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A CRITICAL ANALYSIS OF NATIONAL GOVERNMENT SUPERVISION OF PROVINCIAL GOVERNMENT UNDER THE 1996 CONSTITUTION

A CRITICAL ANALYSIS OF NATIONAL GOVERNMENT SUPERVISION OF PROVINCIAL GOVERNMENT UNDER THE 1996 CONSTITUTION

by

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DECLARATION

Student number 06848516

I declare that the dissertation titled A *critical analysis of national government supervision of provincial government under the 1996 Constitution* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references in a list of sources included in the thesis.

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David Skhumbuzo Manganye Date

SUMMARY

This dissertation is the product of an in-depth literature review on national government supervision of a provincial government in terms of the 1996 Constitution. While the Constitution accords equal recognition to the national, provincial and local spheres of government, and furthermore confers autonomy on each one of them, these three spheres are interrelated, which means that the upper spheres supervise the lower spheres. Hence, it became necessary to establish the rationale behind the wide-ranging powers which the Constitution confers on the national government to supervise a provincial government, and so the rationale behind the concept of “government supervision” was investigated. Accordingly, mainly local sources dealing with national government supervision of provincial government were studied, and a case study of national government supervision of Eastern Cape, Limpopo and North West provincial government was undertaken.

In order to understand the interrelationship among the three spheres of government, which is the crux of the notion of “government supervision”, the structure of government ushered in by the 1996 Constitution is discussed. Taking cognisance of the fact that the theme of this dissertation is intergovernmental supervision, this study also discusses the legal framework for national government supervision of provinces. The case studies conducted in these three provinces revealed certain shortcomings, which then led to recommendations for remedial action.

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Key Terms

National executive, national government, provincial government, Parliament, sphere of government, jurisdiction, intergovernmental relations, supervision, regulation, monitoring, intervention, and support.

List of Abbreviations

AFS: Annual Financial Statement

ANC: African National Congress

EFF: Economic Freedom Fighters

DA: Democratic Alliance

DOH: Department of Health

IGR: Intergovernmental Relations

IMC: Inter-Ministerial Committee

IMTT: Inter-Ministerial Task Team

MINMEC: Ministers and Members of the Executive Councils Meeting

NCOP: National Council of Provinces

NT: New Text (in reference to the 1996 Constitution)

OTP: Office of the Premier

SCOPA: Standing Committee on Public Accounts

SCM: Supply Chain Management

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CHAPTER 1

INTRODUCTION

1. Introduction

The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution), declares the Republic of South Africa to be one, sovereign and democratic state.[1] This provision of the Constitution emphasises the indivisibility of the Republic of South Africa. The Constitution further stipulates that the Republic, as a sovereign state, is administered by a government constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.[2] From these constitutional provisions, it is evident that the government of the Republic is analogous to a system, comprising subsystems that function co-operatively to enable the whole system to discharge its functions. This means that the national, provincial and local spheres of government are the subsystems of government of the Republic of South Africa.

Layman defines the first of the three terms used to describe the government of the Republic, namely distinctive, in the context of section 40(1) of the Constitution, as "that element which reflects that each sphere exists in its own right; it is a final decision maker on a defined range of functions and is accountable to its constituency for its own decisions."[3] It seems apparent that the term 'distinctive' is quite loaded with meaning, which is manifested in the elements thereof, referred to above. Layman further elaborates that, although provinces are distinctive, they exercise their powers and perform their functions within the regulatory framework set by the national government which is also responsible for monitoring compliance with that framework. De Visser concurs with Layman's view on the role of national and provincial government in relation to the local sphere of government, arguing

[1] Section 1 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).
[2] Section 40(1) of the Constitution.
[3] Layman T Intergovernmental relations and service delivery in South Africa: Ten Year Review The Presidency (2003) 8 (hereafter Layman Intergovernmental Relations 2003).

that the concept of "regulation" refers to "national and provincial government's role in setting the framework within which local government must exercise its autonomy".[4] Mathenjwa agrees with De Visser and Layman, and asserts that, "in setting the framework for local government the national and provincial government can pass legislation and issue directives regulating the exercise of local government powers".[5] This explains how the three spheres of government are interrelated. Interrelatedness introduces the second descriptor of the government of the Republic. Interrelatedness is defined by regulation and supervision exercised by the national government over provinces, while the local sphere is regulated and supervised by both the provincial and national spheres of government.[6] At the heart of interrelatedness is the nature of the relationship between the autonomous spheres of government in terms of which upper spheres supervise lower spheres. Interdependence among the three spheres, according to Layman, finds expression in the fact that, "only collectively and in co-operation with one another can they provide government that meets the needs of the country as a whole".[7] Interdependent is the third and last descriptor of the government of the Republic. The essence of the interdependent descriptor lies in the fact that the three spheres of government depend on one another in discharging the mandate of governing the Republic of South Africa as one sovereign state.

2. Problem Statement

While each of the three spheres of government has autonomy derived from its distinctive nature, the lower spheres are supervised by upper spheres in line with the "interrelated" descriptor referred to above. Evidently, this kind of a constitutional setup has inherent conflict as, on the one hand, it recognises the autonomy of each sphere while, on the other hand, it subjects the lower spheres to the authority of the upper spheres in terms of which upper spheres supervise lower spheres. In this

[4] De Visser Developmental local government: a case-study of South Africa: book reviews- SA Publications (2005) 170.

[5] Mathenjwa M Contemporary Trends in Provincial Government supervision of Local Government in South Africa Law Democracy & Development Volume 18 (2014) http://dx.dol.org/10.4314/ldd.v1811.9 181 (hereafter Mathenjwa Contemporary Trends 2014).

[6] Layman Intergovernmental Relations (2003) 8.

[7] Layman Intergovernmental Relations (2003) 9.

regard the Constitution, for instance, provides that the national and provincial government supervise the local sphere of government.[8] Provincial government is specifically instructed by the Constitution to provide monitoring and support to local government in the province.[9] Mathenjwa argues that serious challenges are encountered in the functioning of government whose structural architecture is such that power is distributed among, and simultaneously shared by, different spheres of government.[10] Mathenjwa takes this point further by expressing a need for a mechanism to ensure that all spheres of government exercise their powers properly for the good of governance in the Republic[11]. Notwithstanding the shortcoming of being potentially intrusive, intergovernmental supervision appears to be the kind of mechanism necessary to ensure the proper functioning of the three spheres of government as a coherent whole. The Constitution does provide for the system of intergovernmental supervision within the context of the mandatory framework of co-operative government principles and intergovernmental relations, about which more is said below. This study's focus is, therefore, on the in-depth analysis of supervision of provincial government by national government.

The Constitution empowers the national sphere of government to intervene in the provincial sphere of government in circumstances where a provincial government is either unable or unwilling to fulfil its executive obligations in terms of the Constitution or legislation.[12] It seems evident that intervention by the national government in a province must be preceded and necessitated by a situation or circumstances of the failure or unwillingness of a provincial government to discharge obligations vested in it by the Constitution or legislation.

[8] Section 155(7) of the Constitution enjoins the national government, subject to section 44, and the provincial government to see to the effective performance by municipalities of their functions in respect of Schedules 4 and 5.

[9] Section 155(6)(a) of the Constitution

[10] Mathenjwa Contemporary Trends (2014) 178.

[11] Mathenjwa Contemporary Trends (2014) 178.

[12] Section 100(1) of the Constitution provides that, when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure the fulfilment of that obligation.

The Constitution mentions two examples of broad modalities or forms of intervention which the national executive may employ when intervening in a province, and these are, firstly, intervention by issuing a directive to a provincial executive pointing out governance failures and remedial action to be undertaken by a province concerned.[13] Secondly, it is intervention by taking over the responsibility that the Constitution or legislation imposes on a province which the province is failing, or unable, to discharge.[14] The Constitution spells out the broad objectives to be achieved through the last mentioned modality of intervention as: maintenance of essential national standards or meeting established minimum standards for rendering of a service; maintaining economic and national security; and preventing a province from acting unreasonably to the detriment of another province or the country as a whole.[15] Upon closer scrutiny of the powers of intervention by the national executive in a province, it becomes evident that they are very wide as the Constitution allows the national executive to intervene by taking any appropriate steps to remedy the situation. Munzhedzi warns that intervention is not always innocent as, in certain instances, it may be motivated by either national or provincial politics.[16] Munzhedzi expands on this point by citing an example where a provincial administration leadership does not support the national leadership, and so when the national executive invokes its intervention powers in such circumstances, suspicions may arise about the purpose intended to be achieved through the intervention. The point made by Munzhedzi in respect of intervention provides a cogent and compelling case of an instance where intervention may be motivated by ends which are contrary to the provisions and spirit of the Constitution. The legality or constitutionality of national government intervention in a province, if conducted under the circumstances referred to by Munzhedzi, is cast in doubt.

The national executive, currently dominated by the ruling party which is the African National Congress (ANC), seems to have been vested with unfettered constitutional

[13] Section 100(1) (a) of the Constitution.
[14] Section 100(1) (b) of the Constitution.
[15] Section 100(1) (b) (i) (ii) and (iii) of the Constitution.
[16] PH Munzhedzi "The national government intervention in the provincial government: A case of Limpopo province in South Africa" (2014) Mediterranean Journal of Social Sciences (5) 2.

powers to take any appropriate steps to remedy failure by the provincial government to discharge its obligations in terms of the Constitution or legislation. The dominance of the national government by one party may also lead to abuse of the power to intervene in a provincial government. A critical analysis of national government supervision of provincial government under the 1996 Constitution is being undertaken to determine when national government intervention in a provincial government may be legally valid. The evidence available indicates that the national executive has intervened by the assumption of provincial obligation in some of the provinces, which are Eastern Cape on 02 March 2011 in respect of the Department Education[17] ; Limpopo on 05 December 2011 in respect of Provincial Treasury, Education ,Health, Public Works, and Roads and Transport[18]; and North West on 09 May 2018 whereby all ten state departments were placed under administration, where the national executive assumed responsibility in five departments whilst the other five were issued with a directive[19]. The measures undertaken by the national executive were quite drastic because intervention, by its very nature, encroaches on the autonomy of a sphere of government. The need for a framework to regulate the delicate balancing of national executive powers of intervention and the autonomy of spheres of government, both of which are provided for in the Constitution, seems quite evident.

The principles of co-operative government constitute a very useful framework to guide the relationship and working together among the three spheres of government. Broadly, these principles emphasise the indivisibility of the Republic of South Africa by instructing all spheres of government to: preserve the peace, national unity and the indivisibility of the Republic; secure the wellbeing of the people

[17] Statement to the National Assembly on the Eastern Cape Education Department intervention by Mrs Angie Motshekga, Minister of Basic Education 16 March 2011 https://www.gov.za/satement-nationalassembly-eastern_cape-education-department-intervention-mrs-anaie-motshekga (Date of use 26 May 2016).

[18]Statement issued by Jimmy Manyi, Cabinet Spokesperson and CEO of Government Communications (GCIS), December 5 2011 (hereinafter Statement by Cabinet Spokesperson December 5 2011) https://www.polity.org.za (Date used 27 February 2017).

[19] Report to the Inter-Ministerial Task Team on Section 100(1b) Intervention in the North West province 5 June 2018 Ad Hoc Committee on North West Intervention (Date of use 23 April 19) (Hereinafter, Report to the IMTT on North West Intervention 14 June 2018).

of the Republic; provide effective, transparent, accountable, and coherent government of the Republic as whole; and be loyal to the Constitution, the Republic and its people.[20] The principles of co-operative government furthermore insist on the working together of the three spheres of government by demanding co-operation among them by adhering to the following: respecting each other's constitutional status, institutions, powers and functions of government in other spheres; abstaining from assuming any power or function not conferred on them in terms of the Constitution; avoiding, when exercising their powers, encroaching on the geographical, functional or institutional integrity of government in another sphere; acting in good faith towards each other; and fostering friendly relations.[21] It has become necessary to investigate whether the national executive has complied with the principles of co-operative government when invoking its intervention powers in respect of the three provinces mentioned above.

The next challenge is that of establishing whether the objectives of national government intervention were met in the provinces where the provisions of section 100 of the Constitution were invoked. The object of section 100 is to ensure that provinces in respect of which intervention powers were invoked by the national executive are able to fulfil the obligations imposed on them by the Constitution or legislation. It has, thus, become necessary to conduct case studies on supervision by national government in different provinces that will establish whether or not those interventions were conducted in a manner consistent with the Constitution and whether the objectives of the intervention were realized.

The research question for this study, therefore, is:

> When may a national government intervention in provincial government be legally valid and what are the factors that may determine whether the outcome of a national government intervention in provincial government is achieved?

[20] Section 41(1) (a) to (d) of the Constitution.
[21] Section 41(1) (e) to (h) of the Constitution.

3. Literature Review

Closer examination of the Constitution reveals that the structural design of the government of the Republic, brought about by the Constitution, is a multi-sphere government comprising national, provincial and local spheres.[22] When illustrating the constitutional intents about the three spheres of government, Edwards brings in the notion of partnership between the spheres of government where each sphere is distinctive and has a specific role to play.[23] The three spheres of government, though distinctive, they are interdependent and interrelated. Simeon and Murray concur with Edwards when they state that co-operative government instructs the three spheres of government to function as a whole, unified system, collaborating rather than competing.[24]

Layman argues that, distinctive, in the context of section 40(1) of the Constitution, is that element which recognises each sphere of government as having a right to its own existence, and capacity to make own decisions in respect of which it accounts to its constituency."[25] In agreement with Layman, Mettler asserts that the autonomy of the local sphere of government, for example, is evidenced by the fact that its powers are derived from the Constitution, thus the by-laws of a municipal council cannot be reviewed in terms of administrative law.[26] Phago, while recognising the constitutional entrenchment of the autonomy of each sphere, puts forward an argument that the government of the Republic of South Africa is not just the sum

[22] Section 40(1) of the Constitution

[23] Edwards T "Co-operative governance in South Africa with specific reference to the challenges of intergovernmental relations". School of Government. Central University of Technology (2008) 67 UNISA Press Pretoria

[24] Simeon R and Murray C "Multi-sphere government in South Africa: An Interim Assessment" (31) (2001) 71 Oxford University Press

[25] Layman T Intergovernmental relations and service delivery in South Africa: Ten Year Review The Presidency (2003) 8 (hereafter Layman Intergovernmental Relations 2003).

[26] Mettler J Provincial-municipal relations: A few challenges (2003)1 Law, Democracy and Development

total of the three spheres of government because its success mainly depends on mutual support among the three spheres.[27]

Layman further argues that while the distinctive quality of each sphere of government points to its autonomy, autonomy per se is not the absolute defining descriptor as it has to be balanced with the "interrelated" descriptor also applicable to each of the spheres of government. The "interrelated" descriptor demands that, the provincial sphere of government, for example, exercises its powers and perform its functions within the regulatory framework set by the national government which is also responsible for monitoring compliance with that framework.[28] Evidently, the Constitution is also premised on the principle that the national sphere of government supervises the provincial sphere, while a provincial sphere, in turn, supervises the local government sphere.[29] The Constitution further provides for specific circumstances in which the national sphere is given powers to supervise the local sphere of government.[30] Concurring with Layman's view on the role of national and provincial government in relation to the local sphere of government de Visser argues that the concept of "regulation" refers to "national and provincial government's role in setting the framework within which local government must exercise its autonomy".[31] Mathenjwa agrees with de Visser and Layman when he states that, "in setting the framework for local government the national and provincial government can pass legislation and issue directives regulating the exercise of local government powers".[32]

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[27] Phago K National government intervention in provincial administration and governance: the case of Limpopo province Published Online 1 October 2018 https://hdl.handle.net/10520/EJC-1724bfdb2f (Date used 25 March 2021)

[28] Layman Intergovernmental Relations (2003) 8

[29] Section 155(6)(a) of the Constitution instructs each provincial government, by legislative or other means, to provide for monitoring and support of local government in the province.

[30] Section 155(7) confers authority, legislative and executive authority, subject to section 44 of the Constitution, to see to the effective performance by municipalities of their functions in respect matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

[31] De Visser Developmental local government: a case-study of South Africa: book reviews- SA Publications (2005) 170.

[32] Mathenjwa M Contemporary Trends in Provincial Government supervision of Local Government in South Africa Law Democracy & Development Volume 18 (2014) http://dx.dol.org/10.4314/ldd.v1811.9 181 (hereafter Mathenjwa Contemporary Trends 2014).

Having noted that, notwithstanding its autonomy, a provincial sphere of government is supervised by the national sphere, as argued by Layman and supported by Mathenjwa and de Visser, it becomes necessary to explain the concept of "supervision" in the context of government supervision provided for in the Constitution. Prior to the Second Amendment of the Constitution, the word 'supervision' was , as the court put it, used along with the word 'intervention' to designate the power of one level of government to intrude on the functional terrain of another.[33] Noting the somewhat blurred distinction between the terms "supervision" and "intervention", as it was the case then, the word "supervision" was closely examined with reference to academic writers. In this regard de Visser argues that supervision is much broader than intervention as it encompasses more elements, such as regulation, evaluation, intervention and redistribution.[34]

While supporting de Visser's argument on the concept "supervision" Mathenjwa, identifies only three elements of thereof, viz. monitoring, intervention, and support, thus infusing some of the elements identified by De Visser into only three elements.[35] Stytler and de Visser agree with Mathenjwa as they contend that three concepts that form the integral part of "supervision" are monitoring, support, and intervention.[36] What seems quite evident from the conception of "supervision" by the scholars, cited above, is that supervision is a broad concept which has its constituent elements one of which is "intervention". What comes out clearly is that all the above legal experts have identified "intervention" as a distinct element of supervision. Tying in the loose ends in respect of the notion of "supervision" , Stytler and de Visser provide a definition of "supervision" that encapsulating the three elements identified by the other academic writers alluded to above. In this regard Stytler and de Visser argue that, with respect to individual municipalities, supervision entails: the monitoring of their performance; support, if required, to exercise their

[33] First Certification judgment [370].
[34] De Visser J Developmental local government: A case study of South Africa (2005) Intersentia Antwerpen-Oxford 170.
[35] Mathenjwa M J The Supervision of local government: Application of the legal framework: submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa 77.
[36] Stytler and de Visser "Local Government" in Woolman and Bishop Constitutional Law of South Africa. 2nd Edition. January 2013: Revision Service 5. 22-113.

functions and powers; and entering the autonomous domain of municipalities through acts of intervention when there is failure in governance.[37]

The other element of "supervision" is "monitoring", which the Constitutional Court in the context of local government, defined as "the antecedent or underlying power from which the provincial power to support, promote and supervise Local Government emerges."[38] The Court, still on this point, further unpacked "monitoring" as meaning to "observe", "keep under review" and the like. Muleneh further unpacks the concept "monitoring" as a system of collection of information on a defined time basis to identify problems and corrections that are needed, and further argues that, though not specifically mentioned in the Constitution, monitoring power is implied by the intervention power stated under section 100 of the Constitution.[39] Evidently, the information gathered through observing and collection of data provide the basis for further supervision processes such as support or intervention.

While the definitions of the concept "supervision" provided by the legal scholars, as enunciated above, have been quite helpful in enhancing the understanding of the 2003 amendment of the Constitution in respect of sections 100 and 139 thereof, it is conspicuous that the research work of these legal experts focuses on provincial government supervision of local government. The angle taken by this research project focuses on national government supervision of provincial government and it is quite vital in strengthening governance in these two spheres of government.

Undoubtedly, as the title of the dissertation indicates, the theme thereof is intergovernmental supervision, which, according to Seedorf and Sebanda, is the vertical dimension of supervision, entailing a dispensation whereby upper spheres

[37] Steytler N and de Visser J "Local Government" in Woolman S et al Constitutional Law of South Africa. 2nd Edition. January 2013: Revision Service 22-123.
[38] First Certification judgment[371]
[39] Muleneh YA Supervisory of the Centre to the Region (2009) 22

supervise the lower spheres.[40] Mathenjwa highlights the rationale of intergovernmental supervision by stating that it is about ensuring that all spheres of government exercise their powers to accomplish good governance.[41] However government supervision is not confined to the vertical dimension, but there is also a horizontal dimension thereof. The latter dimension of government supervision, according to Seedorf and Sibanda, looks at the horizontal division of state power into the three branches of government, namely legislative, executive and the judiciary.[42] The division of powers among the three branches of government is generally known as the doctrine of separation of powers.

Diseko expand on Seedorf and Sibanda's notion of horizontal division of power by stating that separation of powers creates checks and balances, which are, safeguards that prevent any branch of government from acquiring sweeping powers in all functions of the state.[43] De Vos *et al* concur with Seedorf and Sibanda when they assert that the whole essence of the doctrine of separation of power is to ensure that governmental power is not concentrated in one institution or branch or office or person with the ultimate aim of preventing abuses thereof by the government itself or by one powerful individual, such as the president.[44] In this regard Rautenbach and Malherbe assert that the freedom of the citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of government authority into legislative, executive and judicial authority, and its exercise by different government bodies.[45]

[40] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-13.
[41] Mathenjwa MJ The pros and cons of Intergovernmental Supervision under the 1996 Constitution of South Africa 2016 URL: https://hdl.handle.net/10500/26362 (25 March 2021)
[42] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12- 13.
[43] Diseko MD The status and role of provincial governance in South African Constitutional dispensation 1996-2012 submitted in fulfilment of the requirements in respect of the Doctoral Degree Qualification Governance and Political Transformation in the Faculty of Humanities at the University of Free State January 2018
[44] De Vos P et al South African Constitutional Law in Context (2014) Oxford University Press 60.
[45] Rautenbach-Malherbe IM Constitutional law (6th ed.) (2012) Butterworths 59.

While Mdledle's contribution to the intergovernmental supervision takes a perspective that focuses on national and provincial government, the main theme thereof is on the role of the National Council of Provinces in reviewing national government intervention in provincial governments. Mdledle argues that while the purpose of the review power of intervention by the NCOP is to ensure that national government does not abuse the power of intervention in provinces, such a noble purpose cannot be realised if the NCOP does not have a process which provides for detailed steps and what kind of information the NCOP needs to assess in order to review the intervention.[46]

Articulating sentiments similar to those expressed by Mdledle on the possibility of abuse of powers ,conferred on the national sphere of government by the Constitution, to intervene in a provincial government, Mudhendzi warns that intervention is not always innocent as it may be motivated by either national or provincial politics.[47] Munzhedzi illustrates his point by arguing that this may include a situation when the provincial administration leadership does not support the national leadership. Mudhendzi goes on to say that, in cases like these, even when the intervention is legitimate, there may also be a suspicion that it is the result of political reasons.[48] Greffrath and van der Walt concur with Mudhendzi's view on the inherent danger of abuse of powers of intervention by upper spheres and argue that intervention is not always exclusively motivated by issues of service delivery and governance but there are also political factors indicative of state dysfunction such as factionalism whose aim is to influence the balance of power in a given municipality or within a party itself.[49]

[46] Mdledle TP Evaluating the role of the NCOP in reviewing national government interventions in provincial governments: a case study of the 2011 interventions in the Eastern Cape and Limpopo provinces: A research paper submitted in partial fulfilment of the requirements for an LLM in Law, State and Multi-level Government The University of Western Cape 16

[47] Munzhedzi PH "The National Government intervention in the Provincial Government: A Case of Limpopo Province in South Africa" September 2014 Article in Mediterranean Journal of Social Sciences 5(20) 3 (hereafter Mundhedzi The National Government intervention in the Provincial Government 2014).

[48] Mundhedzi The National Government intervention in the Provincial Government (2014) 3.

[49] Greffrath W and van der Walt G Section 139 intervention in South African local government, 1994-2015. New Centre, 75(July): 135-160 (2016) 158

The summary of the literature reviewed thus far identifies the "intervention element" of "supervision" as being the most intrusive form of supervision, therefore it is important that constitutional imperatives for the invocation of powers of intervention by the upper spheres in the lower spheres, must be met. It is for this reason the literature review process undertaken here also dealt with some case law pertinent to the concept of "intervention" as one of the elements of "supervision". Perhaps it is quite pertinent at this stage to point out that the Constitution confers powers on the national executive to intervene in a provincial government when the latter is unable or unwilling to fulfil its obligations in terms of the Constitution or legislation.[50] Section 139 of the Constitution is a sister clause to section 100 thereof which confers similar powers to a provincial government in circumstances where there is evidence of inability of unwillingness on the part of a municipality to discharge its obligations in terms of the Constitution or legislation. Some pertinent case law is being reviewed below.

In the *Mnquma Local Municipality V Premier of the Eastern Cape* case,[51] the court provided guidance on the issue of intervention when it stated that, in deciding on the lawfulness of the provincial government intervention in local government, the phrase "cannot or does not fulfil an executive obligation in terms of the Constitution or legislation" was explained as constituting a statutory precondition or jurisdictional fact, the existence of which is a necessary prerequisite for the exercise by the relevant executive authority of its statutory power to intervene.[52] While the requirements for intervention clarified by the court in the Mnquma case was in the context of provincial government intervention in a local government, which is not the focus of this study, the decision by the court is quite useful as it helps in the interpretation of the provisions of section 139 which is a sister provision of section 100 of the Constitution, the latter being applicable to national executive intervention

[50] Section 100 of the Constitution
[51] Mnquma Local Municipality and Another v Premier of the Eastern Cape (231/2009) [2009] ZAECBHC 14 (05 August 2009) (hereafter Mnquma local Municipality case).
[52] Mnquma local municipality case [43].

in provincial administration. Section 139 of the Constitution, according to the Court, is concerned with an omission or inaction by a municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not past failure. Thus intervention would not be appropriate where a past omission has already ceased".[53] This enunciation by the court, though with reference to section 139 of the Constitution, helps to clarify the provisions of section 100 of the Constitution, which is couched in similar terms. This research study seeks to establish whether the national government, where it invoked the provisions of section 100 of the Constitution to intervene in provinces, complied with the principle of legality with reference to both substantive and procedural requirements.

Section 139 empowers the provincial government to "intervene by taking any appropriate steps to ensure fulfilment of that obligation".[54] In the Second Certification Judgment,[55] the Constitutional Court clarified this formulation with reference to section 100 of the Constitution by stating that "appropriate steps" in section 100(1) must be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power between different levels of government".[56] The clarity provided by the Constitutional Court in respect of this formulation helps to set the parameters within which the national executive may exercise the powers conferred upon it by section 100 of the Constitution clearly. In other words, the phrase "taking any appropriate steps" does not bestow unfettered discretion on the national government to be exercised upon a provincial government when intervening in a province. In the Mnquma case, the court made reference to *the Pharmaceutical Society of South Africa v Tshabalala* where it was stated that "In determining what is appropriate, one must consider the conflicting interest of all those involved and affected" and that "one is dealing with a balancing act implicit in the right of access"[57]. The court, therefore, concluded that, "taking appropriate

[53] Mnquma Local Municipality case [148].
[54] Section 139 of the Constitution.
[55] Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996) (hereafter the Second Certification of the Constitution).
[56] Second Certification of the Constitution [124].
[57] Mnquma Local Municipality case [72].

steps" requires a balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government". It is evident that intervention by one sphere in another sphere of government is meant to enable or support the relevant sphere of government to acquire the necessary capacity to discharge its obligations in terms of the Constitution or legislation. This is the whole essence of co-operative government. In this regard, Edwards makes a point that co-operative government requires the three spheres to function as a whole, collaborating rather than competing.[58] In the process of a critical analysis in line with the focus of this research, an effort will be made to establish whether, in exercising its power to "take any appropriate steps", the national government acted in a manner that respects the integrity of the provincial government in line with the constitutional requirement of effective government.

In the *Premier of the Western Cape V President of the Republic of South Africa,*[59] it was stated that the national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution.[60] This was in reference to the provisions of section 100 of the Constitution which pertain to national government's supervision of provinces. Further, in the First Certification judgment[61], the Constitutional Court made a finding that the Constitutional Principles (CPs) contemplated that the national government would have powers that transcend provincial boundaries and competences, and that "legitimate provincial autonomy does not mean that the provinces can ignore constitutional framework and demand to be insulated from the exercise of such power."[62] This finding by the highest court in the Republic of South Africa places the

[58] Edwards, T: "Co-operative governance in South Africa with specific reference to the challenges of intergovernmental relations". School of Government. Central University of Technology (2008) 68 UNISA Press Pretoria.

[59] Premier, Western Cape V President of the Republic of South Africa and Another (CCT26/98) [1999] ZACC 2; 1999(3) SA 657; 1994(4) BCLR 383 (29 March 1999).

[60] Premier of the Western Cape case [59].

[61] In re: Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) (hereafter the First Certification judgment).

[62] First Certification Judgment.

issue of the supervisory powers of national government over provinces beyond any doubt. What is now at issue is whether the national government, when exercising these constitutionally-entrenched powers, acted in a manner that is constitutionally valid.

Section 100(2) sets out the procedural requirements which the national executive must satisfy if it intervenes in the province in terms of section 100 (1) (b). These requirements are that:

(a) It must submit a written notice of intervention to the National Council of Provinces within 14 days after the intervention began;
(b) The intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
(c) The Council must, while the intervention continues, view the intervention regularly and may make any appropriate recommendations to the national executive.[63]

4. Objective of the study

The objective of this study is to determine the instances when national government intervention in a provincial government may be legally valid and to assess the factors that determine whether the outcome of national government intervention in a provincial government is achieved.

[63] Section 100(2) of the Constitution.

5. Methodology

This study will rely primarily on the qualitative method of research. It will examine the Constitution, legislation, case law and case study of practical intervention by national government in selected provincial departments in different provinces. The scope of the research will apply mainly in South African law, although international law will also be considered.

6. Chapter synopsis

Chapter 1: Introduction

This is an introduction to the study. It will comprise background, problem statement, objectives, methodology and chapters layout.

Chapter 2: The notion of government supervision under the 1996 Constitution.

The focus of this chapter will essentially be three-fold: namely, Inter-branch monitoring of government by tracing its origins from the doctrine of separation of powers; the supervision of organs of state by Parliament; and the national Legislature's intervention in a provincial legislature.

Chapter 3: The structure of government in the Republic.

This chapter will focus on a discussion of sections 40 and 41 of the Constitution, case law and other academic writings in defining the structure of government created by the 1996 Constitution.

Chapter 4: Legal framework for the supervision of provincial government.

This chapter discusses the relevant provisions of the Constitution that regulate national government supervision of provincial government.

Chapter 5: Case study on the supervision of provincial government.

The focus of this chapter will be a discussion on case studies on a practical national government supervision of specific provincial government departments.

Chapter 6: Conclusion

This chapter summarises the salient points of the study and draws conclusions about the findings. Recommendations will also be made.

Chapter 2

THE NOTION OF GOVERNMENT SUPERVISION UNDER THE 1996 CONSTITUTION OF SOUTH AFRICA.

1. Introduction

It was stated in chapter 1 that the Republic of South Africa is one indivisible state,[64] the government of which is made up of three autonomous spheres, local, provincial and national, which are mutually dependent and interrelated.[65] It became evident that the structural architecture of the government of the Republic, ushered in by the Constitution, is predicated on the principle that the national sphere of government supervises the provincial sphere, whilst a provincial sphere, in turn, supervises the local government sphere,[66] and, furthermore, in specifically circumscribed circumstances, the national sphere is given powers to supervise the local sphere of government.[67] It is, therefore, necessary to explain the concept of "supervision" in the context of government supervision as provided for in the Constitution.

As mentioned above, defining the concept "supervision" in the context of the Constitution, requires that reference be made to the Second Amendment of the Constitution. In terms of this amendment, the heading of section 100 of the Constitution was amended by the substitution of the heading national supervision of provincial administration by the heading "national intervention in provincial administration."[68] A similar amendment was effected whereby the heading "provincial supervision of local government" in section 139 of the Constitution was

[64] Section 1 of the Constitution.
[65] Section 40 of the Constitution.
[66] Section 155(6)(a) of the Constitution instructs each provincial government, by legislative or other means, to provide for monitoring and support of local government in the province.
[67] Section 155(7) confers authority, legislative and executive authority, subject to section 44 of the Constitution, to see to the effective performance by municipalities of their functions in respect matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).
[68] GN 516 GG 247 44 of 1 April 2003 (hereafter the Second Amendment of the Constitution).

substituted by "provincial intervention in local government."[69] Prior to this amendment, the word 'supervision' was , as the court put it, used along with the word 'intervention' to designate the power of one level of government to intrude on the functional terrain of another.[70] The question that arises at this stage is whether the substitution of the word supervision with intervention has any significance in respect of the meaning of sections 100 and 139 of the Constitution. The answer to this question lies in the meaning of the word supervision. According to de Visser, supervision is much broader than intervention as it encompasses more elements, such as regulation, evaluation, intervention and redistribution.[71] Mathenjwa, while concurring with De Visser, identifies the following elements of the concept of supervision, viz. monitoring, intervention, and support, and infuses some of the elements identified by De Visser into those three, referred to above.[72] According to Stytler and de Visser, the three concepts that form the integral part of supervision are monitoring, support, and intervention, thus concurring with Mathenjwa.[73] Whilst the constituent elements of supervision referred to by the authors mentioned above deal with intergovernmental supervision, the concept government supervision is broader under the Constitution of South Africa.

Though the main theme in this study is on intergovernmental supervision of the executive action of provincial government by the national executive, the notion of governmental supervision in the new constitutional dispensation is broader and not confined to intergovernmental supervision. The view that section 100 of the Constitution provides for the national executive supervision of the provincial executive is supported by the wording of section 100 (1) of the Constitution which permits the national executive to intervene in a province when the province fails to

[69] Section 4 of the Second Amendment of the Constitution.
[70] First Certification judgment [370].
[71] De Visser J Developmental local government: A case study of South Africa (2005) Intersentia Antwerpen-Oxford 170.
[72] Mathenjwa M J The Supervision of local government: Application of the legal framework: submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa 77.
[73] Stytler and de Visser "Local Government" in Woolman and Bishop Constitutional Law of South Africa. 2nd Edition. January 2013: Revision Service 5. 22-113.

fulfil an executive obligation.[74] National executive refers to the President of the Republic and his/ her Cabinet,[75] and executive action of the province is exercised by the Premier of a province together with a Provincial Executive Council.[76] So that the critical features and the rationale of government supervision can be understood, this chapter explains the notion of government supervision in its broader sense.

What has been dealt with thus far, in relation to the concept of "government supervision", is an examination of the concept of "supervision" from the dimension of the vertical separation of powers in a state between local, provincial and national spheres of government.[77] The vertical separation of powers entails a dispensation whereby upper spheres supervise the lower spheres.[78] However, for a better understanding of the concept of government supervision in its broader sense, this chapter describes, in much more detail, the monitoring of branches of government by one another, monitoring of all organs of state by Parliament and intervention in the provincial legislature by the national legislature. This it does by tracing the origin of the concept of inter-monitoring of branches of government from the constitutional doctrine of the separation of powers; describing the features of the Constitution on the monitoring of branches of government by one another; and looking at the monitoring of the organs of state by Parliament and provincial legislatures. This dimension of government supervision looks at the horizontal division of state power into the three branches of government, namely legislative, executive and the judiciary.[79] Inter-monitoring of branches is discussed next.

[74] See section 100 (1) of the Constitution of the Republic of South Africa, 1996 provides that when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking appropriate steps to ensure fulfilment of obligation.

[75] Section 85 (1) – (2) of the Constitution provides that the President of the Republic exercises executive action of the Republic together with the Cabinet.

[76] Section 125 (1) – (2) of the Constitution provides that the executive authority of a province is vested in the Premier of that province who exercises it together with the other members of the Executive Council.

[77] Seedorf S and Sibanda S "Separation of Powers" in Constitutional Law of South Africa 2nd Edition 2013 Juta and Co. 12- 13 (hereafter Seedorf and Sibanda Separation of Powers in Constitutional Law of South Africa (2013).

[78] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-13.

[79] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12- 13.

2. Inter-monitoring of branches of government

Inter-monitoring of branches is a constitutional mechanism to restrict the exercise of public power. There are substantive and procedural mechanisms of effecting such restrictions.[80] The substantive restriction of public power can be done through constitutional provisions that, among other things, entrench the rule of law, the supremacy of the Constitution and the Bill of Rights, so that people can be protected against the abuse of state authority.[81] The procedural mechanism of imposing restrictions on the abuse of public power is the doctrine of separation of powers.

2.1. The doctrine of separation of powers

The doctrine of separation of powers is a constitutional mechanism to restrict the exercise of public power in order to prevent the accumulation of pubic power in the hands of one institution and the abuse of public power.[82] De Vos *et al* concur with Seedorf and Sibanda when they assert that the separation of powers is meant to ensure that governmental power is not concentrated in one institution or branch or office or person with the ultimate aim of preventing abuses thereof by the government itself or by one powerful individual, such as the president.[83] They go on to say that this is a mechanism which is predicated on the notion that a more predictable and transparent way of distributing government power to different branches thereof is a much more effective way of preventing tyranny than solely relying on the goodwill of the rulers.[84] The doctrine of the separation of powers is anchored on the belief that good governance is more likely when political power is distributed between different institutions and persons. The comprehensive definition of this doctrine, which encapsulates the key elements already mentioned by De Vos *et al* and Seedorf and Sibanda, is offered by Rautenbach and Malherbe who assert that the freedom of the citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of government authority

[80] De Vos P et.al. South African Constitutional Law in Context (2014) Oxford University Press 60.
[81] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-1.
[82]Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-9.
[83] De Vos P et al South African Constitutional Law in Context (2014) Oxford University Press 60.
[84] De Vos P et al South African Constitutional Law in Context (2014) Oxford University Press 60.

into legislative, executive and judicial authority, and its exercise by different government bodies.[85]

The doctrine of the separation of power is understood to have emerged in the political philosophy of Enlightenment in the 17th century Europe.[86] Among the prominent names associated with the origins of the notion of separation of powers is John Locke from England and Charles, Baron de Montesquieu, from France. John Locke's main pre-occupation was to prevent the replacement of absolute monarchic power by absolute parliamentary power in England.[87] His writings, therefore, focussed on ways of countering the power accumulating tendencies of those in power and the concomitant abuse thereof. However, Locke's conception of separation of powers did not cater for separation between the executive and the judiciary.[88] Concurring with the preceding point on Locke's view on the separation of powers, Seedorf and Sibanda state that John Locke's conception of the doctrine of the separation of powers saw the judicial function as part of the executive, as it was for him part of the implementation of abstract legal rules.[89] The concept was further polished by Charles, Baron de Montesquieu, who brought about a further separation of powers between the Executive and the Judiciary, thereby bringing about a fully-fledged theory which is known as the *trias politica*.[90] The separation of power is a mechanism which is grounded on the notion that a more predictable and transparent way of distributing government power to different branches thereof is a much more effective way of preventing tyranny than relying solely on the goodwill of the rulers.[91]

Montesquieu viewed the doctrine of separation of powers as the division of powers across the three branches of government, namely the legislative branch, the executive branch, and the judiciary.[92] This is called the principle of the separation of

[85] Rautenbach-Malherbe IM Constitutional law (6th ed.) (2012) Butterworths 59.
[86] De Vos P et al South African Constitutional Law in Context (2014) Oxford University Press 62.
[87] De Vos P et al South African Constitutional Law in Context (2014) 62.
[88] De Vos P et al South African Constitutional Law in Context (2014) 62.
[89] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-5.
[90] De Vos P et al South African Constitutional Law in Context (2014) 62.
[91] De Vos P et al South African Constitutional Law in Context (2014) 60.
[92] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-6.

powers. Seedorf and Sibanda concur with this view of the separation of powers when they say it is also called the separation of public institutions,[93] which is distinct from the other three elements of the doctrine of separation of powers. What stands out clearly from the first element of this doctrine is that governmental power must be distributed among the three branches or public institutions with the rationale of this seeking to avoid the over-concentration of power in one person or institution of government, as such a political dispensation may render citizens vulnerable to the arbitrary use of power by the most powerful.

The second element of the doctrine of separation of power relates to the separation of personnel. The principle of the separation of personnel is anchored on the notion that each branch must have specific personnel assigned, often exclusively, to discharge the branch's mandate.[94] The categories of personnel in the three branches comprise the following: Members of Parliament constitute the main category of personnel of the legislative branch of government[95]; the executive branch consists of the President, Deputy President and Ministers[96]; finally, the personnel of the judicial branch of government consist of judges and magistrates.[97]

The third element to be outlined is the separation of functions. The separation of functions is premised on the notion of the conferral of distinct areas of responsibility and authority on each of the three branches and preventing one branch from usurping powers and functions of others.[98] The three elements of the doctrine of separation of powers described thus far, namely the separation of powers, the separation of personnel and the separation of functions are what Seedorf and Sibanda collectively refer to as the pure form of the doctrine of separation of

[93] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-2.
[94] De Vos P et al South African Constitutional Law in Context (2014) 61.
[95] De Vos P et al South African Constitutional Law in Context (2014) 61.
[96] Section 91 of the Constitution.
[97] Section 174 of the Constitution provides for the appointment of judicial officers which include judges at different levels of seniority and it further stipulates that other judicial officers are appointed in terms of the Act of Parliament, which in this case is the Magistrates' Courts' Act 32 of 1944 and these include magistrates.
[98] De Vos P et al South African Constitutional Law in Context (2014) 61.

powers.[99] The defining quality of this form of the doctrine of separation of powers is that it excludes influence or interference by one branch into the affairs of another. The concomitant drawback of this is that it falls short of a mechanism to resolve a problem where one branch extends its sphere of influence by unduly encroaching on the functional autonomy of other branches. This glaring drawback was addressed through the coming into being of the fourth element of the doctrine of separation of powers which is known as the checks and balances.[100]

This element complements the other three principles by allowing each branch to exercise a certain degree of control over the others. It, for example, vests in the executive the right to participate in the appointment and dismissal of members of the judiciary, whilst at the same time it confers authority on the legislature to impeach the executive, and, finally, it vests power in the judiciary to declare acts of both the executive and the legislature unconstitutional and void.[101] This seems quite intrusive as it entails one branch blocking another from executing actions which it believes are within the scope of its constitutional mandate.

The doctrine of separation of powers, as elucidated upon above in terms of its four elements, is not specifically mentioned in the Constitution of South Africa, but it does find expression in the architecture of the Constitution. The principle of the separation of functions, for example, is manifested in the Constitution where the function of the legislature universally is to pass law.[102] The executive authority in the Republic of South Africa is vested in the President.[103] The judicial authority in South Africa is vested in courts.[104] Furthermore, in the South African context, there is an evident overlap of personnel between the executive and legislative branches of government in that the Deputy President and the other Ministers, apart from two whom the

[99] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-10.
[100] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-9.
[101] Seedorf and Sibanda "Separation of Powers" in Constitutional Law of South Africa (2013) 12-11.
[102] Sections 44(1) of the Constitution.
[103] Section 85(2) of the Constitution.
[104] De Vos P et al South African Constitutional Law in Context (2014) 61.

President may appoint from outside the National Assembly, are also members of Parliament.[105] The Constitutional Court pronounced on the issue of the separation of personnel among the branches in its response to some objection raised during the processes leading to the certification of the final Constitution. The objection was mainly about the issue of the dual membership of Members of Cabinet, other than the President, who were also Members of Parliament, thus, in the objector's view, offending the principle of separation of powers.[106] The argument advanced in support of this contention was that such an arrangement was not in accord with how the doctrine of separation of powers was being practised in the constitutional jurisdictions of United States, Netherlands, France and Germany. In response to this objection, the Constitutional Court stated that there is no universal separation of powers, neither is there is a separation of power which is absolute.[107] The Court further pointed out that the German model of separation of powers does not have such the requirement that Cabinet Members must not be Members of Parliament. The Constitution instructs the President to select the Deputy President from among members of the National Assembly.[108] The Constitution gives further powers to the President to appoint any number of Ministers from among the members of the National Assembly and also to appoint a maximum of two Ministers from outside the Assembly.[109] This arrangement forms part of the South African model of the separation of powers which is enshrined in the Constitution. The subject of the separation of powers has been, and continues to be, the subject matter of court challenges.

Among the first court challenges on the subject of separation of powers arose from the dispute between the Executive Council of Western Cape and the national government relating to the validity of the amendment of the Local Government Transition Act.[110] The President had effected these amendments by proclamation

[105] Section 91 of the Constitution.
[106] Certification of the Constitution of the Constitution of the Republic of South Africa, 1996 (CCT 23/96 [1996] ZACC 26; 1996(4) SA 744(CC); 1996(10) BCLR 1253 (CC) (6 September 1996) (hereafter First Certification Judgment [107].
[107] First Certification Judgement [108].
[108] Section 91(3) (a) of the Constitution.
[109] Section 91(3) (b) (c) of the Constitution.
[110] Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) (hereafter Executive of Western Cape v President).

purporting to act in terms of the powers vested in him under the Local Government Act. The applicants based their challenge mainly on the fact that the Proclamations were unconstitutional because they encroached on the functional or institutional integrity of the Western Cape Province. When considering this matter, the court acknowledged the power vested in the Parliament by the Constitution and stated that there is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies.[111] However, the court went on in its reasoning and drew a distinction between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including the power to amend the Act under which the assignment is made, as section 16 A of the transition act did.[112] Notwithstanding differences in reason, the members of the Court were in full agreement in their conclusion that, owing to their inconsistency with the Constitution, the provision of section 16 A of the Local Government Transition Act was invalid.[113] What emerges clearly from this judgment is that the legislative branch of government cannot abdicate its plenary powers to amend laws in favour of the executive branch of government, and neither can the executive branch usurp such powers. This is in line with the principles of the division of powers and the separation of functions. The principle of the separation of personnel is discussed next.

The discussion below places each of the three branches of the government of the Republic of South Africa at the centre and indicates how each of the branches checks the others so that they do not abuse their powers in the process of discharging their mandate. Discussed below is the principle of checks and balances which is the crux of inter-branch monitoring.

[111] Executive of Western Cape v President [51].
[112] Executive of Western Cape v President [51].
[113] Executive of Western Cape v President [101].

2.2. Monitoring of the judiciary by the legislative and the executive branches of government

The Constitution positions the National Legislature such that both the National Assembly and the National Council of Provinces, which are Houses of Parliament, have members who sit in the Judicial Services Commission which is a body that presides over processes which culminate in the list from which the President appoints judges.[114] The Legislative branch of government, thus, checks the judiciary by participating in processes that finally result in the appointment of judges by the President. The Constitution also makes provision for circumstances under which a judge may be removed.[115] The Judicial Services Commission must first make a finding of incapacity, gross incompetence and gross misconduct. It has already been mentioned that the Judicial Services Commission has a combined total of ten Members of Parliament serving in it. The next step in the process is that the National Assembly's call to remove the judge must have a two thirds majority supporting vote.[116] If such a majority is satisfied by the National Assembly, the President must dismiss the judge.[117] It is evident that the legislature checks the judiciary by participating in the appointment and dismissal of judges, as has been explained above. The next branch of government which monitors the Judiciary is the National Executive, the specific role of which is unpacked below.

The National Executive/Cabinet checks the Judiciary in terms of the Constitution as the Constitution provides that a Cabinet Member responsible for the administration of Justice or the delegate of the Cabinet member concerned is one of the members of the Judicial Services Commission, which, as explained above, is responsible for the appointment of judges.[118] The Executive branch of government thus checks the Judiciary through the participation of such a Cabinet Member in the appointment of judicial officers. However, the Constitution vests the final authority to appoint judicial

[114] Section 178(1) (h) (i) of the Constitution makes provision for six members of the National Assembly and 4 permanent delegates of the National Council of Provinces to serve in the Judicial Services Commission.
[115] Section 177 of the Constitution.
[116] Section 177(1) (b) of the Constitution.
[117] Section 177(2) of the Constitution.
[118] Section 178(1) (d) of the Constitution.

officers in the President as the head of the National Executive.[119] Effectively, this means that the senior members of the judiciary, namely the judges, are appointed by the President. The President appoints the Chief Justice and Deputy Chief Justice after consulting the Judicial Services Commission and leaders of parties represented in the National Assembly.[120] The Constitution further stipulates that the President appoints the President and Deputy President of the Supreme Court of Appeal after consulting the Judicial Services Commission.[121] The other judges of the Constitutional Court are also appointed by the President after consulting the Judicial Services Commission and leaders of the parties represented in the National Assembly.[122] The Executive branch of government, therefore, checks the Judiciary through the exercise by the President as head of the National Executive of the powers vested in him by the Constitution to appoint judicial officers. It is the President on whom the Constitution confers power to dismiss the judge upon the adoption of a resolution of the National Assembly calling for a judge to be removed.[123] This is another way in which the National Executive checks the judiciary. In a nutshell, the Executive participates in appointing and dismissing judicial officers.

2.3. Monitoring of the legislative branch of government by the judiciary and Executive

The Judiciary checks the legislative branch of government by invoking its powers of judicial review.[124] The Constitution vests judicial review powers in the Judiciary and these powers entail, among others things, that the Supreme Court of Appeal, the High Court or a court of similar status may declare any Act of Parliament or a provincial Act invalid, subject to confirmation of such an order by the Constitutional Court.[125] By checking the legislature in this manner, effect is given to the clause of the Constitution which proclaims it as the supreme law of the Republic, and so a law

[119] Section 174 of the Constitution.
[120] Section 174(3) of the Constitution.
[121] Section 174(3) of the Constitution.
[122] Section 174(4) of the Constitution.
[123] Section 177(3) of the Constitution.
[124] Section 172 of the Constitution vests in superior courts powers to declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of its inconsistency.
[125] Section 172(2) of the Constitution.

or conduct inconsistent with the Constitution is invalid.[126] Judicial review is, therefore, the mechanism by which the Judiciary checks the Legislature.

While it needs to be acknowledged that the Constitution confers legislative authority of the national sphere of government on Parliament,[127] the Executive is required to carry out functions such as implementing national legislation, developing and implementing national policy, and preparing and initiating legislation.[128] It is the President who is responsible for assenting to and signing Bills passed by the national legislature.[129] The President does not just rubber-stamp Bills as the Constitution empowers him to refer a Bill back to the National Assembly for reconsideration of such a Bill's constitutionality if necessary.[130] Furthermore, the President is mandated by the Constitution to refer a Bill to the Constitutional Court for a decision on the Bill's constitutionality.[131] There is, thus, evidence that the executive branch does keep the legislative branch in check so that the latter does not abuse its legislative power.

2.4. Monitoring of executive branch by the judiciary and the legislature.

The Judiciary checks the national executive through its powers of judicial review as provided for in the Constitution in terms of which the Supreme Court of Appeal, High Court or courts of similar status may review any conduct of the President.[132] However, such powers of Superior Courts are subject to concurrence by the Constitutional Court, otherwise the declaration of constitutional invalidity by superior courts other than the Constitutional Court has no legal force. What is evident is that any conduct by any member of the executive branch which is inconsistent with the

[126] Section 2 of the Constitution.
[127] Section 43(a) of the Constitution.
[128] Section 85(2) of the Constitution.
[129] Section 84(2) (a) of the Constitution.
[130] Section 84(2) (b) of the Constitution.
[131] Section 84(2) (c) of the Constitution.
[132] Section 172(2) (a) of the Constitution.

Constitution can be declared invalid. The role of the National Legislature/Parliament in checking the executive branch is discussed next.

The Constitution vests powers in Parliament to oversee the executive. These powers include, but are not limited to, the following: scrutinising and overseeing executive action[133]; providing for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation[134]; overseeing all organs of state; summoning any person to give evidence before the National Assembly[135]; and holding members of the Cabinet individually and collectively accountable to Parliament.[136] Some of these provisions confer oversight authority on Parliament as a whole while others vest them either in the National Assembly or the National Council of provinces. There are also those constitutional provisions that go as far as conferring oversight authority on provincial legislatures.[137] However, the discussion below focuses on the monitoring of the executive branch of government by Parliament.

The Constitution states that Members of the Cabinet are collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions.[138] The Constitution further demands that Members of Cabinet act in accordance with the provisions the Constitution and provide Parliament with full and regular reports concerning matters under their control.[139] Evidently these constitutional provisions pronounce Parliament as the forum of accountability to which Members of Cabinet give an account, as a collective or individuals, of how they are executing national mandates assigned to them in terms of the

[133] Section 42(3) of the Constitution.
[134] Section 55(2) of the Constitution.
[135] Section 56 of the Constitution.
[136] Section 92(2) of the Constitution.
[137] Section 114(2) (a) (b) instructs a provincial legislature to put oversight mechanisms in place to hold provincial executive organs of state accountable to it and maintain oversight over the provincial executive authority and any provincial organ of state.
[138] Section 92(2) of the Constitution.
[139] Section 92(3) of the Constitution.

Constitution.[140] In view of the fact that the oversight mandate of Parliament is executed through its two houses, the focus of this discourse now proceeds to those distinctive provisions of the Constitution which vest the authority of monitoring the National Executive in the National Assembly and the National Council of Provinces, respectively. The oversight powers vested in each of the two houses of Parliament are dealt with separately for the purpose of showing how the two houses of Parliament, as Montesquieu put it, arrest the power of the executive.

The Constitution defines the core mandate of the National Assembly as representing the people and ensuring government by the people, by, amongst other things, scrutinising and overseeing executive action.[141] This is the oversight mandate which the Constitution specifically bestows upon the National Assembly, meaning that scrutinising and overseeing the executive action is the mandate of the National Legislature. The practical implication of these powers is that the Constitution confers jurisdiction on the National Assembly to oversee or monitor the President, Deputy President and other Members of Cabinet who are Ministers in charge of each of the government departments. Having had authority to oversee the Executive of government bestowed upon it, a further oversight obligation is imposed on the National Assembly in terms of which it is required by the Constitution to provide for mechanisms to hold all executive organs of state at the national sphere of government accountable to it.[142] This constitutional obligation also requires the National Assembly to provide mechanisms to maintain oversight of the exercise of the National Executive authority, which includes the implementation of national legislation.

The Constitution vests power in the National Assembly or any of its committees to summon any person to provide evidence or information before it on oath or affirmation, or to produce documents.[143] These powers also mandate the National

[140] Parliament of South Africa 'Oversight and Accountability Model' 2.2.
[141] Section 42(3) of the Constitution.
[142] Section 55(2) (a) of the Constitution.
[143] Section 56 of the Constitution.

Assembly or any of its committees to require a person or institution to report to it, and they further entitle it to enforce compliance with its summons through national legislation or the rules and orders.[144] The Constitution further confers authority on the National Assembly to remove the sitting President from office by passing a resolution with a two-thirds supporting vote of its members.[145] This is, by any definition, wide-ranging oversight powers of the National Assembly. However, the Constitution does stipulate the conditions under which the National Assembly may invoke such powers, and these are circumstances where the President has committed the following violations: serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of the office.[146] The Constitution imposes a further sanction on anyone who has been removed from the Office of the President owing to a serious violation of the Constitution or law, or serious misconduct, by stipulating that such a person forfeits any benefits of that office and is barred from serving in any public office.[147] The National Assembly may, by a vote supported by majority of its members, pass a vote of no confidence in the Cabinet, excluding the President, and in such circumstances the President must reconstitute the Cabinet.[148] However, if the National Assembly, by a vote supported by the majority of its members, passes a motion of no confidence against the President, the President and the members of the Cabinet and Deputy Ministers must resign.[149] The National Assembly wields very strong oversight powers which, if used appropriately and decisively, can enhance the accountability of the national executive and thereby strengthen good governance.

The powers of the National Assembly to oversee the National Executive and the obligation imposed on it by the Constitution to establish mechanisms for discharging this mandate has been, and continues to be, the subject of debate. This debate centres on the extent to which the National Assembly is succeeding in ensuring that such mechanisms are not only in place but are also functioning in line with the

[144] Section 56 (b) and (c) of the Constitution.
[145] Section 89 of the Constitution.
[146] Section 89(1) of the Constitution.
[147] Section 89(2) of the Constitution.
[148] Section 102(1) of the Constitution.
[149] Section 100(2) of the Constitution.

reason for their existence. Contestations around these matters do not only find expression in the arena of the National Assembly but have also been the subject matter of court cases. Among the example of cases is the one when the Economic Freedom Fighters instituted a Constitutional Court challenge against the Speaker of the National Assembly, in her representative capacity, for the failure of the National Assembly to hold former President Zuma accountable for his failure to comply with Public Protector's findings and remedial action.[150] The background to this case is that the Public Protector, as part of her constitutional mandate, had conducted an investigation into allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla residence of the President of the Republic.[151] The findings of the Public Protector were that the President had failed to act in line with certain of his constitutional and ethical duties in that he knowingly derived undue benefits from the irregular deployment of state resources. The remedial action directed by the Public Protector was that the President, duly assisted by certain functionaries, should work out and pay a portion fairly proportionate to the undue benefit that he had accrued to him and his family. The remedial action also entailed that the President should reprimand the Ministers involved in that project, for specified improprieties.[152] The Public Protector's report was submitted to both the President and the National Assembly. One year later neither the President nor the National Assembly had acted upon the report, but, instead, the National Assembly had instituted two *Ad Hoc* Committees to examine the Public Protector's report and the report compiled by the Minister of Police at the behest of the National Assembly.[153] The report of the *Ad Hoc* Committee and that of the Police Minister exculpated the President, and both of these reports were endorsed by the National Assembly.

It is on the bases outlined above that the Economic Freedom Fighters and the Democratic Alliance launched a Constitutional Court application seeking an order to

[150] Economic Freedom Fighters V Speaker of the National Assembly and Others; Democratic Alliance V the Speaker of the National Assembly and Others (CCT143/15; CCT 171/15) [2016] ZACC 11; 2016 (3) SA 580 (CC) (31 March 2016) (hereafter EFF1 Case).
[151] EFF1 Case [2].
[152] EFF 1 Case [3].
[153] EFF 1 Case [12].

affirm the legally-binding effect of the Public Protector's remedial action directing the President to comply with the Public Protector's remedial action and declaring that both the President and the National Assembly had acted in breach of their constitutional obligations.[154] The doctrine of the separation of powers came out quite strongly in this Constitutional Court judgment. Chief Justice Mogoeng observed that, incidentally, the President had mandated the Minister of Police to investigate and report on whether the President was liable for any contribution in respect of the security upgrades having had regard to legislation, past practices, culture and findings contained in the respective reports (evidently referring to the report that the Minister would produce as well as that of the Public Protector). [155] The National Assembly had also commissioned the Minister's report and this report exonerated the President by making a finding that the non-security features for which the Public Protector had found the President liable were, in fact, security features. So the President, according to the Minister's report which was endorsed by the National Assembly, was not liable. The Court judgment clarified that the President was at liberty to assign any Minister, including the Minister of Police, with the task of assisting him, in collaboration with National Treasury, to determine the *quantum* of the non-security features for which he was found liable by the Public Protector.[156] The judgment went on to say that, if the President was not satisfied with the Public Protector's finding, the Judiciary was the appropriate branch to apply the law in resolving disputes.[157] The President, relying on the report finding by the Minister of Police and subsequently endorsed by the National Assembly, neither paid for the non-security installations nor reprimanded the Ministers involved in the Nkandla project, resulting in a finding by the Court that the President had failed to uphold, defend and respect the Constitution as the supreme law of the land.[158]

Having made the finding against the President, the Court turned to the National Assembly. The position of the National Assembly as summarised by the Court was

[154] EFF 1 Case [13].
[155] EFF 1 Case [79].
[156] EFF 1 Case [80].
[157] EFF 1 Case [81].
[158] EFF 1 Case [83].

that, after receipt of the Public Protector's report, it had taken steps in terms of section 42(3) of the Constitution which enjoins it to scrutinise and oversee the executive action.[159] In this respect, the National Assembly had set up an *Ad Hoc* Committee to look into the Public Protector's report. The Court was in full agreement with this position, and this echoed the view of the National Assembly which stated that "a scrutiny implies a careful and thorough examination or a penetrating or searching reflection." The Court went further by referring to the doctrine of separation of powers by drawing a distinction between its scope of jurisdiction and that of the National Assembly. In this regard the Court pronounced that its scope of operation did not empower it to dictate to the National Assembly how to execute its constitutionally conferred oversight mandate over the executive.[160] The role of the courts is broadly to determine whether what the National Assembly does, in substance or reality, enables it to fulfil its constitutional obligation.[161]

While the Court had no issue with the appointing an *Ad Hoc* Committee by the National Assembly and requiring the Minister of Police to look into the Public Protector's report, it found it constitutionally impermissible that the reports produced by these two sets of investigations purported effectively to set aside the Public Protector's findings and remedial action.[162] The choice made by the National Assembly not to take the Public Protector's report on review, based on the reports generated by the investigations it had commissioned, but instead used such reports to exonerate the President amounted to a usurpation of the authority vested only in the judiciary.[163] The Court, therefore, found that the National Assembly's resolution based on the Minister's finding exonerating the President from liability was inconsistent with the Constitution and unlawful.[164]

[159] EFF1 Case [85].
[160] EFF1 Case [93].
[161] EFF1 Case [93].
[162] EFF 1 Case [94].
[163] EFF 1 Case [94].
[164] EFF 1 Case [99].

Another court challenge pertinent to the oversight mandate of the National Assembly was also instituted by the EFF against the Speaker of the National Assembly. The background to this Constitutional Court case challenge revolves around Parliamentary mechanisms for holding the President of the Republic accountable and the constitutional obligation of the National Assembly to hold him to account.[165] Whilst holding the President accountable is provided for in the Constitution, the Constitutional Court challenge, at issue here, was specific to the National Assembly holding the former President of the Republic, President Jacob Zuma, accountable for his failure to implement the Public Protector's remedial action contained in the Public Protector's report dated 19 March 2014.[166] In its Court papers the EFF stated that the National Assembly had a constitutional obligation to hold the President accountable for his failure to implement the Public Protector's report of 19 March 2014 and that it had failed to fulfil this obligation. Secondly, whilst the applicants later changed their argument in respect of the second basis of their case, the judge indicated that the applicants had also initially said that the National Assembly had a constitutional obligation to put in place mechanisms and processes for holding the President accountable with regard to his failure to implement the Public Protector's report, but it had also failed to fulfil this obligation. [167] The legal question which the Court had to answer was whether the National Assembly had failed to put in place mechanisms and processes to hold the President accountable for failing to implement the Public Protector's report.[168] In delivering the judgment, the Court made reference to quite a number of provisions on the oversight mandate of Parliament over the Executive and the circumstances in which the Judiciary may play a role of adjudicating disputes relating to such matters, whilst having regard to the doctrine of separation of powers. These provisions and the commentary on them by the Court are referred to below.

[165] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017) (hereafter EFF 2 Case) [1].
[166] EFF Case 2 [1].
[167] EFF Case 2 [2].
[168] EFF Case 2 [28].

With regard to the powers of the National Assembly to remove the President from office, as mentioned above, the Court explained that section 89 of the Constitution is couched in permissive terms, meaning that it uses the word “may” to suggest that the National Assembly has powers to remove the President from office. Further clarification was provided that, if the National Assembly were to pass a resolution with the two-thirds majority of the members of the National Assembly calling for the removal of the President from office, as provided for in section 89 of the Constitution, in the absence of any of the grounds listed under this section, the resolution would be inconsistent with the Constitution and invalid.[169] This means that such a resolution could be set aside on review by courts. Other aspects of interpretation of some of the oversight powers of Parliament over the Executive, which emerged during the Court case under discussion here, relate to sessions where members of the National Assembly ask members of the Executive, including the President, questions which they have to answer, and motions of no confidence under section 102 of the Constitution, referred to above.[170] With regard to the oversight mechanism of vote of no confidence, Chief Justice Mogoeng asserted that the motion of no confidence in the President, on its own, would have sufficed, even if it were the only oversight mechanism that could have been used to hold the President accountable for failing to implement the Public Protector’s report.

Expanding on the motion of no confidence in the President, as one of the oversight mechanisms at the disposal of the National Assembly, Deputy Chief Justice Zondo provided clarity in this respect. He argued that arriving at a conclusion as to whether or not the President had been held accountable through the motion of no confidence in the President is not contingent on the outcome of the vote by members of the National Assembly. Justice Zondo’s reasoning was that, succeeding in passing the motion of no confidence in the President is not the absolute determinant of whether this constitutional accountability mechanism has been invoked because, regardless of whether the motion succeeds or fails, the National Assembly will be said to have held the President accountable, as long as the motion has been tabled, debated

[169] EFF 2 Case [103].
[170] EFF2 Case [36].

and voted upon. This means that, while the outcome of the vote of the motion of no confidence in the President is important to both those who support it and those who oppose it, the test of whether the President has been held to account is on whether this constitutional mechanism has been employed by the National Assembly to hold the President accountable. Put succinctly, Deputy Justice Zondo stated that whether the National Assembly had held the President to account through a motion of no confidence in him or not cannot depend upon the result of the vote.[171] Applying this reasoning to the facts of the EFF2 case, he, therefore, concluded that, if his reasoning was correct, it then follows that the fact that motions of no confidence in the President were moved, deliberated and voted upon on 10 November 2016 and 8 August 2017 means that the National Assembly did hold the President to account through such motions. Having argued this way, Judge Zondo went further to say the fact that the motions of no confidence in the President were moved, deliberated and voted upon on 10 November 2016 and 8 August 2017 means that the National Assembly did hold the President to account through such motions. This then proved that the applicants' contention that the National Assembly did nothing to hold the President to account was not true.

The supervisory role of the National Council of Provinces, which, as stated above, is the other House of Parliament, is discussed next.

2.5. Monitoring of the executive branch by the National Council of Provinces

The Constitution vests powers, similar to those of the National Assembly, in the National Council of Provinces or any of its committees, to summon any person to appear before it to give evidence on oath or affirmation or to produce documents.[172] This section of the Constitution confers further powers which the NCOP may invoke to cause any person or institution to report to it, and this house of the National legislature may also compel a person or institution, through national legislation or

[171] EFF 2 Case [93].
[172] Section 69(a) of the Constitution.

the rules and orders, to comply with a summons it issues to any person or institution to appear before it.[173] It is now clear that both houses of parliament have powers to summon anyone or any institution to give evidence relevant to its oversight responsibilities. Evidently, the Constitution has provided a conducive environment for both the NCOP and the National Assembly to discharge their oversight mandates. The NCOP is further empowered to require a Cabinet member, a Deputy Minister, an official in the national executive or a provincial executive to attend a meeting of the NCOP or its committee.[174]

3. Monitoring of organs of state, other than the executive, by the national legislature

The oversight mandate of the National Assembly is not confined to the national executive, as the Constitution instructs this House of Parliament to provide for mechanisms to maintain oversight of any organ of state.[175] There are quite a number of organs of state, and it is neither possible nor desirable to enumerate all of them here, but key amongst them are the Chapter 9 institutions. Chapter 9 institutions comprise the Public Protector, Human Rights Commission, The Commission for the Protection and Promotion of the Rights of Cultural, Religious, and Linguistic Communities, the Commission for Gender Equality, the Auditor-general, and the Electoral Commission.[176] The National Assembly has an oversight mandate over these organs of state.

The Constitution imposes a duty on the National assembly to play a crucial role in the appointment of the Public Protector, the Auditor-General and members of other Chapter 9 institutions, by making recommendations for their appointment for approval by the President.[177] The recommendation of the National Assembly carries so much weight that section 193(4) of the Constitution obliges the President to

[173] Section 69(c) of the Constitution.
[174] Section 66(2) of the Constitution.
[175] Section 55(2) (b) of the Constitution.
[176] Section 181(1) of the Constitution.
[177] Section 193(4) of the Constitution.

appoint those recommended by it. As much as the Constitution confers powers on the National Assembly to recommend the appointment of the Public Protector, the Auditor-General and other members of the Chapter 9 institutions, as alluded to above, it also vests powers in the National Assembly powers to remove them from office on the grounds of misconduct, incompetence or incapacity.[178] The Constitution prescribes a special majority to be satisfied by the National Assembly when recommending the removal of the Public Protector or the Auditor-General, and this requires that such a supporting vote must be adopted by at least a two-thirds majority of the members of this house of Parliament.[179] However, with regard to the removal of other chairpersons of Chapter 9 institutions, a simple majority vote supporting such a resolution of the National Assembly is all that is required.[180] The weight attached to the recommendation of the National Assembly is so great that the President must remove a person from office upon the adoption of a resolution of the National Assembly calling for that person's removal.[181] It is quite evident from the constitutional provisions, cited above, that the oversight powers of the National Legislature over the organs of state, established in terms of Chapter 9 of the Constitution, puts the National Legislature in a very powerful position. This constitutional arrangement is wholly conducive to good governance. Having noted the monitoring powers conferred on the National Legislature in terms of the Constitution, as discussed above, the next focus of this scientific discourse is on the mechanisms provided for by the Constitution and/or legislation which are geared towards enabling Parliament to execute its oversight powers to enhance good governance.

4. Monitoring mechanisms of Parliament

It was mentioned earlier that the Constitution instructs the National Assembly and National Council of provinces to put mechanisms in place that will enable these two Houses of Parliament to hold all executive organs of state in the national sphere of

[178] Section 194(2) of the Constitution.
[179] Section 194(2) (a) of the Constitution.
[180] Section 194(2) (b) of the Constitution.
[181] Section 193(4) (b) of the Constitution.

government accountable to them. This oversight mandate vested in these two houses of Parliament also extends to other organs of state. In discharging their oversight mandate Parliament makes use of two broad oversight mechanisms, the first category being Parliamentary oversight committees. Parliamentary oversight committees include Portfolio Committees of the National Assembly[182] and the Select Committees of the National Council of Provinces[183]; Joint Committees; *Ad Hoc* Committees; the Joint Standing Committee; and Specialised Committees.[184] The second category of oversight mechanisms of Parliament comprises plenary oversight processes.[185] These two categories of oversight mechanisms of Parliament are closely looked at below.

4.1. Oversight Committees of Parliament

The committees of both Houses of Parliament are vital enablers of the legislative branch of government in discharging its oversight mandate. Committees of the National Assembly are vested with powers to perform their oversight function by the Rules of this House of Parliament,[186] while powers of committees of the National Council of Provinces are stipulated in its own rules.[187] The powers conferred in these oversight committees in terms of their respective rules are very similar in their content and formulation. Both Rule 103 of the National Council of Provinces and Rule 167 of the National Assembly vest powers in the respective committees of both Houses of Parliament to, amongst other things, summon any persons to appear before a committee to give evidence on oath or affirmation or to produce documents; receive petitions, representations or submissions from interested persons; conduct public hearings; and permit oral evidence, representations and submissions. It seems quite evident that the Rules find their origins in the provisions of the Constitution which empowers the National Assembly and the National Council of Provinces and their respective committees to, among other things, summon people

[182] Rule 225 of the Rules of the National Assembly.
[183] Rule 151 of the Rules of the National Council of Provinces.
[184] Parliament of South Africa 'Oversight and Accountability Model' 3.1.1.
[185] Parliament of South Africa 'Oversight and Accountability Model' 3.1.2
[186] Rule 167 of the Rules of the National Assembly provide for the general powers of a committee of the National Assembly.
[187] Rule 103(1) of the Rules of the National Council of Provinces.

to appear before them to give oral or documentary evidence and to receive petitions and submissions.[188] Committees are, thus, one category of oversight mechanisms at the disposal of both the National Assembly and National Council of Provinces geared towards enabling Parliament to execute its oversight mandate over organs of state. That having been said, each of the relevant committees of Parliament is dealt with below.

The Speaker of the National Assembly, with the Concurrence of the Rules Committee, establishes the Portfolio Committees that mirror the portfolios in government,[189] which means that each portfolio committee is established to oversee each of the government departments. The demands imposed by the Rules of the National Assembly on each portfolio committee entail the following: maintaining of oversight within its portfolio of national executive authority, including implementation of policy and legislation; exercising oversight of any executive organ of state falling within its portfolio; and overseeing any constitutional institution falling within its portfolio.[190] The mandate of a portfolio committee, as defined by the Rules of the National Assembly, is so encompassing that it does not only cover the government department it was established to oversee, but, as stated above, it also extends to any other organ of state and constitutional institution.

A portfolio committee may investigate, monitor, enquire into, and make recommendation to the National Assembly.[191]

Select committees are established in terms of the Rules of the National Council of Provinces to deal with legislation, oversight and other matters concerning the affairs of government.[192] The establishment of select committees mirrors the clusters in government, which means that the affairs of government may be clustered and

[188] Sections 56 and 69 of the Constitution.
[189] Parliament of South Africa 'Oversight and Accountability Model' 3.1.1.
[190] Rule 227(1) of the Rules of the National Assembly.
[191] Rule 127(1) (c) of the Rules of the National Assembly.
[192] Rule 151(1) of the Rules of the National Council of Provinces.

assigned to any select committee.[193] A distinction may, thus, be drawn between the establishment of a portfolio committee and a select committee as the former mirrors government portfolios whilst the latter mirrors a cluster of government departments. Select committees report directly to National Council of Provinces.[194]

The Rules of the National Assembly makes provision for the establishment of an *ad hoc* committee by resolution of that House of Parliament, or, alternatively, the Speaker may, during the adjournment of the Assembly for a period of more than 14 days, appoint an *ad hoc* committee, after consultation with the Chief Whip and the most of senior whip of each of the other parties represented in the Assembly.[195] The name of this committee speaks for itself; it is an *ad hoc* committee, meaning that it may be established for the performance of a specific task only. The Rules of the National Assembly demand that a resolution or a decision of the Speaker of the National Assembly on the basis of which an *ad hoc* committee was established must specify the task and the times for the completion of such task. Like all other oversight committees established in terms of the Rules of the National Assembly, but subject to the Constitution or legislation or other provisions of this House of Parliament, the *ad hoc* committee has powers to execute its mandate.[196] In the EFF 2 case referred to above it was stated that an *ad hoc* Committee is an accountability-enforcing mechanism created and available to be utilised by political parties represented in the National Assembly.[197] The Court further pointed out that this oversight mechanism had been used before successfully and cited an example where the Democratic Alliance had asked for the establishment of an *ad hoc* Committee in the President Al-Bashir-related impeachment process. In retracting the initial basis upon which its case was based, the Economic Freedom Fighters stated that it was not the applicants' case that there were not mechanisms available in the rules to hold the President to account. The rules are flexible enough to create a mechanism to hold the President accountable, including the establishment of an *ad hoc* committee for

[193] Rule 151(2) of the Rules of the National Council of Provinces.
[194] Parliament of South Africa 'Oversight and Accountability Model' 3.1.1.
[195] Rule 253(1) of the Rules of the National Assembly.
[196] Rule 167 of the Rules of the National Assembly.
[197] EFF 2 Case [243].

that purpose."[198] The last part of the EFF's retraction statement demonstrates the efficacy of *ad hoc* committee as an accountability and oversight mechanism available to the National Assembly. That said, the category of committee mechanisms discussed below are Specialised Committees.

Among the specialised oversight committees is the Standing Committee on Public Accounts established in terms of the Rules of the National Assembly.[199] The key mandate of this Committee is to consider the financial statements of all the executive organs of state, constitutional institutions or public bodies when those statements are submitted to Parliament and to consider audit reports issued in respect of the financial statements submitted to Parliament or reports issued by the Auditor-General.[200] The Committee may report to the National Assembly on any of those financial statements which it scrutinised and may initiate an investigation falling within its scope of mandate.

The term "organ of state" as defined by the Constitution, alluded to above, also includes the Auditor-General, thus conferring the oversight jurisdiction of this institution on the National Assembly. In this regard the Rules of the National Assembly, in line with section 10(3) of the Public Audit Act, provide for the Standing Committee on the Auditor-General.[201] The Public Audit Act instructs the National Assembly to provide for a mechanism to maintain oversight over the Auditor-General to give effect to section 55(2) (b) (ii) of the Constitution.[202] The mandate of this oversight committee, as its name indicates, is to maintain oversight over the Auditor-General and to perform the functions and exercise the other powers enshrined in the Public Audit Act.[203]

[198] EFF 2 Case [44].
[199] Rule 243 of the Rules of the National Assembly.
[200] Rule 245 of the Rules of the National Assembly.
[201] Rule 249 of the Rules of the National Assembly.
[202] Section 10(3) of the Public Audit Act 25 of 2004.
[203] Rule 251 of the Rules of the National Assembly.

It has been mentioned that the Constitution vests oversight of the executive and other organs of state in Parliament as a collective, or in each of its two houses (the National Assembly and the National Council of Provinces) as well as the respective committees of the respective Houses. Only one of the two broad Parliamentary oversight mechanisms, focussing on committees of Parliament, have been discussed thus far, and so the focus below is on the plenary oversight processes of Parliament.

4.2. The plenary oversight mechanisms of Parliament

The Rules of the National Assembly also provide for some plenary processes as another category of oversight mechanisms. This category of oversight mechanisms entails, among other things, the President's State of the Nation Address.[204] These Rules instruct the Speaker of the National Assembly to publish the President's State of the Nation Address in the Minutes of Proceedings and put it on the Order Paper of the National Assembly for discussion.[205]

The Plenary oversight mechanisms also provide a platform for a member of the National Assembly at which a motion of no confidence in the Cabinet or the President in terms of section 102 of the Constitution may be proposed.[206] The Speaker of the National Assembly, given such circumstances, is required to deal with this oversight process in terms of the applicable rules, law, and orders of the House. Arrangements are made by the Speaker to schedule, debate and vote on the motion of no confidence.[207] It is, thus, evident that the plenary mechanisms provide one category of enablers through which the National Assembly processes the provisions of the Constitution relating its oversight mandate.

[204] Rule 18 of the Rules of the National Assembly.
[205] Rules 19 and 20 of the National Assembly.
[206] Rule 129 of the Rules of the National Assembly.
[207] Rule 129(5) of the Rules of the National Assembly.

Another plenary oversight mechanism provided in terms of the Rules of the National Assembly is the notice and placing of questions to Members of Cabinet.[208] Questions in this regard may be addressed only to Members of Cabinet and they must fall within the scope of the official mandate for which the Cabinet Member is responsible.[209] There are, thus, questions directed to Ministers, the Deputy President and the President and they may require oral or written responses.

The discussion on the plenary and parliamentary committee oversight mechanisms is the last aspect of the national legislature's supervision of the national executive dealt with in this chapter. However, the concept of government supervision cannot be confined to the national sphere of government, and so the provincial legislature's monitoring of the provincial executive, as mandated by the Constitution, is looked at below. It is quite prudent to point out that, owing to the close similarities of the nature of the monitoring mandate of legislative organs of state over executive organs of state at national and provincial levels, repetition becomes inevitable. In order to balance the quest to provide a broader view of the concept of government supervision on one hand, and minimising repetition, on the other hand, the monitoring of a provincial executive by the provincial legislature is discussed very briefly below.

An important observation is that, whilst the Constitution confers powers on Parliament to oversee any organ of state,[210] which by implication includes those in provincial spheres of government, it also places an obligation on a provincial legislature to oversee any provincial organ of state.[211] This observation is fascinating because the Constitution, by implication, makes the overseeing of a provincial organ of state a functional area of concurrent competence of Parliament and a provincial

[208] Rule 134 of the Rules of the National Assembly.
[209] Rule 134(5) of the Rules of the National Assembly.
[210] Section 55(2) (b) (ii) of the Constitution states that the National Assembly must provide mechanisms to maintain oversight of any organ of state.
[211] Section 114(2) (b) (ii) of the Constitution states that a provincial legislature must provide for mechanisms to maintain oversight of any provincial organ of state.

legislature. This point is not stated explicitly by the Constitution, but it can be gleaned from sections 55(2) (b) (ii) and 114(2) (b) (ii) of the Constitutions referred to above. The obligations of the national legislature and those of a provincial legislature as they relate to their respective oversight responsibilities over organs of state are thus both thought provoking and fascinating. Evidently, the National Assembly's mandate is quite broad as its oversight jurisdiction is in respect of any organ of state, while the oversight jurisdiction of a provincial legislature in respect of an organ of state, on the other hand, is qualified and strictly confined to those located in a particular province. This concurrent national and provincial jurisdiction or oversight of provincial organs of state, like any other concurrent jurisdictions, contains within it inherent conflict.

Perhaps at this point it is pertinent to reiterate the point made in the introduction that the concept of government supervision includes intervention as one of its defining elements. The discussion in the next paragraph looks at the concept of government supervision from the angle of the intervention of national legislature in the provincial legislature.

5. Intervention of national legislature in the provincial legislature

The national legislature's intervention in provincial legislature constitutes a kind of national legislature's supervision of provincial legislature in certain cases to ensure uniformity across provinces on certain issues of importance to the nation as a whole. In this regard, the Constitution caters for specially circumscribed conditions wherein Parliament may intrude in the exclusive functional area of provincial legislative competence. Thus the Constitution specifically stipulates that Parliament may intervene, by passing legislation in accordance with section 76(1)[212], with regard to a matter falling within the functional area listed in Schedule 5 of the Constitution.[213] Bills passed in terms of section 76 of the Constitution are ordinary Bills affecting

[212] Section 76 provides for ordinary Bills affecting provinces and section 76(1 thereof) specifically outlines the procedures to be followed by Parliament when passing these kinds of Bills.
[213] Section 44(2) of the Constitution.

provinces, so when Bills within this category are passed by the National Assembly they must be referred to the National Council of Provinces and be dealt with in accordance with procedures provided for in this section.[214] The Constitution sets out the criteria on the basis of which national government may legislate on subject matter(s) falling exclusively on provincial competence. The criteria that must be met by Parliament in order to have the powers to encroach on the exclusive legislative terrain of a provincial legislature, in accordance with section 44(2) of the Constitution, include considerations such as: national unity; economic unity; maintenance of essential national standards; minimum standards for service delivery; and the prevention of unreasonable action by a province to the detriment of another province or the country as a whole.[215]

The Constitution provides for the framework for handling conflicts between national and provincial legislation,[216] and part of this framework sets out circumstances under which national legislation shall prevail over provincial legislation. In this regard, section 146 of the Constitution stipulates the conditions that must be met for national legislation to prevail over provincial legislation. These conditions are that: firstly, the national legislation deals with a matter that cannot be regulated effectively by legislation passed by individual provinces; secondly, that national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation which the national legislation satisfies by providing norms and standards, frameworks, or national policies; thirdly, the national legislation is necessary for the maintenance of national security, the maintenance of economic unity, the protection of the common market; the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services; or the protection of the environment.[217] The other conditions are that national legislation must be aimed at preventing unreasonable action by province that is prejudicial to the economic, health or security interest of another

[214] Section 76(1) of the Constitution.
[215] Section 44(2) of the Constitution.
[216] Section 146 of the Constitution.
[217] Section 146(1) (c) (i) (ii) of the Constitution.

province or the country as a whole.[218] The conditions under which national legislation takes precedence over provincial legislation, set out above, correspond with some of those enumerated in section 44(2) of the Constitution.

When examining section 44(2) of the Constitution closely it becomes evident that legislation passed in terms of it is imbued with override features. This means that national legislation enacted in accordance with section 44(2) of the Constitution prevails over provincial legislation. That this special category of national legislation takes precedence over provincial legislation is stated in unambiguous terms by the Constitution when it stipulates that legislation referred to in section 44(2) prevails over provincial legislation in respect of the matters within functional areas listed in Schedule 5.[219] Evidently, national legislation enacted in terms of section 44(2) of the Constitution has built-in elements that override provincial legislation. The status of national legislation enacted through the invocation of section 44(2) of the Constitution, when viewed in relation to provincial legislation, is elevated as it prevails over the latter category of legislation. It was stated above that intervention is that element of government supervision which is intrusive as it has a serious bearing on provincial autonomy. This matter was addressed by the Constitutional court in the Certification Judgement. Perhaps it might expand the analysis of government supervision if some attention were paid to the Constitutional Court's pronouncement on this subject below.

Among other issues which the Constitutional Court has had to deal with was the question whether the NT[220] made adequate provision for "legitimate provincial autonomy".[221] In addressing this constitutional issue, the court made reference to quite a number of relevant matters, including the exclusive powers of the provinces, provided for in NT Schedule 5 in relation to the power of Parliament to intervene in the area of exclusive provincial competence in terms of section 44(2) of the NT. In

[218] Section 146(3) (a) of the Constitution.
[219] Section 147(2) of the Constitution.
[220] NT means New Text which refers to the 1996 Constitution.
[221] Certification Judgment [250].

this respect the court stated that this power of intervention by Parliament in a provincial legislature is defined and limited. It furthermore stated that, outside that limit, the exclusive provincial power remains intact and beyond the legislative competence of Parliament.[222] The court then went on to confirm compliance to the intervention powers of Parliament by stating that the NT 44(2) follows precisely the language of CP XXI.2, and it added that provision is made for exclusive provincial powers within the contemplation of the CPs[223] so the contentions to the contrary must be rejected.[224] This is evidence of the confirmation of the constitutionality of the national legislature's intervention in an exclusively provincial legislative terrain of a provincial government. Constitutional Principle (CP) XXI.2 sets out the mandatory criteria that would be applied with regard to the allocation of powers to the national government and the provincial governments.[225] These criteria were then incorporated into section 44(2) the New Text (NT), which, as mentioned above, is the 1996 Constitution. The Constitutional Court was confirming that section 44(2) of the Constitution is derived from Constitutional Principle XXI.2, referred to above. Conflict of legislative jurisdiction between national and provincial legislatures also arose during the processes leading to the finalisation of the National Liquor Bill which is the subject of discussion below.

The constitutionality of Parliament's legislative mandate in functional areas perceived to be exclusively provincial also came up during the Constitutional Court case where the then President invoked his powers by referring the Liquor Bill to the Constitutional Court for a decision on its constitutionality.[226] The specific legal

[222] Certification Judgment [257].

[223] CPs means Constitutional principles. There were 34 of these principles which were agreed upon by the negotiators as the criteria for the basis on which the New Text would be assessed to determine its compliance.

[224] Certification Judgment [257].

[225] 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.

[226] Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999) (hereafter the Liquor Bill Case.

question which the Constitutional Court had to decide was the ambit of national and provincial powers conferred by the Constitution and their interrelation where the national legislature is said to encroach on an exclusive provincial competence.[227] The referral, as stated in this case, required a determination of the scope of exclusive provincial competence within the functional area of liquor licences.[228] This legal question is especially relevant to the quest for broadening an understanding of the scope of government supervision, which, as stated earlier, also involves its intervention element. The court, in making reference to section 146 of the Constitution which is alluded to above and which relates to conflict between national and provincial legislation, stated that it is evident that, where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2).[229] The court went on to say that the corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.[230] The pronouncement made by the Constitutional Court in respect of some overlap between national and provincial legislative competences, as pronounced in the Liquor Bill case, provides broader insight into the legislative scope of jurisdiction of national and provincial legislature.

6. Conclusion

This chapter has looked at the notion of the concept “government supervision” where the meaning of this concept was explained with reference to its elements as identified from case law and academic writings by authorities in the field of constitutional law. These elements are: setting of the regulatory framework for supervision by the national sphere of government through legislation and other directives; monitoring which entails the process of evaluating the extent to which the

[227] The Liquor Bill Case [38].
[228] The Liquor Bill Case [38].
[229] Liquor Bill case [51].
[230] Liquor Bill case [51].

regulatory framework is being adhered to by the lower spheres so that the data collected through such a process can help inform the nature of support required by the sphere being monitored; intervention which was defined as the most invasive form of supervision as it entails encroachment by one sphere in the functional terrain of another; and support, the form of which depends on the data collected through monitoring. Two broad dimensions of supervision were dealt with, the first being the vertical dimension entailing the separation of powers whereby the upper sphere of government supervises the lower spheres.[231] The second dimension of supervision, the horizontal dimension of supervision, entails the inter-monitoring of legislative, executive and judicial branches of government in order to prevent an accumulation of power in the same hands leading to its abuse. The thrust of the discussion was on inter-branch monitoring, the origin of which was traced from the doctrine of the separation of powers. The third key aspect of supervision covered in the chapter dealt with the intervention of the national legislature in a provincial legislature in terms of the Constitution.

Having dealt with the meaning of, rationale for and notion of government supervision, the structure of government of the Republic brought about by the Constitution is discussed next.

[231] Seedorf and Sibanda Separation of powers (2013) 12-13.

Chapter 3

THE STRUCTURE OF GOVERNMENT IN THE REPUBLIC

1. Introduction

For a better understanding of intergovernmental supervision, which is the main focus of this study, it is necessary to explain the structure of government created by the Constitution. As stated in chapter 1 above, government in the Republic is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.[232] This provision of the Constitution is at the crux of the structure of government in the Republic. When closely examining section 40(1) of the Constitution, cited above, four key words stand out clearly. These are "spheres, distinctive, interdependent and interrelated". The first part of this chapter, therefore, analyses these four key words with a view to establishing their relevance and significance in explaining the structure of government in the Republic. After the analysis of the key words, the next focus will be on how the meaning and implications of the word "sphere" of government finds expression in the allocation of powers to the national, provincial and local spheres of government of the Republic as enshrined in the Constitution.[233] In this way, the relationship between the structure of government in the Republic and the allocation of functions to the three spheres of government will also be investigated. The complexities associated with such allocations of functions will form part of the discourse.

The third area of focus will be on how the relationship between the three spheres is regulated. It is for this reason that the principles of co-operative government and intergovernmental relations, as provided for in the Constitution, will be examined

[232] Section 40(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

[233] Schedules 4 and 5 of the Constitution make provision for the allocation of functional areas of concurrent national and provincial legislative competence. Part B of Schedule 4 enumerates the functional areas concurrently shared by national, provincial and local spheres government. Part B of Schedule 5 provides for the powers which provincial government shares with municipalities, the latter being the local sphere of government.

closely.[234] The third focus area of this chapter specifically deals with the constitutional principle of co-operative government and intergovernmental relations[235]. Specific emphasis will be placed on selected provisions.

2. The meaning of the word "spheres" of government

Government in the Republic is constituted by national, provincial and local spheres of government which are distinctive, interdependent and interrelated[236]. Accordingly the meaning of the word "spheres" is investigated with the purpose of understanding its connotation with regards to the structure of government envisaged in the 1996 Constitution. The choice of the word "sphere", as used in the Constitution, in reference to the government of the Republic appears to be deliberate and, as such, it heralded what Woolman and Bishop term "a linguistic turn away from the hierarchical relationship between national, provincial and local government[237]." The word "levels" which was previously used during the pre-constitutional era and in the interim Constitution in reference to how the government of the Republic was structured, appears to have become anachronistic in the current constitutional dispensation. It is, therefore, not surprising that the current Constitution does not make any reference to the word "levels" of government. Whilst the rationale for the choice of "spheres of government" instead of "levels of government" appears to have some justification, the question that still remains relevant is whether the turn away from the use of the word 'levels' is merely linguistic or whether there is a much more practical embodiment of a change of philosophy in respect of the relationship between the three key constituent elements of the government of the Republic.

It, therefore, becomes necessary to look back at the time during which the word "levels" of government were used for the purpose of highlighting the rationale for the

[234] Section 41 of the Constitution.
[235] Section 40 of the Constitution.
[236] Section 40 of the Constitution.
[237] Woolman S and Roux T "Co-operative government and Intergovernmental Relations" in Woolman S et al Constitutional law of South Africa (2013) (2nd ed) Juta and Co 14-10 (hereafter Woolman and Roux Co-operative government and Intergovernmental Relations (2013).

absence of this word in the Constitution. The pre-1994 constitutional dispensation in the Republic was characterised by a very strong central government where municipalities owed their existence to, and derived their powers from, provincial ordinances that were passed by provincial legislatures.[238] The provincial legislatures themselves had limited law-making authority, conferred on them and circumscribed by parliamentary legislation. In this constitutional arrangement, the provincial and municipal "levels of government", as they were then known, were totally subservient to the central government.[239] The interim Constitution, which came into effect on 27 April 1994[240], continued to use the phrase "levels" of government.[241] The coming into effect of the Constitution on 4 February 1997[242] resulted in the substitution of the word "spheres" of government for "levels" of government in reference to the three tiers of government of the Republic. This marked a deliberate and fundamental break with the past in an unprecedented manner. The bases for this assertion include that, in respect of the local sphere of government, the Constitution bestows both executive and legislative authority on a Municipality Council.[243] Unlike the situation in the past where the provincial governments performed functions which were delegated to them by the central government, some of which provinces further delegated to local governments, the Constitution conferred original powers to each of the three spheres of government.[244] The fact that each of the three spheres now has original constitutional powers means that neither national nor provincial legislation can take away the powers and functions bestowed upon any sphere of government without its being sanctioned by the Constitution. This point is well expressed by Thornton-Dibb when he says that "original powers can be described

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[238] CDA Boerdery (Edms) BPK en Andere v Nelson Mandela Metropolitan Municipality (526/05) [2007] ZASCA 1 [2007] SCA 1 (RSA) (6 February 2007) [33] (hereafter CDA Boerdery case).

[239] CDA Boerdery case [33].

[240] 27 April 1994 is reflected as the commencement date of the Interim Constitution and it appears just immediately after the table of contents thereof.

[241] Schedule 4 Article XX of the Interim Constitution provides that each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. Thus the Interim Constitution continued to use the word "levels" of government.

[242] 4 February 1997 is the date of commencement of the Constitution which is reflected on the page of the Constitution which precedes its table of contents.

[243] Sections 156(1) of the Constitution grants executive authority to a municipality and 156(2) confers authority on a municipality to administer by-laws.

[244] In the CDA Boerdery case [33] the court stated that, "under the pre-constitutional dispensation, municipalities owed their existence to, and derived their powers from, provincial ordinances that were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by parliamentary legislation."

as the most original source because these original powers cannot be removed or amended by ordinary statute or provincial acts and can only be altered or withdrawn if the Constitution itself is amended".[245] Amending the constitutional powers of any sphere of government will require that the Constitution itself be amended. There is, thus, a clear basis for the argument that the use of the word "sphere" in the Constitution does not represent a mere linguistic turn-away from the hierarchical relationship among the three tiers of government, but it represents significant strides made in bringing about a change of philosophy in respect of the relationship between the three tiers of government. The use of the word "sphere" of government marks a fundamental departure from the pre-constitutional dispensation.

While on the subject of "sphere", it is pertinent to point out that, when reference is made to the original powers conferred on the three spheres of government, these relate to legislative and executive powers.[246] In the case of the provincial sphere of government, the Constitution confers the legislative authority of a province on the provincial legislature[247], whilst the executive authority of a province is vested in the Premier of that province who exercises it together with the Provincial Executive Council.[248] The extent of the entrenchment of powers of the spheres of government is further demonstrated by the fact that the Constitution also provides that "a provincial legislature is only bound by the Constitution and, if it has passed a constitution for its province, it is also bound by that constitution."[249] Section 104(3) entrenches the authority of a provincial legislature in very clear terms, and this provides further evidence of a fundamental change of philosophy in so far as the relationship between the spheres of government is concerned. The provincial sphere is no longer expected simply to wait for delegation from the national sphere, neither is the local sphere of government expected to wait for delegation from the

[245] Thornton-Dibb MP Local Government and the Protection of Environment: An Analysis of "Municipal Planning" and "Environment" submitted in partial fulfilment of the degree of Master of Laws (LLM) College of law and management studies School of law University of Kwa-Zulu Natal (Pietermaritzburg) 2013 15 (hereinafter Thornton-Dibb Local Government 2013).
[246] De Vos P et al South African Constitutional Law in Context 295.
[247] Section 104 (1) of the Constitution.
[248] Section 125(1) and (2) of the Constitution.
[249] Section 104(3) of the Constitution.

provincial sphere, because all spheres now have constitutionally sanctioned powers and functions.

Perhaps it is important to mention that the legislative authority of the national sphere of government is vested in Parliament[250] whilst the executive authority of the Republic is vested in the President who exercises such authority together with other members of the Cabinet.[251] Mentioning the executive and legislative powers conferred by the Constitution on the national sphere of government is merely intended to reinforce the point that all three spheres are now vested with such powers so that the implications and connotation of the word "sphere" are highlighted. The significance of the word "sphere" is that it is in contrast to the word "levels", and this contrast is not mere semantics but represents a fundamental change which finds expression in how the functions have now been allocated among the three spheres. The word "sphere" means any one of the three subsystems of the government of the Republic, each of which exists to fulfil a particular mandate as a contribution towards the governance of the Republic of South Africa as one sovereign democratic state. A sphere of government is a particular and practical embodiment of how governmental power in the Republic is shared by its specialist units or sub-systems in order to deliver services aimed at satisfying the needs of the citizenry. A sphere represents a practical expression of how the government in the Republic is structured to satisfy the needs of its people, the examples of which include: basic needs such as water and sanitation; social needs such as education, health, social development; and managing foreign affairs, national defence, safety and security of the inhabitants of the Republic, etc. More will be said about the preceding point in the aspect of this chapter that deals with the allocation of powers among the three spheres of government.

Having closely examined the meaning and implications of the word "sphere" of government with reference to the rationale behind the preference of this word over

[250] Section 43(a) of the Constitution.
[251] Section 85(1) and (2) of the Constitution.

"levels" of government in the current constitutional dispensation, there might be unintended implications arising from the examination. Firstly, inadvertently, an impression might be created that the linguistic turn away associated with the use of the word "sphere" has completely resolved the contentious issue of national government dominance over the two other spheres of government, and the domination of the local government by the provincial government, which prevailed during the pre-constitutional era.[252] Secondly, inadvertently, another impression might be created that the powers and functions of the three spheres of government have been so clearly delineated to the extent of eliminating uncertainties, in some instance, as to their respective roles. Holding such a utopian view would constitute a simplistic understanding of the very complex phenomenon of co-operative government. These matters are dealt with in more detail below with respect to the aspect of this work which focusses on the complexities of the allocation of powers to the three spheres of government.

The centrality of the word "sphere" in understanding the structure of government of the Republic lies in the change of philosophy in respect of the relationship between the three spheres of government. Perhaps it is pertinent that, in the quest to further illuminate the nature of the word "sphere" as used in chapter 3 of the Constitution,[253] the analysis of this word is taken a step further by looking at it in relation to the three descriptors, namely distinctive, interdependent and interrelated. With this in mind the discourse will now consider the meaning and connotation of the three descriptors, i.e. "distinctive"; "interdependent" and "interrelated" spheres of government.

[252] CDA Boerdery case [33]

[253] Section 40 of the Constitution employs the word "sphere" of government instead of "levels" of government which was the pre-constitutional era characterisation of how the government was structured and the use of the word levels of government extended to the era where RSA was governed through the Interim Constitution which commenced on 27 April 1994.

2.1. *The phrase "distinctive, interdependent and interrelated*"

2.1.1. The meaning of "distinctive" spheres of government

Layman defines the term 'distinctive' as being "that element which reflects that each sphere exists in its own right; it is a final decision maker on a defined range of functions and is accountable to its own constituency for its own decisions".[254] In concurrence with Layman's conception of "distinctive" spheres, Stytler and De Visser argue that the term "distinctiveness" indicates that each sphere of government is autonomous with its own powers.[255] The first part of Layman's definition of "distinctive" points out that each sphere has a right to its existence. It has a particular purpose that must be fulfilled for its existence. The distinctive element of every sphere highlights the point that each of the three spheres has a reason that justifies its existence. When one considers the three elements of "distinctiveness" of each of the three spheres, as identified by Layman and alluded to above, i.e. right of existence, having own functions, and accountability to its own constituency, it leads to the conclusion that these three elements constitute the essence of what is referred to as the autonomy of each sphere.

The notion of autonomy of each sphere of government in the context of co-operative government in chapter 3 of the Constitution[256] along with the founding provision which emphasises the indivisibility and sovereignty of RSA results in a certain degree of complexity. The complexity arises from the fact that the autonomy of each sphere, as informed by its distinctive nature, must be understood and exercised within the context of the fact that the Republic is one and indivisible state. It is then apparent that the autonomy of the spheres, especially the provincial and local spheres, is relative and, as such, it has to be exercised within the confines of what de Visser refers to as the regulatory framework set by the national sphere of government.[257] The role of the national sphere of government in setting the

[254] Layman T Intergovernmental relations and service delivery in South Africa: A Ten Year Review: The Presidency (2003) 8 (hereinafter Layman Intergovernmental Relations 2003).
[255] de Visser Developmental local government: (2005) 170.
[256] Chapter 3 of the Constitution is dedicated on Co-operative government.
[257] Layman Intergovernmental Relations (2003) 8.

regulatory framework for the other spheres of government will be dealt with when the notion of "interrelated spheres" is looked at in subsequent paragraphs. The constitutional court pronounced itself quite clearly on the matter of provincial autonomy when it stated that the Constitutional Principles never contemplated the creation of sovereign and independent provinces.[258] The court completed its reasoning in respect of the preceding point by stating that, on the contrary, the Constitutional principles contemplate the creation of one sovereign state in which the provinces will have only those powers and functions allocated to them by the final Constitution.[259] As alluded to above, provincial autonomy must thus be understood within the context of the indivisible Republic of South Africa which is governed by the three distinctive spheres, all specializing in their constitutionally sanctioned mandates and within the regulatory parameters set by the national sphere of government.

Layman further says that each sphere is a final decision maker on a defined range of functions. To be a final decision maker presupposes a certain degree of autonomy to make such decisions. As mentioned above, these decisions are, in this context, defined by the Constitution and other relevant legislation. The point of the relative autonomy of each sphere is echoed by Mathenjwa when he says that distinctiveness implies that spheres are autonomous, but also dependent on one another, and are enjoined in a relationship to work together as a team with one another.[260] In the Premier of the Western Cape v President of the Republic of South Africa, the court, when making reference to section 40 of the Constitution and the way the three spheres are described as distinctive, interdependent and interrelated, indicated that this was consistent with the way power has been allocated to the three spheres.[261] The court went on to say that distinctiveness lies in the provision made for elected government at national, provincial and local levels. It is becoming quite apparent

[258] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996(4) SA 744(CC); 1996(10) BCLR 1253 (CC) (6 September 1996) [259] (hereinafter First Certification of the Constitution).

[259] First Certification of the Constitution [259].

[260] Mathenjwa M "Constitutional obligations imposed on a provincial government in instances where a municipality cannot provide basic services as a result of a crisis in its financial affairs" (1) 2014 TSAR 61.

[261] Premier of the Western Cape v President of the Republic of South Africa Paragraph [50].

that, firstly, the existence of the three spheres of government is a practical expression of the distinctiveness descriptor. Secondly, there is a nexus between the distinctiveness of each sphere of government and the allocation of powers. The allocation of powers to the three spheres is dealt with later on in this chapter. Perhaps it is important to state that it is also becoming evident that the distinctive nature of each sphere, as an essential element of government, is not an end in itself, but is rather a means of enabling each sphere to exercise its powers and perform its functions in order to deliver on its mandate of providing government services to meet the needs of the citizenry.

It is prudent to conclude the analysis of the distinctiveness of each sphere by pointing out that, if the descriptor "distinctive" is viewed in isolation from the other two descriptors of "interdependence" and "interrelatedness", its true purpose and meaning could be subverted and even confused with independence. This could be contrary to the letter and spirit of the founding provision that of the Constitution that "the Republic of South Africa is one, sovereign, democratic state".[262] Having dealt with the distinctiveness descriptor of the three spheres of government, the focus will now be on "interdependent" spheres of government, and this is covered in the next paragraph.

2.1.2. The spheres of government are "interdependent"

It was mentioned above that the Constitution declares the spheres of government as being not only distinctive, but also "interdependent". [263]The plain grammatical meaning of the word "interdependent" is "dependent on each other"[264]. In line with this definition of interdependence, Layman asserts that the spheres must exercise their powers for the common good of the country as a whole by co-operating with one another.[265] Interdependence can best be explained by the fact that the

[262] Section 1 of the Constitution.
[263] Section 40 of the Constitution.
[264] Cambridge English Dictionary.
[265] Layman Intergovernmental Relations (2003) 9.

Constitution allocates specific powers to each of the three spheres of government, and this means that each sphere specialises in different aspects of governance. [266] Municipalities, for example, are a local sphere of government and they are essentially responsible for the provision of basic services, such as water, electricity, refuse removal, and municipal infrastructure.[267]

The significance of the descriptive "interdependent", as used in reference to the "spheres of government", lies in the fact that the three spheres depend on one another in providing government services to the citizens of the Republic of South Africa. The national sphere of government, for instance, is not well placed to discharge the functions of municipalities and neither is the provincial government well positioned to handle matters of national defence and foreign affairs, for example, as the latter two functions are exclusively for the national sphere of government.[268]

In essence, the interdependence of the three spheres means that government in the Republic functions as a whole or a system comprising national, provincial and local spheres which are interdependent elements/parts of one system. Layman sums it up so well when he says "only collectively and in co-operation with one another can they (i.e. the three spheres of government) provide government that meets the needs of the country as a whole."[269] The national, provincial and local spheres of government are structures or elements of the whole/system of government of the Republic and these elements must function co-operatively to enable the whole/system, of which they are part, to discharge its obligation of providing government services to the people of the Republic.

[266] Schedule 5 of the Constitution.
[267] Layman Intergovernmental Relations (2003) 8.
[268] Layman Intergovernmental Relations (2003) 8.
[269] Layman Intergovernmental Relations (2003) 9.

The “distinctiveness” descriptor, as dealt with in the previous paragraphs, links very well with the “interdependence” descriptor. The link between “distinctive” and “interdependent” descriptors is established by the fact that each distinctive sphere of government exists in order to serve a particular governmental purpose, and the other spheres depend on it in so far as that particular mandate/purpose is concerned. It has been stated that national defence is, for example, a functional area of exclusive national competence. It is important at this stage to point out that, whilst the distinctive nature of each sphere of government finds expression in the constitutional provision for elected government at national, provincial and local government, the interdependence and interrelatedness flow from the founding provision that “the Republic of South Africa is one sovereign, democratic state..”.[270] The next paragraph will discuss the last descriptor, “interrelatedness”, so that the picture about each sphere of government, as an integral constituent of the structure of government in the Republic, becomes clearer.

2.1.3. The spheres of government are interrelated

Layman has identified two crucial powers exercised by the national sphere of government over the provincial and local spheres of government. These are, firstly, that the national government provides a regulatory framework within which both the provincial and local spheres of government operate.[271] Secondly, the national government is responsible for monitoring compliance with the regulatory framework. This explains how the three spheres are interrelated, meaning that the interrelatedness is governed by regulation and supervision exercised by the national government over provinces, while the local sphere, on the other hand, is regulated by both national and provincial spheres of government.[272] Mathenjwa states that interrelatedness implies that the three spheres are enjoined to work in a relationship with one another as a team.[273] The whole essence of the “interrelatedness”

[270] Section 1 of the Constitution.
[271] Layman Intergovernmental Relations (2003) 8.
[272] Layman Intergovernmental Relations (2003) 8.
[273] Mathenjwa M “Constitutional obligations imposed on provincial government in instances where a municipality cannot provide basic services as a result of a crisis in its financial affairs” (1) (2014) TSAR 61.

descriptor is the supervision of one sphere by another and this is in line with the founding provision of the Constitution which emphasises the indivisibility of the Republic as a democratic state.[274]

The national and provincial spheres have supervisory competences over municipalities,[275] while the provincial government, in turn, is supervised by the national government. The preceding point was clarified in the Certificate judgment where the court stated that "NT 55(2) (b) (ii) requires the National Assembly to maintain oversight over any organ of state, which will include a Department of a Provincial government."[276] The purpose and significance of supervision is that of ensuring coherence in the governance of the Republic. Supervision is a constitutional mechanism of ensuring that the three elements of the system of government of the Republic, i.e. the three spheres, operate as whole comprising distinctive, interdependent and interrelated parts to enable the government of the Republic to deliver on the mandate entrusted to it by the citizenry. The Constitution enjoins government to provide effective, accountable, transparent and coherent governance for the Republic as a whole.[277]

Since every sphere of government exists to serve a particular mandate to meet the needs of the citizenry, the next level of this discourse, as indicated in the introduction, will be on how the word "sphere" finds expression in the allocation of powers by the Constitution to the three spheres of government.[278] The above discussion has set the tone for the analysis of the allocation of functions to the three spheres of government by the Constitution.[279]

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[274] Section 1 of the Constitution provides that "the Republic of South Africa is one sovereign, democratic state".

[275] Section 157(7) confers on the national government and provincial government legislative and executive authority to see to the effective performance by municipalities of their functions in respect of Schedules 4 and 5 matters, by regulating the exercise by municipalities of their executive authority, referred to in section 156(1).

[276] First Certification judgment [294].

[277] Layman Intergovernmental Relations (2003) 10.

[278] Schedules 4 and 5 of the Constitution.

[279] Schedules 4 and 5 of the Constitution.

3. The allocation of powers in terms of Schedules 4 and 5 of the Constitution

The Constitution allocates functions to the spheres of government on concurrent and exclusive bases.[280] The Constitutional Court judgment explained the rational connection between the system of co-operative government and the manner in which powers are allocated to the three spheres of government in terms of Schedules 4 and 5 of the Constitution. In this regard the court stated that the constitutional system chosen by the Constitutional Assembly is one of co-operative government in which powers in a number of functional areas are divided concurrently to provincial and national spheres of government.[281] The court went on to say that this choice was contrary to competitive federalism, which some other political parties may have favoured.[282] The word "spheres" of government finds expression in the allocation of powers in that the Constitution makes provision for functional areas of concurrent national and provincial legislative competence.[283] Provision has also been made for functional areas of exclusive provincial competence.[284] The two broad categories of allocated functional areas of competence relate to the subject matter of the functional area concerned. Each of these two broad categories of government powers are analysed below with a view to demonstrating how the word "spheres" finds expression in the allocation of powers to the three spheres of government.

3.1. The functional areas of concurrent national and provincial legislative competence

The concurrent legislative powers are those government functions shared by national and provincial spheres of government.[285] These are functional areas in respect of which both national and provincial spheres of government can legislate. As stated earlier on, concurrent functional areas are in Schedule 4, but it needs to

[280] Schedule 4 Functional Areas of concurrent National and Provincial Legislative competence; Schedule 5 Functional Areas of exclusive Provincial Legislative competence.
[281] First Certification judgment [286].
[282] Certification judgment [286].
[283] Schedule 4 of the Constitution.
[284] Schedule 5 of the Constitution.
[285] Schedule 4 of the Constitution.

be stressed that these are further categorised into Part A and Part B.[286] The functional areas listed in Part A are those allocated to national and provincial spheres of government on a concurrent basis[287], whilst those in Part B are local government matters over which both national and provincial spheres have competence to the extent set out in section 155(6) (a) and (7) of the Constitution. More is said about Part B concurrent functions below. Among other examples of functional areas falling under Part A of Schedule 4 are: Education at all levels, excluding tertiary education; Environment; Health; Housing; Welfare services (now called Social Development); and Agriculture.[288] Perhaps it is necessary to cite one example to illustrate the nature of concurrent national and provincial functional areas of competence. The functional area which is used for the illustration is basic education. This kind of education is what is generally referred to as the schooling sector. The nature of school education or basic education is such that both the national and provincial spheres (i.e. Parliament and each of the nine Provincial Legislatures) have concurrent competence to legislate. Effectively this means that the national sphere of government does not have the monopoly to legislate on matters of basic or school education. Unlike in the pre-constitutional era, the provincial sphere of government now has original legislative powers in respect of those functions listed in the Schedule 4 of Constitution.[289] The constitutional power conferred on provinces is evidence of the relative autonomy enjoyed by each province in line with its distinctive quality as a sphere of government.

Considering that the effect of the concurrency of powers is that both the national and provincial spheres of government can legislate in respect of the same subject matter and at the same time,[290] the question that arises is what happens in the case of a conflict between the provincial and national legislation? The Constitution makes provision for the handling of conflict between national legislation and provincial

[286] Schedule 4 of the Constitution.

[288] Schedule 4 of the Constitution.

[289] Sections 104 and 125 of the Constitution vest legislative authority of a province and executive authority of a province to the provincial legislature and the Premier of a particular province, respectively. Further Schedules 4 of the Constitution confers powers which a province exercises concurrently with national government while Schedule 5 thereof provides for exclusive provincial powers.

[290] National Education Policy Bill [53].

legislation falling within functional areas of concurrent national and provincial legislative competence.[291] There are two main broad categories of circumstances set out by the Constitution where national legislation, on matters of concurrency of functions, shall prevail over provincial legislation. These are circumstances where, firstly, the national legislation applies uniformly with regard to the country as a whole, provided the following conditions are met by such legislation: the national legislation deals with a matter that cannot be effectively regulated by legislation passed by provinces individually; the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity; and national legislation is necessary for the maintenance of peace and economic unity, the protection of common markets, the promotion of equal opportunities or equal access to government services, and the protection of environment .[292] The second condition to be met in order for national legislation to prevail over provincial legislation in concurrent functional areas is that the national legislation must be aimed at preventing unreasonable action by a province which is prejudicial to the economic, health and security interests of another province or the country as a whole.[293] It seems quite evident that, unlike the situation in the pre-constitutional era, it is no longer given that national legislation will always prevail over provincial legislation. Simeon and Murray further provide a useful response to the question posed above by explaining what will happen if national and provincial legislation are in conflict in areas of concurrent national and provincial legislative competence when they state that there is no blanket paramountcy for national legislation.[294] The provision against the presumption of supremacy of national legislation over provincial legislation lends credence to concurrent national and provincial legislative authority. Such concurrency of functions was unimaginable in the pre-constitutional era where “central government” dominated the other “levels” of government.

[291] Section 146 (1) of the Constitution.
[292] Section 146(2) (a) (b) (c) of the Constitution.
[293] Section 146(3) of the Constitution.
[294] Simeon R and Murray C Multi-sphere government in South Africa: An Interim Assessment (31) (2001) Oxford University Press 73.

Part B of Schedule 4 provides for the competences of the local sphere of government over which both national and provincial spheres of government have concurrent powers. As mentioned above, the extent of jurisdiction of both national and provincial spheres over these local government powers is limited by the Constitution in the following manner: firstly, the provincial government must, through legislation and other measures, monitor and support local government and promote local government capacity to enable it to deliver on its mandate.[295] Secondly, both the national and provincial governments are, subject to section 44 of the Constitution,[296] enjoined by the Constitution to invoke their legislative and executive powers to ensure the effective functioning of municipalities in respect of functional areas in Schedules 4 and 5 by regulating the exercise by each municipality of the executive authority conferred on them in terms of Section 156(1) of the Constitution.[297] Schedule 4 Part B is, in essence, a functional area of concurrent national, provincial and municipal government competence. Examples of Part B functional areas in Schedule 4 include, amongst other things, building regulations and child care facilities. The implications of allocating concurrent functions to the three spheres of government is that there is always a potential for conflict. The conflict arises out of the fact that national and provincial spheres can legislate in respect of the same functional area and at the same time.[298] The only reasonable way in which concurrent functional powers can be exercised is through co-operation among the spheres of government.[299] The significance of Part B of Schedule 4 is that it provides for functional areas where the national, provincial and local spheres are enjoined by the Constitution to work with one another to deliver government services to the citizenry.

[295] Section 155(6) (a) and (b) of the Constitution.
[296] Section 44 of the Constitution provides for national legislative authority including parliament's legislative intervention authority in functional areas of exclusive provincial competence and authority to pass legislation with regard to a matter reasonably necessary for or incidental to effective exercise of power with regard to any matter falling within Schedule 4.
[297] Section 155(7) of the Constitution.
[298] The National Education Policy Bill [53].
[299] The National Education Policy Bill [53].

3.2. The functional areas of exclusive provincial legislative competence

The Constitution confers functional areas of exclusive legislative competence on the provincial sphere of government.[300] The functional areas of exclusive provincial competence are those functions which are the sole competence of the provincial sphere of government on which the national government cannot encroach without valid reason. National government cannot encroach on Schedule 5 powers unless authorised in terms of section 44(2) of the Constitution, and this exception for national intervention in exclusive provincial areas of competence is defined and limited. Outside that limit, the exclusive provincial power remains intact and beyond the legislative competence of Parliament. [301] In terms of the division of powers, provinces have only those powers listed in the Constitution or legislation. The court pronounced on this point when it stated that the Constitutional Principles do not contemplate the creation of sovereign provinces, but, on the contrary, they contemplate the creation of one sovereign state in which provinces will have only those powers and functions allocated to the by them New Text.[302] The nature and extent of the powers of provinces were clarified, when as De Vos *et al* put it in reference to the court's ruling, provinces are creatures of the National Constitution i.e. they can exercise only those powers which the Constitution or legislation allocates to them.[303] The nature and extent of provincial powers *vis-à-vis* those of national government were also tested in the case of the *Premier of Limpopo* where the Premier of Limpopo refused to assent to the Financial Management of the Limpopo Provincial Bill which had been passed by the legislature of that province. The Premier's reservation about the Bill was that the province did not have the requisite competence to pass such a Bill as it was not specifically provided for in the Constitution.[304] When this matter finally reached the Constitutional Court, the decision was that the Bill did not fall into the legislative competence of the Limpopo legislature. The key consideration for the court's decision was that the defining feature of our constitutional scheme for the allocation of powers between Parliament

[300] Schedule 5 of the Constitution provides for functional areas of exclusive provincial competence.
[301] First Certification judgment [257].
[302] First Certification judgment [259] (NT means New Text which refers to the Constitution).
[303] The National Education Policy Bill [23].
[304] Premier of Limpopo v Speaker and Others (CCT 94/10)[2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011) [11]

and provinces is that the legislative powers of provinces are enumerated and clearly defined, while those of Parliament are not.[305] The legislative powers of provinces are clearly enumerated in the Constitution.[306]

Examples of functional areas of exclusive provincial competence include: abattoirs; provincial sports; provincial roads and traffic; provincial cultural matters; provincial recreation and amenities; liquor licences.[307] As alluded to earlier on, the allocation of exclusive powers to a provincial sphere provides cogent and compelling evidence that the abandonment of the word "levels" in favour of the word "sphere" confirms that the Constitution gives recognition to the autonomy of a provincial government as a distinctive sphere of government. The other spheres are dependent on a provincial sphere in rendering of services which are within the functional areas enumerated in Schedule 5 of the Constitution.

Part A of Schedule 5 of the Constitution lists the functional areas of exclusive provincial legislative competence, while Part B provides for those functional areas of the local sphere of government over which the provincial sphere of government has supervisory and regulatory functions.[308] The supervisory and regulatory functions performed by the provincial sphere of government are indicative of how the provincial and local spheres of government are interrelated. Examples of Schedule 5 Part B functional areas include: beaches and amusement facilities;

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[305] Premier of Limpopo [24].

[306] Section 104(1)(b of the Constitution) provides—

(1)The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power—

(a)to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation for its province with regard to—

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5;

(iii) any matter outside those functional areas and that is expressly assigned to the province by national legislation;

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

[307] Schedule 5 of the Constitution.

[308] Section 155(7) of the Constitution.

billboards and the display of advertisement in public places; cemeteries, funeral parlours and crematoria.[309]

The manner in which the Constitution has entrenched the powers of provinces is that it has dedicated a whole chapter to provinces.[310] Chapter 6 of the Constitution provides for, amongst other things, the legislative [311] and the executive authority of provinces.[312] Since these powers are derived directly from the Constitution, they are original powers. Provinces are no longer at the mercy of "the central government" as was the case prior to the coming into effect of the Interim Constitution and eventually the final Constitution. The Constitution vests the legislative authority of a province in its legislature and further confers authority on the provincial legislature to pass legislation, firstly, in respect of any subject matter within functional areas of concurrent national and provincial legislative competence; secondly, any matter within a functional area of exclusive provincial legislative competence; thirdly, any matter outside the preceding two functional areas, and expressly assigned to the province by national legislation; and, fourthly, any matter for which a provision of the Constitution envisages the enactment of provincial legislation.[313] Legislative powers of a province also include the power to change the name of the province[314]; the power to pass a provincial constitution[315]; incidental powers for the purpose of any subject matter listed in Schedule 4[316]; and the power to make recommendations to the National Assembly in respect of any matter outside the authority of a particular provincial legislature or in respect of which national legislation prevails over provincial law.[317]

[309] Schedule 5 Part B of the Constitution.
[310] Chapter 6 of the Constitution is dedicated on provinces.
[311] Section 43 of the Constitution.
[312] Section 125 of the Constitution.
[313] Section 104(1) (a) and (b) of the Constitution.
[314] Section 104(2) of the Constitution.
[315] Section 104(2) of the Constitution.
[316] Section104 (4) of the Constitution.
[317] Section104 (5) of the Constitution.

While it has been mentioned above that the legislative powers have been broadly categorised into Schedules 4 and 5 of the Constitution, there are functional areas which have not been listed in the Constitution. The functional areas not listed in the Constitution are referred to as residual powers and they form part of further analysis below. Having said that, it needs to be acknowledged that the subject of the allocation of powers to the three spheres of government is a very complex matter, and so such complexities are looked at below.

4. The complexities of the allocation of powers to the spheres of government

4.1. The overriding clauses: Section 44(2) of the Constitution

Having acknowledged the strides made in entrenching powers of the spheres of government in the Constitution and the broad categorisation of them through Schedules 4 and 5 of the Constitution, referred to above, there are circumstances under which Parliament may legislate with regard to exclusive provincial powers enshrined in Schedule 5 of the Constitution. In this regard the Constitution provides that Parliament may intervene by passing legislation, in accordance with section 76(1), with regard to a matter falling within the functional area listed in Schedule 5.[318] The Constitution, however, circumscribes the circumstances under which the national sphere may legislate in matters which are exclusively provincial legislative competences. The Constitution further prescribes the procedure to be complied with when such legislation is passed by directing that the Bill must be referred to the National Council of Provinces and be dealt with the prescribed procedures.[319]These circumstances are enunciated in section 44(2) of the Constitution.[320] The criteria on the basis of which national government may legislate on subject matter(s) falling exclusively on provincial competence enumerate each of the circumstances which confers such powers on the national sphere of government. It was mentioned earlier that these criteria include considerations such as: national unity; economic unity; the

[318] Section 44(2) of the Constitution.

[319] Section 76 of the Constitution makes provision for a procedure to be followed by the National Assembly when passing ordinary Bills affection provinces. Subsection (4) (a) thereof states that a Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation envisaged in section 44(2).

maintenance of essential national standards; minimum standards for service delivery; and to prevent unreasonable action by a province to the detriment of another province or the country as a whole. Stytler provides more clarity in respect of the nature and extent of the powers that may be invoked by the national Parliament in terms of Section 44(2) when he argues that, "If national legislation meets one of the required criteria, it is not only valid, but it overrides any provincial legislation to the extent of a conflict".[321] The overriding powers conferred on the national sphere of government and the supremacy element built into it, as explained above, seem to be pointing to the fact that the remnants of the hierarchical relationship between the national and provincial governments are still there. Although the conditions under which national government may exercise exclusive provincial powers have been defined by section 44(2) of the Constitution, the kind of concurrency of national and provincial legislative powers embedded in this provision of the Constitution in functional areas which are exclusively provincial appears to have an effect similar to that of section 146 of the Constitution.[322]

Having noted Stytler's argument on the powers that may be invoked by Parliament in terms of section 44(2) of the Constitution, it is pertinent that reference is made to the court's pronouncement on the same matter in *Ex Parte* President of the Republic of South Africa *in re* Constitutionality of the Liquor Bill wherein the Constitutional Court emphasized the point in respect of the limitation imposed by the Constitution on the exercise of Schedule 5 functions by Parliament when it stated that Parliament's power of intervention in the field of exclusive powers was "defined and limited" by section 44(2) of the Constitution.[323] This point was further clarified by the same Court when it went on to state that outside this limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament.[324] It is,

[321] Stytler N "Concurrency and co-operative government: the law and practice in South Africa" 2001 South African Public Law 16 SAPL 241 220 (hereafter Stytler N Concurrency and co-operative government 2001)

[322] Section 146 of the Constitution deals with provisions that regulate conflicts between national and provincial legislation.

[323] Ex Parte President of the Republic of South Africa: in re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999) (Hereafter the Liquor Bill Case) [48].

[324] The Liquor Bill case [48].

therefore, evident from the court's statement that the general constitutional norm is that Schedule 5 competences are beyond the reach of national Parliament, but, as an exception to this norm, Parliament may invoke the override provisions of Section 44(2) of the Constitution. This means that each province, as a distinctive sphere of government has original powers and functions as derived from Schedule 5, which it must use to plan and co-ordinate the delivery of services to its residents. The Constitution also provides for mechanisms to deal with any conflict between national and provincial legislation and the circumstances under which national legislation shall prevail over provincial legislation in respect of functional areas of concurrent national and provincial legislative competence.[325] More is said about this provision later on in this chapter.

With regard to the preceding point in respect of the circumstances under which national legislation will prevail in matters of exclusive provincial competence, the question that arises is whether the dominance of national government over the lower spheres has been resolved in the current constitutional dispensation. This question remains very relevant, and, in this regard, Rautenbach and Malherbe argue that "despite the provisions of the Constitution, a situation of complete national dominance over provinces has developed in practice".[326] In support of this argument, Rautenbach and Malherbe point out that the Constitution intended for the provinces to develop into viable and strong regional governments within the controlled framework of co-operative government. In a further argument on this point, Rautenbach and Malherbe identify certain elements in the Constitution which, in their view, created the opportunity for increasing the centralisation of authority in the hands of national government. These elements are: the emphasis on concurrency; the financial dependence of provinces; and the principle of co-operative government itself.[327] In their further argument on this point, Rautenbach concedes that what appears to be a national government monopoly over virtually all

[325] Section 146 of the Constitution provides for mechanism to deal with conflicts between national and provincial legislation.

[326] Rautenbach IM and Malherbe Constitutional law (6th ed) Butterworths (2012) 223 (hereafter Rautenbach Constitutional law 2012).

[327] Rautenbach Constitutional law (2012) 223.

legislative initiative arises out of an incorrect interpretation of the Constitution that legislative authority over concurrent matters is vested in the national Parliament and its implementation in the provinces. The preceding point does not warrant any further argument as there is acknowledgment by the author that it is not constitutionally correct for national government to relegate provinces to being mere implementing agents of the national Parliament in respect of the functional areas of concurrent national and provincial powers. Perhaps, in the same vein, it needs to be emphasized that it is not appropriate for provinces to submit to being relegated by national government into mere implementing agents of Parliament. It is prudent to underline the point made earlier on that the distinctive element of each sphere of government confers on it autonomy and, as such, it is accountable to its constituency. Accountability of a sphere to its constituency presupposes, amongst other things, that the people being served by a particular sphere may hold their leadership to the decisions it takes if such decisions are not in the interests of the people being represented. It was explained above, however, that it is not disputed that the Constitution does provide for the special circumstances in which national government may exercise Schedule 5 competences.

The allocation of provincial powers, dealt with above, makes it necessary for certain mechanisms and principles to be put in place to guide the various actors in government in their execution of governance responsibilities in different spheres. It is for this reason that the Constitution makes provision for the principles underpinning this area of governance in the form of co-operative government principles and intergovernmental relations.[328] The principles of co-operative government and intergovernmental relations are dealt with later on in this chapter. The difficulty in respect of the allocation of powers between the spheres of government may lead to the impression that there are, in fact, no exclusive provincial powers because the national government may still take them from provinces anyway. Stytler makes a point by clearly extracting examples of what he calls truly provincial competences in the sense of such powers belonging to only

[328] Section 41 of the Constitution provides for the principles of co-operative government.

one competent level of government, and these are: the naming of a province; the writing of a provincial constitution; and the adoption of a language policy. [329] As mentioned above, it needs to be emphasised that, notwithstanding the fact that the exclusive provincial competences are not beyond the reach of national government, these powers remain exclusively provincial and national government cannot encroach on these if not sanctioned by the relevant provisions of the Constitution.

The interpretation of exclusive provincial powers has been, and continues to be, a contentious issue. There are still conflicting interpretations by courts which, to date, have not been reconciled. A particular approach on provincial powers was followed by the court in the *DVB Behuising* case delivered in 1999, on one hand, while a different one was adopted in the Liquor Bill case heard in the year 2000. The court's approach on the interpretation of provincial powers was well articulated in the Liquor Bill case where the court stated that "It is evident that where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4 or through the powers of intervention accorded by section 44(2) of the Constitution".[330] Evidently the effect of this statement by the court does not only confirm the dominance of the national sphere of government through this approach to the interpretation of provincial powers, but it also serves as evidence of the existence of exclusive national competences, notwithstanding the fact that these are not listed in a specific schedule of the Constitution as it is the case with exclusive provincial competences enshrined in Schedule 5 of the Constitution. Perhaps it is worth noting that the judgment in the Liquor Bill case was delivered on 11 November 1999 whereas the *DVB Behuising* case, to which reference will be made here to illustrate what appears to be conflicting views of the constitutional court on the exclusive provincial powers, was decided on 2 March 2000.

[329] Stytler N Concurrency and co-operative government (2001) 220.
[330] Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 1 BCLR 1 (CC), 2001 1 SA 732 (CC) [52] (hereafter the Liquor Bill case].

The court challenge lodged by DVB Behuising (Pty), Ltd arose from the dispute on the constitutionality of the competence of the North West Legislature to deal with the land tenure, contending that the repeal of these chapters was beyond the legislative competence of the North West government.[331] The central findings, which led Judge Mogoeng to grant the order sought by the applicant, were the following:

(a) Provincial legislatures have "a clearly defined and limited legislative authority" and have to operate "within the strict parameters" of that authority.
(b) In construing the powers of provincial legislatures the relevant provisions of the Constitution must "be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise authority it does not have and thereby usurp the powers of Parliament".[332] The bases for Judge Mogoeng's findings seem quite clear, and they are a typical example of the practical application of the approach of strict application of provincial powers.

A contrasting approach to the understanding of provincial powers was articulated by Ngcobo J on behalf of the Constitutional Court a year later at the hearing of confirmation proceedings in respect of the Behuising case. In reference to the judgment by the North West High Court on the Behuising's case, Ngcobo J disagreed with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the Schedule should be given "strict interpretation". The argument of Ngcobo J was that, "In the interpretation of those Schedules there is no presumption in favour of either national legislature or provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable national Parliament and provincial legislatures to exercise their legislative powers fully and effectively".[333] Despite this statement by the constitutional court, which is in clear contradiction to the interpretation approach of

[331] In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another (CCT22/99) [2000] ZAAC 2; 2000 (4) BCLR 347 [3] (hereafter DVB Behuising case).
[332] DVB Behuising case [16].
[333] DVB Behuising case [17].

provincial powers previously adopted by the North-West High Court in the Behuising case, the constitutional court did not repudiate the approach on provincial powers which it had applied in the Liquor Bill case a year before.

It is important to show that, although the constitutional court confirmed the North West High Court's finding that the North West legislature lacked competence to deal with the land tenure, and, therefore, could not repeal the tenure provisions in the proclamation, it did so on grounds different from those articulated by Mogoeng J. Ngcobo J explained the grounds upon which the majority judgment was based as follows, "When the Constitution took effect, the Proclamation, save for regulations 1 and 3 of Chapter 1 and the provisions of Chapter 9 as amended, was administered by the North West. It was, therefore, provincial legislation in terms of section 239 of the Constitution to that extent only. In the event it was competent for the North West to repeal the whole Proclamation but not the provisions of the Proclamation it did not administer. The North West lacked competence to repeal regulations 1 and 3 of Chapter1 and the provisions of Chapter 9, as amended. It follows that the repeal of those provisions was unconstitutional. It is to this extent only that the order of the High Court must be confirmed". The interpretation of provincial powers thus remains a vexed question.

4.2. The overriding provision applicable in conflict between the national and provincial legislation falling within the functional of concurrent competence

The constitutional provisions of section 44(2) and section 146, the latter being the main focus of this paragraph, appear to have had similar effect on power relations between the national and provincial spheres of government. This similarity of effect can be deduced from the fact that section 44(2) provides for circumstances under which national legislation prevails over provincial legislation in functional areas of exclusive provincial competence[334] and section 146(2) provides for circumstances

[334] Section 147 (2) provides that national legislation referred to in 44(2) of the Constitution prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

in which national legislation that applies uniformly with regard to the country as a whole prevails in functional areas of concurrent national and provincial competence. Effectively, this means that, at a given point in time, national legislation may prevail over provincial legislation pertaining to a functional area of exclusive provincial competence, and it also means that national legislation may prevail in a functional area of concurrent national and provincial competence[335] as long as the constitutional pre-conditions for invoking the powers of both sections 44(2) and 146 have been met. It is important to point out that section 146 also provides for circumstances in which provincial legislation prevails over national legislation. This point is clarified below.

Perhaps it is pertinent that a further discussion is undertaken in respect of section 146 of the Constitution so as to illustrate its effect on power relations between the national and provincial spheres of government. Firstly, this section is applicable in conflicts in respect of concurrent national and provincial legislative competence enshrined in schedule 4 of the Constitution.[336] Secondly, the section sets conditions that must be met for national legislation to prevail over provincial legislation.[337] These conditions include instances where a particular matter cannot be effectively regulated by individual provincial legislation and, thereby, requires national legislation; matters requiring uniformity across provinces; and considerations of

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[335] Section 146 (2) of the Constitution enumerates conditions under which national legislation shall prevail in functional areas of concurrent national and provincial legislative competence.

[336] Section 146(1) of the Constitution.

[337] The conditions listed in section 146(2) (a) to (e) and (3) of the Constitution are that: (a) the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by provinces individually.

(b)The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and national legislation provides that uniformity by establishing - (i) norms and standards; (ii) frameworks; or (iii) national policies.

(c) The national legislation is necessary for- (i) the maintenance of national security; (ii) maintenance of economic unity; (iii) the protection of common markets in respect of mobility of goods, services, capital and labour; (iv) the promotion of economic activities across provincial boundaries; (v) the promotion of equal opportunity or equal access to government services; or (vi) the protection of the environment

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by province that-

(a) is prejudicial to the economic, health and security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

national security, economic unity, and protection of common markets. Other considerations justifying national legislation to prevail over provincial legislation cater for instances where a province has to be prevented from acting so unreasonably such that interests of another province or the country as a whole are prejudiced.[338] It, therefore, seems quite clear that the Constitutional mechanisms provided for in section 146 of the Constitution are in line with the founding provision of the Constitution which foregrounds the indivisibility of the Republic of South Africa as a sovereign state.[339] Section 146 has a built-in mechanism to constrain the apparent supremacy of national legislation over provincial legislation by explicitly providing for circumstances in which provincial legislation in respect of functional areas of concurrent national and provincial competence prevails over national legislation. In this regard, section 146 provides that provincial legislation prevails over national legislation if subsection (2) or (3) thereof does not apply.[340] As alluded to earlier on, subsection (2) enables national legislation to prevail over provincial legislation in respect of matters that cannot be effectively regulated by individual provincial legislation, and subsection (3) applies if national legislation is required to prevent unreasonable action by one province which may prejudice the interests of another province or the country as a whole.[341] The restriction imposed on national legislation is a very important constitutional mechanism which balances the status of national legislation *vis-à-vis* that of provincial legislation. Effectively this means that it is not a foregone conclusion that national legislation will always prevail over provincial legislation in functional areas of concurrent national and provincial legislative competence. This is a good example of a fundamental shift from the dispensation characterised by complete dominance of what used to be called central government over provincial government.

It should be noted that the subject of the allocation of powers to the spheres of government does not only end with the powers of exclusive provincial competence as enshrined in schedule 5 of the Constitution and those of concurrent national and

[338] Section 146(3) of the Constitution.
[339] Section 1 of the Constitution provides that the Republic is one, sovereign democratic state.
[340] Section 146(5) of the Constitution.
[341] Section 146 (2) (3) of the Constitution.

provincial legislative competence in Schedule 4 of the Constitution. The next paragraph focuses on functional areas of exclusive national legislative competence, notwithstanding the fact that these powers have not be clearly demarcated as such by the Constitution.

4.3. The plenary or residual powers of the national sphere of government

It was indicated earlier on that the Constitution does not make specific provision for a separate schedule that contains functional areas of exclusive national legislative competence, as is the case with Schedule 5. The view that the national sphere of government also has its exclusive powers was expressed by the Constitutional Court during the Certification Judgment in the following terms: "It was not disputed that the national level of government has exclusive powers in respect of all matters other than those specifically vested in provincial legislatures by the NT."[342] This constitutional court judgment is quite helpful because it clears up any certainty that may arise out of the fact that the Constitution does not specifically spell out that the national sphere of government does have exclusive powers. Exclusive powers of the national sphere of government can be gleaned from closer scrutiny of the Constitution.[343] Layman concurs with the Constitutional Court when he looks at the powers of national sphere of government *vis-à-vis* those of provinces, and he states that there are a limited number of provincial powers, including the granting of liquor licences, provincial roads, ambulances and provincial planning.[344] Residual powers of parliament were further clarified in the Liquor Bill case where the Constitutional Court stated that, by contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national legislature. These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters.[345] The Court further clarified the fact that the list of exclusive competences in Schedule 5 must, therefore, be given meaning within the

[342] In re: Certification of the Constitution of the Republic of South Africa 1996(CCT26/98) [1996] ZACC 26 1996(4) SA 744(CC): 1996(10) BCLR 1253(CC) (6 September 1996) [256] (hereafter First Certification judgment].
[343] Liquor Bill Case [45].
[344] Layman Intergovernmental Relations (2003) 8.
[345] Liquor Bill Case [45].

context of the constitutional scheme that accords Parliament extensive power encompassing "any matter" excluding only the provincial exclusive competences.[346]

As alluded to earlier on, according to Layman, the national government is exclusively responsible for national defence, foreign affairs, the criminal justice system (safety, security and courts), higher education, water and energy resources, and administrative functions such as home affairs and tax collections.[347] The list of exclusive national legislative competences, provided by Layman, is not exhaustive. There are quite a number of factors that contribute to the view that the national sphere of government dominates the legislative terrain. These include the very nature of residual powers enjoyed by national government to legislate on any matter other than schedule 5.

4.4. Intervention powers of the national executive in provincial matters

Another complexity of the allocation of powers to the different spheres of government is brought about by the constitutional provision which empowers the national executive to intervene in provincial administration by taking any appropriate steps to remedy identified failures of a provincial administration concerned.[348] The powers bestowed on the national executive in terms of this provision of the Constitution are evidently too wide, and these include, firstly, the power to issue a directive to the provincial executive of the province concerned outlining the extent of the failure to fulfil its executive obligations and the remedial action required, and, secondly, the national executive may assume responsibility for the relevant obligations.[349] The Constitution does prescribe the circumstances under which section 100 intervention powers may be invoked by the national executive and the peremptory procedures to be followed. The point being made here, however, is that the boundaries between the allocated powers of the national and provincial spheres

[346] Liquor Bill Case [46].
[347] Layman Intergovernmental Relations (2003) 8.
[348] Section 100 of the Constitution.
[349] Section 100(1) (a) and (b).

are very soft, which is why the complexity of the allocation of powers is being referred to here. More will be said about section 100 intervention in Chapter 3 of this work.

5. The principles of co-operative government and intergovernmental relations

Considering the overlap of legislative and executive powers which is characteristic of a system of government that embraces a concurrency of functions among national, provincial and local spheres of government, the Constitution makes provision for the principle of co-operative government and intergovernmental relations.[350] The purpose of such a system of intergovernmental co-ordination is to manage any potential conflict among the various spheres exercising concurrent competencies.[351] In this regard, Mathenjwa argues that the Constitution makes a provision for the principles of co-operative government which instructs all spheres of government and organs of state to commit themselves to the Republic of South Africa, first by securing the wellbeing of the Republic and by providing "effective, transparent, accountable and coherent government of the Republic as a whole."[352] He elaborates on this point by stating that the commitment of the spheres to the Republic and the provision of coherent government entails that the upper sphere should supervise the lower sphere in order to prevent any decline of government in the Republic.[353] As one ponders the supervision of lower spheres by the upper sphere and its concomitant complexities, it seems apparent that the co-operative government principles, as a framework for such supervision, have to create and maintain a very delicate balance in respect of intergovernmental relations. The delicate balancing act includes, amongst other things, reconciling the autonomy of each sphere of government with the fact that a sphere, such as the local sphere of government, is supervised by both the national and provincial spheres of government. On this point it was stated, in the Premier of the Western Cape v President of the Republic of South Africa, that the powers and functions of

[350] Section 41 of the Constitution.
[351] De Vos et al South African Constitutional Law (2014) 274.
[352] Mathenjwa Contemporary Trends (2014) 179.
[353] Mathenjwa Contemporary Trends (2014 179 to 180.

municipalities as set out in section 156 of the Constitution are subject to supervision by national and provincial government, and that national and provincial legislation has precedence over municipal legislation.[354] The court went further by pointing out that the powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to compromise or impede a municipality's ability or right to exercise its powers or perform its functions.[355] The latter statement by the court is in line with one of the co-operative government principles which enjoins all spheres of government to "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere".[356] The delicate balancing role of the principles of co-operative government is manifested in the acknowledgment of the supervisory powers of national and provincial government over municipalities, on one hand, with the built-in restraining or limiting mechanism in respect of the exercise of these supervisory powers by the upper spheres, on the other hand. The point made here is that the supervisory power of the upper spheres is constrained by the constitutional framework and that such powers must be exercised to enhance, and not impede, the functioning of municipalities.

The provincial sphere of government, when viewed in relation to the national sphere, is a lower sphere, and, as such, it is supervised by the national sphere. The question of the autonomy of each sphere of government was addressed by the court in the Certification Judgment with reference to provincial autonomy *vis-à-vis* the regulatory role of the national sphere of government over the provincial sphere of government. In this judgment, the Court explained that contrary to the establishment of sovereign and independent provinces, the constitutional principles envisage the creation of one sovereign state in which the provinces will have only those powers and functions allocated to them by the NT, meaning the New Text, which is the 1996

[354] Premier, Western Cape V President of the Republic of South Africa and Another (CCT 26/98) [1999(3) SA 657; 1994 [40] (hereafter Premier of the Western Cape case).
[355] Premier of the Western Cape case [40].
[356] Section 41(1) (g) of the Constitution.

Constitution.[357] The court went on, still on this point, to say, "the CPs also contemplate that the Constitutional Assembly (CA) will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences". The latter statement by the court has made the matter of the powers of national government much clearer in that its legislative and executive powers transcend provincial boundaries. Still on the point of provincial autonomy, the court stated that "legitimate provincial autonomy does not mean that the provinces can ignore that framework and demand to be insulated from the exercise of such power."[358] While provincial autonomy is recognised by the Constitution, such recognition cannot be used by provincial government as a buffer against the legitimate and constitutionally sanctioned exercise of supervisory powers by national government. The delicate balancing act in this context is that, whilst provincial autonomy enjoys constitutional protection from abuse of supervisory powers of national government, in the same way provinces are also constrained from abusing their autonomy to the detriment of "effective, transparent, accountable, and coherent government for the Republic as a whole".[359] The co-operative government principle which pertains to the geographical, functional and institutional integrity of government in another sphere does not only restrain the national sphere's exercise of power over lower spheres, but it also limits the lower spheres from abusing the constitutional protection afforded to them.

The co-operative government principles set the parameters within which all spheres must operate in the governance of the Republic. These principles specifically provide that "all spheres and all organs within each sphere must not assume any power or function except those conferred on them in terms of the Constitution". [360] This principle sets the parameters within which all three spheres must operate, and it, therefore, serves as a constitutional protection against abuse of authority by upper spheres over lower spheres. The principles of co-operative government must,

[357] First Certification Judgment [259].
[358] First Certification Judgment [259].
[359] Section 41(1) (C) of the Constitution.
[360] Section 41(1) (f) of the Constitution.

therefore, be understood as the mandatory framework within which power conferred by the Constitution on each of the three spheres of government must be exercised and measured. The significance of these principles when looked at in relation to the three descriptors of "distinctive", "interdependent" and "interrelated" is that they provide the framework within which disputes among the different spheres of government can be resolved. With regard to the preceding point, Stytler states that competition of competences should be mediated within the normative framework of co-operative government.[361] The principles of co-operative government enjoin the three spheres to co-operate with one another in mutual trust and good faith.[362] The Constitution provides guidance as to how the preceding principle can be implemented, and this includes: fostering friendly relations; mutual support of the three spheres of government; mutual consultations on matters of common interest; and avoiding legal proceedings against one another.[363] It seems quite evident that the principles of co-operative government, if properly applied and adhered to, can yield huge benefits for the government of the Republic and its citizenry. In view of the fact that it is human beings who are operating in various government structures, responsible for the actual business of governing the three spheres, the next focus of this discourse will, therefore, be on intergovernmental relations.

5.1. Intergovernmental relations

Having laid the mandatory framework for the co-operation of the three spheres of the government of the Republic, as enunciated in the preceding analysis of the co-operative government principles, intergovernmental relations are dealt with in this paragraph. Intergovernmental relations are inextricably linked to the principle of co-operative government and so the heading of the Constitution which provides for these two aspects of this mandatory framework is formulated as "Principles of co-operative government and intergovernmental relations."[364] In this regard, the Constitution takes a step further by making provision for the enactment of national

[361] Stytler Concurrency and co-operative government (2001) 225.
[362] Section 41(1) (h) of the Constitution.
[363] Section 41(1) (h) (i) (ii) (iii) and (vi) of the Constitution.
[364] Section 41 of the Constitution.

legislation aimed at establishing the structures and institutions to promote and facilitate intergovernmental relations.[365] The Constitution further provides for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.[366] In order to give effect to this constitutional provision, Parliament passed the Intergovernmental Relations Framework Act 13 of 2005. This Act empowers any Cabinet member to establish a national intergovernmental forum to promote and facilitate intergovernmental relations in the functional area of competence for which that Cabinet member is responsible.[367] These kinds of intergovernmental forums are called Minmec, which means a standing body consisting of at least a Cabinet member and Members of the Provincial Executive Council responsible for functional areas similar to those of a Cabinet member.[368] In the Department of Basic Education, for example, such a Minmec is called the Council of Education Ministers (CEM). The CEM is chaired by the Minister of Basic Education and members are the Deputy Minister of Basic Education and every provincial political head of education.[369]

Having examined the constitutional provisions aimed at establishing intergovernmental structures as mechanisms intended to promote relations among the spheres of government and settle disputes, as referred to above, perhaps there is now a need to pause for a moment and ask the following question: What are intergovernmental relations? In responding to this question, reference will made to Simeon and Murray, and Layman. Simeon and Murray offer the following definition: "the engines, mechanisms, procedures and structures by which spheres of government and organs of state co-operate to achieve their various ends are collectively known as intergovernmental relations."[370] Layman also provides a definition of intergovernmental relations, and his is that, "Intergovernmental Relations are a means of marshalling distinctive effort, capacity, leadership and resources of each sphere, and directing these as effectively as possible towards the

[365] Section 41(2) (a) of the Constitution.
[366] Section 41(2) (a) (b) of the Constitution.
[367] Section 9(1) of the Intergovernmental Relations Framework Act 13 of 2005.
[368] Section 1 of the Intergovernmental Relations Framework Act 13 of 2005.
[369] Section 9 of the National Education Policy Act 27 of 1998.
[370] R Simeon and C Murray Multi sphere governance in South Africa: An Interim Assessment 14-25.

developmental and service delivery objectives of government as a whole."[371] It seems quite evident that intergovernmental relations represent the collective elements mentioned in the preceding sentence. What is quite appealing about both definitions is that they encapsulate both the vertical and horizontal dimensions of intergovernmental relations. Vertical intergovernmental relations refers to the relationship between the national, provincial and local spheres of government.[372] What appears to be a distinguishing feature of the vertical dimension of IGR is that they are across spheres. Horizontal intergovernmental relations, on the other hand, refers to relations among the organs of state within each sphere.[373] It seems quite evident that, in its quest to implement the co-operative government philosophy entrenched in the Constitution, the principles of co-operative government needed to be strengthened with constitutional provisions which give direction in terms of the establishment of structures that will, in turn, set processes in motion to realize co-operation among the spheres of government. The IGR, therefore, complement the principles of co-operative government by creating relations and processes which are a prerequisite for co-operation of the spheres of government.

The co-operative government system was put to test during the early stages of the republic's constitutional democracy when the Premier of the Western Cape, on behalf of the government of that province, instituted a legal challenge questioning constitutional validity of of certain amendments to the Public Service Act, 1994 (the 1994 Act) introduced by the Public Service Laws Amendment Act, 1998.[374] The grounds upon which the Western Cape challenge was based were mainly that the new legislative scheme (the new scheme) both infringes the executive power vested in the provinces by the Constitution and detracts from the legitimate autonomy of the provinces recognised in the Constitution.[375] These constraints, the Western Cape argument continued, constituted an invasion of the "functional or institutional

[371] Layman Intergovernmental Relations (2003) 10.
[372] Woolman and Roux "Co-operative government" in the Constitutional law of South Africa (2013) 14-10.
[373] Woolman and Roux "Co-operative government" in the Constitutional law of South Africa (2013) 14- 10.
[374] Premier, Western Cape v President of the Republic of South Africa and Another [1] (hereafter called Premier of Western Cape case).
[375] Premier of Western Cape case [4].

integrity" of provincial governments.[376] The constraints, referred to above, and which formed the crux of the Western Cape legal challenge, essentially pertain to changes brought about by the 1998 Amendment.[377] These changes include that: firstly, the definition of a Department was extended to include provincial departments and, thus, the new definition comprised "a national department, a provincial administration or a provincial department"; secondly, provincial heads of departments were accorded broader functions and responsibilities similar to those of heads of national departments, and they were no longer under the administrative control of the Provincial Director General; thirdly, the DG became Secretary to the Executive Council of the province concerned and was further assigned the responsibility intra-governmental responsibilities; fourthly, a provincial head of department became directly accountable to the Member of the Executive Council (MEC) of the portfolio concerned; fifthly, a premier of a province had to request the president to approve the establishment or abolition of a department in a province; and, sixthly, the Minister of Public Service and Administration (the Minister) may, after consulting with the relevant executing authority, make determinations regarding the allocation or abolition of any function of any department or the transfer of any function from a department to another body. The ruling of the court on the legal challenge in the Western Cape matter can be briefly summarised as follows. On the issue of powers of provincial heads of departments in relation to those of the Director General of a province, the court ruled that, "the requirement that the DG should not exercise powers or perform duties entrusted or assigned by the legislative framework to heads of provincial departments is a perfectly reasonable provision in the light of the structure which has now been determined, and it ensures that the heads of departments take responsibility themselves for the functions assigned to them."[378] The court further clarified that the MECs, as executing (do you mean executive?) officers have authority to give instructions to the heads of departments, and that the premier, through the DG, can cause any Department to provide reports on any pertinent matter.[379]

[376] Premier of Western Cape case [81].
[377] Premier of Western Cape Case [5].
[378] Premier of the Western Cape Case [73].
[379] Premier of the Western Cape Case [73].

The provision does not prevent the Members of Executive Councils, from giving instructions to the heads of departments, nor does it prevent the Premier from seeking advice from the DG with regard to any department within the provincial administration, or from requiring important issues arising from such reports to be referred to the Executive Council for its consideration.

With regard to the other aspect of the Premier of the Western Cape case challenging the requirement that the premier must submit to the president a request for approval either to establish a new department or to abolish an existing one, the court ruled as follows. It was acknowledged that "in substance, the premier has the power to establish or abolish provincial departments. This power is limited only to the extent that it must be exercised by way of a request directed to the President."[380]

The importance of the political process of engagement between national and provincial spheres, using the intergovernmental forums, institutions and procedures provided for by the Intergovernmental Relations Framework Act, cannot be overemphasized as the constitutional court considers these mechanisms crucial in deciding a dispute. In the Premier of the Western Cape case the court stated that, "The Western Cape government had an opportunity of making its views known on the relevant issues and of making representations concerning draft legislation. Indeed, the 1998 amendment reflects changes to the original proposals to accommodate some of the objections raised by the Western Cape government".[381]. In the case of Western Cape, the court did not only consider the substance of the Public Service Amendment Act but also the political process preceding its enactment. In order for the political processes to take place, appropriate consultative structures, as provided for in the Intergovernmental Relations Framework, must be put in place. As alluded to above, the Constitution makes provision for structures

[380] Premier of the Western Cape case [80].
[381] In re: Premier of Western Cape case [90].

and institutions that will promote intergovernmental relations and prescribe mechanisms and procedures to facilitate the settlement of intergovernmental disputes.[382]

6. The system of government established by the Constitution

The analysis of the structure of government indicates that the Constitution created a multi-sphere government made up of national, provincial and local spheres.[383] It has also been indicated that legislative functions are allocated to each sphere on the basis of the subject matter of those functions,[384] and that these broad categories of allocation of powers are, firstly, the functional areas of concurrent national and provincial legislative competence, and, secondly, the functional areas of exclusive provincial competence.[385] It was further pointed out that the provincial and local spheres of government can perform only those functions listed in the Constitution, or specifically assigned to them by the national sphere of government. The provincial sphere can also assign functions to the local sphere of government.[386] Having discussed the structure of government in the Republic in the manner briefly reiterated in this paragraph, the main question now is: what is the system of government which was established by the Constitution? This question has been partly answered in the analysis above so far, though not directly, and specific details directly responding to the question have also not been provided. It has also been mentioned above that the final decision of the Constitutional Assembly in respect of the choice of a system of government of the Republic is that of co-operative government. It would be a bit simplistic to respond to the question posed above merely by stating that the system of government is either a federal or unitary system.

[382] Section 41(2) and (3) of the Constitution.
[383] Section 40 of the Constitution.
[384] Bronstein V "Legislative Competence" in Constitutional law of South Africa (2006) (2nd ed) Juta and Co 15-1 (hereinafter Bronstein Legislative Competence (2006).
[385] Schedules 4 and 5 of the Constitution.
[386] Bronstein Legislative Competence (2006) 15-16.

When considering the possible response to the question posed above, it is worth noting that the words "federalism/federal state, and central government/unitary system" are conspicuous by their absence in the final text of the Constitution. It will become clearer as this discourse progresses as to whether non-reference to the two broad systems of government by the Constitution necessarily means that the system of government of the Republic does not bear any characteristics of the federal or unitary systems of government. The starting point, when responding to the question posed above regarding what system of government is established by the Constitution, should be that the Constitution has ushered in co-operative government system. On the subject of co-operative government, Woolman and Roux make reference to comparative concepts of co-operative government wherein they indicate that there is a whole range of models of co-operative government.[387] The two authors identify two broad categories of co-operative government, i.e. the so-called divided federal states and integrated federal states.[388] In order to indicate the basic difference between the two forms of federal states, it needs to be pointed out that, in the divided federal system, there is a clear division of functions between national governments and provincial government, independent taxing powers for regions or provinces, and few formal mechanisms of co-operation between the various levels of government as separate levels of government must negotiate their own agreements on matters of mutual concern[389] Examples of divided federal states are the USA, Canada and Switzerland. The integrated federal states, on the other hand, confer both exclusive and concurrent functions on different levels of government and provide for procedures designed to enhance co-operation between levels and organs of state.[390] Germany is the most typical example of an integrated federal state, and South Africa's system of co-operative government replicates many of the best practices of the German system.[391]

[387] Woolman and Roux "Co-operative government" in the Constitutional law of South Africa 2013).
[388] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-3 to 14-5.
[389] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-3.
[390] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-5.
[391] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-5.

Upon closer scrutiny of the characteristics of the divided federal model and integrated federal model, it is evident that the latter, to a significant extent, reflects the features of the co-operative government system as enshrined in the Constitution. Evidence in support of the assertion that the integrated federal model finds expression in the Constitution includes the following: firstly, in line with the defining characteristics of the integrated federal system, the Constitution confers legislative powers on Parliament in respect of the national sphere, on the Provincial Legislatures in respect of the provincial sphere and on the Municipal Councils for the municipal sphere. [392] As mentioned earlier, the Constitution further divides the legislative powers into two broad categories, namely functional areas of concurrent national and provincial legislative competence, and functional areas of exclusive provincial competence.[393] The preceding point further corroborates that the Constitution, in line with the integrated federalism, confers legislative powers on different levels of government. Secondly, the Constitution provides for procedures designed to enhance co-operation between spheres and organs of state within each sphere in the form of the principles of co-operative government and intergovernmental relations.[394] The powers of a provincial sphere in the case of South Africa are further strengthened by the constitutional clause which provides that a provincial legislature is bound only by the Constitution and, if it has passed its provincial constitution, also by that Constitution.[395] Perhaps it is fitting at this stage that reference is made to the caution expressed by Woolman and Roux in respect of the subject of co-operative government. This point is dealt with below.

The first cautionary note is that the concept of co-operative government has meaning in fewer than fifty countries that may be properly described as federal, and, therefore, the majority of nations are unitary, not federal.[396] Secondly, the taxonomy of divided federalism and integrated federalism often fails to focus on the conventions and institutions which make the federal systems work.[397] It seems quite

[392] Section 43 (a) (b) and (c) of the Constitution.
[393] Schedule 4 and 5 of the Constitution.
[394] Section 41 of the Constitution.
[395] Section 104(3) of the Constitution.
[396] Woolman and Roux “Co-operative Government” in the Constitutional law of South Africa (2013) 14-6.
[397] Woolman and Roux “Co-operative Government” in the Constitutional law of South Africa (2013) 14-6.

evident that the conventions and institutions which make federalism work would, in the case of South Africa's constitutional dispensation, refer to the principles of co-operative government and intergovernmental relations. In this regard, Ronald Watts and Nico Stytler assert that the final Constitution of South Africa creates a space for two competing forms of federalism, which the two authors distinguish as Intergovernmental Relations (IGR) and Co-operative government.[398] The first form of federalism, according to these authors, is called Co-operative IGR, and it assumes relative parity between national government, provinces and municipalities. Co-operative IGR, as described above, fits well with what was said earlier on in respect of the co-operative government system provided for by the Constitution as this system is predicated on the notion of relative parity of all spheres of government.

The second form of the integrated South African semi-federalist state, according to Watts and Stytler, is called coercive IGR, and it reflects a hierarchical distribution of power in terms of which national government largely dominates the nation's sub-national constituent parts, i.e. the provinces and municipalities. The two authors cite various pieces of legislation which, in their view, enable national government to dominate provinces, and they further make reference to certain sections of the Constitution which tend to tilt the scales in favour of national government dominance over provincial and local spheres of government. Among the pieces of legislation perceived to be pro-national government dominance over the other two spheres are: the Intergovernmental Relations Act; the Division of Revenue Act; the Intergovernmental Relations Framework Act; and the Provincial Tax Regulations Process Act.[399] Simeon and Murray raise related matters, and these corroborate the view that the national sphere tends to dominate provincial and local spheres of government, and these include such matters as fiscal arrangements.[400] The argument pertaining to fiscal matters, as advanced by these authors, is that the national sphere monopolises all revenue sources and, as a consequence of this,

[398] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-6.
[399] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-6.
[400] Simeon R and Murray C Multi-Sphere Government in South Africa: An Interim Assessment 2001 (31) 65-92 Oxford University Press 73 (hereafter Simeon and Murray 2001 Multi-Sphere government in South Africa).

provinces have a very limited revenue-raising and borrowing capacities, and even these are subject to national regulation. Provinces, thus, have little fiscal autonomy.[401] This point is corroborated by the fact that provinces raise only about 4 percent of their revenues on their own.[402]

It is on the basis of the argument advanced above that Watts and Stytler contend that South Africa operates with an integrated federal state that employs a coercive form of IGR and co-operative government. At the heart of this contention is, firstly, acknowledgement by both authors, of the evidence of relative parity among the three spheres of government of the Republic, hence the inclusion of the element of co-operative government in their formulation of the type of federalism (i.e. a coercive form of IGR and co-operative government), which, in their view, obtains in South Africa. Secondly, the two authors have tied co-operative IGR with coercive IGR to illustrate the point that, in the South African constitutional dispensation, there are still unitary or central tendencies which bring about national government dominance over the other two spheres. Simeon and Murray are also very critical of the division of power among the spheres of government in terms of the South African co-operative government system, and also concur with the view that, to a significant extent, this system tends to favour national government dominance over provinces. They reason as follows. While all spheres have authority to legislate, the Constitution gives sweeping powers to national government to set national standards and norms and to override provincial legislation that threatens national unity or national security;[403] secondly, there is a shortlist of exclusive provincial powers and these are subject to the power of national government to legislate, if deemed necessary, to achieve the purposes outlined in section 44(2) of the Constitution. Most of the critical powers are concurrent. Critical concurrent powers include social services, such as: basic education/schooling; health; housing and social development services and, finally, section 146 of the Constitution provides for circumstances under which national legislation prevails over provincial law.

[401] Simeon and Murray X Multi-Sphere government in South Africa (2001) 74.
[402] Simeon and Murray Multi-Sphere government in South Africa (2001) 81.
[403] Simeon and Murray Multi-Sphere government in South Africa (2001) 72.

Having presented an argument about how the Constitution exhibits the features of integrated federalism with reference to its specific provisions, it is important to point out that the powers wielded by the upper spheres of government in relation to the lower spheres negates the essence of federalism. Section 100 of the Constitution, as mentioned above, empowers the national government, under certain circumstances, to take over the powers of a provincial government. Secondly, the Constitution vests powers in a provincial government to intervene in a local government, if exceptional circumstances warrant it, by dissolving the Municipal Council and appointing an administrator until a newly-elected Municipal Council has been elected.[404] Taking cognisance of the extent of the power conferred by the Constitution on the upper spheres of government, it is reasonable to conclude that the RSA co-operative government system can, by most definitions, be considered as an example of as quasi-federal system. De Vos *et al* identify what appears to be one of the most defining characteristics of a quasi-federal system, which is that in a quasi-federal system the national government retains more power and influence over law making and policy formulation than is usually the case in a fully-fledged federal system.[405] The discussion above attests to this conclusion as the strong indications are that the national government still retains great power and influence in law making and policy formulation. The provincial and also local spheres of government can legislate only on matters the Constitution allows them to do, whereas the national government, over and above Schedule 4 and 5 functions, also has power to pass legislation in terms of section 44(2) of the Constitution and still retain residual power to legislate on any other subject matter which the Constitution does not prohibit. That having been said, it is acknowledged that co-operative government system is a very complex system to implement, and, in a South African context, it manifests itself in the form of a quasi-federal system.

[404] Section 139(1) (c) of the Constitution.
[405] De Vos P et al South African Constitutional Law in Context (2014) 268

Whilst maintaining the position given earlier on that South Africa is an example of a quasi-federal state, the points mentioned below indicate that it is not always possible for a country's system of government to match all the characteristics of a particular model of a governance system perfectly. It has emerged, from the above discussion, that there are different permutations of federalism, such as divided and integrated federalism. It has also emerged that, while the constitutional text foregrounds the co-operative government system predicated on the relative parity of national, provincial and local spheres of government, there is very clear evidence of central tendencies which ordinarily are associated with unitary system of government. As pointed out by Simeon and Murray, Chapter 3 jurisprudence of the constitutional court is predicated on two principles, namely, firstly, one sphere of government or organ of state may not use its power to undermine the effective functioning of another sphere or organ of state, and, secondly, the central integrity of each sphere or organ of state, as demanded by the co-operative government principles, must be understood in the light of the powers and purpose of that entity.[406] It has also become evident that, while it cannot be disputed that the national government has powers of intervention in quite a number of functional areas which are competences of either provincial or local sphere of government, the Constitution circumscribes the requirements for invoking such powers thus imposing limitations on the use of intervention powers by the upper sphere. It has also been mentioned that the national executive may intervene in a province by taking any appropriate measures, including the issuing of a directive and the assumption of the relevant obligations in the province concerned, subject to the existence of circumstances provided for in section 100 of the Constitution.[407] It was also said that the Constitution provides for exceptional circumstances under which national government may legislate on a matter that falls exclusively within the competence of provincial government.[408]

[406] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-8.
[407] Section 100 of the Constitution.
[408] Section 44(2) of the Constitution.

7. Conclusion

The discourse on the structure of government, undertaken above, has revealed that the Republic is a multi-sphere government comprising national, provincial and local spheres.[409] There are four key words which have emerged as being central in describing how the government is structured. These are spheres, distinctive, interdependent, and interrelated. The word "sphere" is used in the Constitution to usher in a new philosophy of governance predicated on relative parity of power between the three autonomous, but interdependent and interrelated, spheres.[410] This new philosophy of governance is called co-operative governance where governmental power is allocated between national and provincial spheres on a concurrent and exclusive basis, as informed by the subject the functional areas concerned. The subject matter of what needs to be legislated may relate to matters categorised as falling under concurrent national and provincial legislative competence, such a basic education, health and social development, to mention only a few.[411] The second category of the broad government functional areas is the functional area of exclusive provincial competence in which the national government cannot encroach unless sanctioned by the constitution.[412] Some complexities of the allocation of powers in a multi-sphere co-operative government system were acknowledged and discussed. Having considered the information that emerged from the literature consulted thus far there seems to be a general view that, notwithstanding the fact that the words federalism or unitary state are not mentioned in the Constitution, the South African co-operative government system is a quasi-federal system. The basis for this conclusion, as explained above, is that the national government retains greater power and influence over law making and policy formulation when seen in relation to the national and provincial spheres of government. That said, it needs to be mentioned that the Constitution pronounces that government in the Republic comprises national, provincial and local spheres. That South Africa is one of about fifty states that embrace co-operative government is evident.

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[409] Section 40 of the Constitution.
[410] Woolman and Roux "Co-operative Government" in the Constitutional law of South Africa (2013) 14-6.
[411] Schedule 4 of the Constitution.
[412] Schedule 4 of the Constitution.

Having explained the structure of government in the Republic, the legal framework for intergovernmental supervision under the Constitution is discussed next.

Chapter 4

THE LEGAL FRAMEWORK FOR NATIONAL GOVERNMENT SUPERVISION OF PROVINCIAL GOVERNMENT

1. Introduction

In dealing with the notion of government supervision, in chapter 2 above, its meaning was discussed. It emerged from the discussion that the concept "government supervision" has certain constituent elements of which monitoring is one. The constituent elements identified by different scholars of constitutional law and case law include regulation, evaluation, monitoring, intervention, support, and redistribution. Some authors combine some of these elements into one. It also became quite clear that there are different dimensions from which the concept "government supervision" can be viewed, namely inter-branch monitoring, inter-governmental supervision, and national government legislative intervention in a provincial government. The focus of this chapter is on the legal framework for the supervision of provincial government by national government. This means that this chapter looks at supervision from an intergovernmental dimension. The discussion will, thus, be started with an in-depth analysis of the meaning of supervision where each of its constituent elements is revealed.

As this chapter is on national government supervision of provinces, reference will be made to section 155(6) and (7) of the Constitution which provides for national and provincial government supervision of local government[413] and section 139 intervention which sets out substantive and procedural requirements for provincial government intervention in local government.[414] Although these provisions of the

[413] Section 155(6)(a) of the Constitution enjoins each provincial government to provide for the monitoring and support of local government in the province by legislative or other measures; Section 155(7) of the Constitution provides that, the national government, subject to section 44, and the provincial government have the executive and legislative authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in 156(1).

[414] Section 139 of the Constitution provides for Provincial intervention in local government.

Constitution relate to the supervision of local government by the national and provincial spheres, which is not the focus of this dissertation, they serve the purpose of illuminating the concept of "intergovernmental supervision". The thrust of the discussion will be on the analysis of the provisions of section 100 of the Constitution which provide for national government intervention in a provincial government.[415] The discussion will make reference to case law and academic writings. The entire section 100 of the Constitution will be broken down into its constituent parts, and the meaning and implications of each will be closely examined in order to illuminate the nature, content, rationale and ambit of supervision of provincial government by national government. Most importantly, the analysis of this section of the Constitution will help to explain what the factors or circumstances that confer authority or jurisdiction on the national executive to intervene in a provincial government are. Reference will also be made to the processes of intervention and built-in constitutional mechanisms meant to prevent the arbitrary use of the power of intervention by the national executive in a provincial administration. Accordingly, both the substantive and procedural aspects of intervention will be examined. The conclusion will then provide a summary of the salient points of Chapter 4 of the dissertation and establish a link with the next chapter. Chapter 3, therefore, provides the framework for the basis against which the legality (or otherwise) of national intervention, to which some provinces have been subjected, can be tested.

2. The intergovernmental dimension of the concept "supervision"

In chapter 1 above, reference was made to the Second Constitutional Amendment of 2003 where the word "supervision" in both sections 100 and 139 of the Constitution was replaced by "intervention". On this point, Stytler and de Visser clarify how and why "supervision" was replaced by "intervention" in the Constitution. In the Constitutional amendment of 2003, the word "supervision" in headings of sections 100 and 139 of the Constitution was replaced by the narrower but correct concept of "intervention."[416] This brought the heading of these two sections in line

[415] Section 100 of the Constitution provides for national intervention in provincial administration.
[416] Stytler N and de Visser "Local Government" in Woolman et al. Constitutional Law of South Africa (2nd Ed) (2013) 22-114 (hereafter Stytler and de Visser Local government 2013).

with the Constitutional Court's view of the concept of "supervision" as a concept distinct from "monitoring" and "support". Stytler and de Visser expand further on the notion of governmental supervision stating that it is broadly defined as "the power of national and provincial government to exercise hierarchical control over municipalities."[417] It is quite apparent that this kind of definition also considers the concept of "supervision" from an intergovernmental viewpoint with specific reference to supervision of the local sphere of government by the two upper spheres, i.e. the national and provincial spheres of government. The hierarchical nature of supervision finds expression in the fact that, in this definition, the upper spheres of government (national and provincial) supervise the lower sphere, which is the local government. Muluheh defines supervision as "overseeing the activities and conduct of another and making certain that everything is done correctly".[418] Muluneh expands on this definition by pointing out that supervision is necessary to assure that national laws are implemented in all provinces.[419] The preceding statement by Muluneh also locates the concept "supervision" within the intergovernmental context, and, most importantly, it takes the meaning of this concept a step further by providing the rationale behind the supervision of the spheres of government, which is ensuring the implementation of national laws, meaning good governance. Concurrence between Steytler and de Visser, on the one hand, and Muluneh, on the other, lies in the fact that they all employ the words 'regulation' and 'overseeing' in defining supervision. In reference to supervision, de Visser asserts that, at a foundational level, the national government establishes the broad legislative frameworks in terms of which local government functions are exercised.[420] With respect to individual municipalities, supervision entails: the monitoring of their performance; support, if required, to exercise their functions and powers; and entering the autonomous domain of municipalities through acts of intervention when there is failure in governance.[421]

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[417] Stytler and de Visser Local government (2013) 22-113.

[418] Muluneh YA Supervisory Power of the Centre to the Region in South Africa and Ethiopia: A Comparative Analysis LLM 2009 University of the Western Cape ETD 20 (hereafter Muleneh Supervisory of the Centre to the Region 2009).

[419] Muluneh Supervisory of the Centre to the Region (2009) 20.

[420] Stytler and de Visser Local government (2013) 22-113.

[421] Steytler N and de Visser J "Local Government" in Woolman S et al Constitutional Law of South Africa. 2nd Edition. January 2013: Revision Service 22-123.

De Visser defines the principle of supervision, in the context of 2003 constitutional amendment of section 139 of the Constitution, as comprising of regulation, evaluation, intervention and redistribution.[422] He defines "regulation" as referring to the role of the national and provincial governments in setting the framework within which local government must exercise its autonomy. Mathenjwa concurs with de Visser when he states that, "in setting the framework for local government the national and provincial government can pass legislation and issue directives regulating the exercise of local government powers".[423] The role of the national sphere of government is, therefore, to set the standards against which the performance of both the provincial and local spheres of government can be measured. The regulatory framework, thus, sets the expectations of national government from the lower sphere(s) and the parameters within which each sphere of government exercises its powers and performs its functions. It was noted that when de Visser's four elements of supervision, mentioned above, are juxtaposed with those identified by Steytler and de Visser, the following emerges, viz. that intervention is a feature/element common to both categories. However, a difference was observed in respect of the naming of the other elements of supervision, for example in de Visser's categorisation of the elements of supervision, cited above, he uses the word "evaluation" whereas in Steytler and de Visser the word "monitoring" is used. Monitoring and evaluation, though, do not have the same meaning. They are related concepts as they are both diagnostic in nature, i.e. they are both concerned with the gathering and interpretation of information on the basis of which decisions are made. Both monitoring and evaluation enable decision makers to decide whether support is necessary and, if so, what form or shape it must it.

Muluneh corroborates the view of the close relationship between the concepts of

[422] de Visser Developmental local government: a case-study of South Africa (2005) Intersentia Antwerpen-Oxford, 170 (hereafter de Visser 2005)

[423] Mathenjwa M "Contemporary Trends in Provincial Government supervision of Local Government in South Africa" 181.

"monitoring" and "evaluation" when he defines the former as a system of collection of information on a defined time basis to identify problems and corrections that are needed.[424] Muluneh goes on to say that the information gathered through monitoring may be used by the national government in evaluating the conduct of the provincial government. The information gathering and evaluation thereof form the basis for the national government to decide whether or not intervention is needed. Finally, de Visser uses the word "redistribute" while, in Steytler and de Visser, the word "support" is used. It is submitted that the supervision element of "redistribute" is one form or example of the kind of support that, depending on the needs and circumstances identified, may be offered to the municipality. Whilst acknowledgement needs to be made that the elements of the concept "supervision" have been packaged and described somewhat differently, as demonstrated above, there is strong concurrence among the scholars about what constitutes the concept "government supervision" as will be further demonstrated below.

Supervision as a single process will, depending on the circumstances of each case, unfold in the manner outlined above. In the case of the supervision of local government, the national and provincial legislative frameworks (regulations) provide the local sphere of government with the norms and standards against which its performance is measured to determine whether or not there is compliance. The same principle applies *mutatis mutandis* in respect of the supervision of provincial government by national government. The step in the supervisory process which follows the establishment of the regulatory framework by the national sphere of government is monitoring. In this regard the Constitutional Court defined "monitoring power" as "the antecedent or underlying power from which the provincial power to support, promote and supervise Local Government emerges".[425] The court went on to say, in its various textual forms, 'monitor' means to 'observe', 'keep under review' and the like. It is the power to test or measure at intervals Local Government compliance with national and provincial legislative directives or with the New Text (Constitution) itself. Monitoring is, therefore, that element of supervision that must

[424] Muluneh YA Supervisory of the Centre to the Region (2009) 22.
[425] First Certification judgment [371].

be exercised by the upper sphere of government over the lower sphere having had due regard for the autonomy of each sphere of government. In this regard, the Constitutional court makes reference to a "hands-off relationship between local government and other levels of government". The preceding statement by the Constitutional court is an expression of the constitutional imperative imposed on all spheres of government to respect the integrity and autonomy of government in another sphere. As alluded to above, this constitutional imperative is encapsulated in the principles of co-operative government, especially in section 41(1) (g) of the Constitution.[426] Muluneh argues that, "Monitoring power is implied from the intervention power stated under section 100 of the Constitution."[427] The significance of this point stems from the fact that the Constitution does not make specific reference to the word "monitoring", nor does it make specific reference to "supervision", however both concepts are embedded in the Constitution with the former being the element of the latter, as explained above. There seems to be consensus that, implicit in the monitoring element of supervision, is the responsibility to see to it that provinces are functioning normally.

With regard to the supervision of local government by national and provincial government there is general acknowledgement of the need for the provincial and national spheres of government to support and promote the local sphere of government in order to enhance the latter's capacity to manage its affairs, exercise its powers and perform its functions.[428] The Constitutional Court referred to this kind of relationship as the "hands-on relationship".[429] It, therefore, stands to reason that the "support" element of the concept "supervision" is embedded in the Constitution. As pointed out above, the Constitution enjoins both the national and provincial spheres of government to support and strengthen the capacity of the municipalities. It has also been stated that the supervision element of support, unlike the element of monitoring, is not simply implied by the Constitution, but it is explicitly provided

[426] Section 41(1) (g) of the Constitution provides that "all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere."
[427] Muluneh YA Supervisory of the Centre to the Region (2009) 22.
[428] Section 154(1) of the Constitution.
[429] First Certification Judgment [372].

for in section 154(1). In the case of the local sphere of government, the intervention element of the concept "supervision" can be briefly explained with reference to section 139 of the Constitution. In terms of this section of the Constitution, a provincial government may intervene in a municipality if it cannot, or does not, fulfil an executive obligation in terms of the Constitution or legislation.[430] Section 139(1) enumerates appropriate steps which may be taken by a provincial government when intervening in a municipality.

It seems quite evident from the provisions of section 139(1) of the Constitution that, as stated earlier, "intervention" is a very drastic and intrusive element of the concept "supervision" as it involves the taking over of responsibility of one sphere of government by another. This constitutes the encroachment of one sphere of government on the autonomy and integrity of another sphere. Such encroachment, as referred to above, is in conflict with the letter and spirit of the co-operative government principle that, "all spheres of government and all organs within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere."[431] It is for this reason that the Constitution sets a clear threshold for intervention in a municipality so that the power of intervention by the upper sphere in a lower sphere can be exercised within the parameters that pass the constitutional muster. As cited above, section 139(1) (b) has clearly enumerated the goals to be achieved through intervention and, most importantly, each of the three goals are in the alternative. This essentially means that the power of intervention by a provincial government in a municipality can be invoked to achieve any one or more of the three outcomes in subparagraphs (i)-(iii) of section 139(1) (b) of the Constitution. The most extreme element of intervention is paragraph (c) of section 139(1) which empowers a provincial government to dissolve a Municipal Council if this is warranted by exceptional circumstances. This subsection is one of the far-reaching constitutional amendments brought about by the 2003 amendment of the

[430] Section 139(1) of the Constitution.
[431] Section 41(1) (g) of the Constitution.

Constitution.

The concept of 'supervision' in the context of intergovernmental supervision having been explained, national government intervention in provincial government in terms of section 100 of the Constitution is discussed next.

3. National government intervention in provincial government: the scope and meaning of section 100 of the Constitution

The Constitution provides that, "When a province cannot or does not fulfil an executive obligations in terms of the Constitution or legislation the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation."[432] In paragraphs (a) and (b) of section 100(1) the Constitution cites two examples of appropriate measures, and these are the issuing of a directive to the provincial executive describing the extent of the failure and the requisite remedial steps to be taken, and the assumption of the relevant obligation by the national executive, meaning the obligation which a particular province has failed to discharge. As explained above, intervention is the most invasive form of supervision. It is for this reason that the substantive and procedural requirements for this constitutionally sanctioned encroachment by one sphere of government on the autonomy of another sphere are critically analysed below.

3.1. Substantive requirements for national government intervention in a province.

Muluheh offers a very helpful definition of the meaning of substantive requirements in the context of section 100 of the Constitution when he states that these are "conditions or facts that should exist to enable the national government to intervene in provinces."[433] Essentially, substantive requirements for intervention refer to the reason(s) for intervention. These requirements are discussed below.

[432] Section 100(1) of the Constitution.
[433] Muluneh YA Supervisory of the Centre to the Region (2009) 33.

3.1.1. Inability or unwillingness by a province to fulfil an executive obligation

Section 100(1) of the Constitution confers jurisdiction on the national executive to intervene in a province under certain circumstances which are broadly stated in this subsection. As mentioned earlier, the jurisdiction, at face value, appears to be in conflict with the framework provided for by the co-operative government principles enshrined in Chapter 3 of the Constitution, which enjoins all spheres of government and all organs of state within each sphere to exercise their powers and perform their functions in a manner that does not encroach on the geographical, institutional and functional integrity of government in another sphere.[434] More is said below on this point so that the question can be answered as to whether or not this *prima facie* violation of the Constitution has some constitutional grounds for justification.

In the *Mnquma* case, the court stated that, "It is clear from a reading of the first part of subsection (1) that the authority or power of the national executive to intervene in a manner as provided for therein is subject to the existence of the fact that a province 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'".[435] The court went on, still in reference to subsection (1) of section 100 of the Constitution, to say, "This subsection constitutes a statutory precondition or jurisdictional fact, the existence of which is a necessary prerequisite to the exercise by the national executive of the power of intervention bestowed upon it by the Constitution."[436] This is the reason for national government intervention in a province. It may appear to be a very straightforward matter, but this point needs to be examined in more detail. It is, therefore, crucial that section 100 and all its subsections, including subsection (1), are viewed within the context of the Constitution as a whole, especially considering the co-operative government principles.[437] It seems evident that, without invoking subsection (1) of section 100 as an empowering provision, the national executive cannot be in a position to

[434] Section 41(1) (g) of the Constitution.
[435] Mnquma Case [47].
[436] Mnquma paragraph [47].
[437] Section 41 of the Constitution.

intervene in a province. It, therefore, follows that the national executive must act within the authority conferred on it by subsection (1) of section 100 because failure to operate within this mandate would constitute lawless conduct. This point was well articulated by the counsel for the applicants in *the Mnquma* case where it was argued that, "the authority of a national executive to act in terms of sub-section (1) is subject to the existence of certain facts or the fulfilment of certain conditions, and that the exercise of such authority in the absence of those facts or without fulfilment of those conditions would render the provincial executive without jurisdiction and, as a consequence, the decision to intervene would be *ultra vires*." [438]

Having clarified the fact that subsection (1) of section 100 of the Constitution confers jurisdiction on national executive to intervene in a provincial administration, it is, therefore, crucial that the next level of analysis of this subsection focuses on the meaning, context, and nature of a fact that vests jurisdiction on national government to intervene in provincial administration. It is important that the nature of the circumstances that give rise to a jurisdictional fact for national government intervention in provincial administration are well understood by the national executive, as a constitutionally sanctioned repository of such power, so that when such power is applied in a given set of facts, it is such that it satisfies the requirements of the principle of legality. The relevant question at this point could relate to the form in which a jurisdictional fact may arise or manifest itself. A jurisdictional fact may exist or be manifested in two forms, the first being an instance or a situation where such a fact is capable of being determined or established in an objective manner. The second form is the one whereby the power or authority of making a determination as to the existence or otherwise of a jurisdictional fact is vested in the repository or holder of the power of intervention who has sole discretion in making such a determination. These two manifestations of jurisdictional fact, cited in the Mnquma case,[439] were articulated in the S*outh African Defence and Aid Fund and Another v Minister of Justice.* Section 100(1) of the Constitution does not entrust the national executive, as the repository of the power of intervention, with the sole

[438] Mnquma case [34].
[439] Mnquma case [47].

discretion to make a determination as to whether or not, in its opinion, the prerequisite fact or state of affairs exists prior to the exercise of such power. This section, on the contrary, is couched in a manner that requires the existence of facts or circumstances to be determined in an objective way in respect of a particular province so that jurisdiction can be conferred on the national executive to intervene.

In the First Certification judgment, the court stated that, "Section 100 creates an exception to the general principle that the implementation of provincial legislation in a province is an exclusive provincial executive power."[440] This exception to the general principle provides for instances where certain conditions exist or where facts have been established indicating inability or failure by a provincial administration to discharge its executive obligations in terms of the Constitution or legislation. The court went on to explain that, "the action of the national executive contemplated by NT 100 is either to put the province on terms to carry out its obligations (and presumably to intervene if it then fails to do so) or to assume responsibility for such functions itself to the extent that it is necessary for any of the purposes set out in NT 100(1) (b)."[441] This point was further clarified in the Certification of the amended text of the Constitution where the court stated that, "NT[442] 100 does not diminish the right of provinces to carry out the rights vested under the NT, it makes provision for a situation in which they are unable or unwilling to do so. This cannot be said to constitute an encroachment upon their legitimate autonomy."[443] Invoking section 100 is, therefore, not a routine activity by the national executive, but the section rather provides for power that may be exercised over a provincial administration in special circumstances of failure or inability by the provincial administration to deliver on its constitutionally or legislatively sanctioned executive obligations. This kind of intervention is essentially a stop-gap measure that the national executive may take for the purpose of restoring good governance in a province concerned. In view of the fact that intervention is by its very nature invasive, as it entails the violation of the autonomy of one sphere of government by another, it is critical that the ambit of

[440] First Certification judgment [263].
[441] First Certification judgment [265].
[442] NT means New Text which is in reference to the 1996 Constitution.
[443] First Certification judgment [266].

this power is well construed by both spheres of government involved, i.e. the national sphere and the provincial sphere, in this context. The language used in conferring jurisdiction on the national executive to intervene in a provincial administration is crucial and is dealt with in the paragraph below in order to further clarify the circumstances under which the power of the national executive to intervene in a province can be properly construed.

3.1.2. The inability or failure must be due to an omission by the provincial government and it must be ongoing.

The other two critical aspects which are pertinent in determining the national executive's jurisdiction in terms of section 100(1) of the Constitution are that, firstly, this subsection is concerned with a failure that is due to omission, and not a positive action, by the provincial government and, secondly, the subsection is formulated in the present tense. These two points were enunciated in the *City of Cape Town v Premier, Western Cape and Others* where Swain J, in reference to subsection (1) of section 139 of the Constitution, said the following, "This section is concerned with an omission or an inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased."[444] In this regard, it needs to be pointed out that section 100(1), as a sister provision of section 139(1) of the Constitution, pertains the present or ongoing failure by a provincial government to carry out its executive obligations conferred on it by the Constitution or legislation. It, therefore, stands to reason that the power of national government intervention in a province may not be invoked to address past acts of failure or omissions which have since been addressed by the province. Such a kind of intervention would be in violation of both the letter and spirit of section 100 of the Constitution. The absence of the reason for intervention renders the national government without jurisdiction.

[444] City of Cape Town v Premier, Western Cape and Others [79].

3.1.3. The failure relates to the inability to fulfil an executive obligation in terms of the Constitution or legislation

The pertinent question that needs to be answered at this stage of the analysis of the substantive requirement for national executive intervention in a province, as provided for in section 100(1) of the Constitution, is "what constitutes an executive obligation of a provincial government in terms of the Constitution or legislation?" The answer to this question will provide valuable guidance in terms of determining whether or not a provincial government is failing or unable to discharge the executive obligations bestowed on it by the Constitution or legislation. It would be illogical to arrive at a determination that a provincial government has failed to discharge its executive obligations in terms of the Constitution or legislation when such powers have not been defined. The paragraph below explains, without dwelling much on it, the meaning of the "executive obligations of a provincial government."

Executive obligation can be explained, firstly, by reference to section 85 of the Constitution which vests executive authority of the Republic in the President who exercises this authority with the other members of the Cabinet.[445] At a provincial level, the executive authority is vested in the Premier of that province who exercises it together with the other Members of the Executive Council.[446] The executive authority at provincial level includes: the implementation of provincial legislation in the province; the implementation of all national legislation within the functional areas listed in Schedules 4 and 5; administering in the province, national legislation outside functional areas in Schedules 4 and 5; 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 Act of Parliament.[447] The executive obligation of a provincial government, therefore,

[445] Section 85(1) and (2) of the Constitution.
[446] Section 125(1) and (2) of the Constitution.
[447] Section 125 of the Constitution.

means providing effective government at a provincial level and discharging functions associated therewith or incidental thereto. This obligation is in line with the principles of co-operative government which, amongst other things, enjoins all spheres of government and all organs of state within each sphere to provide effective, transparent, accountable and coherent government for the Republic as a whole.[448] Executive obligation, in a nutshell, means to provide good governance. Alamaw, on the meaning of "executive obligations", is of the view that, "it is an obligation to implement laws and excludes an obligation to make laws."[449] It is submitted that this is the essence of the phrase "executive obligation", because the definition offered by Muleneh is in line with that provided by the Constitution, as referred to above, and provides the most distinguishing feature of the phrase. In the Mnquma case, the Court explained that the rationale behind using the term "executive obligation" was in the context of the autonomous position occupied by the local government in the constitutional framework, the aim of which was to limit intervention to a failure to fulfil obligations that are executive in nature.[450] It should follow that the rationale behind the use of the expression "executive obligation" applies to intervention by the national executive in a province in a way similar to that described above in the context of the local sphere of government. The basis for this assertion is that autonomy is a feature that applies to all the three spheres of government, including the provincial sphere. In the Mnquma case, the court explained that the inability to fulfil an executive obligation should be interpreted so as to include the inability to fulfil an executive obligation effectively.[451] The court's statement is in line with the point made earlier on that the whole rationale for intervention is to ensure effective governance.

The meaning of executive obligations was the last aspect dealt with in explaining subsection (1) of section 100 of the Constitution, and now what seems to be the most relevant question to ask at this point relates to what the nature of the power bestowed on the national executive in terms of section 100(1) of the Constitution is.

[448] Section 40(1) (c) of the Constitution.
[449] Muluneh YA Supervisory of the Centre to the Region (2009) 26.
[450] Mnquma case [61].
[451] Mnquma case [52].

The response to this question is provided in the paragraph below.

3.1.4. The power of the national executive to intervene in a province is discretionary

Once it has been established that a provincial government cannot, or does not, fulfil an executive obligation, the national executive is given the power to intervene. The power itself is discretionary in nature. In the Mnquma case, the Court clarified this point, in the context of provincial government intervention in a municipality, by stating that, "the use of the word "may" is a clear indication that this is so. Accordingly, even though the jurisdictional fact exists, the provincial executive concerned is not obliged to exercise it."[452] However, it must be pointed out that, while the power of intervention has been couched in directory, as opposed to peremptory terms, this does not exonerate the national executive, as a sphere of government, from its constitutional obligation to provide effective, transparent, accountable and coherent government for the Republic as a whole.[453] It is submitted that the national executive has an obligation to intervene to restore good governance in a province in circumstances where there is evidence of failure or the inability by the provincial government to discharge its executive obligations in terms of the Constitution or legislation. It is further submitted that failure by the national government to intervene in a province where circumstances that confer jurisdiction on it to do so have arisen constitutes a serious omission on the part of the national government. Having dealt with the substantive requirements for national government intervention in provinces with reference to failure or the inability of a provincial government, the meaning and context of "executive obligation", and the discretionary power of the national executive to intervene in a province, the focus of the discourse below will now be on the form of intervention.

3.1.5. The meaning and implications of "any appropriate steps"

In the Mnquma case, the court stated that "the relevant portion of sub-section (1) of

[452] Mnquma case [64].
[453] Section 41(1) (c) of the Constitution.

Section 139 authorises the provincial executive to take 'any appropriate steps to ensure fulfilment' of the obligation 'including' the issuing of a directive, and assuming responsibility."[454] What emerges from the latter sentence, cited from Mnquma case, is that the ambit of the intervention steps is wide, but such steps must be appropriate. The inference of a wide scope of intervention measures is derived from the use of the word "any" in reference to such measures. Even though that as the case, the measures of intervention must be appropriate.

It was explained in the Certification of the amended text (AT) that "the reference to "appropriate steps" in AT 100(1) must be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power among different levels of government."[455] This is an important statement because it clearly locates the context within which the phrase "taking any appropriate steps" must be understood. The context is the Constitution as a whole, and it, therefore, follows that taking any appropriate steps does not confer unfettered discretion on the national executive when it intervenes in a province. Expanding on the point of "any appropriate measures", the court stated that "it would not be appropriate for the national executive to attempt to intervene in provincial affairs in a manner other than that authorised by the Constitution or by legislation enacted in accordance with the Constitution." It is, thus, evident that the appropriateness or otherwise of the intervention steps taken by the national executive in respect of a province is a matter that needs to be tested against the Constitution or relevant legislation. The court illustrated this point with an example of what is excluded in respect of "any appropriate steps" when it stated that, "it would not, however, include resort to means that would be inconsistent with AT[456] chapter 3, and. in particular, with the obligation under AT 41(1) (g) to exercise its powers in a manner that 'does not encroach on the geographical, functional or institutional integrity' of provincial governments."[457] This is in line with the distinctive character of each of the three

[454] First Certification judgment [266].
[455] Certification of the amended text [124].
[456] AT means Amended Text which refers to the final Constitution of the Republic of South Africa.
[457] In the First Certificate Judgment the court stated that he right to intervene is subject to the provisions of NT 41(1)(e), (f) and (g), which require all levels of government to:

spheres of government, as provided for in section 40 of the Constitution, which provides that each of the three spheres of government is distinctive, interdependent and interrelated.[458] The distinctive character of each sphere of government was explained in chapter 2 of this dissertation as that element which defines the autonomy of each of the three spheres of government. It was also explained, in the same chapter, that the Constitution further enjoins all spheres of government to respect the constitutional status, institutions, powers and functions of government in other spheres.[459]

As alluded to earlier on, the power of the national executive to intervene in a province is an exception to the constitutional provision that vests the executive authority of a province in a Premier of the province concerned, which he/she exercises together with the other members of the Executive Council. This power of the national executive is also an exception to the principles of co-operative government which closely guard the autonomy of each of the three spheres, which was also commented on above.

In the Mnquma case, the court explained the phrase "Appropriate steps" with reference to the Constitutional Court's pronouncement where the court stated that appropriate steps would, thus, include action such as a resort to the procedures established under AT 41(2) for the promotion of intergovernmental relations and the settlement of intergovernmental disputes and the exercise of the treasury control powers under AT 216.[460] The Constitutional Court continued to say that appropriate steps would not, however, include resort to means that would be inconsistent with

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"(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution; [and]
(g) exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere".

[458] Section 40(1) of the Constitution.
[459] Section 41(1) (e) of the Constitution.
[460] Certification of the Amended Text [124].

AT chapter 3, and, in particular, with the obligation under AT 41(1)(g) to exercise its powers in a manner that "does not encroach on the geographical, functional or institutional integrity" of provincial governments.[461] It is evident from the latter example that the co-operative government principles in chapter 3 of the Constitution serve as the normative framework against which the appropriateness or otherwise of intervention measures of the national government in a province can be tested.

The examples of appropriate measures given by the court, cited above, clearly illustrate the point that appropriateness is determined within the context of the Constitution. It, therefore, follows that, once the national executive has established the existence of facts or circumstances that warrant intervention in terms of section 41(2) and or section 216 of the Constitution, such measures will be appropriate. The Constitution, for example, empowers national treasury to stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent breach of measures to ensure both transparency and expenditure control in each sphere of government.[462] Invoking such constitutional provisions, in the circumstances described in the previous sentence, constitutes appropriate steps. There is a rational connection or nexus between stopping the transfer of funds by national treasury and commission of breach of transparency and expenditure control measures by an organ of state, as illustrated by the example given above. The main constitutional consideration is that, when an obligation is not performed by a province, the national executive may intervene through taking appropriate steps.

It seems quite evident that it is not possible to provide an absolute definition or an exhaustive list of "appropriate steps" contemplated in subsection (1) of section 100 of the Constitution because the appropriateness or otherwise of an intervention measure must be determined on the basis of facts or circumstances that give rise to the intervention. Making reference to the Pharmaceutical case, the court, in the Mnquma case, summed up the issue on what constitutes an appropriate dispensing

[461] Certification of the Amended Text [124].
[462] Section 216 of the Constitution.

fee by stating that, “there is not an absolute standard for being appropriate and more than one fee (meaning dispensing fee charged by pharmacists and private doctors) can be appropriate. The word carries with it a measure of elasticity and reasonable persons may within reason disagree on what is and what is not appropriate.”[463] There is, however, a constitutional and legislative framework on the basis of which a decision may be taken or a conclusion may be drawn, and whether, in a particular case, the intervention by the national executive in a particular province is appropriate. Still on the Mnquma case, the court cited what may be seen as being some of the essentials of the phrase “appropriate steps” and these are that appropriate steps must fit the situation so that the form of intervention must address the particular circumstances of the case; it requires a balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government; a further consideration is the purpose of the power to intervene and this can be determined only with due regard to the nature of the executive obligation that was not fulfilled, the interests of those affected by the failure to fulfil an executive obligation; and it is clearly designed as a corrective measure to ensure that such steps are taken that would resolve the problems that may be experienced in a particular municipality. This necessitates the question of whether the form of intervention that is contemplated would be effective and commensurate with the nature and/or the extent of the failure to fulfil the obligation concerned.”[464] As alluded to earlier on, the Mnquma case dealt with provincial government intervention in local government in terms of section 139 of the Constitution which is a sister provision of section 100 of the Constitution. It, therefore, needs to be pointed out that the essentials of the phrase “any appropriate steps” as enunciated by the court in the Mnquma case applies *mutatis mutandis* in respect of section 100 intervention.

The above guidelines provided by the Mnquma case are a very helpful contribution to the legal framework for national government supervision of provinces because this kind of framework enables the repository of the power to intervene in provincial

[463] Pharmaceutical case [79].
[464] Mnquma case [72].

administration to make a proper decision about whether certain intervention measures are appropriate in a given set of circumstances. It also serves as normative framework against which a decision of the national executive to intervene in a province and the manner of the intervention may be tested to determine whether it is appropriate or not. Over and above the guidelines given above, the court added two further essential guidelines that can help in making a determination on whether or not an intervention is appropriate, and these are justice and fairness. In this regard the court stated that, in *Pharmaceutical Society of South Africa v Tshabalala-Msimang*[465] case and in *Hoffmann v South African Airways*[466], the respective courts had to determine the meaning of the word "appropriate" in the context of "appropriate dispensing fee" and "appropriate relief". It was held that appropriateness in the context of the Constitution imports the elements of justice and fairness and that "In determining what is appropriate one must consider the conflicting interests of all those involved and affected" and that "One is really dealing with a balancing act implicit in the right of access…"[467] The preceding point underscores the fact that intervention must be conducted in good faith and this must find expression in the justice and fairness defining qualities of "any appropriate steps". The discourse on national executive intervention in a province is taken to another level below with specific focus on the procedural requirements that must be met when "any appropriate steps" are taken by the national executive to ensure the fulfilment of the obligations which the provincial government has failed to do. The Constitution provides two examples of modalities or forms of intervention which are dealt with below.

[465] In the Pharmaceutical Society of South Africa v Tshabalala-Msimang case [76] Justice Ngcobo explained the meaning of appropriateness within the context of section 38 of the Constitution and indicated that there can be no talk of appropriateness which excludes justice and fairness. He concluded this line of reasoning by declaring that appropriateness imports the elements of justice and fairness.

[466] In Hoffmann v South African Airways [42] Ackermann J made a remark that, in the context of a comparable provision in the interim Constitution, "[it can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate." Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

[467] Pharmaceutical Society of South Africa v Tshabalala-Msimang supra at para [77].

4. The form/modalities of intervention

When the substantive requirements for national government intervention in terms of section 100 of the Constitution have been satisfied, the national executive may intervene by taking any appropriate steps to ensure the fulfilment of those obligations which the province is unable or unwilling to fulfil.[468] This section of the Constitution confers power on the national executive not merely to intervene, but also to decide on the nature and extent of intervention.[469] This is the last aspect of subsection (1) of section 100 of the Constitution. As mentioned earlier, two examples of these forms of intervention have been provided by the Constitution, and these are "issuing of a directive to the appropriate provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to fulfil its obligations[470] and assuming responsibility for the relevant obligation in that province to the extent necessary to discharge the obligations enumerated in subparagraphs (i) to (iv) of section 100(1) (b).[471] However, the antecedent to the implementation of 100(1) (b) measures is the issuing of a directive in terms of paragraph (a) of subsection 100(1).

4.1. The issuing of a directive

In the Certification of the amended Constitution the court explained the steps of the process in terms of section 100(1) by stating that, firstly, a directive must be issued in terms of NT 100(1) (a).[472] The Court went on to say that, after this has been done, the national executive may assume responsibility for the obligations to the extent that it is necessary to do so, the assumption of responsibility being contingent upon the response to the directive.[473] Thus, section 100 of the Constitution has established a process of intervention by the national executive in provincial administration. In this regard subsection (3) of section 100 provides that national

[468] Section 100(1) of the Constitution.
[469] Muluneh YA Supervisory of the Centre to the Region (2009) 35.
[470] Section 100(1) (a) of the Constitution.
[471] Section 100(1) (b) of the Constitution.
[472] Certification of the Amended Text paragraph [119].
[473] Certification of the amended text [119].

legislation may regulate a process established by this section.[474] This puts beyond any doubt the fact that intervention in terms of section 100 of the Constitution is essentially a two-pronged process. The court was even more explicit on this point when it stated further that, "AT 100(1) (a) and (b) deal with one process. This flows from the fact that they have not been formulated in the alternative but are linked by the conjunction "and".[475] When one juxtaposes the provisions of section 100 (1) (a) and (b) with those of its sister provision in section 139(1) (b) and (c), it emerges that the latter provisions are joined by the conjunction "or". This indicates that section 139(1) steps are in the alternative and are not successive steps of the same process. This is one of the material differences between these two similarly worded provisions of the Constitution.

It is important to point out that the issuing of a directive, as the first procedural step in the process of intervention by the national executive in a province, must not be executed in a manner that ignores the purpose for which it is intended. The intention of the directive is to bring to the attention of the provincial government the shortcomings in the governance of the province so that it can take corrective measures on its own. This measure of intervention is not meant to be simply an empty ritual. In other words, it would be contrary to the spirit of the Constitution when the national executive issues a directive to the provincial executive when the former had already taken a prior decision to assume responsibility for the provincial obligation in question. Invoking section 100(1) (a) in the manner alluded to in the preceding sentence ignores the object or the rationale behind this procedural step. On this point the Constitutional court stated, in the Certification of the amended text, that "the issuing of a directive in terms AT 100(1)(a) has no consequences in itself; it only has relevance as part of a process which requires a directive to be issued before the intervention sanctioned by AT 100(1)(b) takes place."[476] This essentially means that the issuing of a directive is a first step in a process, and, if such a directive is not complied with by the relevant provincial administration, this may lead

[474] Section 100(3) of the Constitution.
[475] Certification of the amended text [120].
[476] Certification of the amended text [120].

to a more intrusive next step of intervention.[477] The intervention measure which relates to assuming responsibility for the relevant obligation by the national executive in a province is discussed below.

4.2. Assumption of responsibility for the obligation that has not been fulfilled

The Constitution, in certain circumstances, empowers the national executive to intervene by assuming responsibility for the relevant obligation in a province to achieve the objectives which are clearly enumerated therein.[478] Firstly, section 100(1) (b) empowers the national executive to exercise the most intrusive form of power upon a provincial administration, and this power entails taking over the function that ordinarily resides with a provincial government.[479] In view of the intrusive nature of the power of intervention, the objectives for which such power may be exercised by the national executive are clearly circumscribed by the Constitution. Upon closer scrutiny of subsection 100(1) (b), it is evident that the objectives are framed in the alternative, which means that the national government may assume responsibility for a certain provincial obligation to achieve any one or more of these objectives. The basis for intervention by the national executive could be that it, for example, seeks to "maintain essential national standards or established minimum standards for the rendering of a service; or to maintain economic unity; or maintain national security or prevent unreasonable action by a province that may prejudice another province or the country as whole."[480] It seems quite logical to conclude that at the heart of national executive intervention in a province is the desire to strengthen governance in the province so that the citizens of the Republic can receive services at the required standards.

The clause in respect of assuming responsibility for the obligation that has not been fulfilled is self-explanatory. Firstly, it is apparent that there should be no assumption

[477] Certification of the amended text [119].
[478] Section 100(1) (b) of the Constitution.
[479] Section 100(1) (b) empowers the national executive to assume responsibility for the relevant obligation which the province cannot or does not fulfil.
[480] Section 100(1) (b) (i) to (iv) of the Constitution.

of responsibility by the national executive if the province has already fulfilled the relevant obligation. This assertion is based on the understanding that the issuing of a directive is not merely an empty ritual, but it is an act of good faith by the national executive for the purpose of correcting that which has been identified as a failure by a provincial government concerned. The principles of co-operative government instruct all spheres of government to co-operate with one another in mutual trust and good faith.[481] This point corroborates the view alluded to earlier on that, if the directive issued by the national executive is complied with, it should follow that the intervention must not take place. Any intervention by the national executive that seeks to achieve other purpose(s) outside the scope provided for in the Constitution is *ultra vires*. It is for this reason that the Constitution prescribes very specific and strict procedures with which the national government must comply when invoking the intervention powers in terms of section 100(1) (b).

5. The procedural requirements for national government intervention in a provincial government in terms of section 100 (2) of the Constitution

The procedural requirements for intervention refer to the manner by which the national government, as mandated by the Constitution, takes "any appropriate steps" with the view to ensuring the realisation of the unfulfilled provincial obligation.[482] This essentially refers to the "how part" of the intervention. It has been alluded to above that the phrase "taking any appropriate steps…." is indicative of the forms or modalities of intervention. Once a decision to intervene in a provincial government has been taken by the national executive, a directive must be issued to the relevant provincial government. Depending on the response of the provincial government concerned, a more invasive next modality, namely assuming responsibility for the relevant obligation in the province, may be invoked.[483] That having been said, the three sequential procedural steps must be adhered to by the national executive when invoking its constitutionally sanctioned intervention in a

[481] Section 41(1) (h) of the Constitution.
[482] Muluneh YA Supervisory of the Centre to the Region (2009) 36.
[483] Section 100(1) (a) and (b) of the Constitution.

provincial government.

Firstly, the national executive must submit a written notice of intervention to the National Council of Provinces within 14 days after the intervention began.[484] As alluded to earlier, the procedural steps for intervention are couched in peremptory terms and, therefore, compliance with them has to be exact. Secondly, the intervention must end when the Council disapproves the intervention within 180 days after the intervention began or when, by the end of that period, it has not approved the intervention.[485] This procedural step is quite stringent because it makes it clear that the National Council may, through positive conduct, direct the national executive to discontinue the intervention, or, through an omission, cause an intervention to be discontinued. The omission in this context refers to an instance where, at the end of 180 days from the commencement of the intervention, the NCOP has not granted approval of the intervention. Thirdly, the Council must, while the intervention continues, review' the intervention regularly and may take any appropriate recommendations to the national executive.[486] It is quite evident that the Constitution requires the NCOP to monitor the intervention very closely right from the first 14 days thereof through to the six-month period, and right up to the conclusion of the whole process. These stringent monitoring measures by the NCOP over the national executive are not surprising because, as explained earlier on, the assumption of responsibility of one sphere of government by another sphere is quite drastic, and it requires strict measures to prevent arbitrariness in the exercise of such power.

6. Conclusion

From the discourse on the legal framework for national government supervision of provinces embarked upon in this chapter, it has emerged that this legal framework is critical in regulating intergovernmental supervision. It has become evident that the

[484] Section 100(2) (a) of the Constitution.
[485] Section 100(2) (b) of the Constitution.
[486] Section 100(2) (c) of the Constitution.

supervision powers of the upper spheres of government over the lower spheres is a constitutional requirement geared towards providing good and effective government for the benefit of the citizens of the Republic of South Africa. It is for this reason that the national sphere of government supervises the provincial and local provincial spheres of government while the provincial government, in turn, also supervises the local sphere of government. The discourse has also revealed that the constitutional requirement of supervision of lower spheres by upper spheres needs to be balanced with the constitutional imperative of respecting the autonomy of the spheres of government.[487] Essentially, this involves balancing the founding provision of the Constitution which, as mentioned above, emphasises the indivisibility of the Republic,[488] on one hand, and the constitutional imperatives of the co-operative government principles in chapter 3 of the Constitution, on the other hand.[489] The principles of co-operative government, amongst other things, instruct the two spheres to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. This is a very delicate balance which requires a well formulated legal framework to make it work.

The discussion on the legal framework also revealed that supervision involves regulation, monitoring, support and intervention. The relationship between these four constituent elements of supervision has been explained as setting the regulatory framework which can be in the form of national directives or norms and standards against which the governance of the lower spheres is measured, observing, gathering and interpretation of evidence through monitoring in order to decide what support is required. Intervention was characterized as being a very invasive or intrusive form of supervision which must be exercised under special circumstances provided for in terms of section 100 of the Constitution. It was explained that it is for this reason that stringent substantive and procedural requirements are provided for in the Constitution. The legal framework for national

[487] Section 41(1) (e) of the Constitution instructs all spheres of government to respect the constitutional status, institutions, powers and functions of government in other spheres.
[488] Section 1 of the Constitution.
[489] Section 40 of the Constitution.

government supervision of provinces, as discussed in this chapter, therefore ties in very well with the next chapter which deals with “Case study on the supervision of provincial government”. The legal framework will be used to analyse each and every case study of intervention by the national executive in a province in order to determine whether such interventions are constitutionally and legally valid.

Chapter 5

CASE STUDY ON SUPERVISION OF PROVINCIAL GOVERNMENT

1. Introduction

Chapter 4 dealt with the legal framework for the national government supervision of provinces. The focus of this chapter is on a critical discussion of case studies of supervision in different provinces. As stated in chapter 4, the concept "supervision", in the context of provincial government supervision of local sphere of government, includes setting out the regulatory framework, monitoring of, intervention in, and support of local government.[490] These four elements also apply to the national government supervision of the provincial sphere of government. The specific focus of this chapter is on the intervention element of supervision, and it is looked at from the perspective of national government intervention in the provincial sphere, as provided for by the Constitution.[491] Specifically this entails looking at the practice of supervision in Eastern Cape, Limpopo and North West provinces. The rationale for choosing these three provinces is that all three of them have been put under national government administration, meaning that the national executive has assumed responsibility for the relevant executive obligation which the provincial government was unable or unwilling to discharge.[492] Considering that intervention, as mentioned in chapter 3, is the most intrusive form or modality of supervision, it was felt that through this chapter a wider scope for an analysis of national government supervision of provinces will be provided. Secondly, the Eastern Cape is the first province in which section 100 (1) (b) was invoked and this was on 2 March 2011, It, thus, presents a test case for the intervention by national government in a province[493]. Limpopo is the first province in which five Limpopo provincial state

[490] De Visser (2005) 170

[491] Section 100 of the Constitution.

[492] Section 100(1) of the Constitution empowers the national executive to intervene in a province in circumstances where the province cannot or does not fulfil its executive obligations in terms of the Constitution or legislation by taking any appropriate measures to ensure fulfilment of the obligation in question.

[493] National Intervention in Eastern Cape Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011https://www.pa.org.za (Date used 18 February 2019).

departments were subjected to national government intervention by the assumption of responsibility.[494] Finally, as at the time of the writing of this chapter, North West was the province with the highest record of section 100 intervention whereby the national executive, on 09 May 2018, invoked section 100(1) on the entire administration of North West.[495] In conducting case studies in the three provinces, use will be made of source documents such as correspondence between national and provincial government in different provinces about intervention discussion and resolutions of parliamentary committees.

The second aspect of this chapter is on the assessment of the supervision conducted in respect of each of the three provinces identified for the purpose of this study. Such analytical assessment will be conducted with reference to the following guiding elements: substantive requirements for intervention[496]; procedural requirements for intervention[497]; the co-operative government principles[498]; the relevant rules of the National Council of Provinces (NCOP); and case law and legislation. The modalities of interventions provided for by the Constitution will be tested against the elements, referred to above, and a conclusion will then be arrived at as to whether national supervision over the identified provinces pass the constitutional muster of legal validity. The practice of the supervision of provincial government is discussed below.

2. The practice of supervision of provincial government

2.1. Supervision of the Eastern Cape Department of Education

In her address of the National Assembly on 16 March 2011, the Minister of Basic Education, Mrs Angie Motshekga, declared that, on 02 March 2011, Cabinet had

[494] Statement issued by Jimmy Manyi, Cabinet Spokesperson and CEO of Government Communications (GCIS), December 5 2011https://www.polity.org.za (Date used 22 February 2019).
[495] Inter-Ministerial Task Team (IMTT) update on North West intervention, with Ministers Ad Hoc Committee on North West Intervention 16 August 2018 https://pmg.org.za (Date used 02 March 2019).
[496] Section 100(1) of the Constitution.
[497] Section 100(3) of the Constitution.
[498] Section 41 of the Constitution.

resolved that she (the Minister of Basic Education) would, as mandated by the Constitution, assume responsibility for the Eastern Cape Department of Education as it had failed to achieve minimum standards of service delivery.[499] In making this announcement, the Minister of Basic Education set out the background to and reasons for the intervention. The Minister made reference to the engagements she had had with the Eastern Cape Provincial Department of Education prior to her address to the National Assembly, where, according to her, it had become evident that there were serious capacity challenges confronting that province which made it difficult to implement an effective turn-around strategy that would be in the best interest of the learners in that province.[500]

The Minister enumerated the specific challenges which confronted the Eastern Cape Education Department, key of which were the following:

- Poor management of procurement process resulting in failure by the provincial Education Department of Eastern Cape to provide textbooks and stationery schools for which the Provincial Education Department supplies textbooks and stationery;
- Poor implantation of policy which led to overspending and so the scholar transport programme was suspended owing to over-spending;
- Factors such a non-compliance with policy, poor management of budget, and poor supply chain management led to the termination of the School Nutrition Programme before the end of the financial year; and
- Another compounding factor was the failure by the Provincial Education Department to implement the school infrastructure development

[499]Statement-national assembly-eastern cape-education-department-intervention-mrs-angie-motshekga Statement to the National Assembly on the Eastern Cape Education Department intervention by Mrs Angie Motshekga, Minister of Basic Education 16 March 2011 https://www.gov.za/ (hereafter Statement-national-assembly-eastern-cape-education-department-intervention-mrs-angie-motshekga) (Date used 10 March 2019).

[500]Statement-national-assembly-eastern-cape-education-department-intervention-mrs-angie-motshekga https://www.gov.za/ (Date used 11March 2017).

programme effectively which resulted in funding earmarked for school infrastructure being returned to the National Treasury.[501]

On 17 March 2017, the Deputy Minister of the Department of Basic Education, Mr Mohamed Enver Surty, then briefed the NCOP on the steps taken by the Department of Basic Education which had led to the decision to intervene in the Eastern Cape Department of Education. In this brief, the Deputy Minister made reference to a wide range of consultations held with the leadership of the Eastern Cape Province, in particular the Premier and the MEC for the Department of Education. He informed the NCOP that, during the consultation with the leadership of the Eastern Cape, it emerged that there were serious challenges of capacity in the Department of Education in that province. Furthermore, the Deputy Minister briefed the NCOP on the objectives of the intervention.[502]

Further particulars of the problems were captured in the *Centre for Child Law and others v Minister of Basic Education and Others.* This case came about when six original applicants lodged an urgent application which sought to force the respondents to implement the 2012 educator post establishment, which had been declared but not implemented. Essentially the applicants required the respondents to fill the vacant posts by a specified date, to pay the salaries of temporary educators who had not been paid by a set date, to employ and pay teachers who had been appointed by school governing bodies to vacant posts and to declare the educator post establishment for 2013 including non-teaching staff by specific date.[503] The Department of Education in the Eastern Cape had not been able to resolve the long-outstanding issue of post provisioning, the result of which was that schools ended up having more teachers than they needed while others had too few teachers.[504] This state of affairs had an adverse effect on teaching and learning in Eastern Cape.

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[501]Statement-national-assembly-eastern-cape-education-department-intervention-mrs-angie-motshekga https://www.gov.za/ (Date used 15 April 2019).

[502] National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011 https://www.pa.org.za (Date used 13 April 2019).

[503] Centre for Child Law case [2].

[504] Centre for Child Law [12]

What further complicated personnel provisioning matters was that the provincial department had failed to transfer teachers to needy schools, and the budget spiralled out of control when teachers at under-resourced schools were appointed to fill vacant posts on a temporary basis.[505] In its desperation to contain personnel costs the provincial department had dismissed 4000 temporary teachers.

The court ruled in favour of the applicants by compelling the respondents to declare the 2013 post establishment for both teaching staff and non-teaching staff of public schools in the province and added that they were required to fill those posts.[506] Effectively the applicants were granted the orders that they had sought. The court's reasoning was that the interpretation of the legislation that is consistent with the obligation on the respondents to respect, protect, promote and fulfil the fundamental right to basic education meant that the Member of the Executive Council (MEC) in charge of basic education in Eastern Cape was empowered and obliged by the South African Schools Act to determine the establishment for both teaching staff and non-teaching staff at public schools in the province.[507] The MEC had thus failed to discharge the obligations in terms of the Constitution which, as mentioned above, confers on the children of Eastern Cape the right to basic education and the South African Schools Act which obliges the MEC to declare the post establishment of a public school, as stated above.

Having discussed the Eastern Cape Education Department intervention, the Limpopo intervention is discussed next.

[505] Centre for Child Law [13]
[506] Centre for Child Law Case [34].
[507] Centre for Child Law Case [32].

2.2. Supervision of Limpopo Provincial government

On 05 December 2011, Cabinet convened a special meeting at which a decision was taken to put five Limpopo provincial departments under administration in terms of which the national executive assumed responsibility for the executive obligations the province was unable or unwilling to discharge, as provided for in section 100(1) (b) of the Constitution.[508] The five state departments affected were Provincial Treasury; Education; Health; Public Works; and Roads and Transport. The then Cabinet Spokesperson and Chief Executive Officer (CEO) of Government Communication, Mr Jimmy Manyi, announced this Cabinet decision at the press briefing on the same day.[509]

Mr Manyi briefly set out the circumstances that had given rise to the intervention by national government in Limpopo province and also mentioned the departments to be put under national executive administration. These circumstances included the fact that Limpopo was one of the provinces about whose state of financial administration Cabinet had been concerned. Mr Manyi made reference to the Cabinet meeting of 23 November 2011 when the Minister of Finance had reported on the request which had been received by National Treasury from the province of Limpopo for the approval of an additional overdraft facility. Mr Manyi explained that the request had arisen from the fact that Limpopo had experienced a cash crisis two weeks prior to the Cabinet's meeting, as the province had depleted their R757,3 million overdraft facility with the Corporation for Public Deposits (CPD). Faced with this crisis situation, Limpopo had requested an increase of their facility by R1 billion (to R1, 7 billion) from the National Treasury for the purpose of making it possible for the province to pay salaries and wages on 23 November 2011. National Treasury

[508] Statement issued by Jimmy Manyi, Cabinet Spokesperson and CEO of Government Communications (GCIS), December 5 2011 (hereinafter Statement by Cabinet Spokesperson December 5 2011) https://www.polity.org.za (Date used 27 April 2019).

[509] MEDIA STATEMENT: JOINT MINISTERIAL TEAM ON LIMPOPO SECTION 100 INTERVENTION 19 January 2012 Cabinet Spokesperson: Jimmy Manyi and Director: GCIS Limpopo: Thanyani Ravhura (hereafter Joint Ministerial Team on Limpopo intervention 19 January 2012) www.treasury.gov.za (Date used 27 April 2019).

did not grant their request.[510] Instead, the provincial government was rescued through alternative arrangements whereby an early transfer (two days before the actual date of transfer) of their equitable share was made in order for the province to pay salaries. The Cabinet then tasked the Minister of Finance with responsibility to review the financial situation in Limpopo and other affected provinces and report back to Cabinet with recommendations. It was against the above background that a special Cabinet meeting was convened on 05 December 2011. As stated above, having considered the situation prevailing then in Limpopo, Cabinet then decided, on 05 December 2011, that the Limpopo Provincial Government be placed under a section 100 (1) (b) intervention of the Constitution, which meant that the national executive assumed responsibility for the five Limpopo Departments.

In implementing that Cabinet decision the *modus operandi* adopted by national government was that MECs, Heads of Departments (HODs), Chief Financial Officers (CFOs) and other appropriate officials would be replaced by National acting deployees on a case-by-case basis.[511] Monitoring committees, under the leadership of National Treasury, comprising of different ministries were put in place. These National ministries were the Departments of Higher Education and Training, Basic Education, Transport, Health, Public Works, Justice, and Public Service and Administration.[512] Members of the National Executive would assume responsibility for the following Departments in line with section 100(1) (b) of the Constitution, Provincial Treasury, Education, Transport & Roads, Health, and Public Works.[513]

Having outlined the synopsis of the circumstances that led to the Cabinet decision to intervene in Limpopo, it is prudent that, for the purpose of assessment of

[510] De Vos P Can the Government intervene in Limpopo- constitutionally speaking? https://constitutionallyconstitutionallyspeaking.co.za (Date used 05 May 2019).

[511] National Government to take control of 5 Limpopo Departments–Cabinet press statement 5 December 2011 https://www.politicsweb.co.za/documents/national-govt-to take-control-of-5-limpopo-depts (Date used (02 July 2019) (hereinafter National govt to take control of 5 Limpopo Departments).

[512] National govt to take control of 5 Limpopo Departments https://www.politicsweb.co.za/documents/national-govt-to take-control-of-5-limpopo-depts.

[513] National govt to take control of 5 Limpopo Departments https://www.politicsweb.co.za/documents/national-govt-to take-control-of-5-limpopo-depts.

supervision in Limpopo, the circumstances prevailing then in each of the five Limpopo provincial departments subjected to intervention are outlined briefly below. This is done with reference to the National Treasury briefings of the Standing Committee on Public Accounts (SCOPA) at the meeting held on 11 June 2012[514] and other meetings of Parliamentary Committees pertaining to the national government intervention in Limpopo. At the meeting held on 11 June 2011, Mr Ndoda Biyela, Administrator of Assets and Liabilities Management, National Treasury, reported that, amongst other key problems prevailing in Limpopo, were that Heads of Departments (HODs) had abdicated their accounting officer functions.[515] In the paragraphs below Mr Biyela described the specific problems in each of the departments under administration.

Key among the challenges in the Department of Health were that it had an audit disclaimer in 2010/11 owing to insufficient audit evidence for commitments of R2.9 billion. This Department had R400 million irregular expenditure of goods and services; contraventions of supply chain regulations; R138.2 million unpaid accruals and problems with assets. Unauthorised expenditure was reported to be at R340 million in March 2011. The Department had spent 59.2% of budget by October but was projecting to overspend.[516] Further details of the state of affairs prevailing at that time as pointed out by the then Government spokesperson, Jimmy Manyi, were that it had become evident that the cumulative effect of the problems of failure to pay suppliers and possible refusal by suppliers to do business with the provincial administration would be a direct threat to public health in Limpopo.[517] The circumstances of failure by the Department of Health led to intervention by the National Executive.

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[514] Section 100(1) (b) Limpopo provincial interventions, Public entity boards: National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 17 January 2019 (hereinafter National Treasury briefings Public Accounts (SCOPA) 12 June 2012 1.

[515] National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 17 January 2019.

[516] National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 17 January 2019).

[517] Joint Ministerial Team on Limpopo intervention 19 January 2012 www.treasury.gov.za (Date used 22 August 2019) (hereinafter Media statement on Limpopo intervention by Cabinet Spokesperson 19 January 2012).

Key challenges facing the Department of Education in Limpopo included that the Department of Education had received a qualified audit in 2010/11 mainly arising from the poor management of the human resources functions. Poor management of human resources was evidenced by the fact that there were 2 400 excess teachers, while there were at least other 200 teachers who were registered but unable to be accounted for physically, and the cost associated with that was R1 billion a year. There was a problem of accumulated unauthorised expenditure amounting to R2.2 billion. The situation in this department was exacerbated by the accruals which were said to be at R189 million and, further, it projected overspending.[518] It also emerged from the media briefing of 19 January held by the then Government spokesperson that certain schools did not receive any transfer of funds during 2011 in accordance with the national norms and standards, and this made the day to day running of the schools extremely difficult.[519]

The Department of Public Works also contributed to the financial woes of Limpopo government as it had a qualified audit for 2010/11 because of problems emanating from its asset management, inability to verify assets, and numerous violations of supply chain regulations, including awarding tenders without the proper bid processes, the modification of existing contracts to increase tender values and the awarding of tenders without checking the interest of the bidders.[520] The problems in this department were aggravated by the fact that consultancy fees accounted for an unusually high proportion – 25%, or a quarter - of infrastructure costs, which is about 7% higher than the average at national level.[521]

[518] National Treasury briefings Public Accounts (SCOPA) 12 June 2012 https://pmg.org.za (24 August 2019) (Date used 18 January 2019).
[519] Statement by Cabinet Spokesperson December 5 2011 https://www.polity.org.za (Date used 26 August 2019).
[520] National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 01 September 2019).
[521] Statement by Cabinet Spokesperson December 5 2011 https://www.polity.org.za (Date used 01 September 2019).

The Department of Roads and Transport also compounded the financial crisis of the province of Limpopo in the following manner. This department also had a qualified audit for 2010/11, emanating from the fact that it had no contract management systems in place, it was unable to verify commitments of R84.5 million, and the internal control systems were lacking, with the accounting officer, in particular, having almost abdicated oversight over the Limpopo Roads Agency. The accumulated unauthorised expenditure was said to be at R67 million by the end of March 2011.[522]

The financial situation confronting the Limpopo provincial administration was so dire that even the Provincial Treasury had to be put under national government administration. Whilst in the ordinary course of events a Provincial Treasury (PT) has oversight over all departments, the nature of the situation in Limpopo warranted that National Treasury (NT) assumed oversight of all departments, not only those under administration.[523] The Public Finance Management Act (PFMA) imposes an obligation on a Provincial treasury to exercise oversight responsibilities over other provincial departments, and this specifically includes preparing the provincial budget and exercising control over its implementation.[524] A Provincial treasury is further required to enforce the PFMA and any other prescribed national and provincial norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems in provincial departments.[525] The Limpopo Provincial Treasury, although it had received an unqualified audit, had not performed its functions adequately, in numerous respects, including banking and cash management, and its dysfunctional public finance functions had led to poor expenditure monitoring, budget planning, and infrastructure monitoring.[526] That is how dire the situation was in Limpopo, thus warranting National Treasury to assume responsibility for all state departments in that province, including the Provincial

[522] Statement by Cabinet Spokesperson December 5 2011https://www.polity.org.za ((Date used 01 September 2019).
[523] National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za ((Date used 18 September 2019).
[524] Section 18(1) (a) and (b) of the Public Finance Management Act 1 of 1999.
[525] Section 18(2) (b) of the Public Finance Management Act 1 of 199.
[526] National Treasury briefings Public Accounts (SCOPA) 12 June 2012 https://pmg.org.za ((Date used 18 September 2019).

Treasury. It can, therefore, be concluded that the Limpopo Provincial Treasury failed to discharge its obligations in terms of the PFMA. What further worsened the situation was that various key positions had not been filled, and, even when staff were in place, they had capacity challenges. Over and above the worsened position of Limpopo, the Exco had endorsed illegal procurement processes and there was evidence of illegal payments and irregular lease agreements. There was no risk management function.[527] During the media briefing of 19 January 2012, the Government spokesperson described the situation in the provincial Treasury as having reached crisis proportions, effectively meaning that, by December 2011, the provincial treasury management function in Limpopo had collapsed. This collapse, according to Mr Manyi, was evidenced by the fact that there was no proper cash management system in place and the budget section of the provincial treasury appeared to have been dysfunctional. [528]

On 22 November 2011, it became clear that the province would not be able to pay its workforce, mainly comprising of teachers, doctors, nurses and social workers. The service providers and other public sector employees were facing the same situation. The media briefing concluded by pointing out that National government had to take emergency measures towards the end of 2011 because, technically, the Limpopo Province was bankrupt[529]. The intervention, according to the media briefing, was aimed at restoring the capacity of the provincial treasury and provincial government as a whole to exercise proper financial management, ensure fair and transparent procurement and deliver appropriate services at the correct costs to the people of Limpopo.

[527] https://pmg.org.za https://pmg.org.za (Date used 18 September 2019) National Treasury briefings Public Accounts (SCOPA) 12 June 2012.

[528] Joint Ministerial Team on Limpopo intervention 19 January 2012: www.treasury.gov.za (Date used 15 October 2019).

[529] Joint Ministerial Team on Limpopo intervention 19 January 2012 www.treasury.gov.za (Date used 15 October 2019).

2.3. Supervision in North-West

On 09 May 2018, Cabinet invoked section 100(1) of the Constitution on the entire provincial administration of the North-West, almost two weeks after the North-West Department of Health had been placed under section 100(1) (b) administration.[530] This meant that in five of the ten provincial departments the national executive intervened by issuing a directive pointing out failures by the provincial government and the required remedial action, while, in respect of the remaining five departments, it intervened by the assumption of responsibility. Section 100(1)(a) of the Constitution was invoked in respect of the following state departments, Finance, Economic and Enterprise Development (DFEED), Local Government and Human Settlements (DLGHS), Rural, Environment and Agricultural Development (DREAD), and Social Development and Tourism (DSDT).[531] The state departments placed under section 100(1)(b) intervention were the Department in the Office of The Premier (OTP), the Department of Community Safety and Transportation (DCST), specifically the transportation component, and the Departments of Basic Education and Sports Development (DBESD), the Department of Health (DoH), Public Works and Roads (DPWR).[532]

Broadly, the problems in North-West, as captured in the Inter-Ministerial Committee (IMC) report of 14 June 2018, were, key amongst others that, notwithstanding the existence of governance structures, there was prevalence of very ineffective financial controls, governance and accountability. There was evidence that Supply Chain Management (SCM) control systems had been weakened and in some instances had collapsed entirely, from provincial level all the way down to local government, unauthorised and irregular expenditure had escalated, and this had

[530] Inter-Ministerial Committee (IMC) on North West intervention, with Ministers and Deputy Ministers' report to the Ad Hoc Committee on North West Intervention 14 June 2018 1(hereinafter IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention) https://pmg.org.za (Date used 27 October 2019).

[531] Inter-Ministerial Committee (IMC) on North West intervention, with Ministers and Deputy Ministers' report to the Ad Hoc Committee on North West Intervention 14 June 2018 1(hereinafter IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018) https://pmg.org.za (Date used 27 October 2019).

[532] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 2 November 2019).

cumulatively grown by an annual average of R2.1 billion, from R8.6 billion in 2013/14 to R15.39 billion in 2016/17.[533] What made matters even worse was the fact that Provincial Treasury was not properly exercising its oversight functions over the other state departments. It is worth mentioning that the IMTT's findings had been that the DFEED had had a clean audit, but that such evidence of good governance had been compromised by the fact that it had not performed so well in its oversight of other state departments.[534] The presentation, titled "Impact of accountability failures in North-West", made by the Auditor General, during the briefing of the *Ad Hoc* Committee on North-West Intervention, describe the failures of the North West Administration succinctly, and this included the following: There had been regression in audit outcomes for departments and public entities for over five years, meaning from 2012/13 to 2016/17.[535] All five departments under section 100(1)(b) had had material non-compliance findings for four consecutive years (2013/14 – 2016/17), all five of them failed to prevent irregular expenditure, they all had material misstatements in submitted Annual Financial Statements (AFS), and, finally, they were all non-compliant in respect of procurement and contract management. There was evidence of non-compliance with expenditure management in respect of the DoH, Education, and Department of Public Works, and there was evidence of the lack of implementation of consequence management in the Department of Health and Department of Public Works. 91% of the R15, 2 (R13, 9 billion) of unresolved irregular expenditure had been incurred by the five state departments under section 100(1) (b).[536]

The intervention plan required, amongst other things, that National Ministers, whose Ministries shared concurrent functions with corresponding provincial departments in the North-West Administration, were requested to conduct *in situ* condition assessment/diagnostic analysis in those provincial departments in the North-West

[533] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 2 November 2019).

[534] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 21 November 2019).

[535] Ad Hoc Committee on North-West's briefing by the North West, National Treasury, Auditor General on NWPG Fiscal position 27 June 2018 https://pmg.org.za (Date used 22 November 2019.

[536] Ad Hoc Committee on North-West's briefing by the North West, National Treasury, Auditor General on NWPG Fiscal position 27 June 2018 https://pmg.org.za (Date used 29 November 2019.

and advise the Inter-Ministerial Task Team (IMTT) on the type, nature and scope of the intervention to be considered in their corresponding provincial departments in the North-West.[537] The circumstances that led to intervention in respect of the first five departments in which the national executive intervened by issuing a directive in terms of section 100(1) (a) of the Constitution are described below.

2.3.1. Issuing of a directive in terms of section 100(1) (a) of the Constitution in respect of the five North-West provincial departments

The directive issued to the DFEED described the extent of failure by this department including failure to capacitate the Supply Chain Management (SCM) sections in other departments and entities to get them performing similarly as DFEED. The directive also pointed out a need for strengthening of those SCM systems, redress unauthorised, irregular, fruitless and wasteful (UIFW) expenditure by provincial departments and entities and a need to address non-compliance and backlogs in respect of infrastructure procurement, improve revenue collection and health resource allocation. The strengthening of the local Municipal Finance Management Act (MFMA) unit within the DFEED was required to ensure that local government in North-West received the relevant support from DFEED.[538]

In line with the intervention arrangement, the national ministers responsible for ministries with concurrent functional areas of competences with corresponding departments in North-West had to conduct diagnostic assessments in those departments and advise the IMTT. The Department of Human Settlement (DHS) had identified human settlements as high risk in NW, and had approved the DLGHS business plan. However, the provincial department had not met its targets, and the DHS had recommended seven intervention areas for the DLGHS. The directive was that the two departments (National and Provincial) had to formalise what had

[537] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 29 November 2019)

[538] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 29 November 2019).

already been an ongoing intervention. This involved the delivery of business plans, a multi-year human settlements development plan, and the appointment of suitably qualified and capable contractors who were registered with National Home Builders Registration Council (NHBRC) and Construction Industry Development Board (CIDB).[539]

The biggest finding had been AgriDelight, which had been a Project Management Unit (PMU) which had been appointed to do a lot of work at DREAD. The IMTT's findings had been that a great deal of unauthorised, Irregular Fruitless and Wasteful (UIFW) expenditure at DREAD had actually originated from the controversial contract of AgriDelight.[540]

In this case, the two corresponding departments with concurrent functional areas were the national Department of Cooperative Governance and Traditional Affairs (COGTA) and its provincial counterpart, which is the Department of Local Government and Department of Human Settlement. COGTA had identified and issued directives to the provincial Department of Local Government and Human Settlement in respect of the problems at NW which were said to be worse at local municipalities. The directive indicated that of the 20 disclaimed audit opinions for the 22 NW municipalities, 12 were dysfunctional and required urgent intervention.[541] Those municipalities had either previously had section 139 applied to them before or disclaimers and other serious situations.[542] COGTA had been clear that it could salvage those municipalities, restore governance and ensure the approval of a new organisational structure, deal with audit improvement plans, the appointment of

[539] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 29 November 2019).
[540] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 10 December 2019).
[541] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 10 December 2019).
[542] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 10 December 2019).

senior managers in municipalities, the bloated organisational structures and develop revenue enhancement plans for the DLGHS.

In this case, the two departments with functional areas of concurrent competence are the Department of Agriculture, Forestry and Fisheries (DAFF) and its provincial counterpart the Rural, Environment and Agricultural Development (DREAD). The directive issued by the Department of Agriculture, Forestry and Fisheries (DAFF) included the following interventions, the assessment of programmes regarding the implementation of projects that NW had, especially the Comprehensive Agriculture Support Programme (CASP) and the iLima Letsema programme. There was engagement on the reasons why the NW DREAD business plan for the year had not been approved. The biggest finding had been AgriDelight, which had been a Project Management Unit (PMU) which had been appointed to do a lot of work at DREAD. The IMTT's findings were that a lot of UIFW expenditure at DREAD had actually originated from the controversial contract of AgriDelight.[543] (This sounds very like the final paragraph of the previous page.)

The Inter-Ministerial Committee report indicated that the Inter-Ministerial Task Team had very limited work on the tourism component of the Department of Social Development and Tourism (DSDT). It was, however, mentioned that the provincial DSDT at NW had participated in strike action where it had been found that officials had been complaining about the building and occupational health matters where the Department was housed. The challenges there related to the separation of powers between administration and political leadership.[544] Assessment of oversight, financial and contract management, and the management of litigation and governance arrangements was required.

[543] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 18 December 2019).

[544] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 18 December 2019).

As mentioned above, the Inter-Ministerial Task Team on North West did not find much work to do in the Department of Tourism.

2.3.2. Assumption of responsibility in terms of section 100(1) (b) of the Constitution

2.3.2.1. Office of the Premier (OTP)

The findings had been that the OTP had failed to provide administrative leadership for the NW, and could not prevent conditions that had led to the breakdown of essential services which had necessitated national intervention.[545] The Office of the Premier had taken quite a number of irrational decisions, such as centralising services that should have been performed by the provincial Department of Co-operative government and other departments, and so the Office of The Premier (OTP) became the implementing agent. The Premier's Office, for example, took over the North-West Park and Tourism Board. The OTP thus failed to exercise its monitoring and oversight responsibilities but, instead, usurped functions that belonged to other provincial departments.[546] It was as a consequence of the findings referred to above that the Department of Performance Monitoring and Evaluation and Department of Public Service and Administration then developed a section 100 (b) plan for the OTP with responsibilities which both departments would assume, including enhancing governance and ensuring compliance with legal prescripts and the reviewing of delegations.

2.3.2.2. Department of Basic Education and Sports Development (DBESD)

The provision of basic education is a functional area of concurrent competence of the Department of Basic Education (DBE) and Provincial Education Department in each of the nine provinces. In the case of North-West the DBESD is the provincial counterpart of DBE. With regard the DBESD, the finding was that it needed to

[545] Ad Hoc Committee on North-West Intervention's briefing by the West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 22 December 2019).

[546] Ad Hoc Committee on North-West Intervention's briefing by the North West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 08 January2020).

restore service delivery and good governance. The main concerns and interventions had been matters of emphasis from AGSA's report, including the strengthening of financial and human resources management, curriculum development, management and delivery, conditional grants and early childhood development management, district coordination.[547] The findings further revealed that infrastructure development, the identification of learners qualifying for learner transport and the national schools' nutrition programme would also be matters receiving emphasis.[548]

The specific problems in this Department, as per the Auditor General's report on North-West, included, like all the other four North West provincial departments in which the national executive assumed responsibility, that the DBESD had material non-compliance findings for the four consecutive years (2013/14; 2014/15; 2015/16 and 2016/17) in respect of the following: irregular expenditure had not been prevented; there was material misstatement in submitted Annual Financial Statement (AFS); and procurement and contract management.[549]

2.3.2.3. The Department of Health (DoH)

The provincial Department of Health had been inundated with problems which escalated to crisis proportions so that health workers embarked on a protracted strike. The findings of the IMTT were that there had been serious challenges around governance at the provincial DoH and the absence of effective SCM and financial controls. Investigations had started and had been handed over to the relevant authorities. The national DoH would assume responsibility for strengthening SCM, focusing on potential risks related to corruption, initiation of disciplinary and criminal proceedings, and diagnostic assessment of investigating root causes of internal governance, leadership and organisational matters. The sustainability of projects and an exit strategy, including monitoring and evaluation, ensuring implementation

[547] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 08 January2020).
[548] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 08 January2020).
[549] Ad Hoc Committee on North-West Intervention's briefing by the North West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 18 January 2020).

of the procurement reform project, would be rolled out by DoH national, together with National Treasury (NT).[550] The DoH was also found by the Auditor General to be non-compliant in aspects pertaining to the failure to prevent irregular expenditure; material misstatement in submitted Annual Financial Statement (AFS); and procurement and contract management. R714 million irregular expenditure had been incurred by the Department during 2016/17 financial year.[551]

2.3.2.4. The Department of Public Works and Roads (DPWR)

The Inter-Ministerial Task Team had found that there was evidence of the usurpation of functions of the Department of Public Works and Roads by the Office of The Premier. The effect of this usurpation was the erosion of the core functions of DPWR with adverse consequences for service delivery.[552] The DPWR wanted clarification and a re-delegation of some of those functions to execute its mandate more effectively.[553] The findings were, amongst other things, that the DPWR needed a clearly-structured facilities management and maintenance plan the appointment competent service providers; ensuring the availability of technical and skilled professionals in the NW, and it was for this reason that DPWR had to focus on recruiting and retaining such highly qualified built environment professionals. What exacerbated the problems of NW in respect of DPWR had been the irregular expenditure of R3.4 billion in the 2017/18 financial year attributable to non-compliance with SCM and deviations from procurement. The review of the SCM organisational structure had to deal with an adequate segregation of duties. The DPWR had a backlog of R36 billion in work related to road infrastructure, yet the

[550] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 18 January 2020).
[551] Ad Hoc Committee on North-West Intervention's briefing by the North West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 18 January 2020).
[552] Inter-Ministerial Committee on the intervention in the North-West Provincial Government with Ministers and Deputy Ministers' report to the Ad Hoc Committee on North West Intervention 14 June 2018 5 (hereinafter Inter-Ministerial Committee on the intervention in the North West 14 June 2018) https://pmg.org.za (Date used 12 February 2020).
[553] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 12 February 2020).

same department had R140 million in under-spending. This Department alone had incurred R550 irregular expenditure during 2016/17 financial year.[554]

2.3.2.5. The Department of Community Safety and Transport (DSCT)

The findings were that there were serious problems in the transport management component of the DCST, and the national Department of Transport had to assume responsibility for ensuring forensic investigations that would be conducted for areas already identified as having had possible problematic contracts.[555] The problems included scholar-learner transport; internal controls system gaps in the SCM; and the update of risk assessment registers. R880 million irregular expenditure in 2016/17 had been incurred by this Department.[556]

3. Assessment of the supervision of provincial government

3.1. Assessment of supervision in Eastern Cape

3.1.1. Substantive requirements for intervention in Eastern Cape

The Constitution empowers the national executive to intervene in provincial administration in circumstances where a province is unable or unwilling to fulfil its executive obligations in terms of the Constitution or legislation.[557] It was also explained, in chapter 4 of this work which focussed on the legal framework for supervision, as to what the nature of facts or circumstances is that must exist before an upper sphere intervenes in a lower sphere of government. It was clarified that the facts or circumstances of failure must exist objectively, and they must continue

[554] Ad Hoc Committee on North-West Intervention's briefing by the North West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 22 February 2020).
[555] Committee report on North-West intervention: briefing by Committee Researchers and Content Advisor 07 August 2018 https://www.parliament.gov.za (Date used 22 February 2020).
[556] Ad Hoc Committee on North-West Intervention's briefing by the North-West, National Treasury, Auditor General on NWPG fiscal position 27 June 2018 https://pmg.org.za (Date used 26 February 2020).
[557] Section 100(1) of the Constitution mandates the national executive, when the national government cannot or does not fulfil its executive obligation in terms of the Constitution or legislation, to intervene in a province by taking any appropriate steps to ensure fulfilment of that obligation.

to exist at the time a decision to intervene is made.[558] It was further explained that it is the existence of such facts or circumstances of failure which confer jurisdiction on the upper sphere to intervene in a lower sphere.

When applying the framework of intergovernmental intervention, provided by the Constitution and further enunciated by case law, it emerged from the practice of supervision by the national executive in the Eastern Cape Department of Education that there was evidence of the existence of jurisdictional facts which warranted the intervention of the national executive in that province. The assertion made here is that the substantive requirements for the national executive intervention in the Eastern Cape Department of Education had been satisfied. The bases for this assertion are provided below.

Furthermore, the court in the Centre for Child law case, painted a broader picture of the effects of failure by the Eastern Cape Department of Education when it stated that problems in the Eastern Cape Department of Education had a knock-on effect on other rights in the Constitution, such as sections 28 and 7 of the Constitution.[559] Section 28 of the Constitution foregrounds a child's best interests in every matter concerning the child.[560] Surely the litany of mismanagement instances prevailing in the Eastern Cape Department of Education and its concomitant adverse effects on the provision of schooling infringed the child's best interests which the Constitution proclaims as being paramount in all matters pertaining the child. The Constitution enjoins the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.[561] The evidence of mismanagement, cited above, points in the direction that the state department of basic education in the Eastern Cape had failed dismally in

[558] Mnquma Case [49].
[559] Centre for Child Law Case [21].
[560] Section 28(2) of the Constitution entrenches a child's interests by providing that a child's best interests are of paramount importance in every matter concerning the child.
[561] Section 7(2) of the Constitution.

discharging this constitutional obligation, thus conferring jurisdiction on the national executive to intervene.

In concluding the substantive requirements for intervention, perhaps it is important to mention that the list of mismanagement violations implicating the Eastern Cape Department of Education did not relate only to the failure or unwillingness by the province to discharge its obligations in terms of the Constitution, but it also indicated the failure to execute its obligations in terms of legislation. Some of the pieces of legislation, which the court, in the Centre for Child Law case, identified as having been violated are briefly described below. The Public Finance Management Act (PFMA) imposes, among other obligations on the Accounting Officer, a duty to take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote.[562] Clearly, evidence of the violation of this statutory obligation was in the form of the dramatic over-expenditure of the budget for the Compensation of Employees, as alluded to above. Non-compliance with the PFMA provisions is indicative of an inability to discharge executive obligations in terms of the legislation and it had adverse consequences for governance in the Eastern Cape. The Public Service Act confers power, and, at the same time, imposes duties on an executive authority for the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment."[563] At issue here was the inability or unwillingness of the MEC for Education in Eastern Cape, as the executive authority, to declare the post provision of the non-teaching staff for 2013 which the Public Service Act empowers him to do. Another piece of legislation which is of relevance to this discourse is the South African Schools Act. This Act empowers school governing bodies to establish posts for teaching staff and non-teaching staff, respectively, additional to the establishment determined by the Member of the

[562] Section 39(2) (a) of the Public Finance Management Act No. 1 of 1999.
[563] Section 3(7) (a) of the Public Service Act 103 of 1994.

Executive Council, subject to applicable pieces of legislation.[564] Failure by the MEC for Education to declare the post provision, as explained above, created uncertainties for school governing bodies of public schools in respect of creation of posts for educators and non-teaching staff additional to the staff establishment determined by the MEC in terms of the Employment of Educators Act and Public Service Act respectively.[565] This point was expressed by the court in the Child law centre case, where the court ruled that it was necessary for governing bodies to be informed of the establishments of both teaching and non-teaching staff so that they could budget for, and fill, posts additional to the establishments for both teachers and non-teaching staff.[566] In other words, they could not exercise their powers in terms of sections 20(4) and (5) of the South African Schools Act properly and rationally without knowing how many teachers and non-teaching staff are provided for by the provincial department.[567]

It needs to be reiterated that the substantive requirements for national intervention in Eastern Cape in respect of the Department of Education were met. The above discussion provides evidence in support of this conclusion. Having dealt with the assessment of the substantive requirements for intervention in the Eastern Cape we arrived at the conclusion that, as the court put it in the Mnquma case, the jurisdictional fact was in existence[568] and the intervention was thus necessary. As mentioned above, in such circumstances the Constitution makes provision for modalities or forms of intervention which the national executive may embark upon to remedy the situation. These modalities for intervention include the issuing of a directive to the provincial executive pointing out the failures and the remedial action required.[569] The modalities or forms of intervention are discussed below with a view

[564] Section 20(4) and (5) of the South African Schools Act.
[565] Section 20(4) of the South African Schools empowers school governing bodies of public schools to establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of the Employment of Educators Act 76 of 1998. Section 20(5) of the South African Schools Act empowers school governing bodies of public schools to establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of the Public Service Act of 1994.
[566] Child Law Case [31].
[567] Centre for Child law Case [31].
[568] Mnquma case [47].
[569] Section 100(1) (a) and (b) of the Constitution.

to determining whether they were implemented by the national government in line with the Constitution.

3.1.2. Issuing of a directive and co-operative government principles

The two stage sequential process, as provided for in section 100(1) (a) of the Constitution, which starts with the issuing of a directive to the provincial executive describing the extent of failure by the province and steps required to remedy the situation, and then followed by assumption of responsibility, appears to have not been complied with in respect of the national executive intervention in the Eastern Cape Department of Education. It was explained in chapter 4 of this dissertation, with reference to case law, that the issuing of a directive is a first step in a process, and, if such a directive is not complied with by the relevant provincial administration, this may lead to the more intrusive next step of intervention.[570] From the available evidence on the national executive intervention in the Eastern Cape Department of Education there is no indication that a directive was issued as required by section100(1)(a) of the Constitution. It, therefore, seems unlikely that, in view of the fact that compliance with such a crucial constitutional requirement could have been omitted by both the Minister and Deputy Minister in their address to the National Assembly and the NCOP, there had been such compliance. It is, therefore, reasonable to conclude that the national executive did not issue a directive to the Department of Education in the Eastern Cape. The implications of this omission are looked at within the backdrop of the co-operative government principles below.

Firstly, as explained above, it must be acknowledged that there was compelling evidence of the existence of circumstances and facts of failure of the Eastern Cape Department of Education to discharge its constitutional and legislative obligation to provide schooling in that province and that these failures conferred jurisdiction on the national executive to intervene in terms of section 100(1) of the Constitution. It is also quite pertinent that acknowledgement is made that the Constitution

[570] Certification of the Amended Text [119].

recognises the autonomy of each of the three spheres, which includes the provincial sphere of government.[571]

At the heart of the use of intervention powers by an upper sphere in the affairs of a lower sphere of government, in this context the national executive over the provincial sphere, is the balancing of provincial autonomy, on one hand, with the supervision mandate of the national sphere over the lower spheres, on the other hand. The principles of co-operative government regulate this balancing act in a very significant way by, amongst other things, instructing all spheres and all organs of state to co-operate with one another in mutual trust and good faith.[572] The elements of this co-operative government principle include fostering friendly relations among the spheres of government, assisting and supporting one another, and informing one another of, and consulting one another on, matters of common interest. Considering this principle of co-operative government, it can be argued that it was reasonably expected that the intervention in Eastern Cape should have been preceded by the issuing of a directive. This would be in line with assisting and supporting the provincial government by the national government, which must be the main purpose for intervention. The assertion that intervention must be mainly about supporting and assisting is well stated in the Constitution where it says the national government may intervene by assuming responsibility to the extent necessary to maintain national standards or meet established standards, or maintain economic and national unity and national security.[573] The principle of co-operative government pre-supposes a need to consult and inform one another on matters of common interest.[574] Surely, basic education is a matter of common interest of both the national and provincial spheres of government. The Constitution proclaims basic education as a functional area of concurrent national and provincial legislative competence.[575] Notwithstanding the letter and spirit of the Constitution explained in

[571] Section 40(1) of the Constitution.
[572] Section 41(1) (h) of the Constitution.
[573] Section 100 (1) (b) (i-iii) of the Constitution.
[574] Section 40(1) (h) (iii) of the Constitution.
[575] Schedule 4 of the Constitution.

this paragraph, the national executive did not issue a directive to the Eastern Cape Department of Education before intervening by assuming responsibility.

The co-operative government principles further instruct all spheres to provide effective, transparent, accountable and coherent government for the Republic as a whole.[576] It is argued that the issuing of a directive by the national government to the Eastern Cape Provincial government, clearly outlining failures by the provincial department of education in that province and the necessary corrective action, would have ensured transparency in respect of the intervention. While it is not disputed that there was compelling evidence for intervention in the Eastern Cape, it remains strange and inexplicable as to why the two-stage process of issuing a directive and then assuming responsibility as prescribed by the Constitution was not followed.

The Co-operative government principles also enjoin all spheres to respect the constitutional status, institutions, powers and functions of government in other spheres.[577] Among the three descriptors used by the Constitution to describe each of the three spheres of government is "distinctive". The meaning of distinctive sphere of government includes the fact that it is autonomous and has its own powers and functions.[578] The autonomous status of a sphere of government (Eastern Cape Provincial government in this case) is conferred on it by the Constitution when it describes each sphere as distinctive[579]. It is on this basis that an argument is raised that, in line with the co-operative government principle instructing all spheres of government to recognize the constitutional status of all spheres, the national executive should have issued a directive to the Eastern Cape government prior to intervention by assuming responsibility for basic education in that province. Issuing a directive by the national executive to the Eastern Cape government describing the nature and extent of failure in the functional area of basic education and the required

[576] Section 41(1) (c) of the Constitution.
[577] Section 14(1) (e) of the Constitution.
[578] Layman T Intergovernmental relations and service delivery in South Africa: Ten Year Review: The Presidency (2003) 8.
[579] Section 40 of the Constitution.

remedial measures would have shown respect by the national executive for the autonomous status of the province. It is submitted that the national executive, thus, acted in breach of the Constitution by conducting its intervention in a manner that failed to recognise the autonomous status of the Eastern Cape provincial government. It is submitted that, when a sphere of government acts in breach of the Constitution, such conduct invalid[580]. To the extent that the conduct of the national executive of failing to issue a directive to the Eastern Cape government before intervening by assumption of responsibility was inconsistent with the Constitution, it is, therefore, submitted that it was invalid.

It is now common cause that the national executive did assume responsibility for the Education Department in the Eastern Cape, notwithstanding that no directive had been issued. Having concluded that failure of the national executive to intervene by first issuing a directive before assumption of responsibility in that province was in breach of the supreme law of the Republic, the next focus of this assessment is on the procedural requirements for intervention provided for by the Constitution.[581] This aspect of analysis looks at whether these procedural requirements were met in respect of the Eastern Cape intervention.

3.1.3. The procedural requirements for intervention in Eastern Cape

It is now common cause that the national executive intervened in Eastern Cape by assuming responsibility, as provided for by the Constitution.[582] It is also common cause that the issuing of a directive prior to intervention by assuming responsibility was not done in respect of Eastern Cape intervention. However, it has also been explained that there was evidence of circumstances of failure by the provincial Department of Eastern Cape that warranted intervention by the national executive. This paragraph looks at the set of procedural requirements which the national executive must satisfy when intervening in a province by the assumption of

[580] Section 2 of the Constitution.
[581] Section 100(2) of the Constitution.
[582] Section 100(1) (b) of the Constitution.

responsibility for the obligations which a provincial government is unable or unwilling to discharge.

Key considerations in the assessment of procedural compliance of the national executive intervention in provincial administration, which are spelt out by the Constitution, are that the national executive must submit a notice for intervention to the National Council (NCOP) within 14 days after the intervention commenced. The intervention must end if the NCOP disapproves of the intervention within 180 days after the intervention began or if, by the end of that period, it has not approved the intervention and, lastly, the NCOP must, while the intervention continues, view the intervention regularly and may make any appropriate recommendations to the national executive.[583] The application of these procedural requirements to the facts of the national government intervention in the Eastern Cape Department of Education reveals the following. The Minister mentioned the submission of a notice of intervention when addressing the National Assembly on the national executive's decision to intervene in Eastern Cape Department of Education.[584] Considering that the intervention began on 02 March 2011 when the national executive took a decision to intervene in the Eastern Cape, it is confirmed that the notice of intervention was lodged on 15 March 2011,[585] which was within the timeframe of 14 days as provided for in the Constitution. In this regard it can be confidently said that the national executive complied with the requirement for the notice of intervention and the timeframe within which such notice must be lodged.

With regard to the second procedural requirement in terms of section 100(2)(b) which provides for 180 days as the timeframe within which intervention must have been approved by the NCOP, it has been established that the intervention was

[583] Section 100(2) (a) (b) (c) of the Constitution.
[584] Minister of Basic Education address to the National Assembly 16 March 2011 https://www.gov.za/ (Date used 06 March 2020).
[585] Minister of Basic Education address to the National Assembly 16 March 2011 https://www.gov.za/ (Date used 06 March 2020).

approved by the NCOP on 25 August 2011.[586] When taking cognisance of the fact that the notice of intervention was submitted to the NCOP on 15 March 2011, and the intervention was approved on 25 August 2011, it can be concluded that the intervention was approved within the constitutional timeframe of 180 days.

Pertaining to the third procedural requirement that the NCOP must review the intervention while it continues, Mdledle emphasises this constitutional imperative by asserting that the review power of the NCOP is meant for the NCOP to guard against the abuse of power by the national executive when deciding to intervene in a province.[587] While there is evidence that the NCOP conducted reviews in respect of the Eastern Cape intervention, as will be shown below, the process was not without flaws. As mentioned above, the national executive intervened in Eastern Cape on 02 March 2011, and the Select Committee on Education and Recreation met with delegates from the Department of Basic Education to receive briefing on, amongst other things, intervention in Eastern Cape Department of Education in terms of section 100 of the Constitution.[588] On 13 April 2011, the Select Committee on Education and Recreation, having considered the briefing and recommendations of the Basic Education of 22 March 2011, met with the NCOP to report thereon, and it recommended the approval of the Eastern Cape intervention.[589] Another review meeting was undertaken on 13 March 2012 where the Committee met with the provincial legislature, officials of provincial Department of Education, the MEC for Education, the Head of Education in Eastern Cape and the co-ordinator of the

[586] Minutes of Proceedings of the National Council of Provinces, Third Session, Fourth Parliament No. 28 of 2011 2969.

[587] Mdledle TP Evaluating the role of the NCOP in reviewing national government interventions in provincial governments: a case study of the 2011 interventions in the Eastern Cape and Limpopo provinces: A research paper submitted in partial fulfilment of the requirements for an LLM in Law, State and Multi-level Government The University of Western Cape 13 (hereafter Mdledle TP Evaluating the role of the NCOP in reviewing national government interventions in provincial governments 2011).

[588] Basic Education Laws Amendment Bill deliberations; Department of Basic Education on Notice of intervention in Eastern Cape Department of Education in terms of section 100 of the Constitution: briefings 22 March 2011 https://pmg.org.za (Date used 05 January 2020).

[589] ATC 110413: Report on Briefing by Basic Education Department on Intervention to Eastern Cape Department of Education: NCOP Education and Technology, Sports, Arts and Culture https://pmg.org.za (Date used 05 January 2020).

intervention task team.[590] On 14 - 15 March 2012, the Committee met with various stakeholders including teachers, school governing body members, provincial and national Department of Basic Education officials, and the purpose of the meeting being to receive a progress report on the implementation of section 100 intervention in the province. Notwithstanding evidence in support of the conclusion that the three elements of the procedural requirements of the national executive intervention in the Eastern Cape Department of Education were met, the weakness, as Mdledle puts it, it is not clear whether the reviews are effective as there is currently no criteria on the basis on which such reviews are conducted.[591] This holds true for the manner in which Eastern Cape intervention was conducted.

3.2. Assessment of the supervision in Limpopo

3.2.1. Substantive requirements for intervention

The key challenges which prevailed in the five state departments of Limpopo in 2011, were explained in paragraph 2.1 above. It was mentioned that key amongst these challenges were that two weeks prior to the Cabinet meeting of 23 November 2011 Limpopo had experienced a cash crisis as the province had exhausted their R757,3 million overdraft facility with the Corporation for Public Deposits (CPD). It was further explained that, in its desperation, the province had requested National Treasury to increase their loan facility by R1 billion (to R1, 7 billion) in order to enable the province to pay salaries and wages on 23 November 2011, which National Treasury declined.[592] However, the gravity of the situation resulted in arrangements being made in terms of which an early transfer (two days before the actual date of transfer) of their equitable share was made in order to be able to pay salaries and, thus, salvage the situation.[593] These circumstances proved the existence of

[590] ATC120823: Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape from 13-16 March 2012, following the intervention by the National Department of Basic Education, dated 08 August 2012 https://pmg.org.za (Date used 07 January 2020).

[591] Mdledle TP Evaluating the role of the NCOP in reviewing national government interventions in provincial governments 2011 90.

[592] De Vos P Can the Government intervene in Limpopo? - Constitutionally speaking 06 December 2011 https://constitutionallyspeaking.co.za (Date used 06 March 2020).

[593] De Vos P Can the Government intervene in Limpopo? - Constitutionally speaking 06 December 2011 https://constitutionallyspeaking.co.za (Date used 16 March 2020).

objective facts of governance failure in Limpopo, thus warranting national government intervention in that province. It is not surprising that the Cabinet, having considered the situation then prevailing in Limpopo, decided, on 05 December 2011, that the Limpopo Provincial Government be placed under a section 100 (1) (b) intervention of the Constitution, so assuming responsibility for five Limpopo provincial departments.[594] The provincial departments in which the National Executive intervened by assuming responsibility were: Provincial Treasury; Education; Transport & Roads; Health; and Public Works.[595] It would be very difficult for anyone to argue differently as there was compelling evidence that the executive obligations of a province, as conferred on the premier of a province and the members of the Executive Council[596], could no longer be discharged. There was cogent and compelling evidence of the decline of governance in Limpopo and so the national executive had to intervene by invoking the provisions of the Constitution.[597]

It could be argued that the evidence of governance failure in Limpopo bore a certain degree of resemblance to that of the Eastern Cape except for the fact that, in the case of Limpopo, the magnitude of the problem was much greater, as five state departments had to be put under administration in that province while it was only the Department of Education with regard to Eastern Cape. As was the case with the Eastern Cape, the failure or inability of the provincial administration of Limpopo to discharge its obligations also had a knock-on effect on other constitutional rights, such as the right for everyone to have access to health services[598], the constitutional provision that a child's best interests are of paramount importance in every matter concerning the child.[599], and everyone's right to basic education.[600] There was evidence of serious violations of the Public Finance Management Act which,

[594] Statement by Cabinet Spokesperson December 5 2011 https://www.polity.org.za (Date used 16 March 2020.
[595] National Treasury's briefings of the Public Accounts (SCOPA)11 June 2012 https://pmg.org.za (Date used 16 March 2020).
[596] Section 125 of the Constitution.
[597] Section 100(1) of the Constitution.
[598] Section 27(1) of the Constitution.
[599] Section 28(2) of the Constitution.
[600] Section 29(1) (a) of the Constitution.

amongst other things, enjoins accounting officers to take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote.[601]

That said, reference has to be made to the methods or modalities of intervention which the national executive is empowered by the Constitution to employ when the preconditions for intervention have been met.[602] These forms of intervention, as explained above, are the issuing of a directive and intervention by assumption of responsibility.[603]

3.2.2. Issuing of a directive

As was the case in Eastern Cape intervention, dealt with above, there appears to be no indication that the national executive had issued a directive to the Limpopo Provincial government in line with the Constitution.[604]. As alluded to earlier on, the issuing of a directive is a constitutional requirement. It was explained in Chapter 4 of this work with reference to the Certification of the Amended Text that the Constitutional Court pronounced on the issuing of a directive when it stated that, firstly, a directive must be issued in terms of section 100(1) (a) of the Constitution, and, presumably, depending on the response to the directive, the national executive may assume responsibility for the obligations to the extent necessary to do so.[605] The Court further clarified this point by stating that section 100(1)(a) and (b) of the Constitution deal with one process, flowing from the fact that these two sub-sections have not been formulated in the alternative but are linked by the conjunction "and".[606] It can, therefore, be concluded that there was no compliance with the

[601] Section 39 of the Public Finance Management Act No 1 of 1999.
[602] Section 100(1)(a) of the Constitution provides for the circumstances under which the national executive may intervene by issuing a directive and by assumption of responsibility and such circumstances manifest themselves when a province cannot or does fulfil its executive obligations in terms of the Constitution or legislation.
[603] Section 100(1) (a) and (b) of the Constitution.
[604] Section 100(1) (a) of the Constitution.
[605] Certification of the Amended Text [119].
[606] Certification of the Amended Text [119].

constitutional provision requiring the national executive to issue a directive before assuming responsibility. This failure then placed the national executive in breach of the Constitution.

It is now common cause that, notwithstanding non-compliance with the issuing of a directive, the national executive did assume responsibility for the relevant obligations in respect of the five Limpopo state departments. Considering the political climate prevailing during the time at which the national executive intervened in Limpopo, especially as it relates to the tension between the provincial executive of Limpopo and the national executive, some scepticism was expressed from certain quarters in relation to the intervention. As De Vos put it, more cynical observers, including the ANC Youth League, questioned the timing and the motivation of such announcement and wondered whether it had anything to do with President Jacob Zuma's fight back campaign to neutralise his political opponents inside the ANC".[607] Considering that the magnitude of national executive intervention in the Limpopo province had been of unprecedented proportions at that time, De Vos questioned whether it could be a coincidence that it was launched only in the home province of Julius Malema?"[608]

The point made by De Vos is crucial when considering that there is always a possibility of the arbitrary use of power bestowed upon certain individuals or a collective in power. The cynicism referred to by De Vos about the timing of the intervention and the prevailing political climate within the ANC at the time, finds resonance with Munzhedzi's view that intervention is not always innocent as it may be motivated by either national or provincial politics.[609] Munzhedzi illustrates his point by arguing that this may include a situation when the provincial administration

[607] De Vos P Can the Government intervene in Limpopo?- Constitutionally speaking 06 December 201 1https://constitutionallyspeaking.co.za (Date used 16 April 2020)

[608] De Vos P Can the Government intervene in Limpopo?- https://constitutionallyspeaking.co.za (Date used 16 April 2020)

[609] Munzhedzi PH "The National Government intervention in the Provincial Government: A Case of Limpopo Province in South Africa" September 2014 Article in Mediterranean Journal of Social Sciences 5(20) 3 (hereafter Mundhedzi The National Government intervention in the Provincial Government 2014).

leadership does not support the national leadership. He goes on to say that, in cases like these, even when the intervention is legitimate, there may also be a suspicion that it is the result of political reasons.[610] Be that as it may, it is submitted that the objective existence of facts confirming governance failures of the Limpopo provincial administration warranted the intervention in that province to ensure the "maintenance of essential standards or [meeting] established minimum standards for the rendering of service", as required by the Constitution.[611]

The fact that the national executive had substantive bases for intervention in Limpopo does not compensate for non-compliance with the constitutional requirement for issuing a directive. The co-operative government principles enjoin all spheres to act in accordance with mutual trust and good faith towards one another, which includes informing and consulting one another on matters of common interest.[612] The issuing of a directive indicating areas of weakness in the Limpopo provincial administration would have allowed the province to respond to or remedy the situation, and, if not, the national executive would have then intervened by assuming responsibility. The intervention element of the concept of supervision, as the Constitutional Court put it, is the power of one level of government to intrude on the functional terrain of another.[613] Thus, intervention is, by its very nature, invasive, as it entails the violation of the autonomy of one sphere of government by another. It is critical that the ambit of this power is well construed by both the national and provincial spheres of government as repositories of the constitutional power of intervention. Will it then be correct to infer that failure by the national executive to issue a directive before assuming responsibility in Limpopo was due to the fact that the national executive misconstrued its powers, or was this omission evidence that the national executive acted in bad faith by not informing the provincial government of its governance failure and the required remedial action?

[610] Mundhedzi The National Government intervention in the Provincial Government (2014) 3.
[611] Section 100(1) (b) (i) of the Constitution.
[612] Section 41(1) (h) (iii) of the Constitution.
[613] Certification of the Constitution of the Republic of South Africa 1996 [370].

As mentioned in the assessment of Eastern Cape intervention, the co-operative government principles impose an obligation on all spheres to act in good faith towards one another.[614] Perhaps the grounds of justification by the national executive could be that the litany of governance failures in Limpopo was such that urgent intervention by assumption of responsibility was the most appropriate measure under the circumstances. However, the counter argument could be that circumstances of failure of such magnitude, as was the case in Limpopo, could not have developed overnight. The deterioration of governance in Limpopo happened over time and, despite warnings from National Treasury, the problems ware never addressed[615] Thus, the national executive could have arrested the decline of governance earlier by issuing a directive and then assumed responsibility if there was non-compliance with the directive, but it did not. There could be many arguments for and counter arguments on the issue of the national executive intervention by issuing a directive but the fact that failure to issue a directive was in breach of the Constitution remains uncontested. As stated in respect of the Eastern Cape intervention, conduct inconsistent with the Constitution is invalid.[616] This breach of the Constitution has serious implications for national executive intervention in provinces.

3.2.3. Procedural requirements for intervention

The three criteria used to assess procedural compliance in respect of the intervention in the Eastern Cape are also used in the case of Limpopo. As indicated above, these criteria are: notice of intervention; approval of the intervention; and review of the intervention. In the discussion below, the procedural requirements for intervention are applied to the facts of the national government intervention in Limpopo.

The first procedural step relates to the submission of a written notice to the National Council of Provinces within 14 days after the intervention begun, as required in

[614] Section 41(h) of the Constitution.
[615] National Treasury's briefings of the Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 16 April 2020).
[616] Section 2 of the Constitution.

terms of section of the Constitution[617]. Considering that, on 5 December 2011, the national executive took a decision to intervene in Limpopo[618] and that a notice of intervention was submitted to the NCOP on 7 December 2011[619], it can be concluded that the notice was issued within the timeframe of 14 days stipulated by the Constitution.[620] This procedural requirement was, therefore, met. Secondly, the Constitution imposes 180 days as the timeframe within which the NCOP may approve the intervention.[621] In line with the timeframe of 180 the intervention in Limpopo Province was approved by the NCOP plenary on 29 May 2012 after the notice to intervene had been submitted of 7 December 2011.[622] There is also evidence that the NCOP did review the intervention in Limpopo while still in progress. These reviews included a briefing to a joint sitting of the Select Committee on Finance, Public Services, Education, Appropriation and Social Services on interventions that the national government had undertaken to carry out in December 2011, including that of Limpopo province, was held on 09 February 2012[623] The Minutes of Proceedings of the National Council of Provinces dated 29 May 2012 reflect that a report on Limpopo intervention was tabled and adopted by this Council.[624] Another evidence of review of the Limpopo intervention is in the form of National Treasury feedback on the progress made since the intervention which was tabled to the Select Committee on Finance on 16 November 2012.[625] While there is evidence that the NCOP did conduct reviews on Limpopo intervention, as pointed out by Mdledle, the absence of a framework indicating the intervals during which

[617] Section 100(2) (a) of the Constitution.
[618] Statement by Cabinet Spokesperson December 5 2011 https://www.polity.org.za (Date used 16 April 2020).
[619] National Government interventions in Gauteng, Free State and Limpopo Ministerial briefings to a joint sitting of the Select Committees on Finance, Public Services, Education, Appropriation and Social Services 09 February 2012 https://pmg.org.za (Date used 19 April 2020).
[620] The Constitution sets 14 days of commencement of intervention as the timeframe within which notice of intervention must be submitted to the NCOP.
[621] Section 100(2) (b) of the Constitution.
[622] Minutes of the Proceedings of the National Council of Provinces Fourth Session, Fourth Parliament No. 15 of 2012, 1960 29 May 2012.
[623] National Government intervention in Gauteng, Free State, and Limpopo: Ministerial Briefings 09 February 2012 https://pmg.org.za (Date Used 18 July 2018).
[624] Minutes of Proceedings of the National Council of Provinces Fourth Session, Fourth Parliament No.15 of 2012, 1960 20 May 2012 https://ww.yumpu.com/en/document/read/6325654/national -council-of provinces-parliament-of-south-africa (Date used 18 July 2018).
[625] Report of the Select Committee on Finance on the follow-up visit to Limpopo in terms of Section 100(2) of the Constitution of the Republic of South Africa, 1996, 16 November 2012 https://pmg.org.za (Date used 21 July 2018).

such reviews must be conducted remains a serious weakness of this constitutional imperative.

3.3. Assessment of the supervision of North-West

3.3.1. Substantive requirements

In a similar way, as the assessment of the substantive requirements for national intervention in respect of the Eastern Cape and Limpopo was conducted above, the main focus here is also on establishing whether there were circumstances proving failure or inability of the North-West provincial administration to fulfil its executive obligations in terms of the Constitution or legislation. As explained in paragraph 2.3 above, in summary, the problems in North-West entailed the following. Notwithstanding the fact that governance structures were in place in North West, there was strong evidence of a decline of governance in that province. This evidence was in the form of a litany of facts or circumstances of failure by the provincial administration, most important of which included the following: There were ineffective financial controls, governance and accountability; High increase of unauthorised and irregular expenditure which had cumulatively grown by an annual average of R2.1 billion, from R8.6 billion in 2013/14 to R15.39 billion in 2016/17.[626]; Supply chain management (SCM) control systems had been weakened and entirely collapsed in certain cases, all the way down to local government; Failure by Provincial Treasury to exercise its oversight functions over the other state departments properly, notwithstanding the fact that the DFEED had had a clean audit[627]

In the presentation, titled “Impact of accountability failures in North-West”, made by the Auditor General during the briefing of the *Ad Hoc* Committee on North-West Intervention on 14 June 2018, the Auditor General succinctly described failures of

[626] IMC on North-West intervention’s report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 09 April 2020).

[627] IMC on North-West intervention’s report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 09 April 2020).

the North-West Administration, and these were the following: There had been a regression in audit outcomes for departments and public entities over five years, from 2012/13 to 2016/17[628]; All five departments under section 100(1)(b) had had material non-compliance findings for four consecutive years (2013/14 – 2016/17); all five of them failed to prevent irregular expenditure; they all had material misstatements in submitted Annual Financial Statements (AFS); and, lastly, they were all non-compliant in respect of procurement and contract management. The Auditor General's presentation further revealed that there was evidence of non-compliance with expenditure management in respect of DoH; Education and Department of Public Works; and there was evidence of a lack of implementation of consequence management in the Department of Health and Department of Public Works; 91% of the R15, 2 (R13, 9 billion) of unresolved irregular expenditure had been incurred by the five state departments under section 100(1) (b).[629] The facts highlighted in this paragraph present so cogent and compelling a case for national executive intervention that it is extremely difficult to dispute them, which shows that the existence of a jurisdictional fact for intervention is confirmed.

The evidence gathered so far in respect of North-West section 100 intervention indicates that there was objective existence of facts that warranted interventions in quite a number of departments, the first of which, the Department of Health, was put under section 100(1) (b) intervention. Having confirmed the existence of facts and circumstances which conferred jurisdiction on the national executive to intervene in North-West province, the next focus of this discourse will be on the methods or modalities of intervention provided for by the Constitution. The Constitution makes provision that, once the condition for national executive intervention in a provincial administration has been met, the national executive may intervene by issuing a directive and, thereafter, by the assumption of responsibility.[630] Having said that, the issuing of a directive is discussed next.

[628] North-West, National Treasury, Auditor General on NWPG Fiscal position Ad Hoc Committee on North West Intervention 27 June 2018 https://pmg.org.za (Date used 30 April 2020).
[629] North-West, National Treasury, Auditor General on NWPG Fiscal position Ad Hoc Committee on North West Intervention 27 June 2018 https://pmg.org.za (Date used 30 April 2020).
[630] Section 100(1) (a) and (b) of the Constitution.

3.3.2. The issuing of a directive

3.3.2.1. Directives issued in terms of section 100(1) (a) in respect of five North-West provincial departments

It was explained in paragraph 2.3 above that the national executive intervention in North-West split the provincial administration into two where the national executive intervened by issuing a directive in respect of five provincial departments and assumed responsibility in the other five departments.[631] It was explained above that the five provincial North-West departments in respect of which the national executive intervened by issuing a directive were: the Department of Finance, Economy and Enterprise Development (FEED); The Department of Local Government and Human Settlement (DLGHS); the Department of Rural, Environment, and Agricultural Development (READ); the Department of Social Development; and the Department of Tourism.[632] The contents of governance failures and remedial action required in respect of each of these five departments were spelt out in paragraph 2.3 above. No further discussion on this point is done here as there is certainty on the matter of the national executive's compliance regarding the issuing of a directive to the North West government pertaining the five North West departments.

3.3.2.2. Provincial Departments in respect of which a directive in terms of section 100(1) (a) of the Constitution was not issued

It was also explained above that the national executive intervened in the following state departments of North-West by simply assuming responsibility for the relevant obligations: Office of The Premier; Department of Health; Department of Public Works and Roads; Department of Education and Sports; and Department of

631 IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).

632 IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).

Community Safety and Community Liaison.[633] The practice of supervision in North-West as discussed above has revealed that the constitutional requirement of national executive issuing a directive to the provincial government did not precede intervention in respect of the five above mentioned departments. Effectively, that meant that the assumption of responsibility by the national executive was not preceded by the issuing of a directive to the provincial executive describing the extent of failure to fulfil its obligations and the statement of steps required to meet its obligations.

Perhaps it is necessary to make reference again to the pronouncement by the Constitutional Court on the matter of issuing a directive. The court clarified that the Constitution prescribes the process that must be followed when the national executive intervenes in a province in terms of the Constitution. This, according to the court entails, firstly, that a directive must be issued, after which then the national executive may assume responsibility for the obligations, presumably depending upon the response to the directive.[634] As it was the case with Eastern Cape and Limpopo interventions by the national executive, there was non-compliance with the requirement of issuing a directive in respect of the five North-West Departments placed under section 100(1) (b) intervention, thus placing the national executive in breach of the Constitution.

The arguments advanced in respect of the national executive's failure to issue a directive prior to intervention by the assumption of responsibility in Eastern Cape and Limpopo above, and the implications of this, also apply in the North-West intervention . While it may not be desirable to repeat such arguments here as that might lead to repetition, it is, nevertheless, important to highlight some of crucial and pertinent points because the North-West case study, though related to those of Eastern Cape and Limpopo, is a distinctive study on its own. In this regard it needs to be mentioned that the failure of the national executive to issue a directive to the North West Provincial government in respect of the five departments mentioned

[633] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).
[634] Certification of the Amended Text [119].

above was in breach of the co-operative government principles which are a mandatory framework for intervention by upper spheres over lower spheres. The Constitution recognises the autonomy of each sphere of government[635], which includes the North-West provincial sphere of government. It is, thus, submitted that the assumption of responsibility of the five departments by the national executive without a prior directive to the provincial government violated its autonomy.

As pointed out in the Eastern Cape and Limpopo interventions, the balancing of provincial autonomy, on one hand, with the supervision mandate of the national sphere over the lower spheres, on the other hand, remains critical. The principles of co-operative government provide a constitutional mechanism for maintaining this crucial balance as they instruct all spheres and all organs of state to co-operate with one another in mutual trust and good faith.[636] Key among the elements of this co-operative government principle includes the fostering of friendly relations among the spheres and mutual assistance, support and consultation on matters of common interest. There is, thus, a reasonable basis for the argument that that it was reasonably expected that the intervention in North-West should have been preceded by the issuing of a directive in respect of all the ten provincial departments, not just five. This would be in line with assisting and supporting of the provincial government by the national government, which must be the main purpose for intervention as directed by the Constitution. On this point the Constitution states that the national government may intervene by assuming responsibility to the extent necessary to maintain national standards or meet established standards and maintain economic, national unity and national security.[637] Having regard to the autonomy of each sphere, the Constitution clearly demarcates and limits the intervention powers of the national executive to the extent of the support required to meet the standards it sets, which are enumerated in the preceding sentence.

[635] Section 40(1) of the Constitution.
[636] Section 41(1) (h) of the Constitution.
[637] Section 100 (1) (b) (i-iii) of the Constitution.

It remains strange and inexplicable as to why the two-stage process of issuing a directive and then assuming responsibility as prescribed by the Constitution was not observed by the national executive. The instruction to all spheres of government by the Constitution to the effect that all spheres must provide effective, transparent, accountable and coherent government for the Republic as a whole[638] would have been well executed by the national executive had it acted in a transparent way by taking the provincial government into its confidence by informing it of the governance failures in North-West and the required corrective action.

The Co-operative government principles also enjoin all spheres to respect the constitutional status, institutions, powers and functions of government in other spheres.[639] It is submitted that, in view of the fact that the national executive acted in breach of the mandatory framework enshrined in the Constitution in the form of co-operative government principles,[640] such conduct is not consistent with the Constitution. The analysis made in respect of the national executive intervention in North-West, as it relates to the issuing of a directive before assumption of responsibility by the national executive in the five departments mentioned above, lead to the very same conclusion arrived at in respect of the Eastern Cape and Limpopo. The conclusion is that, as the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid[641]. To the extent, therefore, that the national executive failed to issue a directive to the North-West government indicating governance failure in that province and the required corrective action before intervening by assumption of responsibility was inconsistent with the Constitution, it is submitted that it was invalid.

[638] Section 41(1) (c) of the Constitution.
[639] Section 41(1) (e) of the Constitution.
[640] Section 41 of the Constitution.
[641] Section 2 of the Constitution.

3.3.2.3. Procedural requirements

The procedural requirements, as set out in the Constitution and referred to in the Eastern Cape and Limpopo interventions, require that a notice of intervention be issued to the NCOP within 14 days of its commencement; ending the intervention if the NCOP disapproves it within 180 days or by the end of 180 days if it has not yet approved it; and, lastly, that the NCOP must, while the intervention continues, review it.[642] That said, and considering that on 09 May 2018 the national executive took a decision to intervene in North-West[643] and the notice of intervention was lodged with the NCOP on 11 May 2018[644], it can, therefore, be concluded that the written notice of intervention was submitted to the NCOP within 14 days after the intervention began as required by the Constitution.[645] There is, therefore, evidence of compliance with this procedural requirement.

The Constitution prescribes a period of 180 days within which approval may be granted by the NCOP.[646] Taking cognisance of the fact that the intervention began on 09 May 2018, the media statement issued by the then acting Government spokesperson, Ms Phumla Williams, on 29 November 2018 confirmed that NCOP had endorsed the North-West intervention within 180 days as required by the Constitution.[647]

[642] Notice of intervention in terms of section 100(1) of the Constitution of the Republic of South Africa, 1996 Thursday 17 2018.
[643] Notice of intervention in terms of section 100(1) of the Constitution of the Republic of South Africa, 1996 Thursday 17 2018.
[644] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).
[645] Section 100(2) (a) of the Constitution sets the timeframes for submission of notice of intervention by the national executive to the National Council of Provinces.
[646] Section 100(2) (b) of the Constitution.
[647] Inter-Ministerial Task Team on North-West Intervention progress/ Government Communication and Information System (GCIS) https://www.gcis.gov.za/newsroom/media-releases/inter-ministerial-Inter-Ministerial Task Team on North West Intervention progress/ Government Communication and Information System (GCIS) task-team-north-west-intervention-progress (Date used 05 May 2020).

As mentioned above, the Constitution instructs the NCOP to view the intervention while it continues to make any appropriate recommendations to the national executive. Notwithstanding the existing of the weaknesses of the review process of the NCOP cited by Mdledle in respect of the absence of a clear framework which must have criteria and intervals for conducting such reviews, there is evidence that the NCOP met on different occasions regarding the North-West intervention. These meetings included the following: NCOP *Ad Hoc* Committee on Section 100 in North-West held on 14 June 2018.[648] NCOP *Ad hoc* Committee on Section 100 intervention in North-West held on 12 September 2018.[649] Other review meetings of the NCOP Ad-Hoc Committee on the North-West intervention, which have been referred to above are: National Treasury and the Auditor-General which was held on 27 June 2018, and both of these meetings were discussed above. Another meeting was held on 15 October 2013 where the Premier of Limpopo briefed the NCOP on the progress made in the province of Limpopo, and it was during this address that it became clear that the intervention in Limpopo was gravitating towards its end. As mentioned above, the serious gap is that the Constitution does not specify the intervals at which the NCOP must conduct its reviews. There is also no national legislation regulating these reviews, so, therefore, even if there is evidence of such reviews conducted by the NCOP, there is no standard against which such reviews can be tested to determine the extent of compliance.

4. Conclusion

The discussion in this Chapter has dealt with case studies of national government intervention in Eastern Cape, Limpopo and North-West provinces. The two broad legal framework criteria used to assess legal compliance of each of the three interventions are the substantive requirements, procedural requirements, as well as compliance with the sequential for the intervention modalities. There are important and, to a greater extent similar, observations that emerged from the case studies

[648] Inter-Ministerial Task Team on North-West Intervention progress/ Government Communication and Information System (GCIS) https://www.parliament.gov.za (Date used 28 August 2020).

[649] Inter-Ministerial Task Team on North-West Intervention progress/ Government Communication and Information System (GCIS) https://www.parliament.gov.za (Date used 28 August 2020).

conducted in these three provinces. These observations include that there was existence of evidence of governance failure threatening the provision of government services to the residents of the three provinces, thus conferring jurisdiction for national intervention. Effectively, the substantive requirements for national intervention in provincial administration, as provided for in the Constitution, were met, thus conferring jurisdiction on the national executive to intervene in the three provinces.

Having been conferred with jurisdiction to intervene in the three provinces, the next logical step, provided for by the Constitution, was that the national executive would take the first step of the two-stage process of issuing a directive to a province concerned, indicating governance failures in that province and the corrective measures to be undertaken. However, the observation made is that the two stage process was not complied with in respect of Eastern Cape and Limpopo, whilst there was inconsistent/partial compliance with regard to North-West. The national executive simply intervened by assuming responsibility in both Eastern Cape and Limpopo whereas in North-West directives were issued in respect of five departments whilst intervention by assumption of responsibility without the prior issuing of a directive was done in respect of the other remaining five departments, as explained in the case studies above. The conduct of the national executive thus violated the co-operative government principles which are a mandatory framework for all three spheres of government.[650] It was mentioned in the discussion of the three case studies that the principles of co-operative government violated by the national executive include those enjoining all spheres to observe transparency in their business of governing the country; respecting the constitutional status of the three spheres which includes autonomy of each sphere; informing and consulting with one another.[651] It was submitted that, taking cognisance of the fact that the Constitution is the supreme law of the Republic, and that law or conduct inconsistent with it is invalid,[652] it should follow that the conduct of non-compliance by the national

[650] Section 41 of the Constitution instructs all spheres to adhere to the principles of co-operative government.
[651] Section 41(1) (c) (e) and (h) of the Constitution.
[652] Section 2 of the Constitution.

executive as it relates to its failure to issue a directive, renders the intervention invalid to the extent of its inconsistency with the Constitution. Evidently non-compliance with the issuing a directive defeats the purpose of having a constitutional mechanism to guard against the possible abuse of section 100 intervention. The NCOP is also implicated here as it is a constitutional body with powers to approve or disapprove the intervention.[653] This means that the NCOP should have noticed this non-compliance with and taken corrective measures as it is a constitutional structure bestowed with authority to approve interventions.

The third observation made is that there is clear evidence that two-stage modalities as provided by the Constitution were not complied with because, in the Eastern Cape and Limpopo the directive was not issued at all, and also it was not issued in respect of the five North-West Departments where the national executive intervened by assumption of responsibility. As mentioned above, these departments are: the Office of The Premier; Health; Public Works and Roads; Education and Sports; and Community Safety and Community Liaison.[654] This means that the national executive intervention in terms of section 100(1) (b) of the Constitution in respect of all the three provinces was never preceded by the issuing of a directive, but, instead, it was commenced with assumption of responsibility which is a more serious and unfriendly means of intervention in that it interferes with the executive authority of a provincial government vested in it by the Constitution. Law or conduct inconsistent with the Constitution is invalid, meaning, in this case, that constitutionally or legally speaking the national executive intervention by assumption of responsibility in Eastern Cape, Limpopo and North-West was invalid. Evidently, this unconstitutional conduct by the national executive encroached on the constitutional status of these three provincial governments.

[653] Section 100(2) (b) of the Constitution confers powers on the NCOP to approve or disapprove national intervention in provincial administration.

[654] IMC on North-West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).

However, it was mentioned that the procedural requirements for intervention by assumption of responsibility as provided for by the Constitution were, to a greater extent, met in respect of all three provinces. The procedural requirements entail adherence to set timeframes in respect of submission of a written notice of intervention; approval of intervention by the NCOP; and review of the approved intervention by the NCOP.[655] However, it was mentioned that the review mandate of the National Council of Provinces, peremptorily couched as it is, is very difficult to measure. It was found that the main reason for this difficulty can be attributed to the fact that this section of the Constitution lacks specificity as it simply requires that while the intervention continues the NCOP must view it regularly and make appropriate recommendations to the national executive.[656] It was submitted that, in the absence of a clear measure provided for either by the Constitution or legislation enacted in terms thereof, it is very difficult to arrive at a well-substantiated conclusion as to whether there was compliance with this procedural requirement for national government intervention in the provinces or not. Finally, it was established that, notwithstanding the fact that the Constitution makes provision for the enactment of legislation to regulate the process established by section 100 of the Constitution, to date no such legislation is in place.

[655] Section 100 (2) of the Constitution.
[656] Section 100(2) (c) of the Constitution.

Chapter 6

CONCLUSION

1. Introduction

In this study the concept of "government supervision" was looked at with reference to four of its key constituent elements which are regulation, monitoring, intervention and support. Further, the rationale as well as the vertical and horizontal dimensions of government supervision were also dealt with. The vertical dimension of supervision refers to intergovernmental supervision and it entails that the upper spheres of government supervise the lower spheres of government whereas the horizontal dimension thereof deals with inter-monitoring of the legislative, executive and judicial branches of government. The whole rationale behind inter-branch monitoring was traced from the doctrine of separation of powers whose purpose is to prevent accumulation of power in the same hand, and the concomitant abuse thereof.

The analysis of the structure of government was undertaken where it was explained that the Republic is a multi-sphere government comprising national, provincial and local spheres.[657] Whilst it came out quite clearly that the word "sphere" as used in the Constitution, intimates equal importance of all the three spheres of government, there is still evidence of a hierarchical relationship among them in terms of which national government supervises the provincial government.

The Constitution makes provision for co-operative government which is a philosophy in the new constitutional dispensation. Co-operative government principles provide the framework that regulates the interrelatedness of the three spheres of government. Whilst it is not disputed that the national sphere of government

[657] Section 40 of the Constitution.

supervises a provincial sphere, it came out quite clearly that such supervision must be exercised within the framework of co-operative government. Co-operative government principles instruct all spheres to commit themselves to the partnership required to govern one sovereign democratic Republic of South Africa. It was also indicated that the system of co-operative government enshrined in the Constitution, to a significant extent, brought about a semi- federal state.

When looking at the legal framework for national government intervention in a provincial government, the gist of which was on an in-depth analysis of section 100 of the Constitution with reference to case law and legislation, three key aspects were dealt with. These three aspects are: the substantive requirements for intervention, the two-stage process of intervention or modalities of intervention, and the procedural requirement thereof. These three key aspects of the legal framework for intervention were then applied in the case studies of national executive intervention in Eastern Cape, Limpopo and North West provinces and the following findings were made.

2. Findings

2.1. It was found that the whole rationale behind “government supervision” is to prevent the decline of governance, hence the upper spheres supervise the lower spheres. Couched in positive terms, it was found that the rationale behind government supervision is to provide good and effective government for the benefit of the citizens of the Republic of South Africa. Thus, the Constitution confers authority on the national sphere of government, as the upper sphere, to supervise the provincial sphere of government.

2.2. The key elements of the concept “government supervision” are monitoring, intervention, and support. The relationship among the constituent elements of the concept “government supervision” identified was summarised as: regulation which entails setting of the regulatory framework for supervision by the national sphere of government through legislation and other directives; monitoring which entails the process of evaluating the extent

to which the regulatory framework is being adhered to by the lower spheres so that the data collected through such a process can help inform the nature of support required by the sphere being monitored; Intervention which was defined as the most invasive form of supervision as it entails encroachment by one sphere in the functional terrain of another; and lastly, support, the form of which depends on the data collected through monitoring.

2.3. Notwithstanding section 100(3) of the Constitution which makes provision for the enactment of a national legislation regulating national government intervention in provincial administration, there is no such legislation in place.

2.4. The study also revealed that Parliament's intervention powers in provincial legislature, as provided for in section 44(2) of the Constitution, constitutes a unique kind of supervision because it entails the national legislature's supervision of provincial legislature in certain cases. The uniqueness of this kind of supervision lies in the fact that intervention in terms of section 100 of the Constitution, which is the most intrusive form of supervision, involves a national executive intervention in a provincial executive, meaning that it is executive to executive, whereas intervention of Parliament (National legislature) in a provincial legislature in terms of section 44(2) of the Constitution, is legislature to legislature.

2.5. There are similar findings that came out of the case studies conducted in the provinces of Eastern Cape, Limpopo and North West. In all three provinces it was found that there was existence of evidence of governance failure threatening provision of government services to the residents of these three provinces, thus conferring jurisdiction for national intervention. Effectively, the substantive requirements for national government intervention in provincial administration of these three provinces, as provided for in the Constitution, were met, thus conferring jurisdiction on the national executive to intervene in Eastern Cape, Limpopo and North West.

2.6. Though jurisdictional facts for the intervention in Eastern Cape, Limpopo and North West provinces existed, it was found that the national executive did not comply with the two-stage process of issuing a directive to each of the three provinces, indicating governance

failures and the corrective measures to be undertaken by each of the three provinces. This conduct by the national executive placed it in breach of the Constitution, thus rendering the intervention unconstitutional or legally invalid. It must be pointed out that with regard to North West the national executive complied partially with the two stage process. Specific findings in respect of each of the three provinces are provided below:

2.6.1. In specific terms, the national executive did not issue a directive prior to intervening in Eastern Cape but instead it simply intervened by assuming responsibility in both Eastern. The autonomy of this provincial sphere of government, derived from its distinctive nature, was thus encroached upon by the national sphere of government. This placed the national executive in breach of the principles of co-operative government and intergovernmental relations. The conduct of the national executive in this regard amounted to disrespect of the constitutional status, institutions, powers and functions of Eastern Cape government provincial sphere of govern; the national executive also encroached on the geographical, functional or institutional integrity of the Eastern Cape; the national executive also violated the Constitution by not co-operating with the Eastern Cape government in mutual trust and good faith by not issuing the directive as per section 100(1)(a) of the Constitution. This failure or omission by the national executive is conduct which inconsistent with the Constitution and therefore renders the intervention by the national executive legally invalid.

2.6.2. The national executive committed the same breach of the Constitution, as in the Eastern Cape case, by not issuing a directive to the Limpopo government prior to assuming responsibility for the five provincial state departments. The national executive intervened by simply assuming responsibility for the obligations in respect of the Provincial Treasury; Education; Transport & Roads; Health; and Public Works.[658] This conduct placed the national executive in breach of the Constitution to the extent similar to that of Eastern Cape, thus rendering the intervention, by the national executive in Limpopo, legally invalid.

2.6.3. The national executive did not issue a directive prior to intervening in the following five state departments of North West: Office of The Premier; Health; Public Works and Roads; Education and Sports; and Community Safety and Community Liaison.[659] Instead

[658] Section 100(1) (b) Limpopo provincial interventions, Public entity boards: National Treasury's briefings of the Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (Date used 16 March 2020).

[659] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).

the national executive intervened by assumption of responsibility for the relevant obligations in the five departments mentioned above. This also placed the national executive in breach of the Constitution, thus rendering intervention in the five North West state departments inconsistent with the Constitution, meaning it was invalid to the extent of its inconsistency.

2.6.4. Notwithstanding the national executive's failure to issue a directive prior to assumption of responsibility in respect of Eastern Cape, Limpopo and five North West Departments mentioned above, the national executive intervened by issuing a directive in respect of the following North West departments: the Department of Finance, Economy and Enterprise Development (FEED); The Department of Local Government and Human Settlement (DLGHS); Department of Rural, Environment, and Agricultural Development (READ); and the Department of Social Development; and Department of Tourism.[660] The intervention by the national executive in the five state departments of North West was legally valid. Based on these findings the following recommendations are suggested.

3. Recommendations

3.1. It is recommended that national legislation be enacted to regulate national government intervention in a provincial government, as envisaged in section 100(3) of the Constitution.[661]. The object of such national legislation would be to provide for measures regulating national government intervention in a provincial government. It submitted that the Minister of Cooperative Governance and Traditional Affairs must have oversight responsibility in respect of the envisaged national legislation.

3.2. It is recommended that training be conducted on the national government intervention in a provincial government in terms of section 100 of the Constitution, targeting members of the national and provincial executive, the NCOP especially the relevant Select Committees and those administrators who get appointed in various Inter-Ministerial Task Teams on interventions.

[660] IMC on North West intervention's report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 01 May 2020).

[661] Section 100(3) allows for the enactment of a national legislation to regulate the intervention process provided for in section 100 of the Constitution.

Conclusion

If the recommendations of this research work are applied the capacity of the Executive will be enhanced to supervise provincial government within the dictates of the Constitution. The research opens avenues for other scholars to further contribute on the subject of national government supervision of provincial government.

BIBLIOGRAPHY

Statutes

The Constitution of the Republic of South Africa, 996

The Intergovernmental Relations Framework Act 13 of 2005

The National Education Policy Act 27 of 1998

The Public Audit Act 25 of 2004

The Public Finance Management Act 1 of 1999

The Public Service Act 103 of 1994

The South African Schools Act 84 of 1996

Case law

CDA Boerdery (Edms) BPK en Andere v Nelson Mandela Metropolitan Municipality (526/05) [2007] ZASCA 1 [2007] SCA 1 (RSA) (6 February 2007)

Certification of the Amended Text of the Constitution of The Republic of South Africa, 1996(CCT37/96) [1996] ZACC 24; (1) BCLR 1; 1997 (2) SA 97 (4 December 1996)

City of Cape Town v Premier of the Western Cape and Others (5933/08) [2008] ZAWCHC 52; 2008 (6) SA 345 (C) (1 September 2008)

Economic Freedom Fighters V Speaker of the National Assembly and Others; Democratic Alliance V the Speaker of the National Assembly and Others

(CCT143/15; CCT 171/15) [2016] ZACC 11; 2016 (3) SA 580 (CC) (31 March 2016)

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)

Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 1 BCLR 1 (CC), 2001 1 SA 732 (CC)

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)

In re: Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996(4) SA 744(CC); 1996(10) BCLR 1253 (CC) (6 September 1996)

In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another (CCT22/99) [2000] ZAAC 2; 2000 (4) BCLR 347

In re: National Education Policy Bill No 83 of 1995 (CCT46/95) [1996] ZACC 3; 1996(4) BCLR 518; 1996(3) SA 289 (3 April 1996)

In re: National Education Policy Bill No 83 of 1995 (CCT46/95) [1996] ZACC 3; 1996(4) BCLR 518; 1996(3) SA 289 (3 April 1996)

In South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 31 (CPD)

Mnquma Local Municipality and Another V Premier of the Eastern Cape and Others (231/2009) [2009] ZAECBHC 14[05 August 2009]

Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang No and Another (542/2004, 543/2004) [2004] ZASCA 122 (20 December 2004)

Premier of Limpopo v Speaker and Others (CCT 94/10) [2011] ZACC 25; 2011 (11) BCLR 1181 (CC); 2011 (6) SA 396 (CC) (11 August 2011)

Premier, Western Cape V President of the Republic of South Africa and Another (CCT26/98) [1999] ZACC 2; 1999(3) SA 657; 1994(4) BCLR 383 (29 March 1999)

The Centre for Child Law Case and Others v the Minister of Basic Education and Others (1749/2012) [2012] ZAECGHC 60 [2012] 4 All SA 35 (ECG) 2013 (3) SA 183 (ECG) (3 July 2012) [1] (hereafter the Centre for Child Law Case

Books

Rautenbach I M *Ratenbach-Malherbe Constitutional Law* 2013 South Africa Lexis Nexis (Pty) Ltd

De Vos P et al *South African Constitutional Law in Context* 2014 Oxford University Press Southern Africa (Pty) Limited

De Visser *Developmental local government: a case-study of South Africa* (2005) Intersentia Antwerpen-Oxford

Woolman et al *Constitutional Law of South Africa* (2nd ed.) January 2013: Revision Service 5 Juta and Co

Chapters in books

Bronstein V “Legislative Competence” in Woolman S et al *Constitutional law of South Africa* (2006) (2nd ed) Juta and Co

Seedorf S and Sibanda S “Origins and Conceptual framework of Separation of Powers Doctrine Scholar Articles 2008 Chapter 12” in Woolman S et al

Constitutional Law of South Africa (2nd ed.) January 2013: Revision Service 5 Juta and Co

Stytler N and de Visser "Local Government" in Woolman S et al *Constitutional Law of South Africa* (2nd Ed) (2013)

Woolman S and Roux T "Co-operative government and Intergovernmental Relations" in Woolman S et al *Constitutional law of South Africa* (2nd ed.) January 2013: Revision Service 5 Juta and Co

Journal articles

Edwards T "Co-operative governance in South Africa with specific reference to the challenges of intergovernmental relations". School of Government. Central University of Technology 2008 UNISA Press Pretoria

Greffrath W and van der Walt G Section 139 intervention in South African local government, 1994-2015. New Centre, 75(July): 135-160 (2016) 158

Madue SM 2012 "Complexities of the oversight role of legislatures" (47) 2012 Journal of Public Administration

Mathenjwa M "Constitutional obligations imposed on provincial government in instances where a municipality cannot provide basic services as a result of a crisis in its financial affairs" (1) 2014 TSAR

Mathenjwa M "Contemporary Trends in Provincial Government supervision of Local Government in South Africa 18(2014) LLD for Law Democracy and Development

Mettler J Provincial-municipal relations: A few challenges (2003)1 Law, Democracy and Development

Munzhedzi PH "The National Government intervention in the Provincial Government: A Case of Limpopo Province in South Africa" September 2014 Article

in Mediterranean Journal of Social Sciences 5(20) 3 (hereafter Mundhedzi The National Government intervention in the Provincial Government 2014).

Simeon R and Murray C “Multi-sphere government in South Africa: An Interim Assessment” (31) (2001) Oxford University Press

Stytler N “Concurrency and Co-operative government: the law and practice in South Africa (2001) 16 SAPR|PL 241

Government reports

Layman T “Intergovernmental relations and service delivery in South Africa: Ten year review” 2003 the Presidency, Pretoria

Newspapers, other media reports and internet sources

Ad Hoc Committee on North West’s briefing by the North West, National Treasury, Auditor General on NWPG Fiscal position 27 June 2018 https://pmg.org.za (Date used 22 November 2019)

ATC 110413: Report on Briefing by Basic Education Department on Intervention to Eastern Cape Department of Education: NCOP Education and Technology, Sports, Arts and Culture https://pmg.org.za (Date used 05 January 2020)

ATC120823: Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape from 13-16 March 2012, following the intervention by the National Department of Basic Education, dated 08 August 2012 https://pmg.org.za (Date used 07 January 2020)

Basic Education Laws Amendment Bill deliberations; Department of Basic Education on Notice of intervention in Eastern Cape Department of Education in terms of section 100 of the Constitution: briefings 22 March 2011 https://pmg.org.za (Date used 05 January 2020)

Committee report on North West intervention: briefing by Committee Researchers and Content Advisor 07 August 2018 https://www.parliament.gov.za (Date used 22 February 2020)

De Vos P Can the Government intervene in Limpopo – Constitutionally speaking? https://constitutionallyspeaking.co.za (Date used 05 May 2019)

Inter-Ministerial Committee (IMC) on North West intervention, with Ministers and Deputy Ministers' report to the Ad Hoc Committee on North West Intervention 14 June 2018 https://pmg.org.za (Date used 27 October 2019)

Inter-Ministerial Task Team (IMTT) update on North West intervention, with Ministers Ad Hoc Committee on North West Intervention 16 August 2018 [1]https://pmg.org.za (Date used 02 March 2019)

Inter-Ministerial Task Team on North West Intervention progress/ Government Communication and Information System (GCIS) https://www.gcis.gov.za/newsroom/media-releases/inter-ministerial-task-team-north-west-intervention-progress (Date used 05 May 2020)

.

MEDIA STATEMENT: JOINT MINISTERIAL TEAM ON LIMPOPO SECTION 100 INTERVENTION 19 January 2012 Cabinet Spokesperson: Jimmy Manyi and

Director: GCIS Limpopo: Thanyani Ravhura www.treasury.gov.za (Date used 27 April 2019)

Minutes of Proceedings of the National Council of Provinces Fourth Session, Fourth Parliament No.15 of 2012, 1960 20 May 2012 https://ww.yumpu.com/en/document/read/6325654/national -council-of provinces-parliament-of-south-africa (Date used 18 July 2018)

National Government interventions in Gauteng, Free State and Limpopo Ministerial briefings to a joint sitting of the Select Committees on Finance, Public Services, Education, Appropriation and Social Services 09 February 2012 https://pmg.org.za (Date used 19 April 2020)

National Government to take control of 5 Limpopo Departments – Cabinet Special Cabinet press statement December 5 2011 https://www.politicsweb.co.za (Date used 12 July 2019)

National Intervention in Eastern Cape Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011 https://www.pa.org.za (Date used 18 February 2019)

Notice of intervention in terms of section 100(1) of the Constitution of the Republic of South Africa, 1996 Thursday 17 2018

Report of the Select Committee on Finance on the follow-up visit to Limpopo in terms of Section 100(2) of the Constitution of the Republic of South Africa, 1996, 16 November 2012 https://pmg.org.za (Date used 21 July 2018)

Phago K National government intervention in provincial administration and governance: the case of Limpopo province Published Online 1 October 2018 https://hdl.handle.net/10520/EJC-1724bfdb2f (Date used 25 March 2021)

SABC NEWS “Mpumalanga Health placed under administration: Friday 04 July 2014” www.sabc.co.za (Date used 16 August 2016)

Section 100(1) (b) Limpopo provincial interventions, Public entity boards: National Treasury briefings Public Accounts (SCOPA) 11 June 2012 https://pmg.org.za (17 January 2019)

Statement to the National Assembly on the Eastern Cape Education Department intervention by Mrs Angie Motshekga, Minister of Basic Education 16 March 2011 https://www.gov.za/satement-national-assembly-easterncape-education-department-intervention-mrs-anaie-motshekga

Theses

Diseko MD The status and role of provincial governance in South African Constitutional dispensation 1996-2012 submitted in fulfilment of the requirements in respect of the Doctoral Degree Qualification Governance and Political Transformation in the Faculty of Humanities at the University of Free State January 2018

Mathenjwa MJ *The supervision of local government: Application of the legal framework.* (LLD thesis University of South Africa 2013)

Mdledle TP *Evaluating the role of the NCOP in reviewing national government interventions in provincial governments: a case study of the 2011 interventions in the Eastern Cape and Limpopo provinces*: A research paper submitted in partial fulfilment of the requirements for an LLM in Law, State and Multi-level Government The University of Western Cape

Muluneh YA *Supervisory Power of the Centre to the Region in South Africa and Ethiopia: A Comparative Analysis* (LLM Dissertation 2009 University of the Western Cape ETD)

Thornton-Dibb MP *Local Government and the Protection of Environment: An Analysis of "Municipal Planning" and "Environment"* submitted in partial fulfilment of the degree of Master of Laws (LLM) College of law and management studies School of law University of Kwa-Zulu Natal (Pietermaritzburg) (2013)

Other sources

Cambridge English Dictionary

Parliament of South Africa 'Oversight and Accountability Model' 2.2

Rule 103(1) of the Rules of the National Council of Provinces

Rule 167 of the Rules of the National Assembly provide for the general powers of a committee of the National Assembly