureds" and "Indians" respectively - were largely denied participation through successive constitutional dispensations together with the restrictive functioning of laws governing the franchise. (Cloete 1992:31-33; Wiechers 1985:299-300.) Their constitutional situation was, however, not a static one; the period from about the middle of the previous century up to the dawning of the democratic era in 1994 was marked by a series of attempts to accommodate them constitutionally in various ways, as described *inter alia* by Basson and Viljoen (1988: chapter 8). The complexity in the structure and functioning of government which resulted from these attempts at accommodation is evident from the South African statute book and the published works of constitutional law and public administration experts (Basson & Viljoen 1988; Cloete 1992; Wiechers 1985).

### **5.3 Governmental systems**

The period from 1910 to 1994 can, in the author's view, be characterised broadly as one in which there was a *core* system of government in place throughout, patently focused on maintaining control of government by the White population group, around which in the course of time a number of *supplementary*, essentially subordinate systems for the Black, Coloured and Indian population groups came to be established. This distinction between a core system and supplementary systems provides a useful means of ordering the material to be presented in the following sections.

#### **5.3.1 Core system of government**

The core system of government is taken to consist of three levels or spheres of government - national, provincial and local - as instituted by the 1909 Constitution. Although a number of structural and functional changes were effected over the years, this core system of government has remained in place since the establishment of the



South African state in 1910 and up to the present day. The three levels or spheres of government are reviewed *seriatim* in the following paragraphs, the review covering the period from 1910 up to the implementation of the first fully democratic constitution in 1994.

### **5.3.1.1 National government**

The 1909 Constitution established a national parliament for the Union consisting of the King (or a governor general as his representative), a senate and a house of assembly (section 19). Parliament was given *full power* (author's emphasis) to make laws for the peace, order and good government of the Union (1909 Constitution: section 59). By implication - and this was confirmed by other provisions of the 1909 Constitution - the legislative and executive authority of all subnational governments was subordinated to that of the national parliament. Parliament could at any time adopt legislation on any matter, including a matter falling in a category for which responsibility was assigned by or in terms of law to a subnational level of government.

As far as the executive arm of national government was concerned, the 1909 Constitution - in contrast to more recent drafting practice (as evidenced in the constitutions adopted in 1993 and 1996) - did not define executive authority or specify its content. The 1909 Constitution employed the expression "executive government" and vested the particular competence in the King, to be administered by the monarch himself or by a governor general acting as his representative (section 8). In practice, and throughout the currency of the 1909 Constitution, the executive authority was indeed exercised formally by the Governor General. Provision was made for an executive council to advise the Governor General, as well as ministers to administer the departments of state of the Union, such ministers also to serve as members of the Executive Council (1909 Constitution: sections 12,14). Although the 1909 Constitution did not mention a cabinet, the convention of a cabinet as an executive body, consisting of a prime minister and other ministers, which was at that time well established in the United Kingdom and its colonies, was followed on the implementation of the Constitution. To make possible the discharge of executive governmental responsibilities, provision was made in the 1909 Constitution for a public service, which

was to be deployed at both the national and the provincial levels of government (sections 140-141).

The period between 1910 and 1994, when the first fully inclusive democratic constitution was implemented, was marked by a number of major developments within the constitutional domain of the country which impacted upon the core system of government. It lies beyond the scope of the thesis to deal with these developments in detail, but it is appropriate that some of the most important developments be noted:

- (a) South Africa, which until then had in various ways been subject to the legislative and executive authority of the United Kingdom (Wiechers 1985:201-205), was in 1931 recognised as a sovereign state under the British Crown by the British parliament, with the adoption of the Statute of Westminster. The essential provisions of the Statute of Westminster were incorporated into South African law by the Status of the Union Act 69 of 1934 (Wiechers 1985:129). South Africa continued to be a member of the British Commonwealth.
- (b) Thirty years later South Africa, by the adoption of the Republic of South Africa Constitution Act 32 of 1961 (hereinafter referred to as the 1961 Constitution) became an independent republic, following a referendum which was held in 1960 (Basson & Viljoen 1988:38). The government-of-the-day applied for the country to remain a member of the Commonwealth, but in the face of opposition by other member states to the country's continued membership, the application was withdrawn, South Africa thus leaving the Commonwealth (Wiechers 1985:133).
- (c) The 1970's marked the commencement of a process of serious reflection in government circles about constitutional change in South Africa - for the first time since the establishment of the Union in 1910, according to Wiechers (1985:218). At the beginning of 1981 the Senate, which had functioned as the second chamber of the national parliament for 61 years, was abolished by an amendment of the 1961 Constitution effected by section 13 of the Republic of South Africa Constitution Fifth Amendment Act 101 of 1980. The same Act (section 34) made provision for a President's Council, an advisory body

appointed by the State President, and whose members could be drawn from the White, Coloured, Indian, and Chinese population groups. One of the main tasks given to the President's Council was to advise on a new constitutional dispensation for the country. (Wiechers 1985:244-245.)

- (d) Based *inter alia* on suggestions emanating from the President's Council (Basson & Viljoen 1988:38) a new constitution was drafted and adopted by Parliament as the Republic of South Africa Constitution Act 110 of 1983 (hereinafter referred to as the 1983 Constitution). Following a referendum amongst the White electorate to test its acceptability, the new constitution was implemented in 1984 (Basson & Viljoen 1988:38). The 1983 Constitution provided for regulation by the White, Coloured and Indian population groups of their respective "own affairs", coupled to their joint involvement in the regulation of the "general affairs" of the country as a whole (sections 14-15, read with sections 19, 30-31). The new Constitution also made it possible for members of the Coloured and Indian legislatures to be appointed by the President as ministers in the national cabinet, which was charged with the executive government of general affairs (1983 Constitution: section 20(d)). The Black population group was not included in the so-called "tricameral" system instituted by the 1983 Constitution; it was excluded from the definition of "population group" for purposes of the application of the "own affairs" concept. The administration of the affairs of this population group was subsumed under the constitutional construct of "general affairs". (1983 Constitution: section 100(1) read with sections 14-15.)

Prior to the advent of the tricameral system of government in 1984, the constitutional developments noted above seem to have had little effect on the functions and powers of government at the national level. A parliament based essentially on the White population group, remained the country's sovereign legislative body, empowered to control as it saw fit, the national life of all South Africans, irrespective of the population group to which they belonged. This was the outcome of a form of state founded on parliamentary sovereignty as opposed to one founded on constitutional sovereignty. The abolition of the Senate in 1981 changed the structure of legislative government at the national level but in no way detracted from the national parliament's sovereign competence. As far as executive government was concerned, a single national

executive government or cabinet – rooted in and responsible to the national parliament – was in place from 1910 to 1984, and directed the government and administration of the country as a whole.

The 1983 Constitution changed the basic structure of the core system of government significantly. The unicameral parliament was replaced by one with three houses - for the Coloured, Indian and White population groups respectively. Each house was to look after the “own affairs” of its particular population group and to join with the other two houses in the control of the country’s “general affairs”. Four executive governments thus came into existence: a ministers’ council or cabinet for each of the three population groups, and a national cabinet for the nation as a whole.

The fact that it was to prove extremely difficult to precisely and completely distinguish “own affairs” from “general affairs” in practical organisational terms (Commission for Administration: 1984-1990), did not detract from the historical significance in the South African context of moving from a single political executive and a single legislature at the national level of government to a multiplicity of such bodies. It is common cause that the tri-cameral system of government was a failure, probably doomed from the outset by the exclusion of the Black population group, and in general by the apartheid ideology perceived as being inherent in the own affairs concept. Nevertheless, it can be said that the tri-cameral system did serve to accord a substantial measure of direct participation in the core system of government to population groups other than the White group, while still excluding the Black population group.

### **5.3.1.2 Provincial government**

The 1909 Constitution, in establishing the Union of South Africa, made provision for a system of subnational government which was to operate in the four provinces of the Union (1909 Constitution: chapter V). The key elements, in respect of each province, were an administrator appointed by the Governor General-in-Council, a provincial council elected by the enfranchised citizens of the province, and an executive committee elected by the provincial council. (1909 Constitution: sections 68, 70-71, 78.)

The provincial councils were mandated constitutionally to function as legislative bodies for the respective provinces, with the power to make ordinances in relation to specified classes of subjects. Thirteen such classes of subjects were identified, including an open ended class to provide for the addition of subjects by means of national legislation. (1909 Constitution: section 85.) An ordinance properly passed and assented to (see below) would have the force of law within the province concerned (1909 Constitution: section 91). In accordance with the stipulated sovereignty of Parliament in legislative matters - as noted in section 5.3.1.1 *supra* - the 1909 Constitution placed a limiting qualification on the exercise of legislative authority by the provinces: any ordinance made by a provincial council would have effect as long and as far only as it was not repugnant to any Act of Parliament (section 86). A provincial council could therefore not make an ordinance contrary to an existing law of Parliament; and were Parliament to make a law countermanding an existing provincial ordinance, such ordinance would immediately be rendered null and void. As a further safeguard to ensure the primacy of national government, the 1909 Constitution required every ordinance passed by a provincial council to be assented to by the Governor General-in-Council (section 90).

As far as the executive arm of government at provincial level was concerned, the 1909 Constitution stipulated a "chief executive officer" for each province, to be appointed by the Governor General-in-Council, and to be styled the administrator of the province (section 68). The provincial council of a province was required by the Constitution to elect four persons to form, together with the administrator and under his chairmanship, the executive committee of the province. The Constitution stipulated that an executive committee " ... shall on behalf of the provincial council carry on the administration of provincial affairs". (1909 Constitution: sections 78, 80.)

The provincial government structure established by the 1909 Constitution continued in essentially unchanged form until 1986. In that year, the four provincial councils were abolished by the Provincial Government Act 69 of 1986. Each province retained an executive committee, consisting of the administrator and a number of other persons appointed by the State President (Provincial Government Act 69 of 1986: section 7(1)). The Act stipulated expressly that the administrator together with the other members of the executive committee would constitute the executive authority of the province (Act 69 of 1986: section 7(2)). No racial qualification or disqualification was laid down as to the

persons who could be appointed to an executive committee, opening the way for the appointment of persons of all population groups. The Act stipulated only that the State President should as far as practicable give preference to persons resident in the province (Act 69 of 1986: section 7(3)). With the disappearance of the provincial councils the legislative authority of a province passed to the administrator, who was required to exercise this authority by means of proclamation, subject to certain provisos (Act 69 of 1986: section 14(2)).

The abolition of the provincial councils in 1986 constituted a fundamental change in the system of provincial government as it had existed in South Africa for 76 years. Although the Provincial Government Act 69 of 1986 required any proclamation by an administrator with legislative effect to be approved by a standing committee of Parliament (section 14(2)), such a committee could hardly be regarded as a credible substitute for a directly elected provincial legislature focused on the affairs of its province. Indeed, the approval of essentially provincial legislation by committees of Parliament could be seen as being tantamount to the centralisation of legislative authority, a view also expressed by Basson and Viljoen (1988:292). The abolition of the provincial councils removed the *representative*, albeit non-inclusive, base of provincial government. In fairness it could be said that in the light of increasing demands for constitutional change in the country, the modified system for the provinces was not intended to last indefinitely, but on the face of it was designed to serve as an interim arrangement until an universally acceptable constitutional dispensation could be set in place – as indeed occurred some eight years later in 1994.

### **5.3.1.3 Local government**

As a founding statute recognising three levels of government, the 1909 Constitution had notably little to say about the powers of the third, or local level of government. The 1909 Constitution provided for the continuation of “all powers, authorities, and functions” of local authorities existing at the establishment of the Union (section 93). The matter of local government was dealt with further by a provision which assigned to provincial councils the power to make ordinances concerning “municipal institutions, divisional councils, and other local institutions of a similar nature” (1909 Constitution: section 85(vi)). At the time of the establishment of the Union, local government was

firmly established in all four colonies (Cloete 1976:9-11) and it was clearly the intention of the National Convention 1908-1909, which drafted the Constitution, that the existing systems in each of the colonies should be maintained in the new state, with control vested in the respective provincial governments. According to Cloete (1992:188) the four systems of local government were all based on the Cape model, which had originally been set in place by the Municipal Ordinance (Cape) 9 of 1836, but had each developed its own characteristics. However, the four systems all had certain features in common, viz elected councils, control of the local authorities by a higher level of government, and the requirement that citizens had to pay for the goods and services provided by the local authorities (Cloete 1992:188).

The divisional councils specifically mentioned in the 1909 Constitution were peculiar to the Cape Colony, which became the Cape Province. In terms of legislation dating back to 1855, the whole of the territory of the Province was divided into divisions, and each division placed under the jurisdiction of an elected divisional council (Cloete 1976:167). Broadly speaking, a divisional council was responsible for the provision, maintenance and control of stipulated categories of roads, for the control of certain activities in rural areas, and the provision of municipal type services in residential localities which had not yet developed to the point where a municipality with concomitant local government institutions could be established (Cloete 1976:169; Divisional Council Ordinance (Cape) 18 of 1976).

For a long time after the establishment of the Union, local government in South Africa was dominated by the White population group. Although the demarcated municipalities were populated to varying degrees by members of all population groups, town and city councils consisted generally of councils elected by the White population group. The policy of separate development espoused by the government which came to power in 1948 had a notable effect on local government. The Group Areas Act 41 of 1950, which divided the population into racially based groups, provided for the setting up of defined areas for occupation by the various groups, and provided further for the institution of a governing body for any group area (other than an area occupied by the White population group), such governing body to function under the supervision of a designated (White) – author's insertion - local authority (Act 41 of 1950: sections 2, 3, 6). From that point onward developments in local government regarding the Coloured and

Indian population groups were directed by successive versions of the Group Areas Act and associated provincial ordinances (Cloete 1992:194-195). In respect of the Black population group, developments were guided by a series of national statutes, building on the advisory boards for Black residential areas introduced by the Black (Urban Areas) Consolidation Act 25 of 1945 (Cloete 1992:197-200).

It is evident from a reading of Cloete (1992:189-200) that the course of development was a complex one with variation between the provinces as well as marked differences regarding the Black population group, on the one hand, and the Coloured and Indian population groups, on the other. It is beyond the scope of this limited overview to examine these developments in detail, and a brief synopsis based on Cloete's work referred to above, must suffice. Generally speaking, a particular area would initially be accorded participation in the White based local authority by means of an advisory committee, to be followed later by some form of management committee performing both an advisory function and stipulated executive and supervisory functions on behalf of the parent local authority, to be followed still later by a separate and fully mandated local authority for the area in question. In 1971 the administration of urban areas residentially occupied by Blacks was removed from the competence of the provincial councils and the White controlled local authorities and made a direct responsibility of the national government (Bantu Affairs Administration Act 45 of 1971).

The development process as sketched did in fact lead to the establishment of a number of fully fledged local authorities for the Black, Coloured, and Indian population groups. By 1991, with the separate development epoch rapidly drawing to a close, there were, according to Cloete's tally, one municipal council (for Coloureds) in the Cape Province, four town councils and two town boards (for Indians) in Natal, and 33 city councils and 98 town councils (for Blacks) within all provinces (Cloete 1992:196-197, 200).

A noteworthy, additional form of local government emerged in South Africa in 1985 with the adoption of the Regional Services Councils Act 109 of 1985. The councils instituted were charged with the delivery of services - essentially of an infra-structural or bulk nature - on a regional basis, which could best be provided through joint action of the local bodies variously representing the different population groups in the respective regions (Regional Services Councils Act 109 of 1985: section 3(1)(b), schedule 2). In



accordance with the governmental framework instituted by the 1983 Constitution, services identified as suitable for provision on a regional basis in terms of the Act were those that could be seen as “general affairs”. The councils were constituted by members from all population groups nominated by the local bodies represented on the councils (Act 109 of 1985: section 6), and were given substantial decision-making powers, similar to those of local authorities, except the power to levy rates on immovable property (Act 109 of 1985: section 4). They were assigned a dedicated revenue base in the form of a regional service levy imposed on employers and a regional establishment levy imposed on vendors in the respective regions (Act 109 of 1985: section 12). The councils are not without importance in the constitutional history of the country: they constituted a meaningful step towards integrated, co-operative and inclusive government, albeit restricted to the local sphere of government.

The process of integration at local government level was accelerated, and provided with incontrovertible legitimacy, by the Local Government Transition Act 209 of 1993, which came into effect in 1994 shortly before the implementation of the country’s first fully democratic constitution. The Act provided for the setting in place of an array of transitional local government structures to serve all parts of the country, viz the metropolitan areas, the other urbanised but non-metropolitan areas, and the rural areas. This interim phase of democratic government in the local sphere had still to be completed at the time of the implementation of the 1996 Constitution in April 1997.

### **5.3.2 Supplementary systems of government**

The evolution of governmental systems in South Africa since about the middle of the previous century was marked by the implementation over time of an array of racially based systems supplementary to the core system dominated since 1910 by the White population group. This general development was driven essentially by the policy of apartheid (later renamed separate development) of the National Party government which came to power in 1948. In the broadest sense separate development envisaged that specified (racially based) population groups, other than the White group, should be accommodated constitutionally by the gradual introduction of forms of self-determination supposedly appropriate to each group which, in the case of the Black group, could even culminate in national states independent of South Africa. The supplementary

systems are reviewed below, commencing with those instituted for the Black population group.

### **5.3.2.1 Black population group**

On the establishment of the Union of South Africa in 1910, Blacks were to all intents and purposes excluded from meaningful participation in the core system of government, although the 1909 Constitution did protect the then existing voting rights of Black people in two of the erstwhile colonies, viz the Cape of Good Hope and Natal (section 36). However, the qualification requirements were such that only a limited number of Black persons in the two colonies were able to vote (Cloete 1992:225; Wiechers 1985:299). Cloete (1992:225) notes that in 1935, 25 years after the establishment of the Union, there were 10 628 Black persons registered as voters in the Cape Province and one in Natal. In 1936 Blacks in the Cape Province were placed on a separate voter's roll and given the right to elect three Whites to represent them in the House of Assembly and two to represent them in the Provincial Council. At the same time provision was also made for the indirect representation of the country's Black people in the Senate (Representation of Blacks Act 12 of 1936: sections 6-8). The representation of Black people in the two houses of Parliament was abolished in 1959 by the repeal of the Representation of Blacks Act 12 of 1936 by the Promotion of Black Self-government Act 46 of 1959.

The total exclusion of Blacks from the core system of government should be seen in the context of the policy of the government which had come to power in 1948. In terms of the apartheid policy, the Black, Coloured and Indian population groups were required to develop – also in constitutional and governmental terms - along paths distinct from that of the White population group, which group effectively controlled the core system of government. In the case of Blacks the application of separate development was no doubt motivated by its proponents to a large extent by the fact that Blacks had historically come to inhabit distinct and substantial territories within the borders of South Africa, such territories having been demarcated and set aside for their occupation by legislation passed in 1913 and 1936 (Black Land Act 27 of 1913; Development Trust and Land Act 18 of 1936).

The first major step towards a dedicated system of government for Blacks was taken with the adoption of the Black Authorities Act 68 of 1951. The Act made provision for a hierarchy of governmental forms to be instituted in areas of the country demarcated for settlement by Blacks, consisting of tribal authorities at the lowest level, regional authorities at an intermediate level, and territorial authorities at the highest level. The Act did not initially apply to the area of the country known as the Transkei, which had been served since 1931 by a body known as the United Transkeian General Council. The Act was, however, made applicable to the Transkei in 1956 by proclamation of the Governor General, with the General Council being replaced by the Transkei Territorial Authority. (Basson & Viljoen 1988:309-311.)

The process of self-government for Blacks was taken further by the adoption of the Promotion of Black Self-government Act 46 of 1959. Eight Black nations (or national units) were formally recognised by the Act, each linked to a particular geographic area or territory regarded as a particular nation's homeland. The Act carried forward the process towards self-government based on the scheme of territorial authorities provided for in the Black Authorities Act 68 of 1951 referred to above (Cloete 1992:227). Implicit in the provisions of the Promotion of Black Self-government Act 46 of 1959 was the acceptance by the government-of-the-day that the Black homelands could eventually attain to fully independent statehood, that is to say outside the territorial borders of South Africa (Wiechers 1985:438).

The Transkei Territorial Authority, established in 1956, was the first such authority to be instituted in terms of the Black Authorities Act 68 of 1951. A further eight territorial authorities were established between 1961 and 1977 (Cloete 1992:227). Instituted at the highest level of the hierarchy of authorities, a territorial authority displayed the key features of a system of government, including a deliberative body elected or selected from among the members of the regional authorities, an executive council, and a number of administrative institutions (departments) to perform public functions like justice, agriculture, works, and education (Cloete 1992:226-228).

The next major phase in the development of Black governments commenced in 1963 with the adoption by Parliament of the Transkei Constitution Act 48 of 1963. In terms of the Act the Transkei became a self-governing national state within the territorial borders

of South Africa. The Transkei Constitution was a fully elaborated one, providing *inter alia* for a national flag, a national anthem, a legislative assembly, a political executive body, a public service commission, and public service departments. However, Transkei remained subject to the South African head of state, who had to assent to all bills passed by the legislative assembly before they could become law. The degree of authority granted to the new self-governing state was, in the author's view, nonetheless substantial, as is evidenced by the list of subjects in respect of which laws could be made - to the exclusion of Parliament - and further by the power to amend or repeal, in so far as it concerned the Transkei and citizens of the Transkei, Acts of the Republic of South Africa dealing with the assigned subjects. (Basson & Viljoen 1988:312-313; Cloete 1992:228.)

Eight years after the Transkei became a self-governing territory, the South African Parliament passed the National States Constitution Act 21 of 1971, subsequently retitled the Self-governing Territories Constitution Act (National States Constitution Amendment Act 111 of 1990: section 5). The Act was essentially an enabling measure in terms of which the other homelands could achieve self-governing status on a par with that of Transkei. From 1972 to 1984 a further nine homelands achieved self-government in terms of Act 21 of 1971, viz Bophuthatswana, Ciskei, Lebowa, Venda, Qwaqwa, KwaZulu, Gazankulu, KwaNdebele, and Kangwane (Cloete 1992:230).

By the 1970's it was established government policy that a self-governing territory could advance constitutionally to full independence as a state separate from the Republic of South Africa, and that such territories would, indeed, be encouraged to opt for independence. At the request of the government of the Transkei the South African Parliament in 1976 adopted legislation enabling the self-governing territory to become an independent state (Status of Transkei Act 100 of 1976). The Transkeian Legislative Assembly thereupon adopted the Republic of Transkei Constitution Act 1976, and the Transkei became an independent state in the same year. The self-governing territories of Bophuthatswana, Venda and Ciskei followed suit in 1977, 1979 and 1981 respectively (Vorster, Wiechers & Van Vuuren 1985:99,169,221). None of the remaining six self-governing territories opted for independence, these territories retaining their self-governing status right up to the time of the implementation of the 1993 Constitution in April 1994. The independence granted to Transkei, Bophuthatswana,

Venda and Ciskei was, because of the rejection in principle of the apartheid policy, not recognised by the international community, which continued to regard these territories, together with their governmental institutions, as part and parcel of South Africa (Cloete 1992:231).

### **5.3.2.2 Coloured population group**

The development of governmental institutions for the Coloured population group needs to be seen in the light of the fact that, unlike the Black population group, they disposed of no territory or territories which could be regarded as constituting a “homeland” for them.

On the establishment of the Union of South Africa in 1910 Coloureds resident in the Cape Colony and in Natal retained the voting rights that they possessed at that stage. They were, however, excluded from the franchise in the new provinces of the Orange Free State and Transvaal. In the Cape Province, where the Coloured population was concentrated, the qualification requirements for voters were such as to inhibit in practice the number of Coloureds able to vote (Wiechers 1985:299). In 1956 Coloureds were removed from the common voters’ roll by the Separate Representation of Voters Act 46 of 1951, and placed on a separate voters’ roll for the election of four Whites to represent them in Parliament and two in the Cape Provincial Council. Thirteen years later, in 1969, even this limited right of representation (by proxy) in the national and one provincial legislature was taken from them upon the establishment of the Coloured Representative Council in terms of the Coloured Representative Council Act 49 of 1964.

At the national level of government, the first separate institution for Coloureds with some bearing on government, was the Advisory Coloured Council established in 1943. This was not a governmental or even a statutory body, but an advisory body instituted by cabinet decision and consisting of nominated members. It was apparently not a success and was dissolved in 1950. (Wiechers 1985:429.) Concomitant with the removal of Coloureds from the common voters’ roll in 1956, provision was made in the Separate Representation of Voters Act 46 of 1951 for a partially elected national Board for Coloured Affairs with the assigned function of advising the Government concerning Coloured affairs (Act 46 of 1951: section 14(1)). According to Basson and Viljoen

(1988:322) the Board, which existed from 1959 to 1969, inspired little confidence among the Coloured people. It was abolished upon the establishment of the Coloured Representative Council in 1969.

The Coloured Representative Council, provided for in the Coloured Representative Council Act 49 of 1964, and instituted by proclamation of the State President on 1 July 1969 (Wiechers 1985:430), was the first body resembling a government which was established specifically for the Coloured population group. The majority of the members of the Council were elected, and the Council was accorded legislative and executive powers concerning a number of substantial matters, in addition to an advisory function. The Council was, however, subjected to stringent limitations in the performance of its assigned functions by the provisions of the Act. All bills had to be approved by the minister in the national government responsible for Coloured affairs prior to their introduction in Council (section 21(2)), and no legislation of the Council would have the force of law if it was repugnant to an Act of Parliament (section 25(1)). The minister already referred to controlled the Council's budget (section 22(2)). In the course of its existence very little legislation of note was adopted by the Council (Wiechers 1985:431).

Because of its inherent shortcomings the Council was not able to establish itself as a credible institution of government in the eyes of the Coloured population group and, almost inevitably, was dissolved in 1980 (Wiechers 1985:432). Coloured people had to wait for the 1983 Constitution and the tri-cameral structure set in place by it (*vide* section 5.3.1.1 *supra*), to attain a measure of meaningful - if still problematical - participation in the government of the country.

### **5.3.2.3 Indian population group**

Of the four major population groups the Indians have the shortest history in South Africa, having arrived in the country for the first time in about 1860 (Cloete 1992:33). As in the case of the Coloureds, no territory within the borders of South Africa could be claimed by the Indians as an area of traditional settlement or a homeland. With the advent of the Group Areas Act 41 of 1950 areas within the urban areas controlled by White municipal councils were demarcated for occupation by members of the Indian population group. Developments concerning the Indians in the sphere of local government, which

followed a path similar to that of the Coloureds, have already been dealt with (*vide* section 5.3.1.3 *supra*).

Following the establishment of the Union of South Africa in 1910, and up to the implementation of the tri-cameral parliament in 1984, the Indian population group to all intents and purposes did not participate in the system of parliamentary government (Basson & Viljoen 1988:322). Attempts were, however, made to give them a voice in certain matters of specific concern to them.

In 1961 Indians were for the first time accepted officially as a permanent part of the South African population, followed three years later, in 1964, by the institution of an advisory body designated the National Indian Council, consisting of appointed members (Cloete 1992:33). The Council was replaced by the South African Indian Council instituted in terms of the South African Indian Council Act 31 of 1968.

Initially the South African Indian Council was also an appointed body; however, amending legislation adopted in 1972 and 1978 (South African Indian Council amendment Acts 67 of 1972 and 83 of 1978) had the effect *inter alia* of enlarging the Council and also transforming it into a largely elected body. From 1978 until its abolition in terms of the 1983 Constitution the Council consisted of 40 elected and five appointed members (Act 83 of 1978: section 1). Although provision was made for an executive committee since the inception of the Council (Act 31 of 1968: section 10), its role as an executive body was initially couched in vague terms (Act 31 of 1968: section 10(6)), and later restricted to the exercise of powers delegated to it by the responsible minister or the executive committee of a province, and then only in specified functional areas such as education and community welfare (section 10A inserted in Act 31 of 1968 by Act 67 of 1972). The Council had no legislative competence and could at no stage be seen as a credible form of government for or by Indians. The Council was mainly an advisory body, functioning also as a link between the national government and the Indian population. (Wiechers 1985:434-435.)

With the adoption of the 1983 Constitution which provided for a tri-cameral parliament with separate houses for the White, Coloured and Indian population groups, it became

possible for Indians to participate directly in the government of the country for the first time.

## **5.4 Assignment of responsibilities**

For purposes of surveying the assignment of responsibilities to levels or spheres of government in the period covered by this historical overview it is convenient to follow the same ordering structure employed in section 5.3 *supra*. The findings of the research are thus presented under sub-headings dealing respectively with the core and supplementary systems of government, in that order.

### **5.4.1 Core system of government**

A basic pattern for the assignment of responsibilities within the core system of government was laid down by the 1909 Constitution, in terms of which the South African state was established. This pattern in essence remained in place until the implementation of the 1983 Constitution in 1984. It was not changed in any substantial way by the Constitution which was implemented in 1961, and in terms of which the country's constitutional status was changed from a monarchy to a republic (*vide* section 5.3.1 *supra*). The Constitution adopted in 1983, however, did bring about substantial changes. The overview presented in this section focuses firstly on the scheme of assignment introduced by the 1909 Constitution, and which continued under the 1961 Constitution, and then on the arrangements set in place by the 1983 Constitution.

#### **5.4.1.1 1909 and 1961 Constitutions**

Section 85 of the 1909 Constitution identified thirteen "classes of subjects" encompassing matters in relation to which a provincial council could, subject to the provisions of the Act and the consent of the Governor General-in-Council, make ordinances. The classes of subjects identified were as follows:

- (i) Direct taxation within the province in order to raise a revenue for provincial purposes;



- (ii) the borrowing of money on the sole credit of the province with the consent of the Governor General-in-Council and in accordance with regulations to be framed by Parliament;
- (iii) education, other than higher education, for a period of five years and thereafter until Parliament otherwise provides;
- (iv) agriculture to the extent and subject to the conditions to be defined by Parliament;
- (v) the establishment, maintenance, and management of hospitals and charitable institutions;
- (vi) municipal institutions, divisional councils, and other local institutions of a similar nature;
- (vii) local works and undertakings within the province other than railways and harbours and other than such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise;
- (viii) roads, outspans, ponts, and bridges, other than bridges connecting two provinces;
- (ix) markets and pounds;
- (x) fish and game preservation;
- (xi) the imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated;
- (xii) generally all matters which, in the opinion of the Governor General-in-Council, are of a merely local or private nature in the province; and
- (xiii) all other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council.

By implication any “class of subject” not assigned to the provinces by the 1909 Constitution was one in respect of which Parliament had the sole right to legislate. This statement should be read in conjunction with section 59 of the 1909 Constitution which gave Parliament the “ ... full power to make laws for the peace, order, and good government of the Union”. Put in other words, the residuary legislative power of the state was vested in Parliament.

The 1909 Constitution did not stipulate any general criterion or rule to be applied in determining the matters on which a provincial council could legislate. Research into the proceedings of the South African National Convention, which sat between October 1908 and May 1909, and which produced the draft bill which was subsequently enacted by the British Parliament as the South Africa Act 1909, also provided no indication of a criterion or rule to be applied, or of any attempt to develop such a criterion or rule. The minutes of proceedings of the Convention show that in the course of a few days a series of motions regarding classes of subjects to be assigned to the provinces were put to plenary sessions of the Convention and, after discussion, either rejected or adopted, with or without amendment. The actual discussions which took place were not minuted. After the list of classes of subjects had been largely completed, the matter was submitted to a committee of the Convention for finalisation (National Convention:90). The committee's recommendations as to classes of subjects, which did not differ much from those which the Convention had already agreed to, were thereafter accepted by the Convention in plenary session with a single addition (National Convention:112-113). No record was kept of the proceedings of the particular committee or of any other committee appointed by the Convention (National Convention:vii-viii).

It was clearly the intention of the National Convention that the stipulation regarding provincial legislative powers to be included in the Constitution should serve as a basic, initial statement of such powers, to which additional powers could be added as and when necessary. Section 85(xiii) provided expressly for provincial councils to make ordinances on " ... all other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council". Parliament availed itself of this provision for the first time in 1913 with the adoption of the Financial Relations Act 10 of 1913. The Act identified twelve additional matters in a schedule to the Act which could, with the concurrence of the executive committee of a province, be entrusted to the province by the Governor General. The Act was amended and substituted on a number of occasions, ultimately being substituted by the Financial Relations Act 65 of 1976. The corresponding schedule of Act 65 of 1976 had at that stage been expanded to 24 matters which could be entrusted to a province by the national executive authority. A copy of the schedule is appended to the thesis as annexure 6. In addition to the matters assigned to the provinces in terms of financial

relations legislation, matters were also entrusted to the provinces by other national legislation dealing with certain functional fields, public health being a prime example.

The approach followed in drafting what was to become section 85 of the 1909 Constitution can be typified as a *denotative* one, that is to say a class of subject was identified as a discrete item and included with other such items in a list of classes of subjects in respect of which legislative power was assigned. The only suggestion of a *connotative* approach, in which a class of subject would be defined in terms of generic attributes or features, is to be found in section 85(xii) of the 1909 Constitution in which reference is made to “matters of a merely local or private nature” in a province. This was patently a rather vague stipulation, requiring interpretation as to what is of a “merely local or private nature”. The denotative approach was also followed in respect of the assignment of additional matters to the provinces in terms of the financial relations legislation referred to in the previous paragraph. At no stage was a definition or set of criteria provided for determining the matters, or categories of matters, or classes of subjects which properly belonged with the provinces.

From a technical perspective, it is to be noted that no particular order was followed or created in the listing of classes of subjects in section 85 of the 1909 Constitution. As far as style of presentation is concerned, a functional approach was followed in some instances in the wording of items - as in for example “the borrowing of money ...”, “the establishment, maintenance, and management of hospitals ...”, and “the imposition of punishment by fine, etc”. In the majority of instances, however, a nominal subject rather than a function was listed, as in “direct taxation”, “education”, and “agriculture”. The style of presentation followed in the compilation of the list of additional matters entrusted to the provinces in terms of the financial relations legislation (*vide* annexure 6 of the thesis) is notable for the extent to which items are worded in functional mode - for example “the preservation of fauna and flora”, the “distribution of poor relief”, and the “establishment and administration of townships”. However, also in this list nominal subjects rather than functions are listed in a number of instances, for example “irrigation schemes”, “land settlement schemes”, and “drive-in theatres”. Again, no particular order or structure is discernible in the compilation of the list.

The 1961 Constitution, which replaced the 1909 Constitution, did not depart materially from the provisions of the earlier constitution dealing with the legislative powers of the provinces. The expression “Governor General-in-Council” was replaced by the expression “State President”; the provision relating to municipal institutions, divisional councils and other similar local institutions was extended to include certain specified institutions; the powers relating to education were further restricted by the exclusion of what was referred to as “Bantu education”; and the powers relating to fish and game preservation were made subject to certain provisions of the Sea Fisheries Act 10 of 1940. Generally viewed, the package of basic provincial powers determined in 1909, even including the specific formulations employed, was retained on the country becoming a republic 51 years later. (1961 Constitution: section 84(1).) What also remained in place were the powers in relation to matters assigned to the provinces in terms of the financial relations legislation already referred to, as well as powers delegated to the provinces in terms of other national legislation.

As a founding document recognising three levels of government, the 1909 Constitution had notably little to say about the powers of the third or local level of government. The matter of local government was dealt with by assigning to the provincial councils the power to make ordinances concerning “municipal institutions, divisional councils, and other local institutions of a similar nature” (1909 Constitution: section 85(vi)). Presumably this formulation was intended – and, indeed, was so understood by the new provincial governments – to include the determination of the legislative and associated executive powers to be exercised by the local authorities instituted in a province. Cloete records that since 1910 each of the four provincial councils adopted a series of ordinances to regulate municipal government and administration within its area of jurisdiction. The usual approach followed was to adopt from time to time a general ordinance on local government, supplemented where necessary by ordinances dealing with specific aspects of local government and administration. The legislative powers of local authorities were not unqualified: in each province the bylaws adopted by municipal councils were subject to the approval of the provincial administrator. The adoption of the 1961 Constitution did not change the situation in regard to local government in any material way. (Cloete 1976:12.)

The ordinances regulating local government in each of the provinces stipulated the matters for which municipal councils would be responsible. A largely uniform pattern emerged across the four provinces. Cloete (1976:155-164) identifies the following as major “functional activities” of the country’s municipal authorities: Streets, sidewalks and drainage; cemeteries and crematoria; parks and recreation facilities; water supply; electricity supply; abattoirs; rubbish and night soil removal (also sewage); health services; conservation of the environment; community development; housing and slum clearance; town and city planning; and the licensing of businesses. In addition to the responsibilities which were assigned to local authorities in terms of provincial ordinances, certain responsibilities were also assigned to them over the years by Acts of Parliament. In terms of both the 1909 and the 1961 Constitutions Parliament was the sovereign legislative authority of the country (1909 Constitution: section 59; 1961 Constitution: section 59(1)), and thus empowered to assign responsibilities to local governments as it saw fit. An early example of a national law assigning responsibilities to local governments is the Public Health Act 36 of 1919; other examples of such legislation are the Slums Act 53 of 1934, the Air Pollution Prevention Act 45 of 1965, and the Housing Act 4 of 1966.

The responsibilities which came to be vested in the country’s local authorities were evidently such as could best be attended to at a local level. For the most part the responsibilities in question were directed at ordering and developing the physical environment in demarcated local areas, and at providing the services essential to promoting a satisfactory quality of life for the inhabitants of such areas. However, in the context of the present thesis, it is important to note that many of the activities in which municipal authorities were and continue to be involved, form part of broader public functions in the performance of which other levels or spheres of government are also substantially involved, for instance water provision, electricity supply, public health, environmental conservation, housing, and physical planning. This phenomenon gives rise to the complex question of which *aspect* or part of a public function ought to be performed at or in each of the various levels or spheres of government. This question is taken up in chapter 9 of the thesis.

#### 5.4.1.2 1983 Constitution

In the context of the general question of the assignment of responsibilities to governments, the 1983 Constitution, which brought the tri-cameral parliament into being, is of considerable interest, albeit of little enduring significance. The key to the new scheme of government was the distinction drawn between so-called “own affairs” and “general affairs” (1983 Constitution: sections 14-15).

The 1983 Constitution defined “own affairs” in dual fashion, both *connotatively* and *denotatively*. Section 14(1) of the Constitution stipulated that “... (M)atters which specially or differentially affect a population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs, are, subject to the provisions of section 16, own affairs in relation to such population group”. Thus the drafters of the 1983 Constitution set out what was meant (connoted) by own affairs, the definition being worded in such a way as to provide a general test which could be applied in deciding whether or not any particular matter was an own affair of a population group. Section 14(2) of the 1983 Constitution supplied an additional, denotative, definition by stipulating that “... (M)atters coming within the classes of subjects described in Schedule 1 are, subject to the provisions of section 16, own affairs in relation to each population group”. The schedule referred to consisted of a list of 14 classes of subjects. As the list is quite voluminous it is not quoted here but appended to the thesis as annexure 7. Section 16, which is referred to in both section 14(1) and section 14(2) of the 1983 Constitution, stipulated certain requirements which had to be satisfied when questions on own or general affairs were decided by the State President. As for the definition of general affairs, the Constitution drafters employed a negative approach, the text stipulating simply that “... (M)atters which are not own affairs of a population group in terms of section 14 are general affairs” (1983 Constitution: section 15).

No particular order (not even alphabetical) is discernible in the compilation of the list of subjects making up schedule 1 of the 1983 Constitution (*vide* annexure 7 of the thesis). From a perusal of the schedule it is apparent that a considerable degree of difficulty was encountered in demarcating the classes of subjects encompassing matters which

constituted own affairs of a population group. Generally speaking, complete public functions - that is functions encompassing the whole of social welfare, education, health, etc. - were not specified; what was specified in the schedule were aspects or subdivisions of public functions. In some instances accuracy of circumscription was sought by specifically including or excluding an aspect of a matter. In other instances, matters or aspects of matters were included in the list subject to the provisions of applicable general laws. The somewhat convoluted formulations appearing in the schedule provide significant evidence of the conceptual difficulties to be overcome in seeking to specify constitutionally the responsibilities of discrete governments focused on supplying the needs of different population groups within a single state territory.

Realistically viewed, the degree of socio-economic integration of population groups which had taken place in South Africa by 1983 was in the author's opinion such as to make it virtually impossible to achieve a neat and credible compartmentalisation of the activities of government into own and general affairs. Glaring examples of activities which could not be compartmentalised readily are tertiary education, museums and libraries, hospitals and clinics, local government, agriculture, and water supply. Yet all these matters were listed in the applicable schedule of the 1983 Constitution as own affairs, albeit with various qualifications. It is not surprising that it took a number of years to give effect to the 1983 Constitution in organisational terms. In the annual report of the Commission for Administration for 1989 (five years after the formal implementation of the 1983 Constitution) reference is made to the finalisation of investigations into the establishment of control over local government as an own affair (Commission for Administration 1989:42). As late as 1993 the Commission's annual report lists a project concerning the rationalisation of certain own and general affairs functions as one of the most important projects that received attention during the year (Commission for Administration 1993j:21). The reorganisation process required by the 1983 Constitution was eventually overtaken by the political forces driving the country towards a fully democratic system of government.

As far as the powers of provincial councils were concerned, the 1983 Constitution had a marked effect. The matters in respect of which provincial councils were empowered to make ordinances - stipulated in section 84(1) of the 1961 Constitution - together with the additional matters entrusted to the provinces in terms of other legislation, were retained,

but not in respect of matters declared to be own affairs of the Coloured, Indian and White population groups (1983 Constitution: schedule 2, part 1, paragraph A.2(h)). In effect, provincial affairs became general affairs. The provinces' responsibilities in relation to the Black population group, which was excluded from the own affairs construct, were maintained - for example hospitals and clinics. Some major public functions which were affected by the allocation of governmental responsibilities between own and general affairs by the 1983 Constitution were education, health, local government, and community development.

The matters left in the hands of the provinces on the adoption of the 1983 Constitution remained essentially unchanged when the provincial councils were abolished in terms of the Provincial Government Act 69 of 1986. What changed was the way in which the provincial legislative and executive authority in relation to such matters was to be exercised, a matter already dealt with in section 5.3.1.2 *supra*.

As far as local government was concerned, the functions to be performed by local authorities, whether in terms of provincial ordinances or national laws, were not changed by the 1983 Constitution *per se*. What did change was the controlling framework within which local authorities were required to operate, encompassing from that point on the three own affairs administrations, a national department with an overall responsibility for local government in the country (general affair), and the provincial administrations, who continued to have a responsibility for local government in relation to the Black population group, and were required in certain instances to act as agents for the own affairs administrations. The complexity in government and administration attendant upon the attempts at constitutional accommodation of the various population groups has already been remarked on (*vide* section 5.2 *supra*).

The regional services councils which were instituted during the currency of the 1983 Constitution (*vide* section 5.3.1.3 *supra*), had as their essential brief the joint exercise and carrying out of powers and duties in relation to certain functions on behalf of local bodies in specified areas (Regional Services Councils Act 109 of 1985: preamble). The councils were given the same powers as other local authorities, with the exception of the power to levy rates on immovable property (Act 109 of 1985: section 4(1)). The



councils' revenue was to come from two types of levy imposed in terms of section 12 of the Act.

The functions for which a regional services council would be responsible were those identified as regional functions by the appropriate provincial administrator from a list contained in schedule 2 of the Regional Services Councils Act 109 of 1985. The list is appended to the thesis as annexure 8. It contains 22 items, the first 21 covering virtually the whole gamut of local government services, and the last item constituting an open category with the designation "other regional functions". The items are not classified in any way or arranged in any particular order. A few are worded as public functions - for example "bulk supply of water" - but most are stated simply as nominal subjects - for example "libraries".

#### **5.4.2 Supplementary systems of government**

The assignment of responsibilities under the supplementary systems of government developed and introduced for the Black, Coloured, and Indian population groups are examined *seriatim* below.

##### **5.4.2.1 Black population group**

The development of governmental institutions for the Black population group in the so-called homelands has been sketched in section 5.3.2.1 *supra*. As far as the assignment of responsibilities is concerned, the provisions of the Self-governing Territories Constitution Act 21 of 1971 (initially designated as the National States Constitution Act) are particularly noteworthy. However, in examining this legislation it needs to be borne in mind that self-government as provided for in the Act was intended as the penultimate phase in a process of development which was to culminate in independent statehood, and that the process as such was rejected in many quarters.

In determining the responsibilities of a self-governing territory the Self-governing Territories Constitution Act 21 of 1971 employed a dual ordering mechanism which provided for both specific stipulation (section 3(1)) and specific exclusion (section 4). Matters specifically assigned to the legislative assembly of a self-governing territory

were listed in a schedule to the Act (schedule 1). Matters excluded from the powers of a legislative assembly were set out in section 4 of the Act, viz the following:

- (a) military organisation;
- (b) manufacture of arms, ammunition or explosives;
- (c) diplomatic and consular matters;
- (d) control of a "Police Force of the Republic" charged with the maintenance of peace and order and the preservation of internal security;
- (e) postal, telegraph, telephone, radio, and television services;
- (f) railways, harbours, national roads and civil aviation;
- (g) immigration;
- (h) currency, banking and related matters;
- (i) customs and excise; and
- (j) amendment, repeal or substitution of the Act itself.

Schedule 1 of the Self-governing Territories Constitution Act 21 of 1971 was amended on numerous occasions between 1972 and 1992 by amending legislation as well as, since 1979, by proclamation of the State President, following the insertion of a section in the Act (section 37A) giving the State President the power to do so. At the time of the repeal of the Act by the 1993 Constitution, schedule 1 of the Act consisted of 74 items spread over 4½ pages of relatively fine print. An abbreviated version of the schedule is appended to the thesis as annexure 9. There is no obvious structure or order to the long list of matters - not even alphabetical - although some grouping of related items is discernible, for example those in relation to welfare services and agriculture respectively. Some items are worded in functional style - for example item 1 ("administration and control of departments") and item 4 ("establishment, maintenance, etc., of clinics") - while others are rendered as nominal subjects - for example item 8 ("nature conservation") and item 11 ("markets and pounds"). Some items are stated succinctly in a few words, while others are presented as lengthy descriptions, with numerous qualifying phrases regarding the inclusion or exclusion of aspects, or stipulating provisos. All in all, the technical treatment of the matter leaves much to be desired.

Notwithstanding its technical shortcomings, the assignment of responsibilities by the Self-governing Territories Constitution Act 21 of 1971 is noteworthy in a historical context. The Act can be said to have applied an essentially federal approach in reserving a relatively limited number of matters to the national government and assigning virtually all other matters to the particular subnational sphere of government. The degree to which powers were devolved to the self-governing territories is further evident from certain concomitant provisions of the Act, as amended, which -

- (a) enabled the legislative assembly of such a territory to amend or repeal any law, including any Act of Parliament, dealing with a scheduled matter (section 3(1)(b));
- (b) stipulated that a law made by a legislative assembly would apply also to citizens of the self-governing territory who were resident outside its borders but within the Republic of South Africa (section 3(1)(c)); and
- (c) generally excluded Acts of Parliament dealing with a scheduled matter from application in the area of a self-governing territory or in relation to a citizen of such a territory (section 3(3)).

As a subnational category of government, self-governing territories were charged with responsibilities far in excess of those assigned to provincial administrations up to 1994 or, indeed, to provincial governments under the present Constitution. Although all bills passed by the legislative assembly of a self-governing territory had to be assented to by the South African head of state before they could become law (Act 21 of 1971: section 3(2)), the scale of the assignment of responsibilities was nonetheless impressive. As suggested above, this finding needs to be qualified by noting the underlying motive, viz the realisation of the apartheid policy of the government-of-the-day.

#### **5.4.2.2 Coloured population group**

Institutions established prior to 1984 - when the 1983 Constitution was implemented - with the specific purpose of attending to the needs of the Coloured population group, have been noted in section 5.3.2.2 *supra*. The Advisory Coloured Council, established

in 1943, and the Council for Coloured Affairs, established in 1959, were both bodies appointed by a minister in the national cabinet and were instituted to advise the national government on Coloured affairs. They were not governmental bodies and are therefore not fully germane to the present study which is focused on the assignment of responsibilities to levels or spheres of government (*vide* section 3.3.3 of the thesis for an analysis, clarification and definition of the concept “government”).

The Coloured Representative Council instituted in 1969 in terms of the Coloured Representative Council Act 49 of 1964, which was for the greater part an elected body, did bear some resemblance to a government. In addition to the Council being assigned an advisory and consultative function, provision was made for the Council and its executive committee to exercise legislative and executive powers in relation to certain specified matters affecting the Coloured population group, viz finance, local government, education, community welfare and pensions, and rural areas and settlements for Coloureds (Act 49 of 1964: sections 17(6)(a), 21(1)). However, as indicated in section 5.3.2.2 *supra*, the Council's powers were strictly circumscribed by its founding Act, and as a result its impact as a form of government was slight. The assignment of responsibilities to the Council for the performance of public functions was clearly of a tenuous nature, limiting its value as an object of study for purposes of the thesis.

#### **5.4.2.3 Indian population group**

The two institutions of note focused on the Indian population group in the period prior to 1984, when the Indian community was accommodated in the tri-cameral Parliament in terms of the 1983 Constitution, have been described in section 5.3.2.3 *supra*. The National Indian Council was a purely advisory body and the South African Indian Council, which replaced it in 1968, little more. The Council had no legislative power and although its executive committee could perform specified executive functions under delegation of the responsible minister or the executive committee of a province, it clearly had no original responsibility in a constitutional sense for the performance of public functions. The relevance of its activities for purposes of the thesis is therefore slight.

## 5.5 Evaluation

An evaluation of the merits of systems of government operative in South Africa between 1910 and 1994, when the first fully democratic constitution was implemented, is a matter essentially for political scientists and constitutional lawyers. For the student of Public Administration, systems of government are largely a given, a starting point for the study of administrative structures and processes which emanate from particular systems of government. Central to the present study are public functions - as defined in section 3.3.3 of the thesis - for the performance of which political bodies are responsible - and ultimately accountable to the citizenry - but which also constitute the activities and, indeed, the *raison d'être* of government departments and other public institutions. In this evaluation of what has gone before the focus is therefore on the manner of deployment of public functions amongst levels or spheres of government rather than on the systems of government *per se*.

Given the importance and the far-reaching implications of the way in which responsibility for the performance of public functions is deployed within the state, it is appropriate that such deployment should be regulated in the constitution or other founding law of the state. This has been the case in South Africa since its creation as a state in 1910, but the manner in which the assignment of responsibilities was effected constitutionally needs to be examined and assessed. Commencing with the 1909 Constitution, the assignment of responsibilities to subnational governments could at best be described as desultory. While certain "classes of subjects" falling within the legislative authority of the provinces were specified in the 1909 Constitution, a substantial void was left as to other matters which Parliament in its discretion could decide to entrust to the provinces (section 85). Parliament exercised its powers in this connection by means of the adoption from time to time of financial relations legislation as well as other legislation dealing with specific public functions. Quite soon a situation was reached in which the number of matters entrusted to the provinces by subsequent Acts of Parliament exceeded the number specified in the Constitution. The explanation for this phenomenon is most likely to be found in the fact that the majority of the participants in the National Convention favoured a *union* above a *federation* (Kriek 1992b:135-147). The main implication of this choice was that the central government would be a strong

and clearly superior one, with the provincial governments fulfilling a supplementary and subordinate role. Parliament would be the highest legislative authority in the land, fully capable of regulating as it saw fit the activities of the subnational governments at the provincial and local levels. Nevertheless, the incomplete assignment of responsibilities by the Constitution *per se* must be regarded as a substantial shortcoming. Anyone wishing to ascertain exactly how responsibilities were deployed amongst the national, provincial and local levels of government would of necessity have to look much wider than the Constitution itself; indeed, he or she would have to embark on quite substantial research. The Constitutions of 1961 and of 1983 did not address this shortcoming but, indeed, perpetuated it.

In identifying matters to be dealt with by subnational governments the Constitutions of 1909, 1961 and 1983 and other relevant statutes for the most part employed a mechanism of *denotative definition*. Matters, or subjects, or classes of subjects - such are the terminological variations encountered in the formal language of the legal texts - for which subnational governments were to be responsible, were simply denoted as items and incorporated in a list. With one major exception, no *connotative definition* of the type of matters which properly belong with a particular level or sphere of government, or a criterion or set of criteria which could be applied in identifying such matters, is to be found. The major exception occurs in the 1983 Constitution, in which a connotative definition regarding that which comprises the own affairs of a population group is provided (section 14(1)). However, even in this instance certain specific subjects which the lawgiver regarded as own affairs were denotatively listed in a schedule to the 1983 Constitution (schedule 1). While the assignment of responsibilities by means of listing in statutes, or schedules to statutes, may be a legally acceptable way of doing so, it can hardly be seen as a satisfactory way of regulating the functional relationships between levels or spheres of government. There would appear to be a need to proceed in such an important matter from an appropriate definition, or *fundamentum divisionis*, or body of principles, or set of criteria - or a combination of such aids - on the basis of which determinations can be made as to the matters to be entrusted to each level or sphere of government.

From a Public Administration perspective, the period covered by the overview presents a picture of an extensive, changing and ongoing division of responsibilities. Within the

core system of government (*vide* sections 5.3.1 and 5.4.1 *supra*) substantial structures of government and administration came into existence and operated for many years at the provincial and local levels of government. The division of responsibilities between the general and own affairs spheres of government under the 1983 Constitution was also substantial, leading to the establishment of relatively large own affairs administrations. As far as the supplementary systems of government were concerned (*vide* sections 5.3.2 and 5.4.2 *supra*), developments in relation to the Black population group especially (*vide* sections 5.3.2.1 and 5.4.2.1 *supra*), led to the assignment of a notably wide spectrum of responsibilities to the self-governing territories, and the concomitant development of large administrative structures. Clearly, a substantial and diverse array of government structures and forms came into existence, and were utilised extensively for the deployment of responsibilities.

The assignment of responsibilities which took place during the period under review, can be typified as a form of *decentralisation* of government and administration and, as indicated above, the decentralisation was substantial. However, whether and to what extent an actual *devolution* of state authority took place, is an entirely different question. Throughout the period under review the primary authority to govern continued to reside in the national parliament. Parliament was at liberty to substitute and amend the particular parts of the Constitution at will or, by the adoption of other legislation, to substantially increase or diminish the number of matters entrusted to the provincial and local governments, or to alter the parameters of matters so entrusted. One of the outstanding features of the period in question is therefore the maintenance - in the formal constitutional sense - of strong centralised control over the structures and activities of the state. This situation did not, however, inhibit the deployment of a plurality of governments and a magnitude of executive administrative institutions throughout the country.

Another outstanding feature of the period covered by the overview is the degree of structural and functional complexity which resulted from the various adjustments and innovations which were effected in the machinery of the state. To illustrate: Immediately prior to the implementation of the first democratic constitution in 1994 there were in South Africa fifteen discrete executive administrations (one central, four provincial, six in the self-governing territories, and four in the "independent states");

consisting of some 195 departments (Robson 1996:59-60). The complexity in government and administration, with the attendant proliferation of public institutions, can be attributed for the most part to the application of the policy of separate development with its stated goal of achieving some form of constitutional accommodation for the Black, Coloured and Indian population groups without compromising the position of the White population group. Whatever the causes of governmental complexity and institutional proliferation, however, the attendant potential for inefficiencies and wastage in supplying the needs of the public are matters of valid concern to all who wish to see sound, accountable public administration.

A major shortcoming in efforts of the past to set out the basic structures of government, and to stipulate the responsibilities of each level or sphere, was the treatment accorded to local government. The 1909 Constitution had no section, not to mention a chapter, dealing specifically with local government. Indeed, a reference to local government is to be found only in that part of the 1909 Constitution dealing with the provinces, where it was stipulated *inter alia* that "municipal institutions, divisional councils, and other local institutions of a similar nature", constituted one class of subjects in relation to which a provincial council would be competent to make ordinances (section 85(vi)). By contrast, the 1909 Constitution contained 27 sections dealing with the structures and powers of the provinces, and certain miscellaneous matters pertaining to the provinces (sections 68-94). The 1909 Constitution's treatment of local government can justifiably be described as dismissive - on the face of it not much importance was attached to this tier of government. This "constitutional attitude" towards local government was maintained with the adoption of the 1961 and the 1983 Constitutions. For a long time therefore - from the establishment of the South African state in 1910 right up to the implementation of the first democratic constitution in 1994 - local government was in the author's view not accorded due recognition as a level or sphere of government, being relegated to a Cinderella position in the state household. The neglectful treatment of local government in successive constitutions over a period of 84 years is astonishing in view of the obvious and immediate importance to the population at large of the typical services provided by the country's local authorities.

The constitutions of the past and other Acts of Parliament assigning responsibilities to levels and spheres of government leave much to be desired as far as the technical



aspects of presentation are concerned. The following shortcomings are to be noted especially:

- (a) Taxonomically assessed, there is invariably no particular order, structure or grouping of items to be discerned in the compilation of lists of matters (or subjects or classes of subjects), whether in the main texts of statutes or in the schedules to Acts. The lists are no more than that - lists - generally notable for their lack of order and, in a number of instances, for their length. Prime examples of lengthy, jumbled lists are to be found in schedule 2 of the Financial Relations Act 65 of 1976 as well as in schedule 1 of the Self-governing Territories Constitution Act 21 of 1971 (appended to the thesis as annexures 6 and 9 respectively).
- (b) From a stylistic perspective, two alternative styles of presentation are invariably employed. In some instances matters are presented in *functional mode*, for example “the preservation of fauna and flora”, while in others, matters are indicated as *nominal subjects*, for example “markets and pounds”. The importance of consistently employing a functional mode of description in stipulating the responsibilities of levels or spheres of government is argued in chapter 9 of the thesis.
- (c) As far as the employment of language is concerned, it is notable that In the same list, matters are sometimes described succinctly - in less than, say, 10 words - and sometimes by way of lengthy, verbose statements, compare for example item 10 (“establishment and administration of townships”) and item 14 (“town planning”) of schedule 2 of the Financial Relations Act 65 of 1976 (annexure 6 of the thesis). In some instances a matter is presented by way of a straightforward statement, as in “the establishment, maintenance, and management of hospitals and charitable institutions” (1909 Constitution: section 85(v)), whilst in other instances various qualifying mechanisms are employed, typically by stipulating inclusions, exclusions, and provisos, as for example in item 2 (“education”) and item 6 (“local government”) in schedule 1 of the 1983 Constitution (annexure 7 of the thesis).

Considering the inherent importance of the assignment question for achieving orderly government and administration, it could reasonably have been expected that a greater measure of sophistication and consistency would have developed over the years in the technical treatment of the matter in constitutions and other statutes. This did not happen.

## **5.6 Conclusion**

Against a background of government and administration influenced substantially by ideological considerations based on race, this chapter has endeavoured to provide an overview of the assignment of responsibilities to levels or spheres of government since the establishment of the Union of South Africa in 1910 up to the time of the implementation of the first fully democratic constitution in 1994. Developments concerning the core system of government, and certain racially focused supplementary systems of government which came into existence during the period in question, have been traced and the principal features of the various systems noted. The assignment of responsibilities to governments was obviously an integral part of the evolution of the governmental system as a whole. The assignments made have been examined in context, and commented on critically. The chapter then proceeded to provide an evaluation of the assignment of responsibilities over the period under review. The evaluation has been done from a Public Administration perspective, focusing broadly on constitutional and technical aspects, without taking a position on the underlying ideological motives of past governments.

A question which arises is that of the extent to which it could be said that the approaches to the assignment of responsibilities to levels or spheres of government adopted in the past have been scientific, or have moved in a scientific direction. It has been suggested elsewhere (Robson 1998a:37) that an approach to the ordering of public functions, as a basis for the assignment of legislative and executive powers, could be followed which would be systematic and logical and which may come to be accepted as scientific. A scientific approach in the particular field would be one which satisfied certain criteria including, in the view of the author, the development of a general definition and classification of public functions, the clarification of fundamental

assumptions and key concepts, the identification of assignment principles, the development of precise terminology, and the development of a reliable and accessible methodology for ordering a multitude of public functions into a single, internally consistent whole. Tested against such criteria, the way in which the assignment of responsibilities to governments for the performance of public functions was done in the past, can hardly be said to have been scientific. This is not to say that the assignment of responsibilities was done in an arbitrary manner - obviously every assignment decision received due consideration at the time. However, the assignment scheme operative at any particular juncture was accomplished through pragmatic and *ad hoc* endeavours - in which ideological considerations patently played a substantial part - rather than by the application of what could be regarded as a scientific approach.

The historical overview has not encompassed the arrangements set in place by the 1993 and 1996 Constitutions; these are to be dealt with in the following two chapters of the thesis, commencing with the 1993 Constitution.

## **CHAPTER 6: ASSIGNMENT OF RESPONSIBILITIES: 1993 CONSTITUTION**

### **6.1 Introduction**

The 1993 Constitution was operative from April 1994 to February 1996, a period of slightly less than two years. It was a transitional or interim constitution and for that reason one may be tempted to regard it as being of less importance than the 1996 Constitution which followed it, and which has now become established as the founding law of the country. Again, unlike the 1996 Constitution, the 1993 Constitution was not adopted by a democratically elected Parliament fully representative of all South Africans. However, it would be a mistake to play down the importance of the 1993 Constitution. Indeed, from a scientific point of view the 1993 Constitution was particularly significant, for a number of reasons. The Constitution represented a complete break with the country's chequered and persistently undemocratic constitutional past. It included a comprehensive set of constitutional principles which determined the key features not only of the constitutional structure which it set in place but also of the constitution which was to follow it. The resemblance of the 1996 Constitution to its precursor is unmistakable; the later constitution refined and elaborated an existing structure; it did not create a new one. As far as the allocation of powers to the various levels of government is concerned, the die was largely cast by the 1993 Constitution, not only by way of the constitutional principles which it prescribed, but also in its textual provisions dealing with the particular subject.

This chapter provides at the outset a brief overview of the Multiparty Negotiating Process which culminated in the 1993 Constitution, and then proceeds to deal with the set of constitutional principles which were such an important feature of the negotiations. The proposals of the then Commission for Administration regarding the allocation of functions and powers to the central and regional levels of government, a project in which the author was closely involved, is included as a discrete section of the chapter. A systematic description of the general scheme for the assignment of responsibilities to the levels of government instituted by the 1993 Constitution is provided, followed by a

section which focuses on the way in which specific public functions were treated by the Constitution. The chapter culminates in a critical examination of the assignment of responsibilities by the Constitution, and ends with the drawing of a general conclusion on this part of the research.

## **6.2 Negotiation of a new constitution**

The negotiation, drafting and adoption of the country's first democratic constitution took place over a period of roughly four years. The major milestones in this process are noted below, followed by a brief look at the organisational arrangements for negotiation, and comment on the drafting process, with particular emphasis on the formulation of constitutional principles and the development of proposals regarding the allocation of powers and functions to levels of government.

### **6.2.1 Milestones**

Former President F W de Klerk's address at the opening of the South African Parliament on 2 February 1990 is generally regarded as the first step in a remarkable process which led four years later to the implementation of the country's first democratic constitution on 27 April 1994. De Klerk put it to the assembled members of what was to be the last "apartheid" parliament, that he envisaged the development of a totally new and just constitutional dispensation, as well as the recognition and protection of those fundamental human rights which generally form the basis of Western democracies. (Venter 1994:211.)

Following the unbanning of the African National Congress and various other organisations fundamentally opposed to the then existing constitutional dispensation – a major development announced by De Klerk in his opening address - a negotiating process was initiated, which unfolded by way of a number of historic events.

During the period May 1990 to February 1991 three bilateral agreements were concluded between the Government and the African National Congress aimed at preparing the climate for negotiation. In September 1991 the National Peace Accord

was signed by representatives of then existing governments and various non-governmental organisations. After a preparatory meeting at the end of November 1991, the Convention for a Democratic South Africa (which became known as CODESA I) met over two days in December 1991. A declaration of intent was adopted and five working groups instituted with the brief of formulating draft agreements on various aspects of a transition to a democratic dispensation. CODESA II was convened in May 1992, but failed to make any further progress, due to the main actors not being able to find common ground on certain issues. Negotiations resumed in May 1993, under the title "Multiparty Negotiating Process" (MPNP), using the earlier CODESA documentation as its starting point. Seven months later the MPNP had finished its work, having finalised the details of a new constitution, as well as peripheral legislation, procedures and structures related to the transition to a new dispensation. (Venter 1994:212-213.)

Parliament adopted the new constitution on 22 December 1993. Amendments were adopted at further sessions of Parliament during the period February to April 1994. The 1993 Constitution came into effect on 27 April 1994.

### **6.2.2 Organisational arrangements**

The basic structure of the Multiparty Negotiating Process consisted of the following five components:

- ?? Plenary meetings;
- ?? the Negotiating Forum;
- ?? the Negotiating Council;
- ?? the Planning Committee; and
- ?? seven technical committees (NA 1993a:5).

The plenary meetings were constituted by the leaders of the participating parties and the purpose of these meetings was to confirm any agreements reached by the negotiating bodies. The Negotiating Forum, consisting of delegates and advisers representing the participating parties, had two functions, viz (a) to receive and confirm (with or without amendments) reports and proposals from the Negotiating Council; and (b) to instruct the Negotiating Council and supervise its work. The Negotiating Forum ceased to exist in

July 1993 and it would appear that the Negotiating Council thereafter submitted its reports directly to the plenary meetings via a steering committee. (NA 1993a:6-7.) The Negotiating Council and its Planning Committee were the key components of the negotiating process (NA 1993a:5, 10). The Council consisted of two delegates (of which one had to be a woman) and two advisers nominated by each of the twenty-six participating parties. The Council established seven technical committees to assist it in its work, including one to deal with constitutional issues. The Planning Committee was essentially a facilitating body entrusted by the Council with the responsibility of managing and co-ordinating the work of the technical committees. (NA 1993a:8-10.)

For purposes of the present study, the work of the Technical Committee on Constitutional Issues (whose brief included the formulation of constitutional principles and the development of proposals concerning the assignment of responsibilities to the provinces), was of particular importance, and was consequently subjected to thorough research.

### **6.2.3 Drafting process**

The drafting of what was to become the 1993 Constitution, and which was referred to during the negotiations as the “transitional” constitution, was done by the Technical Committee on Constitutional Issues. The Committee consisted exclusively of lawyers who, judging from the names appearing in the official records, were all eminent people in the field, with most of them being established experts in constitutional law. The Committee met frequently during the period May to November 1993; however, only three sets of minutes of its meetings are available in the National Archives Repository – those for the meetings held on 10, 12 and 13 May 1993. It could not be established whether the Committee ceased to minute its proceedings, concentrating its efforts on the compilation of reports, or whether the minutes of the other meetings were lost. The Committee produced 27 reports, copies of which are available in the Repository.

Reading through the Committee's reports it is evident that the Committee was at pains not to become involved in the negotiations *per se* but to confine itself to its brief of developing technically acceptable proposals and draft texts for consideration by the Negotiating Council. From its reports it is evident that the Committee worked closely

with the Council, reviewing and adjusting its documents in line with Council debates and decisions, keeping before the Council issues which had to be resolved, asking for clarification of Council viewpoints and instructions where necessary, and indicating to the Council when essentially political decisions were called for. The general picture which emerges from a reading of the reports is of a complicated drafting process proceeding methodically and purposefully.

The two aspects of the Committee's work which are of particular relevance to the present study are the formulation of constitutional principles and the development of the constitutional framework or scheme for the allocation of powers to the three levels of government. These two aspects are examined in the following sections.

#### **6.2.3.1 Constitutional principles**

The Technical Committee on Constitutional Issues obviously attached great importance to the compilation of a set of constitutional principles and to getting these adopted by the Negotiating Council. Its very first report contains a substantial section on constitutional principles (NA 1993b: section 5). Subsequently the Committee dealt with the constitutional principles in six of its reports (NA 1993c; NA 1993d; NA 1993f; NA 1993n; NA 1993p; NA 1993r), and in addition issued three supplementary reports on the constitutional principles (NA 1993g; NA 1993h; NA 1993j). The first comprehensive set of constitutional principles was presented by the Committee in its third report dated 27 May 1993, the set consisting of 23 principles, of which 14 were of a general nature and nine dealt specifically with the allocation of powers to the various levels of government (NA 1993d). With some reformulation, editing and elaboration all these principles were absorbed eventually into the final set of principles accommodated in schedule 4 of the 1993 Constitution. As an integral part of the drafting process the initial set of principles was added to and refined over a period of approximately six months, in the light of the debates in the Negotiating Council and also on the initiative of the Committee. By the time of the Committee's 26<sup>th</sup> report, dated 15 November 1993, the constitutional principles numbered 32 and were close in number and formulation to the final set of 34 principles eventually enacted into the 1993 Constitution as its schedule 4 (NA 1993t).



Of the 34 constitutional principles contained in schedule 4 of the 1993 Constitution, eleven are particularly relevant to the present study (these are identified and examined in section 6.3.2 *infra*). For purposes of the study an insightful exercise has been that of checking to what extent the relevant constitutional principles had already been incorporated in the first comprehensive set of principles presented to the Negotiating Council by the Technical Committee as early as May 1993. It was found that with the exception of two principles, all the constitutional principles in question had already found a place in the initial set. Of course, allowance has to be made for a degree of reformulation and editing as well as some elaboration of the principles between the time of their first presentation and their enactment into law. The main changes are noted below.

Constitutional principle I was elaborated by requiring the envisaged democratic system of government to be committed to achieving equality between men and woman and people of all races. Additional components were added to constitutional principle XVIII as originally formulated, the most important of which for present purposes was a stipulation that the powers and functions of the provinces as defined in the “final” constitution would not be substantially less than or substantially inferior to those provided for in the “transitional” constitution. The original formulation of what was finally adopted as constitutional principle XVIII provided that the powers and functions of the local level of government should also be defined in the constitution; this requirement was omitted from the final formulation. Significantly, constitutional principle XIX which, as originally formulated, provided that the powers and functions of the national and provincial levels of government “may” include exclusive and concurrent powers, in its final formulation replaced the permissive “may” with an imperative “shall”. Constitutional principle XX in its final formulation added a number of aspects which were to be borne in mind in the allocation of powers to levels of government, viz financial viability, effective public administration, the need for and the promotion of national unity and legitimate (*sic*) provincial autonomy, and cultural diversity.

The two constitutional principles relevant to the study which are not to be found in the original set, are XXIV, which stipulates that provision must be made for a framework of local government powers, functions and structures in the constitution, and XXXIV, which provides for the possibility of constitutional provision being made for a “notion” of

the right to self-determination by any community sharing a common cultural and language heritage.

The conclusion to be drawn from the foregoing is that as early as May 1993, the basis for the assignment of responsibilities to levels of government, as captured in certain constitutional principles, had substantially been determined. The date is important: it precedes by more than a month the receipt by the Technical Committee of proposals emanating from the Commission of Administration regarding the allocation of powers to the various levels of government in a new constitutional dispensation (*vide* section 6.4 *infra*). What is noteworthy in this connection is that the Commission had based its input largely on its own interpretation of the subsidiarity principle, a principle which did not find its way into the set of constitutional principles, and also the fact that the Commission did not employ the mechanism of concurrent powers in developing its proposals.

#### **6.2.3.2 Allocation of powers**

It is evident from a perusal of the Technical Committee's reports that the Committee consciously steered clear of adopting any particular *model* for the allocation of powers and functions to the national and subnational levels of government, for example a "unitary" or a "federal" model. At an early stage of its work, the Committee commented on federal versus unitary states, on decentralisation, and on confederation, as well as on the notions of concurrent powers, residual powers, and the asymmetrical allocation of powers (NA 1993c:4-8). However, from the start the Committee seems to have been guided only by the general consensus which had emerged amongst the negotiating parties of a constitutional distribution of the powers of government amongst democratically elected national, regional and local governments (NA 1993c:3-4). For the rest, the research has led to a general finding that the Committee took the line of developing in a pragmatic way a workable allocation framework which it considered to be suitable for and acceptable in the South African situation. Such an open-minded approach, bolstered by impressive legal expertise, and bearing in mind the highly charged political environment in which the Committee had to do its work, is hardly to be faulted.

The Committee's fourth report, dated 3 June 1993, contained a suggested list of "functional areas" in respect of which provinces could be entrusted with powers during what the Committee saw as the transitional period. The list contained 21 items, ranging from "agriculture", through "education", "local government", and "transport", to "welfare". (NA 1993e:6-7.) No indication was provided in the report as to the rationale for selecting the particular items, and no minutes are available for consultation on this point. Significantly, the Committee pointed out that the allocation of *specific elements* of the particular functional areas to the provinces "and other levels of government" would require expertise in the field of public administration, and that the detailed allocation should be done at the time of the drafting of the "final" constitution (NA 1993e:7).

In the first draft outline of the "transitional" constitution, presented by the Committee on 21 July 1993, the number of functional areas earmarked for the exercise of legislative authority by the provinces had grown to 24 (NA 1993i). The draft contained a section – section 6(1) – stipulating that the national executive, after consultation with each provincial executive, and receipt of a recommendation by the envisaged Commission on Provincial Government, would determine the *extent* of the legislative and executive competence of *each* province (within the listed functional areas). The national executive's determination of competences would have to be approved by the constitution making body (to be set up by the "transitional" constitution) before promulgation by the President. Provision was also made – in section 6(4) – for a provincial executive to decline an authorised power, thus introducing a semblance of an asymmetrical approach to the allocation of powers.

From its commentary on its first draft outline of the "transitional" constitution it is evident that the Committee took the view that the allocation of powers in that constitution would be of an interim nature, and that the allocation of powers was a matter which could only be settled in the "final" constitution. The Committee surmised that the envisaged constitution making body could decide on an allocation of powers which would be different to that made under the constitution for the transitional period. The Committee expressed the view that in the circumstances it would be appropriate for the provinces to have *concurrent* rather than *exclusive* powers, and that there should be consultation and co-operation between the national government and the provincial governments concerning the exercise and implementation of such powers. (NA 1993k:14-18.) The

Committee was evidently not attuned to achieving a definitive division or separation of powers by means of the “transitional” constitution.

Some two weeks later, the Committee had adopted a new stance regarding the allocation of powers to the provinces. In section 118(1) of the Committee’s second draft outline of the “transitional” constitution, provision was made for *exclusive* legislative competence for the provinces in 15 functional areas. In terms of section 118(3) of the draft, Parliament was barred from legislating on matters in the listed functional areas unless it was necessary to do so in certain circumstances. Four categories of circumstances in which Parliament could adopt legislation which would take precedence over provincial legislation were set out, these being closely related to the requirements which were ultimately to be adopted as constitutional principle XXI, which stipulates the criteria to be applied in the allocation of powers to the national and the provincial governments respectively. In addition to their “exclusive” competence, the provinces were also given “full legislative competence” in relation to 12 functional areas, while Parliament was given concurrent legislative competence in regard to the same 12 functional areas – *vide* section 118(4) of the second draft outline of the “transitional” constitution. In an apparent endeavour to protect the provinces against unjustified interference by Parliament, a section (section 118(7)) was included to the effect that Parliament could not exercise its aforesaid legislative powers – under either section 118(3) or section 118(4) - so as to encroach upon the geographical, functional or institutional integrity of a province, or in a manner which would deprive a provincial government substantially of any of its concurrent competences. (NA 1993I.) It seems fair to comment that with Parliament given the power to also legislate, albeit conditionally, in regard to matters in the exclusive category, exclusivity in provincial competence had become a relative concept. It would perhaps have been more logical to make do with a single category, viz that of concurrent national and provincial competences, with the exercise of such competences being made subject to certain provisos. This is precisely what was done when the 1993 Constitution was eventually adopted.

The third draft outline of the Constitution, presented by the Technical Committee to the Negotiating Council on 20 August 1993, retained in essence the scheme for the allocation of powers as set out in draft section 118 referred to above, except for some

changes in the wording of the parliamentary “overrides” contained in subsection 118(3) (NA 1993m:38-41).

By the time of the presentation of the Committee’s eighteenth report to the Negotiating Council on 3 November 1993, section 118 of the draft constitution had undergone marked changes (NA 1993o:9-11). No motivation for the changes is provided in the report, but research into the submissions received by the Committee showed that the new formulation followed closely the wording of a draft section 118 formulated in bilateral discussions between the South African Government and the African National Congress, and which had been submitted to the Committee six days earlier, on 28 October 1993 (NA 1993v). The reformulated section gave a provincial legislature concurrent competence with Parliament with regard to specified functional areas. The two lists of functional areas which had previously been determined as areas in which provincial legislative competence would apply (“exclusive” and “full”), had been replaced by a single list of functional areas earmarked for concurrent competence, with the combined list of functional areas being reduced from 27 to 20. Ten of the previously designated functional areas (five in the “exclusive” list and five in the “full” list) had been left out, and three new functional areas added. The mechanism of parliamentary overrides, which had been introduced in the second draft outline of the constitution, was retained and would apply to all the listed functional areas. The overriding power of Parliament would continue to be a qualified one: an Act of Parliament would prevail over a provincial law inconsistent therewith but only to the extent that one or more of five criteria applied, including for example the Act’s dealing with a matter that could not be regulated effectively by provincial legislation, or dealing with a matter that required to be regulated or co-ordinated by uniform norms or standards.

Subsequent to 3 November 1993 the emerging draft of the constitution stayed with the mechanism of concurrent powers for the national and the provincial governments. No new provision was made for exclusive competences for the provinces. The draft section dealing with provincial powers – which was to become section 126 of the 1993 Constitution – showed little change between its wording as supported by the Technical Committee on 3 November 1993 and its wording as incorporated into the “transitional” constitution adopted by Parliament in December 1993. Two months or so later the Constitution of the Republic of South Africa Amendment Act 2 of 1994, changed the

formulation of section 126, but only as to form, not substance. The term “concurrent competence” was dropped, and the revised text stipulated separately that a provincial legislature and Parliament would be competent to make laws with regard to matters falling within a single list of functional areas. In addition, the wording of the introductory phrase to the subparagraphs setting out the parliamentary overrides was swung around so as to provide that a provincial law would prevail over an Act of Parliament, *except* where one or more of the stipulated criteria applied. Although indicating a heightened appreciation of the role to be performed by a provincial legislature, the change was cosmetic rather than substantial.

As regards local government, the Technical Committee in its thirteenth report, dated 16 September 1993, identified a number of constitutional principles which it considered to be relevant to the local government level. The Committee then proceeded to present a first draft chapter on local government. On the subject of powers and functions, a key feature of the Committee’s proposals was that the powers and functions of local government were to be provided for by law – in other words they were not to be set out in the Constitution. (NA 1993n.) The initial draft formulations on local government were elaborated in the Committee’s twentieth report, dated 4 November 1993 (NA 1993q), and finalised in its twenty-fifth report, dated 15 November 1993 (NA 1993s). The formulations contained in the latter report were very close to those incorporated ultimately in chapter 10 of the 1993 Constitution. Three noteworthy draft provisions did not survive the negotiating process: these were (1) a provision granting access to the Constitutional Court in the event of an encroachment or threatened encroachment of a local government’s competences (NA 1993n:3); (2) a proviso that the future powers and functions of a local government would not be less than those existing at the time of the commencement of the Constitution (NA 1993q:2); and (3) a provision that the powers and functions of a local government would be changed only after consultation with the local government concerned (NA 1993s:15). It would seem that the Committee had in view a somewhat stronger position for local government than that which the negotiating parties were ultimately prepared to allow.

### **6.3 Review of the constitutional principles**

The constitutional principles which were appended to the 1993 Constitution as schedule 4 are of particular importance in the constitutional development of South Africa. This is so in general terms, but also specifically in relation to the powers of the subnational governments, a subject addressed or alluded to in many of the principles. Clearly, the constitutional principles are deserving of close examination for purposes of the present thesis. Before embarking on such an examination it is necessary to dwell for a moment on their origin as well as on their role in the constitutional development of the country.

#### **6.3.1 Origin and role**

The 1993 Constitution laid the groundwork for the so-called “final” Constitution and did this by specifying a comprehensive set of principles with which the final Constitution had to comply. To ensure such compliance the 1993 Constitution stipulated that a new text to be passed by the Constitutional Assembly would not be of force and effect unless the Constitutional Court certified that all its provisions complied with the principles which had been laid down. The principles were developed during the process of negotiation as a matter of priority and it would appear that substantial agreement on their content preceded the drafting of the constitutional text. The principles have been described as an innovative feature and it has been pointed out that the principles, which were designed to bind a future parliament, also served as a guideline in the formulation of the provisions of the 1993 Constitution. (Venter 1994:213-214.) Haysom (2001:44) opines that the pre-eminent concern of the constitutional principles was the nature and extent of the powers of the provinces and the degree of autonomy to be devolved on them.

The constitutional principles dealing with the allocation of powers or the assignment of responsibilities in effect constituted a directive framework to guide the realisation of the particular aspect of the new state. Nothing quite like this had been attempted before. As pointed out in the historical overview in chapter 5, earlier efforts in South Africa at ordering the responsibilities of the respective levels or spheres of government had generally not been underpinned by clearly stated or readily discernible theoretical concepts, but had instead occurred in an evolutionary or ideologically driven fashion. A

possible exception is to be found in the 1983 Constitution which introduced the theoretical construct – strongly rejected by the majority of the population – of own affairs (in respect of certain population groups) and general affairs, as a basis for the assignment of responsibilities.

### 6.3.2 Examination

Of the 34 constitutional principles which were adopted, eleven are regarded as being relevant to the subject of the present study: these are numbers I, VI, XVI, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, and XXXIV. The principles indicated are contained in annexure 10 of the thesis and examined in the following paragraphs.

Constitutional principle I requires that one sovereign state be established, with a common South African citizenship, and a system of government committed to achieving equality between men and women and people of all races. It is fundamentally important for the assignment of responsibilities. The principle in essence calls for national unity and wholeness and fair treatment for all. Its implications for the assignment of responsibilities are clear: No matter how responsibilities may be divided, shared or allocated between levels or spheres of government, such division, sharing or allocation may not detract from the essential oneness of the state as experienced by its citizens. It could be argued that the best way to realise principle I would be to have a single government exercising all powers or discharging all responsibilities in relation to public functions. But numerous other constitutional principles also have to be adhered to; and taken together the set of constitutional principles effectively prohibited the establishment of a monolithic system of government (*vide* following discussion).

Constitutional principle VI prescribes a separation of powers between the legislature, the executive and the judiciary, and further specifies that there shall be appropriate checks and balances to ensure accountability, responsiveness and openness. The inclusion of this principle constitutes recognition of the *trias politica* doctrine, which postulates a horizontal division of powers between the major arms of government within the state. As the present thesis is focused on the vertical division of powers and responsibilities, the horizontal division is not dealt with.



Constitutional principle XVI calls for government to be structured at national, provincial and local levels. This injunction mandates the application to South Africa of a three-tiered model of government, as found in many countries of the world (*vide* Blaustein and Flanz 1971). It is a directive of fundamental importance, serving to determine the basic structure of government and public administration in the country. Adoption of a multi-tiered model implies the distribution of responsibilities for the performance of public functions amongst the various levels of government within the state – otherwise there would be no reason for the adoption of such a model. In a constitutional context it could be argued that a multi-tiered structure implies *inter alia* that each level of government will be given both a *substantive* as well as a *distinctive* role to fulfil in relation to public functions. The alternative would be an arbitrary and probably conflicting assignment of responsibilities, which could hardly be reconciled with the expected orderliness of a constitutional dispensation.

Constitutional principle XVIII, which consists of five parts, is aimed at placing the responsibilities of the provinces on a firm (constitutional) footing, and protecting the provinces against the possibility of an overly power conscious central government acting in a way which would have the effect of undermining the constitutionally decreed position of the provinces. The following “guarantees” bearing on functional responsibilities are built into the principle:

- (a) The powers and functions of the national government and the provincial governments respectively shall be defined in the Constitution;
- (b) the powers and functions of the provinces, as defined in the Constitution, shall not be substantially less than or substantially inferior to those provided for in the 1993 Constitution;
- (c) amendments to the Constitution which alter *inter alia* the powers and functions of the provinces will require approval by a special majority of the provincial legislatures or, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives. If only certain provinces are effected, the approval of their legislatures will also be required; and
- (d) provision is to be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding *inter alia* its powers and functions.

Constitutional principle XIX is a specification to be complied with by constitution drafters. It stipulates that the powers and functions of the national and provincial levels of government shall include both exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis. What the latter requirement seems to anticipate is that a neat, mutually exclusive assignment of responsibilities to three levels of government may not be readily achievable, and that provision should therefore be made for flexibility in determining in practice what each level of government will be responsible for.

Constitutional principle XX is also essentially a specification, and one of comprehensive scope. It requires that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. It incorporates two criteria which are to be applied in the allocation of powers between different levels of government, viz the allocation is to be conducive to financial viability at each level of government, and also to effective public administration. The basis of allocation should in addition recognise the need for and promote national unity and legitimate provincial autonomy; it should also acknowledge cultural diversity.

Constitutional principle XXI takes the form of a set of criteria to be applied in the allocation of powers to the national and the provincial governments respectively. These criteria are examined below:

Criterion 1: This is a basic general directive stipulating – somewhat obviously – that the level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and rendering of services. Perhaps it would be fair to add that effectiveness has an established place within the science of Public Administration as a normative guideline to be followed by public institutions in discharging their responsibilities.

Criterion 2: This criterion is important in the context of the present study as it stipulates the circumstances in which the national government shall be empowered to intervene in or override the actions of subordinate authorities, viz where it is necessary (a) to maintain essential national standards; or (b) to establish minimum standards; or (c) to maintain economic unity; or (d) to maintain national security; or (e) to prevent

unreasonable action by one province which will be prejudicial to the interests of another province or of the country as a whole.

Criterion 3: This criterion encompasses those circumstances in which it is essential for the country “ ... to speak with one voice, or act as a single entity – in particular in relation to other states ... “, and assigns the responsibility to the national government.

Criterion 4: This criterion encompasses the objective of uniformity, stressing that where uniformity “ ... across the nation ... “ is required in the performance of a function the responsibility should be assigned predominantly, or even wholly, to the national government. The validity of the criterion would appear to be self-evident. This criterion would appear to be closely related to the maintenance of generally applicable standards as encompassed by criterion 2.

Criterion 5: The focus here is again on economic unity, an objective already captured in criterion 2.

Criterion 6: This criterion is really a stipulation or specification, couched in rather vague terms, of powers which provincial governments are to have, either exclusively or concurrently with the national government.

Criterion 7: The question of “mutual co-operation” between the national government and the provincial governments is encompassed by this criterion, with specific reference to the allocation of concurrent powers. Powers are to be allocated concurrently where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service. Co-operation between governments can generally be regarded in a positive light; however, it is possible that too much emphasis on co-operation could tend to lessen the importance of achieving a clear demarcation of functional responsibilities in the first place.

Criterion 8: This criterion is a stipulation concerning the allocation of powers ancillary to the primary powers allocated to the national and provincial governments respectively. It is of little interest in dealing with the assignment question as such.

Constitutional principle XXII has as its objective the protection of the provinces against undue interference by the national government and would appear to be closely related to principle XVIII. It stipulates that the national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces. It is in essence a guarantee given to the provinces and does not have a bearing on the assignment of responsibilities *per se*. However, it does serve to support the implication inherent in principle XVI (*vide supra*), viz that the distribution of responsibilities amongst the levels of government is to be done in an orderly and accountable way. It is noteworthy that the prohibition placed on interference by the national government does not extend to the affairs of local government.

Constitutional principle XXIII requires that in the event of a dispute arising concerning the legislative powers allocated concurrently to the national government and the provincial governments, which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government. In essence the principle is aimed at avoiding a deadlock in the government of the country and lays down a rule to be followed should such a situation threaten. This injunction as to legislative precedence confirms the vesting of residuary power in the national government.

Constitutional principle XXIV requires a framework for local government powers, functions and structures to be set out in the Constitution, while the detail is to be regulated in parliamentary statutes or in provincial legislation or in both. It is essentially a specification with which constitution drafters are to comply and not a principle as such.

Constitutional principle XXXIV takes a tack fundamentally different to that of the other constitutional principles already dealt with above – which all address the assignment question on a territorial, vertical basis – by providing for self-determination by a community sharing a common cultural and language heritage, provided there is proven support within a community for such self-determination. The provision is formulated in passive or, at best, neutral terms: cultural self-determination as a “notion” is not precluded but also not propounded – in stark contrast to the situation in a country such as Belgium where it lies at the heart of the constitutional dispensation. Of particular

interest is the provision that self-determination by a qualifying community need not necessarily be exercised in a defined territorial entity within the Republic; it could also be exercised “ ... in any other recognised way”.

### 6.3.3 Analysis and critique

It is noticeable that the constitutional principles examined and commented on in the previous section, are not formulated as principles *per se*. The collection of statements could be described more accurately as *a set of specifications* to be complied with in the drafting of a constitution for South Africa. To say that “ ... government shall be structured at national, provincial and local levels” (principle XVI), or that “ ... The boundaries of the provinces shall be the same as those established in terms of this Constitution” (principle XVIII-3), or that “ ... the powers of the ... levels of government shall include exclusive and concurrent powers” (principle XIX), is not to state a *principle*, but rather to formulate a *specification* which is to be complied with in the drafting process. The specifications frequently appear in the form of criteria which have to be applied (especially principle XXI), but also include the odd guarantee, rule or condition – *vide* principles XXII, XXIII and XXIV-2 respectively. However, on closer examination of the formulations a number of actual principles are to be discerned, or would appear to suggest their presence. Before identifying these, it is useful to pause for a moment at what the term “principle “ could be taken to connote in the process of drafting a constitution.

A dictionary of philosophy (Runes 1962) defines the term “principle” as follows, “A fundamental cause or universal truth; that which is inherent in anything”. The same source gives the origin of the term as the Latin word *principe*, from *principium*, meaning “a beginning”. The quoted definition and the Latin word from which the term is derived, are appropriate for present purposes. Applied to the drafting of a constitution, the word “principle” (now functioning as a term) would be used in an acceptable way if it was employed to denote certain fundamental points of departure (beginnings) which can be adopted as being true, and which by extension have the attributes of being valuable and trustworthy. In other words, a principle should point the way towards producing a “good” constitution, or one which would be seen to be good by a community which has generally come to embrace Western democratic values. The identification of principles

relevant to the assignment of functions and powers to levels of government which would appear to be inherent in the specifications bearing on the assignment question is essayed in the following paragraphs.

Constitutional principle I, with its emphasis on one sovereign state, a common citizenship, and a system of government committed to achieving equality amongst all, suggests that the underlying principle on which it is based is that of *national integrity, oneness or unity*. In determining the allocation of powers – or the assignment of responsibilities – to levels of government within the state, national unity would appear to be a valid and strongly directive principle to apply. Acceptance of the principle for application to the structures of government would require that the allocation of powers or the assignment of responsibilities be done in a way which would promote amongst members of the community a sense of national unity, of them all being accommodated, protected and nurtured within a single constitutional entity.

The principle of national unity is also to be found nestling in some of the other specifications making up those constitutional principles which have particular relevance to the subject of the thesis. Constitutional principle XXI, which prescribes a number of criteria to be applied in the allocation of powers, identifies amongst such criteria the maintenance of essential national standards, the maintenance of national security, and the prevention of unreasonable action by a province which would be prejudicial to the interests of another province or of the country as a whole (XXI-2). These objectives (ideals) can all be related to the establishment and maintenance of national unity. The same finding applies to constitutional principle XXI-3, which requires that, when necessary, South Africa should “speak with one voice”, as well as constitutional principle XXI-4, which speaks of “uniformity across the nation”.

Closely allied to the principle of national unity – indeed it could be seen as an aspect of that principle – is that of *economic* unity. The principle is identified clearly in constitutional principle XXI-2, which gives to the national government a role to be fulfilled *inter alia* where it is necessary for the “maintenance of economic unity”. The principle is also discernible in constitutional principle XXI-5, which refers to the determination of national economic policies, the promotion of interprovincial commerce,

and the protection of the common market, and which calls for preference to be given to the national government in the allocation of powers to deal with such matters.

In addition to the principle of economic unity, the *principle of equality* is also to be found tucked away in constitutional principle XXI-2. Equality is referred to in passing in constitutional principle I. The references in principle XXI-2 to the maintenance of essential national standards and the establishment of minimum standards for the rendering of services, seem to suggest that all members of the community should be treated equally, at least as far as the involvement of the state in their lives is concerned. Equality is also the principle underlying the guarantees as to equality of opportunity and access to government services referred to in constitutional principle XXI-7 (*vide infra*). Whether a system of government *per se* is capable of ensuring equality amongst its citizens is debatable; but the principle of equality could be understood to imply an assignment of responsibilities which will at least seek to ensure *equality of governmental treatment* of all South Africans.

A principle not presented as such but discernible in some of the constitutional principles, is that of *provincial autonomy*. Constitutional principle XVIII-4 lays down a rule requiring special majorities in the appropriate legislative bodies for any amendments of the Constitution which alters the powers, boundaries, functions, or institutions of provinces. If the amendment concerns specific provinces only, it is to be approved by the legislatures of such provinces. Constitutional principle XVIII-5 specifies that provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments which affect its powers, boundaries and functions. Constitutional principle XIX stipulates *inter alia* that the powers of the provincial level of government shall include both exclusive and concurrent powers. The specification of exclusive powers can be regarded as a manifestation of the principle of provincial autonomy. Constitutional principle XX refers to provincial autonomy by name, specifying that the allocation of powers shall recognise the need for and promote *inter alia* provincial autonomy. Constitutional principle XXII places a restriction on the exercise by the national government of its powers by requiring that the exercise of such powers, whether exclusive or concurrent, shall not encroach upon the geographical, functional or institutional integrity of the provinces. Clearly, provincial autonomy is inherent in these specifications governing the allocation of powers. It is, however,

accommodated in formulations which allow wide scope to constitution makers for deciding on the degree of provincial autonomy which is to be established.

Constitutional principle VI which prescribes the *horizontal* separation of fundamental powers within the state, is clearly a manifestation of the *trias politica* doctrine usually associated with the name of Montesquieu. The principle underlying the doctrine – and the particular specification in which it is manifested – could be identified perhaps as the *principle of non-concentration* (of state powers); however, it is not directly relevant to the present study, which is focused on the *vertical* separation of powers within the state.

Constitutional principle XXI-7 emphasises the need for mutual co-operation between the national and the provincial governments where it “... is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service”. The principle at issue here could be identified as the *principle of co-operation* (between levels of government). Considered in context, the principle conforms to the understanding within the particular context of the concept “principle” as indicated above, viz as a generally accepted point of departure for writing a constitution.

Finally, the *principle of self-determination* can be extracted from the set of constitutional principles bearing on the assignment of responsibilities within the governmental structure of the country. Constitutional principle XXXIV provides for self-determination by a community sharing a common cultural and language heritage, by allowing constitutional provision to be made for self-determination by any such community. The constitutional principle is formulated in passive mode; self-determination is not actively promoted. Self-determination is also implied in constitutional principle XX, which requires the allocation of powers between different levels of government to be done on a basis which *inter alia* acknowledges cultural diversity. It is to be noted that constitutional principle XX refers to *levels* of government, while constitutional principle XXXIV provides for self-determination to be accommodated “... in a territorial entity within the Republic or in any other recognised way”. This formulation would seem to admit of self-determination also within a *sphere* of government focused on a community not necessarily concentrated in a specific territorial entity (region). As the term “self-determination” could also be applied in a broad sense in defining a nation-state’s relations with the rest of the



international community, it is in need of appropriate qualification in the present context. It is proposed to use the qualified term “cultural self-determination”.

In summary, although the constitutional principles analysed in this section are formulated generally as a set of specifications to be complied with by constitution makers rather than as principles *per se*, a number of principles with relevance for the assignment of responsibilities to levels of government are nevertheless to be discerned in the formulations. These are –

- ?? the principle of national unity;
- ?? the principle of economic unity;
- ?? the principle of equality;
- ?? the principle of provincial autonomy;
- ?? the principle of co-operation; and
- ?? the principle of cultural self-determination.

Conspicuous by its absence is the principle of subsidiarity, which is defined and discussed in section 3.3.3 of the thesis.

A critical examination of the assignment of responsibilities under the 1993 Constitution would necessarily include an evaluation of the manner in and extent to which the aforementioned principles were applied. Such a critical examination is contained in section 6.6 *infra*.

#### **6.4 Input of the Commission for Administration**

This section of the chapter deals with proposals which were developed by the Commission for Administration in 1993 concerning the allocation of functions and powers to the central and regional levels of government and which were submitted to the Multiparty Negotiating Process. The information provided is taken mainly from copies of documents forming part of the author’s personal records covering the period in question. The appropriate official file of the erstwhile Office of the Commission for Administration is No 10/17/B.

The Commission for Administration was a statutory body appointed by the State President in terms of the Commission for Administration Act 65 of 1984. The Commission was charged, generally, with a directive and oversight role in relation to the public service and certain other public institutions. The Commission at the time consisted of a Chairman and one other Commissioner (the author), and was supported in its work by a substantial and diverse staff complement, including *inter alia* persons qualified and experienced in the field of government organisation. One of the major responsibilities of the Commission was to make recommendations to government concerning the establishment or abolition of public service departments, as well as in regard to the functions they were to perform (Public Service Act 111 of 1984: section 3(2)(a)).

#### **6.4.1 Development of the Commission's input**

The South African Cabinet took a decision in November 1992 requiring of the Commission to develop proposals concerning the allocation of government functions (*owerheidswerksaamhede*) in a new governmental dispensation. A document shows that such proposals were considered to be of particular importance in the process of designing a new governmental structure for the country, and specifically for purposes of drafting a new constitution. (Commission for Administration 1993g.) The Cabinet decision was taken at a point in time more or less halfway between the termination in failure of CODESA II and the resumption of multi-party negotiations in May 1993 (*vide* section 6.2.1 *supra*).

On the basis of preparatory work done by the Commission and its professional staff, the Commission in February 1993, still some months before the commencement of the Multiparty Negotiating Process in May 1993, launched a major programme of organisation development work under a programme title "*Rasionalisasie van owerheidsorganisasies*" ("Rationalisation of government organisations"). The programme approved by the Commission was comprehensively specified as to its purpose and execution, with the programme document consisting of a main text of seven pages and eight annexures. The programme was to be carried out by the Commission's staff, under the supervision of the Commission, and with the co-

operation of government departments. (Commission for Administration 1993a.) By mutual agreement between the author and the Chairman of the Commission, the author assumed responsibility for the direction and oversight of the programme.

A key aspect of the programme for purposes of the present study was the development of what the Commission referred to as “blueprints” for all the major functions, such as agriculture, health, and welfare. The programme provided precise guidelines for the researching and compilation of a blueprint (*vide* following section). For each main function a senior official on the staff of the Commission was designated as the project manager for that function. The Commission attached importance to the experience and insights of career officials in the various departments who were involved in the actual performance of a function, and the programme provided for such experience and insights to be utilised fully in developing a view on the future deployment of the function. The directors general of the departments involved in the performance of a particular function were requested to assign a member or members of their management teams with whom the responsible project manager in the Commission’s Office could liaise with regard to the deployment of the function. A properly compiled and verified draft blueprint for a main function was to be submitted to the Commission for consideration. The Commission would then consult as necessary with affected directors general and ministers regarding aspects of the blueprint, after which it would be finalised as the Commission’s view concerning the deployment of the particular main function in a future governmental dispensation. (Commission for Administration 1993a.)

By means of a concerted effort by the Commission and its staff, assisted by a great many people in government departments, between 25 and 30 main function blueprints were generated over a period of roughly four months from February to June 1993, and provisionally finalised by the Commission towards the end of June 1993. At this time a request was received from the Constitutional Development Service (a then existing government department) to supply the Service as a matter of urgency with proposals concerning the allocation of functions and powers in a new constitutional dispensation with a view to utilisation in the ongoing constitution negotiating process. In response, the Commission on 25 June 1993 furnished the Service with a working document which could be used for the stated purpose. Copies of the document were at the same time furnished to all members of the Cabinet. (Commission for Administration 1993i.) The

Commission regarded the working document as a provisional input as it was at that stage still engaged in the refinement of its proposals. The Commission did not regard the suggestions contained in the document as formal (statutory) recommendations.

According to a document in the National Archives Repository the Commission's working document was submitted to the Multiparty Negotiating Process on 28 June 1993 by an entity identified as the South African Government Office: World Trade Centre, as a submission of the South African Government. In accordance with a decision of the Cabinet, the document had no marking or annotation identifying it with the Commission and the covering letter makes the point that being a working document, it does not necessarily reflect the final position of the Government. It goes on to say that that the document is submitted in view of a remark in the fourth report of the Technical Committee on Constitutional Issues to the effect that the allocation of specific elements of what the Committee was by then referring to as "functional areas" to provinces and other levels of government requires expertise in the field of public administration. The letter ends with a specific request that the working document be transmitted to the Technical Committee on Constitutional Issues for its consideration. (NA 1993u.)

The author's personal records show that following the submission of its working document, the Commission was involved in discussions on the government side concerning the functions and powers of the future central and regional governments, and also made inputs concerning formulations which could go into the draft of the new constitution. However, the Commission at no stage had any direct interaction concerning the assignment question with the Technical Committee on Constitutional Issues, which was the component within the Multiparty Negotiating Process charged with the formulation of provisions to be included in the new constitution.

The documents held in the National Archives Repository provide no indication as to what transpired regarding the particular submission by the South African Government already referred to, and which actually constituted a substantial contribution by the Commission to the negotiating process. In the absence of minutes (*vide* the first paragraph of section 6.2.3 *supra*) – there is no record available showing that the Technical Committee on Constitutional Issues considered the submission and if it did, what decision it took concerning the document. It is also not known whether the Committee was made

aware or became aware of the origin of the document, or of the programme of development work on which it was based. What the record does show is that some 3 ½ weeks previously the Committee in its fourth report had adopted a list of “functional areas” in respect of which the provinces could be entrusted with powers, and that despite some variations in approach during the drafting process as to how exactly the respective powers of the national and provincial governments were to be linked to functional areas, the Committee by early November 1993 had settled on a list of functional areas in respect of which the national and provincial governments would have concurrent powers, with associated “rules” governing the exercise of such powers. This result of the negotiating process was in essence to be incorporated in the 1993 Constitution as its section 126. What the record also shows is that the final position of the Technical Committee on national and provincial powers corresponded markedly with a combined input of the South African Government and the ANC following bilateral discussions. (*Vide* discussion of the drafting process which culminated in the particular section of the 1993 Constitution in section 6.2.3.2 *supra* .)

The conclusion to be reached is that a substantial programme of participatory research conducted at the time – which is described in more detail in the following section – did not in the event have any noticeable effect on the final drafting of the particular part of the 1993 Constitution. As an endeavour to contribute significantly to the drafting of the particular part of the 1993 Constitution, the Commission’s rationalisation programme came to nought. The development work, which was thoroughly planned and carefully done, is nevertheless considered by the author to have value when viewed from a developing scientific perspective within the Public Administration domain. The main features of the exercise are described in the following section.

#### **6.4.2 Features of the development work**

The Commission’s rationalisation programme was planned so as to fit the circumstances of the time, and aimed at providing a well-founded base for moving governmental structures into a new constitutional order. Some of the most important features built into the programme, with particular emphasis on the development of function blueprints, are noted below.

The programme was a distinctly purposeful one, its purpose being stated as follows (translated from Afrikaans): To promote, in close consultation with the Government and in harmony with the constitutional development process, an accountable redeployment of government functions, and to realise such redeployment in practice. (The reference to “government functions” was to a large extent a reference to public functions as defined and treated in this thesis.) To facilitate achievement of the stated purpose particular attention was paid to programme management. The respective roles of the Commission and its professional staff were spelt out; each main function was assigned to a senior member of the professional staff as his responsibility; directors general and designated members of their management teams were involved in the programme; and provision was made for consultation as necessary by the Commission with directors general and members of the Cabinet. (Commission for Administration 1993a.)

A number of policy directives were included in the programme. In line with the philosophical guideline of political supremacy recognised within the discipline of Public Administration ( *vide* for instance Cloete 1994:64-69), the programme was to be directed by the Government’s views and objectives regarding a future governmental dispensation. However, the development work was also to be done in harmony with the constitutional development process. The programme was to be a comprehensive one, covering all the main government functions, in respect of each of which a blueprint was to be developed and cleared at various levels, spelling out in detail how the function ought to be deployed over three levels of government. Emphasis was placed on the full and effective utilisation of the experience and insights of senior career officials who were directly involved in the performance of a function. Also emphasised was the correct and consistent use of terminology, with key terms being identified and defined. (Commission for Administration 1993a.)

The blueprint was conceived of as an innovative administrative instrument, designed to address directly and precisely the question of which functions or aspects of functions should be assigned to the respective levels of government in an envisaged three-tiered governmental structure. A blueprint would in essence constitute a proposal concerning the deployment of a main function in a new dispensation. In the Commission’s view a blueprint could be utilised as an objective input from an apolitical body for purposes of

deliberation (including negotiation) concerning the functions and powers of governments in a new dispensation.

The analytical work required in the development of a blueprint was driven by two principles, viz the subsidiarity principle, and what was referred to as the competency principle (*bevoegdheidsbeginself*) (Commission for Administration 1993f: annexure B:3-4). The Commission identified the two principles on the basis of its understanding of the Government's views and objectives regarding a future governmental dispensation. The identification of these principles took place before the commencement of the Multiparty Negotiating Process in May 1993. It was the Commission's understanding that the Government was in favour of an essentially federal system; the application of the *trias politica* doctrine concerning the horizontal separation of governmental powers; three levels of government; the demarcation of a geographic area of jurisdiction for each government to be instituted; maximum devolution of governmental decision-making; and the greatest degree of financial self-sufficiency and fiscal independence for regional and local governments. (Commission for Administration 1993f: annexue B:1-3.)

The subsidiarity principle was taken by the Commission to postulate that a government programme or activity should not be assigned to a higher level of government if it could be carried out or performed satisfactorily at a lower level of government. The Commission held the view that this was the organising principle *par excellence* which should be applied if the objective was to involve communities effectively in the processes of government and administration. For purposes of applying the principle the following criteria were adopted:

- ?? Is there a substantial reason why a government at a lower level cannot perform the particular activity?
- ?? Will allocation of the activity to a lower level of government be prejudicial to the mutual interests of or harmonious relations between governments at that level?
- ?? Is there any substantial reason to believe that allocation of an activity to a lower level of government would be prejudicial to the state as a whole?

(Commission for Administration 1993f: annexure B:3-4.)

The competency principle introduced by the Commission postulated that where an activity or a power to decide or dispose of a matter had been assigned to a government at a lower level, any government at a higher level should be precluded from intervening in the performance of the activity or the exercise of the assigned power. Regarding this principle the Commission was in favour of a constitutional provision to the effect that an activity or a power assigned to a government should be alienable only with the agreement of that government, or by means of a special legislative procedure requiring a substantial majority vote in favour of alienation. (Commission for Administration 1993f: annexure B:4.)

In an endeavour to ensure that its analysts adhered to the two principles adopted for the development of blueprints, and went about their work in a methodical way, the Commission directed that a certain approach be followed. This approach, which came to be known as the “bottom to top approach”, required of project staff to commence their analysis of a main function at the lowest level of government, and to proceed from there to the higher levels. As a first step a determination had to be made of the activities making up the particular function which could be allocated to the lowest level of government. If all the activities making up the function could be placed at the lowest level, it was logically not necessary to involve the next higher level of government in the performance of the function. If it was not possible to exclude the higher level of government, only those activities – accurately described – which necessarily (for substantial reason) had to be performed at the higher level, were to be assigned to the higher level. A determination of the activities to be performed at the lowest level of government having been made, the analysis could then be focused on the intermediate or regional level and ultimately proceed to the national level of government. (Commission for Administration 1993f: annexure B:5.)

The guidelines to analysts anticipated that the analysis of a function could lead to a finding that –

- ?? a function could be assigned completely (that is to say including all the activities making up the function) to a single level of government; or
- ?? a function could be performed for the greatest part at one level of government, but that certain activities needed to be performed at a higher level; or



?? a function was constituted in a way which required each level of government to be involved in the performance of certain (defined) aspects of the function.

A key objective was that should an activity be assigned to a higher level of government, the assignment should be defensible on rational grounds, in other words a substantial reason for the assignment should be capable of being advanced. (Commission for Administration 1993b:5-6.)

Apart from the identification of principles to be applied and an analytical approach to be followed, the development of blueprints was also based on the identification and definition of key terms. Eleven such terms were identified, viz “activity”, “blueprint”, “deconcentration”, “delegation”, “decentralisation”, “devolution”, “function”, “major function”, “government”, “power”, and “subsidiarity”. (Commission for Administration 1993d: List of terms for inclusion in annexure E of the rationalisation programme document.) The list of terms as originally defined in Afrikaans, with English translations now added, is contained in annexure 11 of the thesis. Some of these terms have been incorporated in the conceptual framework of the present study (*vide* section 3.3.3 of the thesis) and also absorbed into the proposed theoretical model presented in chapter 9 of the thesis.

The blueprint format employed in the development work was a relatively sophisticated instrument, with the following main features:

- ?? It was focused on providing a concise, accessible picture of the activities making up a function which were appropriate to the respective levels of government in a three-tiered governmental structure.
- ?? In line with the “bottom to top” approach, the activities to be performed at each level of government were set out in distinct sections in ascending order from the local level through the regional to the central level of government.
- ?? The section dealing with local government contained three subsections with the headings “Service provision”, “Legislation”, and “Co-ordination”. Under the heading “Service provision” detail was to be provided of all key activities to be

performed by a municipal department involved in the performance of the particular function at that level. The heading “Legislation” was further sub-divided, requiring an indication of the legislative powers to be exercised by municipal governments in two categories, viz (1) legislation to be adopted within the parameters set by a law of a higher government, and (2) legislation to be adopted by a municipal council in its own right. Under the heading “Co-ordination”, the blueprint required an indication of matters in respect of which local governments, in performing their activities in relation to a particular function, were required to act in a mutually co-ordinated way, either with the involvement of the regional government, or without such involvement.

?? The section of the blueprint document dealing with the regional level of government, followed the same pattern as that of the section dealing with the local level, but with appropriate adjustments to reflect the relation of the regional level to the national and the local levels in respect of legislation and co-ordination. In respect of the regional level of government an additional subsection was provided under the heading “Administrative control”. In this subsection information was to be provided concerning the exercise by a regional government of administrative control over local governments within its area of jurisdiction. The mechanism of administrative control was refined into four categories, viz (1) prescriptive direction of specified actions, (2) receipt of reports and returns, (3) performance of inspections, and (4) decision of individual cases.

?? The final section of the blueprint document, focused on the central government level, followed the same pattern as that of the section dealing with regional government, but with the wording adjusted appropriately to reflect the relation of the central level of government to the regional and local levels.

(Commission for Administration 1993e; 1993f: annexure G.)

The blueprint format employed was such as to encourage thorough data collection and rigorous analysis. In addition guidelines were provided to analysts concerning the development of blueprints (Commission for Administration 1993f: annexure G). It could be said that the blueprint concept, properly applied, would produce a scenario of the

possible deployment of a main function which would be deserving of serious consideration.

According to the author's recollection blueprints were developed for between 25 and 30 main functions – the exact number cannot be established at his stage. However, there is documentary proof of the blueprinting of at least 23 main functions, these being the number of functions covered in the Commission's document which was submitted to the Multiparty Negotiating Process and to which reference has been made *supra*. The functions addressed in the document were as follows:

Agriculture	Local government
Civic affairs and migration	Manpower
Correctional services	Mining and minerals
Education	Police services
Energy regulation	Provision of roads
Environment affairs	Regional development
Finance	Social welfare
Forestry	Trade and industrial promotion
Health services	Transport affairs
Housing and urban development	Water supply
Justice	Works
Land surveying and deeds registration.	
(NA 1993u.)	

The document referred to in the preceding paragraph dealt essentially with the regional and central levels of government, although it did contain some references to activities which could be entrusted to local governments. The document contained suggestions relating to each of the 23 main functions listed above with regard to the following:

- ?? The key activities to be performed by the staff of regional and central government departments respectively;
- ?? aspects in respect of which regional governments could be given the authority to adopt legislation within parameters set by legislation of the central level of government; and

?? aspects in respect of which regional governments could, and the central government would be empowered to adopt legislation in their own right.  
(NA 1993u.)

### **6.4.3 Assessment**

The development work on which the Commission's contribution to the negotiating process was based, was not planned consciously as a scientific research project which would meet all the requirements which research projects generally are expected to satisfy. The work was nevertheless carefully planned and then performed in a controlled manner. The project evinced certain features which, taken together, had the potential to produce function blueprints which would have a substantial degree of precision and possible acceptability, including the following: a clear statement of the purpose of the project; a prescribed methodology; an identification of specific principles to be applied; a particular analytical approach; an identification and definition of key terms; an insistence on the participation of experienced non-political practitioners involved in the performance of a function; and the specification of a results format which was designed to have practical utility. Notwithstanding the present research finding that the development of blueprints had no discernible influence on the allocation of functions and powers by the 1993 Constitution, the particular programme of work could be of continuing academic interest and may have some claim to recognition from a scientific perspective.

## **6.5 General scheme for the assignment of responsibilities**

The 1993 Constitution set in place a three-tiered governmental structure: national, provincial and local. The associated scheme for the assignment of responsibilities to the three levels of government is examined below, focusing on each level of government in turn, followed by sections dealing with interventions in the affairs of the subordinate governments and the protection of the powers of the provinces with regard to public functions.

### 6.5.1 National government

Section 37 of the Constitution stipulated that the legislative authority of the Republic would, subject to the Constitution, vest in Parliament. Section 75 contained a companion provision regarding *executive* authority, namely that the executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament, would vest in the President. It is to be noted that in the Constitution executive authority was linked to and, indeed, *followed* legislative authority; from which it can be deduced that the authority to make laws was acknowledged as the *primary* authority within the system of government. This vesting of primary authority would seem to be true not only of South Africa and its 1993 Constitution, but of virtually all countries in which a system of representative democracy is to be found. A deduction to be made from section 37 of the Constitution is that to the extent that the authority to make laws was not assigned to any other legislature, such authority would be exercised by the national legislature. In established constitutional and federal parlance the *residual authority* (or power) of the state was vested in the national government. Whatever the subnational governments were not specifically empowered to do, the national government could do – subject of course to the Constitution. In the preferred terminology of the thesis, the residual responsibility to perform public functions was assigned by the Constitution to the national government.

In addition to the competence to legislate on any matter not specifically mentioned in the Constitution, the national government in its legislative capacity was empowered by section 126(2A) to also make laws with regard to matters assigned to the provinces (*vide* following section).

### 6.5.2 Provincial government

Section 126(1) of the Constitution gave to provincial legislatures the competence to make laws with regard to all matters within a number of “functional areas” specified in schedule 6 of the Constitution. A matching executive competence was accorded provinces by section 144(2). Twenty-nine functional areas of legislative competence were itemised in the schedule referred to, as substituted by section 14 of the

Constitution of the Republic of South Africa Second Amendment Act 3 of 1994. The provincial legislative competence was, however, not to be exercised to the exclusion of the national legislature. On the contrary, Parliament was given a specific competence to *also* make laws on matters falling within the functional areas listed in schedule 6 of the Constitution (section 126 (2A)). Thus both Parliament and a provincial legislature could make a law dealing with the same matter. This obviously raised the question of legislative prevalence: should both Parliament and a provincial legislature exercise their law-making competence in regard to a specific matter, whose law would prevail and when would it prevail? The Constitution regulated this question by introducing a rule which was to be applied in determining prevalence.

Section 126(3) of the Constitution stipulated that the provincial law would prevail, except in so far as –

- “(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed (*sic* – perform a matter?) effectively, requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
- (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
- (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.”

To prevail, an Act of Parliament had to apply uniformly in all parts of the Republic (section 126(4)).

Although the Constitution – as quoted above –stated as a general point of departure that within the area of concurrent powers of the national and provincial governments, a

provincial law would prevail, the exceptions stipulated in section 126(3) are obviously all important. Indeed, the wide scope provided for deciding that an Act of Parliament would prevail over a provincial law, thus effectively narrowing the scope for provincial legislation, is particularly to be noted. The Constitution did not state specifically who should decide when an Act of Parliament would prevail, but from another part of the Constitution it would appear that if necessary recourse could be had to the Constitutional Court for such decisions. Section 98(2)(e) provided that the Court would have jurisdiction over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, including “ ... any dispute of a constitutional nature between organs of state at any level of government”.

The mechanism of concurrent powers in relation to the legislative powers of the national and the provincial legislatures, as stipulated in section 126 of the Constitution, will be examined critically in a following section of this chapter. Suffice it to say that the particular provisions of the Constitution did not constitute a *division* of legislative authority, in the sense of allocating some matters to the provincial legislatures and some to Parliament, or of allocating some matters to the provincial legislatures and leaving all other matters to Parliament, or *vice versa*. Not a single matter was stipulated as one in respect of which a provincial legislature could legislate autonomously.

While the primary responsibilities assigned to the provinces by the Constitution are to be found in their stipulated legislative competence (section 126(1) read with schedule 6), their potential array of responsibilities was not limited to the matters on which they could make laws. Their *executive* responsibilities went further: in addition to the matters over which they had made laws they were also given executive authority in respect of matters *assigned* to them under the transitional arrangements incorporated into the Constitution (section 235), or in terms of any other law, as well as matters *delegated* to them by or under any law (section 144). The assignment scheme was therefore only partially determined by section 126(1) – read with schedule 6 - of the Constitution. To ascertain the full extent of the responsibilities to be exercised by the provinces one would have to survey the executive assignments made in terms of the transitional arrangements or by or under any other law, as well as the responsibilities delegated formally to the provinces.

### 6.5.3 Local government

One of the matters on which both Parliament and the provincial legislatures could make laws was local government (section 126(1), section 126(2A), schedule 6). This competence was to be exercised subject to the provisions of chapter 10 of the Constitution (schedule 6). The particular chapter, which was devoted entirely to local government, was particularly eloquent on the subject of the *status* of the third tier of government. It stipulated that local government would be autonomous and, within prescribed legal limits, entitled to regulate its own affairs (section 174(3)). It went on to stipulate a limiting requirement in regard to actions by Parliament or a provincial legislature, viz that any such action would “... not encroach on the powers, functions and structures of a local government to such an extent as to compromise the fundamental status, purpose and character of local government” (section 174(4)). However, the hard reality as to the envisaged status of local government emerged in the very next section of the Constitution, which stipulated that the powers, functions and structures of local government would be determined by law of a competent authority (section 175(1)). A “competent authority” would be either Parliament or the appropriate provincial legislature (section 126(1), section 126(2A), schedule 6). The Constitution did give an indication of the *type* of services to be rendered by local government by requiring a local government, to the extent determined by any applicable law (of a competent authority), to make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education (*sic*), housing and security within a safe and healthy environment (section 175(3)).

In terms of powers to perform public functions, it is clear that no original such powers were earmarked by the Constitution for exercise by local governments. A local government could do nothing that it was not specifically permitted to do by either an Act of Parliament or a provincial law. In addition, whatever a local government was given to do, it was required to do – it could not neglect or refuse to carry out the law of a higher level authority, and it was by no means clear whether it would have recourse to an independent arbiter (Constitutional Court?) should it experience a law as onerous or perceive it as militating against its own objectives. However, the Constitution did



require that local governments, including organised local government, be given a reasonable opportunity to make representations regarding proposed legislation (section 174(5)). A local government was given the power to make bylaws, but these could not be inconsistent with the Constitution or an Act of Parliament or a provincial law (section 175(4)).

#### **6.5.4 Intervention in the affairs of subnational governments**

The 1993 Constitution did not make specific provision for intervention, whether through legislation or executive action, by the national government in the legally authorised affairs of a provincial government, or by a provincial government in the legally authorised affairs of a local government within its area of jurisdiction. Such intervention could of course become necessary should a subordinate government fail to discharge, or be incapable of discharging its assigned responsibilities. It is considered necessary to note the lack of provisions for intervention by a higher level government in view of the inclusion of such provisions in the 1996 ("final") Constitution.

#### **6.5.5 Protection of assigned powers**

The powers given to the provinces, as well as the exercise or performance by them of their assigned powers or functions, were protected against easy amendment or cancellation by certain provisions of the Constitution. Any Bill seeking to amend the legislative or executive powers of the provinces, as stipulated in sections 126 and 144 of the Constitution respectively, was required to be passed by both the House of Assembly and the Senate by a majority of at least two-thirds of all the members of each House. The legislative and executive competences of a particular province could not be amended without the consent of the provincial legislature. (Section 62(2).) A Bill affecting the exercise or performance of the powers or functions of the provinces could not be adopted by Parliament unless it was passed separately by both Houses. Should the Bill affect the exercise or performance of the powers or functions of a particular province or provinces only, it also had to be approved by a majority of the senators of the province or provinces in question in the Senate. (Section 61.)

## 6.6 Treatment of specific public functions

The 1993 Constitution fixed responsibility for the performance of specific public functions in two places, viz section 126, which set out the legislative competence of the provinces, and chapter 14, which dealt with the defence and policing functions. These two groupings of functions are examined *seriatim* below. It should be borne in mind that the term “public function” is used with the definition provided in chapter 3 of the thesis, viz a complex, logically inclusive composite of activities undertaken by one or more government departments, or other public institutions, and which is directed at the satisfaction of a particular need of the community, or part of the community. Only those sets of activities which are focused *directly* on the satisfaction of community needs are included within the purview of the thesis. Functions performed by government departments or other public institutions which are essentially of an *enabling* or *controlling* nature, and which impact *indirectly* on community need satisfaction, are excluded from the scope of the present study. Prime examples of such functions which are dealt with in the Constitution are the financing of government programmes, the control of expenditure, the administration of the public service, and the auditing function.

### 6.6.1 Public functions assigned to the provinces

The key information as to the public functions which were assigned to the provinces as their responsibility is to be found in schedule 6 of the Constitution, read with section 126(1) which refers to the schedule. Indeed, schedule 6 lies at the heart of the constitutional structure set in place by the 1993 Constitution. It served as the base on which the broad structure of government and public administration of the new South Africa was built. Read with section 126(1) it essentially demarcated the powers of the provinces, a core question focused on by the Multiparty Negotiating Process. In view of its importance at the time, schedule 6 requires close examination. The main features of the schedule were as follows:

?? The schedule consisted of 29 items, arranged alphabetically from “agriculture” to “welfare services”.

- ?? The items making up the schedule were designated as “functional areas” by section 126(1) of the Constitution. Section 126(1) made it clear that the legislative authority of the provinces consisted of the competence to make laws with regard to all matters which fell within the functional areas listed in the schedule.
- ?? Linguistically viewed, the 29 items listed in the schedule as “functional areas” all have the appearance of *subjects*, in the ordinary dictionary sense of the word, including “agriculture”, “consumer protection”, “indigenous law and customary law”, “provincial public media”, “soil conservation”, and “welfare services”.
- ?? Although the schedule purported, in the wording of its heading, to reflect the legislative competence of the provinces, this claim was only partially valid in view of the fact that the national Parliament was competent to also make laws regarding matters falling within the listed functional areas (section 126(2A) of the Constitution). A correct heading would have read, “Functional areas of concurrent legislative competence of Parliament and the provincial legislatures”.
- ?? Eight of the 29 functional areas listed have qualifications attached to them, the qualifications being of three types. Firstly, there is the *exclusion* of certain parts of a functional area, specifically in the case of airports, education at all levels, and nature conservation. Secondly, there is the *limitation* of a functional area to the provincial sphere, specifically in the case of language policy, provincial public media, and provincial sport and recreation. Thirdly, there is the *subjection* of law making in a functional area to specified parts of the Constitution, as in the case of language policy, local government, and police.
- ?? In stark contrast to the Constitutional treatment of the public functions related to defence and policing, where the aspects (or sub-functions) making up the functions are spelt out in detail (*vide* following section) the schedule withholds virtually all constituent detail of the 29 functional areas with which it is concerned.

The shortcomings of schedule 6 as a key element of the 1993 Constitution will be examined as part of the general critique of the assignment of responsibilities by the Constitution in section 6.7 *infra*.

### 6.6.2 Defence and policing

Defence was not mentioned in schedule 6 of the Constitution, in which the concurrent legislative competences of the national and provincial governments were listed – this public function was clearly seen as the responsibility of the national government. A part of chapter 14 of the Constitution (sections 224-228) was devoted to the National Defence Force, providing for its establishment, command and control, its membership, and its accountability, and setting out its functions. The Defence Force could be employed –

- ?? for service in defence of the Republic, for the protection of its sovereignty and territorial integrity;
- ?? for service in compliance with the international obligations of the Republic with regard to international bodies and other states;
- ?? for service in the preservation of life, health or property;
- ?? for service in the provision or maintenance of essential services;
- ?? for service in the upholding of law and order in the Republic in co-operation with the South African Police Service under circumstances set out in a law where the Police Service is unable to maintain law and order on its own; and
- ?? for service in support of any department of state for the purpose of socio-economic upliftment (section 227(1)).

Although the Constitution spoke of *services* to be rendered by the Defence Force, this was but another way of stipulating various aspects (or sub-functions) making up a major public function. In “function language” one could say that the function was conceived as consisting *inter alia* of defending the Republic, protecting its sovereignty and territorial integrity, and complying with (stipulated) obligations. What is noteworthy is the completeness and clarity with which the Constitution set out what was to be or could be done by the national government under the rubric of “defence”.

As regards policing, schedule 6 contained an entry reading “ ... Police – subject to the provisions of Chapter 14”. The provisions in question (*vide* especially sections 214 to

220) created a dual functional relationship between the national and the provincial governments with regard to police matters, with the following key features:

- ?? The South African Police Service was to be established and regulated by an Act of Parliament (section 214) but a provincial legislature could also pass laws related to the Service, provided that such laws did not conflict with national legislation (section 217(3) and (4)).
- ?? Although the Service would be a single entity, political executive oversight was to be exercised at both national and provincial levels. The national Minister would be “responsible for the Service” (section 216(1)), while in each province a member of the executive council would be charged with “responsibility for the *performance* (author’s emphasis) by the Service in or in regard to that province” of certain stipulated functions (section 217(1), section 219(1)).
- ?? A National Commissioner (of Police) was to be appointed by the President (section 216(2)(a)). The National Commissioner would in turn appoint a provincial commissioner in each province, subject to the approval of the particular member of the executive council. The National Commissioner was to exercise “executive command” of the Service (section 216(2)(b)), but subject to the provisions of the Constitution dealing with provincial policing responsibilities (section 219(1)), and the directions of the minister charged with responsibility for the Service – *vide supra*.
- ?? A detailed exposition was given of the responsibilities of the National Commissioner and of the provincial commissioners respectively (section 218(1), section 219). At the risk of over-simplification, the provinces – through their provincial commissioners – were made responsible for day-to-day policing activities, such as the investigation and prevention of crime and the maintenance of public order, while the national police component was required to take responsibility for the maintenance of a sound police service, the training of its members, and various specialised police services, including the preservation of the internal security of the country, the recording and provision of intelligence data, the keeping of criminal records and statistics, and the provision of forensic laboratory services.

For purposes of the thesis, the setting out of the respective functional responsibilities for policing at the national and provincial levels of government is particularly significant. Indeed, it constituted the only serious attempt by the constitution makers to effect a detailed separation of responsibilities regarding a public function between the national and provincial levels of government.

## **6.7 Critical examination of the assignment of responsibilities**

Three focal points have been selected for a critical examination of the assignment of responsibilities in terms of the 1993 Constitution, viz certain conceptual and technical aspects, the realisation of assignment principles, and the substance of the assignments. These aspects are dealt with *seriatim* in the following paragraphs, followed by a brief comment on intergovernmental relations, and a synopsis.

### **6.7.1 Conceptual and technical aspects**

The term “public function” is evidently one of considerable importance in the practice of public administration, as well as in the scientific study of this area of societal activity (*vide* the analysis and definition of the term in section 3.3.3 of the thesis). The term, or more precisely the concept which it represents, is no less important in the disciplines of Constitutional Law and Political Science, irrespective of the terminology which may be peculiar to these disciplines. The importance of the term lies in the fact that its meaning is located in nothing less than what the multitude of public institutions in the country are required to do in accomplishing the respective purposes for which they have been established, viz in their activities, at both the political executive and the administrative levels. Although the term is defined in a particular way in the thesis (*vide* section 3.3.3) the concept is not new. Public functions as defined, are as old as the establishment of public institutions, certainly in South Africa. One of the tasks given to the Public Service Commission by the Public Service Act 27 of 1923, was to make recommendations concerning the functions of departments, that is to say concerning what they should do. Although the Public Service Commission is no longer charged with this responsibility, the term “function” (and the associated concept) has been retained in the legal framework for the administration of the public service (*vide* sections

3(2)(a)(i) and 3(3)(b) of the Public Service Act 1994, as amended). In examining the assignment of responsibilities by the 1993 Constitution, it is appropriate and necessary to note how the Constitution dealt with a key concept in public administration.

The Constitution did not employ the term “public function” but it did use the term “function” with a conceptually equivalent meaning in one of its chapters, viz chapter 14, which dealt with the Police Service and the National Defence Force. The Constitution also used the term in other senses, as for example in referring to the functions of the President (sections 75 and 82(1)), of the executive deputy presidents (section 84(5)), of ministers (section 90), of the Judicial Service Commission (section 105(2)), of the Public Protector (section 112(1)), of the Human Rights Commission (section 116(1)), and of provincial premiers (sections 144(1) and 147(1)). For present purposes, however, the focus is on the activities (programmes) carried out by public institutions for the satisfaction of community needs – *vide* definition of the term “public function” in section 3.3.3 of the thesis.

To return to chapter 14 of the Constitution: The functions of the Police Service were clearly set out in section 215, including for example the prevention of crime and the maintenance of law and order. In addition there were correct, passing references in other sections of the chapter to the functions to be performed by the Service, for example in sections 217(3) and 217 (4). In setting out what the National Defence Force was required to do, a different terminology and style of drafting was employed. Although the heading of section 227 read “Functions of the National Defence Force” we are told in section 227(1) that the Defence Force could be employed to provide six specified *services*. The language used was appropriate to the term “service”; so for example it was stipulated that the Defence Force could be employed *inter alia* “ ... for service in defence of the Republic, for the protection of its sovereignty and territorial integrity” (section 227(1)(a)). If “function language” had been employed, the text would have read “ ... to defend the Republic in the protection of its sovereignty and territorial integrity”. It is not clear why different formulations were used in dealing with two major public functions within the scope of a single chapter. However, this is not the end of the conceptual inconsistency to be found in chapter 14.

Section 218(1) provided a list of the responsibilities, consisting of 14 items, to be discharged by the National Police Commissioner. As could be expected a number of the responsibilities were of a *managerial* nature, for instance the maintenance of an impartial, accountable, transparent and efficient police service (section 218(1)(a)), and the training of members of the Service (section 218(1)(g)). Interspersed with the managerial responsibilities were “responsibilities” which have the unmistakable look of public functions, for example the preservation of the internal security of the Republic (section 218(1)(c)), and the investigation and prevention of organised crime (section 218(1)(d)). The first of these, the preservation of the internal security of the Republic, was a repetition in words of what had already been indicated (correctly) as a policing function in section 215. A similar mixing of managerial responsibilities and public functions was to be found in section 219 of the Constitution in which the responsibilities of the provincial commissioners were set out.

The haphazard, undefined, inconsistent and confusing use of terms like “function”, “service”, and “responsibility” in the Constitution in dealing with two major public functions of crucial importance to the community, is not acceptable. The purposeful advancement of the practice and study of public administration – certainly also in relation to the policing and defence functions – requires the clarification of concepts as well as the definition and consistent use of the associated terminology (*vide* section 3.3.3 of the thesis where the terms “public function” and “responsibility” are *inter alia* analysed and defined). Perhaps it is time that the ubiquitous term “service” also be given a definite meaning or standardised set of meanings for purposes of the practice and study of public administration.

The term “function”, which was used in dealing with the Police Service and the National Defence Force in chapter 14, in some places correctly, was not used in chapter 9, which was focused on provincial government. In setting out the legislative competence of the provinces the Constitution spoke not of functions but of “matters” falling within “functional areas” (*vide* section 6.6.1 *supra*). At a conceptual level a functional area, as specified in schedule 6 of the Constitution, is not a *function*, and specifically not a *public function*. A public function as defined in the thesis is essentially an action, an activity or set of activities – it is something which is *done*. One cannot “do” agriculture or welfare services, to mention just two of the functional areas listed in schedule 6 of the



Constitution. In public administration one could *promote* agriculture or *render* welfare services, and also *regulate* agriculture or welfare services. As indicated in section 6.6.1 *supra* a functional area as listed in schedule 6 has the appearance of a *subject*. It is not something which can be done, but something which – as indicated by the Concise Oxford dictionary – can be discussed or described or represented, or which could be treated of or dealt with, or which, as in the present instance, could also serve as a collective noun. Although a functional area, linked as it is to the making of laws, has an obvious connection to a public function as defined in the thesis, it is not a public function *per se*.

It could not be ascertained from the records of the Multiparty Negotiating Process, why the particular terminology was used in drafting what was to be enacted as section 126(1) of the 1993 Constitution, or why different terminology was used in dealing with concurrent legislative competences in chapter 9 of the Constitution compared to that used in dealing with the police and defence functions in chapter 14. It is possible that the drafters were focused primarily on producing a formulation which would be amenable to legal interpretation. It is probably true to say that any law, to make sense, must deal with a matter, or a number of matters, or an aspect of a matter. The drafters of the Constitution may have found it a workable approach to focus on *matters* and to demarcate the matters a province could make laws on by identifying a number of subject matter areas, for which the term “functional areas” was found to be appropriate. A further and closely associated explanation is probably to be found in the decision to adopt the mechanism of concurrent powers. Having opted for an assignment scheme in which both Parliament and a provincial legislature could make laws regarding the same matters in specified subject matter areas, combined with rules to decide, when necessary, whose law would prevail in certain circumstances, it was presumably no longer necessary to spell out the exact scope and limits of provincial competence, an endeavour which would have necessitated the employment of more precise terminology.

Schedule 6 of the Constitution which listed the functional areas encompassing matters in respect of which the provincial legislatures would be competent to make laws, is open to criticism at a technical level on a number of grounds. The first has already been alluded to above, viz a functional area is not a public function, and the listing of functional areas provided no certainty as to the public functions or aspects of public functions provincial

legislatures could legislate about. It could be argued that the schedule as designed was acceptable for purposes of accommodating the mechanism of concurrent powers incorporated in the Constitution, but the fact of the matter is that the schedule (*vide* its heading) purported to reflect the legislative competence of the provinces – which it did not, at least not with any degree of precision. In respect of three of the functional areas, viz “airports”, “education”, and “nature conservation”, certain parts of the functional area were excluded, for instance university and technicon education in the case of education. Why certain of the functional areas had exclusions attached to them and not others, is not clear. Surely parts of other major functional areas like “agriculture”, “environment”, “health services”, “housing”, “public transport”, and “welfare services” should also have been reserved to the national government? A further, similar ground for criticism is that provisos (“subject to” qualifications) were attached to three of the functional areas, viz “language policy and the regulation of the use of official languages within a province”, “local government”, and “police”, but not in respect of other functional areas, in respect of which such provisos could no doubt also have been stipulated. Finally, schedule 6 could be criticised on the ground that a citizen wishing to know what the legislative competences of the provinces were, could have been misled by the schedule into thinking that such competences were vastly more extensive than what was actually provided for in the Constitution.

### **6.7.2 Realisation of assignment principles**

At the end of section 6.3.3 *supra* a number of assignment principles inherent in the formulation of constitutional principles making up schedule 4 of the 1993 Constitution were identified as being relevant in relation to the assignment of responsibilities for the performance of public functions to levels of government. The identified principles are as follows:

- ?? The principle of national unity;
- ?? the principle of economic unity;
- ?? the principle of equality;
- ?? the principle of provincial autonomy;
- ?? the principle of co-operation; and
- ?? the principle of cultural self-determination.

In this section of the thesis the extent to which the aforementioned principles were realised in the drafting of the text of the Constitution is examined.

The principle of national unity was fully realised in the text of the Constitution; in fact it was assured by the way in which functions and powers were allocated to the respective levels of government. The Constitution did not provide for a *division* of powers between the various levels of government. No matters were identified in respect of which the provinces could exercise exclusive powers. They were afforded concurrent powers in respect of matters falling within specified functional areas, but the exercise of these powers was made subject to an overriding power which could be exercised by the national government in certain circumstances. The circumstances in which national overriding legislation would be justified, as set out in section 126(3) of the Constitution (*vide* also section 6.5.2 *supra*) – were such as to place the national government in the position to effectively ensure the maintenance of national unity. No original powers were given to the local level of government and no threat to national unity could therefore have emerged from that quarter.

In accordance with the principle of economic unity, the Constitution reserved basic responsibilities like the control of the currency and the banking system to the national government. Although a number of functional areas in respect of which the provinces were given concurrent legislative powers had a direct bearing on the economy - including for example agriculture, consumer protection, the environment, housing, public transport, trade and industrial promotion, and urban and rural development - all of these were subject to the national override provisions contained in section 126(3) of the Constitution. Section 126(3)(d) is especially relevant, referring as it did to the maintenance of economic unity, the promotion of interprovincial commerce, and the protection of the common market in respect of the mobility of goods, services, capital, and labour. In addition, section 126(3)(e) effectively ruled out any provincial law which would materially prejudice the economic interests of another province or of the country as a whole, or would impede the implementation of national economic policies. While provision was made for a provincial legislature to raise certain taxes and to impose surcharges on national taxes (section 156), and for a province to raise loans for capital expenditure (section 157(1)(b)), both powers were made subject to Acts to be passed

by the national legislature. The maintenance of economic unity was assured by the 1993 Constitution.

Apart from the prominence accorded to equality as a basic value in the fundamental rights enshrined in chapter 3 of the Constitution, the Constitution also contained provisions calculated to ensure that in the development and implementation of government programmes there would be equality of treatment for all affected by such programmes. The national override provisions to which reference has already been made, placed a premium on uniform norms and standards that were to apply generally throughout the Republic (section 126(3)(b)), and on the setting of minimum standards for the rendering of public services (section 126(3)(d)). In addition the Constitution was written so as to rule out *inequality* in the treatment of people. Section 4(1) provided that any law or act inconsistent with its provisions, which would include the constitutional principles, would be of no force and effect. By means of section 4(2) the Constitution bound all legislative, executive and judicial organs of state at all levels of government. All these requirements have important implications for the assignment of responsibilities to governments.

The principle of provincial autonomy was realised in the text of the Constitution only to a limited extent. The true measure of a government's autonomy is the extent to which it may adopt laws to regulate its affairs to the exclusion of the involvement of any other government. The provinces were not granted exclusive legislative authority in regard to any matter – in direct contradiction of constitutional principle XIX which specified the granting of such powers in addition to concurrent powers. However, the Constitution did provide some protection to the provinces in regard to their powers and functions by providing that a Bill affecting provincial powers and functions had to be passed separately by both Houses of Parliament, and that a Bill affecting the powers and functions of a particular province or provinces had to be approved also by a majority of the senators of the province or provinces in question (section 61).

As regards the principle of co-operation, the text of the Constitution did not contain provisions stipulating what co-operation between the levels of government – specifically concerning the performance of public functions – was to entail, or how it was to be

achieved. This was in marked contrast to the Constitution which was to follow in 1996, which included a separate chapter on co-operative government.

The principle of cultural self-determination achieved embodiment in the 1993 Constitution, although not initially and only in a token manner, with the insertion of chapter 11A by the Constitution of the Republic of South Africa Amendment Act 2 of 1994. The additional chapter provided for the establishment of a Volkstaat Council, which was conceived of as a constitutional mechanism by means of which proponents of the idea of a Volkstaat could pursue the establishment of such an entity. No actual provision was made for legislative or executive institutions which would be culturally based, and no indication given of the public functions which could possibly be assigned to such bodies as their responsibility. However, it is fair to say that the Constitution, as amended, held out the possibility that a culturally focused sphere of government could be built into the broad governmental framework.

In summary, only three of the six principles singled out for examination, viz the principle of national unity, the principle of economic unity, and the principle of equality, could be said to have been fully realised in the governmental dispensation set in place by the 1993 Constitution. The principle of provincial autonomy did not find substantial embodiment in the structures of government; the principle of co-operation was not made manifest in the text of the Constitution; and the principle of cultural self-determination received no more than passive and conditional acknowledgement.

### **6.7.3 Substance**

It is necessary to focus also on the substance of the allocation of functions and powers to the various levels of government by the Constitution.

Anyone embarking on a reading of the Constitution with a view to establishing exactly what responsibilities were allocated to the provincial and local levels of government, is bound to experience a degree of epistemic frustration. There is less of a problem in ascertaining the functions and powers allowed to the national level of government. Although the Constitution did not say that the residuary powers of legislative and executive government were vested in the national government, it did stipulate that the

legislative authority of the Republic vested in (the national) Parliament, which had the power to make laws for the Republic (section 37), and proceeded to stipulate that the executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament, vested in the President (section 75). By implication, any public function not specifically allocated to a level of government as its responsibility – as for example foreign affairs or the control of the currency – would be the responsibility of the national government. The Constitution spelt out in considerable detail the national government's responsibilities in regard to two major public functions, viz defence and policing (Constitution: chapter 14). In addition the national government was given a concurrent competence with the provincial governments in regard to matters falling within specified "functional areas" (section 126(2A) read with schedule 6). In effect, the constitutional competence of the national government extended to all public functions required to be performed in the Republic, albeit subject to the observance of certain "rules" in regard to the exercise of powers in the concurrent category.

As regards the provincial level of government, the Constitution did not provide a clear and unambiguous picture of what the responsibilities of the provincial governments would be. The legislative competence of the provinces was subsumed in a category of concurrent powers to be exercised by the national and the provincial governments. Although provision was made in the constitutional principles (constitutional principle XIX) for the allocation of exclusive powers to the provinces in addition to concurrent powers, there was no carry through of this specification into the text of the Constitution. No public function, or aspect of a public function, could thus be performed by a provincial government as an original right, that is to say to the complete exclusion of the national government. As regards the substance of a province's legislative competences in terms of the mechanism of concurrent powers, a careful reading of the particular part of the Constitution (section 126 read with schedule 6) will show that the provinces were afforded no more than a potential to make laws concerning certain demarcated matters. This potential was materially affected by the countervailing power of the national government to make laws regarding the same matters (section 126(2A)). Then again, the "rules" of the concurrent powers game have to be noted. Although the Constitution stipulated that a provincial law would prevail over a national law, it would not prevail when one or more of five sets of circumstances, also stipulated in the Constitution, obtained (section 126(3)). These sets of circumstances provided the grounds on which

national legislation would override provincial legislation. The sets of circumstances were formulated so widely that the scope for national legislation in the concurrent powers category was substantially increased and that for provincial legislation substantially decreased. Concurrent powers were clearly not intended to be equal. It requires little imagination to envision a situation in which the national level of government would dominate the legislative scene; a situation which appears to have arisen in South Africa (Pottie 2001:42-43). It would be fair comment to say that in the significant area of legislative powers – the primary locus of governmental power - the Constitution provided only a limited amount of substance to the provinces.

As far as executive government is concerned, the situation of the provinces was markedly different. The Constitution provided ample scope for the provinces to play a substantial role in the rendering of services to their communities. Even in instances where a public function was regulated by an Act of Parliament, the law could entrust the actual rendering of a service to the provinces. This was certainly the situation on the ground following the implementation of the Constitution, with the provinces being made responsible for the provision of major services, especially in the fields of education, health, and welfare, and acquiring extensive administrative structures in the process. The Constitution provided specifically that in addition to matters governed by its own legislation, a province could also be given executive authority in respect of matters assigned to it by or under any law, as well as matters delegated to it by or under any law (section 144(2)). In contrast to a strictly circumscribed and problematical role in the legislative field the provinces, under the 1993 Constitution, could be and were charged with substantial executive responsibilities.

Finally, the position in regard to local government needs to be noted. The Constitution did not allocate any original functions and powers to the local level of government. The functions and powers of local government were to be determined by law of a competent authority (section 175(1)), a competent authority being either Parliament or the appropriate provincial legislature (section 126(1), section 126 (2A), schedule 6). A bylaw of a local government could not be inconsistent with the Constitution or an Act of Parliament or a provincial law (section 175(4)). The actual substance of the responsibilities to be discharged by local governments was therefore not to be found in the Constitution as such, although the Constitution did require local governments to

“make provision for access” by persons residing within its area of jurisdiction to certain services (section 175(3)). The Constitution was not particularly noteworthy for its treatment of or regard for local government as the level of government which in many ways has the most direct effect on the quality of life enjoyed by the residents of a particular locality.

#### **6.7.4 Intergovernmental relations**

As indicated in section 6.5.4 *supra*, the Constitution did not make provision for intervention by a higher level government in the affairs of a lower level government. The lack of such a provision can be seen as a shortcoming of the Constitution, given the stage of development of the country and the real prospect that a subnational government could fail to discharge or be incapable of discharging its assigned responsibilities. A commendable feature of the Constitution was the protection afforded the provinces – as noted in section 6.5.5 *supra* – against easy amendment of the powers given to them in the Constitution, as well as the easy adoption of legislation by Parliament affecting the exercise or performance of their powers or functions.

#### **6.7.5 Synopsis**

Evaluation of a state of affairs requires a standard against which an assessment can be made. In the present instance, an operational standard is discoverable by noting the implications of the decision by the negotiating parties to establish a three-tiered governmental structure. To be credible such a structure would need to evince an allocation or assignment of responsibilities appropriate to each level of government, combined with whatever intergovernmental arrangements may be considered necessary to promote the efficient functioning of the whole. It goes without saying that such allocation and arrangements should be presented with sufficient clarity. The key question to be posed therefore is whether, and how well, the 1993 Constitution succeeded in establishing a credible and clear-cut deployment of responsibilities over the three levels of government which it instituted.

On critical examination of the assignment scheme embodied in the 1993 (“interim”) Constitution, various difficulties are evident at a conceptual and technical level. In



addition, it is apparent that the assignment principles inherent in the constitutional principles were realised in the constitutional text with varying degrees of conviction. But it was the substance of the assignment scheme which constituted the major problem, specifically with regard to the competences of the subnational levels of government.

Despite a specification in the constitutional principles that provincial governments should also be allocated exclusive powers, this did not materialise in the constitutional text as finally adopted. The power ordering mechanism which was adopted, viz that of concurrent powers, is an inherently problematic one, as is evidenced by comments contained in the literature surveyed as part of the present research – *vide* Laufer (1991), De Villiers (1996), Robson (1998a), Pottie (2001), and Levy and Tapscott (2001). In the author's own experience the mechanism of concurrent powers fails to provide certainty as to which level of government is responsible for what; tends to place the weight of legislative power regarding matters in the concurrent category with the national government; tends correspondingly to inhibit the provinces in the exercise of their legislative powers; and leads to a situation in which responsibilities are determined at a political executive level rather than in the Constitution itself. It is also the author's view that the concurrent powers mechanism does little to promote an understanding of the Constitution amongst the public at large.

The alternative to concurrent powers would have been an assignment scheme, embodied in the Constitution, in which the respective powers of the national and the provincial governments were clearly specified. This was the approach advocated by the Commission for Administration, but one which did not find favour with the participants in the negotiating process. The reason for the rejection of the specified powers approach could not be found in the archives of the Multiparty Negotiating Process. However, an author close to the process has noted that, faced with the task of compiling exhaustive lists of national and provincial powers respectively, or finding a way of expressing the interests of both levels of government in a multitude of functional areas, the constitution makers opted for the latter approach, which led to the adoption of the concurrent powers mechanism (Haysom 2001:47-48). On reflection, the decision to emerge from the negotiating process may have been justified under the circumstances. It has to be borne in mind that the negotiating parties were operating under extreme pressures of time, that a decision had been taken at a relatively early stage that the constitution to be

produced would be a transitional one, that the final resolution of the allocation of powers question was not crucial to the setting in place of a fully democratic constitution, and that in any case there were international precedents for the allocation of concurrent powers. Nevertheless, no real division of power between the national and the provincial levels of government was achieved.

Apart from the difficulties inherent in the mechanism of concurrent powers and the failure to give effect to constitutional principle XIX (exclusive powers), the constitutional treatment of the provinces as regards powers and functions also needs to be weighed against a number of other constitutional principles, viz XVI (government to be structured at three levels), XVIII (powers and functions of provinces to be defined in the constitution), XX (provinces to have appropriate and adequate legislative and executive powers; allocation of powers to recognise the need for and promote legitimate provincial autonomy and to acknowledge cultural diversity), XXI-6 (provinces to be empowered to deal with the socio-economic and cultural needs and the general well-being of their inhabitants), and XXII (no encroachment by the national government on the functional integrity of the provinces). The question may well be asked to what extent the Constitution in allocating powers and functions to the provinces satisfied all these requirements.

The local level of government was neglected – this despite the apparent emphasis placed on the importance of local government in section 174 of the Constitution. This part of the Constitution provided *inter alia* that local government would be “autonomous”, that it would be “entitled to regulate its affairs” (albeit within the limits prescribed by or under law), and that Parliament or a provincial legislature could not encroach on the powers, functions and structure of a local government to such an extent as to “... compromise the fundamental status, purpose and character of local government”. One may have expected that a convincing way in which to accomplish these fine objectives would have been to allocate appropriate, original powers to local governments to enable (empower?) them to truly regulate their own affairs. This the Constitution did not do. Under the Constitution local governments could do nothing that was not given to them to do by laws passed at a higher level of government.

The Constitution was far less problematical from the viewpoint of executive government and administration. The Constitution was written in a way which allowed more than enough scope for political executive bodies and their supporting departments at the subnational levels of government to take responsibility for a vast number of programmes aimed at supplying the needs of their communities. However, their activities were to take place largely within a policy and legal framework determined at the national level of government.

The Constitution did not, in the author's opinion, succeed in achieving a substantial, sufficiently informative, easily accessible, and readily explicable deployment of responsibilities over the three levels of government which it instituted. It needs to be stated that this is a finding arrived at largely from a rational and technical perspective; it is possible that the political and practical realities of the time did not allow for the allocation of greater or more precisely defined responsibilities to the provincial and local levels of government.

## **6.8 Conclusion**

The development of South Africa's first democratic constitution necessarily implied a comprehensive *de novo* exercise in constitution writing. During the multi-party negotiations consensus was reached that constitution making would take place in two phases, viz the setting in place of a transitional constitution which would serve to move the country onto a democratic footing for the first time in its history, followed by the adoption of a "final" constitution which was to be written by a constitution making body truly representative of the people, and to be adopted by a Parliament elected democratically in terms of the transitional constitution. An outstanding feature of the constitution making process was the compilation and adoption by the negotiating parties of a comprehensive set of constitutional principles which were to direct the drafting of the "final" constitution, but which were then also applied in the drafting of the transitional constitution.

One of the most important matters to be addressed in the multi-party negotiations was the powers and functions to be exercised and performed by the provincial governments

which were to be instituted as the second tier of a three-tiered governmental structure. The importance of this matter is borne out by the fact that eleven of the thirty-four constitutional principles had to do with the allocation of powers and functions to governments. Although the constitutional principles were formulated essentially as specifications to which a future constitution had to conform, they nevertheless encompassed a number of important assignment principles.

On the basis of three key facets of the assignment of responsibilities by the Constitution, viz conceptual and technical aspects, the realisation of relevant assignment principles, and the substance of the assigned powers, the conclusion to be reached is that the Constitution did not succeed in achieving a satisfactory deployment of responsibilities. Criticism of the assignment scheme has to be tempered by the realisation that it was after all a transitional constitution, one that could not realistically have been expected to provide full and final answers in a highly contentious area of government and administration. It is therefore necessary to look next at the answers provided by the 1996 ("final") Constitution – this is the focus of the ensuing chapter of the thesis.

## **CHAPTER 7: ASSIGNMENT OF RESPONSIBILITIES: 1996 CONSTITUTION**

### **7.1 Introduction**

The 1996 Constitution built on the structure and elaborated the content of the 1993 Constitution. It represented the finalisation of a constitutional development process, marked initially by the setting in place of an interim constitution, which ushered in a fully democratic system of government, and at the same time made provision for a “final” constitution to be written by the democratically elected representatives of the people. The Constitution differs from its forerunner, but not radically so, due mainly to the directive influence of the set of constitutional principles adopted by the Multiparty Negotiating Process. In a sense, the constitution which the country now has is the 1993 Constitution grown to full maturity.

It is appropriate to structure this chapter in basically the same way as the preceding chapter, which focused on the 1993 Constitution. The sections dealing with the making of the Constitution, the general scheme for the assignment of responsibilities, the treatment of specific public functions, and the critical examination of the assignment of responsibilities, correspond closely to the arrangement used in chapter 6. However, it was considered necessary to include two additional sections, viz one dealing with the certification of the constitutional text by the Constitutional Court, and one dealing with co-operative government. The role played by the Constitutional Court has direct relevance for the study as the powers and functions of the provinces was a key issue addressed by the Court in the two certification judgements. The idea of co-operative government, already to be found in the constitutional principles adopted by the Multiparty Negotiating Process, came to fruition fully in the 1996 Constitution, with a chapter being devoted entirely to co-operative government.

## **7.2 Making of the Constitution**

The 1993 Constitution, variously regarded as an interim or transitional constitution, contained comprehensive provisions with regard to the drafting and adoption of a new constitutional text for the country and its promulgation (1993 Constitution: chapter 5). As regards the drafting, this was to be done by the Constitutional Assembly, consisting of the National Assembly and the Senate, sitting jointly (section 68(1) and (2)). The Constitutional Assembly was given the competence to appoint committees of its members, as well as any commissions, technical committees and other advisory bodies to assist it in the performance of its functions (section 72(1)). The Constitution went on to stipulate that the Constitutional Assembly had to appoint an independent panel of constitutional experts to assist it in its work (section 72(2)).

The Executive Director of the Constitutional Assembly at the time has provided a concise record of the structuring and functioning of the Constitutional Assembly. A Constitutional Committee, consisting of 44 members, was instituted and became the most important decision-making structure. To further facilitate matters, the Constitutional Committee established a subcommittee of 20 members, with the membership varying according to the issue at hand. There was also a management committee, made up of 12 members, which dealt with matters of process rather than substance, and had the key task of ensuring that the constitution writing process remained on schedule. The detailed work was assigned to six so-called theme committees, each consisting of 30 members and managed by a chairperson and a core group of seven to eight members. The main function of the theme committees was to ensure inclusivity by receiving views and submissions from interested parties and persons, followed by the submission of reports for debate in the Constitutional Committee. Each theme committee was supported by a technical committee of specialists and experts. (Ebrahim 1998:180-182.) The foregoing brief summary illustrates the scale of the arrangements set in place for producing the “final” constitution.

The theme committee with special relevance to the subject of the thesis, was Theme Committee 3, which was assigned the task of dealing with the relationship between

levels of government. It was mandated to deliberate with regard to constitutional principles XVI, XVII, and XXIV –

- ?? the nature and status of the provincial system and local government;
- ?? national and provincial executive and legislative competences;
- ?? intergovernmental relations;
- ?? local government; and
- ?? financial and fiscal relations.

(Ebrahim 1998:184.)

The Theme Committee held 50 meetings between September 1994 and August 1995, and processed 471 submissions from political parties, government departments, organisations and individuals (Ebrahim 1998:338-339). A final report by the Theme Committee *per se* could not be traced in the National Archives Repository. There is a final report by the technical advisors to the Committee dated 5 September 1995. This consists of a comparative schedule of political party submissions concerning various aspects of intergovernmental relations but does not deal with legislative and executive competences of the spheres of government. (NA 1995.)

Of particular relevance to the present study is the inclusion in the constitutional text, as passed by the Constitutional Assembly on 8 May 1996, of a category of exclusive provincial legislative competences related to functional areas. This evidently occurred at a very late stage. A draft constitutional text dated 29 April 1996 – nine days before the final text was formally passed by the Constitutional Assembly – did not stipulate functional areas of exclusive provincial legislative competence (NA 1996a). However, one day later – on 30 April 1996 – in a memorandum addressed to the members of the Constitutional Committee with the heading “Provincial exclusive legislative competences, schedule 4, schedule 5, local government”, the Executive Director of the Constitutional Assembly submitted to the Committee “copies of drafts tabled before and being discussed in the multilateral”. These drafts included an amended schedule 4 (concurrent powers), a new schedule 5 (exclusive provincial powers), and amended text formulations to accommodate the exclusive provincial powers. The draft provisions show a marked similarity to the provisions finally incorporated in the constitutional text passed by the Constitutional Assembly eight days later. (NA 1996b.)

The directive role of the constitutional principles which were adopted in the course of the Multiparty Negotiating Process was acknowledged fully in the 1993 Constitution. Section 71 stipulated that the “final” constitutional text had to comply with the constitutional principles, and that the text to be passed by the Constitutional Assembly, or any of its provisions, would not be of any force or effect unless the Constitutional Court had certified that all the provisions of the text complied with the constitutional principles. In the context of the thesis it is important to bear in mind that a number of the constitutional principles had a direct bearing on the assignment of responsibilities to subnational levels of government, especially the provinces, including one which stipulated that the powers and functions of the provinces as defined in the new text could not be substantially less than or substantially inferior to those provided for in the “interim” Constitution (1993 Constitution: schedule 4: constitutional principle XVIII.2). This latter requirement was to form the focal point of the certification process conducted in the Constitutional Court – *vide* ensuing section.

### **7.3 Certification of the constitutional text by the Constitutional Court**

The 1993 Constitution – or the interim Constitution as it is widely referred to – contained extensive provisions regarding the making of a new constitution and its adoption (1993 Constitution: chapter 5), including a stipulation that the text had to be certified by the Constitutional Court as complying with the constitutional principles (section 71(2)). The Court’s decision on compliance would be final and binding (section 71(3)). The Court’s role in the adoption of a new constitutional text, with specific reference to the subject matter of the thesis, can be examined conveniently by perusing in turn the Court’s first and second certification judgements.

#### **7.3.1 First certification judgement**

The Court adopted the procedure of allowing both written and oral representations and objections concerning the draft new constitutional text submitted to it. Notices of objection, written representations, and oral argument were submitted by or on behalf of five political parties; in addition, objections were lodged by or on behalf of a further 84



bodies or individuals. The political parties, the Constitutional Assembly, and 27 other bodies or persons were afforded a right of audience. Hearings took place during July 1996 and the Court delivered its judgement in September 1996. (CC 1996a: para. 22-25.)

Having examined the constitutional text in the light of the constitutional principles the Court found that it was unable to certify that all the provisions of the text complied with the constitutional principles. A major part of the grounds on which the Court refused to certify the text had to do with the allocation of powers and functions to the provinces. In this respect, the key obstacle in the way of certification of the text was constitutional principle XVIII.2, which reads as follows:

“The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.”

In assessing the constitutional text against the requirements of constitutional principle XVIII.2 the Court had to make a comparison between the provisions of the new text and those of the 1993 Constitution as they relate to the powers and functions of the provinces. To be able to do this the Court found it necessary to identify and analyse a number of factors which affect the powers and functions of the provinces. (CC 1996a: par. 446.) In addition to comparing the lists of functional areas of provincial legislative competence contained in schedules 4 and 5 of the text with the list of such functional areas contained in schedule 6 of the 1993 Constitution, the Court also compared the two constitutional texts with regard to numerous other matters, including the representation of collective provincial interests in the national sphere of government, the power to make provincial constitutions, the financial and fiscal powers of the provinces, provincial public protectors, provincial service commissions, traditional leadership, provincial executive powers, the power of the national government to intervene in provincial affairs and to override provincial legislation, and the power of an individual province to resist national legislation which affects it specifically (CC 1996a: para. 447-468).

Having given a weight to each of the factors which it analysed the Court came to the conclusion that the powers and functions of the provinces in terms of the new constitutional text were less than and inferior to the powers and functions which the provinces enjoyed under the 1993 Constitution (CC 1996a: par.471). The Court then had to come to a finding regarding the question whether the powers and functions of the provinces in the new constitutional text were *substantially* less than or *substantially* inferior to those allocated in the 1993 Constitution. The Court stated that this was the most difficult of all the questions it had been required to address in the certification proceedings. (CC 1996a: par. 472.)

In moving to a final conclusion the Court identified and dealt with the following factors as key considerations:

?? *Possible differences in the collective powers of the provinces, in fiscal and financial powers, and in their powers concerning the adoption of provincial constitutions:* The Court found no measurable difference in the collective powers of the provinces resulting from the replacement of the Senate by the National Council of Provinces. It also found no material change in respect of the fiscal and financial powers of the provinces, or in their powers in respect of the adoption of provincial constitutions (CC 1996a: par.474).

?? *The extent of provincial legislative competence as reflected in schedules 4 and 5 of the new constitutional text, including local government matters which were made subject to monitoring by the provinces:* The Court found the list of provincial competences to be extensive and noted the significance of the competences, including as they did numerous important functional areas (CC1996a: para. 475-476).

?? *The loss or curtailment of powers in respect of functional areas:* The Court noted that none of the functional areas set out in schedule 6 of the 1993 Constitution had been excluded, although in some instances the extent of the powers had been curtailed. The Court in this connection emphasised particularly policing, education, local government, and traditional leadership (CC 1996a: par. 477). The Court expressed the view that the curtailment of the particular aspects of provincial powers

would not be sufficient in themselves to lead to the conclusion that the powers of the provinces were substantially less than or substantially inferior to the powers vested in them by the 1993 Constitution (CC 1996a: para. 478-479).

What ultimately swayed the Court in finding that constitutional principle XVIII.2 had not been complied with, were the powers given to the national government by section 146 of the new constitutional text in relation to the mechanism of concurrent powers. The Court reasoned that a presumption in favour of national legislation which had been approved by the National Council of Provinces (section 146(4) of the text), and an alteration made in the scope for national overrides to succeed (section 146(2)(b)), gave added strength to national legislation in the concurrent category, and weakened correspondingly the position of the provinces should there be a conflict with competing provincial legislation. (CC1996a: par 480.)

The Court proceeded to find that, taken together, the combined weight of the curtailment of powers which the Court had identified, and the altered override provisions in favour of national legislation, were sufficient to lead to the conclusion that the powers and functions allocated to the provinces in terms of the new constitutional text were substantially less than and inferior to the powers and functions of the provinces as stipulated in the 1993 Constitution (CC1996a: para. 481-482).

It is relevant for purposes of the study to also note the Court's finding in regard to constitutional principle XX. This principle requires *inter alia* that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each to function effectively. The three criteria to be satisfied are *appropriateness*, *adequacy*, and *effectiveness*. It would seem that the setting of this requirement is the closest the constitutional principles came to acknowledging the need for an *allocation rationale*, or in other words a directive or normative basis for deciding – within a tiered governmental structure – *who should do what*.

Unfortunately, the Court did not devote much attention to the lead requirement of constitutional principle XX. In its judgement the Court referred to the basic criteria set in the principle but moved on immediately to the issue of legitimate provincial autonomy, which was identified in the principle as an important objective to be striven for in the

allocation of powers. The Court opined that argument advanced on behalf of objectors to the new constitutional text was “ ... not really that the powers of the provinces are not appropriate or adequate but rather that their legitimate autonomy has not been promoted ...”. (CC1996a: par.236.) Evidently the Court adopted the debatable view that the topic of legitimate provincial autonomy subsumes the question of whether the powers of the provinces are appropriate or adequate for their effective functioning. The Court proceeded to devote half a chapter of its judgement (chapter V, part B) to an analysis and discussion of a number of aspects bearing on the question of legitimate provincial autonomy, but without attempting to assess whether the public functions or aspects of public functions assigned to the provinces as their responsibility were appropriate and adequate so as to enable them to function effectively. Even where the Court dealt with specific public functions, such as policing and education, its purpose was to point to differences between the constitutional texts and not to assess appropriateness or adequacy (CC1996a: para. 391-401, 448, 477- 478). The Court did deal fully with local government issues (CC1996a: chapter VI; chapter VII, part E), but local government is not a public function like the promotion of health or the provision of education; it is more correctly regarded as a sphere of government encompassing a number of public functions as defined for purposes of the thesis (*vide* section 3.3.3). In context, the term “local government” connotes the direction and control over municipal affairs which is to be exercised by the national and provincial spheres of government respectively.

### **7.3.2 Second certification judgement**

With the Constitutional Court having declined to certify the new constitutional text, the Constitutional Assembly reconvened and in October 1996 passed an amended text which addressed the grounds for non-certification set out in the first certification judgement. The amended text was duly submitted to the Court for certification, and this time the Court found that all the provisions of the amended text complied with the constitutional principles. For purposes of the thesis the Court’s testing of the amended text against the stipulations of constitutional principle XVIII.2, which requires that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those provided for in the 1993 Constitution, is particularly relevant.

Regarding the particular constitutional principle the Court had, in its first judgement, expressed concern particularly regarding the curtailment of provincial powers with regard to policing, education, local government, and traditional leadership. But the deciding factor in the Court's view, which caused the new constitutional text to fail the test of constitutional principle XVIII.2, was to be found in the provisions of section 146, which dealt with the exercise of concurrent powers. There were two obstacles to certification, viz the introduction of a specified presumption in favour of national legislation, and a widening of the scope for the exercise of overrides by the national government in the area of concurrent powers. (CC1996b: par. 147.)

In its second judgement, the Court dealt first with the difficulties posed by section 146 of the new text with regard to the exercise of concurrent powers. It declared itself satisfied that these difficulties had been surmounted. The objectionable presumption provision in favour of national legislation had been eliminated, while the textual language dealing with national overrides had been altered in a way which the Court found to be acceptable. (CC1996b: para. 145 – 160.)

The Court then proceeded to a reconsideration of the four functional areas in which in the Court's view, as expressed in the first certification judgement, the powers of the provinces had been curtailed. It found as follows:

?? *Provincial policing powers:* Although the powers of the provinces as provided for in the 1993 Constitution had not been completely restored, the amended text had, in the Court's view, vested a significantly greater degree of power and control in the provinces compared to the new constitutional text (CC1996b: para. 162 – 169).

?? *Tertiary education:* The curtailment of powers in regard to tertiary education had been perpetuated in the amended text (CC1996b: par.170).

?? *Local government:* The powers and functions of the provinces in regard to local government as set out in the amended text were effectively the same as those which they enjoyed in terms of the new text, but were still less than the powers which the provinces enjoyed in terms of the 1993 Constitution (CC1996b: para. 171 – 175).

?? *Traditional leadership*: The amended text had effected no change in the provisions of the new text in the particular functional area (CC1996b: par. 176).

The Court then found it necessary to examine some of the other sections of the amended text in order to determine whether “in the context of the totality of provincial power”, the powers and functions of the provinces could be said to be substantially less than or substantially inferior to the powers which they enjoyed in terms of the 1993 Constitution. The Court looked at the provisions regarding the National Council of Provinces, the Public Service Commission, provincial constitutions, and labour relations, and also considered certain objections which had been submitted to it. (CC 1996b: para. 178 – 201.) Ultimately, the Court came to the conclusion that the powers and functions of the provinces in terms of the amended text were still less than or inferior to those accorded them in the 1993 Constitution, *but not substantially so* (CC 1996b: par.204). For purposes of the present study it is noteworthy that it was the amended provisions relating to provincial policing powers and the override powers of the national government which in particular played a material role in bringing the court to a conclusion different to that in the first certification judgement (CC 1996b: par.204(d)).

### 7.3.3 Comment

With a few exceptions as noted in the preceding sections dealing with the Court’s two certification judgements, the Court did not analyse the responsibilities assigned to the provinces or the municipalities for the performance of public functions. The Court for the most part accepted the “functional areas” and “matters” as listed in the relevant schedules of the constitutional texts at face value. The general question of whether each level or sphere of government had been given appropriate and adequate legislative and executive powers which would enable each to function effectively, as required by constitutional principle XX, was apparently not considered by the Court to be one requiring in-depth examination by it. In fairness it should be noted that “appropriateness”, “adequacy” and “effectiveness” in relation to the allocation of responsibilities for the performance of public functions are criteria which would be extremely difficult to apply in a single exercise to all of the multitude of public functions, and aspects of public functions, especially considering the time constraints within which the Court had to fulfil its certification task. Such an exercise may well have been

considered to be one extending far beyond the Court's specific brief in regard to the constitutional text. Then again, the fundamental question concerning which level or sphere of government should do what, is essentially a policy question – one which requires resolution at a political level. If this premise is accepted, it could be argued that the determination of an appropriate and adequate assignment of responsibilities is a task for the elected representatives of the people, and provided there had been a proper application of minds, it was not for the Court to pass judgement on the assignment scheme as such, or to attempt to examine the assignment of each and every public function, or aspect of a public function, in detail.

In order to ascertain whether the shortcomings in the two certification judgements pointed out in the preceding paragraph were noted also by other commentators on the judgements, a search was done for contemporary articles in law journals or chapters in law yearbooks which specifically address the certification judgements. Six such contributions were found, viz those of Carpenter (1996), Chaskalson and Fick (1996), Landman (1996), Butler (1997), Cowan and Fick (1997), and Malherbe (1997). Generally, these authors provide a brief overview of the certification action and then proceed to deal with those aspects of the judgements which particularly attracted their attention. However, none of them addresses either of the two shortcomings identified *supra* by this author, viz that the Court did not, generally speaking, deal in an analytical way with the assignment of the full array of public function responsibilities, or endeavour to assess whether – as required by constitutional principle XX – each level of government had been given appropriate and adequate legislative and executive powers which would enable it to function effectively.

Also of interest to the present study is the important role which the provisions relating to the so-called national overrides played in the Court's evaluations of the new and the amended constitutional texts against the requirements of constitutional principle XVIII.2, which stipulates that the powers and functions of the provinces should not be substantially less than or substantially inferior to those accorded the provinces in the 1993 Constitution. If the amended text had not removed the Court's reservations on this score, it is probable that the Court, even if for no other reason, would have declined to certify also the amended text. The Court's concern regarding the override provisions in the constitutional texts submitted to it, is understandable considering the

large number of functional areas which were included in the concurrent category of legislative powers. However, it should be borne in mind that overriding powers are relevant only if the assignment scheme provides for the exercise of concurrent powers by the national and the provincial spheres of government. An assignment scheme does not necessarily have to include a mechanism of concurrent powers, with a concomitant – and inherently contentious – set of “rules” to govern the prevalence of a law of one legislature over a similar law of another.

#### **7.4 General scheme for the assignment of responsibilities**

The 1996 Constitution retained the three-tiered governmental structure set in place by the 1993 Constitution, with the notable change that the term “level” used in referring to subnational governments in the earlier Constitution was replaced by the term “sphere”. The general scheme for the assignment of responsibilities to the national, provincial and local spheres of government is examined below.

It is to be noted that the Constitution provides a neat, summary statement of the vesting of legislative authority in the various spheres of government in the country, viz in Parliament in the national sphere, in the provincial legislatures in the provincial sphere, and in the municipal councils in the local sphere (section 43). The Constitution – somewhat disappointingly - does not provide a corresponding summary statement of the vesting of executive authority, but stipulates the executive authority of the three spheres of government separately (*vide* sections 85 (national), 125 (provincial), and 156(1) (municipal)).

##### **7.4.1 National sphere of government**

Section 44(1) of the Constitution sets out the powers of Parliament to amend the Constitution and to adopt legislation concerning other matters. Parliament’s authority to legislate on matters in the specified concurrent categories is retained, and the residuary legislative authority remains with it (section 44(1)). The powers of the two houses of Parliament, the National Assembly and the National Council of the Provinces, are differentiated according to the distinct role which each is required to play in the



legislative process. The roles of the two houses do not require detailed examination in the present context where the focus is on the powers of the respective spheres of government and not on elucidating the functioning of the bicameral national Parliament.

Where the earlier Constitution allocated to Parliament an all encompassing power to make laws for the Republic, including matters in respect of which the provincial legislatures were given concurrent powers, Parliament's power is restricted in a qualified manner in the 1996 Constitution. The restriction is necessary because of the allocation to the provincial legislatures (*vide infra*) of exclusive powers in regard to certain matters. Parliament – specifically the National Assembly – is now empowered to make a law in regard to any matter, including a matter within a functional area of concurrent provincial competence, but excluding a matter within a functional area of exclusive provincial competence (section 44(1)(a)(iii)). The exclusion of Parliament from the last mentioned category of matters is, however, not absolute, but conditional. Parliament may intervene in regard to an excluded matter, provided that certain procedures are followed, in circumstances when it is necessary –

- ?? to maintain national security;
- ?? to maintain economic unity;
- ?? to maintain essential national standards;
- ?? to establish minimum standards required for the rendering of services; or
- ?? to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or of the country as a whole (section 44(2)).

The Constitution confers on the National Assembly the power to assign any of its legislative powers, excluding the power to amend the Constitution, to any legislative body in another sphere of government (section 44(1)(a)(iii)). Such assignments were not possible under the 1993 Constitution.

The direct linking of the national executive authority to the legislative competence of Parliament, a characteristic of the 1993 Constitution (section 75), has not been retained in the 1996 Constitution, but the effect of the relevant new provisions is virtually the same. The executive authority of the Republic still vests in the President (section 85(1)), but to understand the link with the country's legislative authority, one needs to

examine the immediately following subsection which stipulates how the President, together with the other members of the Cabinet, is to exercise the executive authority. This is to be done by –

- ?? implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- ?? developing and implementing national policy;
- ?? co-ordinating the functions of state departments and administrations;
- ?? preparing and initiating (national ) legislation; and
- ?? performing any other executive function provided for in the Constitution or in national legislation (section 85(2)).

In short, the link between executive and legislative actions in the national sphere of government is retained, but a more elaborate statement of what the executive authority entails, is provided.

#### **7.4.2 Provincial sphere of government**

The provincial responsibilities for the performance of public functions are to be found in section 104 of the Constitution which sets out the legislative authority of the provinces, and in section 125 which deals with their executive authority.

A provincial legislature is empowered to pass legislation with regard to any matter within a functional area listed in either schedule 4 or 5 of the Constitution (section 104(1)(b)). Schedule 4 lists the functional areas of *concurrent* national and provincial legislative competence, while schedule 5 lists the functional areas of *exclusive* provincial legislative competence. In both schedules the functional areas are grouped in two parts – indicated as “A” and “B” – with part B in each case consisting of stipulated local government matters, and with the assignments in that part limited to the extent set out in section 155(6)(a) and (b) of the Constitution (*vide infra*). The treatment of the specific public functions assigned to the legislative authority of the provinces is examined in section 7.4 *infra*.

The outstanding difference between the 1993 and the 1996 Constitutions as regards the legislative competence of the provinces, is the assignment of exclusive competence in regard to matters in a number of functional areas. The earlier constitution did not grant any exclusive competence to the provinces. However, as already indicated in the discussion above of the national responsibilities, the exclusive competence given to the provinces is a qualified one: the national Parliament can, in certain circumstances, intervene and pass legislation with regard to a matter falling within the exclusive category.

The mechanism of concurrent national and provincial powers which, in dealing with the 1993 Constitution in chapter 6 of the thesis, was found to be problematical, has been retained in the 1996 Constitution. There is a change in the style of formulation, but the actual changes are technical rather than substantial. While under the earlier constitution a provincial law in the concurrent category would prevail *except in so far as an Act of Parliament was necessary for certain specified reasons* (1993 Constitution: section 126(3)), the 1996 Constitution accords prevalence to the national law *provided certain specified conditions are met* (section 146(2)). Essentially, the grounds on which national legislation will prevail over provincial legislation - the so-called “national overrides” – are the same in both constitutions. However, the later constitution includes an additional overriding ground, viz where the national legislation is necessary to promote equality of opportunity or equality of access to government services (section 146(2)(c)(v)).

Although there is a good deal of conceptual similarity between the circumstances in which Parliament may intervene in the functional areas of “exclusive” provincial competence (section 44(2) of the Constitution), on the one hand, and the conditions to be met in order for national legislation to prevail over provincial legislation in the concurrent category (section 146(2)), on the other, the scope for intervention in exclusively provincial affairs is decidedly narrower than the range of conditions which would permit national legislation to prevail in the concurrent category. It would seem, therefore, as if the introduction of an exclusive category constitutes a meaningful expansion of provincial legislative authority.

As far as the executive authority of the provinces is concerned, the Constitution deals with the matter in a manner similar to that employed in relation to the national sphere of government. Section 125(1) stipulates that the executive authority of a province is vested in its premier, while section 125(2) sets out the ways in which the premier, together with the other members of the executive council, is to exercise this authority, viz by –

- ?? implementing provincial legislation in the province;
- ?? implementing all national legislation within the functional areas listed in schedules 4 and 5 of the Constitution, except where the Constitution or an Act of Parliament provides otherwise;
- ?? administering in the province other national legislation, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- ?? developing and implementing provincial policy;
- ?? co-ordinating the functions of the provincial administration and its departments;
- ?? preparing and initiating provincial legislation; and
- ?? performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

Although there is a close correspondence between the exercise of the legislative and the executive authority in a province, it is apparent that a province's executive responsibilities can extend substantially beyond the area encompassed by its law-making authority – this was also the case under the 1993 Constitution. There is a presumption in favour of a provincial executive administering national legislation within the functional areas listed in schedules 4 and 5 of the Constitution, while provision is also made for the administration on statutory assignment of other national legislation. In addition provision is made for a provincial executive to perform any other function assigned to it in terms of the Constitution or an Act of Parliament. Such assignments could typically include an assignment by a member of the national Cabinet of a power or function that is to be exercised by him or her to a member of a provincial executive, provided certain conditions are satisfied (section 99 of the Constitution). All this flexibility built into the Constitution, which presumably is not without certain advantages, presents its own technical problem: anyone wishing to ascertain the precise scope of the executive responsibilities of a particular province, or of all provinces together, would

have a hard time of it, and be forced to undertake a substantial amount of detailed research.

#### **7.4.3 Local sphere of government**

Moving on to the local sphere of government, the Constitution evinces an approach noticeably different to that followed in relation to the national and provincial spheres. There is a single section (156) dealing with both the legislative and executive powers of a municipality. Significantly the primary emphasis is on executive government, with section 156(1) stipulating that a municipality has executive authority in respect of, and the right to administer (*sic* – surely executive authority implies the “right to administer”), the local government matters listed in part B of schedule 4 and part B of schedule 5 of the Constitution, as well as any other matters assigned to it by national and provincial legislation. Only in the following subsection (156(2)) does the Constitution address the legislative authority of local governments by stipulating that a municipality may make and administer bylaws for the effective administration of the matters which it “has the right to administer”. The reversal of the normal order appropriate to the assignment of responsibilities is clearly evident: first, a right to administer certain matters is given, followed by an empowerment to make laws (“bylaws”) to facilitate the administration.

The potential scope of the executive responsibilities of local government is expanded by section 156(4) of the Constitution which obligates the national and the responsible provincial government to assign to a municipality, by agreement and subject to any conditions which may be set, the administration of a matter within a functional area listed in part A of schedule 4 and part A of schedule 5 of the Constitution, which necessarily relates to local government, in instances where certain criteria can be satisfied: the matter must be one which can be administered most effectively locally, and the municipality must have the capacity to administer the matter. The Constitution also permits a member of the national executive or of a provincial executive to assign any statutory power or function that is to be exercised or performed by him or her to a municipal council, subject to certain conditions being satisfied (sections 99, 126). The problem of establishing precisely what the extent of local governmental responsibilities is, a difficulty already pointed out above in relation to the national and provincial spheres of government, is again evident.

A marked improvement in the Constitution, compared to the 1993 Constitution, is the listing – in part B of schedule 4 and part B of schedule 5 – of the matters which typically should be the responsibility of the local sphere of government. The earlier constitution did not stipulate which public functions were to be performed by local governments. In a somewhat unfortunate drafting approach the makers of the 1996 Constitution saw fit to accommodate information concerning local government matters in schedules dealing primarily with the legislative competences of the national and provincial governments. A separate schedule indicating the functional areas of local government competence would have been more appropriate, and could have served as further confirmation of the importance of local government in the constitutional scheme of things.

#### **7.4.4 Intervention in the affairs of subnational governments**

As pointed out *supra*, the national sphere of government is empowered to intervene with regard to a matter falling within a functional area of exclusive provincial competence as reflected in schedule 5 of the Constitution. Parliament may, when necessary – necessity being determined by Parliament itself – pass legislation with regard to such a matter in order to maintain national security, economic unity, or essential national standards, or to establish minimum standards for the rendering of services, or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or of the country as a whole. The “exclusivity” of provincial competence is therefore a qualified concept.

In addition to legislative intervention by the national government in the affairs of a province, the Constitution also provides for executive intervention. When a province cannot or does not fulfil an executive obligation in terms of the Constitution or other legislation, the national executive may take “... any appropriate steps to ensure fulfilment of that obligation”. Such steps could include issuing a directive to the provincial executive, or the national executive taking over responsibility for the particular obligation in the province to the extent necessary to ensure that the same objectives which apply in respect of legislative intervention – *vide supra* – are realised. (Section 100(1).)

As regards the local sphere of government, both the national government and the responsible provincial government are empowered by the Constitution to intervene in the affairs of a municipality under certain circumstances. The possible interventions are as follows:

- ?? Should a municipality not be able to or neglect to fulfil an executive obligation in terms of legislation (which would include both national and provincial legislation), the provincial executive may take steps to ensure fulfilment of the obligation, on a basis similar to that which applies to executive intervention by the national government in the affairs of a province (section 139(1)).
- ?? Each provincial government must by legislative “or other means” provide for the monitoring and support of local government in the province, and promote the development of local government capacity to enable municipalities to perform their functions and manage their affairs (section 155(6)). While this type of intervention would appear to have a mainly positive objective, the connotation of control inherent in the term “monitoring”, could possibly lead to such an action being experienced by a local government as intrusive.
- ?? The national government, without detracting from its comprehensive legislative authority in terms of the Constitution, and the provincial governments have the legislative and executive authority to – as the Constitution puts it – “see to the effective performance by the municipalities” of their assigned public functions as reflected in part B of schedule 4 (concurrent national and provincial competence) and part B of schedule 5 (exclusive provincial competence). The Constitution directs that this oversight authority of the national and provincial governments is to be exercised by regulating the exercise by the municipalities of *their* executive authority. (Section 155(7).) The executive authority of municipalities encompasses those matters referred to in the B parts of schedules 4 and 5, as well as any other matter assigned to a municipality by national or provincial legislation (section 156(1)).

The provision made in the Constitution for intervention by one sphere of government in the affairs of another sphere provides a significant perspective on the country’s assignment scheme. Although the assignment of responsibilities to each sphere of

government is for the most part discernible in the Constitution - a degree of vagueness remains in respect of responsibilities which could be assigned or delegated by one sphere of government to another – the assignments are not absolute or precisely demarcated. Instead, the responsibilities of the three spheres of government are woven into an integrated and varied fabric of governmental authority, in which a hierarchical relationship between the three spheres is clearly evident. At the highest level, the national government is vested with authority to ensure proper performance of assigned public functions by the provincial and the local governments. At an intermediate level, a provincial government is vested with authority to ensure the proper discharge by the municipalities within the province of their assigned responsibilities.

#### **7.4.5 Protection of assigned powers**

The oversight and controlling authority which the Constitution accords the “higher” sphere governments in relation to the “lower” sphere governments, is balanced by comprehensive measures in the Constitution which are designed to protect the subnational governments against interventions which are over-hasty or ill-considered.

In the bicameral parliamentary structure the National Council of Provinces represents the provinces with the object of ensuring that provincial interests are properly taken into account within the national sphere of government. The Council does this mainly by participating in the national legislative process, as well as by providing a national forum for public consideration of issues affecting the provinces. (Section 42(4).) The detail of the composition and functioning of the Council does not require explication for purposes of the thesis, except for a brief examination of its participation in the national legislative process. Three categories of Bills are processed nationally, viz those amending the Constitution, ordinary Bills which do not affect the provinces, and ordinary Bills which do affect them (sections 74, 75 and 76 respectively). The Council has a role to play in relation to the passage of all three categories of Bills, but it is its role with regard to the first and the third categories mentioned which is of relevance to the question of the powers and functions of the provinces.

Any Bill amending the Constitution which alters the powers and functions of the provinces, has to be passed also by the Council, and with a supporting vote of at least



six of the provinces (section 74(3)). Before such a Bill is introduced in the National Assembly particulars of the Bill must be provided to the provincial legislatures for their views (section 74(5)(b)). If the proposed amendment is not an amendment which affects the provinces, particulars of the Bill must nevertheless be submitted to the Council for a public debate (section 74(5)(c)). If a Bill which alters powers and functions concerns only a specific province or provinces, the Council may not pass the Bill unless it has been approved by the legislature or legislatures of the province or provinces concerned (section 74(8)).

According to the Constitution (sections 76(3) and (4)), Bills falling within the category of ordinary Bills affecting the provinces, are those dealing with matters within the functional areas listed in schedule 4 of the Constitution (concurrent national and provincial legislative competence), as well as a miscellany of other classes of matters, subjects, and bodies regulated in various parts of the Constitution. These are as follows:

- ?? The conferring of authority on provincial delegations to the National Council of Provinces (section 65(2));
- ?? organised local government (section 163);
- ?? the Public Protector (section 182);
- ?? the promotion of the values and principles of public administration (section 195(3));
- ?? the appointment of persons in the public service on "policy considerations" (section 195(4));
- ?? the Public Service Commission (section 196);
- ?? the public service (section 197);
- ?? the intervention by Parliament with regard to a matter falling within a functional area listed in schedule 5 of the Constitution (exclusive provincial legislative competence) (section 44(2));
- ?? the Financial and Fiscal Commission (section 220(3)); and
- ?? matters affecting the financial interests of the provincial sphere of government (chapter 13).

Of particular interest for present purposes is a Bill which deals with a matter falling within a functional area of concurrent national and provincial legislative competence (schedule

4 of the Constitution), and one which provides for intervention by Parliament in a functional area of exclusive provincial legislative competence (section 44(2)).

The legislative process for ordinary Bills affecting the provinces as set out in sections 76(1) and 76(2) of the Constitution, is an elaborate and complicated one, which differs according to whether the Bill is introduced in the National Assembly or in the National Council of Provinces. Any Bill may be introduced in the Assembly while only specified categories of Bills may be introduced in the Council (section 73(1) and (3)). A Bill dealing with a matter falling within a functional area of concurrent national and provincial legislative competence, may be introduced in the Council. Should such a Bill be introduced in and passed by the Council, it has then to be referred to the Assembly, and the Constitution spells out in detail its further processing, depending on whether the Assembly passes the Bill, passes an amended Bill, or rejects the Bill. The processing steps include the referral where appropriate of the Bill to a mediation committee of the two Houses. (Section 76(2).) The detail of the legislative process need not be described here; suffice it to say that for a Bill introduced in the Council to become law it must, either in its original or amended form, or in a version agreed to in the mediation committee, be passed by the Assembly, in effect given the Assembly an ultimate right of veto.

A Bill providing for intervention by Parliament in a functional area of exclusive provincial legislative competence must be introduced in the Assembly and, if passed, be referred to the Council. The further processing of such a Bill is again spelt out in detail in the Constitution, including referral where appropriate to a mediation committee of the two Houses. The enactment of the Bill into law is not dependent on its being passed by the Council. The Council may amend or reject the Bill, or in the mediation committee argue for an amended version of the Bill, but ultimately cannot prevent its passage into law. Provided the Bill is passed with a majority of at least two-thirds of its members, the Assembly can ensure that the Bill becomes law notwithstanding the opposition or reservations of the Council (section 76(1)(e), (i), and (j)). The Council does not have a veto right over a Bill passed by the Assembly.

The essence of the rather complicated processes touched upon above, can be summarised as follows:

- ?? A power or function assigned to the provinces by the Constitution can be altered only if the amending Bill is passed also by the National Council of Provinces, with a supporting vote of at least six provinces. It follows that schedule 4 of the Constitution, which lists the functional areas of concurrent national and provincial legislative competence, can only be amended with the strong support of the Council.
  
- ?? A Bill affecting a matter within a functional area of concurrent legislative competence, which has been introduced in the National Assembly, has to be referred to the Council which, although it cannot veto the enactment of the Bill into law, can oppose it and exert influence on the legislative process by causing the Bill to be amended, or moving the Assembly not to proceed with it, or requiring the Assembly to pass the Bill with a two-thirds majority. However, such a Bill when introduced in the Council can be vetoed by the Assembly.
  
- ?? A Bill providing for intervention by Parliament in a functional area of exclusive provincial competence, and which has to be introduced in the Assembly, can be dealt with by the Council in the same manner as described above in relation to a Bill dealing with a matter falling within a functional area of concurrent legislative competence.

In short, although the Constitution does not effect an absolute division of functions and powers between the national and the provincial spheres of government, it does provide institutional and procedural safeguards which are intended to function in a way which could help to ensure that any encroachment on the provincial domain takes place only after proper consideration and after the provinces have had an opportunity to express their views.

In addition to protection regarding legislation affecting them, the provinces also enjoy protection, via the National Council of Provinces, in the area of executive government. Should the national executive intervene in the administration of a province by taking the steps permitted it in terms of section 100(1) of the Constitution, the intervention must be reported to the Council and be approved by the Council within a stipulated period of time, failing which the intervention must end. Should the Council approve the

intervention, it must review it regularly and make any appropriate recommendations to the national executive. (Section 100(2).) Evidently the Council is in a relatively stronger position to protect provincial interests in the executive domain than in the legislative area.

As regards local government, the position is that a municipality is in a less protected position in relation to the national and provincial governments than a provincial government is in relation to the national government. This is true particularly in the legislative domain. A noticeably weak form of protection, if one can refer to it as such, is afforded by the Constitutional requirement that draft national and provincial legislation that effects *inter alia* the powers and functions of local government must be published for public comment, in a manner which affords organised local government and particular municipalities an opportunity to make representations with regard to the draft legislation.

In the executive domain, a municipality in respect of which the provincial executive has taken steps in terms of the interventionary powers permitted by section 139(1) of the Constitution, is entitled to protection similar to that enjoyed by a provincial government in relation to such action taken against it by the national executive. In the case of a municipality, the intervention must be approved by both the Cabinet member responsible for local government and the National Council of Provinces, within stipulated time periods, failing which the intervention must end. Again, the Council is required, if it approves of the intervention, to review the intervention regularly and, in this instance, to make any appropriate recommendations to the provincial executive. (Section 139(2).) A municipality is not afforded any protection by the Constitution against the national or provincial government when either of these take steps to “see to the effective performance” by the municipality of its functions, by regulating the exercise of its executive authority (section 155(7)). The Constitution does not elaborate on how the regulation of the exercise by a municipality of its executive authority is to be done.

## **7.5 Treatment of specific public functions**

The 1996 Constitution deals with specific public functions in a number of places –

- ?? in sections 44 and 146, read with schedule 4, concerning functional areas of concurrent national and provincial legislative competence;
- ?? in section 104, read with schedules 4 and 5, concerning functional areas of concurrent and exclusive legislative competence of the provinces;
- ?? in section 156, read with schedules 4 and 5, concerning the executive and legislative authority of municipalities; and
- ?? in chapter 11, concerning security functions.

Only public functions which are focused directly on the needs of the community are covered by the thesis; activities making up functions which are of an enabling or controlling nature but which do not impact directly on community need satisfaction are, despite being dealt with by the Constitution, not of interest for present purposes – *vide* comment in the introductory paragraph of section 6.6 of the thesis. In the following sections public functions which are assigned to the provinces and the municipalities respectively, and those public functions which constitute the security services of the country, are examined *seriatim*.

### **7.5.1 Public functions assigned to the provinces**

In the 1993 Constitution information with regard to the public functions assigned to the provinces was provided in schedule 6 of the Constitution, under the heading “Legislative competence of the provinces”. This heading was not entirely accurate as the national government was given the authority to also pass legislation with regard to any matter covered by the “provincial “ schedule. As pointed out in section 6.6.1 of the thesis, a correct heading would have read “Functional areas of concurrent legislative competence of Parliament and the provincial legislatures”. The reference in the 1993 Constitution was to “functional areas” which, as pointed out in section 6.7.1 of the thesis, are not the same entities as public functions, although there is an obvious connection to public functions.

The term “functional area” is again employed in the 1996 Constitution for setting out the scope of the legislative competence of the provinces. The specific functional areas are listed in schedules 4 and 5, dealing with the concurrent national and provincial legislative competence and the exclusive provincial legislative competence respectively.

Each of these schedules has a part B in which a number of local government matters are listed and which are dealt with in the next section. Schedules 4 and 5 are examined below with the focus on provincial powers.

Part A of schedule 4 lists 33 functional areas, compared to 29 such areas reflected in the corresponding schedule (schedule 6) of the 1993 Constitution. The functional areas indicated in the earlier constitution – ranging from “agriculture” to “welfare services” have for the greater part been retained, with some modification of formulation. However, four functional areas – “abattoirs”, “markets and pounds”, “sport and recreation”, and the provincial aspect of “roads” (to which traffic has been added) – are now listed in schedule 5, which stipulates the functional areas of exclusive provincial legislative competence. Nine new functional areas have been added to the concurrent list (schedule 4), viz “administration of indigenous forests”, “disaster management”, “pollution control”, “population development”, “property transfer fees” (*sic*: this can hardly pass as a functional area), “provincial public enterprises”, “public works”, “vehicle licensing” (*sic*: as before), and “industrial promotion”. The latter functional area has been separated from “trade”, which is retained in the list.

Arguably the most important change between the earlier and the current schedule of concurrent legislative competences is the omission of local government as a “functional area” from the current schedule. (As pointed out in the final paragraph of section 7.3.1 *supra*, local government is more correctly regarded as a sphere of government.) In terms of the 1993 Constitution both the national and the provincial legislatures could pass legislation with regard to local government, subject to the provisions of chapter 10 of the Constitution, which dealt specifically with local government. Legislation regarding the ordering of local government beyond the basic categorisation provided by the Constitution (section 155(1)), as well as that concerning the general structuring and functioning of local government, is now the preserve of the national legislature.

The linguistic-technical features of the present list of functional areas in the concurrent category are generally the same as those of its precursor (*vide* section 6.6.1. of the thesis). The items listed continue to have the appearance of subjects, in the common usage sense of the word. Some of the items are qualified by excluding certain parts of the functional area, or by limiting the functional area to the provincial sphere, or by

subjecting lawmaking in the functional area to a specified part of the Constitution. In contrast to the defence and policing functions, where the Constitution stipulates the respective objects of the functions, no indication is given in schedule 4 of the objects or content of the public functions subsumed under the various functional areas, other of course than the degree of meaning inherent in the designation of a functional area ("agriculture", "education", etc.). The same treatment of functional areas was evident in the 1993 Constitution. A notable improvement on the earlier constitution is to be found in the heading of schedule 4, which states correctly that it deals with functional areas of concurrent national and provincial legislative competence. Schedule 6 of the 1993 Constitution, while having essentially the same focus, indicated inaccurately that it dealt with the legislative competence of the provinces.

In contrast to the 1993 Constitution, which did not assign any exclusive competence to the provinces, the 1996 Constitution provides for the exercise by the provinces of exclusive legislative competence with regard to a number of specified functional areas (section 104(1)(b)(ii) read with schedule 5). It needs to be borne in mind that although schedule 5 purports to deal with exclusive provincial legislative competences, the exclusivity is not absolute. As pointed out in section 4 *supra*, Parliament can intervene in such a functional area when necessary in order to accomplish specified objectives (section 44(2)). Schedule 5 lists twelve functional areas of exclusive provincial legislative competence, viz "abattoirs", "ambulance services", "archives other than national archives", "libraries other than national libraries", "liquor licences", "museums other than national museums", "provincial planning", "provincial cultural matters", "provincial recreation and amenities", "provincial sport", "provincial roads and traffic", and "veterinary services, excluding regulation of the profession". The style of presentation is the same as that employed for schedule 4 – *vide supra*. Four of the twelve functional areas – "archives", "libraries", "museums", and "veterinary services" - have a qualification attached to them, consisting of the exclusion of certain parts of the functional area. So for instance, provinces have exclusive legislative competence with regard to archives, other than national archives, and libraries, other than national libraries. In respect of five other functional areas in the list the same sort of qualification is stipulated but in another way, by attaching the prefix "provincial" – thus "provincial planning", "provincial cultural matters", "provincial recreation and amenities",

“provincial sport”, and “provincial roads and traffic”. The reason for this variation in presentation is not apparent.

### **7.5.2 Public functions assigned to the municipalities**

As regards the local sphere of government, the 1996 Constitution indicates quite comprehensively the scope of what are referred to as “local government matters”. In the preferred language of the thesis, the matters listed could be identified as public functions, or aspects of public functions, to be performed by local governments. The list of matters is split between schedules 4 and 5 of the Constitution, in each case being accommodated in part B of the particular schedule. The full lists are as follows:

#### Local government matters listed in part B of schedule 4

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Firefighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Stormwater management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.



Local government matters listed in part Part B of schedule 5

Beaches and amusement facilities  
 Billboards and the display of advertisements in public places  
 Cemeteries, funeral parlours and crematoria  
 Cleansing  
 Control of public nuisances  
 Control of undertakings that sell liquor to the public  
 Facilities for the accommodation, care and burial of animals  
 Fencing and fences  
 Licensing of dogs  
 Licensing and control of undertakings that sell food to the public  
 Local amenities  
 Local sport facilities  
 Markets  
 Municipal abattoirs  
 Municipal parks and recreation  
 Municipal roads  
 Noise pollution  
 Pounds  
 Public places  
 Refuse removal, refuse dumps and solid waste disposal  
 Street trading  
 Street lighting  
 Traffic and parking.

There are thus some local government matters which fall under the concurrent legislative competences of the national and provincial governments, and some which fall under the exclusive legislative competence of the provinces, exclusivity being qualified as indicated before.

It is to be noted that the 38 local government matters of which the Constitution speaks, are not listed in an own schedule of the Constitution, but in schedules focused on the legislative competence of the national and provincial spheres of government. Indeed,

the two schedules do not deal with the legislative competence of local governments at all: the purpose of the B parts of the schedules is to indicate the local government matters in respect of which the national and the provincial governments have legislative competence, either concurrently (schedule 4) or exclusively (schedule 5). The extent of the legislative competence of the national and provincial spheres of government in relation to the municipal sphere is regulated by section 155(6)(a) and (7) of the Constitution, which deals with the monitoring and support of local government, the promotion of the development of local government capacity, and the regulation of the exercise by municipalities of their executive authority. Essentially, the local government matters listed in part B of schedule 4 are matters subject to control by either the national or the provincial governments, while the matters listed in part B of schedule 5 are subject to the “exclusive” control of the provincial governments.

Chapter 7 of the Constitution, which is devoted to local government, does not identify any local government matters other than those set out in the B parts of schedules 4 and 5. Section 156(1)(a), which stipulates the executive authority of a municipality, links this to the two lists of local government matters contained in schedules 4 and 5, while section 156(2) provides that a municipality may make bylaws with regard to such matters.

Although the Constitution switches from “functional areas” to “matters” in identifying public functions to be performed in the local sphere of government, the lists are presented in a manner similar to the lists of functional areas in respect of which the national and the provincial spheres have competence. Each list is an alphabetical arrangement of subjects (“air pollution”, “building regulations”, “child care facilities”, and so on). Some matters are qualified by the word “municipal” – thus “municipal airports” and “municipal planning” – while others are not, as in the examples quoted in the preceding sentence. As all the matters are from the outset identified as local government matters, the reason for the selective employment of the word “municipal” is not clear. One of the listed matters in part B of schedule 4 is qualified by the exclusion of certain aspects, while two are limited as to scope. None of the matters listed in part B of schedule 5 is qualified in any way.

By providing comprehensive lists of matters which belong in the local sphere of government, the present Constitution represents a substantial advance on the 1993 Constitution, which did not. The reason for the grouping of local government matters in two lists, each linked to peculiar oversight arrangements, is not given in the Constitution. It is reasonable to assume that the matters included in part B of schedule 4 (concurrent national and provincial competence) were considered by the drafters of the Constitution to carry greater weight, or to have wider implications, or possibly to be inherently more contentious, than the matters listed in part B of schedule 5 (exclusive provincial competence).

### **7.5.3 Public security functions**

The 1993 Constitution contained a chapter (chapter 14) dealing with two major security functions, viz policing and defence. In the 1996 Constitution security matters are dealt with in chapter 11, with the chapter expanded to encompass all national security services, consisting of a single defence force, a single police service, and any intelligence services established in terms of the Constitution (section 199(1)). The national security function is clearly intended to be a centralised one – the Constitution states specifically that national security is subject to the authority of Parliament and the national executive (section 198(d)).

In contrast to the quite extensive treatment accorded the defence and policing functions in the 1993 Constitution the treatment of these functions in the present Constitution is notably more concise. The defence function is to be performed centrally, while the policing function requires substantial involvement of the provinces for its performance, thus making it relatively more significant for purposes of the thesis.

Where the earlier constitution set out in considerable detail the functions to be performed by the defence force - referring to the functions as "services" - the 1996 Constitution simply states the primary object of the defence force, viz "to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force" (section 200(2)). A significant innovation is the requirement that a civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member

responsible for defence (section 204). Immediately below the political executive level, there is thus a functional dichotomy, with the military part of the function being balanced by a civilian arm at the same organisational level. The purpose of the arrangement is presumably to promote the fullest possible public accountability in the performance of a function which by its very nature has the *potential* for possible abuse and maladministration. However, for purposes of the thesis it needs only to be noted that the defence of the Republic and its people is established as the responsibility of the national government, to the exclusion of the other spheres of government.

As regards the police service, chapter 11 requires the service to be structured to function in the national, provincial and, where appropriate, the local spheres of government (section 205(1)). In contrast to defence, which is clearly a responsibility of the national government, the Constitution requires a deployment of responsibility for the policing function across the national and provincial spheres of government, and envisages that the deployment of responsibility could be extended also to the local sphere. National legislation must establish the powers and functions of the police service, taking into account the requirements of the provinces (section 205(2)). (No mention is made of the requirements of the municipalities.) In contrast to the defence function, in respect of which the Constitution identifies a “primary” object – *vide supra* – the Constitution identifies a plurality of objects for the police service, viz to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law (section 205(3)). The stated “objects” could all be seen as sub-functions or aspects of the policing function.

The Constitution has little to say about the possible responsibilities of municipalities in regard to the policing function, the text going no further than stipulating that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services (section 206(7)).

As far as the provinces are concerned, the Constitution actually uses the term “responsible(-ity)” – one of the key terms of the thesis – in dealing with the role to be fulfilled by a provincial executive in relation to the policing function. The Constitution stipulates that a provincial executive is *responsible* for the policing functions vested in it

by the Constitution itself, assigned to it in terms of national legislation, and allocated to it in the national policing policy (section 206(4)). It is the first of these three categories of functions which is of particular interest to the present study from a *substance* perspective, as presumably national legislation and the national policing policy cannot go substantially beyond that which the Constitution empowers the provinces to do. But what exactly are the functions which are vested in the provinces by the Constitution, and to which reference is made in section 206(4) and again in section 206(5)? According to the last mentioned section the functions are those set out in section 206(3). However, the section to which reference is made does not use the term “function”; it states that each province is *entitled* –

- ?? to monitor police conduct;
- ?? to oversee the effectiveness and efficacy of the police service, including receiving reports on the police service;
- ?? to promote good relations between the police and the community;
- ?? to assess the effectiveness of visible policing; and
- ?? to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province (section 206(3)).

To say that a province is “entitled” to do certain things regarding policing would seem to grant it a role significantly different to what that role would be if it was given the *right* to do those things, or even made *responsible* for the particular matters. Being entitled to engage in a certain activity, even if it is a constitutional entitlement, does not necessarily obligate a province to engage in the activity, but means rather that it may do so, and to the extent that it wishes to do so. With a noteworthy substitution of concepts, the Constitution proceeds in section 206(5) to refer to the activities that a province is entitled to engage in, as “functions”. This section stipulates that in order to “perform the functions set out in subsection (3)”, a province may investigate complaints and make recommendations to the Cabinet member responsible for policing.

To be permitted to investigate complaints would seem to constitute a *right*. Chapter 11 also confers certain other rights with regard to policing on a province, to be exercised by either the provincial executive or the provincial legislature, viz the right -

- ?? to be consulted by the Cabinet member responsible for policing before he or she determines national policing policy, and to determine the policing needs and priorities of the province which the Cabinet member has to take into account in determining policy (section 206(1));
- ?? to participate in a committee consisting of the Cabinet member and the members of the provincial executive councils “responsible” for policing with a view to ensuring effective co-ordination of the police service and effective co-operation among the spheres of government (section 206(8));
- ?? to require the provincial commissioner of police to appear before the provincial legislature or any of its committees to answer questions (section 206(9));
- ?? to be consulted in the appointment of a provincial commissioner (section 207(3));
- ?? to receive an annual report from the provincial commissioner (section 207(5)); and
- ?? to institute, where the provincial commissioner has lost the confidence of the provincial executive, appropriate proceedings for the removal or transfer of, or disciplinary action against the commissioner, in accordance with national legislation (section 207(6)). (The power to remove, transfer or discipline a provincial commissioner vests in the National Commissioner.)

Essentially and significantly, the Constitution does not *divide* the policing function of the country between the national and the provincial spheres of government. The provinces are not given responsibility for the performance of a substantive part of the total function. There is in any case a single police service for the country as a whole (section 199(1)), controlled and managed by the National Commissioner of Police (section 207(2)), who is appointed by the President (section 207(1)). What the Constitution does do, is to allow the provinces a say in the performance of this major public function, leaving it to each province to decide how actively it will exercise the essentially consultative and monitoring rights which have been identified above. It is possible that a provincial government may influence the performance of the policing function in its province in a meaningful way, but the basic responsibility for the performance of the function is with the national government.

As in the case of the defence force – *vide supra* – and presumably in the light of broadly similar considerations, the Constitution provides for the establishment of a civilian

secretariat for the police service, which is to function under the direction of the Cabinet member responsible for policing (section 208).

Moving on to the third branch of the security services, intelligence, the Constitution provides for the establishment of one or more intelligence services by the President, and only by him, in terms of national legislation (section 209(1)). National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or the police service (section 210). In resonance with the provision made for civilian secretariats for the defence force and the police service, the Constitution requires “civilian monitoring” of the activities of all intelligence services by an inspector appointed by the President and approved by the National Assembly with a supporting vote of at least two-thirds of its members (section 210(b)). Intelligence as a public function is clearly a centralised one, a conclusion borne out by the fact that the National Council of Provinces is given no say in the appointment of the inspector of intelligence services.

## **7.6 Co-operative government**

An important and significant innovation in drafting the 1996 Constitution was the inclusion of a chapter (chapter 3) on co-operative government. The chapter in its lead statement declares government in the Republic to be “ ... constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated” (section 40(1)). All spheres of government are then required to observe and adhere to certain principles, and to conduct their activities within certain parameters provided in the chapter (section 40(2)).

Of the principles and parameters provided in section 41(1) the following are particularly relevant to the assignment of responsibilities for the performance of public functions:

- ?? All spheres of government and all organs of state within each sphere must respect the powers and functions of government in every other sphere (section 41(1)(e)).
- ?? No power or function may be assumed other than those conferred in terms of the Constitution (section 41(1)(f)).

- ?? Powers and functions may not be exercised in a manner which encroaches on the geographical, functional or institutional integrity of government in another sphere (section 41(1)(g)).
- ?? Spheres of government and organs of state are to co-operate with one another “in mutual trust and good faith”, *inter alia* by co-ordinating their actions and legislation and by avoiding legal proceedings against one another (section 41(1)(h)(iv) and (vi)).

As regards the avoidance of legal proceedings, chapter 3 goes on to stipulate that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute (section 41(3)).

Haysom (2001:52) expresses the view that the Constitutional Assembly attempted to resolve the questions of legalism and complexity inherent in the assignment of functions and powers by *inter alia* placing greater emphasis on co-operative government. Murray (2001:81) remarks in similar vein that the Constitution is sensitive to the complex needs of what she describes as the highly integrated system which has been adopted in South Africa, and which in her view requires governments to act in partnership rather than in competition with one another. Malherbe (2001:262-263) points out that the Constitution gives effect to co-operative government in various ways: Governments participate on a limited basis in decision-making in other spheres; governments in the different spheres are obliged to assist one another; governments may delegate powers to governments in other spheres, and so facilitate co-operation; and, under narrowly defined circumstances, the national government may intervene in local affairs.

Malherbe (2001:275) goes on to refer to positions with regard to co-operative government taken by the Constitutional Court in jurisdictional judgements delivered by it, viz that the only reasonable way in which concurrent powers can be implemented is through co-operation; that intergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government; that even the powers of intervention of the national Parliament and the national government in exclusively provincial affairs must be exercised subject to the principle of co-operative government; and that co-operation is of particular importance in the field of concurrent



lawmaking and implementation of laws. Steytler (2001:248) identifies three elements in an emerging vision of the Court with regard to co-operative government, viz a unitary emphasis, with an acknowledgement of the paramount position occupied by the national government; the adoption of a non-competitive style of federalism; and an acceptance that political processes are central to the achievement of co-operative government. He, however, cautions against over-emphasis of a process based system of co-operative government, which in his view holds the danger that decision-making may become entangled at the closed political executive level, a state of affairs which can be to the detriment of transparency and accountability to electorates (Steytler 2001:254).

From a Public Administration perspective, it is abundantly clear that the drafters of the Constitution had in mind that the powers and functions of the various spheres of government should be a constitutionally determined matter, and that each sphere of government, with its particular organs of state, should respect the assignment of responsibilities, and co-operate with one another in discharging their respective responsibilities. At the same time there is an acknowledgement to be read between the lines that the separation or division of powers and functions between spheres of government may not always be amenable to clear demarcation, and that disputes can arise in this connection. Should this happen, the parties involved in a dispute are required, in the spirit of co-operative government, to make every effort to resolve the matter short of instituting legal proceeding against one another. It is difficult to find fault with the sentiments concerning co-operative government contained in chapter 3 of the Constitution, but the opinion can be ventured that co-operative government ought not to be seen as a means of remedying inherent defects and shortcomings in the assignment of responsibilities to spheres of government. The accuracy and precision with which responsibilities are assigned by the Constitution, and the possibility of disputes arising in this area, would appear to stand in an inverse relationship to each other. The opinion expressed is elaborated in a note on intergovernmental relations in section 7.7.4 *infra*.

## **7.7 Critical examination of the assignment of responsibilities**

In the preceding chapter of the thesis the assignment of responsibilities under the 1993 Constitution was examined under three headings, viz “conceptual and technical

aspects”, “realisation of relevant constitutional principles”, and “substance”. These headings can also serve for the critique to be presented below.

### **7.7.1 Conceptual and technical aspects**

The confusing and inconsistent use of terms and concepts which was identified as a problem and discussed in section 6.7.1 of the thesis in relation to the 1993 Constitution, has been perpetuated in the 1996 Constitution. The critique contained in section 6.7.1 is not repeated here. Suffice it to say that terms like “function”, “responsibility”, “service”, “functional area”, and “matter”, which are employed in setting out the responsibilities of the various spheres of government, have not been defined or used in a consistent, systematically interlinked manner. This is a basic shortcoming of both recent constitutions, and one which needs to be addressed if a more scientific approach to the assignment question is to be established. An observation to be made is that while the term “function” is used in both constitutions, the drafters of the texts have somehow succeeded in largely avoiding its use in referring to what public institutions are established to do, viz their activities or programmes of work. There is also a continuing inconsistency in the employment of qualifications relating to exclusions, limitations, and provisos in setting out what the various spheres of government are permitted to do. The use of the prefixes “provincial” and “municipal” in referring to some – but not all – functional areas or matters in respect of which competences have been bestowed on provincial and municipal governments respectively, is puzzling, and would appear to be unnecessary.

The literature reviewed as part of the research (*vide* section 2.6 of the thesis) did not contain criticisms regarding the conceptual and technical aspects of constitution drafting similar to those expressed in the preceding paragraph; it is surmised that this is a largely unexplored field. One publication which was consulted (Senelle 1990) does contain suggestions regarding the use of language in referring to the competences of the national and subnational levels of authority, but these formulations are more appropriate to the field of Constitutional Law and do not have utility for purposes of the present study, which are directed *inter alia* at achieving a better understanding and more precise description of public functions. The author is strongly of the opinion that clarity and consistency in the employment of key concepts, accompanied by the necessary

technical sophistication in constitution drafting, are essential prerequisites in any endeavour to place the assignment of responsibilities on a more scientific footing; this matter is taken further in chapter 9 of the thesis.

The orderly structuring of a constitutional dispensation would dictate that the public functions, or aspects of public functions, assigned to all spheres of government should be specified. The Constitution is commendable for doing so, in contrast to the 1993 Constitution which did not specify the public functions to be performed by the municipalities. However, the manner in which the Constitution sets out local government matters, viz by listing such matters in schedules dealing with national and provincial legislative competences, does not constitute due acknowledgement of this important sphere of government, and is unacceptable. It would have been a simple matter to append an additional schedule to the Constitution setting out the legislative competence of the municipalities. The unfortunate impression is created that the primary object of the constitution makers was to differentiate in relation to specified local government matters the oversight to be exercised by the national and the provincial authorities respectively. On the subject of local government competences, it is also not clear why the pattern of setting out, first, the legislative competence of a sphere of government, to which the executive competence is then linked – the pattern followed in regard to the national and the provincial spheres – was not followed through to the municipal sphere. The continuing use of the term “bylaw” - with its add-on connotation – in referring to the legislation of one of three “distinctive” (Constitution: section 40(1)) spheres of government, also needs to be questioned. The term “municipal legislation” would be more appropriate and accurate and its introduction, apart from being generally welcomed by those in local government, could contribute to more effective government in that sphere by possibly stimulating greater interest in legislative actions. Criticism and suggestions similar to the foregoing have not been encountered in local publications reviewed as part of the research. As to the enhanced status of local government, there can be little doubt. De Visser (2002:223) refers to a judgement of the Constitutional Court containing the statement that “local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself”.

From a conceptual and technical point of view the ingenuity of the Constitution, but also its complexity, in dealing with public functions is to be noted. These aspects have been dealt with previously in an article published by the author (Robson 1998a) and the salient points are summarised below.

The ingenuity of the Constitution lies in the way in which it provides legal certainty as to the powers and functions of the key role-players in government. It indicates clearly who can make laws and who can apply them. Where concurrent powers are assigned it provides a comprehensive set of rules for determining whose legislation will prevail in cases of conflict and in what circumstances. On the face of it, all possible eventualities have been foreseen, and the appropriate steps for dealing with eventualities spelt out. The Constitution's provisions regarding functions and powers are, however, also highly complex. To ascertain what the Constitution has to say about public functions requires concerted effort and a substantial expenditure of time; the provisions in question are not readily accessible or easily comprehensible. Not only the ordinary citizen, but even an experienced legislator, administrator or scholar would find it an exacting task to acquire a full understanding of the powers of the various spheres of government in relation to specific public functions. In the article referred to, it was suggested that the difficulty in obtaining a clear picture of the responsibilities of the various spheres of government arose from the legal perspective from which the relevant parts of the Constitution were written. The focus was on the establishment and assignment of formal legal competences with reference to powers and functions in a scheme built for the greater part around the mechanism of concurrent powers. This gave rise to a constitution replete with provisos, cross references, prescribed procedures, adjudication criteria, and oversight mandates. Finally, the point was made that the inaccessibility of the particular parts of the Constitution to ordinary members of the public was not conducive to the proper exercise by them of their democratic rights (in giving direction to government in the various spheres). (Robson 1998a: 34-36.)

### **7.7.2 Realisation of assignment principles**

As reported in section 6.3.3 of the thesis an analysis of the constitutional principles – which in the author's view generally take the form of specifications rather than principles *per se* - showed that there were a number of principles inherent in the particular

formulations which were relevant to the assignment of responsibilities to levels of government. These were the principles of national unity, of economic unity, of equality, of provincial autonomy, of co-operation, and of cultural self-determination. On examination of the text of the 1993 Constitution it was found that –

- ?? the principles of national unity, of economic unity, and of equality had been fully realised in the 1993 Constitution;
- ?? the principle of provincial autonomy did not find substantial embodiment in the structures of government;
- ?? the principle of co-operation was not made manifest in the Constitution; and
- ?? the principle of cultural self-determination received no more than passive and conditional acknowledgement.

The 1996 Constitution shows a substantial advance in regard to the realisation of the particular set of assignment principles. As was the case with the earlier constitution the principles of national unity, of economic unity, and of equality are fully realised in the 1996 Constitution. In addition, there has been considerable progress with regard to the realisation of the principles of provincial autonomy and of co-operation.

The glaring omission in the 1993 Constitution to assign any exclusive powers to the provinces – as required by constitutional principle XIX - has been rectified, with the Constitution now making express provision for exclusive provincial competence with regard to a substantial number of functional areas (section 104(1); schedule 5). The fact that Parliament may, when it is necessary to achieve certain specified objectives, pass intervening legislation with regard to matters in the provincial exclusive category (section 44(2)), qualifies the exclusivity of the competence, but does not neutralise it. Parliament may intervene, but only to achieve a specified objective, which is clearly related to the maintenance of the national interest. In the category of concurrent legislative competence, a greater number of functional areas have been opened to legislative activity by the provinces. Compared to its predecessor, the Constitution provides more fully for the protection of provincial powers, principally through the institution of the National Council of Provinces, and the prescribed role it is required to perform (*vide* section 7.4.5 *supra*) In short, provincial autonomy with regard to the

performance of public functions, although still limited and circumscribed in many respects, would appear to have been strengthened in relative terms.

From a position of not having been made manifest in the text of the 1993 Constitution, the principle of co-operation has in the new constitution not only been fully realised, but has become a cornerstone of the constitutional dispensation. Chapter 3 of the Constitution is devoted in its entirety to co-operative government. All spheres of government are enjoined to observe and adhere to the principles of co-operative government and intergovernmental relations and to conduct their activities within the parameters which are set out in the chapter (section 40(2)). A number of these principles are directly relevant to the performance of public functions, and are referred to briefly in section 7.6 *supra*. Essentially, the Constitution requires of all spheres of government to respect one another's powers and functions, not to assume powers and functions and, in the exercise of their powers and the performance of their functions, not to encroach on one another's geographical, functional, or institutional integrity. They are specifically enjoined to co-operate with one another by co-ordinating their actions and legislation and by avoiding legal proceedings against one another.

It is noteworthy that the chapter on co-operative government occupies a place in the Constitution immediately after the chapters containing the founding provisions (chapter 1) and the Bill of Rights (chapter 2). The message conveyed by the chapter's placement would seem to be that concerning the individual, the constitutional dispensation is based on human rights, and that concerning the functioning of government, it is based on co-operation.

The principle of cultural self-determination was embodied in the 1993 Constitution by means of a provision authorising the establishment of a Volkstaat Council. The Council was envisaged as a mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat. (Section 184A(1), section 184B(1).) The Volkstaat provision was dispensed with in the drafting of the new constitution. The Constitution now, under a heading "Self-determination", contains a provision which follows closely the wording of constitutional principle XXXIV. The possibility of cultural self-determination is held out not only to the proponents of a Volkstaat, but to any community sharing a common cultural and language heritage.

(Section 235.) By thus widening the scope for cultural self-determination, the Constitution can be said to give greater recognition to the principle than was the case with the earlier constitution. However, the observation made in respect of the 1993 Constitution, viz that the principle had received no more than passive and conditional acknowledgement, is considered to be still valid.

As far as could be ascertained from the literature review (*vide* section 2.6 of the thesis), the extraction of principles specifically related to the assignment of public function responsibilities from the set of 34 constitutional principles developed in the course of the Multiparty Negotiating Process, is not something which has attracted the interest of any other researcher.

### **7.7.3 Substance**

As was the case with the 1993 Constitution, so also with the 1996 Constitution it is a well nigh impossible task to obtain a complete and accurate picture of the actual substance of the public function responsibilities to be discharged by the various spheres of government. The problem can be addressed conveniently by focusing *seriatim* on the national and the provincial spheres of government, the local sphere of government, and the provision made in the Constitution for the assignment and delegation of powers and functions between the spheres of government.

#### **7.7.3.1 National and provincial spheres of government**

The centrepiece of the assignment of powers to the national and the provincial spheres of government is the mechanism of concurrent powers, introduced by the 1993 Constitution and perpetuated in the present Constitution. As will be apparent from observations and comments referred to below, the mechanism of concurrent powers has, generally, not been well received. This being the case, one may well ask why it was adopted in the first place. Haysom (2001:46-48) reports that the drafters of the Constitution were faced with a choice: they either had to attempt to compile exhaustive lists of national and provincial powers respectively, or find a way of expressing the interests of both the national and the provincial spheres of government in a multitude of functional areas. They opted for the latter approach, and adopted concurrent powers

as the appropriate mechanism for regulating the powers of the national and the provincial spheres of government. Concurrent powers is by no means a new concept: it features prominently in the Basic Law of Germany (*vide* section 4.4 of the thesis), a constitution which reportedly influenced the South African constitution making process to a substantial degree (Steytler 2001:241; Haysom 2001:46-47). Forty plus years ago a writer on federalism put forward the view that concurrent powers in relation to some matters may be unavoidable, *inter alia* because of a perceived difficulty of allocating matters exclusively to one level of government (Wheare 1963:75-80). Haysom (2001:50) remarks interestingly that the constitutional principles do not mesh properly with the approach, particularly as regards concurrent powers, which was eventually followed in the drafting of both the “interim” (1993) and the “final” (1996) Constitution.

De Villiers (1996:6-7, 9, 37) is outspoken in his criticism of concurrent powers. He emphasises the importance of the Constitution providing as much legal certainty as possible as to which level of government is responsible for a particular function. In his view concurrent powers cause confusion in this connection and encourage the conclusion of intergovernmental agreements, which in turn reduce transparency and increase public uncertainty. De Villiers goes on to argue that such agreements have no constitutional basis, which means the constitutionality of regulations and proclamations arising from them could be challenged. He nonetheless holds the view that no constitution can provide an exact allocation of every single public function, a circumstance which gives rise to the need for co-operation amongst the national government and the provincial governments.

Levy and Tapscott (2001:2) are not as outspokenly critical of the mechanism of concurrent powers as De Villiers, but point out that five years after the adoption of the 1996 Constitution there was still uncertainty over the precise responsibilities of the different levels of the administrative echelon, particularly in the area of concurrent responsibilities. They also express the view that due to the ambiguities of concurrent responsibilities it is not always clear whether the provinces are merely the implementers of national policy, or whether they can truly shape their own identities (Levy & Tapscott 2001:6).



However well-intentioned the allocation of concurrent powers to levels or spheres of government may be, the mechanism seems to have the effect of making the national government dominant in the legislative domain. Laufer (1991:91-94) finds in respect of Germany that despite the Basic Law presumption regarding the primary legislative competence of the *Länder* the Federation plays the dominant role with respect to legislation, with the *Länder* parliaments – as legislative organs – reduced largely to inactivity. In his overview of the first six years of provincial government in South Africa under the new constitutional dispensation, Pottie (2001) comes to a similar conclusion. He reasons that the short duration of provincial legislative sessions, the limited amount of legislation passed, and the largely technical nature of the legislation adopted, is indicative of the relatively narrow scope of provincial powers under the Constitution. Another writer on the situation in South Africa remarks that, generally, the provinces accept that the national government will dominate in legislative matters. She notes the small amount of provincial legislation, even in the areas of concurrent legislation, and observes that national legislation governs the particular matters. (Murray 2001:68-69.) These findings are confirmed by Steytler (2001:244).

It needs to be noted that the Constitutional Court, the arbiter of jurisdictional disputes between organs of state in the national and provincial spheres of government (1996 Constitution: section 167(4)(a)), does not appear to find any difficulty inherent in the Constitution when it is called upon to decide issues regarding concurrent powers which come before it. On the basis of judgements of the Court reported and commented on *inter alia* by Malherbe (2001:271, 274) it would appear that the Court evinces a certain understanding as to the proper functioning of the mechanism of concurrent powers, viz that the provinces are not obliged to follow national policies as laid down in national legislation; that the constitutional provisions for the resolution of conflicts between laws do not inhibit either sphere in the exercise of its legislative powers; that concurrency in legislative powers presupposes co-operation between the national and the provincial governments; and that in the area of concurrent legislative powers there is no presumption in favour of either the national or the provincial legislatures. It would seem to the author that the Court holds the view that the two spheres are equal as far as the exercise of concurrent powers go, that each is in a position to play a full role with regard to the particular powers, and that if a conflict between laws should arise, the Constitution provides adequately for the resolution of any conflict. Malherbe (2001:275)

observes that the Court places particular emphasis on co-operative government as a means for avoiding jurisdictional disputes.

Steytler (2001:247-248) also remarks on the emphasis placed by the constitutional Court on co-operative government, specifically in relation to the exercise of concurrent legislative powers. He refers to a statement by the Court that the Constitution does not embody “competitive federalism” but “co-operative government” (Steytler 2001:253). Steytler is nevertheless critical of the Court in its handling of jurisdictional disputes. He maintains that the introduction of concurrent powers has been marked by a drift towards centralisation in government, and that the Court has not arrested this drift; further that in adjudicating competition between the spheres of government, the Court has been unable to find in favour of the provinces in any meaningful way. He also expresses concern over the emphasis placed on political processes (as a facet of co-operative government) in dealing with issues of concurrency, which in his view (echoing De Villiers – *vide supra*) could result in key decisions on legislation being taken at political executive level. (Steytler 2001:246, 254.)

For purposes of evaluating the substance of the public function responsibilities assigned to the national and the provincial spheres of government respectively, it is not necessary to take the examination of the concurrent powers mechanism any further. The key question to be answered is, “Do the constitutional provisions regarding concurrent legislative powers (sections 44(1) and 104(1) read with schedule 4 of the Constitution) provide substantial clarity as to the public function responsibilities to be discharged by the national and the provincial governments respectively?”. From a Public Administration point of view, the answer is “No”. What has emerged from the research with some clarity is that the substance scale, as far as concurrent powers are concerned, has come down rather heavily in favour of the national government.

Moving on to the question of exclusive provincial legislative powers, the 1996 Constitution differs markedly from its predecessor in providing such powers to the provinces in respect of certain functional areas (section 104(1)(b)(ii) read with schedule 5). This is obviously an important increase in the powers of the provinces, although it should be mentioned that such powers were required all along by constitutional principle XIX. Cowan and Fick (1997:8) regard the development as a significant one for the

country's "system of federalism" – viewed in a constitutional law context – noting that a definite restriction had been placed on the (previously pervasive) legislative powers of Parliament. However, the exclusivity of the particular competence is qualified by section 44(2) of the Constitution which empowers Parliament to intervene by passing legislation with regard to an "excluded" matter when considered necessary to maintain national security, to maintain economic unity, to maintain essential national standards, to establish minimum standards for the rendering of services, or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or of the country as a whole.

Clearly, the assignment of an exclusive legislative competence to the provinces represents a significant increase in the substance of provincial powers, and serves to create a better balance of powers between the national and provincial spheres of government. The extent of the increase is, however, indeterminate given the fact that Parliament can intervene legislatively with regard to a matter in an excluded functional area when considered necessary in the national interest. Time alone will tell to what extent provinces will use - or wish to use, or be able to use - their "exclusive" legislative competence. The scope for Parliament to intervene is noticeably wide, focused as it is on considerations of national security, the wide compass of economic unity, the maintenance of standards, the setting of minimum standards, and the prevention of unreasonable action by a province. As pointed out *supra* in dealing with concurrent legislative powers, the provinces have been relatively inactive in the legislative domain; it is possible that they may, as in the case of concurrent powers, be inhibited also in the exercise of their legislative powers in the exclusive powers category.

Again, it is not possible to ascertain on a reading of the Constitution what in practical (public administration) terms the provinces may or may not do in relation to the functional areas listed in schedule 5 of the Constitution. Determining the actual substance of assigned powers remains a difficult quest. Strictly speaking, the observation made in regard to the 1993 Constitution that no division of powers between the national and the provincial spheres of government has been effected, remains valid.

### 7.7.3.2 Local sphere of government

The provisions of the Constitution dealing with the executive and legislative powers of the municipalities are noticeably convoluted, presenting a substantial challenge to whoever would essay an elucidation of the actual substance of municipal powers.

In terms of section 156(1) of the Constitution a municipality “has executive authority in respect of, and has the right to administer matters listed in part B of schedule 4 and part B of schedule 5 “ of the Constitution, and any other matter assigned to it by national or provincial legislation. Schedules 4 and 5 deal respectively with the concurrent legislative competence of the national and provincial legislatures, and the exclusive legislative competence of the provincial legislatures. To the executive authority of the municipalities is added a legislative authority by section 156(2) which stipulates that a municipality may make and administer bylaws for the effective administration of the matters which it has the right to administer. The impression created is that a municipality’s legislative authority “comes second” to its executive authority, and that its executive authority is the primary locus of its powers. It is certainly municipal executive authority which is the focus of the oversight role to be fulfilled by the national and provincial governments with regard to local government.

Section 155(7) of the Constitution gives to the national and the provincial governments the legislative and executive authority to “see to” the effective performance by municipalities of their listed functions, *by regulating the exercise by municipalities of their executive authority*. What does all this mean in terms of the extent to which a municipality is free to deal with the matters listed in part B of schedule 4 and part B of schedule 5 of the Constitution? De Visser (2002) has addressed the matter and provided some answers in his article dealing with the powers of local government under the current constitutional dispensation.

De Visser (2002:224) points out that the municipalities have both original (or primary) and assigned (or secondary) powers. The *original* powers are those referred to in section 156(1)(a) read with section 156(2) of the Constitution, and which relate to the matters listed in the B parts of schedules 4 and 5. The *assigned* powers relate to other

matters assigned to a municipality by national or provincial legislation, referred to in section 156(1)(b) of the Constitution. For purposes of the present examination it is the original powers of local government which are of particular interest. De Visser (2002:225-236) devotes the greater part of his analysis to the legislative powers of the national and provincial governments in relation to these original powers of local government. In his analysis he focuses separately on local government matters listed in part B of schedule 4 (concurrent national and provincial legislative competence) and matters listed in part B of schedule 5 (exclusive provincial competence) of the Constitution.

The main conclusions which De Visser comes to, can be summarised as follows:

- ?? In respect of schedule 4B matters national and provincial governments have regulatory powers over such matters, but their powers cannot be exercised prescriptively with regard to the “core” of the matters, and are limited to the setting of a legal framework, which includes minimum standards and monitoring (De Visser 2002:231);
- ?? in respect of schedule 5B matters a provincial government has regulatory powers over such matters, but the powers cannot be exercised prescriptively with regard to the “core” of the matters, and are limited to the setting of a legal framework, which includes minimum standards and monitoring (De Visser 2002:232); and
- ?? in respect of schedule 5B matters the national government’s powers are not as wide as those of the provincial governments; it has regulatory powers over schedule 5B matters, but restricted to the grounds stipulated in section 44(2) of the Constitution (which provides for legislative intervention by Parliament with regard to a matter falling within a functional area of exclusive provincial competence (schedule 5)), and to the necessity requirement included in the provision (De Visser:2002:232).

De Visser finds it necessary to provide a diagram to illustrate the regulatory powers of the national and the provincial governments with regard to local government matters. He does not elaborate on the concepts of “core” content (in relation to local government matters), “framework”, “minimum standards”, and “monitoring” which he employs in presenting his findings.

In the author's opinion De Visser has made a valuable contribution to the better understanding of the public function responsibilities of municipalities. At the same time his article is eloquent on the complexity of the particular part of the national assignment scheme, and serves to provide confirmation that it is not possible to ascertain from a reading of the Constitution which aspect of a listed local government matter is – or could be – the responsibility of the national, provincial and local governments respectively. The same observation applies to matters which *could* be assigned to the municipalities by the national and provincial governments in terms of section 156(1)(b), particulars of which are unknown until an assignment actually takes place.

### **7.7.3.3 Assignment and delegation of powers to subnational governments**

The Constitution provides amply for the assignment and delegation of powers to subnational spheres of government. The key provisions for assignment and delegation are as follows:

- ?? The National Assembly may assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government (section 44(1)(a)(iii));
- ?? a provincial legislature may assign any of its legislative powers to a municipal council in the province (section 104(1)(c));
- ?? a Cabinet member may assign any power or function that is to be exercised or performed by him or her in terms of an Act of Parliament to a member of a provincial executive council or to a municipal council, subject to certain stipulated conditions being complied with (section 99);
- ?? a member of the executive council of a province may assign any power or function that is to be exercised or performed by him or her in terms of an Act of Parliament or a provincial act, to a municipal council, subject to certain stipulated conditions being complied with (section 126);
- ?? the national and the provincial governments must assign to a municipality, by agreement and subject to conditions, the administration of a matter listed in part A of schedule 4 (concurrent national and provincial legislative competence) and part A of schedule 5 (exclusive provincial competence) which necessarily relates to local

government, if (a) the matter would most effectively be administered locally, and (b) the municipality has the capacity to administer it (section 156(4)); and

?? an executive organ of state may delegate any of its powers or functions to any other executive organ of state, subject to conditions, or exercise any power or perform any function for any other executive organ of state on an agency or delegation basis (section 238).

It is difficult to imagine a greater degree of flexibility in the ordering of powers and functions by legislatures, political executive bodies, and executive organs of state (principally departments and administrations in the three spheres of government, as per definition in section 239 of the Constitution) than that allowed by the South African Constitution. Almost anything is possible with a view to facilitating the functioning of the machinery of government. The flexibility in the system is directly appropriate to the realisation of the notion of co-operative government, which occupies such a prominent place in the Constitution. Murray (2001:67) remarks on the “soft” responsibility boundaries between the spheres of government and observes that the Constitution requires the business of government to be conducted according to the principle of co-operative government. The provisions referred to above are clearly important as a means towards satisfying such a requirement. However, in trying to evaluate the substance of the responsibilities to be discharged by subnational governments – an important focus of the present study – the high degree of flexibility pertaining to the exercise and performance of legislative and executive powers and functions, is a major problem. The flexibility built into the Constitution, while admirable in other respects, tends to mask rather than to clarify the actual responsibilities of the respective spheres of government. To obtain an accurate picture of the substance of the responsibilities of the provincial and municipal spheres of government, one would have to embark on detailed research into the assignments and delegations operative at a specific point in time. It is apparent that also in this area of intergovernmental relations, the Constitutional text has its limits as an aid in determining, simply, who does what.

#### **7.7.3.4 Comment**

The Constitution employs essentially four mechanisms for ordering the responsibilities of the spheres of government, viz concurrent powers for the national and provincial

spheres, qualified exclusive powers for the provincial sphere, regulatory oversight by the national and provincial spheres over the local government sphere, and ample provision for assignment and delegation of responsibilities between spheres of government. The resulting substance of each sphere's responsibilities is a function of the interaction of these mechanisms. However, while particular mechanisms can be examined, described, and evaluated, it is not possible, without embarking on a great deal of empirical research, to obtain a reasonably accurate picture of the actual substance of the responsibilities which each sphere of government is called upon to discharge.

In summary, the Constitution does not set out clearly and unambiguously the actual substance of the legislative and executive powers to be exercised by the three spheres of government respectively. In general, it can be said that the primary power of the state, viz the power to direct and oversee society by the making of laws, is located predominantly with the national government, while the legislative roles to be fulfilled by the subnational spheres of government are essentially supplementary ones. As far as the exercise of executive authority is concerned, the deployment of responsibilities for the provision of services and the carrying out of programmes seems to be such as to involve all three spheres in a substantial manner.

#### **7.7.4 A note on intergovernmental relations**

The Constitution (section 41(2)) stipulates that an Act of Parliament must (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and (b) provide for appropriate mechanisms and procedures to facilitate intergovernmental disputes. The particular section is contained in chapter 3 of the Constitution, which deals with co-operative government, and the assumption can therefore be made that in constitutional terms intergovernmental relations is regarded as part and parcel of co-operative government. The notion of co-operative government as required by the present Constitution has been examined briefly in section 7.6 *supra*. An Act as envisaged in the Constitution has not yet been adopted. It is considered necessary to comment briefly on the assignment of public function responsibilities to spheres of government in the context of intergovernmental relations.



In section 7.6 *supra* the opinion was expressed that co-operative government ought not to be seen as a means of remedying inherent defects and shortcomings in the assignment of responsibilities to spheres of government. How does this tie in with the conduct of intergovernmental relations? The author would argue that the need for intergovernmental relations arises from the fundamental (constitutional) decision to have a multi-tiered – or multi-sphered – system of government. This decision having been taken, it follows that each sphere of government will be required to participate appropriately in the total system of government and administration of the country. Such participation is focused for the most part on the discharge of assigned public function responsibilities, in other words on the provision of certain goods and services aimed at the satisfaction of community needs. Inherent in this national “division of work” is the need to ensure that the combined efforts of all spheres of government contribute optimally to the advancement of the common good. The author would suggest that intergovernmental relations is the means to achieving this end.

As the research has shown, there is no fixed, universally endorsed way of deploying public function responsibilities. However, the manner in which responsibilities are deployed is likely to influence intergovernmental relations. If the public functions, or aspects of public functions, for which each sphere of government will be responsible are determined in a thorough, accountable, and generally acceptable way, and are accurately described, it is reasonable to assume that intergovernmental relations will be influenced positively. On the other hand, if the assignments are done in a haphazard fashion, or if there is a lack of clarity as to what each sphere of government may or may not do, it must be expected that intergovernmental relations could be seriously hampered. It would seem therefore that endeavours to build an effective system of intergovernmental relations should start by paying close and thorough attention to the assignment of public function responsibilities.

#### **7.7.5 Synopsis**

In the lead in to the synopsis of the corresponding critique of the 1993 Constitution (*vide* section 6.7.5 of the thesis) a key question was posed, viz whether, and how well, that Constitution succeeded in establishing a credible and clear-cut deployment of

responsibilities over the three levels of government. The same question can be asked in relation to the present Constitution, and needs to be considered along similar lines.

The problem inherent in the confusing and inconsistent use of terminology and concepts which was identified in relation to the earlier constitution, remains, and will have to be addressed if the assignment question is to be dealt with in a scientific way. Remarkably, the drafters of both constitutional texts have succeeded in largely avoiding the use of the term “function” in one of its most widely established applications, viz for referring to what public institutions are established to do, in other words their activities or programmes of work.

The 1996 Constitution is commendable for moving beyond the national and the provincial spheres of government by also setting out the public functions of the municipal sphere, something which the 1993 Constitution failed to do. However, the manner in which the Constitution does so leaves much to be desired, with emphasis being placed not on what belongs appropriately within the local sphere of government, but on the apportionment of oversight responsibilities regarding local government to the national and provincial spheres respectively. Local government would seem to deserve better, especially considering the constitutional declaration that the three spheres of government are “ . . . distinctive, interdependent and interrelated” (1996 Constitution: section 40(1)). A close reading of the constitutional provisions regarding the executive and legislative competences – presented in that (reversed) order – of local governments, together with the continued employment of the term “bylaw”, tends to convey the impression that this sphere of government is intended to play a subordinate role, occupying itself to a large extent with the administration of laws adopted in the other spheres of government.

The Constitution is notable for its ingenuity, but also for its extreme complexity. Ingenuity is evident in the comprehensive legal framework which has been provided for setting about the performance of public functions, but as is apparent from section 7.4 *supra*, the particular parts of the Constitution, read as a whole, are highly complex. Even an experienced legislator, administrator or academic would find it an exacting task to ascertain exactly what the public function responsibilities of the various spheres of government are. Two of the main reasons for the complexity would seem to be the

essentially legal perspective from which the particular provisions were written, and the employment of the inherently problematic concurrent powers mechanism. Had a Public Administration approach been applied, it is possible that a more accessible deployment of powers and functions could have been achieved (*vide* chapter 9 of the thesis).

The 1996 Constitution represents a substantial advance on the 1993 Constitution in regard to the realisation of the assignment principles which, as part of the research, were extracted from the set of constitutional principles (largely drafting specifications) adopted as part of the Multiparty Negotiating Process in 1993, viz the principles of national unity, of economic unity, of equality, of provincial autonomy, of co-operation, and of cultural self-determination. The improvement is evident especially in regard to the principles of provincial autonomy and of co-operation.

The unsatisfactory situation created by the 1993 Constitution in not providing a clear picture of the actual substance of the responsibilities to be discharged by the various spheres of government in the performance of public functions, has been continued under the 1996 Constitution. The reasons for this are mainly the essentially obfuscating nature of the mechanism of concurrent powers; the power given to the national government to intervene in the provincial exclusive category of powers, in so doing qualifying the “exclusivity” of the particular competence; the limitation, qualification and subordination of the executive and legislative roles to be fulfilled by local governments; and the various provisions for the assignment by means of executive or legislative action of responsibilities by “higher” spheres of government to “lower” spheres of government. The net result is that the actual responsibilities to be discharged by the various spheres of government cannot be ascertained accurately on a reading of the Constitution; to obtain an accurate picture it would be necessary to undertake substantial research encompassing a vast number of laws and executive actions. Broadly viewed, it would seem that the primary (legislative) power of the state continues to reside predominantly in the national government, with the provinces and the municipalities fulfilling essentially supplementary roles.

Although the scheme for the assignment of responsibilities to levels of spheres of government introduced by the 1993 Constitution has been elaborated in certain respects – mainly through the better realisation of assignment principles, the introduction of a

category of exclusive powers for the provinces, and the listing of matters which belong in the municipal domain – the 1996 Constitution does not, in the author's opinion, succeed in establishing a credible and clear-cut deployment of responsibilities to the three spheres of government.

## 7.8 Conclusion

Because of the directive effect of the set of constitutional principles adopted during the Multiparty Negotiating Process in 1993, the present Constitution is not really a new constitution, but an elaboration and refinement of the 1993 Constitution. This is certainly true of the assignment of responsibilities to levels or spheres of government, where elaboration is evident particularly with regard to the realisation of constitutionally based assignment principles, the assignment of (qualified) exclusive powers to the provinces, and in the provision of detail regarding matters appropriate to the municipal sphere of government. However, the centrepiece of the assignment scheme instituted by the earlier constitution, viz the provision of concurrent powers for the national and the provincial spheres of government, with its shortcomings, has been retained.

The Constitution bears the imprimatur of the Constitutional Court, the Court having found – after declining to certify the initial text – that all the provisions of the amended text submitted to it, complied with all the constitutional principles. As pointed out in section 7.3.3 *supra*, a reservation can be expressed about the certification action with regard to the appropriateness and adequacy of the legislative and executive competences of the various spheres of government as required by constitutional principle XX.

The thesis has up to this point –

- ?? sought to orientate the study in scientific terms (chapter 2);
- ?? set out and elucidated the design of the research project (chapter 3);
- ?? dealt with the assignment of responsibilities in a sample of countries other than South Africa in order to contextualise the particular phenomenon over a wider front (chapter 4);

- ?? surveyed the South African experience with the assignment of responsibilities to levels or spheres of government from the inception of the South African state in 1910 up to the implementation of the first democratic constitution in 1994 (chapter 5);
- ?? analysed and evaluated the assignment of responsibilities in terms of the epoch-making 1993 Constitution (chapter 6); and
- ?? provided a follow-up analysis and evaluation of the present (1996) Constitution.

In chapter 2 of the thesis it was indicated that the purpose of the study was to make a research based contribution to the body of knowledge constituting Public Administration, specifically concerning the assignment of responsibilities to levels or spheres of government. To round off the research reported on in the previous chapters, it is appropriate to summarise, analyse, and interpret the findings. Such a stocktaking is essayed in the following chapter.

## **CHAPTER 8: SUMMARY, ANALYSIS AND INTERPRETATION OF RESEARCH FINDINGS**

### **8.1 Introduction**

The purpose of this chapter is to provide a consolidated summary as well as an analysis and interpretation of the research findings reported on in the preceding chapters of the thesis. The objective is a dual one: firstly, to provide a critical overview of the assignment of responsibilities for the performance of public functions as a phenomenon in the system of government; and secondly, to evaluate the state of the assignment question in scientific terms. The stated objective should be seen against the background of the particular problem which motivated the research project, as well as within the context of the stated purpose pursued with the project.

The problem underlying the research has been dealt with fully in section 2.3 of the thesis. In a nutshell, the problem is that an important matter, with far-reaching implications for the government and administration of the country, and virtually all other countries, is patently under-researched, with the result that a body of scientifically founded knowledge with regard to the assignment of responsibilities for the performance of public functions is not yet in evidence. This finding is underscored by the paucity of analytic treatment of the public function responsibilities of levels or spheres of government in the literature of Public Administration, as well as in the literature of related disciplines such as Political Science and Constitutional Law; by the absence of a substantial research record; and by the limited treatment accorded the question in academic curricula. As regards the purpose of the study, this is simply to address the identified problem in a systematic manner and, in so doing, to endeavour to make a research based contribution to the developing body of knowledge constituting Public Administration.

The research findings are summarised in the following section. This is followed by a section in which the findings are analysed and interpreted from a scientific perspective. The chapter culminates in a concluding statement concerning what has been learnt from the research.

## **8.2 Summary of research findings**

The findings under the major headings of the research project are summarised in the following paragraphs. As all sources used have been acknowledged in the various chapters of the thesis, this information is not repeated here.

### **8.2.1 Literature review**

The literature review, contained in section 2.6 of the thesis, covered the local (South African) research record as well as published books and articles in two disciplines, viz Public Administration and Constitutional Law, and one specialised field of study, viz federalism. A conspectus of the literature examined is provided in the following paragraphs.

Regarding the South African research record, no postgraduate dissertation or thesis dealing with the subject of the present study in a comprehensive way could be found. There is a doctoral thesis of 1993 dealing comprehensively with public functions but this is focused on the essential activities to be undertaken by government, rather than being left to other sectors of society (Loxton 1993). The Human Sciences Research Council has not undertaken research with a focus similar to the present study. Although not to be found in the official research record, presumably because no research report was published, work done by the erstwhile Commission for Administration in 1993 is directly relevant to the subject of study. This work is described, examined and evaluated in section 6.4 of the thesis.

As regards publications within the discipline of Public Administration, it has been established that the assignment question does not figure as a major issue or as one enjoying substantial recognition as an integral part of the discipline. However, there are significant references in the literature to complexity and confusion regarding the respective responsibilities of national and subnational governments which tend to confirm the importance of the assignment question. Relevant insights which were encountered in the literature survey are acknowledged at appropriate places in the thesis.

From a scientific point of view, the sample of Public Administration literature which was perused did not produce evidence of an established, defined body of knowledge dealing with the assignment of responsibilities. The author is of the opinion that a contribution towards a more scientific ordering of public function responsibilities could be made from within the discipline of Public Administration, and suggested as much in an article published in 1998 (Robson 1998a).

A substantial number of books and journal articles by South African experts on constitutional law were examined as part of the literature review. The conclusion reached is that writers in the particular field are intensely interested in the vertical separation of powers within a country's governmental structure, but in their own peculiar way. Their interest would appear to lie essentially in the legal rules which govern the institution and functioning of legislative and executive institutions (including the assignment and exercise of power), as well as in the role which judicial institutions have to play in this connection. It is also evident that the constitutional lawyers' attention is attracted whenever there is conflict or looming conflict in the exercise of assigned powers; their professional response typically being to examine, apply and interpret the Constitution and other law in such cases. However, as regards the actual content of the public functions, or aspects of public functions, for which the various levels or spheres of government have been made responsible, they would appear to regard this as a given; as something which presumably needs to be determined through an essentially political process.

Of the three bodies of literature reviewed, that on federalism was found to have relatively greater relevance and value for the present study. More space has therefore been devoted in the thesis to reporting on and evaluating this part of the literature reviewed. A significant development in the literature on federalism would appear to be a movement away from regarding states as being federations or not being federations, towards a more pragmatic view in which it is accepted that states tend to evince federal characteristics in varying degrees. If this approach is accepted, it has a fundamentally positive implication for dealing with the assignment question, viz that the assignment of public function responsibilities to levels or spheres of government need not be tied to perceptions of the state as being or striving to be a federation or a union, but can be



studied independently or such perceptions, in other words that there is room for establishing the assignment question on its own, objective (scientific) base. This idea is taken further in chapter 9 of the thesis.

Although writers on federalism are concerned essentially with the accommodation of political power within the state, and such power is given form and substance in the responsibilities assigned to the national and subnational governments respectively, it is evident from the literature that they are not focused on the critical consideration of the public functions, or aspects of public functions, which are or ought to be the responsibility of the various governments. No evidence was found of a developed theory or model dealing with the deployment of public function responsibilities over levels or spheres of government.

Despite the findings referred to in the preceding paragraph, there are nevertheless a number of insights to be gleaned from the sample of the literature on federalism which has been perused which could be of value in the development of an assignment theory or model. These are summarised below, in no particular order and with a measure of interpretation by the author: (The sources are acknowledged in section 2.6.4 of the thesis and are not referred to again here.)

- ?? Consideration needs to be given to the technical aspects of listing the matters for which national and subnational governments respectively are responsible.
- ?? Political, social and economic factors could promote a desire in subnational units to be autonomous for certain purposes.
- ?? Classifications of public functions have been proposed in the past and are in existence; however, these do not address the vertical separation of powers.
- ?? Unity and diversity are not opposites; unity should be contrasted with disunity and diversity with homogeneity.
- ?? There is a recognised principle – the principle of subsidiarity – which addresses the vertical separation of powers directly.
- ?? Another principle encountered in the literature with relevance to the assignment of responsibilities, is that of exclusivity (in the exercise of powers once assigned).

- ?? Responsibility for a public function cannot always be assigned exclusively to a single level of sphere of government, necessitating deployment over two or more levels or spheres.
- ?? Recourse to the concurrent powers mechanism could be seen to be necessary because of a perceived difficulty of allocating a matter exclusively to one level of government.
- ?? Generally, the concurrent powers mechanism does not receive favourable comment. Concurrent powers cause confusion, encourage the determination of responsibilities outside the constitution by political executives, and lead to a situation in which the central government dominates the legislative domain.
- ?? The intertwinement of responsibilities in a hierarchy of governments places a premium on intergovernmental relations, especially regarding co-operation and co-ordination.
- ?? There is some evidence of an attempt to develop an appropriate “language” to deal with the assignment of powers and functions, albeit with a constitutional law focus.
- ?? In addition to the territorial stratification of responsibilities, there are other bases on which states can be organised, especially with a view to accommodating culturally distinct minorities.
- ?? The location of the so-called residuary powers of government in a state is an important factor in determining the relative positions of power of the national and subnational levels of government.
- ?? The question of symmetry versus asymmetry in relation to the assignment of responsibilities to subnational governments, is an issue in the federalism debate. There would appear to be a natural tendency in states to favour the symmetrical allocation of powers. However, it may be advisable where subnational governments lack adequate capacity, to assign responsibilities incrementally.
- ?? Constitutions ought not to be over-written by listing public function responsibilities in too much detail.
- ?? There is an argument to be made for not regarding the assignment of responsibilities as a once-off decision, or binding political agreement, but to see it as a matter which should proceed in an inductive or evolutionary manner.

It is conceivable that some or all of these insights from a sister discipline could serve to provide a useful backdrop against which a Public Administration approach to the assignment of responsibilities could be pursued.

### **8.2.2 The assignment of responsibilities in other countries**

The countries included in the study (*vide* chapter 4 of the thesis) were Australia, Belgium, Germany, Spain, and the United Kingdom. A recapitulation of the findings is provided in the following paragraphs.

In all five countries, responsibility for the performance of the public functions concerning defence, foreign affairs, and public finance is assigned to the highest level of government; as regards other public functions, there is no obvious uniformity evident as to the assignment of responsibilities to the various levels or spheres of government. An outstanding feature of the assignment schemes mandated by the various constitutional texts is that of complexity, with the resultant problem of accessibility encountered by anyone who wishes to know what each level or sphere of government is actually responsible for. Some of the prime factors contributing to complexity are the dual basis of division of responsibilities (cultural and regional / hierarchical) as applied for instance in Belgium; the assignment of concurrent legislative powers to the national and subnational levels of government as found in Germany; and the employment of negative denotation in ordering responsibilities between levels of government as found in Spain and the United Kingdom. This latter practice consists of excluding stipulated matters from the legislative competence of a level of government without specifying what it may actually legislate on.

Taxonomically viewed, the treatment of the assignment question is generally poor. With the exception of Belgium, where a degree of connotative meaning is implicit in the concept of *persoonsgebonden* matters, a *fundamentum divisionis*, a defined assignment rule, or a set of assignment criteria, is generally lacking. Matters for which governments are responsible are listed without categorisation and in no particular order; the language used in referring to matters lacks precision and consistency; references are mostly to *subjects* (for example, “education”) rather than *public functions* (for example, “the provision of education”); and there is little sign of an endeavour to deal

systematically or insightfully with the reality that many public functions are deployed over more than one level of government.

The assignment schemes of the countries studied are focused generally on the national level of government and the level immediately below the national level. Constitutional provisions concerning local government are sparse, with local government generally being regulated by laws enacted by higher levels of government. In view of the impact which local government can have on the quality of life of the citizenry, the seemingly dismissive way in which the responsibilities of local government are treated can be regarded as a constitutional shortcoming of the countries in question.

The present research has lead to the general conclusion that in none of the countries studied a clear, comprehensive demarcation of governmental responsibilities has been achieved. There is little evidence that the assignment question has been handled in a manner which could reasonably be described as scientific.

As a “by-product” of the research conducted, it has been found that any attempt to classify a state in absolute terms as either a union or a federation could be problematical; there is ample evidence of states evincing both unitary and federal characteristics, albeit mixed in various ways, and irrespective of the distinguishing formal titles by which they are known as states.

### **8.2.3 Assignment of responsibilities in South Africa prior to 1994**

The historical survey, which is contained in chapter 5 of the thesis, covers the period of 84 years from the establishment of the South African state in 1910 up to the implementation of the first democratic constitution in 1994. This period can be characterised as the pre-democratic era of government and administration in South Africa. It was marked, from the beginning, by the recognition and formal establishment of the White population group as the dominant group in society and the state; to be followed in later years by attempts of the governments-of-the-day to achieve an acceptable constitutional “accommodation” of the Black, Coloured, and Indian population groups, but without compromising the dominant position of the White group. However, the emphasis of the historical survey has not been on the political or

ideological aspects of the system of government which was in operation, but on the ways in which responsibility for the performance of public functions were deployed amongst levels or spheres of government. Some key findings of the survey are highlighted below.

At the constitution drafting convention which preceded the establishment of the South African state, a clear and conscious decision was taken to establish a *union* and not a *federation* (*vide* section 5.5 of the thesis). This decision had a strong centralising effect on the assignment of responsibilities to levels of government, and this centralisation of authority – or more accurately, ultimate authority as well as residual authority – in the central government was to be an outstanding feature of the system of government for many decades. In line with the orientation towards strong central control, the 1909 Constitution listed a relatively small number of “classes of subjects” in respect of which the provinces would have legislative authority, but at the same time giving Parliament the authority to entrust in its discretion additional matters to the provinces through the adoption of ordinary legislation. Over the years a great number of matters was so entrusted, the list eventually exceeding in number the classes of subjects stipulated in the Constitution. Centralised control was maintained by requiring all provincial legislation to be approved at national level and by ruling out any legislation repugnant to national legislation.

The 1909 Constitution had virtually nothing to say about local government, stipulating merely that “municipal institutions, divisional councils, and other institutions of a similar nature” constituted one class of subjects concerning which provinces could make ordinances. This somewhat dismissive attitude towards local government evident in constitutional arrangements persisted throughout the period covered by the survey; indeed, even the first democratic constitution implemented in 1994 was focused on two rather than three levels of government. The Cinderella treatment of local government in the assignment of responsibilities, remarkable in the light of the growth of towns and cities, is by no means peculiar to South Africa (*vide* section 8.2.2 *supra*).

Another outstanding feature of the period covered by the survey was the degree of structural and functional complexity in government which resulted from the racially based ideology and its associated policies and practices. As an adjunct to what can be

regarded as the core system of government throughout the period dealt with, supplementary governmental structures, taking different forms and driven by different time-tables, came into existence, each with its peculiar assignment of responsibilities. The deployment of governmental responsibilities in the country eventually presented a highly convoluted picture, making even its description for purposes of the thesis a challenging task. The research has shown that immediately prior to the implementation of the 1993 Constitution, South Africa had fifteen discrete executive administrations (one central, four provincial, six for the so-called “self-governing territories”, and four for the so-called “independent states” within the country’s internationally recognised borders); eleven public services (one for the national and the provincial administrations, six for the self-governing territories, and four for the independent states); and over a hundred government departments. And yet, complexity in the deployment of governmental responsibilities is again not peculiar to South Africa; a similar situation was found to exist in other countries (*vide* preceding section).

Not much is to be garnered from the historical survey as far as theory is concerned. Matters to be dealt with by subnational governments were as a rule indicated denotatively, that is to say, by listing. With one exception there is no connotative type definition, *fundamentum divisionis*, body of principles, or set of criteria to be applied in deciding which matters or public functions properly belong at or within a particular level or sphere of government. The exception is to be found in the 1993 Constitution in which a connotative definition of what constitutes an “own affair” of a population group was provided.

Taxonomically and technically viewed, assignment shortcomings similar to those encountered in the study of a selection of other countries are also in evidence in South Africa’s constitutional past. Lists of matters assigned are notable for their lack of order and, in a number of instances, for their length. Two modes of presentation are invariably employed: in some instances matters are indicated in *functional* mode (for example “the preservation of fauna and flora”); in other instances matters are presented as *nominal subjects* (for example “markets and pounds”). In the same list matters are in places described succinctly, and in other places by way of lengthy, verbose statements. Sometimes a matter is identified by means of a straightforward statement, without qualification; at other times qualifying mechanisms are employed, typically by

stipulating certain inclusions, exclusions, or provisos. Negative denotation (*vide* section 8.2.2 *supra*) was, however, not resorted to. The inescapable conclusion to be reached from the research is that in the past the assignment of responsibilities was done in a pragmatic and *ad hoc* manner – in which ideological considerations patently played a prominent role – and not by the application of what could be regarded as a scientific approach. However, it is to be noted that the lack of such an approach is also evident when looking at the assignment schemes of other countries.

#### **8.2.4 1993 Constitution**

The assignment of responsibilities for the performance of public functions in terms of the country's first democratic constitution is dealt with fully in chapter 6 of the thesis. The main findings are summarised in the following paragraphs.

For purposes of the present study the 1993 Constitution is regarded as being relatively more important than the 1996 Constitution, notwithstanding the fact that it was conceived of and designed as a transitional basic law, and had a currency of slightly less than two years. The main reason for its importance is to be found in the fact that it mandated a comprehensive set of constitutional principles which determined not only its own essential features but also those of the constitution that followed it. The “final” (1996) Constitution elaborated an existing dispensation, it did not create a new one.

As far as the assignment of responsibilities is concerned, the 1993 (“interim”) Constitution introduced a discernible theoretical foundation on which the assignment was to be based. Again, this is to be found in the set of constitutional principles, with 11 of the 34 principles dealing specifically with the respective powers of the national and provincial levels of government. As part of the research the relevant principles were examined and analysed. It was found that the principles had not been formulated as principles *per se*, and that the particular formulations could be described more accurately as a set of specifications which was to be complied with in the drafting of a constitution for the country (*vide* section 6.3.3 of the thesis). The specifications encompassed a number of criteria which had to be satisfied, but also the odd guarantee, rule, and condition which was to be applied. However, even as formulated, the constitutional principles have an obvious theoretical quality, reflecting

as they do a systematic endeavour to “think about” or to “think through” what was to be done (allocation of functions and powers), before actually doing it.

On analysis a number of actual assignment principles were found to be present in the eleven formulations identified as being relevant to the study: these are the principle of national unity, the principle of economic unity, the principle of equality, the principle of provincial autonomy, the principle of co-operation, and the principle of cultural self-determination. There may be others, but these six are clearly important in building a body of scientific knowledge concerning the assignment question.

The 1993 Constitution was the result of a multiparty negotiating process of considerable magnitude, in which a large number of interested parties, bodies and individuals were involved, and which attracted a substantial number of proposals and suggestions. Among these inputs was one by the erstwhile Commission for Administration, which was based on a programme of development work with which the author was closely associated, and which had as an objective the production of “blueprints” for the allocation of functions to levels of government. The particular work included *inter alia* a clear statement of purpose, a prescribed methodology, an identification of certain principles, a particular analytical approach, an identification and definition of terms, participation by experienced non-political administrators, and a specified results format which was designed to have practical utility. Based on the present research, the conclusion was reached that the Commission’s input had no discernible influence on the allocation of functions and powers in terms of the 1993 Constitution. Notwithstanding this finding, the Commission’s work may have some claim to recognition from a scientific point of view. It is considered to have value for purposes of constructing a directive model for the assignment of responsibilities (*vide* ensuing chapter of the thesis).

On critical examination, the assignment of responsibilities by the 1993 Constitution was found to have numerous shortcomings.

At a conceptual level, the Constitution tended to obfuscate rather than to clarify and firmly establish “public function” as a key concept in determining the structure of government, this despite the fact that public functions, as defined in the thesis, have



been recognised and regulated for many decades by public service law in South Africa. Technically speaking, the term “functional area” employed by the Constitution was not an acceptable substitute for the term “public function” and, coupled to the adoption of the concurrent powers mechanism, failed to provide certainty as to the extent of the respective legislative powers of the national and provincial levels of government. Also at a technical level there was an unexplained and patently arbitrary use of exclusions and provisos in describing functional areas. Schedule 6, which by its heading, purported to be a listing of the legislative competences of the provinces, was in fact a listing of functional areas in respect of which the provinces and the national government would have concurrent powers.

As for the realisation of assignment principles, it was found on analysis that the principle of national unity and the principle of equality were fully realised in the Constitution, and that the maintenance of economic unity, as required by the corresponding principle, was indeed assured by the Constitution. The principle of provincial autonomy was realised in the Constitution, but only to a strictly limited extent. In contrast to the later Constitution, the principle of co-operation in the performance of public functions was not manifested clearly. The principle of cultural self-determination received no more than passive and conditional acknowledgement.

As regards the substance of the allocation of functions and powers, the Constitution gave a clear indication of the extensive reach of the powers of the national government, also placing the residuary powers of government at that level. The treatment of the provinces was, however, highly problematical, with the legislative competence of the provinces subsumed in a category of concurrent powers exercisable by both the national and the provincial governments. The sets of circumstances in which national legislation in the concurrent category would override conflicting provincial legislation were couched in such wide terms that the national government was placed in a position, and inevitably came to dominate the legislative domain. The situation regarding the provinces was aggravated by a failure to grant exclusive legislative powers regarding any matter to the provinces, despite a stipulation in the constitutional principles requiring this to be done. The Constitution did not allocate any original functions or powers to the local level of government, which is noteworthy considering the important role which local governments are expected to play in promoting the quality of life of their inhabitants, but

not really surprising when looked at in the light of practices in other countries. The Constitution was less problematical as far as executive government and administration were concerned, with subnational governments being placed in the position to render extensive services to their communities, albeit largely within a policy and legal framework determined at the national level of government.

Considered in its entirety, the Constitution did not achieve a substantial, sufficiently informative, and readily accessible or explicable deployment of responsibilities over the three levels of government which it instituted.

#### **8.2.5 1996 Constitution**

The scheme for the assignment of responsibilities to spheres of government as elaborated in the so-called “final” Constitution, is the subject matter of chapter 7 of the thesis. The salient findings of the research into the Constitution are noted below.

To become law the draft text of the 1996 Constitution had to be certified by the Constitutional Court to the effect that all the provisions of the text complied with the constitutional principles which had been embodied in the 1993 (“interim”) Constitution. The certification requirement and the relevant judgements of the Court have a particular relevance to the subject of the present study. The Court in its first certification judgement rejected the initial text which had been submitted to it on the grounds that the text did not comply with constitutional principle XVIII.2, which stipulated that the powers and functions of the provinces could not be substantially less than or substantially inferior to those provided in the 1993 Constitution. The Court found that there had been a curtailment of provincial powers in some areas and that changes which had been made with regard to the exercise of concurrent powers had weakened the position of the provinces. The amended text which was subsequently submitted to the Court addressed the problems identified by the Court. In its second certification judgement the Court again found that the powers and functions of the provinces were less than those accorded them in the 1993 Constitution, but not *substantially* so. The amended text was thereupon certified as complying with all the constitutional principles.

One of the constitutional principles which the Court found had been complied with – constitutional principle XX – requires that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each to function effectively. Analysis of the certification judgements showed that the Court subsumed the particular requirement under the question of legitimate provincial autonomy, the promotion of which is also required by constitutional principle XX. The Court noted that the argument advanced on behalf of objectors to the text was not that the powers of the provinces were not appropriate or adequate but rather that their legitimate autonomy had not been promoted. It would seem that in the absence of objections regarding the substance of the public function responsibilities assigned to the provinces, the Court did not consider it necessary to examine the complete set of assigned responsibilities in depth in order to make a finding as to their appropriateness or adequacy. It is possible that the Court would have considered such an examination and determination to lie outside the scope of its brief, or that the substance of the responsibilities given to the provinces was essentially a policy matter, requiring a political decision by the Constitutional Assembly.

Moving on to the features of the Constitution which are relevant to the study, the confusing and inconsistent use of terms and concepts, which was identified as a problem of the “interim” Constitution, was perpetuated in the “final” Constitution. It is remarkable that the term “function” was used in both constitutions but not in one of its best known applications within the domain of government and administration, viz to refer to that which government departments and other public institutions are established to do. Similarly, the use of qualifications - encompassing exclusions, limitations, and provisos - in no discernible pattern and with no apparent consistency, a shortcoming of the 1993 Constitution, has been continued in the present Constitution.

As a commendable improvement compared to its precursor, the 1996 Constitution includes substantial listings of matters appropriate to the local sphere of government. However, the manner of inclusion – by listing such matters in schedules dealing with national and provincial legislative competences - is unfortunate. The order of setting out governmental competences – legislative, followed by executive – is reversed in the case of local government, while there is continuing use of the somewhat deprecating term “bylaw” in referring to municipal legislation. Taken together, these key features

create the impression that local government is intended to play a subordinate, largely administrative role in relation to the national and provincial governments.

In dealing with the functions and powers of the various spheres of government the Constitution is notable for its ingenuity. It sets in place a comprehensive framework which provides a clear legal base for determining the powers and functions of the respective spheres of government, together with rules for determining prevalence where there is conflicting legislation; principles and directives for dealing with intergovernmental disputes; and powers and procedures for intervening in the affairs of subnational governments where necessary. This comprehensive legal framework comes at a price, viz a high degree of complexity. The provisions dealing with powers and functions are not readily accessible or easily comprehensible, making it an exacting task not only for the ordinary member of the public but also for professional people in politics and administration to acquire an understanding of the powers of the various spheres of government in relation to specific public functions. The main cause of the complexity is probably the mechanism of concurrent powers which has been built into the Constitution.

The Constitution shows an advance on the 1993 Constitution as far as the realisation of constitutional principles is concerned. The principle of provincial autonomy is recognised more clearly with the identification of a substantial number of functional areas in respect of which the provinces are given exclusive legislative powers. The exclusivity is qualified in that Parliament may intervene in a listed functional area, but only when the intervention is clearly necessary in order to achieve a specified objective in the national interest. Provincial autonomy is strengthened further by the constitutional provisions for the protection of provincial powers, principally by means of the role to be fulfilled by the National Council of Provinces. The greatest advance in comparison to the earlier constitution is, however, in the realisation of the principle of co-operation. Co-operation is now a cornerstone of the constitutional dispensation, with a separate chapter (chapter 3) devoted to co-operative government. All spheres of government are required *inter alia* to respect one another's powers and functions and not to encroach on one another's geographical, functional or institutional integrity. The principle of cultural self-determination continues to find expression in the Constitution, and in a more acceptable manner: cultural self-determination is held out not only to the

proponents of a Volkstaat but to any community sharing a common cultural and language heritage.

As was the case with the interim Constitution, the actual substance of the responsibilities of the various spheres of government is not readily apparent. The principal reasons for this continuing, major shortcoming are as follows: The employment of the mechanism of concurrent powers; the vesting of powers of intervention in Parliament regarding functional areas of exclusive provincial competence; the placement of the legislative role of local government in a subservient position to its executive, largely administrative role; and the fact that the executive and legislative roles of the subordinate spheres of government are not co-determinate, with a number of provisions making it possible for provincial and municipal governments to carry out programmes of work wider in scope than the functional areas or matters specifically assigned to them by the Constitution. Generally speaking, legislative authority is located predominantly with the national government, while executive responsibilities are more evenly distributed over the three spheres of government.

The Constitution lays an apparently sound foundation for intergovernmental relations, based on the idea of co-operative government as elaborated in chapter 3 of the Constitution. However, the Constitution's shortcomings in setting out the actual scope of the powers and functions of the three spheres of government, obviously presents a problem for the conduct of intergovernmental relations. As a consequence – and it is a matter of some concern – it is to be expected that there will be a heavy dependence on the resolution of “turf disputes” at the political executive level or, in other words, by means which are essentially extra-Constitutional.

Although the assignment scheme introduced by the 1993 Constitution has been elaborated and improved in certain respects, notably through the better realisation of assignment principles, the introduction of a category of exclusive powers for the provinces, and the listing of matters which belong in the municipal domain, the Constitution still cannot be said to have succeeded in establishing a credible and clear-cut deployment of responsibilities over the three spheres of government.

### **8.3 Analysis and interpretation**

The stated purpose of the present study is to make a contribution to the body of knowledge which is Public Administration, specifically with regard to the assignment of public function responsibilities to levels or spheres of government. To be able to do this, it is necessary to assess, on the basis of the research which has been done, the degree to which a scientific approach to the assignment question is already in evidence. Such an evaluation can best be done by putting in place a purpose-specific set of basic criteria as to what would constitute a scientific approach, and then weighing the research findings against the criteria identified. The larger question of what constitutes a science cannot, within the framework and limits of the chapter, be examined in detail; what is presented is no more than a rough guide for assessing a particular field of activity from a broadly scientific perspective – hence the reference to a purpose-specific set of criteria.

#### **8.3.1 Scientific requirements**

According to Mouton, a science can be understood as a specific body of knowledge which has evolved over time. In his view, the building of such a body of knowledge arises from the engendering in a scientist – presumably either established or aspiring - of an epistemic (knowledge) interest in a particular phenomenon. (Mouton 1996:9-11, 13.) For purposes of scientific enquiry the scientist objectifies some aspect of the social world by transforming a certain phenomenon into a cognitive object of study (Mouton 1996:64). Applied to Public Administration, one could say that the cognitive object of study consists, generally, of the complex phenomenon of public institutions and their activities, and that the prosecution of the study of this object through targeted research has resulted in the body of knowledge which is Public Administration (Wessels 1999a:365; Pauw 1999:9). Wessels (1999a:377) emphasises that Public Administration is a developing science, noting the fact that the reality which it studies does not remain the same. Research into an aspect of public administration can be seen as an endeavour to contribute usefully to this developing body of knowledge.

A science is made up of various components. Writing about social sciences in general, Mouton (1996:14) mentions as examples factual and descriptive statements,

explanatory hypotheses, theories, laws and models, various kinds of assumptions and postulates, and usually implicitly held beliefs and values. Although referred to as examples, the components mentioned by Mouton would appear to constitute a quite comprehensive list. It would seem that Mouton (1996:123) uses the term “postulate” as a preferred alternative to the term “principle”. In another place this author refers to scientific knowledge as consisting of the body of propositions (factual statements, hypotheses, models, theories, laws) which at a specific time is accepted by the scientific community as being valid and reasonably correct (Mouton 1996:13). Wessels refers to what he calls the key contents of a science as a body of knowledge, identifying in this connection own concepts, definitions, hypotheses, models, typologies, theories, and paradigms. Writing in 1999, he interestingly poses the question whether Public Administration, as a science, has these components. (Wessels 1999a:366.) Presumably one can ask the same question in respect of a postulated part of Public Administration, the assignment of public function responsibilities to governments being a case in point.

Having demarcated a phenomenon, or set of phenomena, for study, the assumption can reasonably be made that the study will proceed by way of the observation of the object(s) of study and the recording of the observations. It can be assumed further that to be useful scientifically, a systematic approach to observation and recording will need to be followed. A haphazardly collected hodge-podge of random observations can hardly serve any meaningful purpose. Scientifically, the answer lies in the development of a classification or typology reflecting key attributes of the object(s) of study. Classification is important in the development of any science but especially so in its early stages (Copi & Cohen 1990:451). In his MA dissertation the author, having considered various definitions at the time, defined the term “classification” (noun) as “*n logiese skema van denkekatégorieë waarin essensiële ooreenkomste en verskille wat in ‘n stel objekte aanwesig is, weerspieël word*” (Robson 1978:12). This definition is somewhat unsatisfactory in not bringing out an important dimension of classification, viz that of hierarchy. Copi and Cohen (1990:450) remark that classification involves not merely a single division of objects into separate groups but further subdivision into subgroups and subclasses. An accountable classification will satisfy three basic criteria: it must be comprehensive, covering the whole body of objects demarcated for study; it must be designed so that classes and subclasses are mutually exclusive; and a single basis of

division (*fundamentum divisionis*) must apply throughout (Joseph 1906:103-105). Copi and Cohen make the important point that the same set of objects can be classified differently depending on the purpose or interest of the classifier, and illustrate this with reference to the classification of the books in a library. Different classifications will be compiled by a librarian (according to content or subject matter), a bookbinder (according to binding methods), and a bibliophile (according to age or relative rarity). They go on to argue that one classification scheme is better than another to the extent that it is more fruitful in suggesting scientific laws and more helpful in the formulation of explanatory hypotheses. (Copi & Cohen 1990:450.)

The scientist seeks not only to observe and describe the phenomena forming the object of his study, but also to *understand* and *explain* them (Copi & Cohen 1990:420; Mouton 1996:46; Ball 2005:35). Compiling an accountable classification scheme would constitute a substantial step in an endeavour to understand the targeted phenomena. However, the scientist will strive to go beyond this stage by devising hypotheses, theories and laws which point out important regularities and relationships present within a set of phenomena, and perhaps suggest that there are certain factors which underlie the regularities and relationships. Clearly, this is the more creative side of scientific activity (Copi & Cohen 1990:426).

“Theory” is obviously a key term in science; but it is also a ubiquitous one and needs to be clearly understood. A dictionary of philosophy defines the term as “the hypothetical aspect of anything ...An abstraction from practice” (Runes 1962:317). Authors writing about the term emphasise the understanding and explaining functions of theories (Marais 1993:111-112, 116; Hodge *et al.* 2003:18; Mouton 1996:124; Pauw 1999:9). The close relationship of the terms “theory”, “hypothesis”, and “law” in scientific discourse needs to be noted. They all have an understanding or explaining function, and can be arranged in a logical hierarchy, with the term “hypothesis” conveying a proposed explanation; the term “theory” conveying a higher order explanation, viz a hypothesis which has been well confirmed; and the term “law” conveying the highest order of explanation, viz one enjoying well nigh universal acceptance (Copi & Cohen 1990:423). The same authors, however, consider the vocabulary of “hypothesis”, “theory”, and “law” to be unfortunate since, in their view, it tends to obscure the fact that all general propositions in science should be regarded as hypotheses, never as dogmas



(Copi & Cohen 1990:423). This view is supported by Mouton (1996:121) when he states that a hypothesis is a statement that makes a provisional or conjectural knowledge claim about the world. There seems to be agreement amongst metascientists that no matter how many times a hypothesis (knowledge claim) is confirmed by observation, it retains its provisional or conjectural nature. It is noteworthy that in the discipline of logic, classification schemes are also regarded as hypotheses (Copi and Cohen 1990: 451). However, in general usage – also in scientific circles - the term “theory” enjoys a distinct popularity, signifying *inter alia* something different or opposite in meaning to the term “practice” (Runes 1962:317; Pauw 1999:10). The term is obviously a useful one in scientific discourse, broad enough at a conceptual level to include the terms “hypothesis” and “law”, but not ruling out the use of either of the other two terms where they are more appropriate. In a social science like Public Administration there would at this stage of its development appear to be scope only for the employment of the terms “hypothesis” and “theory”; given a constantly changing reality, it is unlikely that a virtually irrefutable law can be postulated in relation to public institutions and their activities. What seems to be key, is that the hypothetical nature of all theory, as knowledge claims about the world which could be found to be incorrect, should constantly be borne in mind.

For present purposes – the putting in place of an operational evaluation base or standard for assessing the “scientificness” of assignment schemes and practices relating to the public function responsibilities of governments – it is necessary to pause briefly at some of the other components of a science identified by Mouton and Wessels *supra*. These are models, postulates and paradigms.

Mouton differentiates models from theories on the basis of function: while a theory has an explanatory function, he ascribes to a model a *heuristic* function. By “heuristic” he means a form of guiding, which could be understood as uncovering or pointing towards the way in which certain phenomena function or operate. Models, he says, serve as analogies and scientific metaphors for real life occurrences. In a heuristic approach, the scientist reveals certain relationships relating to a phenomenon and systematises these into a model of how the phenomenon functions. Mouton contrasts models with typologies – a term he seems to prefer to classifications – postulating that while a typology provides a *static* image of a phenomenon, a model represents the *dynamic*

aspects of the phenomenon. (Mouton 1996:196-198.) While it could be argued that a model, as described by Mouton, is but another type of theory - seeking also to promote understanding of or to explain a phenomenon - Mouton's views on models are valuable and amenable to fruitful application in Public Administration, for example in depicting the dynamics of policy making.

An important finding of the present study is that there are certain principles of assignment in evidence in the documentary record pertaining to recent constitutional developments in South Africa (*vide* section 6.3.3 of the thesis). Mouton (1996:123) does not mention principles in his listing of the components of a science, but does include assumptions and postulates. He notes that postulates are *usually general principles* – this author's emphasis - that are accepted as being applicable to all human behaviour, and are hence regarded as being self-evidently true. (Mouton 1996:123.) Runes (1962:250) defines the term principle as “a fundamental cause or universal truth; that which is inherent in anything”. This definition has been used in the section of the thesis referred to above, in which the constitutional principles adopted in South Africa are analysed and criticised. As regards the term “postulate”, Runes provides a specific Kantian meaning, and for the rest refers the enquirer to his entry for “mathematics”, where the term is used in the sense of an unproved proposition (Runes 1962:244, 189). A German lexicon of basic philosophic concepts provides more clarity, giving the meaning of the term as “*eine zum Verständnis der Erfahrung geforderte, grundsätzliche Annahme, die aber nicht beweisbar ist*” (Neuhäusler 1967:168). Wessels (1999a:366) does not mention principles or postulates specifically in his listing of the contents of a science. That the terms “postulate” and “principle” are close in meaning - as suggested by Mouton – can be confirmed by reference to a general dictionary. The Shorter Oxford dictionary offers the following:

- “postulate” : A proposition demanded or claimed to be granted; especially something claimed or assumed as a basis of reasoning, discussion, or belief; hence, a fundamental condition or principle.
- “principle” : A fundamental truth or proposition, on which many others depend; a fundamental assumption forming the basis of a chain of reasoning.

For present purposes it would seem that one of these terms will suffice. The preference is for the term “principle” because of its direct relevance to the study as indicated above.

Moving on to paradigms - as an important element to look for in assessing the degree to which a scientific approach is in evidence in a particular practice or activity – Wessels (1999b:385) provides a brief but practically useful elucidation of the concept: The term “paradigm”, as it has become established in the scientific domain, was coined by Thomas Kuhn in 1962 in his work on scientific revolutions. As interpreted by Mouton in an essay on Kuhn, Kuhn’s necessary components of a paradigm can be stated to be (i) a commitment to a specific theory or law, or set of theories or laws, (ii) acceptance of a particular methodology and specific research techniques, (iii) commitment to specific quasi-metaphysical assumptions and pre-suppositions, and (iv) certain assumptions made by scientists as scientists; in short, therefore, a paradigm can be said to be the accepted framework within which a given group of scientists normally work (Mouton 1993:55-57). Wessels (1999b:384 *et seq.*) has employed the paradigm concept in examining and elaborating three macro-research methods prominent in the social sciences, viz the quantitative paradigm, the qualitative paradigm, and the participatory action paradigm. Against this brief background, it is suggested that the presence or absence of a discernible paradigm ought to be included as a criterion for assessing the status of an activity as a *scientific* activity.

Finally, the way in which language is used – and especially the identification and definition of terms and concepts - would appear to be an important ingredient in putting together a set of evaluation criteria for present purposes. Wessels (1999a:366) identifies own concepts and definitions as part of the key contents of a science. As far as Public Administration is concerned, it can be typified as an essentially conceptual science, requiring for its proper study an understanding of the nature and function of concepts, and ongoing efforts at identifying, clarifying and defining its peculiar terms and concepts (*vide* in this connection section 3.3 of the thesis). For proper discourse on Public Administration it is necessary to differentiate between three verbal tools, viz “word”, “concept”, and “term”. The correct use of these tools of the scientist’s trade has been touched upon in section 3.3.1 of the thesis. It needs to be noted that definition occupies an important place within the discipline of Logic, with its own

principles and rules. Copi and Cohen (1990: chapter 4) devote a full chapter to definition in their introductory text on logic.

In the light of the foregoing discussion, it is proposed that the following criteria be applied for purposes of making a summary assessment of the extent to which the assignment of responsibilities for the performance of public functions by governments can be said to constitute a scientific endeavour:

- ?? Viewed generally, is there a distinct body of knowledge, characterised by the types of components variously identified by Mouton and Wessels *supra*, in existence, and is there a group of people who possess this knowledge and are contributing to its increase?
- ?? Has the object of study, public functions, been clearly identified and defined?
- ?? Is there an established conceptual framework or standardised terminology, properly defined, which can serve to facilitate discourse on the assignment question?
- ?? Are there established typologies or classifications of public functions for purposes specifically of the assignment of responsibilities for their performance to levels or spheres of government?
- ?? Is there a paradigm discernible which applies specifically to the study of public functions, or aspects of public functions, as assigned to levels or spheres of government for performance?
- ?? Given that true scientific endeavour consists not only in the observation, description and classification of phenomena, but also in a concerted effort to *understand* phenomena, what propositions of an explanatory nature have been, or can be put forward concerning the assignment of responsibilities, whether in the form of postulates or principles, models, hypotheses or other forms of theory?

In the following section the research findings are weighed against the aforementioned criteria.

### 8.3.2 Assessment

No distinct body of knowledge in the sense discussed *supra*, which exhibits a substantial number of the typically scientific components referred to, has been encountered in the course of the literature review (*vide* summary in section 8.2.1 *supra*). There are countless references to public functions – mostly by other names – but the references are of a descriptive, historical, selective, or polemical nature. Public functions as phenomena in societal life – what they are, how they relate to the community and to government, how or why responsibility for their performance is deployed amongst levels or spheres of government – are not dealt with in an analytical, scientific manner, and do not emerge as a distinct subject of authorship. The 1998 article by the author does deal with public functions as a whole, but is essentially a critical comment on the relevant aspects of the 1996 Constitution, culminating in a suggestion that there is room for a scientific approach to the assignment question (Robson 1998a). The literature of federalism provides valuable insights concerning the (political) power environment relevant to the assignment of public function responsibilities, and at times touches upon technical aspects of the assignment question, but does not provide a developed theory as to which public functions, or aspects of public functions, belong at or in the various levels or spheres of government. The paucity of directly relevant literature is reflected in the Public Administration curricula of leading universities, where the assignment question is either not dealt with, or receives the briefest of treatment (*vide* section 2.2 of the thesis).

The record of known research projects in South Africa shows no directly applicable research dealing with the subject of the present study, and there is thus no emerging body of knowledge to hand from that quarter (*vide* section 8.2.1 *supra*). Although not featuring in the research record, presumably because no report was published, the work done by the erstwhile Commission for Administration in 1993 in developing an input to the Multiparty Negotiating Process, would appear to be significant in the context of building a body of knowledge. The work in question is described, examined and evaluated in section 6.4 of the thesis. Particularly noteworthy in the present context are the attention paid to terminology, the identification of what were thought to be relevant principles, the design and application of a specific methodology, the application of a

particular analytical approach, and the involvement of experienced career officials in what could be seen as an instance of the employment of a participatory action research paradigm. These aspects resonate well with the set of criteria proposed above for evaluating the scientific character of a particular activity. It would seem that the knowledge generated by the Commission's programme of work has enduring value and that it could find a place in an emerging body of knowledge concerning the assignment question.

The question whether there is a group of people identifiable as being in possession of scientific knowledge of the assignment question, and who are contributing to its increase, is not amenable to a ready answer. Judging by the research record and the literature surveyed, the existence of substantial expertise in the specific field is not apparent. Experienced practitioners in public administration can be expected to have practical knowledge of the deployment to levels or spheres of government of the specific public functions in the performance of which they are actively engaged, yet without being knowledgeable on the assignment question as a whole, or at a theoretical level. It can reasonably be assumed that public administrationists – practitioners and academics – who have a particular interest in macro-organisational matters or in intergovernmental relations will have an understanding of the deployment of public function responsibilities, and be qualified to participate in the assignment debate. However, it is not possible to say to what extent their individual expertise would, in respect of the assignment question, encompass the basic criteria being applied in this summary evaluation. The paucity of focused interest regarding the subject matter of the thesis has been a problem in conducting the research, virtually ruling out the possibility of an in-depth exchange of views or a substantial dialogue with fellow researchers. At the same time, it can be said that the situation encountered serves to confirm the essentially exploratory nature of the research.

Regarding the identification and definition of the basic object of study, viz public functions, the research has shown that the concept, as well as the term "function", are well established in public administration as practised in South Africa, and are also recognised in the literature of Public Administration. At least as far back as 1923 the Public Service Act has employed the term "function" with the general meaning of what government departments are mandated to do, in other words their activities or

programmes of work. Definitions of the term appear in published lexicons of Public Administration; two of these definitions are quoted in section 3.3.3 of the thesis. These definitions are broadly acceptable, but also notably succinct and limited in the extent to which they bring out the full meaning of the term. In the thesis the term has been qualified by the addition of the word “public” and given a fuller connotative definition (*vide* section 3.3.3 of the thesis). The term as defined could be useful in building a conceptual framework to encompass the assignment question.

The research did not reveal an established conceptual framework or standardised terminology which can facilitate discourse on the assignment of public function responsibilities to levels or spheres of government. It has been necessary, therefore, to create a conceptual framework for purposes of the present study, and the proposed framework has been built into the design of the research project (*vide* section 3.3 of the thesis). The development work of the Commission for Administration to which reference is made *supra*, could conceivably also be of use in the further development of a conceptual framework with its associated terminology.

No classification of public functions compiled specifically for purposes of the assignment of responsibilities for their performance to levels or spheres of government was found in the literature surveyed. Again, the work done by the Commission for Administration in 1993 could be of use in developing such a classification. In his 1998 article the author suggested that it may be useful, or even necessary, to differentiate the policy-making, execution, and control aspects of public functions for purposes of relating constitutional stipulations concerning legislative and executive powers to the discipline of Public Administration (Robson 1998a:25-26). Such a division is in itself a classification, which may need to be accommodated in a developing theory of assignment. It needs to be noted that every country which assigns powers and functions to levels and spheres of government has in effect set up a classification of public functions. However, these arrangements can hardly be regarded as scientifically accountable classifications. Based on the research findings (*vide* chapter 4 of the thesis) such “classifications” are usually not *comprehensive*, tending to concentrate on only two levels of government while acknowledging the existence of a third. They do not cope satisfactorily with the requirement of *exclusivity*, evincing a good deal of circumscription as well as the extensive use of qualifying conditions, which make it difficult to determine what exactly a

particular level of government is responsible for in practice. (Where the mechanism of concurrent powers is employed, any notion of exclusivity is virtually negated.) Finally, *the basis of division* is usually not clearly stated, or more than one *fundamentum divisionis* is employed, examples being a division based on both territorial and cultural considerations as in Belgium, and the “own affairs” / “general affairs” model as applied in South Africa in the 1980’s.

In the light of the patently under-researched status of the assignment question, it is not surprising that no particular paradigm related to its study has been encountered. It would seem that for a recognisable paradigm to become established, some development with regard to theory and methodology related to the assignment of public function responsibilities to governments would have to take place, and be acknowledged within the discipline of Public Administration.

Finally, it is necessary to assess the extent to which theory, in the sense of an endeavour to understand and explain the phenomenon of the assignment of public function responsibilities, has emerged. In the *ad hoc* set of criteria which is being applied the theory aspect has been focused on the identification of propositions of an explanatory nature which have been, or can be put forward, whether in the form of principles, models, hypotheses or other forms of theory.

The research has yielded no model of the nature described in section 8.3.1 *supra*, viz a representation, or analogy, or metaphor of how a particular phenomenon functions in practice, and which captures the dynamic as opposed to the static aspect of the phenomenon. The function “blueprints” developed by the Commission for Administration in 1993 (*vide* section 6.4 of the thesis) did have a distinct, relatively sophisticated structure, and could perhaps be regarded as a form of modelling applied to the deployment of public function responsibilities over tiers of government. For the rest, the research did not reveal any clearly stated hypothesis seeking to explain the phenomenon in question, although it could conceivably be argued that the so-called subsidiarity principle is in essence a hypothesis, or at least that it has a significant hypothetical quality.



What the research did produce, is a number of principles related to the assignment of public function responsibilities which seem to underlie, or could underlie, the way in which assignments are made. The subsidiarity principle (*vide* section 3.3.3 of the thesis) is established in the literature as well as in the academic curriculum, while at least one author has postulated the principle of exclusivity as being valid in relation to the assignment of responsibilities (Senelle 1990:40). In South Africa the constitutional principles adopted in the course of the Multiparty Negotiating Process in 1993 have, on analysis, yielded a substantial crop of principles with apparent validity for the assignment of responsibilities. The assignment principles derived from this source are the principle of national unity, the principle of economic unity, the principle of equality, the principle of co-operation, the principle of provincial autonomy, and the principle of cultural self-determination (*vide* section 6.3.3 of the thesis). The degree to which the identified principles were realised in the drafting of the 1993 and 1996 Constitutions is examined in sections 6.7.2 and 7.7.2 respectively of the thesis. The finding is that the first four principles listed have been realised substantially, while the principle of provincial autonomy and the principle of cultural self-determination have been realised to a lesser degree.

The six assignment principles extracted from the constitutional principles would appear to have an applicability wider than the South African system of government. In the evaluation of the assignment schemes of five other countries (*vide* section 4.7 of the thesis) the comment is made that there seems to be a general consensus that the public functions dealing with defence, foreign affairs and public finance must be performed at the highest level of government. In terms of underlying principles this finding can be interpreted as providing confirmation of the acknowledgement of the principles of *national unity* and *economic unity* in the sample of five countries surveyed. It can reasonably be assumed that the principle of *equality*, implying as it does that everyone is entitled to equal treatment by the institutions of government, would be honoured in the particular five countries, who are all generally regarded as Western style democracies. The principle of *provincial autonomy*, which is amenable to application to subnational governmental units irrespective of the designation used, is clearly also in evidence in other countries, in the mere fact that powers and functions *are* deployed to subnational governments. Of course the degree of autonomy granted may vary, but such variations do not negate the directive influence and hence the importance of the

principle. Adherence to the principle of *co-operation* is clearly in evidence in Belgium and Germany. Although the Belgian constitution does not provide specifically for co-operation between the various authorities, extensive provision for co-operation is made in special legislation (Senelle 1990:150-155). In Germany, given the degree of functional intertwinement which has developed between the Federation and the *Länder*, co-operation between these units of government has become a matter of great importance, for which the term “co-operative federalism” has been coined (Laufer 1991:91-94; chapter 7). Belgium provides a prime example of the application of the principle of *cultural self-determination*, with its public function responsibilities organised on a dual basis, viz the regional and the cultural (*vide* section 4.3 of the thesis).

A noteworthy additional principle encountered in the review of the assignment schemes of a sample of countries is that of *asymmetry*, specifically as applied in Spain (*vide* section 3.5 of the thesis). Briefly stated, the principle stipulates that the public function responsibilities assigned to subnational units of government can differ from one such unit to another – presumably where there are reasons for such differentiation and differentiation is acceptable to an affected unit of government. The principle was also found in the literature review; however, with an indication that there would appear to be a tendency to favour a symmetrical above an asymmetrical allocation of powers to subnational units of government (Agranoff 1994:83; Gagnon 1994:132).

In summary, this assessment shows that a scientific approach to the assignment question is in evidence only to a limited degree. A distinct, dedicated body of knowledge is not apparent; the particular phenomenon is under-researched; expertise concerning the assignment of responsibilities is not readily available; work remains to be done concerning the identification and definition of key concepts; a conceptual framework and standardised terminology to facilitate discourse is not readily to hand; an accountable, relevant classification of public functions is not in existence; a particular paradigm for the study of the assignment phenomenon has not become established; and little by way of theory has been put forward. However, the research has revealed the presence of a number of principles which would appear to underlie the assignment of public function responsibilities. Also, the work done by the erstwhile Commission for Administration regarding the development of function “blueprints” could be of value in an endeavour to build a knowledge base concerning the assignment question.

## 8.4 Conclusion

This chapter has sought to provide an integrated overview of the research findings reported on more fully in the preceding chapters of the thesis, and to evaluate the state of the assignment question in scientific terms. It has been compiled in a manner intended to give the reader a concise yet clear picture of what the research was about, and of the main findings which have been made.

In the first part of the chapter a summary has been provided of the research findings with regard to the assignment of responsibilities in a sample of countries other than South Africa; the history of the assignment question in South Africa prior to 1994; and, in sequential chapters, the assignment question as determined by the 1993 and the 1996 Constitutions respectively. Also included in the summary are salient points from the review of literature selected from the disciplines of Public Administration, Constitutional Law, and Political Science. Two major lessons can be drawn from this research: firstly, that the assignment schemes of different countries have a strongly *sui generis* character; and secondly, that despite the obvious importance of the assignment of public function responsibilities, not much by way of a scientific approach to the assignment question is in evidence. These two findings would appear to be not unrelated. In the second part of the chapter a closer, more analytic and systematic look has been taken at assignment practices in scientific terms. Here the finding is again that although the research has delivered some valuable insights, especially as regards explanatory principles, much remains to be done before there can be serious talk of a generally acceptable scientific approach to the assignment of responsibilities. In the ensuing chapter a tentative theoretical model for the assignment of responsibilities is presented for consideration.

## **CHAPTER 9: A THEORETICAL MODEL FOR THE ASSIGNMENT OF RESPONSIBILITIES**

### **9.1 Introduction**

The research into the assignment of public function responsibilities in South Africa, as well as in a sample of other countries, has yielded little evidence of a sound theoretical approach to the assignment question. The literature review conducted as part of the research also did not yield a developed, substantial or substantive theory aimed at understanding or explaining the assignment phenomenon. These findings are cause for concern, bearing in mind the implications of the assignment of responsibilities for a country's system of government and administration. This chapter endeavours to construct a provisional theoretical model as an aid to the accountable assignment of responsibilities for the performance of public functions to levels or spheres of government.

In South Africa, the Constitution adopted in 1996 has established the term “sphere of government”, in substitution of the term “level of government”, as the one to be used in referring to one of the three constituent classes of government, viz national, provincial, and local. However, in analytical work regarding the assignment of responsibilities to the spheres of government it is at times – for example when dealing with the subsidiarity principle – more appropriate and meaningful to employ the term “level of government”. In this chapter both terms are employed as considered appropriate depending on the nature of the argument. (*Vide* note concerning the concept “levels or spheres of government” in section 9.5.1 *infra*.)

In building the model, a number of simplifying assumptions have to be made. It is also necessary to emphasise that a Public Administration approach is followed, as presumably a quite different model could emerge if a different approach was followed, say for instance one based on the precepts of Constitutional Law. Key elements of the model are language, classification, assignment principles, and methodology. All these aspects are dealt with in separate sections below. First, however, it is necessary to pause for a moment at the concept or notion of a theoretical model.

## 9.2 Models and modelling

The proposed theoretical model uses the term “model” with a specific meaning. Before presenting this meaning it is considered necessary to reflect on the use of the term, generally, in scientific practice.

According to Mouton (1996:196-198) models serve as analogies and scientific metaphors for real life occurrences; they have a heuristic function, which he describes as a form of guiding. He distinguishes a model from a typology or classification: whereas a typology provides a static image of a phenomenon, a model represents the dynamic aspect of the phenomenon.

Definitions accessible on the internet generally support Mouton's view; three examples are quoted below:

“An abstract model (a conceptual model) is a theoretical construct that represents physical, biological or social processes, with a set of variables and a set of logical and quantitative relationships between them” (Online 2005a).

“A representation of a process or system that attempts to relate the most important variables in the system in such a way that analysis of the model leads to insights into the system” (Online 2005b).

“A model is a simplified representation of how something happens or works in the real world” (Online 2005c).

A published work dealing with research methods for public administrators, offers the following definition:

“Model. A representation of reality, it delineates certain aspects of the real world as being relevant to the problem under investigation and makes explicit the relationships among these aspects; it enables the formulation of empirically testable propositions regarding the nature of these relationships”. (O'Sullivan & Rassel 1989:475.)

Elsewhere in the same publication the elements of a model are identified as variables and constants (O'Sullivan & Rassel 1989:13).

All the quoted definitions have two things in common: they typify a model as a representation of something encountered in the real world, and they emphasise that what is represented has a dynamic quality, characteristic of a process, or a system, or of the functioning of something. While the first mentioned of these common factors is applicable to the model developed in this chapter, the second is not. The proposed model does indeed represent something encountered in the real world - the assignment of responsibilities to levels or spheres of government - but it does not deal with the dynamics or the process of assigning responsibilities.

The model presented here seeks to delineate an accountable basis on which responsibilities for public functions can be assigned to levels or spheres of government. It is built on what is seen as a Public Administration approach to the assignment question, and it incorporates as its main components a defined conceptual framework, a number of principles which are assumed to be valid, and certain aspects of scientific methodology. It takes the form of an idealised scheme which could, but need not necessarily be followed in practice. In this sense it could be said to have a guiding function as referred to by Mouton (1996:196-198). It is comparable to an endeavour by, say, an educationist to conceptualise an ideal learning institution for secondary education, or by an architect to envision an ideal set of buildings for such an institution. The model points to what could be done, but does not presume to prescribe what should be done. Ultimately – and again this is in line with a Public Administration approach – decisions on the assignment of responsibilities to national and subnational governments need to be taken within the political domain, by bodies properly elected and constituted for that purpose.

“Modelling” in the present context, connotes simply the setting up of a model of the sort described in the foregoing paragraph.

### 9.3 Assumptions

In building the proposed theoretical model it is necessary to make certain assumptions. Making assumptions is acceptable in scientific practice provided they are reasonably justified (Mouton 1996:14). In the present instance some assumptions are considered to be justified because of the perceived complexity of developing a model capable of accommodating every possible variation in the assignment of public function responsibilities. As is evident from the definitions quoted, as well as the discussion, in the preceding section, a model is an idealised scheme and not necessarily an exact representation of the real world, or something which is replicable exactly in practice.

For purposes of the present modelling exercise, three basic assumptions are made. Firstly, that the state is a secular one; in other words that while guaranteeing freedom of religion as a fundamental right (*vide* 1996 Constitution: section 15), the state is not founded or organised in any way, nor does it function, in accordance with the doctrine or tenets of any religion. Secondly, that the state is organised on a geographical basis, with subnational governments focused on provinces, and within provinces, on municipalities. It is assumed therefore that no governmental structures have been instituted or are envisaged for culturally distinct communities. Lastly, that all subnational governments, provincial and municipal, are viable; in other words, that they are fully capable in terms of material and human resources to satisfactorily discharge all the responsibilities entrusted to them.

### 9.4 A Public Administration approach

In the construction of the present theoretical model a Public Administration approach is followed. It is necessary to emphasise this particular orientation because of the interest displayed in the assignment or deployment of functions and powers within the state by the related disciplines of Constitutional Law and Political Science. On the basis of the research done, it can be postulated that these disciplines each view the assignment question from their own perspective, which in turn determines their scientific and professional attitude to the question.

Constitutional lawyers have an obvious and intense interest in the allocation of powers within the state, but their interest would appear to lie essentially in the legal rules which govern the institution and functioning of legislative and executive institutions, as well as the role which judicial institutions have to play in this connection. It would seem that for them the actual content of the public functions for which the various governments are or will be responsible, is largely a given – a matter to be determined through a political process. (*Vide* section 2.6.3 of the thesis.) Political scientists again are concerned essentially with the accommodation of political power within the state. While it is true that power is given form and substance by the assignment of responsibilities to national and subnational governments respectively, the political scientist's epistemic interest would not appear to extend to the consideration in detail of the actual content of the public functions which are or ought to be the responsibility of the various governments. (*Vide* section 2.6.4 of the thesis.)

Applying a Public Administration approach implies that attention be given to a number of key facets; these are addressed seriatim in the following sections.

#### **9.4.1 Value based guidelines**

Public administration is distinguished from other types of administration in the main because it has its own set of guidelines that underlie its theory and practice – thus avers Cloete (1994:87). These guidelines are value based, and fall in two major groups, viz those emanating from the body politic, and those emanating from the community (Cloete 1994:63-88). Botes *et al.* (1996: part III; chapter 5) demonstrate a similar value focus, under a heading “Deterministic guidelines or normative principles for public administration”. Cloete (1994:64-82) identifies political supremacy, public accountability, and the tenets of democracy as emanating from the body politic; and classifies religious doctrines and value systems, fairness and reasonableness, balanced decisions, thoroughness, probity, and economy, effectiveness and efficiency in the category of “community values”. The guidelines or principles identified by Botes *et al.* (1996:285-293) are guidance of the supreme political authority, public accountability and responsibility, public efficiency, the application of administrative law, respecting the values of society, pursuance of high ethical norms and standards, and social justice and equality.



It is not considered necessary to examine all the value based guidelines referred to above, in relation to the proposed theoretical model. However, three of the guidelines in question are particularly relevant in putting together – and applying – a theoretical model for the assignment of public function responsibilities to governments: these are political supremacy, democratic requirements, as well as economy, effectiveness and efficiency. Brief comment concerning these guidelines is called for.

*Political supremacy:* It is necessary to bear in mind constantly that public institutions are established and function within a political environment and under the direction and control of the appropriate legislative and political executive institutions. All fundamental decisions bearing on public administration – and decisions as to what the various levels or spheres of government should occupy themselves with are fundamental decisions – have to be taken by the properly constituted and empowered political bodies. Nevertheless, it can be postulated that theorising and model building concerning the assignment of public function responsibilities to governments is also an appropriate activity for public administrationists to engage in. Indeed, they can conceivably make a substantial contribution in this field, based on their professional knowledge and experience, their theoretical insights, as well as any appropriate studies and analyses which they may have done. Ultimately, however, assignment decisions are political decisions. An important implication to be noted is that a proposed theoretical model, if it is to find practical application, will first have to achieve acceptance by the key political institutions.

*Democratic requirements:* It can be postulated that the degree of commitment evinced by legislative and political executive institutions in upholding the tenets of democracy, and of satisfying democratic requirements in a practically effective way, will have a decisive influence on the substance of the public function responsibilities assigned to subnational governments. The country having opted for a fully democratic system of government the following scenario can be envisioned in relation to the deployment of public function responsibilities: At each level or in each sphere of government, governments will be elected by universal suffrage exercised in separate elections (even if they do take place simultaneously). If the Constitution – as it does – requires a three-tiered structure of government – and leaving aside for the moment the technical

difficulties inherent in demarcating public function responsibilities – it can be deduced logically that the national government will concern itself with national, the provincial governments with provincial, and the municipal governments with local matters. Each level or sphere of government will have an appropriate and, in descending order, narrower geographic focus. It is almost certain that each provincial and each municipal government will have its seat of government located physically within its area of jurisdiction. As public function responsibilities move away from the governmental centre of the state to positions of relative proximity to the communities to be served, it can be contended that government is being brought closer to the people. The deployment of public function responsibilities in this manner could be regarded as an appealingly positive outcome of the application of a democratic approach to government.

*Economy, effectiveness and efficiency:* This guideline has an obvious applicability in the modelling of an assignment scheme. Given the constitutionally decreed multiplicity of governmental structures, with their concomitant cost outlays, it makes good sense that responsibility for the performance of a particular public function should be assigned in a way that will ensure that, as far as possible, services are rendered economically, effectively, and efficiently. Such an ideal situation is obviously easier to envision in theory than to realise in practice; but the importance of adhering consciously to the basic guideline in making assignment decisions is not thereby diminished. To illustrate: it would be hard to imagine that economy, effectiveness and efficiency would be promoted if a central government department in Pretoria were to be made responsible for the weekly removal of refuse from all households across the land. Then again, it can hardly be expected of each and every municipality in the country to provide a specialised hospital service to its inhabitants.

#### **9.4.2 Community needs, public functions and government**

For purposes of the theoretical model it is accepted that public functions arise from and are directed at the satisfaction of community needs. This is a long established view, as evidenced for instance in the course content of a training programme in organisation and methods presented under the auspices of the then Public Service Commission in the 1960's (PSC 1969: lecture 21:1). By extension it can be said that the country's public administration, encompassing as it does its public institutions and their activities, has

as its fundamental purpose the satisfaction of community needs. However, it is not the responsibility of government to satisfy all the needs of all the members of the community.

For theoretical purposes the assumption can be made that the individual members of the community, either acting on their own or in voluntary association with one another, can satisfy many of their personal or essentially private needs without looking to government for assistance. However, in contemporary society the further assumption needs to be made that there are substantial needs – for example the need for law and order, the need for health services, and the need for a clean and safe environment – which because of the human, financial and other resources required, cannot be satisfied by the individual members of society without the involvement of government. Government steps in to satisfy such needs, but the spectrum of needs which government will supply, and the manner and extent of its involvement, is hardly likely to be the same in all countries at all times. It can be postulated further that governmental involvement in community need satisfaction will be influenced by the political ideology adhered to by the government-of-the-day. So for example, it can be conjectured that a government espousing social democratic values will tend to become relatively more involved in community need satisfaction than one adhering to a liberal democratic ideology.

The needs to be supplied by government can be ordered into three major groups of needs, viz the need for safety and security, the need for order in societal living, and the need for an existence which is commensurate with human dignity. On the basis of this broad categorisation it can be postulated that there are three major groups of public functions to be performed by government, viz those focused on protection, on regulation (of societal living), and on the promotion of socio-economic development. If this broad grouping of public functions is accepted as valid, it can be postulated that the purpose of the state is to ensure for its people an existence that is safe, orderly, and commensurate with human dignity.

No claim is made for the originality of the foregoing statements regarding community needs and their satisfaction; they do, however, represent the author's considered view of the matter, based on many years of experience in the field. It has been documented previously in an unpublished report on a comprehensive departmentalisation project

undertaken for the Provincial Administration of the Western Cape (Robson 1998b:10-12).

Against this background the hypothesis can be advanced that – at least in South Africa – all three spheres of government serve essentially the same purpose or, stated more accurately, are jointly and severally involved in the realisation of the all-encompassing national purpose, viz to ensure for the inhabitants of the country an existence which is safe, orderly and commensurate with human dignity. Obviously, the three spheres don't all do the same things, but there is no denying that all three are involved in one way or another in providing protection, ensuring order, and promoting socio-economic development. An insightful confirmation of this view is provided by the 1996 Constitution in relation to local government: section 152(1)(c) of the Constitution requires specifically of a local government to promote the socio-economic advancement of its citizens. This fundamental injunction would seem to imply that a local government must for example also interest itself in matters such as job creation, welfare services, and education and training – matters which are primarily the responsibility of other spheres of government.

The involvement of all three spheres of government in the prosecution of the national purpose as stated *supra*, is a factor of crucial importance in considering the assignment of responsibilities for the performance of public functions to levels or spheres of government. Argument about which sphere of government should be responsible for a particular public function is frequently fruitless, or at best incorrectly focused. A worthwhile argument is one in which the key question is the extent to which each of the three spheres of government ought to be involved in the performance of a public function. Such a questioning approach could lead to a finding that it is necessary that one sphere of government should take complete responsibility for a particular public function; but it could also lead to a finding that a particular public function could be performed best by involving more than one sphere of government in its performance. The question then to be decided is what *aspect* of a public function should be the responsibility of which sphere of government. Another possible finding is that while a particular sphere of government need not be involved directly in the rendering of a service, it needs to control or perhaps to co-ordinate the rendering of the service. There is evidently no easy answer to assignment questions, or a simple “one pattern fits

all functions” approach which can be applied. In a Public Administration approach to the assignment question each substantial public function needs to be analysed against the constitutionally instituted structure of government and a decision taken as to a workable and acceptable deployment of responsibility for its performance.

#### **9.4.3 Formalisation of public function responsibilities**

It is a virtually universal phenomenon that the public function responsibilities of levels or spheres of government are set out in the constitution or other founding law of a country. Frequently, however, recourse is also had to ordinary law for this purpose, an obvious example being the assignment of responsibilities to the local level of government. Because of the importance to government and administration of having clarity as to the role to be played by each level or sphere of government in a country, it is suggested that it is appropriate that the assignment of responsibilities be stipulated in the constitution. An alteration to the assignment scheme will then entail a constitutional amendment, subject to compliance with whatever special procedures or majorities are required for such an amendment. In this way a substantial check can operate against over hasty or poorly considered changes to the assignment scheme. The constitutional accommodation of the assignment scheme will of course also serve to promote stability in government and administration.

Ideally, it should be possible to determine by consulting a country’s constitution what each level or sphere of government is authorised to do. This has generally not been the case in South Africa (*vide* sections 5.5, 6.7.5, and 7.7.5 of the thesis), or in other countries (*vide* section 4.7 of the thesis). The research has shown that there are a number of ways in which the ideal situation can be undermined, watered down, or adulterated, including the use of ordinary legislation to assign responsibilities to subnational governments; empowering a legislature to delegate some of its powers to another legislature; and allowing a political executive to delegate some of its powers to another political executive. There is probably an argument to be made in favour of a degree of flexibility in legislative and executive arrangements; however, it is questionable whether any perceived advantage will outweigh the disadvantages of a situation in which the respective responsibilities of the national and subnational governments are not readily ascertainable.

Consideration of the formalisation of public function responsibilities poses not only the question of *where* responsibilities should be formally set out, but also *how* they should be presented. A Public Administration approach points to the application of a certain method, which differs from that which has heretofore been applied in South Africa. It calls for an analysis of all public functions to be made with a view to determining clearly and accurately which public functions, or aspects of public functions, “belong” with the respective spheres of government. Ideally, such an analysis should result in a comprehensive database pointing to the responsibilities to be discharged by each sphere of government, whether legislative or executive, or both, in relation to particular public functions or aspects of public functions. In this way clarity can be obtained concerning the substance of what each sphere of government should be required to do, and this data can then serve as a referential base for stipulating legislative and executive powers in the Constitution. To illustrate: the section of the Constitution regulating the powers of provincial legislatures could state simply that a provincial legislature shall have the power to make laws regarding matters indicated in column A of annexure X of the Constitution.

The Constitutions of 1909, 1961, 1983, 1993, and 1996 each dealt with, or at present deals with, the stipulation of legislative and executive powers in its own peculiar way, variously linking these powers to “classes of subjects” (1909 Constitution), “own affairs” and general affairs” (1983 Constitution), and “matters in functional areas” (1993 and 1996 Constitutions). In none of the Constitutions were, or are, the key provisions determining the public function responsibilities of levels or spheres of government based on a comprehensive, prior analysis and reasoned allocation of such responsibilities. The resultant defects and shortcomings have been documented fully in chapters 5, 6 and 7 of the thesis.

## **9.5 Language**

In the study of the assignment schemes of a number of countries other than South Africa (chapter 4 of the thesis), in the historical survey of the assignment of responsibilities in South Africa (chapter 5), as well as in the examination of the assignment schemes

instituted by the 1993 and the 1996 Constitutions (chapters 6 and 7), one of the major findings throughout has been the poor and confusing use of language in dealing with the assignment question. In developing a theoretical model for the assignment of responsibilities it is imperative that close attention be paid to the use of language. Two aspects are addressed in the following sections, viz the building of a conceptual framework, and the employment and consistent use of what is referred to as “public function language”.

### **9.5.1 Conceptual framework**

In developing a theoretical model for the assignment of responsibilities it is important that the assignment question be placed in a properly constructed and clearly defined conceptual framework. Conceptualisation as an integral part of research in the social sciences has been dealt with in setting out the research design of the present study (*vide* chapter 3 of the thesis). The exposition already provided need not be repeated here, except perhaps for reiterating the observation by Mouton (1996:181) that concepts are the building blocks of scientific knowledge. It can safely be assumed that a conceptual framework for dealing with an aspect of a science – in this instance the assignment of public function responsibilities as an aspect of the science of Public Administration – cannot be determined in a single action. The building of a conceptual framework necessarily has to begin at some point – or with some key concept – but it is reasonable to expect that the initial, probably rudimentary, framework would be elaborated with the passage of time as more knowledge of a phenomenon is gained and validated.

It is proposed that the construction of a conceptual framework as an integral part of the theoretical model should proceed as follows: To begin with a key concept or building block needs to be identified as the cornerstone for the conceptual framework. Noting that the focal point of the exercise is the assignment of responsibilities for the performance of public functions to levels or spheres of government, the cornerstone is clearly the concept “public function”. Without this concept the exercise becomes meaningless, and no conceptual framework can be built. On the other hand, the concept “public function” taken in isolation is also of little use; it is only when it is joined to the concepts “assignment”, “responsibility”, and “levels or spheres of government”

that a conceptually meaningful whole emerges which relates to the satisfaction of community needs by means of governmental action. It is proposed therefore that the construction of a conceptual framework for the assignment of public function responsibilities be commenced by linking together the four basic concepts referred to. To this initial framework other relevant concepts can be added as appropriate.

“Public function” and the other concepts in the initial framework need to be defined. Proceeding from the elucidation of concepts essayed in section 3.3.3 of the thesis, it is proposed that the following definitions be adopted, with acknowledgement of source materials as already indicated in that section:

“public function”: A complex, logically inclusive composite of activities undertaken by one or more government departments, or other public institutions, and which is directed at the satisfaction of a particular need of the community, or part of the community.

“assignment”: The allotment (of responsibility) to levels or spheres of government as a share of the totality of governmental responsibility to be discharged in the country.

“responsibility”: A charge, trust or duty assigned to a government and for which it is answerable or accountable to the elected representatives of the people for which it has been instituted to serve as a government.

“levels or spheres of government”: A hierarchical ordering of governments consisting typically, from top to bottom, of a national government, a number of provincial, state or regional governments, and a number of local governments.

Note: The 1996 Constitution dispensed with the term “level of government” used in the 1993 Constitution, replacing it with the term “sphere of government”. A difference in meaning between the old and the new terms cannot, however, be deduced from a reading of the Constitution. It is surmised that the drafters of the Constitution were not comfortable with the connotation of super-ordination and subordination inherent in the term “level of government”, and also considered the term “sphere of government” to be more in line with the principle of co-operation adopted by them (*vide* constitutional principle XXI-7 and sections 6.3.3 and 7.7.2 of the thesis).



“government”: A body of persons charged with the duty of governing the state or a constituent part of the state.

For purposes of the theoretical model it is necessary to elaborate the initial framework by the addition of four other key concepts: these are the concepts “activity”, “subsidiarity”, “control”, and “co-ordination”. The following definitions, formulated to fit the emerging conceptual framework are proposed:

“activity”: An action forming part of a public function which must be carried out if the public function is to be performed satisfactorily.

“subsidiarity”: A relationship between levels of government in which governments at a higher level perform only those public functions, or aspects of public functions, which governments at a lower level cannot perform equally well or better.

“control”: An activity performed by governments at a higher level in relation to governments at a lower level in an effort to ensure that a public function, or aspect of a public function, is performed satisfactorily, and which can include the issuance of directives, the receipt of reports and returns, the performance of inspections, and the decision of individual cases or appeals.

“co-ordination”: An activity performed by governments at a given level in relation to governments at the same or a lower level in an effort to ensure that the services forming part of a public function are rendered in an integrated, synchronised and balanced way.

The formulations are those of the author but are based on formulations and insights contained in certain source documents which are noted below.

The definition of “activity” follows closely the definition of “werksaamheid” generated as part of the Commission for Administration’s 1993 programme of rationalisation (CFA 1993d: annexure E: terminology). The definition of “subsidiarity” is based on one encountered in the literature review conducted as part of the study (Laufer 1991:262). The definition of “control” is a new formulation by the author; however, the four key

modes of control incorporated in the definition have been taken from a set of guidelines for the development of blueprints issued by the Commission for Administration in 1993 (CFA 1993f: annexure G:4). Finally, the definition of “co-ordination” - also a new formulation – is based on an observation contained in vintage course material of the then Public Service Commission postulating that management obtains co-ordination “by properly balancing, synchronising and integrating the work of the different units in the organisation” (PSC 1969: lecture 5:3-4). In the author’s experience in public administration this is the essence of co-ordination, whether the co-ordinating is to be done by an individual manager or an institution or a government.

### **9.5.2 Public function language**

If there is to be worthwhile progress in bringing the assignment of public function responsibilities on to a scientific footing, it is essential that greater precision and consistency be achieved in the language used in dealing with the assignment question. It could be said that the assignment question requires its own language. In this regard the study of the assignment phenomenon would appear to be no different than the study of countless other phenomena in the real world, in respect of which the establishment of an own appropriate terminology is an important factor in determining progress within the community of researchers.

The research conducted into the assignment phenomenon as manifested in South Africa over many years and in a sample of other countries has brought to the fore a number of language related shortcomings, chief among which are the following:

- ?? “public function”, as a key term connoting what governments do with a view to satisfying community needs, is not generally recognised or applied, although it must be said that one of the many uses of the word “function” is roughly equivalent in meaning to the term “public function”;
- ?? there is evidence of a confusing practice of referring to public functions both in terms of something which is done – which in the author’s view is the correct connotation – and as a nominal subject or topic. To take an early example: in section 85 of the 1909 Constitution there is included amongst the classes of subjects in relation to which provinces could make ordinances an entry which reads “the establishment,

- maintenance and management of hospitals and charitable institutions” (something which is done), and another which reads “markets and pounds” (a nominal subject);
- ?? public functions are indicated or represented by formulations varying in length from a single word to a relatively verbose statement. To illustrate: in part A of schedule 4 of the 1996 Constitution there is an entry which reads, simply, “Agriculture”, and another which reads “Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence”; and
- ?? public functions are in places listed without any qualification and in other places with various qualifications attached. The qualifications take the form of exclusions, subsections (to laws), or limitations. Examples, again taken from part A of schedule 4 of the 1996 Constitution, are “Airports, other than international and national airports” (qualified by exclusion), “Indigenous law and customary law, subject to chapter 12 of the Constitution” (qualified by subsection), and the example of language policy referred to above (qualified by limitation). The practice of employing qualifications of the nature described is not peculiar to South Africa (*vide* for example section 4.6 of the thesis dealing with the United Kingdom).

In the author’s opinion these shortcomings can be rectified; for purposes of developing a theoretical model for the assignment question it is essential that they are.

The concept “public function” and some associated concepts making up an outline of a proposed conceptual framework for present purposes have been dealt with in section 9.5.1 *supra* and no further comment is required at this point. The other aspects identified as shortcomings are addressed in the following paragraphs.

If the definition of the term “public function” as provided in the thesis (*vide* section 9.5.1 *supra*) is adopted there can be no question of indicating or referring to a public function in any other way than as an activity or, in the words of the definition, “a composite of activities”. It is simply not acceptable to stipulate that a government is responsible for, say, agriculture, or education, or welfare services. The activity style of formulation therefore has to be applied. It can be stipulated, for example, that the national government is responsible for “the determination of national education policy”, the provincial governments for “the provision of primary and secondary education”, and the

municipal governments for “the protection of school children in the immediate vicinity of their schools”. The utility of employing appropriate public function language for purposes of bringing out clearly the respective responsibilities of the three spheres of government in relation to a major public function is immediately apparent. Indeed, it is possible that a commitment to the disciplined use of appropriate language may facilitate the actual process of determining which aspect of a public function properly belongs with each sphere of government.

In order to be able to deal efficiently and effectively with public functions, both in theoretical discourse as well as in practice, it is essential that a public function, or an aspect of a public function, be represented in words by a concise, precise and understandable statement. It is contended that it is possible to achieve this objective; how it could be done is examined in the following paragraphs.

Connotatively, a public function consists of activities directed at the satisfaction of a community need (*vide* definition in section 9.5.1 *supra*). To refer to a specific public function it is necessary to change to the denotative style of description (*vide* section 3.3.1 of the thesis; it can then be said that some of the best known public functions are those focused on national defence, foreign relations, law and order, civic affairs, education, social welfare, health services, the environment, and agriculture. For purposeful communication about public functions two levels of formulation would appear to be necessary, viz a broad formulation (core statement) conveying the essence of the public function, and supplementary formulations describing the actual services to be rendered to the community, together with certain concomitant activities (*vide infra*) which are inherent in the performance of the function.

The foregoing can be illustrated by reference to one of the blueprints which emanated from the erstwhile Commission for Administration’s 1993 rationalisation programme, described and discussed in section 6.4 of the thesis. The public function covered by the blueprint is “health services”, which was described in the core statement as “(the) regulation and rendering of health services”. The services to be rendered included the following:

?? the provision of primary health care services in clinics and in the community;

- ?? provision of advanced treatment, care and rehabilitation services in hospitals and institutions; and
- ?? regulation of the manufacture of medicine and specialised medical equipment.

Each service consists of a multitude of activities; these are not described in detail, but are subsumed under the service as formulated.

In order for the description of a public function, or an aspect of a public function, to have practical utility, but at the same time a satisfactory degree of validity and reliability, it is necessary that it should be compiled with care and with due regard to some basic requirements. The following criteria are postulated:

- ?? The description should consist of a single concise sentence;
- ?? it should be formulated so that it captures as fully as possible all the underlying activities of the public function;
- ?? it should include in its envelope of meaning only those activities which make up the public function, excluding activities which belong to another public function;
- ?? the wording should be such that the average, educated adult person will readily understand on reading the description what the particular public function entails; and
- ?? qualifying phrases, which serve to include or exclude certain aspects, or which stipulate limitations of coverage or other conditions, should be avoided as far as possible.

The criteria suggested above are an elaboration of a largely similar set of criteria determined by the Commission for Administration in 1993 (CFA 1993f: annexure G: paragraph 2.0).

The description of public functions and their constituent activities is obviously not an exact science, and is not likely to ever be one. However, it is imperative for a scientific approach to the assignment question that an appropriate, theoretically defensible, and practically useful style of language for dealing with public functions be developed and employed in a consistent manner. The adoption and application of a set of criteria as suggested above could go some way to resolving the language problems encountered in the research and to which reference has been made at the beginning of this section. In

the absence of precision and consistency in language usage the deliberation of assignment decisions could be rendered considerably more difficult than it already is. It is especially important that professional analysts should master what is referred to here as “public function language”; with the necessary training and experience they should be able to do so.

## 9.6 Classification of public functions

In the course of the research various classifications of governmental functions were encountered. Riker (1964:53) identifies - perhaps somewhat tongue in cheek - two broad areas of governmental action, viz “getting money” and “spending money”. Under the first head he lists two items, viz current financing and deferred financing. The second broad area (“spending money”) is broken down into four major categories, viz external affairs, activities related to internal order, activities related to trade, and activities related to citizens’ welfare. Various items recognisable as public functions are included in the four categories referred to. Caiden (1971: chapter 6) devotes a chapter of his book to the identification and elucidation of governmental functions under the headings “traditional functions”, “nation building functions”, “economic management functions”, “social welfare functions”, and “environmental control functions”. More recently, and in South Africa, Loxton (1993:iii-xi) provides a classification of what he refers to as the primary functions of the state, identifying three broad categories, viz the protective functions, the promotive functions, and the enabling and facilitative functions. The broad categories are broken down into functional items, with numerous items identifiable as public functions as defined in this thesis, including “defence”, “law and order”, and “environmental conservation” (amongst the protective functions), and “welfare and social services”, and “advancement of South Africa’s foreign interests” (amongst the promotive functions). As indicated in section 9.4.2 *supra*, the author has in his work as a consultant employed a threefold broad categorisation of public functions, viz protection, regulation of societal life, and socio-economic development.

In everyday public administration terms the best known classification of governmental functions, albeit a rather pragmatic one, is the annual main budget document which

covers very much all activities of government, sorted into the so-called votes, sub-votes and programmes.

All these classifications can be said to be essentially functional classifications, that is to say they are based in a general sense on the functions to be performed by government departments and other public institutions. To a large extent the basis of division (*fundamentum divisionis*) is the perceived different needs of the community to be satisfied by government action, e.g. the need for protection, the need for law and order, the need for education, and the need for health services. This type of classification does not, however, provide a basis for the assignment of public function responsibilities to levels or spheres of government, where the object of the exercise is to effect a vertical deployment of responsibilities within a tiered structure of government.

Given a three-tiered structure of government, and the need to determine an appropriate and accountable assignment of responsibilities to each tier, it is conceivable that on analysis it could be found that –

- (a) a public function can be allocated totally (that is to say with the inclusion of all activities making up the function) to a single tier of government; or
- (b) a public function can be performed largely at one tier of government, but that certain activities need to be performed at another tier; or
- (c) a public function is so constituted that all three tiers of government need to be involved in its performance. (CFA 1993b:4.)

Taxonomically speaking, what is required in order to address the scenario sketched in the preceding paragraph is a classification of the activities which make up a public function that would delineate logically differentiated packages of activities which, where necessary, could be allocated to different tiers of government.

The blueprint format developed by the erstwhile Commission for Administration as part of its 1993 rationalisation programme required information concerning a main function to be provided under four headings, viz “Service rendering”, “Legislation”, “Co-ordination”, and “Administrative control” (*vide* section 6.4.2 of the thesis). In the author’s recollection the term “control” was qualified as indicated in order to make it clear

that what was at issue was the control exercised by one level of government over another, and not the ongoing programme control exercised by managers. Although there is no indication in the Commission's documents of the time that a generic classification of the activities making up a function was being postulated, it would seem from the present vantage point that the "headings" referred to, can be converted readily and to purposeful effect into *classes of activities*. In all four instances – the rendering of a service, the putting in place of legislation to authorise and direct the service, the co-ordination of the actions of role-players involved in the rendering of the service, and the control of their actions – certain activities have to be performed. The sum total of all these activities equates to the "complex, logically inclusive composite of activities" which constitutes a public function according to its definition (*vide* section 9.5.1 *supra*).

On a moment's reflection, it is apparent that any particular public function could comprise of a large number of discrete activities. Good scientific practice points to the delineation of classes of public function activities where a useful purpose can be served by such a classification. In this instance, and as pointed out *supra*, there is indeed an important use to which a classification of activities could be put. The classification would of course be purpose-specific, but this is what classifications are intended to be (Copi & Cohen 1990:450). The suggested classification can readily satisfy the three basic requirements for a classification scheme, viz comprehensiveness, a clear basis of division, and mutually exclusive classes (Joseph 1906:103-105). By the addition of an "other activities" class to the four classes already postulated, it could in theory be said that the classification is comprehensive, providing a "home" for any other public function activity which could possibly be identified; the classes as set up will evidently be mutually exclusive; and there is a clear basis of division to be discerned. Regarding the latter requirement, it can be postulated that the classes of public function activities are differentiated according to the generic sequence of public accountability. Before any service can be rendered, legislation must be put in place authorising and specifying the service; where necessary the rendering of the service must be co-ordinated; and to ensure compliance with legislative enactments the rendering of the service must be controlled, as necessary on an ongoing or an *ex post facto* basis.

It is proposed that as part of the theoretical model a classification scheme for ordering public function activities, consisting of the classes "service delivery", "legislation", "co-



ordination", "control", and "other activities" be adopted. The last mentioned class is included principally for purposes of ensuring the completeness in a technical sense of the classification; it may not be required for purposes of the analysis of a public function in terms of the theoretical model. A classification scheme as proposed can be regarded as rooted in the science of Public Administration, and would appear to be compatible with both the legislative and the executive arms of government. It could serve as an appropriate and reliable tool when used in the analysis of public functions. Referring again to the Commission for Administration's 1993 programme, the generic aspects of public functions which are now being postulated as classes of activities were in effect tested in regard to more than twenty main functions and found to be valid and useful in pinpointing the respective responsibilities of levels of government (*vide* section 6.4.2 of the thesis).

## **9.7 Establishing a base of assignment principles**

A major finding of the research is that there are a number of principles which would appear to underlie the assignment of public function responsibilities, not only in South Africa but also in other countries. Obviously, these principles need to be incorporated in the proposed theoretical model, with an indication how they could be applied in a meaningful way in making assignment decisions.

### **9.7.1 Sources of principles**

An analysis of the constitutional principles which were adopted in South Africa as part of the 1993 Constitution showed that from this set of basic guidelines six principles could be derived which have specific relevance for the assignment of responsibilities. These were the principle of national unity, the principle of economic unity, the principle of equality, the principle of co-operation, the principle of provincial autonomy, and the principle of cultural self-determination (*vide* section 6.3.3 of the thesis.) To these principles can be added the principle of subsidiarity, which is prominent in the literature (*vide* section 3.3.3 of the thesis) but which, somewhat surprisingly, did not find a place in South Africa's set of constitutional principles. Also encountered in the research were the principles of exclusivity and of asymmetry (*vide* sections 2.6.4.1, 2.6.4.2, and 4.5 of the thesis) .

### **9.7.2 The role to be fulfilled by principles**

The role which the identified nine principles relevant to the assignment of public function responsibilities are envisaged as playing in the application of the proposed theoretical model is examined *seriatim* in the following paragraphs, commencing with the principle of subsidiarity.

#### **9.7.2.1 The principle of subsidiarity**

If there is a single key principle relevant to the assignment question, it is the principle of subsidiarity. It alone of the eight principles identified above relates directly to the deployment of responsibilities within a tiered structure of government. As indicated in section 3.3.3 of the thesis the interpretation of the subsidiarity relationship which is preferred is that of Laufer (1991:262) which, translated from the German, reads “... higher level communities should perform only those duties / tasks (“aufgaben”) which lower level communities cannot perform equally well or better”. For present purposes the word “governments” can be substituted for the word “communities”. In the section of the thesis referred to it was pointed out that “effective” or “satisfactory” performance of a function, or provision of a service, could also be used as the criterion for assigning a responsibility to a lower level of government. However, for purposes of the theoretical model it is suggested that the Laufer criterion of “equally well or better” has more discriminatory power and should therefore be used. A problem foreseen with the “effective or satisfactory” criterion is that a higher level of government could conceivably argue that it can also perform a particular public function activity effectively or satisfactorily, and that there is no reason therefore to assign it to a lower level. Clearly, in cases where a lower level of government can do a better job, the argument in favour of assignment to a higher level of government would fall away, leaving only those cases where both levels are in a position to render satisfactory performance to be decided.

Should the subsidiarity principle be applied consistently and rigorously it follows that in instances where it is proposed to assign a responsibility to a higher level of government, a convincing argument for such assignment needs to be made. In the absence of a

convincing argument for assignment to a higher level, the responsibility would be appropriately and accountably placed at the lower level.

#### **9.7.2.2 The principle of national unity**

This principle lies at the heart of the maintenance of the essential wholeness and integrity of the state. Where a public function has a direct bearing on the maintenance of national unity its performance should be assigned to the national government. A key question to be asked is whether performance of a public function, or aspect of a public function, has the potential to harm or detract from the oneness of the state; if the answer is in the affirmative, assignment to a lower level of government is to be avoided. Again, however, a systematic, scientific approach would require that, if called for, a convincing reason could be furnished to justify the centralisation of responsibility. A cautionary note needs to be sounded: even where there is a convincing argument in favour of the assignment of a responsibility to the national level of government, there may still be a role to be played at a lower level. To illustrate: while it is abundantly clear that South Africa's relations with foreign countries should be conducted at the national level of government, the reality is that the majority of the nine provinces have common boundaries with foreign states, and it may be in the country's interests to involve these provinces in an appropriate way in the conduct of relations with neighbouring states.

#### **9.7.2.3 The principle of economic unity**

This principle is closely allied to the principle of national unity; indeed, it could be said that it captures the economic aspect of the essential wholeness and integrity of the state. The key question to be asked in this connection in considering the assignment of responsibilities, is similar to the one posed in regard to national unity; viz will the performance of a particular public function, or aspect of a public function, at a lower level of government harm, or detract from, or destabilise the optimal functioning of the national economy? Providing an answer could in many instances require a thorough analysis of a function if a situation is to be avoided where each and every responsibility with a perceived potential impact on the economy is assigned to the national level of government. Even if the national government is granted a dominant role in economic matters, close analysis of public functions may disclose substantial areas of

responsibility which could be shared with lower levels of government, for example in regard to the stimulation or regulation of economic activity.

#### **9.7.2.4 The principle of equality**

This principle is directly tied to the Bill of Rights, and its adoption and application in relation to the performance of public functions implies that individual members of the community should be treated equally, at least in so far as the involvement of the state in their lives is concerned. In the analysis of the constitutional principles in section 6.3.3 of the thesis a number of important aspects of government action related to equality in the treatment of people was identified, viz the maintenance of essential national standards, the establishment of minimum standards for the rendering of services, equality of opportunity, and access to government services. In areas where it is imperative that equality of treatment for all be ensured, the adoption and application of the principle of equality would point to the national government taking the lead in policy making and legislation, but not necessarily in actual service delivery, which could be devolved to lower levels of government.

#### **9.7.2.5 The principle of co-operation**

This principle is essentially different to the other principles being dealt with here, in that it does not provide a criterion or measure to be applied in making an assignment decision. It recognises the reality that in a unified state – and all internationally recognised states are unified states – public function responsibilities cannot be assigned so exactly that each level or sphere of government can thereafter function completely independently of the others – in a self-contained functional cocoon so to speak. While it may be essential to impose a structure on society by instituting levels or spheres of government, the dynamic of societal and political life is such that interfaces and interaction between governments cannot be avoided. The principle of co-operation binds levels or spheres of government to working together where necessary in order to promote the greater good of the state and its inhabitants.

In section 7.6 of the thesis a reservation is expressed concerning co-operative government as mandated expressly by the present Constitution, viz that co-operative

government – as the embodiment of the principle of co-operation – ought not to be misused as a means of remedying inherent defects or shortcomings in the assignment of responsibilities. The goal should be to achieve an effective, accountable assignment of public function responsibilities, based on a credible scientific foundation, with the principles and practices of co-operative government, as decreed in chapter 3 of the Constitution, acting as a sort of public function safety net against serious failure in the functioning of the country's system of government.

#### **9.7.2.6 The principle of provincial autonomy**

It is a widespread phenomenon (*vide* chapter 4 of the thesis dealing with the assignment schemes of foreign countries, as well as chapters 5, 6 and 7 dealing with the situation in South Africa) that public function responsibilities are deployed over national and subnational levels or spheres of government. The application of the principle of provincial autonomy is thus widely in evidence, but the manifestations of subnational autonomy are not absolute, but relative, and not the same in all countries or at all times. In designing an assignment scheme the key question is therefore not whether there should be subnational autonomy, but rather in which areas and to what degree subnational autonomy will be workable and generally acceptable. Theoretically viewed, the answer to this question is not readily to hand; however, it can be accepted that a provisional answer will emerge through the application of other assignment principles and by following a well-founded analytical approach – aspects which are accommodated within the proposed theoretical model. Ultimately, however, the nature and extent of provincial autonomy are matters to be decided within the political domain. Such decision making would be facilitated if it were based on the results of thorough, theoretically based analyses, provided of course that the particular theoretical approach is itself acceptable within the political domain.

#### **9.7.2.7 The principle of cultural self-determination**

One of the assumptions made for purposes of building the theoretical model is that the South African state will continue to be organised on a geographical basis, that is to say without the addition of governmental structures focused on culturally distinct communities (*vide* section 9.3 *supra*). How the application of the principle of cultural

self-determination could affect the assignment of public function responsibilities is therefore not taken further in this examination of the possible role of the assignment principles in the proposed theoretical model.

#### **9.7.2.8 The principle of exclusivity**

To apply the principle of exclusivity to an assignment scheme means simply to ensure that as far as possible public functions, or aspects of public functions, defined in terms of their content, are mutually exclusive. In section 9.5.2 of the thesis, dealing with what is referred to as “public function language”, it was postulated that two levels of formulation concerning public functions are required, viz a formulation conveying the essence of a public function, and supplementary formulations describing the activities to be performed. Application of the principle of exclusivity requires that in theory public functions be formulated as to essence in a manner which will make it clear that the public function is uniquely different to all other public functions. As regards services forming part of the public function, each service should be described so as to exclude any other service constituting a part of the function. It goes without saying that the formulation should be such as to also exclude any service forming part of another public function.

#### **9.7.2.9 The principle of asymmetry**

As indicated in sections 2.6.4.2 and 4.5 of the thesis, the principle of asymmetry was encountered in the study of the assignment scheme of Spain as well as in the survey of literature on federalism. The principle stipulates that the public function responsibilities assigned to subnational units of government can differ from one such unit to another – presumably where substantial grounds for differentiation exist, and differentiation is acceptable to the affected unit or units of government. The principle could be applied to resolve a situation where the capacity of governments at the same level of government to perform a particular public function, or aspect of a public function, differs markedly, with some governments fully capable of performing the required activities and others not. There is an indication in the literature of a tendency to favour a symmetrical above an asymmetrical allocation of powers to subnational governments (Agranoff 1994:83; Gagnon 1994:132). On the basis of his direct involvement in the rationalisation of public

administration following the adoption of the 1993 Constitution, the author is of the opinion that the asymmetrical allocation of powers to provinces in South Africa would probably not be acceptable. For purposes of the theoretical model it has been assumed, therefore, that all subnational governments are capable of discharging satisfactorily the responsibilities assigned to them. However, there is a definite rationale underlying the principle, sufficient to justify its inclusion in the proposed theoretical model, albeit on purely theoretical grounds.

### **9.7.3 Synopsis**

The principle of subsidiarity would appear to be the principle *par excellence* to be applied in the assignment of public function responsibilities to levels or spheres of government. However, the principles of national unity, of economic unity, of equality, and of exclusivity are directly relevant to the assignment question, and can be purposefully employed in determining criteria to be applied in the analysis of public functions. The principle of co-operation by its nature is not applicable in the same way as the aforementioned principles; however, the principles and practices of co-operation can play an important role as a safety net against serious failures in the functioning of the system of government should there be lacunae or shortcomings in the formal assignment of responsibilities. Acknowledgement of the principle of provincial autonomy can conceivably promote or strengthen a predisposition to relatively stronger provincial government when assignment decisions have to be taken at the political level. The principles of cultural self-determination and of asymmetry would appear to have a rightful place in a theoretical model for the assignment of responsibilities to levels or spheres of government, but do not seem to have much scope for application in the present situation in South Africa.

## **9.8 Methodology for the ordering of public function responsibilities**

The term “methodology” is used here to refer to the carrying into effect of a particular theoretical approach and not to the development of the approach or model as such. It is postulated that the methodology to be applied in developing an assignment of public function responsibilities to spheres of government should be treated as an integral part

of the theoretical model, because of its inseparable link to the principles incorporated in the model, and further because the efficacy of the model can be evaluated properly only when there is sufficient clarity as to how a specific methodology in combination with other components of the model can lead to a meaningful result.

The methodology to be presented shows distinct points of similarity to the methodology adopted by the erstwhile Commission for Administration in 1993 for the development of blueprints for what were referred to as government functions (*vide* section 6.4 of the thesis), but also differs in certain respects and incorporates a number of refinements. It should be borne in mind that as pointed out in section 6.4.1 of the thesis the author at the time was responsible for the direction and oversight of the Commission's programme.

Various aspects of the proposed methodology are examined below. Before doing so, brief comment is provided on methodology in relation to the Commission for Administration's 1993 programme.

#### **9.8.1 Comment on the Commission for Administration's methodology**

The methodology followed by the Commission in developing blueprints for the vertical deployment of government functions is described in sections 6.4.1 and 6.4.2 of the thesis, and is not repeated here. Some comment is, however, called for.

The Commission applied just two assignment principles, viz the subsidiarity principle and what was referred to at the time as the competency principle. The competency principle (*vide* section 6.4.2 of the thesis) can be equated with the principle of exclusivity (*vide* section 9.7.2.8 *supra*), which is one of nine principles which are regarded as having relevance to the assignment of public function responsibilities (*vide* section 9.7 *supra*). The two principles were identified and employed specifically by the Commission with a view to realising what the Commission understood to be the views and objectives of the government-of-the-day regarding a future governmental dispensation. In its programme document the Commission declared as follows: "*Aan die hand van die gestelde Regeringsbeskouinge en –oogmerke rakende 'n toekomstige owerheidsbestel, word die volgende beginsels geïdentifiseer vir navolging by die ontwikkeling van bloudrukke ...*" (CFA 1993f: annexure B:3). A key objective of government referred to by the Commission was that there should be maximum



devolution of powers of decision making within the structure of the governmental dispensation (CFA 1993f: annexure B:2).

The directive influence of the government-of-the-day is clearly discernible in the Commission's programme, exposing the work done at the time to the possible criticism that it was not free of political influence, even granted that political supremacy is generally accepted as a basic guideline of public administration (Cloete 1994:64-69). However, in the author's opinion it would be an over-reaction to devalue the Commission's work on the grounds that it lacked scientific objectivity. The meaning accorded the concept of subsidiarity by the Commission, viz to the effect that a government programme or activity should not be assigned to a higher level of government if it could be performed satisfactorily at a lower level, is an accurate reading of the principle. So too, the three criteria prescribed by the Commission for applying the principle, although formulated in somewhat general terms, stay with the essence of the principle. (*Vide* in the foregoing connection section 6.4.2 of the thesis.)

The innovative "bottom to top" approach which the Commission required its analysts to follow in developing a view of how activities making up a function could be deployed over the structure of government (*vide* section 6.4.2 of the thesis), although not fully motivated in the Commission's documents, can be regarded as a good, and possibly the best way in which to proceed when applying the subsidiarity principle. The Commission's involvement of experienced officials with first-hand knowledge of a function in its analysis, was a procedural measure which could contribute substantially to the workability and ultimate acceptability of a deployment proposal and, as a form of participative research, was certainly also compatible with a scientific approach.

### **9.8.2 Identification of public functions**

By definition (*vide* section 9.5.1 *supra*), a public function consists of activities directed at the satisfaction of a community need. It follows that not all activities in the public domain qualify to be regarded as constituting one or the other public function. This is especially the case with activities which are directed not at the satisfaction of community needs, but have as their purpose the satisfaction of internal requirements within the government sector, such as the compilation and control of budgets, auditing, the

direction and control of human resource management, and the supply and maintenance of office and other accommodation. Important as these activities are, they are not covered by the proposed theoretical model.

The number and the identity of public functions are not a given; both number and identity have ultimately to be decided by the authority with the competence to determine the deployment of public function responsibilities over the three spheres of government. However, in the course of time public functions have crystallised into entities which are generally quite well known, for example policing, education, health, and welfare. The input made by the Commission for Administration to the Multiparty Negotiating Process in 1993 encompassed 23 so-called main government functions, ranging from agriculture, civic affairs and migration, and correctional services, to transport affairs, water supply, and works (*vide* section 6.4.2 of the thesis). The last mentioned function – works – and another included in the list – finance – possibly do not qualify, or qualify fully, as public functions per definition. Two noticeable omissions from the list are foreign affairs and defence. A precise number of functions cannot be postulated on the basis of the research, and the number could in any case vary depending on how public functions are demarcated by the competent authority on the basis of constituent activities. What is important in the context of the theoretical model is that the number of substantial public functions would seem to be sufficiently limited to bring a rigorous analytical approach to the assignment of public function responsibilities within the bounds of feasibility.

Irrespective of how many public functions are formally recognised each one should be defined with care in accordance with the requirements and criteria suggested in section 9.5.2 *supra*.

### **9.8.3 Acquisition of knowledge of public functions**

In the author's experience a public function is invariably vastly more complicated than may be suggested by its distinctive name, such as education, or health, or welfare. To fully understand a public function – and a full understanding is obviously essential if a serious opinion is to be ventured as to the optimal deployment of responsibilities for its performance – requires thorough study. Such study should include the reading of all

relevant legislation, White Papers, budget documents, published and unpublished reports (including academic theses and dissertations), literature, speeches of key political and administrative figures, parliamentary records, media comment, and web pages, as well as wide-ranging and incisive discussions with experienced people engaged in the actual performance of the function. All this by analysts with the training and experience to be able to embark on studies of this nature. To do a credible public function analysis it is a *sine qua non* that the analyst must first master the nature and content of the function, as well as the key issues related to its performance.

#### **9.8.4 “Bottom to top” approach**

It is postulated that the most accountable assignment of public function responsibilities can be achieved if the deployment of responsibilities is approached from the lowest sphere of government to the highest. This approach was a feature of the Commission for Administration’s 1993 programme (*vide* section 6.4.2 of the thesis and section 9.8.1 *supra*), being referred to at the time as the “bottom to top” approach. However, an argument for this approach has still to be made; this perceived need is addressed in the following paragraphs.

Constitutional principle XVI is in its formulation the shortest of the thirty-four constitutional principles which directed the drafting of both the 1993 and the 1996 Constitutions. It states simply that “government shall be structured at national, provincial and local levels”. In terms of the allocation of powers and functions the inference to be drawn is that each level of government should be given an appropriate but also a substantial and credible role to play in the country’s system of government. The term “government” is not qualified so it encompasses both legislative and executive government. The inference drawn is supported by other constitutional principles: so, for instance, constitutional principle VIII requires representative government based on universal suffrage; constitutional principle XVII requires that at each level of government there shall be democratic representation; constitutional principle XVIII provides various guarantees related to the powers and functions of the provinces; constitutional principle XX stipulates that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively; and constitutional principle XXIV stipulates that a framework for local

government powers, functions and structures shall be set out in the Constitution. The intention of these fundamental guidelines taken together is clear: not only the national government but also the provincial and local governments should be *worthy* governments, democratically elected and accountable, and with substantial powers to exercise and functions to perform. To achieve this objective the responsibilities to be assigned to the provincial and local spheres of government should, in the author's opinion, receive as much attention as the responsibilities to be assigned to the national sphere. It is postulated that the best way to ensure that full and proper attention is paid to each sphere of government, is to look first at the local, then at the provincial and, finally, at the national sphere of government.

The view advanced in the preceding paragraph resonates well with the subsidiarity principle, which is incorporated in the theoretical model. The principle stipulates that where an activity can be performed as well or better at a lower level of government it should not be allocated to a higher level. In considering the deployment of responsibilities in regard to a public function the subsidiarity principle embodies a clear injunction: Look first to the lower level of government. Application of the principle implies further that should it be decided to assign the responsibility to a higher level of government, a sound reason for doing so should exist.

Finally, the dynamic inherent in the functioning of the political system should also be brought into the reckoning. The leading figures in the political world tend naturally to gravitate to the higher levels of public office, and when placed in a situation of having to decide on the assignment of legislative or executive responsibilities, may well be inclined to retain as much responsibility, with the concomitant degree of political influence, as possible at their own level of operation. Proceeding from the lower to the higher levels of government when deliberating on the assignment of responsibilities, could counter this tendency and conceivably lead to a more accountable deployment of responsibilities over the spheres of government.

#### **9.8.5 Analysis of public functions**

It is proposed that an analysis directed at the deployment of public function responsibilities should be done in two steps. As a first step the existing situation with

regard to the deployment of responsibilities should be established through empirical study, with the data being recorded in a certain manner, which will be indicated below. On the basis of the data generated in this way, a critical analysis can then be done with the object of developing a view of how the deployment could look if the “tools” built into the proposed theoretical model are applied. The methodological approach advocated differs from that followed in the Commission for Administration’s 1993 programme, where thorough empirical data collection and systematisation was not required specifically, and analysts were simply instructed to produce a deployment proposal in the form of a blueprint. It should be noted, however, that the Commission was acting under severe constraints of time (*vide* section 6.4.1 of the thesis). The two steps are described below. In order to facilitate presentation, it is assumed that a single public function is being dealt with.

A complete and accurate picture of the way in which responsibility for a public function is actually deployed can be obtained only through diligent study as indicated in section 9.8.3 *supra*. The data collected in the process needs to be aligned with the requirements of the theoretical model. Most importantly, the proposed generic classification of the activities making up a public function (*vide* section 9.6 *supra*) has to be applied in sorting and recording the data collected. This means that for the purpose at hand data collection has to be focused on obtaining full and accurate information regarding service delivery, legislation, co-ordination, and control in relation to the particular public function. The classification proposed in section 9.6. *supra* provides for a fifth category, viz “other activities”, but this category has been included mainly for technical reasons and will probably not be required for the development of an assignment proposal. What is important is that all activities regarding service delivery, legislation, co-ordination and control be captured in the data collection and sorted accurately. To ensure the completeness and accuracy of the data, the documented picture compiled in this manner should be cleared with experienced people with first-hand knowledge of the performance of the function at the various levels of government. Work on the development of an assignment proposal can then proceed.

With acknowledgement to the guidelines issued to its analysts in 1993 by the Commission for Administration (CFA 1993f: Annexure G), but with adjustment, reformulation, and elaboration to fit the proposed theoretical model, the following are

the main steps to be taken in the development of a proposal regarding the assignment of responsibilities for the performance of a public function:

- ?? Determine and define the services encompassed by the public function.
- ?? In respect of each discrete service determine at which level of government it ought to be rendered.
- ?? Determine whether legislation authorising and regulating the service should be effected at the same level of government or at a higher level.
- ?? Determine whether it is necessary that a higher level of government co-ordinate the rendering of the service at lower levels of government.
- ?? Determine whether a higher level of government should play a controlling role in respect of the rendering of the service by governments at a lower level, and specify the nature of the controlling activity to be performed (*vide* definition of “control” in section 9.5.1 *supra*).
- ?? Repeat the above mentioned steps in respect of all other services encompassed by the public function.
- ?? Compile a statement (draft proposal) showing a deployment of responsibilities over all three levels of government in respect of the rendering of all the services encompassed by the public function, together with their associated legislative, co-ordinating, and controlling activities.
- ?? Consult experienced officials with a sound knowledge of the public function about the draft proposal, and finalise the proposal with due regard to any comments and suggestions received.

A key action in developing a draft assignment proposal for a public function is the placement of the services encompassed by the public function. In terms of the proposed theoretical model it is obligatory that a “bottom to top” approach be followed in considering the appropriate level of government at which services should be rendered, commencing with the lowest level. A rigorous questioning technique needs to be applied, based in the main on the assignment principles absorbed into the theoretical model (*vide* section 9.7 *supra*). The primary principle relevant to the task at hand is the subsidiarity principle, which directs that a service should not be placed at a higher level of government if it can be performed equally well or better at a lower level. The assumption should be in favour of placement at the lower level, with the service being

moved to a higher level only if there is a good, convincing reason to do so. To determine whether there is such a reason the placement of the service should be considered in the light of other relevant assignment principles, especially the principles of national unity, of economic unity, and of equality, while the scope for the application of the principle of provincial autonomy should be assessed as well as can be done in the light of prevailing political thinking on the degree of autonomy to be allowed to the provincial level of government. (It is realistic to do so; however, a proper analysis of public functions based on an accountable theoretical model could also influence political thinking on the autonomy question.)

Although the assignment question is being approached within the parameters of a proposed *theoretical* model, there can also be practical considerations bearing on the level of government to which a service should be assigned; these should be identified and carefully weighed. Examples of such practical considerations are the need to centralise in certain instances scarce expertise at one point in the governmental structure, the advisability of avoiding small, uneconomic, ineffective administrative units, and the need perhaps to harmonise governmental and societal structures in relation to the performance of a service. The important point, however, is to avoid an unthinking, arbitrary placement of a service at a higher level of government than is rationally necessary.

The analytical approach sketched above can be illustrated with reference to a specific government service. The payment of social pensions is a service constituting an important activity within the public function "social welfare". The pensions are at present paid by the provincial administrations in terms of the provisions of national law with funds appropriated by Parliament. On rigorous analysis in accordance with the proposed methodology, it is possible that it could be found that there is not a convincing reason why the payments should be done at the provincial level of government, in other words that the service could be rendered by municipal governments, at least by those with adequate human, managerial and technical resources. As regards legislation, however, the principle of equality – equal treatment of all - would point to the national level of government as the level where social pensions legislation should be effected. There may be a convincing reason why provincial governments should co-ordinate the payment of social pensions by municipal governments, while grounds may also exist for

either the national or the provincial governments, or all these governments, to perform specified controlling activities in relation to the payment of social pensions. (Note: A proposal as to the placement of the particular service is not being made; before any such proposal could be made a thorough study of social welfare as a public function would have to be undertaken. The particular service is used merely to illustrate very briefly how the proposed methodology could operate.)

The following additional guidelines regarding the application of the methodology are suggested:

- ?? A draft assignment proposal (*vide supra*) should cover the public function in relation to each level of government, even if no activity is envisaged for a particular level, as confirmation that proper study and systematic analysis have been done.
- ?? Information on the activities to be performed at the various levels of government should be arranged in ascending order from the lowest to the highest level, as an indication that each level has received the attention due to it.
- ?? Subnational governments and their associated administrations may find it efficacious to co-ordinate on a voluntary basis certain activities for which they are responsible. It is not considered necessary that such voluntary co-ordination be reflected in a draft assignment proposal which is intended for eventual formalisation in legislation.
- ?? Particular attention should be paid to the precise and consistent use of appropriate technical language in describing the services and other activities making up a public function (*vide* section 9.5 *supra*).

#### **9.8.6 Formalisation of responsibilities**

If it is accepted that the responsibilities assigned to levels or spheres of government should be reflected in the Constitution – which is the established practice in South Africa and other countries – the question arises as to the best way of accommodating the particular provisions in the Constitution.

In line with the Public Administration approach advocated in section 9.4 *supra*, it is proposed that legal drafting with regard to the public function responsibilities of the spheres of government, should be based on a document structured so as to indicate in



respect of the subnational spheres of government the legislative and executive responsibilities to be discharged by them. Public function responsibilities not indicated in the document will be those that fall to be discharged by the national level of government. Of course, the credibility and utility of the document will depend on the thoroughness with which all public functions have been identified and analysed so as to ensure that responsibilities which could and, in terms of an accepted theoretical model, ought to be discharged by provincial or municipal governments, are indeed assigned to them, and not left to be discharged by the national government – by default so to speak. To facilitate linkage to the legislative and executive arms of government the document should consist of columns showing in respect of each public function the legislative and executive responsibilities to be discharged by the provincial and municipal spheres of government respectively. The information to be inserted in the columns of the document will be sourced from the assignment proposals developed as described in section 9.8.5 *supra*. Once finalised and accepted by the competent authority (Constitutional Assembly or Parliament) the document can be translated into a schedule to be affixed to the Constitution. In the main text of the Constitution the assignment schedule can be referred to as appropriate. So, for example, the provision in the Constitution dealing with the legislative powers of the provinces could stipulate that “provinces shall have the power to discharge the legislative responsibilities indicated in column A of schedule X” or, alternatively, that “provinces shall have the power to make laws with regard to matters indicated in column A of schedule X”. As regards the national government, the Constitution will need to stipulate that Parliament and the national political executive have the power to legislate on and administer matters not assigned specifically to any other sphere of government.

On the basis of the author’s experience in the field, it can be postulated that virtually all public function responsibilities appropriate to the provincial and municipal spheres of government can be captured in an assignment schedule to the Constitution. However, it must be accepted that there can be public functions, or aspects of public functions - almost certainly of relatively minor import - which may not find a place in an assignment schedule as envisaged. It is proposed that any such public functions, or aspects of public functions, be placed under the residuary powers of Parliament, with the result that Parliament can, as necessary, adopt legislation assigning responsibilities for their performance.

### 9.8.7 Comment regarding legislative powers

The laws enacted by a legislative body can evince varying degrees of detailed prescription. In many instances detail not contained in the law itself is accommodated in regulations which, in terms of that law, may be issued by a competent political office holder, and will have the same legal force and effect. Bearing in mind that –

- (a) a convincing reason may be found to exist why the power to legislate with regard to a particular service should be exercised by a level of government higher than the level at which the service is rendered;
- (b) the amount of detail to be included in a law is not self-evident but indeterminate; and
- (c) legal drafters may be inclined to opt for the setting out in a single law of a comprehensive scheme for the regulation of a matter,

it may well happen that legislation drafted and adopted at the higher level of government will leave virtually no “legislative space” to be utilised by the lower level, even though there may be aspects of the matter which could be legislated effectively at the lower level. Such a tendency is evidently not acceptable if it is the intention to accord full value to each level of government in a tiered national structure of government.

As pointed out in chapter 4 of the thesis, the drafters of Germany’s Basic Law apparently took cognisance of the problem of the possible crowding out of subnational legislatures from the legislative domain, and devised a solution in the form of the so-called “framework legislation” (Basic Law: article 75 (1)-(2)). The intention presumably is that in respect of specified matters the Federation should not legislate in a comprehensive, detailed manner but restrict itself to the stipulation of principles and basic parameters, leaving room for the *Länder* to adopt their own legislation regulating such matters in detail. It could not be established as part of the research to what extent the mechanism of framework legislation has been a success in Germany. In South Africa, the German concept found favour with the erstwhile Commission for Administration which in its 1993 programme of rationalisation required of its analysts to differentiate with regard to subnational legislation between legislative powers which would be exercised within parameters determined by a higher level of government and

legislative powers which would be exercised as an original competence (*"in eie reg"*) (CFA 1993f: annexure G:3).

It is postulated that the true determinant of the status of a government, as a government (*vide* definition in section 9.5.1 *supra*), is the extent to which it is empowered to make laws rather than merely to administer laws. If this postulate is accepted, the implication is that in the deployment of governmental responsibilities as much legislative competence as possible should be assigned to provincial and municipal governments. Again, the principle of subsidiarity, applied in conjunction with a framework mechanism, would seem to point the way towards achieving an accountable deployment of legislative responsibilities.

### **9.9 Comment on co-operative government**

Due to the inherent complexity of public functions it would be impossible to achieve a once-off, complete, precise determination of the public function responsibilities of the three spheres of government. Applying the proposed theoretical model could conceivably contribute to a deployment of responsibilities which would go a long way towards providing clarity as to what each sphere of government is authorised to do; however, uncertainties and grey areas will remain, as for example in –

- ?? identifying those public functions, or aspects of a public function, in respect of which responsibility should not be assigned by the Constitution, but be read into the residuary powers of the national government (*vide* section 9.8.6 *supra*);
- ?? deciding on the timing and balancing of government programmes in an endeavour to achieve the optimal co-ordination of the activities making up a public function (*vide* section 9.5.1 (definition of "co-ordination") and section 9.8.5 *supra*);
- ?? determining the form of control, or combinations of forms of control, which need to operate in order to achieve the optimal performance of a public function, and the adjustment of controlling arrangements when necessary (*vide* section 9.5.1 (definition of "control") and section 9.8.5 *supra*); and
- ?? determining the essential content and limits of prescription of a piece of framework legislation (*vide* section 9.8.7 *supra*).

The need for co-operative government will not lapse because the assignment question is dealt with in a more scientific manner, nor will the constitutional principle of co-operation be invalidated. Putting forward a theoretical model for the assignment of public function responsibilities does not detract in any way from the fundamental importance accorded co-operative government in the Constitution. On the contrary, it can be postulated that a concerted endeavour to limit as far as possible the areas of uncertainty in the deployment of responsibilities amongst the spheres of government will contribute substantially to the strengthening of co-operative government. (*Vide* also the note on intergovernmental relations at section 7.7.4 of the thesis.)

#### **9.10 Conclusion**

All theory, including theoretical models, consists of propositions advanced provisionally or tentatively. The key propositions are subject to amendment, adjustment, rejection, replacement, or confirmation in the light of practical experience. The proposed theoretical model is no different. Whatever value it may have can be determined only by testing its efficacy in an actual exercise aimed at developing a proposal on the deployment of governmental responsibilities for the performance of one or more public functions. It will no doubt then be found that the model can be improved upon, refined or elaborated. It needs to be noted that the theoretical approach presented here shows points of similarity with the approach employed by the Commission for Administration in 1993 in the development of the so-called blueprints for the deployment of governmental functions; it can therefore be said that a degree of relevant testing has already taken place.

## CHAPTER 10: REFLECTION

A relatively detailed summary, analysis and interpretation of the research findings is provided in chapter 8 of the thesis, and is not repeated here. However, it is considered to be appropriate that this concluding chapter should return to the genesis of the study and reflect briefly on what has been accomplished.

The thesis can be regarded as a response to a problematic situation which was noted in the very first paragraph of the thesis, and elaborated into a problem statement in section 2.3. The problem in essence is that despite the importance and the far-reaching implications for government and administration of the assignment of responsibilities for the performance of public functions to levels or spheres of government, there is a paucity of scientific knowledge concerning the assignment question. Against this background, the purpose of the study was to make a research based contribution to the body of knowledge constituting Public Administration concerning the assignment question (*vide* section 2.4 of the thesis). In order to provide direction to the study, a number of research questions were identified (*vide* section 2.5 of the thesis). The reflection on results proposed above can proceed conveniently by noting briefly the answers which have been found to the research questions. The questions are dealt with *seriatim* below.

*What is the position as regards relevant literature?* The literature review covered samples of books and articles taken from the disciplines of Public Administration and Constitutional Law and one specialised field of study, viz federalism; it is summarised in section 8.2.1 of the thesis. No evidence was found of an established, defined body of knowledge dealing specifically with public functions and the assignment of responsibilities for their performance to levels or spheres of government.

*What recognition does the assignment question enjoy in academic circles?* To answer this question, local academic curricula were reviewed briefly, and the proposed national qualification unit standards for public administration and management checked. The conclusion arrived at was that the assignment question is recognised as having a

definite place in the discipline of Public Administration but, on the basis of the sources consulted and the verbal enquiries made, is not at present accorded substantial, in-depth treatment (*vide* section 2.2 of the thesis).

*What does the research record show?* No instance could be traced in the available records of research conducted in South Africa, at universities or other research establishments, of a project dealing in a comprehensive, fundamental way with the subject of the present study (*vide* section 2.6.1 of the thesis). However, it is to be noted that development work done by the then Commission for Administration in 1993, although not reported as a research project, is relevant to the subject of the study, and exhibits a substantial degree of scientific relevance. The work in question is examined and evaluated in section 6.4 of the thesis.

*How do other countries assign responsibilities?* The countries selected for study were Australia, Belgium, Germany, Spain, and the United Kingdom; the results are reported in chapter 4 of the thesis. Some key findings are that while there is some consistency in placing certain public functions at the national level of government, the various schemes are largely *sui generis*; that the assignment schemes of these countries are focused largely on the national level of government and the level or sphere immediately below the national level, with sparse treatment accorded to the local level; and that the formulations used in constitutional texts are notable for their complexity rather than their accessibility. The general conclusion reached is that in none of the countries studied, a clear, comprehensive demarcation of public function responsibilities has been achieved, and that there is little evidence of a scientific approach to the assignment question.

*How have responsibilities been assigned in South Africa?* Answering this question constituted a major part of the study and three chapters of the thesis (chapters 5, 6 and 7) are devoted to the examination and evaluation of the assignment schemes instituted in the pre-democratic era, as well as those instituted by the Constitutions of 1993 and 1996. The general finding in regard to the period from 1910 to 1994 is that the assignment of responsibilities was done in a pragmatic and *ad hoc* manner, in which ideological considerations played a prominent role (*vide* section 5.5 of the thesis). The 1993 Constitution marked the advent of an objective approach to the assignment

question, driven in large part by the set of constitutional principles which were adopted at the time; however, on evaluation (*vide* section 6.7 of the thesis) a number of shortcomings were found. Some of these shortcomings are perpetuated in the 1996 Constitution, but the Constitution also shows a substantial advance on its precursor in certain respects (*vide* section 7.7 of the thesis). Critically viewed, however, the finding is that the 1996 Constitution – which is also the present Constitution – does not provide a credible and clear-cut deployment of public function responsibilities over the three spheres of government.

*Where do we stand in scientific terms with the assignment of responsibilities?* This question is addressed in section 8.3 of the thesis. To be in a position to answer it adequately, it was considered necessary to develop a set of criteria for purposes of making an assessment of the extent to which the assignment of responsibilities for the performance of public functions to levels or spheres of government could be said to constitute a scientific endeavour. Tested against the criteria, the finding is that a scientific approach to the assignment question is in evidence only to a limited extent; further that a number of principles would appear to underlie the assignment of responsibilities, and that the work of the Commission for Administration, referred to above, could be of value in building a knowledge base concerning the assignment question.

*Can a model be constructed for the assignment of responsibilities to levels or spheres of government on South Africa?* On the basis of the research done the answer to this question is in the affirmative. Chapter 9 of the thesis puts forward a proposed theoretical model for the assignment of public function responsibilities, following a Public Administration approach. The model encompasses aspects such as the language to be employed, classification in relation to public functions, the establishment of a base of principles, and methodology.

In this concluding chapter it is necessary to pose and to attempt to answer a further question, viz whether the theoretical model proposed in chapter 9 of the thesis can be applied in a redetermination of the respective public function responsibilities of the three spheres of government. The task would obviously be a formidable one as the formal redetermination of responsibilities would entail an amendment, and a substantial one at

that, of the Constitution. The drafting and adopting of amending legislation would have to be preceded by the development of assignment proposals based on a comprehensive analysis of the full spectrum of public functions, followed by the processing of proposals through a credible and acceptable consultative structure involving political parties, existing organs of state, and other institutions and bodies with a legitimate interest in the matter. Even if there should be strong general support for a revision of this magnitude, if the necessary expertise could be marshalled, and if suitable consultative structures could be set in place, it is hardly likely that the task could be completed in anything less than eighteen months. The sheer size and complexity of the task may militate against its ever being attempted, although in the author's opinion this would be the best way to achieve an assignment of responsibilities which would remedy present defects and shortcomings. However, an all or nothing approach to the revision and improvement of the country's assignment scheme, is not the only way of proceeding.

A thorough, systematic and critical analysis as envisaged in the proposed theoretical model could be applied to any public function at any time. Nothing would be lost and much is to be gained by such an endeavour. The exercise would undoubtedly contribute to a better understanding of the function and how its performance could best be deployed over the spheres of government. Such insights could work to the advantage not only of those who are responsible for the performance of the function but also of those who are intended to benefit from its performance. And the best part of it is that real change could be effected without necessarily amending the Constitution, as illustrated briefly below.

Equipped with a fuller understanding of a public function, the National Assembly could limit its legislation regarding matters in the problematic concurrent category (*vide* section 44(1)(a)(ii) and schedule 4 of the 1996 Constitution) to those aspects for which on rational grounds it should take responsibility, leaving other aspects to the provincial legislatures, or endeavour to achieve an effective dovetailing of provincial with national legislation by adopting appropriate framework legislation (*vide* section 9.8.7 of the thesis). Where feasible the National Assembly could assign its legislative power with regard to a specific matter to the provincial legislatures or to municipal councils, as provided for in section 44(1)(a)(iii) of the Constitution. Similarly, a provincial legislature could, in the light of a new insight into the deployment of responsibilities regarding a



particular public function, assign a legislative power to a municipal council in terms of section 104(1)(c) of the Constitution. Within the political executive domain a Cabinet member could, where appropriate, assign a power to be exercised by him or her in terms of an Act of Parliament to a member of a provincial executive council or to a municipal council in terms of section 99 of the Constitution; while a member of the executive council of a province could make a similar assignment to a municipal council in the province in terms of section 126 of the Constitution. In addition the national and provincial governments could take steps to ensure that the administration of matters regulated by national and provincial legislation is indeed assigned as far as possible to municipalities, as required by section 156(4) of the Constitution. (The intergovernmental assignment and delegation of powers is dealt with more fully in section 7.7.3.3 of the thesis.)

It is suggested that the flexibility built into the Constitution regarding the exercise of legislative and executive powers could best be utilised by applying a reasonably valid and reliable scientific approach to the analysis of public functions, with a view to determining in a rational way where a function, or aspects of it, could best be performed in the general interest. The research has lead to the conclusion that such an approach is feasible, and that its purposeful application could lead to substantial improvements in the assignment of responsibilities. However, it needs to be observed that without a thoroughgoing amendment of the Constitution the problems concerning complexity, and poor accessibility, so much an unsatisfactory feature of the deployment of responsibilities by both the 1993 and the 1996 Constitutions, will remain.

A final question to be posed, is whether the purpose of the study, viz to make a research based contribution to the body of knowledge constituting Public Administration concerning the assignment question, has been accomplished. The answering of this question is left to the family of public administrationists.

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**ANNEXURES**



**EXTRACT: AUSTRALIA CONSTITUTION****Section 51**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) Trade and commerce with other countries, and among the States;
- (ii) taxation; but not so as to discriminate between States or parts of States;
- (iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- (iv) borrowing money on the public credit of the Commonwealth;
- (v) postal, telegraphic, telephonic, and other like services;
- (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
- (vii) lighthouses, lightships, beacons and buoys;
- (viii) astronomical and meteorological observations;
- (ix) quarantine;
- (x) fisheries in Australian waters beyond territorial limits;
- (xi) census and statistics;
- (xii) currency, coinage, and legal tender;
- (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- (xv) weights and measures;
- (xvi) bills of exchange and promissory notes;

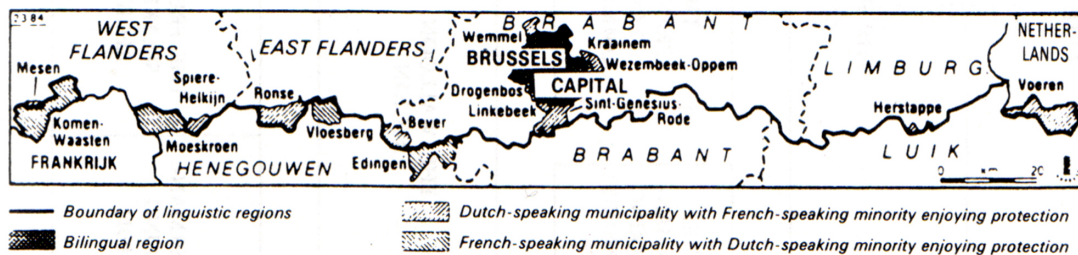
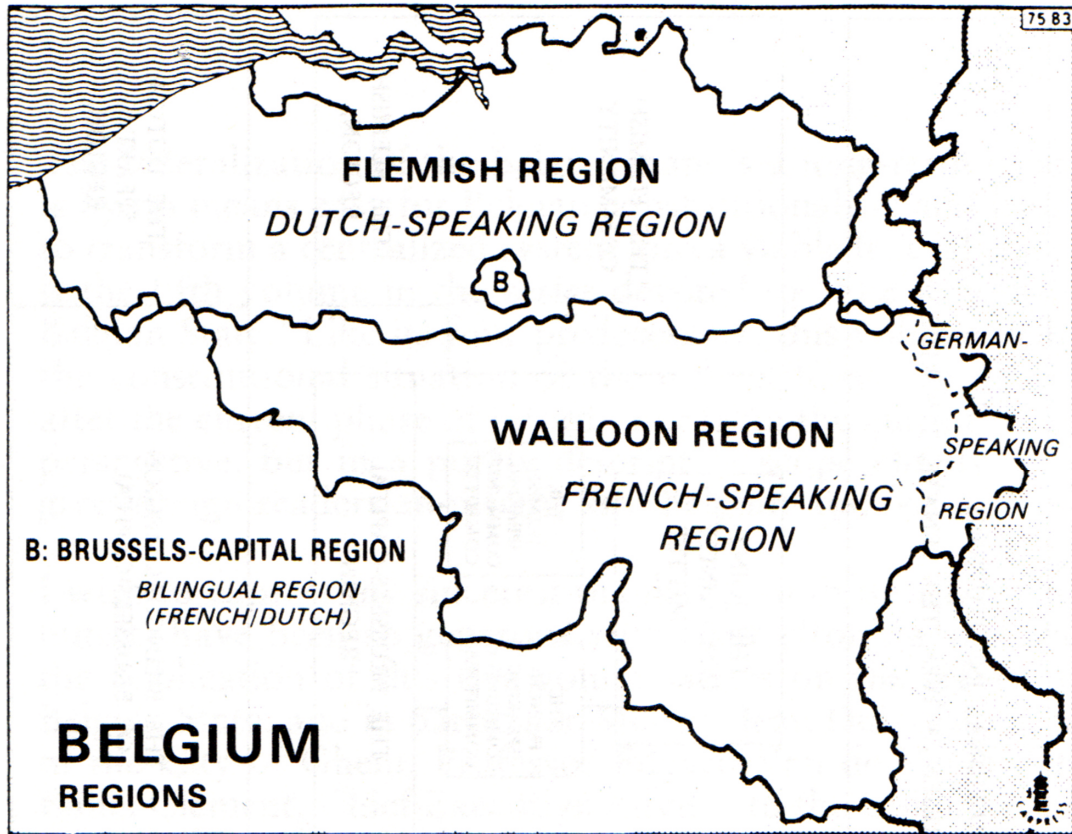
- (xvii) bankruptcy and insolvency;
- (xviii) copyrights, patents of inventions and designs, and trade marks;
- (xix) naturalisation and aliens;
- (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) marriage;
- (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
- (xxiii) invalid and old-age pensions;
- (xxiiiA) the provision of maternity allowances, widow's pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances;
- (xxiv) the service and execution throughout the Commonwealth of the civil and criminal process and the judgements of the courts of the States;
- (xxv) the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxvi) the people of any race for whom it is deemed necessary to make special laws;
- (xxvii) immigration and emigration;
- (xxviii) the influx of criminals;
- (xxix) external affairs;
- (xxx) the relations of the Commonwealth with the islands of the Pacific;
- (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws;
- (xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;
- (xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxiv) railway construction and extension in any State with the consent of that State;
- (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

- (xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia; and
- (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Source:

Blaustein, A.P. & Flanz, G.H. (editors). 1991. Australia, in *Constitutions of the countries of the world*. Release 91-6, November. Dobbs Ferry, New York: Oceana.

## CONSTITUTIONAL “MAP” OF BELGIUM



Source:

Senelle, R. 1990. *The reform of the Belgian State: volume V*. Brussels: Ministry of Foreign Affairs, External Trade and Co-operation and Development. (Memo from Belgium: "Views and surveys", 198 – 1990.)

**EXTRACTS: GERMANY'S BASIC LAW****Article 74 (Subjects of concurrent legislation)**

(1) Concurrent legislative powers extend to the following subjects:

1. civil law, criminal law, and corrections, court organisation and procedure, the legal profession, notaries, and the provision of legal advice;
2. registration of births, deaths, and marriages;
3. the law of association and assembly;
4. the law relating to residence and establishment of aliens;
- 4a the law relating to weapons and explosives;
5. (abrogated)
6. matters concerning refugees and expellees;
7. public welfare;
8. (abrogated)
9. war damage and reparations;
10. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;
11. the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance);
- 11a. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances;
12. labor law, including the organisation of enterprises, occupational safety and health, and employment agencies, as well as social security, including unemployment insurance;
13. the regulation of educational and training grants and the promotion of research;

14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74;
15. the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise;
16. prevention of the abuse of economic power;
17. the promotion of agricultural production and forestry, ensuring the adequacy of the food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts;
18. real estate transactions, land law (except for laws respecting development fees), and matters concerning agricultural leases, as well as housing, settlement, and homestead matters;
19. measures to combat dangerous and communicable human and animal diseases, admission to the medical profession and to ancillary professions or occupations, as well as trade in medicines, drugs, narcotics, and poisons;
- 19a. the economic viability of hospitals and the regulation of hospital charges;
20. protective measures in connection with the marketing of food, drink, and tobacco, essential commodities, feedstuffs, agricultural and forest seeds and seedlings, and protection of plants against diseases and pests, as well as the protection of animals;
21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic;
22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue;
23. non-federal railways, except mountain railways;
24. waste disposal, air pollution control, and noise abatement;
25. state liability;
26. human artificial insemination, analysis and modification of genetic information, as well as the regulation of organ and tissue transplantation.

**Article 74a (Concurrent legislative power of the Federation: remuneration, pensions, and related benefits of members of the public service)**

- (1) Concurrent legislative power extends also to the remuneration, pensions, and related benefits of members of the public service who stand in a relationship of service

and loyalty defined by public law, insofar as the Federation does not have exclusive legislative power pursuant to clause 8 of Article 73.

(2) . . .

(3) . . .

(4) Paragraphs (1) and (2) of this Article apply correspondingly also to the remuneration, pensions, and related benefits of judges of the Länder. . . .

Source:

Flanz, G.H. (editor). 2003. Germany, in *Constitutions of the countries of the world*. Release 2003-3, May. Dobbs Ferry, New York: Oceana.

**EXTRACT: SPAIN CONSTITUTION****Article 148**

1. The Autonomous Communities may assume competences in the following matters:

- 1) Organisation of their institutions of self-government.
- 2) Alterations of the municipal boundaries contained within its area, and in general the functions which belong to the State Administration concerning local corporations and whose transfer is authorised by the legislation on Local Governments.
- 3) Regulation of the territory, urbanism and housing.
- 4) Public works of interest to the Autonomous Community in its own territory.
- 5) Railways and highways whose itinerary runs completely in the territory of the Autonomous Community and within the same boundaries and transportation carried out by these means or by cable.
- 6) Ports of refuge, recreational ports and airports and generally all those which do not carry out commercial activities.
- 7) Agriculture and livestock raising in accord with the general regulations of the economy.
- 8) Woodlands and forestry.
- 9) Activities in matters of environmental protection.
- 10) Water projects, canals and irrigation systems of interest to the Autonomous Community and mineral and thermal waters.
- 11) Fishing in inland waters, hunting and river fishing.
- 12) Interior fairs.
- 13) Promotion of the economic development of the Autonomous Community within the objectives marked by the national economic policy.
- 14) Handicrafts.
- 15) Museums, libraries and conservatories of interest to the Autonomous Community.



- 16) Monuments of interest to the Autonomous Community.
- 17) Promotion of culture, research, and when applicable, the teaching of the language of the Autonomous Community.
- 18) Promotion and regulation of tourism within its territorial area.
- 19) Promotion of sports and adequate utilisation of leisure.
- 20) Social assistance.
- 21) Health and hygiene.
- 22) The custody and protection of its buildings and installations; the co-ordination and other functions with respect to local police forces under the terms an organic law shall establish.

Source:

Blaustein, A.P. & Flanz, G.H. (editors). 1991. Spain, in *Constitutions of the countries of the world*. Dobbs Ferry, New York: Oceana.

Note

The published source document is a translation from Spanish, which presumably explains the peculiarities in the text as transcribed above.

**EXTRACT: SPAIN CONSTITUTION****Article 149**

1. The State holds exclusive competence over the following matters:
  - 1) The regulation of the basic conditions which guarantee the equality of all Spaniards in the exercise of their rights and fulfilment of their constitutional duties.
  - 2) Nationality, immigration, emigration, alienage and the right of asylum.
  - 3) International relations.
  - 4) Defense and the Armed Forces.
  - 5) Administration of Justice.
  - 6) Mercantile, penal and prison legislation; procedural legislation, without prejudice to the necessary specialties which in this order may derive from the particularities of the substantive law of the Autonomous Communities.
  - 7) Labor legislation, without prejudice to its execution by the organs of the Autonomous Communities.
  - 8) Civil legislation, without prejudice to the preservation, modification and development by the Autonomous Communities of civil “fueros”, or special rights, where they may exist. In any case, the rules relative to the application and effectiveness of juridical norms, civil-legal relations having to do with the form of matrimony, regulation of registers and public instruments, the bases for contractual obligations, norms for resolving the conflicts of laws and the determination of the sources of the Law, in this last case, with respect to the norms of the “fueros” and special law.
  - 9) Legislation concerning intellectual and industrial property.
  - 10) System of customs, tariffs and foreign trade.
  - 11) Monetary system, foreign credits, exchange and convertibility; the general bases for the regulation of credit, banking and insurance.
  - 12) Legislation on weights and measures, determination of the official time.
  - 13) Bases and coordination of general planning and economic activity.
  - 14) General Finance and Debt of the State.

- 15) Promotion and general coordination of scientific and technical research.
- 16) External health. Bases and general coordination of health. Legislation concerning pharmaceutical products.
- 17) Basic legislation and economic system of Social Security, without prejudice to the execution of its services by the Autonomous Communities.
- 18) The bases of the juridical system of the public Administrations and the statutory system for its officials which shall in every case guarantee that the administered will receive a common treatment by them; a common administrative procedure, without prejudice to the specialties deriving from the particular organisation of the Autonomous Communities; legislation on forcible expropriation; basic legislation on contracts and administrative concessions, and the system of responsibility of all public Administrations.
- 19) Maritime fishing, without prejudice to the competences attributed to the Autonomous Communities in the regulation of the sector.
- 20) Merchant marine and the ownership of ships; lighting of coasts and maritime signals; ports of general interest, airports of general interest, control of the air space, transit and transport, meteorological service and registration of aircraft.
- 21) Railroads and land transport which crosses through the territory of more than one Autonomous Community; general communications system; traffic and movement of motor vehicles; mail and telecommunications; aerial cables, submarine cables and radio communications.
- 22) The legislation, regulation and concession of water resources and projects when the waters run through more than one Autonomous Community and the authorisation of electrical installations when their use affects another Community or when the transport of energy goes beyond its territorial area.
- 23) Basic legislation on environmental protection without prejudice to the faculties of the Autonomous Communities to establish additional standards of protection. Basic legislation on woodlands, forestry projects and livestock trails.
- 24) Public works of general interest or whose realisation affects more than one Autonomous Community.
- 25) Bases of the mining and energy system.
- 26) System of production, sale, possession and use of arms and explosives.
- 27) Basic norms of the system of press, radio and television and, in general, of the other means of social communication, without prejudice to the

faculties which in their development and execution belong to the Autonomous Communities.

- 28) Protection of the cultural, artistic and monument patrimony of Spain against exportation and exploitation; museums, libraries and archives belonging to the State without prejudice to their management by the Autonomous Communities.
- 29) Public security, without prejudice to the possibility of the creation of police by the Autonomous Communities in the manner which may be established in the respective Statutes within the framework of the provisions of the organic law.
- 30) Regulations of the conditions for obtaining, issuing, approving and standardising academic and professional degrees and basic norms for carrying out Article 27 of the Constitution in order to guarantee compliance with the obligations of the public powers in this matter.
- 31) Statistics for State purposes.
- 32) Authorisation for the convocation of popular consultations via referendum.

Source:

Blaustein, A.P. & Flanz, G.H. (editors). 1991. Spain, in *Constitutions of the countries of the world*. Dobbs Ferry, New York: Oceana.

#### Note

The published source document is a translation from Spanish, which presumably explains the peculiarities in the text as transcribed above.

**EXTRACT: FINANCIAL RELATIONS ACT 65 OF 1976****Schedule 2****MATTERS THE CONTROL OF WHICH AND THE POWER TO LEGISLATE IN RESPECT OF WHICH MAY BE TRANSFERRED BY THE STATE PRESIDENT TO A PROVINCE IN TERMS OF PARAGRAPH (a) OF SUBSECTION (1) OF SECTION 11**

(Abbreviated)

1. The destruction of vermin and the registration and control of dogs.
2. The preservation of fauna and flora.
3. The provision of grants in respect of agricultural and kindred societies . . .
4. The establishment, control and management of libraries and library services, museums, art galleries, herbaria, botanical gardens and similar institutions, and zoological gardens, aquariums, oceanariums, snake parks and similar institutions . . .
5. The control and management of such places upon State land as the State President may reserve as being places of public resort, of public recreation, or of historical or scientific interest.
6. The establishment, control, management and regulation of cemeteries and crematoria and the regulation of matters relating to the removal or disposal of dead bodies.
7. The distribution of poor relief.
8. The regulation of the hours of opening and closing of shops.
9. The administration of the Labour Colonies Act, 1909 (Cape of Good Hope) . . .
10. The establishment and administration of townships.
11. The licensing and control of vehicles and of any other conveyance or means of transport whatsoever . . . and of the drivers of any such vehicles or means of conveyance or transport.
12. The restriction, regulation and control of horse racing, the prohibition , restriction, regulation and control of other racing . . .
13. The licensing, regulation and control of places of amusement and recreation . .
14. Town planning, including -

- (a) . . . ;
  - (b) . . . ;
  - (c) . . . ; etcetera.
15. Irrigation schemes.
  16. Land settlement schemes.
  17. The establishment of labour colonies.
  18. The control of indigenous forests and forest plantations.
  19. The expropriation, . . . of land for public purposes in a province.
  20. The preparation and carrying out of schemes -
    - (a) . . for the supply of water and the disposal of sewage and industrial effluent in any area; and
    - (b) for the provision of any service ordinarily provided by local authorities, . . .
  21. Drive-in theatres, . . .
  22. The provision of insurance cover for the Administrator and members of the executive committee . . .
  23. The establishment of and control over public resorts, places of rest, seaside resorts, etcetera.
  24. Notwithstanding the provisions of . . . (various Acts), but subject to the provisions of section 85 of the Republic of South Africa Constitution Act, 1961 (Act No 32 of 1961), environmental pollution.

**EXTRACT: REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 110 OF 1983****SCHEDULE 1****Subjects referred to in section 14**

1. Social welfare, but subject to any general law in relation to -
  - (a) norms and standards for the provision or financing of welfare services;
  - (b) the control of the collection of money and other contributions from members of the public for welfare services or charity; and
  - (c) the registration of social workers, and control over their profession.
2. Education at all levels, including -
  - (1) instruction by way of correspondence, and institutions providing such instruction;
  - (2) the training of adults in the trades at centres established by the State President acting as provided in section 19(1)(a); and
  - (3) training of cadets at schools in terms of section 3(1)(a) of, and subject to, the Defence Act, 1957, and official school sport,

but subject to any general law in relation to –

  - (a) norms and standards for the financing of running and capital costs of education;
  - (b) salaries and conditions of employment of staff and professional registration of teachers; and
  - (d) norms and standards for syllabuses and examination and for certification of qualifications.
3. Art, culture and recreation (with the exception of competitive sport) which affect mainly the population group in question.
4. Health matters, comprising the following, namely -
  - (1) hospitals, clinics and similar or related institutions;
  - (2) medical services at schools and for indigent persons;
  - (3) health and nutritional guidance; and
  - (4) the registration and control over private hospitals,

but subject to any general law in relation to such matters.
5. Community development, comprising the following, namely -
  - (1) housing;

- (2) development of the community in any area declared by or under any general law as an area for the use of the population group in question, including the establishment, development and renovation of towns and the control over and disposal of land (whether by alienation or otherwise) acquired or made available for that purpose; and
- (3) rent control and control over and clearance of squatting, in such an area in terms of any general law,

but subject to –

- (a) any general law in relation to norms, standards and income groups for the financing of housing; and
  - (b) the provisions of the general law referred to in paragraph (2).
6. Local government within any area declared by or under any general law as a local government area for the population group in question, but subject to any general law in relation to matters to be administered on local government level on a joint basis, and excluding -
- (a) any matter assigned to local authorities by or under any general law; and
  - (b) the exercise by any local authority, otherwise than in accordance with general policy determined by the State President acting as provided in section 19(1)(b), of any power to raise loans.
7. Agriculture, comprising the following, namely -
- (1) agricultural development services, which include research, advisory services and extension;
  - (2) training at agricultural colleges; and
  - (3) financial and other assistance to farmers or prospective farmers, or for the promotion of agriculture.
8. Water supply, comprising the following, namely -
- (1) irrigation schemes;
  - (2) drilling for water for agricultural and local government purposes;
  - (3) subsidising of drilling work and water works for agricultural or local government purposes; and
  - (4) financial assistance in relation to water works damaged by flood.
9. Appointment of marriage officers under any general law.
10. Election of members of the House of Parliament in question, excluding matters prescribed or to be prescribed by or under any general law.
11. Finance in relation to own affairs of the population group in question, including -
- (1) estimates of revenue and expenditure, but excluding the form in which such estimates shall be prepared;
  - (2) the appropriation of moneys for the purposes of such estimates, but excluding such appropriation of moneys for any purpose other than that



for which they are by or under any general law made available for appropriation;

- (3) levies authorised by or under any general law, on services rendered over and above payments for such services;
- (4) the receipt of donations;
- (5) the making of donations not amounting to a supplementation of appropriations contemplated in paragraph (2); and
- (6) the control over the collection and utilisation of revenue, subject to the provisions of the Exchequer and Audit Act, 1975,

but excluding the levying of taxes and the raising of loans.

- 12. Staff administration in terms of the provisions of any general law in relation to staff in the employment of the State.
- 13. Auxiliary services necessary for the administration of own affairs of the population group in question, including the planning of and control over the work connected with the exercise or performance of powers, duties and functions in a department of State for such affairs, and the services provided by or in such a department, and the acquisition, alienation, provision and maintenance of and the control over land, supplies, services, buildings, works and accommodation, transport and other facilities for the purposes of the performance or rendering of such work and services, but subject to any general law in relation to such matters.
- 14. The rendering of services, either with the approval of the State President acting as provided in section 19(1)(b) or in terms of arrangements made between Ministers with such approval, to persons who are not members of the population group in question.

**EXTRACT: REGIONAL SERVICES COUNCILS ACT 109 OF 1985****Schedule 2****Functions referred to in section 3(1)(b)**

1. Bulk supply of water.
2. Bulk supply of electricity.
3. Sewage purification works and main sewage disposal pipelines.
4. Land usage and transport planning in the region.
5. Roads and stormwater drainage.
6. Passenger transport services.
7. Traffic matters.
8. Abattoirs.
9. Fresh produce markets.
10. Refuse dumps.
11. Cemeteries and crematoriums.
12. Ambulance and fire brigade services.
13. Health services.
14. Airports.
15. Civil defence.
16. Libraries.
17. Museums.
18. Recreation facilities.
19. Environment conservation.
20. Promotion of tourism.

21. The establishment, improvement and maintenance of other infrastructural services and facilities.
22. Other regional functions.

**EXTRACT: SELF-GOVERNING TERRITORIES CONSTITUTION ACT 21 OF 1971****Schedule 1 (as amended)**

(Abbreviated)

1. The administration and control of departments . . .
2. Education, . . . but excluding . . . tertiary education . . .
3. In respect of Blacks, welfare services, including . . . social benefit schemes . . .
4. The establishment, maintenance, management, and control of clinics and other institutions in connection with services and schemes referred to in item 3.
5. The control of business and trading undertakings, professions, etc., . . . excluding the issue of licenses in connection with trading in arms and ammunition and explosives.
6. The planning, establishment, etc., of industrial, trading, finance, mining and other business undertakings and projects.
- 6A. Development corporations . . .
7. Agriculture, including soil and veld conservation, etc., . . . but excluding control over the importation into or exportation from the Republic of stock, etc. .
- 7A. The provision of financial assistance to persons . . . who carry on . . . farming operations, . . .
- 7B. The levy and exemption of rental for and grazing fees on land.
8. Nature conservation.
9. The destruction of vermin.
10. Public works and undertakings, etc., . . .
11. Markets and pounds.
12. The establishment and administration of . . . inferior courts and the administration of justice, etc. . . .
13. Labour matters (excluding all matters dealt with in the Workmen's Compensation Act, 1941 (Act 30 of 1941), or the Unemployment Insurance Act, 1946 (Act 53 of 1946)).

14. The erection and maintenance of buildings and structures which the Government of the area may deem necessary for the exercise of its powers and the performance of its functions . . .
15. A direct tax on -
  - (a) (i) citizens or any particular category . . . of citizens;
  - (ii) the income of citizens or any particular category . . . of citizens, . . . ;
  - (b) any or all non-citizens who reside, work etc. within the area;
  - (c) property situated in the area.
16. Fees payable for services rendered by a department . . . or a tribal or regional authority . . .
17. Subject to the provisions of any proclamation issued in terms of section 2 -
  - (a) the conditions of service of the members of the legislative assembly;
  - (b) the convening of a session of the legislative assembly . . . ;
  - (c) the amendment of the proclamation issued by the State President in terms of section 2(1).
18. The appointment, conditions of service, etc., of officers and employees . . .
19. Intoxicating liquor.
20. The appointment, powers, etc., of justices of the peace and commissioners of oaths.
- 20A. Civil defence.
- 20B. Fire brigade services.
21. The protection of life, persons and property and the prevention of cruelty to animals.
- 21A. For the purpose of maintaining public safety, public peace, etc., the prohibition of any organisation or membership of such an organisation; . . .
- 21B. Subject to the conditions determined by the Minister of Police of the Republic, the establishment, control, etc., of a police force.
22. The control, organisation and administration of such personnel or such part of the Police Force stationed in the area concerned as may have been transferred to the Government of a self-governing territory . . .
23. The administration of deceased estates, the execution of wills and matters relating to status, guardianship, etc., in respect of citizens.
24. Registration of deeds and surveys, but excluding trigonometrical surveys.
25. The regulation and control of road traffic, . . . but excluding, subject to the provisions of item 25A, all matters dealt with in the Motor Carrier Transportation

Act, 1930 (Act 39 of 1930), or the Motor Vehicle Insurance Act, 1942 (Act 29 of 1942).

- 25A. With effect from a date to be determined . . . in respect of any particular area, motor carrier transportation: Provided that . . .
- 26. Births, deaths, marriages and customary unions.
- 27. The division of existing tribes, the amalgamation of tribes, the constitution of new tribes, and the recognition, appointment, conditions of service, etc., of paramount chiefs, chiefs and headmen.
- 27A. The recognition, appointment, conditions of service, etc., of chiefs' representatives outside the area concerned.
- 28. Townships and settlements (including the establishment of local government bodies).
- 29. The registration and control of dogs.
- 30(a). Tribal and regional authorities . . . and institutions of a similar nature.
  - (b) Institutions or bodies other than such institutions as are referred to in paragraph (a) which have, . . . similar powers and functions . . .
- 30A. The establishment of public holidays.
- 31. The collection and control over all revenues and fees which accrue to the Government concerned or to a tribal or regional authority.
- 31A. The raising of loans, . . .
- 31B. All aspects regarding any matter having direct or indirect or possible reference to health, health service or cognate professions, the combating of nuisances and population development.
- 31C. With effect from a date to be determined . . . the establishment, disestablishment, administration and control of prisons.
- 31D. Tourism, . . .
- 31E. Legal aid.
- 31F. Amusements or entertainment tax.
- 31G. The licensing, regulation and control of places of amusement and recreation, . .
- 31H. Auction dues.
- 31I. The restriction, regulation and control of horse racing, the prohibition, restriction, regulation and control of other racing, . . .

- 31J. Licensing of totalisators . . . and licences, taxes and fees in connection with horses and other racing and betting and wagering, . . .
- 31K. The establishment, control and management of libraries and library services.
- 31L. The establishment, control and management of museums, art galleries, herbaria, botanic gardens and similar institutions, and zoological gardens, aquariums, oceanariums, snake parks and similar institutions . . .
- 31M. The establishment, control, etc., of cemeteries and crematoria and the regulation of matters relating to the removal or disposal of corpses, . . .
- 31N. Housing schemes.
- 31P. The reservation of places . . . as places of public resort or of public recreation or of historical or scientific interest and of movable or immovable goods of historical or scientific interest and the control and management of such places or goods, . . .
- 31Q. (i) The conclusion or ratification of conventions, treaties and agreements with the Government of the Republic . . . ;  
(ii) the conclusion of contracts and agreements, . . . in order to give effect to powers granted to the government of the self-governing territory . . . ; and  
(iii) the conclusion of agreements with the Government of the Republic extending the area of functions of a corporation or a development corporation which has been established by the government of a self-governing territory, outside such territory: . . .
- 31R. The establishment of new districts and the modification of the boundaries of existing districts in the territory.
- 31S. Sport and recreation.
- 31T. The registration of citizens and the issue of documents contemplated in section 3(1)bis (c) of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952 (Act 67 of 1952): . . .
- 31U. Conservation of the environment.
- 31V. The establishment, control, etc., of a law commission.
- 31W. Control over entrance into the territory by citizens of the Republic of South Africa who are not also citizens of the territory concerned . . .
- 31X. The establishment of a state attorney's office.
- 31Y. The establishment of pension funds for, and the pensioning of, any persons other than officers and employees . . .
- 31Z. Land matters, . . .

- 32. With effect from a date and subject to . . . conditions . . . the provision and distribution of electricity.
- 32A. Meteorological services.
- 32B. The conservation and utilisation of water sources . . .
- 32C. Sectional titles.
- 32D. Appointment of commissions of enquiry.
- 32E. Mineral matters.
- 33. The imposition of penalties for a contravention of or failure to comply with any law made by the legislative assembly.
- 34. Any matter which by virtue of the provisions of section 37A falls within the power of the legislative assembly.



**EXTRACT: CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993**

**Schedule 4**

**CONSTITUTIONAL PRINCIPLES WITH A BEARING ON THE ASSIGNMENT OF RESPONSIBILITIES TO LEVELS OR SPHERES OF GOVERNMENT**

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

XVI

Government shall be structured at national, provincial and local levels.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

#### XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

#### XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

#### XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity – in particular in relation to other states – powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

## XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the province.

## XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

## XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

## XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall

entrench the continuation of such territorial entity, including its structures, powers and functions.

## COMMISSION FOR ADMINISTRATION

### PROGRAMME FOR THE RATIONALISATION OF GOVERNMENT ORGANISATIONS (1993)

#### KEY TERMS WITH DEFINITIONS

(Quoted in the original Afrikaans, with English translations)

##### BEVOEGDHEID / POWER

*'n Wetlik (ook grondwetlik) verleende mag aan die bekleër van 'n amp of pos of aan 'n wetlike liggaam of entiteit om in gespesifiseerde aangeleenthede te kan handel.*

A power assigned statutorily (also constitutionally) to the incumbent of an office or a post or to a statutory body or entity to act in specified matters.

##### BLOUDRUK / BLUEPRINT

*'n Voorgestelde toewysing van die werksaamhede waaruit 'n hoof funksie saamgestel is aan ('n) owerheidsvlak of owerheidsvlakke.*

A proposed allocation of the activities constituting a main function to a level or levels of government.

##### DEKONSENTRASIE / DECONCENTRATION

*Die plasing van personeel en ander hulpbronne by kantore, inrigtings en bedieningspunte weg van die hoofkantoor ten einde die benutting van 'n diens vir kliënte gerieflik te maak.*

The placement of staff and other resources at offices, institutions and service points away from the head office in order to facilitate the utilisation of a service by clients.

##### DELEGASIE / DELEGATION

*'n Bestuurshandeling waarvolgens die houer van 'n bevoegdheid dit aan 'n ander persoon vir uitoefening opdra, onderworpe aan die nakoming van die voorwaardes wat die delegerder bepaal.*

A management action whereby the holder of a power assigns it to another person to be exercised by him or her, subject to compliance with the conditions determined by the delegator.

##### DESENTRALISASIE / DECENTRALISATION

*Enige aksie om die uitoefening van 'n bevoegdheid, die verrigting van 'n werksaamheid of die uitvoering van 'n plig weg te voer van die sentrale punt waar die bevoegdheid, werksaamheid of plig aanvanklik gesetel het.*

Any action to move the exercise of a power or the performance of an activity or duty away from the central point where the power, activity or duty was initially located.

#### DEVOLUSIE / DEVOLUTION

*Die verlening van 'n bevoegdheid aan 'n owerheid benede die sentrale owerheid, by wyse van grondwetlike ordening, met die bedoeling dat die laerliggende owerheid die betrokke bevoegdheid in eie reg en outonoom sal uitoefen.*

The assignment of a power to a government beneath the central government, by means of constitutional ordering, with the intention that the lower government will exercise the particular power in its own right and autonomously.

#### FUNKSIE / FUNCTION

*'n Komplekse, volledige samestelling van werksaamhede wat daarop ingestel is om 'n bepaalde behoefte van die gemeenskap of die samelewing te bevredig.*

A complex, complete composite of activities aimed at the satisfaction of a stipulated need of the community or of society.

#### HOOFFUNKSIE / MAIN FUNCTION

*'n Funksie – kyk omskrywing – wat gekenmerk word deur 'n meerdere samestelling van werksaamhede wat op 'n breë maar logies afgebakende behoefte van die gemeenskap of die samelewing ingestel is, soos byvoorbeeld gesondheid, landsverdediging en onderwys.*

A function – *vide* definition – characterised by a major composition of activities aimed at a broad but logically demarcated need of the community or of society, as for example health, national defence and education.

#### OWERHEID / GOVERNMENT

*'n Samestelling van wetgewende, regerende, ander uitvoerende, en regsprekende instellings wat wetlik verleende bevoegdhede in 'n omskrewe geografiese gebied uitoefen.*

A composition of legislative, governing, other executive, and judicial institutions exercising statutorily assigned powers in a defined geographic area.

#### SUBSIDIARITEIT / SUBSIDIARITY

*'n Beskouing oor die toewysing van werksaamhede aan owerheidsvlakke waarvolgens werksaamhede aan die laagste werkbare owerheidsvlak toegewys word en 'n werksaamheid aan 'n hoërliggende owerheidsvlak toegewys word slegs waar dit vir*

*duidelike en afdoende rede nie bevredigend deur die laerliggende owerheidsvlak behartig kan word nie.*

A view regarding the allocation of activities to levels of government according to which activities are allocated to the lowest practicable level of government and an activity is allocated to a higher level of government only where for clear and sufficient reason it cannot be performed satisfactorily by the lower level of government.

#### WERKSAAMHEID / ACTIVITY

*Enige van verskeie aktiwiteite waaruit 'n funksie saamgestel is en wat moet plaasvind ten einde die funksie bevredigend ten uitvoer te bring.*

Any one of various activities or actions constituting a function and which must take place in order for the function to be performed satisfactorily.

Source:

South Africa. Commission for Administration. 1993d. *Confirmation of rationalisation programme, 16 February*. List of terms for inclusion in annexure E of the rationalisation programme document. Author's file 2/1/2.