

Chapter 14

Co-operative Government & Intergovernmental Relations

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14.1 Introduction *

Prior to 1994, co-operative government and intergovernmental relations were largely foreign terms in the South African political lexicon. While different levels of government existed, all meaningful decision-making processes were concentrated in the national government.

The MPNF at Kempton Park apparently gave little consideration to the processes necessary to facilitate intergovernmental relations. According to De Villiers,¹ the consequent lacuna in the Interim Constitution² reflects: (a) a lack of familiarity with how other multi-tiered dispensations operate; and (b) a politically charged debate between the ANC and NP on the relative merits of federal and unitary systems.³

The absence of express rules, procedures and systems for intergovernmental co-operation in the Interim Constitution did not preclude various government departments from developing both vertical and horizontal channels of communication.⁴ These ad hoc rules and practices, as well as the pragmatism of government actors necessitated by the allocation of concurrent powers under the Interim Constitution, had a knock-on effect with respect to the drafting of the Final Constitution.⁵

The Constitutional Assembly — in FC ss 40 and 41 — laid out principles designed to promote co-ordination, rather than competition, between the various tiers of government and organs of state. To emphasize this shift in relations, FC ss 40 and 41 employ the term 'sphere' rather than 'level'. Sphere intimates

1 See B De Villiers 'Intergovernmental Relations in South Africa' (1997) 12 *SAPL* 198 ('IGR in SA').

2 Constitution of the Republic of South Africa, Act 200 of 1993 ('IC' or 'Interim Constitution').

3 Advocates of a unitary state believed that provincial and local governments should be largely subordinate to the national government. Federalists argued that each level of government should be allocated specified and entrenched powers and that any fundamental encroachment or limitation of such powers functions be deemed unconstitutional. See B De Villiers 'Intergovernmental Relations: The Duty to Co-operate — A German Perspective' (1994) 9 *SAPL/PR* 430 ('A German Perspective'). See also B De Villiers 'Intergovernmental Relations: A Constitutional Framework' in B De Villiers (ed) *The Birth of a Constitution* (1994); N Haysom 'The Origins of Co-operative Government: The "Federal" Debates in the Constitution-making Process' in N Levy & C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 43, 45 (The negotiators shelved heated but unenlightening debates over taxonomy and 'embark[ed] on an inquiry into an appropriate system of constitutional government whose objective would be to promote nothing other than good and effective government'); C Murray & R Simeon 'Multilevel Governance in South Africa: An Interim Report' (unpublished paper) as quoted in K McLean 'Housing Provision through Co-operative Government' (2002)(Unpublished manuscript on file with authors) 15 ('ANC leaders came to see advantages in effective regional governments both for the delivery of services and for the empowerment of citizens. Their exposure to foreign models of federalism, especially in Germany, convinced them that regional governments could be combined with strong leadership from the centre'); N Haysom 'Federal Features of the Final Constitution' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 504.

4 For a discussion of this type of legislation in the context of pre-1996 intergovernmental relations, see *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) ('National Education Policy').

5 Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution').

* The authors would like to thank Hannah Woolaver and Bernard Bekink for their contributions to this chapter. We have also benefited from the insight and assistance of Nico Steytler and Christina Murray.

different sets of responsibilities. (By implication, level denotes a hierarchy in structures of government). But that is as far as the break with the old order goes. Despite the emphasis on 'spheres' with particular, and sometimes exclusive, competencies, the Constitutional Assembly did not create a strong federal state.⁶ As other chapters in this work indicate,⁷ the national government retains both the power of the purse and the ability to override provincial and local government decisions. Moreover, the current dominance of the ANC means that technically independent political actors will be subject to the internal party discipline of that organization.⁸ Of course, if the 2007 ANC Polokwane Conference and the 2009 elections have taught us anything, then it is that we operate in a complex, fluid and unpredictable political environment. The 2007 ANC Polokwane Conference split closely along provincial lines — with Zuma ousting Mbeki. (However the actual margin was greater when one takes into account the support of the ANC Women's League and the ANC Youth League for Zuma). Subsequent events such as the formation of a new (non-minority) party (the Congress of the People (COPE)), sustained period of mass action, demonstrations and strikes by unions (precipitated by a clear strategy of destabilization by COSATU, the SACP and their affiliates), and inevitably clear divisions within the governing faction of the ANC (between moderate populists, on the one hand, and leftists, from COSATU and the SACP, on the other) suggest that internal ANC politics are anything but settled. The 2009 electoral triumph of the Democratic Alliance in the Western Cape — and its cotemporaneous control of the Cape Town metropole — will also test national government, provincial government and municipal relations. The friction between these three levels of government will be keenly felt around spending issues. As we shall see, the national government's current constitutional and statutory control over provincial revenue, taxation and spending allows it to exercise extremely tight control (through conditional grants) over provincial and local imperatives. The independence of spheres of government secured by the Final Constitution ensures that provincial and municipal officials, with sufficient political will, can take decisions that simultaneously oppose current national policy and influence its future formulation.⁹

6 De Villiers suggests that multi-tiered levels of government ensure greater public participation in societies riven by ethnic, religious or racial strife. See De Villiers 'A German Perspective' (supra) at 430-431.

7 See, eg, V Bronstein 'Legislative Competence' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15; S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

8 N Steytler 'One Party Dominance & the Functioning of South Africa's Decentralized System of Government' in R Kubek (ed) *Political Parties and Federalism* (2004) 159.

9 For example, the resistance of the Gauteng provincial government to national government policy regarding the distribution of the anti-retroviral drug Nevirapine to prevent mother-to-child transmission of HIV/AIDS led to a shift in national policy. See *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 ('TAC'). As Nico Steytler and Yonathan Fessha note, challenges to the hierarchical statutory arrangements will become more pronounced as greater party pluralism becomes the norm in local, provincial and national government. See N Steytler & Y Fessha 'Provincial Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance' (2006) (available at www.cage.org.za).

14.2 Comparative concepts of co-operative government

Comparative constitutional law throws up a whole range of models of co-operative governance. So-called divided federal states are generally marked by a clear division of functions between the national government and provincial governments, independent taxing powers for regions or provinces, and few formal mechanisms of co-operation between the various levels of government. Separate levels of government must negotiate agreement on issues of mutual concern. The United States,¹⁰ Canada,¹¹

- 10 A good example of a very weak divided federal dispensation was the post-revolutionary war government of the United States. The Articles of Confederation granted the federal government little more than the power to defend the thirteen states against foreign enemies. The federal government lacked an executive, a judiciary and the power of the purse. Nor did it possess any authority to intervene or to override the 13 sets of laws contrived by the founding States. The carefully calibrated system of shared and divided power crafted by the Constitutional Convention in 1787 was largely an answer to problems of co-ordination that threatened the very existence of the new nation. The federal government possessed only those powers articulated by the US Constitution. Article I, Section 8. All other powers vested in the states that made up the union. Tenth Amendment. Two hundred years later, the constitutionally recognized power of US federal government is such that there are relatively few areas of legislative and executive competence that are not at least shared by federal, state and local authorities. However, sharing competence does not mean coordinated action. Coordinated action is generally a function of mediation and not institutional arrangement.

The US is not without institutional arrangements designed to ensure that the national government takes cognisance of regional and local concerns. One house of Congress, the Senate, is made up of representatives from each of the 50 states. The other house, the House of Representatives, is made up of representatives from generally smaller constituencies — read local communities — from each of the 50 states. As a result, regional and local concerns feature prominently in national debate. See *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528, 550-551, 105 S Ct 1005 (1985) ('[T]he principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by the Congress.') Indeed, political careers at the national level are often measured by the ability of representatives to bring home the 'pork' — that is, to ensure that local or regional communities benefit from national government largesse. See L Tribe 'Model I: The Model of Separated and Divided Powers' *American Constitutional Law* (3rd Edition, Volume I, 2000) 118 — 206.

- 11 See P Hogg *Constitutional Law of Canada* (4th Edition, Volume I, 2001) 5-43-5-45. Hogg describes the Canadian system as one of 'co-operative federalism'. He notes that while the 'formal structure of the Constitution carries a suggestion of eleven legislative bodies each confined to its own jurisdiction, and each acting independently of the others . . . in many fields, effective policies require the joint, or at least complementary, action of more than one legislative body. . . . [T]he essence of co-operative federalism is a network of relationships between the executives of central and regional government. Through these relationships, mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process. The area where cooperative federalism has been most dominant is in the federal-provincial financial arrangements. At any given time, there are over 150 organizations, conferences and committees involved in intergovernmental liaison, indicating a vast array of consultative organisms within the Canadian federation.'

Hogg's description of the Canadian system sounds remarkably similar to the South African model. An architect of the South African system, Firoz Cachalia, has described the system as one of 'co-operative federalism'. See De Villiers 'IGR in SA' (supra) at 199. See also Report of the Commission of Inquiry into Constitutional Problems ('Tremblay Report') (1956, Volume II) 97-131 (Discussion of the nature and the goals of the Canadian federal state.)

and Switzerland¹⁵ are good contemporary examples of divided federal states. So-called integrated federal states generally provide for the exercise of both exclusive and concurrent powers by different levels of government and develop procedures designed to enhance co-operation between levels and organs of state. The national and sub-national governmental structures of Germany have been quite consciously designed to co-operate with each other.¹⁶ South Africa's system replicates many of the best practices of the German system.

- 12 See, generally, T Blacksmith & G Williams *Australian Constitutional Law and Theory* (2nd Edition, 1998) 213-244; Constitutional Commission *Final Report of the Constitutional Commission* (1988) 53-54 ('[T]he minimum essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the government institutions of the Commonwealth and the States, a division of power between these organizations, and a judicial umpire.' The Constitution protects the States from discrimination through taxation, duties, tariffs or regulation of trade, commerce or revenue by the Commonwealth. Likewise, it ensures that citizens of one State are not discriminated against by another. Finally, the equal representation of the States in the Commonwealth Senate ensures a certain even-handedness in the formation of national government policy.) See also 'Australia's System of Government' Department of Foreign Affairs and Trade (2004) <http://www.dfat.gov.au>. Much like the United States, Australia's federal government powers are enumerated. Sections 51 and 52 of the Australian Constitution. The states' plenary powers find their source in s 107. See R Watts 'Intergovernmental Councils in Federations' in *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (2003). Watts notes that Australia, like South Africa, combines federal and parliamentary institutions. While intergovernmental relations are not expressly provided for in the Constitution, Australia has established a number of major formal intergovernmental councils. The Council of Australian Governments (COAG) is Australia's primary intergovernmental institution. COAG consists of the Prime Minister, all the State Premiers and Territory Chief Ministers, and the President of the Australian Local Government Association. The 30-odd intergovernmental ministerial councils charged with various sectoral responsibilities make even more important contributions to IGR. Several of these councils have decision-making mandates assigned by legislation. This assigned authority — along with articulated deliberative and voting processes — makes them genuine intergovernmental co-decision mechanisms. They are quite similar in this respect to South Africa's MINMECs. See § 14.4(d) *infra*. For more on IGR in Australia, see DM Brown *Market Rules, Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (2002) 162, 204-11, 226, 259 - 262; R Wilkins & C Saunders 'Intergovernmental Relations in Australia' in P Meekison (ed) *Intergovernmental Relations in Federal Countries* (2002) 17-23.
- 13 India's Constitution provides expressly for the functional interdependence of various tiers of government. Article 263 allows for the creation of an Inter-State Council (ISC) designed to harmonize federal and state policies. (Despite this constitutional dictate, the ISC only came into being in 1990. The delay, justified in part by a desire to develop a set of best practices for federal-state relations, sheds at least some light on the South African government's delay in bringing into being IGR dispute resolution legislation in terms of FC s 41(2).) The National Development Council, created in 1952, is the setting for intergovernmental debate about Union five-year plans. The Finance Commissions provided for by Article 280 governs constitutionally mandated transfers between Union and State governments. Much like the South African Constitution, the Indian Constitution assigns government competencies according to a Union list, a State list and a Concurrent list. Article 246, Schedule VII, Lists I, II, III. The Union's list of powers embraces such standard national responsibilities as defence, foreign affairs, banking, currency control, taxes and levies. The State list contains such competencies as public order and police, local government, public health, education and state taxes. However, the Union's legislative powers may pre-empt state authority with respect to matters enumerated in the Union and concurrent list of competences. The Union government may also intervene directly in the affairs of the states. Subject to a two-thirds majority of the Council of States (a body similar in function to South Africa's National Council of Provinces), the Union may declare a state of emergency and appropriate the power to legislate with respect to matters covered by the State list. Article 249. All state governors are appointed by the President of the Union. As a result, the federal government retains oversight powers vis-à-vis the affairs of any given state. See HM Seervai 'Federalism in India' *Constitutional Law of India* (4th Edition, Volume 1, 1991) 281-303.

Three cautionary notes are in order. First, the vast majority of nations are unitary, not federal. The concept of 'co-operative governance' has meaningful application in the fewer than 50 nations that may be properly described as federal. Second, taxonomy is often misleading. Distinctions between divided and integrated federal states obscure what is truly interesting: the conventions and the institutions that make a federal system work. Third, the Final Constitution creates space for two competing forms of federalism. Each form of federalism reflects a different conception of intergovernmental relations (IGR) and cooperative governance. As Ronald Watts and Nico Steytler note, the first form of integrated South African federalist state contemplated by the Final Constitution — call it cooperative IGR — assumes relative parity of power between the national government and our

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- 14 See C Souza *Constitutional Engineering in Brazil* (1997). According to the 1988 Brazilian Constitution, the three tiers of government (federal, state and local) have both distinct and concurrent competencies. To get a sense of the relative power of each tier, Souza looks at both the fiscal and expenditure responsibilities of each tier. *Ibid* at 37-53. The federal government retains the lion's share of responsibility for taxation: through income tax, large fortunes tax, import/export duties, rural property and industrial products taxes. States possess the ability to tax incomes, inheritances, capital gains and motor vehicles as well as to create value-added tax. Local governments enjoy the right to tax property, services and fuel. Interestingly, once the distribution of fiscal revenue occurs, the federal government receives but 36.5% of the total. States receive 40.7% and local governments 22.8%. With respect to areas of expenditure, the federal government exercises authority over such expected fields as defence, international trade currency, national highways, postal services, federal police, social security and water. The federal, state and local government share competence over health, welfare and public assistance, culture and education, housing and sanitation, poverty and social marginalization, traffic safety and tourism. The states have residual powers over areas not assigned to the federal or municipal levels by the constitution. Local governments possess exclusive competence over local transport, primary schooling and land use. Despite the constitutionally prescribed competencies of the states, the Brazilian federal government can override state legislation in a set of prescribed circumstances (quite similar to those found in the FC in s 44(2)): (1) where the national interest is threatened, (2) where there is extreme public disorder or (3) when a state's finances are seriously in arrears. Such interventions must be certified by the Brazilian Supreme Court. In general, such an override will only take place after mediation between the federal government and the state government involved has failed. IGR in Brazil is largely informal. It relies on extensive political lobbying and brokered deals between the different tiers of government. While much of the lobbying flows upwards from municipal councillors and mayors to state legislatures and from state officials to congressmen, senators, federal ministers and the president, the 'federal government [post-1988] cannot take decisions about national issues without negotiating with the sub-national spheres.' *Ibid* at 172.
- 15 Switzerland has a unique federal structure. The Federal Council is a collegial executive elected by the federal legislature. It sits for a fixed term and is composed of seven councillors. This structure is mirrored in cantonal political arrangements. Two things set this arrangement apart: (1) the guaranteed representation of the four major political parties in the Federal Council; (2) the possibility of dual membership in the cantonal and federal legislatures; and (3) a constitutional provision that potentially subjects all federal legislation to challenge by referendum. As a result of these unique features, Swiss politics reflects both a high degree of co-operation and a high degree of cantonal autonomy. Provision is made for cantonal participation in decision-making processes at the federal level with respect to federal legislation (Article 45(1)) and foreign policy (Article 55), while inter-cantonal co-operation is promoted through treaties, common organizations and institutions (Article 48). Federal Constitution of the Swiss Confederation, 1999. See JF Aubert & E Griesel 'The Swiss Federal Constitution' in F Dessemontet & T Ansay (eds) *Introduction to Swiss Law* (1995) 15-26.
- 16 See De Villiers 'A German Perspective' (*supra*) at 432 fn 6 (Co-operative federalism is described as follows: '(i) horizontal and vertical co-operation between the various levels of government; (ii) bilateral and multilateral co-operation; (iii) the involvement of the legislative, executive and judicial branches of government; (iv) a combination of voluntary and obligatory co-operation'). The partnership between the German national government (Bund) and the various regions (Länder) is based on the principle of federal trust (Bundestreue). According to the German Constitutional Court, Bundestreue is a right enforceable by both the national and regional governments. See B Verf GE 1, 300. See also B Verf GE 12, 205, 256. That said, there is no exact checklist to measure

subnational constituents (the provinces and the municipalities.)¹⁷ The second form of integrated South African federalist state contemplated by the Final Constitution — call it coercive IGR — reflects a hierarchical distribution of power: national government largely dominates the nation's subnational constituent parts.¹⁸ As we shall see, the Constitutional Court's initial gloss on Chapter 3 suggests a cooperative form of IGR and relative parity between the country's three spheres of government. However, several important pieces of legislation — the Intergovernmental Relations Framework Act 13 of 2005, the Provincial Tax Regulation Process Act 53 of 2001, the Intergovernmental Fiscal Relations Act 97 of 1997, and the annual Division of Revenue Act (as well as many complicated constitutional provisions that determine the parameters of provincial and local fiscal autonomy) concentrate political power in our national government. The marriage of political culture — ANC dominance — to political structures that favour the national government — and ANC dominance — underwrite Watt and Steytler's contention that we currently operate with an integrated federal state that employs a coercive form of IGR and cooperative government.¹⁹

compliance with the principle of *Bundestreue*. It is a constitutional norm given content by the demands of the specific circumstances with which the court is confronted. See De Villiers 'A German Perspective' (*supra*) at 432.

The principle of *Bundestreue* has informed South Africa's commitment to co-operative government and intergovernmental relations. However, notwithstanding the many shared elements of an integrated model, the South African national government retains a dominant position in intergovernmental relations. The South African model is far more centralised in comparison with its German counterpart. For more on German co-operative governance, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 78–92; D Currie *The Constitution of the Federal Republic of Germany* (1994) 77–80; B De Villiers 'Bundestreue: The Soul of an Inter-governmental Partnership' *Konrad Adenauer — Stiftung Occasional Papers* (March 1995); B De Villiers 'Foreign Relations and the Provinces — International Experience' (1996) 11 *SAPL/PR* 204; B De Villiers 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' (1997) 12 *SAPL/PR* 469. To show up the limits of these conceptual categories, it is worth noting that an exemplar of the divided model, the US, has much stronger regional and local representation at the national level than does South Africa.

17 N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in *Intergovernmental Relations: A Festschrift for Ronald Watts* (forthcoming, 2009, on file with author); R Watts *Intergovernmental Relations: A Report for the Department of Constitutional Development and Provincial Affairs* (1999).

18 In 1997, Ronald Watts contended that the Final Constitution 'represents an innovative hybrid combining some federal features with some constitutionally decentralized unitary features'. R Watts *Federalism: The Canadian Experience: Theory and Practice Volume 2* (1997) 2. See also N Steytler 'One Party Dominance and the Functioning of South Africa's Decentralised System of Government' in Rudolf Hrbek (ed) *Political Parties and Federalism* (2004) 159.

19 R Watts 'Intergovernmental Relations: Conceptual Issues' N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22; C Leuprecht & H Lazar, 'From Multilevel to "Multi-order" Governance?' *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems* in H Lazar & C Leuprecht (2007) 1. Steytler writes: 'While the object of providing "coherent government" may seem a neutral goal, the coherence is, however, premised on the "realisation of national priorities"... Given that the nature and extent of these [provincial and municipal] services are prescribed in national policies and legislation, the focus then shifts to [the] "monitoring implementation" of [national] policy and legislation' and not the coordination of varying policy initiatives. N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations' (*supra*) at 7. Steytler and Watt's analyses carry more than a whiff of disappointment — as if things might have been different. But given 15 years of political dominance by the ANC and its longstanding resistance to fully devolved federalism, it is hard to imagine how things might have turned out otherwise.

14.3 Co-operative government and the final constitution

(a) The general framework of co-operative government

Co-operative governance is reflected in any number of different ways in the Final Constitution. FC ss 40 and 41's use of the terms 'spheres' reflects a linguistic turn away from a hierarchical relationship between national, provincial and local government. All spheres of government, be they national, provincial or local, must co-operate vertically and horizontally. For example, municipalities must not only co-operate with one another but also with provincial governments and the national government.²⁰ Finally, FC ss 40 and 41 require that different spheres of government and different organs of state should exhaust all political means of dispute resolution before turning to the courts.²¹

20 See G Devenish *A Commentary on the South African Constitution* (1998) 109.

21 The constitutional framework for co-operative government is not exhausted by the provisions of FC ss 40 and 41.

FC Schedules 4 and 5 specifically provide for concurrent and exclusive legislative competencies for the national and provincial governments. See V Bronstein 'Legislative Competence' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. Although the Interim Constitution made no express reference to co-operative government, the Constitutional Court appeared to recognize the need for just such a system. See *Ex Parte of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at para 34. (A national education policy bill that called for the (executive) co-operation between the provinces and the national government was the subject of abstract review. The Court wrote: 'Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation.' The Court held that Parliament was entitled to make provisions for such co-operation of matters set out in IC schedule 6 and that the objection to such provisions on the grounds that they encroached upon the executive competence of the provinces could not be sustained.) See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*'). (Court confirmed that the Interim Constitution recognized three distinct, but interdependent, levels of government: namely national, provincial and local); *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) at para 290 ('*First Certification Judgement*'). (The Constitutional Court held that Intergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of CP XX that national unity be recognised and promoted. The mere fact that the NT has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.)

Other provisions crosshatch national, provincial and municipal powers. FC ss 146 and 44 delineate the desiderata for national override of provincial legislative prerogatives. FC s 100 sets out the guidelines for national executive supervision and intervention in provincial administrative affairs. Such a supervisory role remains subject to approval, to review and to termination by the National Council of Provinces. The NCOP, as a general matter, represents provincial interests in the national legislature. See FC s 42(4). FC s 125 (3) requires that national government must assist the provinces 'by legislative or other measures to develop the administrative capacity required for the effective exercise' of their functions, powers and duties. National and provincial governments have similar obligations to assist local governments throughout the country. See FC s 154. FC s 238 enables any organ of state in a sphere of government to delegate executive functions from one organ of state to another, and to perform any function for any other organ of state. Parliament may also delegate legislative powers to governments in other spheres, except the power to amend the Constitution. See FC s 44. Provincial legislatures may assign any legislative power to a municipality. See FC s 104. A member of cabinet may assign to a member of a provincial executive council or municipality a power or a function that must be performed in terms of an act of parliament. See FC s 99. A member of the executive council of a province (MEC) may assign any power (executive) to a municipality. See FC s 126.

The Chapter 3 jurisprudence of the Constitutional Court suggests that this 'new philosophy' of co-operative government is governed by two basic principles.²² First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. Second, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and the purpose of that entity. In short, while the political framework created by the Final Constitution demands that mutual respect must be paid, a sphere of government or an organ of state may be entitled to determine the objectives of another sphere of government or an organ of state and to dictate the means by which those objectives are achieved.²³

It is worth noting at the outset that the extant case law on co-operative government can appear a bit 'soft'. The highly qualified nature of many of the Constitutional Court's holdings in this area is a function of the textual, political and procedural environment. First the Court has been regularly forced to contract the imprecise drafting of FC ss 40 and 41. When faced with the choice of offering broad readings that would enable the various subsections in FC ss 40 and 41 to cohere, or narrower, more finely grained readings of individual subsections that would create doctrinal dissonance, the Court generally chooses the former route. Second, the principles of co-operative government are designed to facilitate political solutions to conflicts between different branches of government. The Court has rightly shied away from using Chapter 3 to impose judicial solutions on

- 22 See *Ex parte President of the Republic of South Africa: in re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) ('*Liquor Bill*') at para 40 (Chapter 3 'introduced a 'new philosophy' to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of [FC] s 40(2) to observe and adhere to the principles of co-operative government set out in chap 3 of the Constitution.') See also *First Certification Judgment* (supra) at paras 287-288.
- 23 See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('*DVB Behuising*') (Court held that the functional areas of concurrent legislative authority had to be interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively); *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) ('*Premier, WC v President*') at paras 54-55, 83 (Court wrote that 'the provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. Co-operation is of particular importance in the field of concurrent law-making and implementation of laws.' As a result, a procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration is entirely consistent with the system of co-operative government prescribed by the Constitution); *National Educational Policy Bill* (supra) at para 34 (Court held that the principles of co-operative government must be understood such that the powers assigned to an organ of state for one purpose — read education — may not be employed by the organ of state for another.) But see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1360 (CC) ('*Grootboom*') at paras 39-40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other. But the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations'); *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA) (National and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary.)

quintessentially political problems. Third, principles of co-operative government are rarely dispositive of a matter. In the main, they engage a host of preliminary issues that determine whether or not a matter ought to be before a court at all. The flexibility of many of our co-operative government doctrines affords the courts a significant amount of latitude in deciding whether an intrinsically political issue is sufficiently ripe for judicial intervention. Finally, the promulgation of the Intergovernmental Relations Framework Act 13 of 2005 has largely, but not entirely, displaced the court's role in articulating rules designed to govern the better part of intergovernmental disputes.

(b) FC s 40

40 (1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides.

(i) FC s 40(1): Distinctive, interdependent and interrelated

The phrase 'distinctive, interdependent and interrelated' seems tailor-made for conceptual confusion. And yet, despite the inapt wording, the courts have managed to make sense of it.

The phrase stands for the following propositions. 'Interdependent' and 'interrelated' must be understood in light of FC s 1's provision that South Africa is 'one sovereign, democratic state'.²⁴ (Emphasis added). While the different spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfill its constitutional mandate.²⁵ Despite textual intimations that the spheres are equal, there is a clear hierarchy

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that runs from national government down to provincial government down to local government.²⁶

(ii) FC s 40(2): Parties bound by Chapter 3

24 See *Premier, WC v President* (supra) at para 50 ('Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is 'one sovereign, democratic State', and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.')

25 See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*IEC v Langeberg*') at para 26 ('All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 were designed in an effort to achieve this result'); *Grootboom* (supra) at paras 39-40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution. . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program, but the national sphere of government must accept responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations.')

Another potential source of conceptual confusion is FC s 40(2). It reads, in pertinent part: 'All spheres of government must observe and adhere to the principles in this chapter.' FC s 41(1), however, applies to 'all spheres of government and all organs of state.' To further complicate matters, FC s 41(3), uses the term 'organ of state' without reference to spheres of government. The text thereby raises thorny questions as to how, when and which Chapter 3 obligations apply to a given dispute between state institutions. As we shall see, it is not enough to parrot the text and simply say that Chapter 3's obligations are sometimes imposed solely on spheres of government, sometimes on both spheres of government and organs of state, and sometimes on organs of state alone.

One way of reconciling this terminological confusion is to insist that the term 'spheres of government' should be reserved for relations *between* the different spheres of government (so-called vertical intergovernmental relations). The term 'organs of state within each sphere' could then be used to describe relations *within* a particular sphere (so-called horizontal intergovernmental relations). The problem with this reading is that at least two of the principles in FC s 41(1) — which purports to bind all spheres of government and all organs of state — do not apply to horizontal intergovernmental relations. They are FC ss 41(1)(e) and 41(1)(g). The absence of any textual support for creating such exceptions gives the lie to this particular attempt to reconcile FC ss 40 and 41.

The courts have given meaningful content to this miasma of terminology. In *IEC v Langeberg*, the Constitutional Court began by remarking that 'the national sphere of government comprises at least Parliament and the national executive including the President.'²⁷ Parliament and the national executive were not organs of state as defined in s 239 'because they are neither departments nor administrations within the national sphere of government.'²⁸ Left unqualified, this dictum might have been read to imply that Parliament and the national executive were *not* bound by FC s 41(3) since that provision applies only to organs of state.

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In *National Gambling Board*, the Court held that its remarks in *IEC v Langeberg* should be construed narrowly, such that 'Parliament, the President and the Cabinet are not organs of state within the meaning of paragraph (a) of the definition [in s 239].'²⁹ The *National Gambling Board* Court qualified the dictum in *IEC v Langeberg* such that Parliament, the President and the Cabinet might be regarded as organs of state in terms of s 239(b). Since none of these state institutions or

26 See *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development & Others* 1999 (11) BCLR 1229 (T) ('*Cape Metro Council*') at para 29 (The High Court wrote that the 'apparent autonomy and independence' of the local government sphere is 'relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres which make up the government of the country'); *Fedsure* (supra) at para 48 (Constitutional Court held that the Interim Constitution recognized three distinct levels of government and that each level of government derived its powers from the IC, but that local government's powers were subject to definition and regulation by either national or provincial governments.) See also *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA)(Although FC ss 40 and 41 contemplate distinct spheres of government, the national and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary.)

27 *IEC v Langeberg* (supra) at para 25.

28 *Ibid.*

functionaries was party to *National Gambling Board*, the Court did not have to decide this point. It did, however, endorse the parties' agreement that the Minister of Trade and Industry and the Premier of KwaZulu-Natal were organs of state as contemplated in s 239(b)(i).³⁰

The *National Gambling Board* Court's gloss on *IEC v Langeberg* was recently revisited in *Uthukela District Municipality v President of the Republic of South Africa*.³¹ In *Uthukela District Municipality*, three municipalities sought an order from the Constitutional Court confirming a High Court order directing the President, the national Minister of Finance and the national Minister of Provincial Government — and several other respondents — to pay them their equitable share of national revenue as required by FC ss 214(1)(a) and 227(1)(a). Although the matter had been settled prior to the confirmation hearing, the Court used the hearing as an opportunity both to clarify the extension and the application of the terms used in Chapter 3 and to offer an assessment of the chapter's requirements. Municipalities were expressly identified as 'organs of state in the local sphere of government'.³² The three respondents — the President, the national Minister of Finance and the national Minister of Provincial Government — were expressly identified as 'organs of state in the national sphere of government'.³³ All parties — as organs of state — were found to be subject to the dispute resolution requirements of FC s 41(3)³⁴ and 41(1)(h)(vi).³⁵ Finally, the two sets of organs of state thus identified were found to have failed to make use of the dispute resolution mechanism created by the Intergovernmental Fiscal Relations Act 'for fiscal disputes between organs of State in the national and local spheres'.³⁶

29 *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) ('*National Gambling Board*') at para 21.

30 Given that *National Gambling Board* bound provincial premiers in terms of s 239(b), the President, as head of the national executive, was almost certain to be regarded as an organ of state for the purposes of FC s 239(b), and therefore bound by FC s 41(3). *Premier, WC v President* provided additional support for this proposition. In *Premier, WC v President* the Constitutional Court assumed exclusive jurisdiction under FC s 167(4)(a) of the Constitution to hear a dispute between a provincial premier and the President. FC s 167(4) provides that '[o]nly the Constitutional Court may — (a) decide disputes between organs of state in the national or provincial sphere concerning the status, powers and functions of any of those organs of state.' The Court's decision to assume jurisdiction was based upon an express finding that the President was an organ of State in the national sphere. *Ibid* at para 2. It followed that the President would be bound by the general duty in FC s 40(2) to adhere to the principles in Chapter 3, the specific duties attached to these principles in FC s 41(1) as well as the duty to engage in extra-judicial dispute-resolution in FCs 41(3) prior to any litigation.

31 2003 (1) SA 678 (CC), 2002 (1) BCLR 1220 (CC) ('*Uthukela District Municipality*').

32 *Ibid* at para 18 citing, in support, *IEC v Langeberg* (supra) at para 19.

33 *Ibid* at para 18 citing, in support, *National Gambling Board* (supra) at paras 19–21.

34 *Ibid* at para 19.

35 *Ibid* at para 22.

36 *Ibid* at paras 20–23.

Despite the Constitutional Court's view that the President and the national Cabinet are organs of state as defined in FC s 239(b),³⁷ the distinction drawn in FC ss 40 and 41 between spheres of government and organs of state within a particular sphere may still turn out to be significant. If it is decided that Parliament is not an organ of state, the duty imposed by s 41(3) to engage in extra-judicial dispute resolution will not bind the National Assembly and the National Council of Provinces and, by extension, provincial legislatures and municipal councils. It seems difficult, at first blush, to believe that the drafters of the Final Constitution intended to immunize these bodies from the dictates of FC s 41(3). However, when interpreting the Intergovernmental Framework Relations Act, the Court in *Matatiele* held that the Act does not apply to disputes between Parliament and Provincial Legislatures.³⁸

The decision in *Uthukela District Municipality* resolves the issue of whether provincial executive councils are to be treated as organs of state for purposes of FC s 41. *Executive Council, WC* was only authority for the proposition that a provincial government, represented by its executive council, will be regarded as a sphere of government for the purposes of FC ss 41(1)(e) and (g).³⁹ It was agnostic as to the status of a provincial executive council as an organ of state. Given that *Uthukela District Municipality* holds that members of the national cabinet are organs of state for the purposes of FC s 41, it seems unlikely that provincial cabinets would not be similarly bound.

In *IEC v Langeberg*, the Court suggested, in something of a throwaway line, that '[a]n intergovernmental dispute is a dispute between parties that are part of government in the sense of being either a sphere of government or an organ of State within a sphere of government.'⁴⁰ Taken at face value, this dictum might make the distinction between these two types of party irrelevant for the purposes of FC s 41(3). The problem with this remark is that it contradicts the clear wording of the subsection. FC s 41(3) refers only to 'organs of state'.

After *Uthukela District Municipality*, and the Court's holding that the President and the members of the Cabinet should be regarded as organs of state, the distinction between organs of state and spheres of government begins to look a bit less significant. There is, however, a limit to the effects of this elision. For there is, as yet, no authority for the proposition that the national legislature or provincial

37 FC s 239(b)('In the Constitution, unless the context indicates otherwise, . . . 'organ of state' means (b) any other functionary or institution: (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or ii. exercising a public power or performing a public function in terms of any legislation.')

38 See *Matatiele Municipality & Others v President of the RSA* 2006 (5) SA 47 (CC). The *Matatiele* Court reads the IGRFA so that disputes between national and provincial legislatures remain governed by other sections of the Final Constitution, primarily FC ss 146-150. It may also be that disputes between legislatures — over the implementation of legislation — invariably become disputes between executives and organs of state. The execution of the will of the legislatures — by the executive or some organ of state — would invariably be subject to the dictates of FC s 41(3) and the IGRFA.

39 *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('Executive Council, WC') at paras 29 and 79.

40 *IEC v Langeberg* (supra) at para 21.

legislatures are bound by FC s 41(3). Indeed, *Matatiele* points rather emphatically, the other way.

With those caveats firmly in mind, *IEC v Langeberg* and *National Gambling Board* still provide clear authority for two propositions.

First. *IEC v Langeberg* holds that the Independent Electoral Commission referred to in FC ss 190 and 191 is not 'an organ of State which can be said to be within the national sphere of government.'⁴¹ Three reasons are advanced for this proposition: (1) the Commission is not a department or an administrative agency that is subject to the national executive's co-ordination function in terms of FC s 85(2); (2) the Commission is expressly described in Chapter 9 as being a state institution strengthening 'constitutional democracy' and 'state' is a broader concept than 'national government'; and (3) the Commission is described in FC s 181(2) as 'independent', a description that is incompatible with the notion of 'interdependence' in FC s 40(1).

All three reasons apply equally to the other institutions listed in FC s 181(1): the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; and the Auditor-General. One can assert, with a certain amount of confidence, that: (a) none of these Chapter 9 institutions is bound to observe the principles in Chapter 3; and (b) a dispute involving any one or more of these institutions is not an intergovernmental dispute for the purposes of FC s 41(3).

Second. Most national and provincial regulatory authorities are organs of state within the national or the provincial spheres of government and are therefore bound by FC ss 40 and 41(1) and (3). In *National Gambling Board*, the Court endorsed the parties' agreement that the National Gambling Board and the KwaZulu-Natal Gambling Board were organs of state in the national and provincial spheres respectively.⁴² Once again, the grounds for this particular finding (that the boards exercise a public power or performed public functions in terms of legislation in one or the other of these spheres) applies to a host of similarly situated regulatory bodies. For example, the dispute between the City of Cape Town and the National Electricity Regulator over the former's power to cross-subsidise the provision of free electricity would probably have been regarded as an intergovernmental dispute to which FC s 41(3) applied. On the other hand, the constitutional status of the Independent Communications Authority (ICASA) is closer to that of the Chapter 9 institutions. Although not mentioned in the list of state institutions strengthening constitutional democracy in FC s 181(1), at least some of ICASA's regulatory powers derive from FC s 192. FC s 192 — part of Chapter 9 — provides for 'an independent authority to regulate broadcasting.'⁴³ Following *IEC v Langeberg*, ICASA, as the successor to the IBA, should not be regarded as an organ of state within a particular, 'interdependent' sphere of government.

41 *IEC v Langeberg* (supra) at para 27.

42 *National Gambling Board* (supra) at paras 19-21.

43 FC s 192 reads: 'National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.'

(c) FC s 41

Principles of co-operative government and intergovernmental relations:

- (1) All spheres of government and all organs of state within each sphere must:
 - (a) preserve the peace, national unity and the indivisibility of the Republic;
 - (b) secure the well-being of the people of the Republic;
 - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - (d) be loyal to the Constitution, the Republic and its people;
 - (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;
 - (g) 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; and
 - (h) co-operate with one another in mutual trust and good faith by:
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.
- (2) An Act of Parliament must
 - (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
- (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

(i) FC s 41(1)

The principles set out in FC s 41(1) stand for two basic propositions. First, co-operative government does not diminish the autonomy of any given sphere of

government.⁴⁴ It simply recognizes the place of each within the whole and the need for co-ordination in order to make the whole work.⁴⁵ Second,

FC ss 41(1)(e), (g) and (h) re-inforce the notion that each sphere of government is distinct.⁴⁶

(aa) FC s 41(1)(d): The rule of law

The majority of cases in which the principles of co-operative government have been invoked have not been disputes between different spheres of government and/or organs of state. The majority of these cases involve private parties suing some arm of the government. As a result, FC s 41(1)(d)'s injunction that 'all spheres of government and all organs of state within each sphere must . . . be loyal to the Constitution, the Republic and its people' has been interpreted much like an adjunct to the Constitution's commitment to the rule of law and the legality principle. For example, the *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxusa & Others* Court wrote:

[W]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies [ss 41(1)(d) and 195(1)(e)] of the Constitution, which commands all organs of State to be loyal to the Constitution and requires the public administration to be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.⁴⁷

It would seem reasonable, then, to read FC s 41(1)(d) — along with FC s 41(1)(b) and FC s 41(1)(c) — as designed to promote fairness in the administration of the state. Indeed, the *Hardy Ventures v Tshwane Metropolitan Municipality* court wrote that FC s 41(1), when read as a whole, required 'all spheres of government and all organs of state within each sphere' to provide 'effective, transparent, accountable and coherent government.'⁴⁸

(bb) FC s 41(1)(e): Respect for institutional integrity

At least one court has held that this provision can be read to re-inforce the separation of powers doctrine. In *Bushbuck Ridge Border Committee v Government of the Northern Province*, the High Court held that FC s 41(1)(e) bolstered 'the

44 See, eg, *First Certification Judgment* (supra) at para 292 (The principles set out in FC s 41 'are not invasive of the autonomy of a province in a system of co-operative government.')

45 See *Van Wyk v Uys NO* 2002 (5) SA 92 (C)(Court held that because FC s 41(1) enjoins the central, provincial and local spheres of government to support and assist each other, the MEC for local government could not act *mero motu* in a case where the municipal council had already taken definite steps to investigate an alleged breach of the code of conduct by councillors. Rather, FC s 41(1) required the provincial MEC to await the outcome of the council's own investigation and take cognisance of the council's recommendations before acting in terms of item 14 of Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000.)

46 See *Cape Metro Council* (supra) at para 34 (FC ss 41(1)(e), (g) and (h) reinforce the protection afforded to municipalities by FC s 154(1)).

47 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)('Ngxusa').

48 2004 (1) SA 199 (T)('Hardy Ventures').

constitutional separation of powers — in particular the principle that the courts should not usurp the function of the legislature.⁴⁹ How exactly this provision accomplishes this feat is difficult to discern. While it may prevent different spheres of government from violating each other's institutional integrity, the subsection does not refer to the courts, nor are the courts generally thought to be engaged by these principles of co-operative government. They are the arbiters of disputes between spheres of government and organs of state, and not parties to such disputes.

(cc) FC s 41(1)(f): Enumerated powers

According to the Constitutional Court in *Liquor Bill*, the chapters following Chapter 3 should be 'read and understood' in light of the subordination of all spheres of government to the requirements of co-operative government.⁵⁰ These requirements include the duty imposed by FC s 41(1)(f) 'not to assume any power or function except those conferred on them in terms of the Constitution.' FC s 41(1)(f) is of a piece with FC ss 41(1)(e) and (g). The three subsections remind each sphere of government and every organ of state that the best way to realize co-operative governance is to ensure that all branches do exactly what they are empowered to do — and no more.

(dd) Section 41(1)(g): Abuse of power

FC s 41(1)(g) provides that '[a]ll 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 or institutional integrity of government in another sphere.' Because all the intergovernmental disputes that have come before the courts to date have concerned the proper allocation of powers and functions between the different spheres of government, determining the extension of this provision requires some precision. The provision requires one to distinguish between legitimate disputes about the ambit of a particular organ of state or sphere of government's powers, and the constitutionally forbidden encroachment by one organ of state or sphere of government onto the terrain of another.

In *Premier, WC v President*, the Court articulated this distinction as being one between 'the way power is exercised' and the question 'whether or not a power exists.'⁵¹ In theory, this approach means that FC s 41(1)(g) becomes relevant to the determination of the dispute only once it is established that the powers on which the parties are relying exist. If a particular power does not exist, the dispute must be resolved on the basis that the party concerned is acting unlawfully. Only once it is established that the parties are acting lawfully may the further question arise as to whether any of the parties is exercising its powers in such a way as to 'encroach on the geographical, functional or institutional integrity' of the others. With regard to this question, the Court held that:

49 *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193, 200-202 (CC).

50 *Liquor Bill* (supra) at para 41.

51 *Premier, WC v President* (supra) at para 57.

The functional and institutional integrity of the different spheres of government must be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.⁵²

Unfortunately, this passage blurs the neat distinction between 'the way power is exercised' and 'whether or not a power exists' by implying that the question as to whether FC s 41(1)(g) has been infringed must be answered *relationally*: that is, by looking at the place of the parties in the co-operative government system, including their respective powers and functions. In practice, this means that the

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lawfulness of the exercise of a power and the alleged abuse of that power may not always be as easy to separate as the Court at first indicates. Where it is not crystal clear from the text of the Final Constitution that a sphere of government or an organ actually possesses the power it asserts, the Court's FC s 41(1)(g) doctrine suggests that the more constitutionally dubious the status of the asserted power is, the greater is the likelihood that it will be found to have been abused.⁵³

In *Premier, WC v President*,⁵⁴ the Constitutional Court was asked to resolve a dispute between the Western Cape provincial government and the national government relating to the constitutional validity of certain amendments to the Public Service Act⁵⁵ as introduced by the Public Service Laws Amendment Act.⁵⁶ The Court held that the provisions of Chapter 3 of the Final Constitution were designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. In particular, FC s 41(1)(g) was crafted so as to prevent one

52 Ibid at para 58.

53 See *Cape Metro Council* (supra) at para 122 ('Section 41(1)(g) places a limitation or constraint on the manner in which a sphere of government or an organ of State may exercise its powers or perform its functions. It may be interpreted to mean that no interference with, or encroachment upon, the inviolate sphere of activities of another organ of State is to be tolerated. This is consonant with the spirit of co-operation based on mutual trust and good faith, as envisaged in section 41(1)(h). . . [S]ection 41(1)(g) appears to be directed at preventing one sphere of government from undermining others, thereby preventing them from functioning effectively. Such conduct could, indeed, be regarded as an abuse of power. In deciding whether or not there has been conduct constituting an abuse of power, however, all relevant facts and circumstances should be considered. This would include, as the said dictum suggests, the complainant sphere of government's position in the constitutional order or hierarchy and the relative weight of their applicable powers and functions'); *Executive Council, WC* (supra) at para 80 (Court holds that FC ss 41(1)(e) and (g) 'underscore the significance of recognising the principle of the allocation of powers between national government and the provincial governments. The Constitution therefore sets out limits within which each sphere of government must exercise its constitutional powers. Beyond these limits, conduct becomes unconstitutional.') See also *Executive Council, WC* (supra) at para 29 ('The Constitution therefore protects the role of local government and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an Act of Parliament is inconsistent with such constraints it would to that extent be invalid.')

54 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

55 Proclamation 103 of 1994.

56 Act 86 of 1998.

sphere of government from using its powers in ways that could undermine other spheres of government.⁵⁷ In this respect, the national legislature's constitutional power to establish a single public service had to be exercised so as not to encroach on the ability of the provinces to carry out the functions that are constitutionally entrusted to them.⁵⁸

The *Premier, WC v President* Court further held that a procedure requiring an agreement between the President and the Premier with respect to the legality of a proposed restructuring of the public service within a provincial administration was entirely consistent with the system of co-operative government.⁵⁹ The Court held that s 3(3)(b) of the amended Public Service Act, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, impaired the ability of the executive authority of the province to administer its own laws. Section 3(3)(b) of the amended Act was therefore inconsistent with the Final Constitution to the extent that it empowered the Minister to make the determination without the consent of the Premier.⁶⁰

(ee) FC s 41(1)(h): The duty to avoid litigation

FC s 41(1)(h)(vi) reads, in relevant part, that:

all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.

This principle is reinforced by FC s 41(3). FC s 41(3) provides that:

An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

FC s 41(4) provides that '[i]f a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.' The meaning of these provisions has been considered at length in three cases: *First Certification Judgment*, *National Gambling Board*, and *Uthukela District Municipality*.

57 Ibid at para 58 ('Although the circumstances in which FC s 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.')

58 *Premier WC v president* (supra) at paras 54-61.

59 *Premier, WC v President* (supra) at para 83. (Procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration cannot be said to invade either the executive power vested in the Premier by the Constitution, or the functional or institutional integrity of provincial governments.)

60 Ibid at para 99.

In *First Certification Judgment*, the Constitutional Court held that FC s 41(1)(h)(vi) had to be read together with FC s 41(3).⁶¹ It implied that the latter provision was the primary source of the duty to avoid litigation: FC s 41(3) meant that 'disputes should where possible be resolved at a political level rather than through adversarial litigation.'⁶² The inclusion of this provision did not, however, oust the courts' jurisdiction to hear intergovernmental disputes or 'deprive any organ of government of the powers vested in it under [the Final Constitution].'⁶³

In *National Gambling Board*, the Constitutional Court effectively reversed the normative hierarchy it had established between FC s 41(1)(h)(vi) and FC s 41(3) in *First Certification Judgment*.⁶⁴ The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in FC s 41(2) had not been passed. As a consequence, no formal 'mechanisms and procedures' had been put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether the Court could enforce FC s 41(3). In order to avoid having to decide this point, the Court held that the duty to avoid litigation could be independently founded on s 41(1)(h)(vi).⁶⁵ The Court then enunciated what this duty entailed.⁶⁶

The first two judgments on the duty to avoid litigation can be reconciled by reading *National Gambling Board* as giving content to the Court's statement in *First Certification Judgment* that intergovernmental disputes should be resolved at a 'political level'. In both decisions, the Court drew a line between political and legal forms of dispute resolution. The question as to whether or not FC s 41(1)(h)(vi) has been violated, and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike compromises (i.e. each party's willingness to discharge its duty 'to re-evaluate its position fundamentally').⁶⁷

61 *First Certification Judgment* (supra) at para 291.

62 *Ibid.* Although the *Langeberg* Court was not asked to decide on the relationship between FC s 41(1)(h)(vi) and s 41(3) — and ultimately found FC s 41(3) not to apply to the organs of state before the Court — it appeared to assume that had the IEC been an organ of state within the national sphere of government, FC s 41(3) would have applied. *IEC v Langeberg* (supra) at paras 30-31.

63 *First Certification Judgment* (supra) at 291.

64 *National Gambling Board* (supra) at para 33.

65 *National Gambling Board* (supra) at para 31.

66 *Ibid.* at paras 35-36.

67 *National Gambling Board* (supra) at paras 35-36 (The Court wrote that disputes about 'questions of interpretation' should be resolved 'amicably'. . . '[O]rgans of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally').

Two more years passed before the Court was again asked to consider the relationship between FC s 41(1)(h)(vi) and FC s 41(3). In *Uthukela District Municipality*, the Court first analysed a dispute between several municipalities and the national government in terms of FC s 41(3). After setting out FC s 41(3)'s two-fold obligations, the Court found that a statutory dispute resolution mechanism exists for fiscal disputes between organs of State (in the form of the Intergovernmental Fiscal Relations Act⁶⁸). The *Uthukela District Municipality* Court then addressed the issue of what an organ of State is to do if the dispute resolution mechanism in question does not actually apply to the conflict in question. (The Court deemed it unnecessary to decide the actual merit of the contention that the Act did not apply to the dispute in question.) The Court held that, according to FC s 41(1)(h)(vi), organs of state are obliged 'to avoid litigation against one another irrespective of whether special structures exist or not.'⁶⁹

Uthukela District Municipality confirms *National Gambling Board's* gloss on the requirements of FC s 41(1)(h)(vi) and FC s 41(3), and strengthens the view that

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the two sections re-inforce one another. *Uthukela District Municipality* stands for two further propositions. First, neither s FC 41(1)(h)(vi) nor FC s 41(3) has primacy of place. Second, and more importantly, FC s 41(3) analysis can take place without the legislation contemplated by FC s 41(2). Of course, that lacuna in the law — with the enactment of the IGRFA — no longer exists. What matters, for FC s 41(3) analysis, is whether there is a dispute-resolution mechanism in place. The fact that the Intergovernmental Fiscal Relations Act expressly required parties to use structures such as the Budget Forum prior to approaching a court was more than sufficient to justify the imposition of the obligations of FC s 41(3).

FC s 41(1)(h)(vi) has other implications for litigation flowing from intergovernmental disputes. Should a party request direct access to the Constitutional Court to adjudicate an intergovernmental dispute, the *MEC for Health, KZN v Premier, KZN* Court indicated that the Constitutional Court will refuse such an application if the applicant has failed to comply with the duty to avoid litigation.⁷⁰

(ii) FC s 41(2)

When this chapter was initially published in 2004, the Act of Parliament envisaged by FC s 41(2) had yet to be tabled, let alone passed. Initially, the courts and commentators seemed vexed by Parliament's failure to act. The *National Gambling Board* Court wrote that:

68 Act 97 of 1997.

69 *Uthukela District Municipality* (supra) at para 22.

70 *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 717 (CC), 720, 2002 (10) BCLR 1028 (CC) ('*MEC for Health, KZN v Premier, KZN*') (Constitutional Court held that it will rarely grant direct access to organs of state who have not duly performed their co-operative governmental duties under Chapter 3. Such duties are a privileged factor in deciding whether it is in the interests of justice to grant an organ of state leave to appeal directly to the court. Because the matter before the Court involved a political dispute and the parties had not complied with their obligation to effect co-operative government, leave to appeal was denied.) See also *National Gambling Board* (supra) at paras 33 and 37 ('If this Court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of state involved in litigation with one another.')

It could be argued that the failure of Parliament to comply with its obligations in terms of s 41(2) has rendered the important provisions of ss 41(3) and 41(4) inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasises the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavour. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.⁷¹

As the discussion of *Uthukela District Municipality* indicates, the Court appears to have backed away from this aggressive stance. FC s 41(3) — and by necessity FC s 41(4) — would appear to be operational even in the absence of a FC s 41(2)-mandated Act.

There were a number of compelling explanations for the decade long delay in promulgating the IGRFA contemplated by FC s 41(2) — and hence the willingness on the part of the Constitutional Court not to be overly sanctimonious about the state's 'failure'. First, many parties seem inclined to allow a significant period

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to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any legislation might draw. Second, as the decision in *Uthukela District Municipality* appears to confirm, many parties believe that government sectors are better served by having sector-specific dispute-resolution mechanisms crafted to meet their particular needs than they would be by a general dispute-resolution framework. An audit undertaken by the Department of Provincial and Local Government reflects both lines of thought:

An act of Parliament is required under s 41 (2)(b) of the Constitution to provide for such alternative [non-judicial] mechanisms. In the absence of such an Act, disputes have to be settled politically and/or by means of intergovernmental relations. The Audit addresses these and recommends that legislation be *delayed*. It sees no compelling *urgency* to enact this legislation. Moreover, delay might allow best practices to emerge which can later be captured in effective legislation. The duty to exhaust all procedures before resorting to judicial remedies will obviously continue to apply. Sectorally-based legislation is however encouraged for settling disputes within a sector [eg, the National Environmental Management Act]. Such legislation is essentially issue-sensitive and can give content to a normative framework in terms of which disputes can be settled.⁷²

Even if one agrees with the general sentiments of this 1999 DPLG Audit, it is fair, in 2009, to ask two questions. Had not a reasonable amount of time elapsed in which to pass constitutionally mandated legislation? The Audit suggested delaying enactment so that best practices might have time to emerge. The Audit could not —

71 Ibid at para 32.

72 'Executive Summary' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 6 ('DPLG Audit'). See also 'Conclusions and Recommendations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 11 ('The audit revealed that intergovernmental disputes include constitutional issues, legislative interpretation and policy, and factual disagreements. The nature of the disputes differs as well as the need for expeditious settlement. It would neither be desirable nor practicable to prescribe a uniform mechanism and procedure for the settlement of all these disputes. The fear was expressed by interviewees that legislation should not make the process of dispute resolution inflexible or too cumbersome which would then defeat the object of the exercise. Examples were mentioned where a dispute had to be resolved within 24 hours. In view of the wide variety of disputes that may arise between a wide array of organs of state, the Act should list the broad range of dispute settlement mechanisms and procedures' available to parties rather than attempt to shoehorn all disputes into a single rubric.)

in the face of express constitutional dictates to the contrary — put forward the case for permanently shelving the legislation.⁷³ (However, the Audit's emphasis on sectoral legislation intimates just that.) Was it not possible to set out a basic set of principles — and perhaps a default forum — designed to govern intergovernmental disputes, without displacing the sectoral legislation that caters to the specific needs of a particular governmental domain? Such a two-track approach would appear to best fit the relationship already established between FC s 41(1)(h)(vi) and FC s 41(3). That is, if sectoral legislation provides an adequate forum for

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dispute resolution, then it ought to be the first port of call for potential litigants.⁷⁴ As we shall see, in para 14.5 below, the Intergovernmental Relations Framework Act largely — and rightly — renders these questions moot.

The major intergovernmental disputes resolved by the Constitutional Court prior to 2005 did provide some guidance to the drafters of the IGRFA. These decisions also intimate that space remains for litigation under FC Chapter 3 without any initial recourse to the IGRFA. Five 'pure' intergovernmental disputes involved challenges to the constitutionality of legislation allegedly impinging on the powers and the functions of an organ of state in another sphere of government. The first four, *Premier, WC v President, Cape Metro, Council Executive Council, WC* and *Uthukela District Municipality*, concerned challenges by provincial or local governments to national legislation. In the fifth, *National Gambling Board*, the dispute turned on regulations promulgated under a provincial statute. *National Gambling Board* may be further distinguished from the others on the grounds that the challenge was brought by organs of state in the national sphere and the fact that private companies were party to the dispute. This last point indicates that the mere fact that a private citizen or body is party to a particular dispute does not remove it from the domain of intergovernmental disputes. However, it only becomes or remains an intergovernmental dispute if the main dispute lies between organs of state. The sixth case, *MEC for Health, KZN v Premier, KZN*, presented the Constitutional Court with a conflict between two members of the same provincial executive, each seeking to represent the province in another matter. The Court rapped both parties across the knuckles for 'proceed[ing] with an issue that should not have been brought before this Court and for failing to comply with their obligations to co-operate in government.'⁷⁵

One can adduce at least four guiding principles from the case law (and these principles remain relevant to any future challenge to the IGRFA in terms of Chapter 3 or another section of the Final Constitution). The main type of dispute that the FC

73 India took several decades to create the Inter-State Council — an intergovernmental relations body designed to mediate federal-state disputes and to provide a forum for the discussion of policy initiatives of national and/or regional interest — despite the express mandate of Article 263 of the Indian Constitution. See § 14.2 supra. One important difference between FC s 41(2) and Article 263 is that the former is mandatory and the latter is permissive.

74 When discussing both formal and informal MINMECs, the DPLG Audit contemplated a broadly principled framework, rather than a highly detailed code. The provisions of the envisaged Act could be applied asymmetrically to each structure, provided that any asymmetries are not inconsistent with the basic principles of the legislation. The Audit views the MINMECs as optimal sites for the settlement of political-sectoral disputes. See 'Conclusions and Recommendations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4.

75 *MEC for Health, KZN v Premier, KZN* (supra) at para 13.

s 41(2) Act of Parliament was meant to regulate is a clash between organs of state over legislation passed by one sphere of government that allegedly impinges on the powers and functions of an organ of state in another sphere of government. The FC s 41(2) Act ought not to displace sector-based dispute resolution mechanisms which are more finely attuned to the kinds of issues raised in a given governmental domain. The FC s 41(2) Act ought to provide for expedited dispute resolution so that a matter that has yet to be politically engaged, and thus is not yet ripe, does not get placed before a court. The FC s 41(2) Act ought to distinguish clearly between disputes between state actors — to which it must apply — and disputes between the state and private persons — to which it

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must not apply.⁷⁶ As we shall see below, in § 14.5, the Intergovernmental Relations Framework Act addresses all the concerns directly.

(iii) FC s 41(3)

FC s 41(3) appeared, for a time, to be something of a dead letter. In *National Gambling Board*, the Constitutional Court wrote that 'in the absence of the Act of Parliament contemplated in s FC 41(2), the obligation on organs of state to avoid litigation against one another is founded on FC s 41(1)(h)(vi) rather than FC s 41(3) and (4).'⁷⁷ As we have already noted, the *Uthukela District Municipality* Court rejected the notion that the desiderata of s 41(3) do not obtain absent a singular FC s 41(2) Act.⁷⁸ *Uthukela District Municipality* stands for the proposition that FC s 41(3)'s requirements have purchase even when only a statutory dispute resolution mechanism specific to a given sector applies to the parties to a dispute.⁷⁹

The requirements of FC s 41(3) — along with those of FC s 41(1)(h)(vi) — have been spelled out in a number of cases.⁸⁰ FC s 41(3) demands that organs of state: (1) make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose; and (2) must exhaust all other remedies before they approach a court to resolve the dispute. The case law has put the following gloss on this two-part inquiry. A court interrogating the behaviour of parties to an intergovernmental dispute will appraise: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been

76 See *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others* 2002 (1) SA 76 (SCA)(Supreme Court of Appeal held that although national and provincial governments had responsibility to ensure that municipalities functioned effectively, such responsibility could not turn a dispute between the province and its employees into an intergovernmental dispute for the purposes of FC ss 41(3) and (4)).

77 *National Gambling Board* (supra) at 33.

78 See § 14.3(a)(iii)(ee) supra.

79 It seems reasonable to extend *Uthukela District Municipality's* holding vis-à-vis FC s 41(3) to informal dispute resolution within a given sector. After all, FC s 41(3) reads, in pertinent part, that parties 'must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose.' It does not say that the mechanisms must be creatures of statute or take the form of a statute enacted as required by s 41(2).

80 See § 14.3(a)(iii)(ee) supra.

resolved amicably; and (3) the preparedness of the parties to strike compromises which would require that they re-evaluate their positions.

Who is, and who is not, bound by the dictates of FC 41(3) has been covered in some detail in the discussion of parties bound by FC s 40(2).⁸¹ To the extent that there was any doubt prior to *Uthukela District Municipality*, it now seems clear that the President, members of the national Cabinet, municipalities, as well as provincial premiers and MECs should be regarded as organs of state for the purposes of FC s 41(3) analysis. It also seems clear from the decision in *IEC v Langeberg* that Chapter 9 institutions supporting constitutional democracy are not organs of state 'which can be said to be within the national sphere of government.'⁸² *National*

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Gambling Board supports the proposition that most national and provincial regulatory authorities will be regarded as organs of state within the national or provincial sphere of government.⁸³ None of the cases thus far has addressed the question of whether national or provincial legislatures are bound by FC s 41(3).

(iv) FC s 41(4)

Now that FC s 41(3) has been recognized by the courts as an ineradicable part of the apparatus for settling intergovernmental disputes involving organs of state, FC s 41(4) will be invoked whenever a court is not satisfied that the requirements of FC s 41(3) have been met.

14.4 Intergovernmental relations in Practice

(a) Defining intergovernmental relations ('IGR')

This chapter has been concerned almost entirely with dispute resolution. It goes without saying that the main business of governance is policy construction and that the various arms of the state generally execute policy without dispute. 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.⁸⁴

81 See § 14.3(b)(i)(bb) *supra*.

82 *IEC v Langeberg* (*supra*) at para 27.

83 *National Gambling Board* (*supra*) at paras 19-21.

84 The DPLG Audit defined intergovernmental relations 'as an interacting network of institutions at national, provincial and local levels, created and refined to enable the various parts of government to cohere in a manner more or less appropriate to our institutional arrangements.' 'Executive Summary' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 1. See also C Mentzel & J Fick 'Transformation Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape' (1996) 2 *Africanus* 26 (Intergovernmental relations are a set of mechanisms for 'multi- and bi-lateral, formal and informal, multi-sectoral and sectoral, legislative, executive and administrative interaction entailing joint decision-making, consultation, co-ordination, implementation and advice between spheres of government at vertical as well as horizontal levels and touching on every governmental activity'); P Brynard & L Malan 'Conservation Management and Intergovernmental Relations: The Case of South African National and Selected Provincial Protected Areas' (2002) 21 *Politeia* 101.

(b) Structures and Statutes for Intergovernmental Relations

The institutions that have greased the wheels of IGR in the last ten years include: (1) the National Council of Provinces ('NCOP'); (2) the Intergovernmental Forum ('IGF'); (3) the Presidential Co-ordinating Council ('PCC'); (4) Statutory and non-Statutory MINMECs; (5) the Forum for South African Directors' General ('FOSAD'); (6) the Fiscal and Financial Commission; (7) the Intergovernmental Fiscal Relations Act; (8) the Division of Revenue Act; (9) the Public Finance Management Act; (10) the Provincial Tax Regulation Process Act; (11) the Borrowing Powers of Provincial Government Act; (12) the Medium Term Budget Statement; and (13) Provincial intervention in local government. This section is not meant to be an exhaustive overview of the various engines of IGR. It is, rather, an attempt to show how the Final Constitution, a burgeoning body of statutes and the

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government actors at the coalface have attempted to make manifest the concept of co-operative governance.

(i) The National Council of Provinces

The NCOP is charged with promoting provincial interests through the legislative process.⁸⁵ The NCOP's role with respect to constitutional amendments and legislation deemed not to affect the provinces is marginal. FC s 74 contains provisos designed to circumvent NCOP consideration of amendments. With respect to legislation deemed not to affect the provinces, FC s 75 allows the National Assembly to pass legislation with a simple majority — with or without NCOP approval. As a result, the primary function of the NCOP is the introduction and consideration of FC s 76 bills — legislation deemed to affect the provinces.⁸⁶

The NCOP members are selected by the Provinces — some by the legislature, some by the Premier. This chamber, even with its diminished powers, exercises an important deliberative function. It is *the* national forum for debate of provincial issues. The NCOP also provides a structure within which national officials introduce national laws over which there is concurrent jurisdiction with the provinces.⁸⁷

The legislative work of the NCOP is not inconsequential. Approximately 20% of the bills passed from 1999 through 2001 were FC s 76 bills. Perhaps the most important piece of FC s 76 legislation is the Division of Revenue Bill. According to s 227(1)(a),

85 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

86 The NCOP has 90 members — 10 member delegations from each of the 9 provinces. See FC s 60. Of the ten members from each delegation, only six are permanent. Four special delegates serve at the pleasure of the Premier of the province. Additional provision is made in FC s 67 for 10 part-time, non-voting representatives of local governments. The actual formula for political party representation in the NCOP is set out in FC Schedule 3.

87 See FC s 68 ('In exercising its legislative power, the National Council of Provinces may consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this chapter; and initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.') See also FC s 42(4)(NCOP 'represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.')

each province is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and functions allocated to it.' Five out of nine NCOP provincial delegations must approve the bill.⁸⁸

Critiques of the NCOP as an IGR structure are legion. Reddy has suggested that the NCOP lacks focus, suffers from a lack of internal cohesion created by the presence of permanent and special delegates, allows the national Cabinet to dictate its agenda, does not challenge either national ministries or the National Assembly on matters of provincial interest and fails 'to express distinctive regional interests.'⁸⁹

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De Villiers, while slightly more sanguine about the capacity of the NCOP, likewise notes its legislative impotence, its largely advisory function and the manner in which MINMECs usurp the second chamber's role in the formation of policy.⁹⁰ The Audit conducted by the Department of Provincial and Local Government ('DPLG') observes that not only are MINMECs the primary venue for 'productive discussion of new legislation and policy affecting the provinces, but that even when NCOP delegation votes must be cast on legislation, the decision on how to vote is made at the provincial level by MPLs and Premiers.'⁹¹

The DPLG Audit identifies a number of other structural problems. First, the 90-member NCOP cannot meaningfully review all FC s 75 and FC s 76 bills. Because the 4 special delegates in each delegation do not participate adequately in the committee system, the assessment of most bills rests with the permanent delegates. The 54 permanent delegates simply lack the time to engage in an adequate review of pending legislation. Second, provincial legislatures, which often take the important decisions for their respective NCOP delegations, likewise lack the capacity 'to cope with the exacting demands of legislative scrutiny or to deal with bills expeditiously within the legislative cycle.'⁹² Neither the NCOP nor the Provinces are able to offer considered opinions on matters that affect them. Third, in addition to being a rubber-stamp for the National Assembly, the Audit suggests that the NCOP's limited resources impair its capacity to carry out its oversight responsibilities competently. This concatenation of flaws leads Reddy, De Villiers and the DPLG to describe the NCOP as an insignificant IGR actor.

(ii) The Intergovernmental Forum ('IGF') and the President's Coordinating Committee ('PCC')

The IGF was the most representative consultative body on IGR. It numbered the Ministers and Deputy Ministers of the national government, provincial Premiers and

88 See 'The NCOP: A Forum for Intergovernmental Relations' *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4 ('The NCOP and Intergovernmental Relations Audit')(The Audit makes the case that the NCOP should spend less time debating the finer points of the national Appropriations Bill, and more time engaging the 'conditional grants that the Division of Revenue Bill allocates to provinces.')

89 P Reddy 'Intergovernmental Relations in South Africa' (2001) 20 *Politeia* 21, 32-33.

90 De Villiers 'IGR in SA' (supra) at 202-204.

91 DPLG 'The NCOP and Intergovernmental Relations Audit' (supra) at 4-8.

92 *Ibid* at 8.

MECs, representatives from SALGA and the NCOP, Directors-General of all national and provincial departments, Chairpersons from select parliamentary committees as well as the Chairpersons from the Financial and Fiscal Commission and the Public Service Commission among its many members. While it quite consciously concerned itself with the business of co-operative governance, the IGF was abolished because it was unwieldy, met too infrequently, cost too much, was mainly an information-sharing exercise and had a marginal influence on the construction of national, provincial and local government policy.

The IGF has been replaced by the PCC. The PCC is both leaner and more focused than its predecessor. It is composed of the President, the Minister of Provincial and Local Government and the nine provincial Premiers.⁹³ It has been charged with the more limited task of developing provincial policy and ensuring

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adequate provincial administration of concurrent functions.⁹⁴ As with the IGF, the success of the PCC will turn on its ability to work effectively with the various MINMECs.

(iii) Intergovernmental Relation Committees of Ministers and Members of Executive Councils ('MINMECs')

Intergovernmental Relation Committees of Ministers and Members of Executive Councils consist of the national line-function Ministers and the equivalent provincial Members of the Executive Council of provinces. Some MINMECs are informal, advisory executive structures. Other MINMECs are creatures of statute with clearly delineated responsibilities. As a rule, MINMECs concern themselves with drafting intergovernmental line-function policies, guiding the different spheres of government in the formulation of their own sector-specific policies, harmonising legislation that engages concurrent competencies, transferring information and ensuring the optimal utilisation of financial resources.

A good example of a statutory MINMEC is the Budget Council.⁹⁵ The Council was established by the Intergovernmental Fiscal Relations Act.⁹⁶ It consists of the Minister of Finance and the MEC of Finance for each province.⁹⁷ It meets at least twice annually and is charged with ensuring adequate consultation between the national and provincial governments on 'any fiscal, budgetary or financial matter affecting the provincial sphere,' 'any proposed legislation or policy which has a financial implication for the provinces,' and 'any matter concerning the financial

93 See R Sizane 'The Nuts and Bolts of the South African Intergovernmental Relations System: A Practitioner's Perspective' *Department of Provincial and Local Government* (2001) 5.

94 FC ss 125(1) and (2), and ss 127(1) and (2), set out the extensive executive and administrative authority of provincial Premiers.

95 Other examples of statutory intergovernmental relations bodies are the Committee for Environmental Co-ordination (as provided for by the National Environmental Management Act 107 of 1998) and the Council of Education Ministers (as provided for by the National Education Policy Act 27 of 1996). However, because the representation for the Committee for Environmental Co-ordination is not identical to that of the MINMEC for Environmental and Nature Conservation, each consultative body captures different constituencies and sometimes produces different outcomes. Each remains a valuable, if sometimes redundant, cog in the wheel of IGR. With respect to the limited number of IGR mechanisms created by statute, see C Murray 'The Constitutional Context of Intergovernmental Relations' in N Levy & C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 66, 76.

management, or the monitoring of the finances, of the provinces.⁹⁸ One strength is that a panel was set up to determine the 'best practices' for national-provincial fiscal relations prior to the passage of the enabling legislation for the Council. One

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weakness, consistent with the experiences of other MINMECs, is that the Council is under-resourced and incapable of providing all of the anticipated benefits of co-ordination.

Because no formal procedures govern the establishment and the operation of MINMECs, they vary in structure and competence.⁹⁹ However, several common problems surface across the MINMEC spectrum. First, departments may be organized differently at the national and provincial level. For example, discrete national ministries of culture, health and welfare may be combined into one department at the provincial level. The provincial MEC is thus left with responsibility for three MINMECs. Not surprisingly, this asymmetry may mean that the provinces lack the time and the energy necessary to make meaningful interventions. The result is that policy is determined de facto by the national government.¹⁰⁰ Second, under-resourced provincial MECs often do not have sufficient time to attend all meetings or to respond to all communiqués designed to set agendas. Once again, the result may be that shared national-provincial policy decisions fall primarily within the purview of the national government.¹⁰¹

(iv) Forum for South African Directors-General ('FOSAD')

FOSAD is made up of national and provincial Directors-General. Its broad terms of reference are to ensure the requirements of good governance in the public service as set out FC ss 41 and 195.¹⁰² Its five cluster committees co-ordinate policy

96 Act 97 of 1997. The Act, by creating the Council, gives indirect effect to the process of revenue sharing among the three spheres of government required by FC s 214. On the other hand, the Financial and Fiscal Commission Act 99 of 1997, by creating the Financial and Fiscal Commission, gives direct effect to the constitutional requirements of FC s 220. For more on intergovernmental fiscal relations, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. See also G Penfold and P Reyburn 'Public Procurement' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 25.

97 The Act also makes provision for a Budget Forum. The Forum is charged with oversight of national-local fiscal relations. The Forum consists of the Minister of Finance and the MEC for Finance for each province, five representatives from SALGA and one representative of local government from each of the nine provinces.

98 Section 3 (a)-(c) of Act 97 of 1997.

99 See De Villiers 'IGR in SA' (supra) at 207-210. See also Reddy (supra) at 32.

100 De Villiers 'IGR in SA' (supra) at 208.

101 See De Villiers 'IGR in SA' (supra) at 209. See also Reddy (supra) at 32.

102 See A Bodasing 'Public Administration' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

implementation between national and provincial departments and offer advice to the national Cabinet and the provincial Executive Councils.

(v) Fiscal and Financial Commission

FC s 220 requires the creation of the Financial and Fiscal Commission ('FFC'). This statutory body offers recommendations to the three spheres of government on the vertical division of nationally raised revenue and the horizontal division of revenue between provinces and municipalities. Section 9 of the Intergovernmental Fiscal Relations Act requires the FFC to make similar suggestions. The FFC's role in intergovernmental relations does not end there. In terms of FC ss 214, 218, 228-230 — and various Acts — the FFC has a responsibility to provide opinions on loan guarantees, provincial tax legislation, municipal fiscal powers and functions, and provincial and municipal borrowing.¹⁰³

The FFC has also been relatively vocal about how monies allocated ought to be spent. More pointedly, it has suggested that the national government ought to determine — through conditional grants and other modalities — to a significant degree the actual content of provincial and local government budgets. It

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has recently written that: 'National government departments should clearly define minimum norms and standards for delivery in areas of concurrent responsibility. They should also monitor the performance of provinces in complying with these norms to ensure that the minimum requirement for the use of conditional grants is met.'¹⁰⁴ Similar sentiments have been articulated by members of the national treasury.¹⁰⁵

(vi) The Intergovernmental Fiscal Relations Act ¹⁰⁶

The Intergovernmental Fiscal Relations Act provides a framework for the division of revenue between the three spheres of government. The Act also establishes the Budget Council. This consultative body is primarily designed to serve provincial

103 For more on matters of public finance generally, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2007) Chapter 27.

104 Fiscal and Financial Commission *Submission for the Division of Revenue 2007/08* (2007).

105 Former Minister of Finance, Trevor Manuel wrote:

On the back of a robustly growing economy and [an] efficient South African Revenue Service (SARS) we often find ourselves having more money than we are able to use. I say this with the full knowledge that there may be many people who will find it hard to believe. However, . . . if one examines the spending patterns for the first quarter of this year as contained in the section 32 report published in July it is not very hard to come to this conclusion. The report . . . showed that after three months or 25% of the financial year, spending on some of these [conditional] grants was around 14%. Given past trends it is not hard to predict that if nothing changes during the course of the year we might witness some underspending on some of these grants, yet again.

Department of Provincial and Local Government *Provincial Budgets and Expenditure Review and Local Government Budgets and Expenditure Review* (2006) 4-5.

106 Act 97 of 1997.

needs: it creates the space for consultation on financial matters — including legislation — that may affect the provinces.

(vii) The Division of Revenue Act and the Explanatory Memorandum for the Division of Revenue

The Division of Revenue Act ('DORA')— passed annually — sets out the division of national revenue amongst the three spheres of government in quite substantial detail. The Act adumbrates the transfer of conditional and unconditional grants from the national government to the provinces and to municipalities. It also sets out the rules that govern the purpose and the use of these grants.

The Act is preceded by a Division of Revenue Bill. Perhaps the most important feature of that Bill is the Explanatory Memorandum for the Division of Revenue. This memorandum — required by section 10 of the Intergovernmental Fiscal Relations Act — explains how the Bill meets the criteria set out in FC s 210(2)(a) — (j). It also contains the 'government's response to the annual recommendations of the FFC, and any assumptions and formulae used in arriving at the respective divisions among provinces'.¹⁰⁷

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(viii) The Public Financial Management Act ¹⁰⁸

This Act, discussed at length elsewhere in this treatise, promotes greater accountability and strives to eliminate waste and corruption.

(ix) The Provincial Tax Regulation Process Act ¹⁰⁹

The Provinces, as we have already noted, have a limited capacity to raise their own revenue and are largely dependent on national government largesse. This Act ostensibly seeks to correct this constitutional imbalance and, on its face, provides a mechanism for provinces to introduce new taxes. In short:

A province contemplating a new tax submits a detailed tax proposal developed according to the guidelines that have been agreed to with the Minister of Finance. After examining the proposal and taking account of the recommendations of the Financial and Fiscal Commission, the Minister approves or disapproves the requested tax.¹¹⁰

That, in any event, is how the Act is supposed to work *in theory*. However, in its eight years of existence, the Act has led to an approved provincial tax just once: the Western Cape fuel levy. Indeed, the fairly onerous steps required to secure approval — and the veto power that the Minister of Finance may exercise — means that no tax will be approved unless it is deemed to serve national, as opposed to provincial,

107 Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2002/03 — 2008/09* (2007) 6.

108 For more on the Public Financial Management Act 1 of 1999, see R Kriel and M Monadjem 'Public Finance' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, March 2007) Chapter 27.

109 The Provincial Tax Regulation Process Act 53 of 2001.

110 Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2002/03 — 2008/09* (2007) 6.

priorities. Recent attempts by the Gauteng Provincial Government to promulgate a provincial tax designed to improve provincial roads and public transportation met with resistance from both SANRAL (the national roads agency) and other sectors of the national government. Even though the tax's purposes were entirely benign — and constituted one of the first major attempts to use toll roads to subsidize public transport — the national government's entrenched interest in maintaining control over the fiscus led to the untimely demise of this initiative.

(x) The Borrowing Powers of Provincial Governments Act¹¹¹

The Borrowing Powers of Provincial Governments Act is another act that promises the provinces substantially more than it delivers. In the discussions that led to the passage of this Act, the Budget Council stated that

provincial borrowing would have to be linked to specific infrastructure programmes or projects; would not encumber any specific revenue stream for any funds borrowed, and the total amount of funds each province is allowed to borrow would be determined by its capacity to raise its own revenue, as well as the amount of funding it receives in the form of national infrastructure grants to provinces.

Given the onerous conditions placed upon provincial borrowing — along with the strictures placed upon their borrowing powers by the Final Constitution itself

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— it comes as no surprise that not a single province has borrowed money under the existing framework.

(xi) Medium Term Budget Policy Statement (MTBPS) and Medium Term Expenditure Framework (MTEF)

The Medium Term Budget Policy Statement is released several months before the annual budget is tabled. The statement is both a product of intergovernmental fora on financial and fiscal matters and mechanism intended to elicit responses from various state and civil actors over how the government wishes to spend public resources.

The Medium Term Expenditure Framework provides 'the first signal of the division of revenue and the transfers from nationally-raised revenue to provinces over the next three years and the policy priorities that underpin them'.¹¹² The Framework, published well before the statement and the budget, allows for greater intergovernmental and public debate over national policy and expenditure priorities.

(xii) Provincial intervention in local government

Since 1998, 5 provincial governments have intervened in local government affairs on at least 16 occasions in terms of FC s 139. FC s 139(1) reads, in relevant part,

When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by . . .

- (a) issuing a directive to the Municipal Council . . . stating any steps required to meet its obligations;

111 The Borrowing Powers of Provincial Governments Act 48 of 1996.

112 Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2003/04 - 2009/10* (2008) 9.

(b) assuming responsibility for the relevant obligations in that municipality...

According to the *15 Year Review Report on the State of Intergovernmental Relations in South Africa*, these provincial interventions 'fell into three broad categories':

1. Governance: political infighting, conflict between senior management and councillors, human resource management issues.
2. Financial: Inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds.
3. Service delivery: Breach of sections 152 and 153 of the Final Constitution [outlines service delivery obligations of municipalities].¹¹³

Mot of the interventions took place in terms of FC s 139(1)(b). The national government's Department of Provinces and Local Government suggested that directives issued in terms of FC s 139(1)(a) ought to precede direct intervention in terms of FC s 139(1)(b).

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(c) An Assessment of Intergovernmental Relations and Cooperative Government by the State and Civil Society

Naturally, one might expect the South African government — dominated for 15 years by the African National Congress — to paint a rosy picture of intergovernmental relations. And while the government does issue reports that emphasize improvement as well as compliance with constitutional and statutory obligations, it is hard to not arrive at the conclusion that the national government — as it is currently constituted — would rather not be bothered with co-operative government or more efficient and normatively legitimate intergovernmental relations.

The State's rather Manichean view of IGR and cooperative governance is on full display in its recent report on the subject: *15 Year Review Report on the State of Intergovernmental Relations in South Africa*.¹¹⁴ It expresses great pride in (a) the Acts that make the current system work (the Public Finance Management Act, the Municipal Finance Management Act, the Intergovernmental Relations Framework Act, and the annual Division of Revenue Act); (b) its fairly transparent budget and policy formulation processes; and (c) an IGR system that allows for discretion and flexibility.¹¹⁵ At the same time, it complains, rather bitterly, about:

First, ... misalignment between policy objectives and resource allocation. This can cause a divergence between policy intentions and actual outcomes. Budgets are an important link between policy objectives and policy outcomes. Policies that are not funded or that are inadequately funded are hardly implemented, and their objectives are therefore not properly realised. . . .

[S]econd . . . delivery: Sometimes the wrong sphere is blamed. A policy might fail because it has been badly designed. In that case it is not appropriate to blame the

113 Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008) 41.

114 Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (2008).

115 Department of Provincial and Local Government *Provincial Budgets and Expenditure Review: 2003/04 - 2009/10* (2008) 3.

implementer. Conversely, a policy might not deliver intended outcomes because it has not been properly funded, and this could be due to decisions at the provincial level. In this case it is not appropriate to blame the policy maker. . .

[T]hird . . . the assignment or configuration of certain [competences and] functions lends itself to inefficiency and ineffectiveness.¹¹⁶

In short, the national government often views provinces (and local governments) as impediments to the realization of national priorities. National government may ascribe this problem to a lack of qualified personnel, incompetence or malfeasance — but the song remains the same: the provinces are a problem. At the time of writing this revision (July 2009), national government has even floated the idea of eliminating the provinces in toto. Given that FC s 74(8) would appear to require the assent of the provincial legislatures to such an eventuality — and that one province currently remains in the hands of the Democratic Alliance — such

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a proposed constitutional amendment would appear to be no more than saber rattling.

Ronald Watts and Nico Steytler have reached similar conclusions about the national government's view of co-operative government and intergovernmental relations. However, both authors view the increased centralization of power as both a missed opportunity and a potential calamity.

Ronald Watts recognized, fairly early on, that both the Interim Constitution and the Final Constitution created 'a hybrid system which contained many of the characteristics of a federation, but combined these with some features more typical of a unitary system with constitutional regionalization.'¹¹⁷ Watts was less interested in taxonomy, however, and far more concerned about 'whether the new political framework can reduce the sense of insecurity or suppression within the regional communities and thereby win their loyalty and support for nation building in South Africa.'¹¹⁸

While an active participant in the creation of South African IGR, Watts remained skeptical of its tripartite system and its commitment to 'interconnectedness'.¹¹⁹ That interconnectedness posed two potential problems: (a) policy gridlock and (b) top-down decision-making.¹²⁰

Nico Steytler's assessment of current IGR and cooperative governance is particularly scathing — but, interestingly enough, not substantially different from the

116 Ibid.

117 R Watts 'Is the New South African Constitution Federal or Unitary?' in B de Villiers (ed) *Birth of a Constitution* (1994) 75, 86.

118 Ibid.

119 R Watts *Intergovernmental Relations: A Report by Dr Ronald Watts for the Department of Constitutional Development and Provincial Affairs* (1999) 10-11.

120 R Watts 'Intergovernmental Relations: Conceptual Issues' in N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22, 24.

views of the national government or Ronald Watts. In casting his eye over the recently promulgated Intergovernmental Relations Framework Act, Steytler's gaze comes to rest on s 4, and the more detailed objects of the Act:

- (a) coherent government;
- (b) effective provision of services;
- (c) monitoring implementation of policy and legislation; and
- (d) *realisation of national priorities*. (emphasis added)

Steytler writes that:

While the object of providing “coherent government” may seem a neutral goal, the coherence is . . . premised on the 'realisation of national priorities' Provinces and local government [become] the principal implementers of national legislation and policies . . . [and] the focus then shifts to “monitoring implementation” of those policy and legislation. . . . This focus . . . on the “realisation of national priorities” by provinces and local government . . . [turns] . . . national IGR forums [into] . . . monitoring rather than consultative forums.¹²¹

In sum, Steytler concludes, 'the model underpinning the [IGRFA] is the pursuit of national priorities as defined by the national government.'¹²² Indeed from

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Steytler's analysis of the IGRFA, it would appear that the national government has ultimately secured what the pot-apartheid state (and the ANC) have always wanted: 'a traditional public administration model of government — hierarchical and rule-bound structures and procedures — rather than a decentralised system of government.'¹²³

As a descriptive matter, the national government, Watts and Steytler are in accord as to what they see: a fairly centralized state with features of a federation. As a prescriptive matter, they differ. The ANC-led national government would like to see the provinces — in so far as they are impediments to the realization of national policy — removed. Watts and Steytler, on the other hand, view the provinces (and local government) as important sites for both policy experimentation and enhanced political participation.

14.5 The Intergovernmental Relations Framework Act 13 of 2005¹²⁴

(a) The Purpose of the Act

121 N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' (supra) at 7.

122 Ibid at 9.

123 *Stoytler* (supra) at 9 citing D Schmidt 'From Spheres to Tiers: Conceptions of Local Government in South Africa in the Period 1994-2006' in *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008).

124 Preamble, Intergovernmental Relations Framework Act 13 of 2005 ('IGRFA' or 'the Act'). The Intergovernmental Relations Framework Act 2005 came into force August 15, 2005.

The IGRFA finally fulfills the constitutional obligation contained in FC s 41(2):

(2) An Act of Parliament must—

- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
- (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

The IGRFA rehearses many of the standard tropes on co-operative government found in the Final Constitution. For example, it states that the government of the Republic of South Africa consists of national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

Section 4 of the IGRFA further elaborates on the purpose of the Act:

to provide within the principle of co-operative government... a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including—

- (a) coherent government;
- (b) effective provision of services;
- (c) monitoring implementation of policy and legislation; and
- (d) realisation of national priorities.

The Preamble places an additional, and rather striking (if not odd), gloss on the IGRFA. According to the Preamble, cooperative government is necessary for the progressive realization of our constitutional rights. It identifies the biggest

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challenges facing the nation as the 'need for government to redress poverty, underdevelopment, marginalization of people and communities and other legacies of apartheid and discrimination' and notes that these longstanding structural problems are best combated through 'a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'. It is odd that the IGRFA should be thought the appropriate vehicle to eradicate poverty and to promote development. As Chaskalson P noted in *Premier, Western Cape*, constitutional (or statutory) principles of co-operative government possess a two-fold purpose: (a) to enable our still new democracy to develop a system of government that enables each sphere to work together in a coherent fashion; and (b) to allow each sphere of government to function relatively autonomously within its scope of legislative competence.¹²⁵

(b) A Reasonable Period for Promulgation of the IGRFA?

One might ask — as a preliminary question when reflecting upon the constitutionality and the efficacy of the Act — whether the enactment of the IGRFA

125 See *Premier, Western Cape* (supra) at para 58 (The Court, after examining FC s 41(1)(g), states that the purpose of the section (and Chapter 3 as a whole) 'seems to be to prevent one sphere of government from using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively.')

occurred 'within a reasonable period of the date the new Constitution took effect' in terms of FC s 21 of Schedule 6. On its face, the eight and a half year period — from the certification of the Final Constitution to the promulgation of the Act — might seem 'unreasonable'. Indeed, the Constitutional Court in *United Democratic Movement* found a piece of floor-crossing legislation — contemplated (if not required) by the Final Constitution — constitutionally infirm even though it had been promulgated within a much briefer period of time. Moreover, as we have already noted, the Department of Provincial and Local Government had defended the delay on the more than plausible grounds that the eight years was necessary in order to allow intergovernmental 'best practices' to develop and to enable Parliament to codify those practices in terms of the IGRFA.¹²⁶ Some commentators, such as Rassie Malherbe, have cast doubt on the constitutionality of the Act because it does not, as the DPLG would have it, reflect 'best practices' passed 'within a reasonable period of time'. They note that the Act implements an entirely new set of new procedures for resolution to intergovernmental disputes — nothing akin to what we have seen in South African law or practice. These commentators contend, in addition, that the delay merely allowed the perpetuation of a top-down system of governance in which provincial governments and municipalities were obliged to implement policy decisions made by the national government.¹²⁷ On this account, the strong words of the Constitutional Court in *National Gambling Board*, regarding the failure of the government to enact the legislation

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required by FC s 41(2), could buttress the claim that the IGRFA failed to meet 'within a reasonable period' requirement of s 21 of FC Schedule 6.¹²⁸

But there are good reasons to believe that no such contestation of the constitutionality of the IGRFA would succeed. First, the IGRFA is on the books — and no one has suggested that it is infirm on any other grounds. The *UDM* Court, it might be argued, opted to deploy technical arguments for dispatching with a constitutional challenge that offered other more substantive reasons for finding the legislation at issue infirm. Second, surely the novelty — one might even say ingenuity — of the

126 *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 6.

127 See, eg, Rassie Malherbe 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance' (2006) (4) *Tydskrif vir die Suid-Afrikaanse Reg* 810.

128 See *National Gambling Board v Premier of KwaZulu-Natal* (supra) at para 32: 'The Act of Parliament envisaged in section 41(2) has not been enacted yet. In view of the words in subsection (3) that have been underlined, it could be argued that the failure of Parliament to comply with its obligation in terms of subsection (2) has rendered the important provisions of subsections (3) and (4) inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavour. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister of Justice and Constitutional Development.' However, the Constitutional Court's view of the lacuna in the law appeared to soften and to shift in *Uthukela District Municipality v President of the Republic of South Africa*, even as it endorsed its previous holdings in *First Certification Judgment* and *National Gambling Board*. In short, all extra-judicial avenues for resolving a dispute had to have been exhausted before they became justiciable. It then added the proposition that FC s 41(1)(h) (vi), when read with FC s 41(3), obliged organs of state 'to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not'. 2003 (1) SA 678 (CC) ('*Uthukela District Municipality*') at para 22. The *Uthukela District Municipality* Court's change in heart can be explained by a belief shared by many parties: the state should allow a significant period to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any FC s 41(2) legislation might draw.

legislation counts in its favor. That we did not see much evidence of the use of implementation protocols in law or practice prior to the promulgation of the IGRFA might well suggest that other methods for resolving intergovernmental disputes proved less successful. Indeed, that we have witnessed only one instance of an intergovernmental dispute being litigated in our courts over the past 4 years could well mean that the framework and dispute resolution mechanisms adumbrated in the IGFRA might have quite a lot going for them.

(c) How the IGRFA Works

(i) The Main Forums for Intergovernmental Cooperation and Coordination

The IGRFA deploys a number of innovative mechanisms designed to coordinate action between different spheres of government. These same structures and procedures are also designed to resolve any disputes that may arise in the course of such action: they thereby make good FC Chapter 3's clearly stated preference for political, rather than judicial, resolution of intergovernmental disputes. As the text of the Final Constitution clearly states, and as the Constitutional Court has repeatedly confirmed, only after these political measures have been exhausted can resort be had to judicial mechanisms.

Given the present dominance of the ANC in all spheres of government, and the resulting appointment of Premiers by the National government, some commentators have been quick to diminish the importance of FC Chapter 3 principles

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of cooperative governance and those statutory provisions of the IGRFA that amplify those constitutional principles. They often contend that, at present, both the principles and the statutory provisions are 'largely superfluous'.¹²⁹ With respect, if the 2007 ANC Polokwane Conference and the 2009 elections have taught us anything, then it is that we operate in a complex, fluid and unpredictable political environment. The 2007 ANC Polokwane Conference — which split the party along provincial, patronage and ideological lines — and subsequent events such as the formation of a new (non-minority) party (the Congress of the People (COPE) by disgruntled (former) members of the ANC), a sustained period of mass action by unions and clear divisions within the governing faction of the ANC (between moderates, on the one hand, and leftists, from COSATU and the SACP, on the other) suggest that internal ANC politics are anything but settled. The electoral triumph of the Democratic Alliance in the Western Cape and in Cape Town will also test national government and provincial government relations.

The Act envisages the creation of several intergovernmental forums — some mandatory, some optional. These forums are designed to increase the flow of information to various affected actors and to thereby better enable them to coordinate their activities in areas of either shared competence or devolved administration. The obligatory forums — the President's Co-ordinating Council,¹³⁰ the Premiers' Intergovernmental Forums¹³¹ ("PIFs"), and the District Intergovernmental

129 See V Bronstein 'Conflicts' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition. OS, July 2006) Chapter 16.

130 IGRFA s 6-8.

Forums¹³² (“DIFs”) — are composed primarily of high-ranking office bearers from various spheres of government. However, non-elected, non-political individuals may be invited to attend.

The Act contemplates at least five different optional forums. Any Minister can establish a National Intergovernmental Forum that relates to his or her area of functional competence. The forum consists of the appropriate representatives from National, Provincial and Municipal government.¹³³ Premiers can establish additional Premiers' Intergovernmental Forums to facilitate effective intergovernmental relations in either a particular functional or geographical area;¹³⁴ The Premiers of two or more provinces can jointly establish an Interprovincial Forum to promote intergovernmental relations between a discrete set of provinces.¹³⁵ Similarly, two or more municipalities may establish an Inter-municipality Forum¹³⁶. Any of these forums can establish a Technical Support Structure. These structures — made up of members of the state bureaucracy — are designed to assist elected officials in any of the forums mentioned above.¹³⁷ Finally, and most importantly, these consultative forums — which may adopt resolutions and make

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recommendations — do not qualify as executive decision-making bodies for the purposes of the Act or the Final Constitution.¹³⁸

(ii) Implementation Protocols

To facilitate policy formation and dispute resolution, the IGRFA created a new tool called 'implementation protocols'.¹³⁹ As section 35 of the IGRFA notes, implementation protocols are binding agreements between organs of state in different spheres of government,

[w]here the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, [and] those organs of state

131 IGRFA s 16-21.

132 IGRFA s 24-27.

133 IGRFA s 9-15.

134 IGRFA s 21.

135 IGRFA s 22-23.

136 IGRFA s 28-29.

137 IGRFA s 30.

138 IGRFA s 32.

139 Implementation protocols ensure that organs of state collaborate and thereby vouchsafe 'the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service.'

must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances.¹⁴⁰

Implementation protocols are not contracts — although they may appear that way.¹⁴¹ They are meant to co-ordinate the actions of co-operating organs of government and to ensure that all parties to the agreement discharge their responsibilities in terms of the protocol. The last proviso is important: there will be circumstances in which government actors disagree about the manner in which a responsibility ought to be discharged, or there may be instances in which the parties fail to discharge their duties in terms of the implementation protocol.

The implementation protocol serves first as a reminder of that which the parties must do. As the IGRFA makes clear, however, they also provide the text which governs the resolution of disputes between organs of state in different spheres of government. Nevertheless, the IGRFA makes it exceptionally difficult for parties to an implementation protocol — or some other intergovernmental project — to “litigate” a dispute. First, it ensures that all existing sector-specific statutory dispute mechanisms are employed before resort is had to the IGRFA's dispute-resolution mechanisms. More importantly, it does not displace national or provincial interventions undertaken in terms of FC ss 100 or 139.¹⁴² Second, it reinforces the constitutional duty of different organs of state to avoid litigation. It attempts to do so by ensuring that all formal agreements between organs of state

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contain dispute resolution mechanisms.¹⁴³ It also makes getting to court extremely difficult: before non-judicial dispute resolution can occur, a party must declare that such a dispute exists. However, before such a declaration can be made, section 41(2) of the IGRFA states that,

the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.

After efforts in terms of sections 40 and 41 of the IGRFA have been exhausted, sections 42 and 43 set out the terms in which the parties, assisted by a facilitator, must go about resolving the dispute. Indeed, section 44 of the IGRFA ensures that an

140 Implementation protocols are, essentially, written agreements outlining a plan to execute effectively co-ordinated action. They must also provide dispute settlement provisions. See IGRFA s 35(3)(g)

141 Protocols are an ‘optional tool’ to be utilized by parties to joint action. However, they must be considered if: the action in question concerns subject matter identified as a national priority; it would materially assist the national or provincial government to satisfy its constitutional obligation to build capacity in the area in question in the local sphere of government; it would materially assist the organs of state to co-ordinate their actions; the organ of state responsible for the action does not have the capacity to fulfill its responsibility. IGRFA s 35(2).

142 IGRFA s 39(1): ‘This Chapter does not apply — (a) to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms or procedures; or (b) to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.’

143 IGRFA s 40(2): ‘Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.’

appropriate Minister or an MEC will take ultimate responsibility for resolving the dispute through political compromise. Only when the various mechanisms outlined in the IGRFA have failed — from the implementation protocols identified in section 35 of the IGRFA to the dispute resolution mechanisms set out in sections 30 to 44 of the IGRFA — may a party seek judicial intervention to resolve the dispute.

(iii) Settlement of Intergovernmental Disputes

The IGRFA defines an intergovernmental dispute as:

a dispute between different governments or between organs of state from different governments concerning a matter—

(a) arising from—

(i) a statutory power or function assigned to any of the parties; or

(ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law, and includes any dispute between the parties regarding a related matter.¹⁴⁴

If an intergovernmental dispute does arise, then an organ of state that is party to such a dispute with another government or organ of state can declare a Formal Intergovernmental Dispute ('FID') by making such a declaration in writing to the other party.¹⁴⁵ However, again, such a declaration may occur only after the organ of state in question has made every reasonable effort to resolve the dispute.¹⁴⁶ An FID declaration triggers an obligation to call a meeting that identifies the issues in dispute, mechanisms other than judicial proceedings available to resolve the dispute, and an appropriate facilitator to help resolve the dispute.¹⁴⁷ Depending on the identity of the parties to the dispute, the Minister or MEC for local

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government in the province can call this meeting if the parties fail to do so.¹⁴⁸ The parties must also satisfy any other legislative dispute resolution mechanisms that may be applicable to the dispute in question.¹⁴⁹ It is only upon making a declaration of a Formal Intergovernmental Dispute, and the failure of these procedures to resolve the dispute, that judicial proceedings can be initiated.¹⁵⁰

144 IGRFA s 1.

145 IGRFA s 41(1).

146 IGRFA s 41(2).

147 IGRFA s 42(1).

148 IGRFA ss 42(3) and (4).

149 IGRFA s 42(2).

150 IGRFA s 45.

Since the implementation of the IGRFA, we have witnessed a dramatic reduction in the number of legal disputes between different spheres of government brought to court. On its face, it appears that this reduction could well testify to the effectiveness of the Act.

But the truth may well lie elsewhere — in the hurly-burly of South African politics. The sole dispute resolved by the courts in terms of the IGRFA occurred in *City of Cape Town v Premier, Western Cape, & Others*.¹⁵¹ The City of Cape Town — controlled by the Democratic Alliance — had received information that one of the councillors on the council of the City was guilty of certain misconduct. It engaged the services of a firm of private investigators to investigate the allegations. The probe culminated in a finding by a City disciplinary committee that the councillor in question was guilty of misconduct. The City council then requested that the responsible provincial MEC remove the councillor from office.

The provincial MEC and the Premier — both members of the ANC — refused. They proceeded instead to launch their own investigation in terms of s 106(1)(b) of the Municipal Systems Act 32 of 2000. The Premier established a commission of enquiry into 'Possible Occurrences of Fraud, Corruption, Maladministration, Serious Malpractice and other unlawful conduct in the City and George Municipality'. While the Premier created the commission as an adjunct to the MEC's investigation, he did not rely on s 106(2) of the Systems Act. Nor did he rely on the apposite provision of the Systems Act when he shut down the first commission and established a new commission. The City, later joined by the Democratic Alliance as an intervening party, then approached the High Court seeking the following relief: (1) a declaration that the MEC's decision to establish his investigation under s 106(1)(b) of the Systems Act was unconstitutional; and (2) a declaration that the Premier's decisions to establish the first commission and the second commissions were unconstitutional. The substance of the High Court's findings are not especially germane to this discussion. However, the High Court did note that the Premier's power to appoint a commission to investigate the conduct of a municipality were not located in s 106(2) of the Systems Act but in FC s 127(2)(e), FC s 139, s 37(2)(e) of the Western Cape Constitution, and s 1(1)(a) of the Western Cape Commissions Act and that the Premier could not appoint the second commission as an adjunct to the MEC's initiative under s 106(1)(b) of the Systems Act without relying on s 106(2) of that Act. Not only did the Premier's actions lack a legal foundation, the Court held that

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The Premier therefore did not possess an honest belief that good reasons existed for establishing the Second Erasmus Commission, and possessed such an ulterior motive. As a result his decision was not rationally related to the purpose for which the power was conferred, was arbitrary and therefore unlawful. Consequently, the decision of the Premier to establish the Second Erasmus Commission falls to be set aside.¹⁵²

More pointedly, the High Court held that the Premier had lacked good reasons for establishing the second commission, and had acted with the ulterior motive of embarrassing political opponents. According to the High Court, the appointment of the judge was meant to obscure the Premier's ulterior motive.¹⁵³

151 2008 (6) SA 345 (C).

152 *City of Cape Town v Premier, Western Cape* (supra) at para 163.

153 *Ibid* at para 176.

Our concern, of course, is how this 'dispute' was mediated by FC Chapter 3 and the IGRFA. Given the High Court's assessment that the Premier had acted *male fides*, it is not surprising that the judge finessed the relationship between FC Chapter 3 and the IGRFA. On the High Court's reading of both documents (together), FC ss 41(3) and (4) employs a relaxed standard that only obliges an organ of State to make 'every reasonable effort' to exhaust political channels before resorting to court. Despite the fact the IGRFA, as the super-ordinate legislation contemplated by FC s 41(2), would appear to require specific steps to be taken before resort is had to a judicial forum, the High Court found that, given the clear and uncontroverted 'bad faith' by the MEC and the Premier, the City 'could not reasonably have been expected to take the steps envisaged in the Framework Act before instituting the present proceedings', and that the court accordingly 'had the power to entertain the proceedings in terms of [FC] s 41(4)'.¹⁵⁴

What to make of this single case? One might read the case as standing for the principle that under normal circumstances, all parties ought to follow the procedures and employ the mechanisms laid out in the IGRFA. However, if, as in *City of Cape Town v Premier, Western Cape, & Others*, the court's findings clearly suggest that no political resolution is possible, and that at least one of the parties to the dispute has acted illegally or unconstitutionally, then a court may decide that the strictures of the IGRFA may be loosened so as to allow judicial resolution of the conflict. As matters stand in 2009, a major city (Cape Town) and a province (the Western Cape) in Democratic Alliance control may well give rise to similarly intractable (and potentially 'unconstitutional') disputes.

(d) What Disputes the IGFRA Does Not Cover

(i) Conflicts between National Legislation and Provincial Legislation

The first kind of governmental dispute completely exempt and expressly excluded from the application of the Act involves any clash between national legislation and provincial legislation in functional areas of concurrent competence.¹⁵⁵ Such conflicts are addressed at length from FC ss 146 to 150 and seem to require no further amplification by the Act. The Constitutional Court addressed this express

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exclusion, albeit briefly, in *Matatiele Municipality & Others v President of the RSA & Others*.¹⁵⁶ In challenging the validity of the Twelfth Amendment, the applicants contended that the State had failed to fulfil their constitutional obligations in terms of FC s 41 and their statutory obligations in terms of the IGFRA. The Constitutional Court, per Ngcobo J, swiftly dispatched this contention:

It is difficult to make out what the precise complaint is in this regard. What is clear, however, is that s 41(2) contemplates that an Act of Parliament will be enacted that will establish structures and institutions to promote and facilitate intergovernmental relations. In addition, this statute will provide appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The respondents submitted that this legislation is the Intergovernmental Relations Framework Act 13 of 2005 ... The applicants did not contend otherwise. Nor could they. Section 2(2) provides that the

154 Ibid at para 24.

155 IGRFA s 2(2).

156 2006 (5) SA 47 (CC) ('*Matatiele*').

Framework Act does not apply to Parliament and the provincial legislatures. On its face, therefore, this statute excludes Parliament and provincial legislatures from its ambit. It follows that the submission relating to co-operative government must fail. We are not called upon, and we express no view on whether the Framework Act can constitutionally exclude from its ambit Parliament and provincial legislatures. That is not the question before us.¹⁵⁷

Although the *Matatiele* Court refused to engage the question as to whether the IGRFA Act's exclusion from its ambit of the actions of Parliament and provincial legislatures is constitutional, it seems fair to conclude — given the Court's previous judgments as to what Chapter 3 does and does not cover — that the IGRFA is neither suspect nor infirm with respect to this exclusion.

(ii) Intra-governmental Disputes between Provincial Departments

(aa) The Problem

As we have already noted, for years lawyers, jurists and academics bemoaned a great gaping hole in our law: the Final Constitution had promised to establish a legal regime to mediate and to resolve intergovernmental conflicts. During the first decade of post-apartheid South African life (1996 — 2005), Parliament failed to make good FC s 41(2)'s guarantee that intergovernmental disputes would be resolved by legislation that prevented different spheres of government and opposing organs of state from going to war (or court) over vital policy matters.

The courts did their part in holding things together. Although initially vexed by Parliament's failure to produce FC s 41(2)'s constitutionally mandated

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super-ordinate legislation, the Constitutional Court gradually became less sanctimonious about this lacuna in the law.¹⁵⁸

In the absence of FC s 41(2) legislation, the Court did the best with what it had. In *First Certification Judgment*, the Constitutional Court held that FC s 41(1)(h)(vi) had to be read together with FC s 41(3).¹⁵⁹ It seemed to imply that the latter provision was the primary source of the duty to avoid litigation. In particular, FC s 41(3) meant that 'disputes should where possible be resolved at a political level rather than through adversarial litigation.'¹⁶⁰ The inclusion of this provision did not, however, oust the courts' jurisdiction to hear intergovernmental disputes or 'deprive any organ

157 Ibid at paras 55 – 57.

158 *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) ('National Gambling Board') at para 32 ('[I]t could be argued that the failure of Parliament to comply with its obligations in terms of [FC s 41(2)] has rendered the important provisions of [FC ss 41(3) and 41(4)] inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavor. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.')

159 *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 1458 (CC) ('*First Certification Judgment*') at para 291.

160 Ibid.

of government of the powers vested in it under [the Constitution].¹⁶¹ In *National Gambling Board*, the Court effectively reversed the normative hierarchy it had established between FC s 41(1)(h)(vi) and FC s 41(3) in *First Certification Judgment*.¹⁶² The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in FC s 41(2) had not been passed and no formal 'mechanisms and procedures' were put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether, in the absence of FC s 41(2) legislation, the Court could enforce FC s 41(3). In order to avoid having to decide this point, the Court held that the duty to avoid litigation could be independently founded on FC s 41(1)(h)(vi).¹⁶³ The Court then enunciated what this duty entailed.¹⁶⁴ The first two judgments on the duty to avoid litigation can be reconciled by reading *National Gambling Board* as giving content to the Court's statement in *First Certification Judgment* that intergovernmental disputes should be resolved at a 'political level'. In both decisions, the Court drew a line between political and legal forms of dispute resolution. The question as to whether or not FCs 41(1)(h)(vi) has been violated, and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial

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avenues (or remedies) for resolving the dispute have been exhausted.¹⁶⁵ Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment

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to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (ie each party's duty 'to re-evaluate its position fundamentally') and by extension whether the requirements of FC s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party's commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (ie each party's duty 'to re-evaluate its position fundamentally').¹⁶⁶ The *National Gambling Board* Court wrote that disputes about 'questions of interpretation' should be resolved 'amicably'. . . '[O]rgans of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally.'¹⁶⁷

In *Uthukela District Municipality v President of the Republic of South Africa*, the Constitutional Court endorsed its previous holdings in *First Certification Judgment* and *National Gambling Board*. In short, all extra-judicial avenues for resolving a dispute had to have been exhausted before they became justiciable. It then added the proposition that FC s 41(1)(h)(vi), when read with FC s 41(3), obliged organs of

161 Ibid.

162 *National Gambling Board* (supra) at para 33.

163 Ibid at para 31.

164 Ibid at paras 35-36.

state 'to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not'.¹⁶⁸ The *Uthukela District Municipality* Court's change in heart can be explained by a belief shared by many parties: the state should allow a significant period to pass in order for various government actors and sectors to develop a regime of 'best practices' upon which any FC s 41(2) legislation might draw.¹⁶⁹

The Intergovernmental Relations Framework Act reflects the wisdom of the Constitutional Court's patient approach and adopts many of the Court's views as to how intergovernmental conflicts should be resolved. For the purposes of this section, what is important is that the Act defines intergovernmental relations as a

165 We have consciously chosen to avoid the use of the term remedies — as it appears in FC s 41(3). Peter Birks taxonomy of remedies captures five different denotations of the term in English law: 'a cause of action', to 'a right born of a wrong', to 'a right born from a court order', 'a right born of an injustice' and 'right born of a court's order issued on a discretionary basis.' P Birks 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, 9-17 (The two meanings not mentioned in the text are or grievance, and.) See also R Zakraewski *Remedies Reclassified* (2005). A panoply of purposes for the term exist in South African law: a statutory right (*Fedsure Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 2: 'The 1956 Act . . . created a statutory remedy for the commission of what was referred to as an "unfair labour practice" which was soon interpreted by the Courts to include the unfair dismissal of an employee'); a common-law right (*Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811, 821A (A) ('Its remedy, if any, was to sue oneanate by way of a *condictio*'); an order of summary judgment (*First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at para 8 ('Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy'); a right of appeal (*S v Dzukuda & Others*; *S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 ('If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity'); a the court's order (*Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 ('The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case'). See, generally, M Bishop 'Remedies' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9. See also I Currie and J de Waal *The Bill of Rights Handbook* (5th Edition 2005). As the case law and the denotations of remedies above suggests, a remedy generally requires a specific dispute resolution process that parties must exhaust before moving on to the next process — or to court. The IGRFA does not specify a remedy — but leaves it open to the parties to use informal 'political structures' — MINMECS, Premier Councils, for example — to secure a positive outcome. The reasons are obvious: normal dispute resolution mechanisms — in adversary structures like courts — often generate zero sum outcomes out of their zero sum games. Political solutions are to be preferred as a normative matter for two reasons: (1) deliberation and conversation may elicit more information and produce better outcomes; (2) multiple stakeholder processes create greater normative legitimacy. On information deficits: A growing contingent of constitutional law scholars have recognized that problems of information deficit, lack of cross-cultural understanding and limited institutional competence can be 'solved' by a subtle recasting of existing constitutional doctrines and judicial remedies that extract better information and thereby achieve *more mindful* results. See, e.g., M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267; M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015; C Sunstein *Infotopia* (2007); R Thaler & C Sunstein *Nudge* (2008) For the application of experimental constitutionalism to South African jurisprudence, see S Woolman 'Application' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* 2 ed (OS February 2005) Chapter 31; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* 2 ed (OS July 2006) Chapter 34; S Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming 2010). For more on the possibility of normative legitimacy arising out of conflict about the fundamental norms undergirding a heterogeneous society, see R Cover 'Nomos and Narrative' (1983) 97 *Harvard LR* 42. More importantly, perhaps, the novelty of South Africa's constitutional design — as reflected in Chapter 3 and in the IGRFA — is that it tries through both constitutional provisions and a subordinate piece of legislation to ensure that politics remains relatively cabined, and that disputes that courts are ill-equipped to handle remain in the political domain. See C Murray and R Simeon 'Recognition without Empowerment: Minorities in a Democratic South Africa' (2007) 5 *ICON* 699 (The authors pay particular attention to the manner in which 'South African constitutional design, ... gives

'relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs.'¹⁷⁰ The Act is silent with regard to the problem of how co-operation between provincial departments within any given province should be regulated. We will call this 'horizontal

intra-governmental relations'.¹⁷¹ Neither the Final Constitution's provisions on Co-operative Government in FC ss 40 and 41 nor the Act speak directly to these 'horizontal intra-governmental relations'.¹⁷² The Final Constitution's muteness and the Act's silence with regard to 'horizontal intra-governmental relations' are important for two primary reasons. First, departments within the same sphere of government are often required to co-operate with respect to the discharge of their functions. Second, it is simply not possible to regulate horizontal relations through contracts or binding agreements between departments. Why? Provincial departments lack autonomous legal personality.

One object of this section is to determine whether the Act and its mechanisms for formalizing relationships and resolving disputes between organs of state by way of implementation protocols could be employed to manage intra-governmental relationships. This determination turns, in large part, on what constitutes an intergovernmental dispute for the purposes of the Act and the Final Constitution. Again, our reading of the constitutional provisions on co-operative government and the apposite provisions of the Act is that they are not meant to address or to resolve horizontal provincial intra-governmental conflict. However, both of these constitutional and statutory frameworks — and the case law that has arisen under

strong recognition to diversity and difference in private life, while seeking to the greatest extent possible to prevent ethnocultural differences entering the public sphere ... [and] trace this through the fundamental principles set out in the Constitution, the Bill of Rights, the designation of a multisphere [and co-operative] government.'

166 *National Gambling Board* (supra) at paras 35 -36.

167 Ibid. See, further, R Simeon & C Murray 'Multilevel Government in South Africa: An Interim Assessment' (2001) 31 *Publius: The Journal of Federalism* 65.

168 2003 (1) SA 678 (CC) ('*Uthukela District Municipality*') at para 22.

169 See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999); C Mentzel & J Fick 'Transformation Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape' (1996) 2 *Africanus* 26.

170 IGRFA s 1.

171 'Horizontal intra-governmental disputes' is Stu Woolman's neologism. The denotation is clear. We have constitutional and statutory provisions regarding 'intergovernmental relations' — but none specifically aimed at intra-governmental disputes. We simply want to highlight that they exist, that there is a lacuna in the law regarding their regulation and that there are a couple of constructive ways of mediating those disputes.

172 The Act does engage co-operation between distinct municipalities. For the purposes of this section, however, horizontal co-operation is restricted to co-operation — or lack thereof — between departments within a province.

them — suggest a set of best practices that might assist provincial departments in crafting documents that should ensure greater cooperation between departments and that could assist provincial MECs and the Premier with the resolution of any disputes that might arise between provincial departments.

The second and more important object of this section is to note that the silence of the Final Constitution and the Act is an unavoidable consequence of how provincial power is allocated. In terms of the Final Constitution, all authority over provincial departments, agencies and organs vests within the Premier. Disputes that arise within and between departments, agencies and organs must be resolved by the Premier or other members of the Executive Council.

As we shall see, the constitutional powers of the Premier — along with recent statutory developments and a venerable line of case law — determines the entire landscape for the resolution of provincial horizontal intra-governmental disputes. If the Premier, or the MEC responsible for the implementation of a given policy, wish to hold heads of department or other senior officials culpable for their actions, or their failure to act, then they can do so. I would contend that the most powerful tools for this purpose are performance agreements with heads of department and senior officials. Co-operation between provincial departments can, therefore, be regulated by making satisfaction of co-operation protocols or implementation protocols a component in performance agreements. In addition, the Premier can establish dispute resolution principles and intra-governmental

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forums, akin to those contemplated by the Final Constitution and the Act. Ultimately, however, the power to resolve provincial intra-governmental disputes lies wholly within the hands of the Premier.

(bb) Executive Authority of Provinces

FC s 125 tells us that 'executive authority is vested in the Premier of the Province.' In particular, it tells us that

The Premier exercises the executive authority, together with the other members of the Executive Council, by (a) implementing provincial legislation in the province; (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise; . . . (d) developing and implementing provincial policy; (e) co-ordinating the functions of the provincial administration and its departments.

The language of FC s 125 leads, almost inexorably, to the conclusion that the Premier — along with members of the Executive Council (whom he may appoint and fire at will) — may determine how policy is implemented and how various departments are to work together to realize that policy. Should the Premier and his various line managers wish to establish dispute resolution mechanisms, there is nothing in the Final Constitution to prevent them from doing so. However, in the absence of such dispute resolution mechanisms — say in the form of provincial legislation or internal guidance documents or policy — the responsibility for deciding how disputes are resolved ultimately rests with the Premier and his deputies.

In sum, contrary to intergovernmental disputes in which the courts may, ultimately, be asked to resolve conflicts between organs of state within different spheres of government, the resolution of horizontal intra-governmental disputes between organs of state within the same province will remain the sole prerogative of the Premier. As we shall see in the next section, this result is legally necessary

because different departments do not possess separate legal personality and cannot contract with each other or litigate against each other. Should a Premier wish to rearrange Departments — through merger, through disaggregation of responsibilities or through the shifting of portfolios — she has the constitutional power to do so.¹⁷³ A department that exists and functions largely at the behest of the Premier can hardly be expected to contest decisions taken by another department that exists and functions largely at the behest of the Premier. Both departments not only exist to serve the Premier. The departments are, at their most basic level, merely different manifestations of the Premier. The Premier can hardly be expected to contract with herself or sue herself for some breach of performance.

And yet, differences between provincial departments are commonplace, and many departments operate under the misapprehension that they can enter legally

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binding, and judicially enforceable, contracts with one another. In the next section, we attempt to further demonstrate exactly why provincial departments lack, under South African law, the legal personality necessary to enter contracts with other provincial departments in the same province. Having shown that provincial departments lack the legal personality to enter contracts with other intra-provincial departments, we will turn to the practical question that animates the last portion of this section: How might a Premier establish mechanisms for the resolution of disputes between entities that are, in the end, manifestations of her authority?

(cc) A Lack of Departmental Personality

The Final Constitution does not create provincial departments. Instead it creates nine provinces.¹⁷⁴ Each province, as FC s 125 declares, has a single executive headed by the Premier. Departments themselves are created by section 7(2) of the Public Service Act ('PSA').¹⁷⁵ Departments can be established or abolished by the President (of the national government). He or she may do so simply by amending Schedule 2 of the PSA by proclamation. Amendments of this kind are made 'at the request of the Premier of a province'.¹⁷⁶

As a day-to-day matter, provincial departments function relatively autonomously. Each department, for example, has its own accounting officer.¹⁷⁷ Were the Premier to have to sign off on every decision, provincial government would grind to a halt. However, despite the appearance of departmental autonomy, the province produces consolidated finance statements for all its Departments, has a single provincial

173 See C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20.

174 See FC s 103(1).

175 Proclamation No. 103 of 1994.

176 PSA s 7(5)(a)(ii).

177 See Public Finance Management Act 1 of 1999 ('PFMA') s 36(1). It is also accountable for its own financial management. See PFMA s 38.

revenue fund controlled by the provincial treasury,¹⁷⁸ and has a single budget which controls the expenditure of Departments.¹⁷⁹

The case law buttresses our contention that provincial departments lack the legal personality to contract legally and formally with other provincial Departments within the same province.¹⁸⁰ In *Natal Provincial Administration v South African Railways and Harbours*, the Natal Provincial Administration attempted to sue the South African Railway.¹⁸¹ The railway was, at the time, located in another department

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within the 'Crown'. The Province's claim was dismissed by the court because, given that both the province and the railway were departments of the Crown, the suit would be tantamount to the Crown suing itself.

Years later — in *Government of the Republic of South Africa v Government of KwaZulu* — the Appellate Division confirmed the 'general principle of our law that one organ of the State cannot sue another organ of the State.'¹⁸² Despite this general statement of the law, the KZN Court permitted KwaZulu, a self-governing territory or 'Homeland', to sue the South African government. The Appellate Division found, in the instant matter, that 'there is sufficient separation in identity between the [the South African government], on the one hand, and ... [KwaZulu], on the other

178 PSA s 21.

179 PSA s 39(1)(a).

180 We are not suggesting that departments lack the capacity to take decisions and enter into various contracts (but they do so on behalf of the Premier). Intragovernmental service agreements — unlike other service contracts — are not subject to resolution through litigation. The power to resolve these disputes vests in the Premier. The Premier may create or disband the entities in question.

181 1936 NPd 643. The courts have been clear that pre-1994 case law that coheres with the Constitution is still good law. In a number of relatively recent cases, the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, for example, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) 'constitutional era.' *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('Walters') at para 61. The Supreme Court of Appeal in *Afrox* extended binding precedent — backwards — past the very beginning of even the most controversial understanding of the constitutional era. *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) ('Afrox'). The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any direct attack on a rule of law grounded in a pre-constitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true indirect application), its hands are tied. The High Court is bound to follow the pre-constitutional decisions of the Appellate Division. Brand JA, for the *Afrox* Court, writes: 'Die antwoord is dat die beginsels van *stare decisis* steeds geld en dat die Hooggeregshof nie deur artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- hetsy post-konstitusioneel, af te wyk nie. Ibid at para 29. There can be no doubt, as the law currently stands, about the continued binding authority of pre-1994 decisions handed down by South African courts. See further S Woolman & D Brand 'Is There a Constitution in This Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38.

182 1983 (1) 164, 205 (AD) ('KZN').

hand, to entitle [KwaZulu], . . . to approach the Court for relief.¹⁸³ However, the result in *KZN* is the exception — a natural anomaly thrown up by the absurdities of apartheid. The notion of 'indivisible sovereignty' is a doctrine that will not, therefore, always dispose of internecine conflicts. Indeed, today's South Africa is not an indivisible sovereign. Municipalities, provinces, and public entities have separate legal personality.¹⁸⁴ Thus, while the outcome of *KZN* seems incontrovertible, its principle applies only within a given organ of state.

The IGRFA, as we have seen, defines an 'intergovernmental dispute' as 'a dispute between different governments or between organs of state from different governments'. 'Government', in turn, is defined in IGRFA s 1, as '(a) the national-government; (b) a provincial government; or (c) a local government.' IGRFA s 40 contemplates a "formal agreement between two or more organs of state in different governments" (emphasis added) and regulates dispute resolution between those governments. But no provision is made whatsoever for agreements or disputes within a provincial government between provincial departments. This silence, read against the background of the Final Constitution, and the pre-constitutional case law, is a powerful indication that such agreements are, strictly speaking, not legally enforceable.

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Moreover, the existence of a single provincial revenue fund means that the result of any such disputes would be that the unsuccessful party would make a payment from the provincial revenue fund to the successful party, who, in turn, would place the payment back into the revenue fund. Any intention to reallocate funds between the two departments — for whatever reason — could be more efficiently and less awkwardly achieved through a provincial adjustment in the budget.¹⁸⁵ The presence of a single revenue fund for both 'potential' litigants is one more strong indication that there is an insufficient separation in juristic identity for two governmental entities in the same province to sue each other.¹⁸⁶

Furthermore, if provincial Departments could be established or abolished merely by amending the schedule to the Public Service Act, and provincial departments were treated as independent entities, then it would throw into doubt the status of all contractual claims against all abolished provincial departments. Who would pick up the tab if the department were abolished? As a matter of law, no provision is made in the PSA or the PFMA for the succession of departments. In addition, when provincial departments enter into contracts with third parties, they do so 'on behalf of' the province. Indeed, the State Liability Act states that the Minister or MEC of a department concerned with contractual litigation will be cited as the 'nominal defendant or respondent'.¹⁸⁷

183 Ibid at 205A – 206 A (Emphasis added).

184 Local Government: Municipal Systems Act 32 of 2000 s 2(d). For more on the legal personality of municipalities, see N Steyler & J de Visser *Local Government Law of South Africa* (2007); N Steyler & J de Visser 'Local Government' in S Woolman, T Roux, M Bishop, J Klaaren & A Stein (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22.

185 See PFMA s 31.

186 See *South African Railways v Kemp* 1916 TPD 174, 177 (The existence of a separate Railway Fund undermined the notion of a unified sovereign.)

The Final Constitution, the IGRFA, the PSA, the PFMA, the State Liability Act, the extant case law, the organization of provincial revenue funds and the ability of a Premier to chop and to change departments at will points to a single conclusion. Provincial departments lack the legal personality necessary to enter formal legal agreements and to sue when other provincial departments — in the same province — fail to uphold their end of a bargain.

(dd) Finding a Legal Nexus

Inter-departmental co-operation is a necessary feature of effective provincial government. Even though provincial departments are not legally separate from each other, they develop their own performance requirements and their own organisational identity. They tend to interact with one another on an 'arm's length basis'. These practices have generated pressure for legally-binding protocols or memoranda that regulate inter-departmental co-operation. In other words, some provincial departments would like to be able to sue other provincial departments that fail to discharge obligations undertaken through inter-departmental memoranda — or at least to deal with disputes in a legally formal manner.

As we have already noted, the manner in which power vests within different spheres of government precludes the treatment of intra-governmental disputes between departments in the same province as formal legal disputes. Because departments are a creation of the provincial premier, and may be rationalised, re-organised, established or abolished at the discretion of the Premier, they do not

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possess separate legal identity. Hence, contracts with a provincial department of health are, in fact, contracts with the province, and litigation against a provincial department of health is, in fact, litigation against the province. Thus, just as it is impossible for a person to litigate against himself, so too is it impossible for provincial departments to litigate against each other.

There are two possible responses to this problem. The first response is to develop protocols that regulate intra-governmental co-operation and are enforced by the Premier or the executive of the province. In the next section, we suggest how the Act can be used as a guide in developing such protocols for resolving intra-governmental disputes. (Of course, it follows from the logic of our argument that such disputes can also be resolved by the Premier by fiat.) The second (and related) response is to develop performance-based contracts of employment with senior officials within the Province. Compliance with memoranda of co-operation or intra-governmental implementation protocols can be made a key performance area monitored by MECs or the Premier. Failure to achieve key performance indicators within this performance area can result in reduced bonuses, lack of promotion, re-assignment or even dismissal. In short, because it is not possible to create binding agreements between provincial departments, one compelling alternative is to use the employment agreements of heads of departments or senior officials within the province to enforce memoranda of co-operation. The most effective legal mechanism for ensuring provincial inter-departmental co-operation is to be found in employment contracts — and nowhere else.

If a provincial department intends to pursue this second response, it will be necessary to review current employment contracts with senior officials and obtain labour advice on the possibility of amending these contracts to insert additional

performance requirements. Further elaboration of this rather novel legal mechanism falls beyond the scope of this chapter.

(ee) Using The IGRFA as a Guide to Intra-Governmental Disputes

Although the Act cannot resolve a dispute between two or more departments of the same provincial government, we wish to suggest that it may serve as a “guide” to the formation of documents that might assist the province in the resolution of such conflicts. Section 35 of the Act introduces the concept of implementation protocols ('IPs'). IPs have, heretofore, often been referred to as memoranda of co-operation. The advent of the Act has refined the meaning and the scope of such agreements. As we have already noted, section 35(1) of the Act emphasises that where the implementation of a policy, the exercise of a statutory power or the performance of a statutory function, or the provision of a service is dependant on different state organs acting in concert, the state actors involved must coordinate their actions. They may do so by entering into an implementation protocol. This proviso means that while an IP is not compulsory, some form of agreement of cooperation is necessary. Section 35(2) demands that an IP must be considered in the following situations:

an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area; or an organ of state to which primary responsibility for the implementation of the policy, the

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exercise of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity.¹⁸⁸

(ff) Dispute Settlement

As we have been at pains to point out, neither FC Chapter 3 nor the Act provide mechanisms for the resolution of intra-governmental provincial dispute resolution. The power to determine such mechanisms vests in the Premier.

However, both FC Chapter 3 and the Act suggest how government officials might best resolve such disputes. One non-judicial mechanism might be an intra-governmental forum. Such a forum could be composed of designated officials from the relevant departments, the appropriate MECs and the Premier. The Act also suggests the following dispute resolution mechanisms: (a) the provincial Premier or relevant MECs could provide a facilitator; and/or (b) the facilitator could submit a non-binding report to the Premier.

(gg) Enforcement

Neither Chapter 3 of the Final Constitution nor the Act speak to intra-governmental dispute resolution. The reason for this silence is that intra-governmental disputes between provincial departments do not generate justiciable constitutional or legal conflicts. The power to resolve such disputes vests solely in the Premier of the province.

That the power to resolve such disputes vests solely in the Premier of the province does not mean that the Premier lacks the capacity to prevent intra-governmental conflicts. The Premier has an array of tools at his disposal to prevent — and to resolve — such conflicts. Agreements between departments — though not contracts in the normal justiciable sense — can be crafted in a manner that permits

188 IGRFA s 35(2)(c)-(d). The Act then elaborates, in IGFRA 35(3), the features that an IP must possess.

third parties to determine whether the provincial departments in question have discharged their duties. The Act's provisions regarding Implementation Protocols offer a reasonably good template for such agreements.

Ultimately, however, an intra-governmental agreement is only as good as the penalties in place for non-compliance. Such penalties for non-compliance might range from the withholding of performance bonuses for the parties responsible for the breach to the actual discharge of officials who repeatedly failed to comply with their statutory, ministerial or IP responsibilities. Agreements between provincial departments in the same province must make absolutely certain that all parties concerned understand that failure to discharge their duties may result in the imposition of such severe penalties.

(e) Practical Problems with the IGFA: Premiers' Intergovernmental Forums and the District Intergovernmental Forums

Several studies have suggested that two types of forum envisaged by the IGFA — the Premiers' Intergovernmental Forums (PIFS) and the District

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Intergovernmental Forums (DIFS) — are not living up to expectations. The primary problem is that their membership often suffers from being both over-inclusive and under-inclusive.

As we noted above, forum membership should consist largely of those politicians responsible for the issues under consideration. Research conducted by Nico Steytler, R Baatjies and other academics at the University of the Western Cape reveals a 'doors open' approach to attendance. As a result, forums often contain as many bureaucrats as politicians.¹⁸⁹ Such openness has its virtues: bureaucrats and politicians may exchange useful information. However, other avenues exist for the transmission of technical information. The purpose of the forums is the coordination of policy. The over-inclusiveness has three untoward effects. First, 'too many chefs' may well reduce the effectiveness of forum discussions. Second, the regular presence of bureaucrats may lead to their 'politicization' — when their function, in a well operating democracy, is to provide politicians with fairly objective assessments. Third, the research conducted by Steytler and others suggest that the presence of bureaucrats in these open forums is largely intended to intimidate politicians who hold opposing or minority views.¹⁹⁰ Indeed, the very possibility of such intimidation is one reason the Act sought to limit forum membership in the manner it did.¹⁹¹

The exclusion of local municipalities from PIFs appears to have based upon the assumption that information would be shared with local municipalities through DIFs. However, DIFs have not played this role. The under-inclusivity of PIFs is of particular

189 R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act (2006)* Local Government Project, Community Law Centre, University of the Western Cape.

190 Ibid.

191 The Intergovernmental Relations Audit reports confusion, especially in the DIFs, as to who is a formal member and who is merely an invitee.

import where a given municipality supplies a significant portion of the economic resources required to carry out the mandate of a given PIF.¹⁹²

The studies conducted by the University of the Western Cape also reveal some confusion regarding the obligations each sphere of government and each organ of state have in terms of the IGRFA.¹⁹³ For example, many municipalities operate under the mistaken impression that the inclusion of bureaucrats in the DIFs amounts to the establishment of a Technical Support Structure.¹⁹⁴ Technical Support Structures are independent bodies and consist solely of governmental officials. If a sphere of government wishes to establish such structures, then they must comply with the requirements of the IGRFA.

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Finally, it comes as no surprise that provincial government officials often dominate PIFS and leave little opportunity for district officials to voice their opinions.¹⁹⁵ The PIFs appear to replicate many of the problems we have already identified with national/provincial fora such as the President's Co-ordinating Council.

(f) ANC Dominance and the Efficacy of the IGRFA

As we noted earlier, the Final Constitution creates space for two competing forms of federalism. Each form of federalism reflects a different conception of intergovernmental relations (IGR) and cooperative governance. The first form of integrated South African federalist state contemplated by the Final Constitution — call it cooperative IGR — assumes relative parity of power between the national government and subnational constituents (the provinces and the municipalities.)¹⁹⁶ The second form of integrated South African federalist state contemplated by the Final Constitution — call it coercive IGR — reflects a hierarchical distribution of power: national government largely dominates the nation's subnational constituent parts.¹⁹⁷ However, several important pieces of legislation — including the Intergovernmental Relations Framework Act, the Provincial Tax Regulation Process Act 53 of 2001, the Intergovernmental Fiscal Relations Act 97 of 1997, and the Division of Revenue Act — and constitutional provisions that determine the

192 Ibid.

193 R Baatjies & N Steytler 'Intergovernmental Relations in Practice' (2006) 8(5) *Local Government Bulletin*.

194 R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) Local Government Project, Community Law Centre, University of the Western Cape. See also Y Fessha & N Steytler (2006) *Provincial Intergovernmental Forums: A post-Intergovernmental Relations Framework Act Compliance Assessment* Local Government Project, Community Law Centre, University of the Western Cape (November 2006).

195 R Baatjies & N Steytler *District Intergovernmental Forums and Premiers Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Framework Act* (2006) Local Government Project, Community Law Centre, University of the Western Cape.

196 N Steytler 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in *Intergovernmental Relations: A Festschrift for Ronald Watts* (forthcoming, 2009, on file with author); R Watts *Intergovernmental Relations: A Report for the Department of Constitutional Development and Provincial Affairs* (1999).

parameters of provincial and local fiscal autonomy tilt our body politic in the direction of coercive IGR. The marriage of political culture — ANC dominance — to political structures that favour the national government — and ANC dominance — underwrite this contention.¹⁹⁸ However, Steytler and Watt's analyses in this regard carry more than a whiff of disappointment — as if things might have been different. Malherbe likewise writes: 'The Intergovernmental Relations Framework Act reflects the present centralizing tendency from the side of the national government, and it will serve to confirm, no, reinforce, the de facto status

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of the other spheres as delivery agents of the national government.¹⁹⁹ But given 15 years of political dominance by the ANC (65% of the electorate is still 65%) and its longstanding resistance to fully devolved federalism, it is hard to imagine how things might have turned out otherwise.

One incident serves as anecdotal evidence for the realpolitik view that 'coercion' animates current IGR and the manner in which the IGRFA is brought to bear on specific disputes. In 2006, the Democratic Alliance, with a plurality of the local government vote, secured sufficient support from other opposition parties to form a majority in the municipal government of Cape Town. The ANC controlled provincial government in the Western Cape attempted to change existing regulations in order to enable an ANC coalition to retain control of the municipality. The National government was, not surprisingly, strangely slow to intercede and to mediate the dispute.²⁰⁰ Ultimately, the National government did intervene and a compromise was reached.²⁰¹ Such responses are indicative of coercive IGR and do little to demonstrate a genuine commitment to the Final Constitution's vision of three distinct, interdependent, and interrelated spheres of government.

197 In 1997, Ronald Watts contended that the Final Constitution 'represents an innovative hybrid combining some federal features with some constitutionally decentralized unitary features'. R Watts *Federalism: The Canadian Experience in Federalism: Theory and Practice Volume 2* (1997) 2. See also N Steytler 'One Party Dominance and the Functioning of South Africa's Decentralised System of Government' in Rudolf Hrbek (ed) *Political Parties and Federalism* (2004) 159.

198 See R Watts 'Intergovernmental Relations: Conceptual Issues' N Levy and C Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22; C Leuprecht and H Lazar, 'From Multilevel to "Multi-order" Governance?' in H Lazar and C Leuprecht (eds) (2007) *Spheres of Governance: Comparative Studies of Cities in Multilevel Governance Systems* 1. Steytler writes: 'While the object of providing "coherent government" may seem a neutral goal, the coherence is, however, premised on the "realisation of national priorities"... Given that the nature and extent of these [provincial and municipal] services are prescribed in national policies and legislation, the focus then shifts to [the] "monitoring implementation" of [national] policy and legislation' and not the coordination of varying policy initiatives. N Steytler *Cooperative and Coercive Models of Intergovernmental Relations*' (supra) at 7.

199 See R Malherbe 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance' (2006) (4) *Tydskrif vir die Suid-Afrikaanse Reg* 810.

200 P Joubert 'Zille: ANC Top Dogs in the Loop' Mail & Guardian (25 September 2006) available at http://www.mg.co.za/articlePage.aspx?articleid=284876&area=/insight_national, accessed on 1 May 2009.

201 See D Dyzenhaus 'The Past and Future of the Rule of Law in South Africa' (2007) 124 *SALJ* 734.