

Chapter 15

Legislative Competence

Victoria Bronstein

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15.1 Introduction

This chapter explores how the division of legislative power amongst national and provincial governments in our Constitution affects the validity of legislation. Legislative

competence is an important issue in all constitutional regimes with federal characteristics.¹

The South African Constitution allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation. According to the Final Constitution,² the nine provincial legislatures in South Africa are entitled to legislate, *inter alia*, on the specific subject or 'functional areas' listed in Schedules 4 and 5 of the Final Constitution.³ Legislative competence over functional areas or matters not enumerated in either Schedule 4 or 5, or 'residual' legislative competence, is reserved to the national legislature.⁴ For example, foreign affairs falls within the legislative preserve of the national legislature.⁵

The national legislature and provincial legislatures share legislative competence in respect of the functional areas listed in FC Schedule 4; FC Schedule 4 is accordingly headed 'Functional areas of *concurrent* national and provincial legislative competence' (emphasis added). FC Schedule 4 embraces crucial matters like 'health services' and 'housing'. The functional areas in Schedule 5, by contrast, are the exclusive domain of provincial legislatures. FC s 44(1)(a)(ii) provides expressly that the National Assembly has no power to pass legislation with regard to the functional areas listed in FC Schedule 5, although the national legislature may, in

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exceptional cases, 'intervene, by passing legislation' with regard to the functional areas listed in FC Schedule 5.⁶

In all litigation that turns on questions of legislative competence, one must first determine the subject matter of the legislation under scrutiny, in order to determine the functional area to which the legislation pertains. In some cases this assessment is straightforward. For example, in *In re National Education Policy Bill 1995*,⁷ the National

1 South Africa is best described as a largely centralized state with federal features. However, only governmental practice married to judgments of the Constitutional Court will, over time, determine where South Africa rests on a continuum of states with different degrees of decentralization. For a discussion of the contours of various models of federalism and their influence on South Africa's political structures, see S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14. RL Watts describes our Constitution as a 'unique South African hybrid'. RL Watts 'Foreword: States, Provinces, Länder, and Cantons: International Variety Among Sub-National Constitutions' (2000) 31 *Rutgers Law Journal* 941, 950. He explains his understanding of this hybrid as follows:

The Constitution is predominantly federal in character, although the label 'federation' has not been adopted. In my view, debates about whether South Africa is 'federal' or not are fruitless. More important is whether this particular form of hybrid makes possible effective governance and policy-making at both the national and sub national levels to meet the needs of the South African people, and whether modifications would help to meet these objectives.

Ibid. See RL Watts 'Is the New South African Constitution Federal or Unitary' in B de Villiers (ed) *Birth of a Constitution* (1994) 75-88. This analysis of the Interim Constitution remains relevant. Constitutional Principle XVIII.2 provided that 'the powers and functions of the provinces' could not be substantially reduced by the Final Constitution. Ultimately, the Final Constitution, as certified by the Constitutional Court, ensured that they were not. See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

2 Constitution of the Republic of South Africa ('Final Constitution' or 'FC').

3 FC ss 104(1)(b)(i) and 104(1)(b)(ii).

4 FC s 44(1)(a)(ii).

5 See *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [2000] ZACC 15, 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) ('Liquor Bill') at para 46.

6 See FC s 44(2), discussed at §§15.2(b) and 15.3(b) below.

7 [1996] ZACC 3, 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).

Education Policy Bill⁸ was easily categorised as falling within the functional area of 'education', an area of concurrent legislative competence listed in FC Schedule 4. Other cases are more difficult. The categorisation of legislation may raise challenging questions of statutory interpretation that force the Court to engage delicate political issues.⁹

If Parliament or a provincial legislature is held not to have had the competence to pass specific legislation, the resulting law will be invalid. In many cases about provincial powers, there is only an apparent conflict between specific provincial and national legislation. Thus, the first step in all competence and conflicts cases is to examine both legislative schemes individually to determine whether they are independently competent. If either the provincial legislation, or the national legislation, or both, fail the test of competence, the offending statute or statutes are invalid and the conflict is illusory. In some cases both pieces of conflicting legislation will be fully competent and valid: as we have already noted, our Constitution allows for vast and important areas of concurrent national and provincial legislative competence.¹⁰ (The resolution of such conflicts is dealt with elsewhere.¹¹) It must, however, be remembered that legislative conflict presupposes that the conflicting legislation is competent and valid. The question of competence is always logically prior to the question of conflict.

This chapter begins by explaining how the Final Constitution allocates legislative powers between the national legislature and the provincial legislatures. It then explores three major interpretive issues: (1) the categorisation function; (2) the scope of the FC s 44(2) override; and (3) the scope of the incidental power.

15.2 The Legislative Authority of the Republic

In South Africa, the legislative authority of the national sphere of government is vested in Parliament by FC s 44. The legislative authority of the provincial sphere of government is vested in the provincial legislatures by FC s 104.¹² At least one signal difference exists in the way the Final Constitution treats the two kinds of authority. FC s 44(3) reads:

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When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

The provincial legislatures are also bound by the Final Constitution. In cases where a province has passed a provincial constitution, that province's provincial legislature is bound by both the Final Constitution and the provincial constitution in question.¹³

(a) FC Schedule 4: Concurrent legislative competence

The functional areas listed in Schedule 4 cover fields of concurrent legislative competence.¹⁴ Both the national and the provincial legislatures may pass legislation that

8 Act 83 of 1995.

9 See *DVB Behuising (Pty) Limited v North West Provincial Government & Another* [2000] ZACC 3, 2001 (1) SA 500 (CC), 2000 (4) BCLR 347(CC) ('*DVB Behuising*').

10 See FC Schedule 4.

11 See V Bronstein 'Conflicts' in S Woolman, & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS5, January 2013) Chapter 16. See also S Woolman & T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14.

12 FC s 43.

13 FC s 104(3). See S Woolman 'Provincial Constitutions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 21.

14 The areas of concurrent legislative competence listed in Part A of Schedule 4 are:

regulates matters covered by these functional areas.¹⁵ For example, both the national legislature and a provincial legislature may pass valid legislation with regard to 'housing'.

Determining whether national or provincial legislation prevails in a functional area of concurrent legislative competence is not always a simple matter. As noted in the introduction, legitimate conflicts may arise between national and provincial

legislation when both pieces of legislation are within the competence of the legislatures that enacted them,¹⁶ but the logically prior question is whether each statute is indeed within the legislative competence of the enacting legislature. However, a complex provincial legislative scheme that does fall within the legislative competence of the provincial legislatures may contain discrete provisions that extend into matters that are not enumerated in FC Schedules 4 or 5, and are therefore within the legislative competence of the national legislature alone. It would obviously be undesirable to be too rigid about disallowing such provisions where they are necessary for the coherence of legislation as a whole. In other federal systems, judges have needed to find creative judicial solutions in order to preserve the element of common-sense flexibility that is necessary to avoid legislative paralysis.¹⁷ South African judges and legislators are assisted by FC s 104(4):

Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.¹⁸

Administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases; Casinos, racing, gambling and wagering, excluding lotteries and sports pools; Consumer protection; Cultural matters; Disaster management; Education at all levels, excluding tertiary education; Environment; Health services; Housing; Indigenous law and customary law, subject to Chapter 12 of the Constitution; Industrial promotion; Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence; Media services directly controlled or provided by the provincial government, subject to section 192; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; Pollution control; Population development; Property transfer fees; Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; Public transport; Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; Regional planning and development; Road traffic regulation; Soil conservation; Tourism; Trade; Traditional leadership, subject to Chapter 12 of the Constitution; Urban and rural development; Vehicle licensing; Welfare services'. Part B of Schedule 4 includes 'the following local government matters to the extent set out in section 155(6)(a) and (7): Air pollution; Building regulations; Child care facilities; Electricity and gas reticulation; Firefighting services; Local tourism; Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; Stormwater management systems in built-up areas; Trading regulations; Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems.

15 The national legislature possesses this power in terms of FC ss 44(1)(a)(ii) and 44(1)(b)(ii). The provincial legislature wields the same power in terms of FC s 104(1)(b)(i). For a judgment on national and provincial competence in respect of remuneration of traditional authorities see *Madzhadzi and Others v President of the Republic of South Africa and Others* [2010] ZASCA 57, [2010] 4 All SA 1 (SCA), 2010 (12) BCLR 1309 (SCA). See also *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8, 2006 (5) SA 250 (CC), 2006 (2) SACR 447, 2006 (10) BCLR 1133 (CC) at paras 31-32 (Court confronted the issue of legislative competence, but did not dispose of the matter on those grounds).

16 See V Bronstein 'Conflicts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS5, January 2013) Chapter 16.

17 See K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib & JD Whyte *Canadian Constitutional Law* (Vol 1 1994) 143, 145.

The scope of this power (referred to as the 'incidental power' in this chapter) raises interesting interpretive questions.¹⁹ It is worth noting at the outset that FC s 104(4) appears to confine the provincial legislatures' incidental legislative power to functional areas enumerated in FC Schedule 4. No express provision for incidental legislative power obtains with respect to provincial legislation regulating matters listed in FC Schedule 5. However, the Constitutional Court has suggested that the provinces necessarily hold 'incidental' power in respect of FC Schedule 5 matters.²⁰

(b) FC Schedule 5: Exclusive provincial legislative competence

The provincial legislatures have the power to pass legislation for their provinces with regard to any matter within a functional area listed in Schedule 5 of the Final Constitution.²¹ FC Schedule 5 contains a list of discrete and (it is fair to say)

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relatively local functional areas of exclusive provincial legislative competence.²² Some functional areas possess slightly broader implications: for example, 'provincial cultural matters'. One or two, like 'liquor licenses', may have material financial implications.²³

The general rule is that the national legislature has no competence to enact legislation with regard to any functional area enumerated in FC Schedule 5 (FC s 44(1)(a)(ii)), except in circumstances, contemplated by FC s 44(2), where national legislation is 'necessary' –

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

18 FC s 104(4). See also FC s 44(3). FC s 44(3) confers a similar incidental power on the national legislature: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.'

19 See § 15(3)(c) below.

20 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at paras 244 and 438.

21 FC s 104(1)(b)(ii).

22 Part A of FC Schedule 5 lists the following areas of exclusive provincial competence: Abattoirs; Ambulance services; Archives other than national archives; Libraries other than national libraries; Liquor licences; Museums other than national museums; Provincial planning; Provincial cultural matters; Provincial recreation and amenities; Provincial sport; Provincial roads and traffic; Veterinary services, excluding regulation of the profession'. Part B of Schedule 5 includes 'the following local government matters to the extent set out for provinces in section 155(6)(a) and (7): Beaches and amusement facilities; Billboards and the display of advertisements in public places; Cemeteries, funeral parlours and crematoria; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport facilities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise pollution; Pounds; Public places; Refuse removal, refuse dumps and solid waste disposal; Street trading; Street lighting; Traffic and parking.

23 On provincial roads being an exclusive provincial sphere of activity until powers are assigned to municipalities, see *Reflect-All 1025 CC & Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & Another* [2009] ZACC 24, 2009 (6) SA 391 (CC), 2010 (1) BCLR 61 (CC) at para 75.

National legislation with respect to matters enumerated in FC Schedule 5, enacted in the circumstances contemplated by FC s 44(2), will automatically prevail over provincial legislation purporting to regulate the same matters.²⁴ Where the circumstances contemplated by FC s 44(2) do not exist, any national legislation purporting to regulate a matter enumerated in FC Schedule 5 will be outside of the legislative competence of the national legislature and will be invalid.²⁵

Disputes about whether national or provincial legislation prevails in respect of functional areas enumerated in FC Schedule 5 will tend to be disputes about the legislative competence of national and provincial legislatures and the validity of the statutes concerned, rather than disputes about conflicts between valid statutes. *Ex Parte President of the Republic of South Africa in re: Constitutionality of the Liquor Bill* illustrates this point. The judgment, which deals with FC Schedule 5 subject matter, focuses on competence rather than conflict.

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(c) Powers reserved for municipalities in terms of Part B of FC Schedule 4 and Part B of FC Schedule 5

There is one important caveat to the legislative competence of both national and provincial legislatures when it comes to functional areas set out in Part B of Schedule 4 and Part B of Schedule 5 of the Final Constitution. The local governmental matters enumerated in Part B of each schedule are 'reserved to municipalities' by FC s 156(1)(a), which provides that 'a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5'. FC s 156(2) provides that municipalities 'may make and administer by-laws for the effective administration of the matters which it has the right to administer', while FC s 156(3) provides that a municipal by-law that conflicts with national or provincial legislation is invalid.

It is important to articulate a distinction between legislative competence and executive or administrative authority in considering Part B of both Schedules 4 and 5. While the national and provincial legislatures are concurrently competent to enact legislation regulating matters enumerated in Parts A and B of Schedule 4, and the provincial legislatures are exclusively competent to enact legislation regulating matters enumerated in Parts A and B of Schedule 5, local municipalities enjoy executive authority in respect of, and have the right to administer the local government matters enumerated in Part B of both Schedule 4 and Schedule 5. Neither provincial nor national government entities may exercise executive authority over or administer these local government matters, since this would intrude on the executive authority reserved to the municipalities by FC s 156(1)(a).

Neither Part B of FC Schedule 4 nor Part B of FC Schedule 5, however, confers any legislative authority on municipalities. The limited power to make and administer by-laws set out in FC s 156(2) is an element of the municipalities' executive authority, and authorises municipalities to make by-laws only for the effective administration of the matters enumerated in Part B of FC Schedules 4 and 5.

Part B of FC Schedule 4 and Part B of FC Schedule 5 do, therefore, impose one significant limitation on the legislative competence of the national and provincial legislatures. Any national or provincial legislation purporting to confer executive authority on a provincial or national organ of state to administer a local government matter enumerated in Part B of either FC Schedule 4 or 5 would be beyond the legislative competence of the enacting legislature, and accordingly invalid. According to Judge Nugent in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*:

24 FC s 147(2).

25 *First Certification Judgment* (supra) at para 335.

[W]hile national and provincial government may legislate in respect of the functional areas in schedule 4, including those in Part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities. Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid.²⁶

In *Johannesburg Metropolitan Municipality (SCA)*, the Supreme Court of Appeal held that legislation assigning the administration of town planning and decision-making in respect of zoning applications to a provincial body was invalid, precisely because these matters fall within the executive authority reserved to local government under the functional area of 'municipal planning' enumerated in Part B of FC Schedule 4. Nugent JA uses a functional approach to federalism interpretation in the judgment. By that I mean that he actively considers how different levels of government can function most effectively within the given framework of a constitutional scheme. He also interprets the text in a manner that, following Justice Emeritus Kate O'Regan, aims 'to establish a coherent system of government capable of performing the complex tasks that a modern state must perform' while ensuring 'that the structures and relationships created by the Constitution work as a coherent whole'.²⁷

The facts of *Johannesburg Metropolitan Municipality (SCA)* are as follows. The Johannesburg Metropolitan Municipality had authority to make town planning decisions and regulate land use in terms of the Town-Planning and Townships Ordinance 15 of 1986. At the same time, Chapters V and VI of the national Development Facilitation Act 67 of 1995 endowed equivalent authority upon provincial development tribunals including the Gauteng Development Tribunal. Nugent JA's intuition led him to conclude that:

The existence of parallel authority in the hands of two separate bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area.²⁸

The Supreme Court of Appeal displays its functional inclinations by locating municipal planning and land use at the local level — where it intuitively appears to belong. This disposition reflects an awareness of the judicial objective of 'facilitating democratic accountability at the most appropriate level'.²⁹ The following passage of the judgment describes an example from Linden, Johannesburg:

Eleven town-planning schemes are in operation within the area of jurisdiction of the municipality, including the Johannesburg Town Planning Scheme. Under that scheme Portion 2 of erf 326 Linden is zoned as 'residential 1' meaning that it may be used only for 'dwelling houses', with certain other uses permitted with the consent of the municipality. Upon application by the owner the Gauteng Development Tribunal rezoned the land to 'residential 1 permitting restaurant and retail' so as to allow for the operation of a restaurant and a gift shop. *Why an application that is quintessentially of local interest should have been considered to be appropriate to a provincial tribunal is difficult to imagine.*³⁰

The result of the combination of the ordinance and the Development Facilitation Act was that both the City and the Gauteng Development Tribunal had the

26 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal Others* [2009] ZASCA 106, 2010 (2) SA 554 (SCA), 2010 (1) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA) at para 29 ('*Johannesburg Metropolitan Municipality (SCA)*').

27 K O'Regan 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75(1) *Modern Law Review* 1, 14-15. See also Swinton (*supra*) at 145.

28 *Johannesburg Metropolitan Municipality (SCA)* (*supra*) at para 1.

29 D Tucker 'Interpretations of Federalism: The Australian Doctrine of State Immunity and the Problem of Collective Choice' in J Goldsworthy & T Campbell (eds) *Legal Interpretation in Democratic States* (2002) 245, 259, 261.

30 *Johannesburg Metropolitan Municipality (SCA)* (*supra*) at para 19 (emphasis added).

power to make zoning decisions in Johannesburg. Initially the City approached the High Court which interpreted the schedules in a way that endowed national, provincial and local government with overlapping administrative powers in the area of 'municipal planning'.³¹ When the matter was taken to the Supreme Court of Appeal, Nugent JA explained the problems with the gloss offered by the court a quo as follows:

It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.³²

Nugent JA fails to see 'what purpose would be served by reserving power to local government merely to assist or participate in the exercise of powers by another tier of government.'³³ Hence he interprets the Final Constitution and FC s 156(1), in particular, to give a degree of control to local government administrators. The power over 'municipal planning' is not merely the power to engage in abstract planning with the assistance of national and provincial government. The Final Constitution evinces a clear intention to devolve certain powers to local government. That objective should be given effect. Consequently the Supreme Court of Appeal concluded that chapters V and VI of the Development Facilitation Act 67 of 1995, which gave the Gauteng Development Tribunal the power among other things to grant town planning zoning applications within Johannesburg, was invalid subject to certain conditions. The decision of the Supreme Court of Appeal was upheld by the Constitutional Court.³⁴

The courts have so far been called on to consider only part B of FC Schedule 4.³⁵ The approach discussed in this chapter in respect of Part B of Schedule 4 would apply in respect of the items listed in Part B of Schedule 5.

(d) Exclusive national legislative competence

The phrase 'exclusive national legislative competence' is not used in the Final Constitution. However, the Constitutional Court has described the FC s 44(1)(a)(ii) allocation of legislative power between the national and provincial levels of government using the phrase, indicating that 'the national level of government has exclusive power in respect of all matters other than those specifically vested in the provincial legislatures' by the Final Constitution.³⁶ In short, residual matters outside the scope of the functional areas in Schedules 4 and 5 are the preserve of the national legislature. The Final

31 See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae)* 2008 (4) SA 572 (W).

32 *Johannesburg Metropolitan Municipality (SCA)*(supra) at para 36.

33 Ibid at para 38.

34 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC)(*'Johannesburg Metropolitan Municipality (CC)'*). See also *Maccsand (Pty) Ltd v City of Cape Town & Others* [2011] ZASCA 141, 2011 (6) SA 633 (SCA) at para 21(Plasket AJA observes that municipalities play a 'central role in land use planning in their areas of jurisdiction. It is no doubt appropriate for them to do so given their knowledge of local conditions and their intimate link with the local electorate whose interests they represent.'). See, further, T Humby 'Maccsand: Intergovernmental Relations and the Doctrine of Usurpation' (2012) 27 *South African Public Law* 628.

35 *Johannesburg Metropolitan Municipality (SCA)* (supra) at para 29 and 40-41. (The interpretation of the term 'municipal planning' is beautifully set out by Nugent JA.) See also *Johannesburg Metropolitan Municipality (CC)* at paras 49-57 (Court upholds Supreme Court of Appeal judgment; however, it sets out its own interpretation of 'municipal planning'.)

Constitution also contains provisions that specifically empower the national legislature to enact legislation. For example, FC s 199(4) requires that the security services must be 'structured and regulated by national legislation'.

One must caution that valid provincial legislation can regulate matters that are reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in FC Schedule 4.³⁷ Consequently, provincial powers can bleed into areas of exclusive national jurisdiction.³⁸ A provincial legislature may play an advisory role in matters outside its authority.³⁹

(e) Matters expressly assigned to the province by national legislation

Provincial legislatures can also acquire extra powers by assignment. FC s 44(1)(a)(iii) provides that Parliament may 'assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government, while FC s 104(1)(b)(iii) contemplates that a provincial legislature may pass legislation for its province with regard to any matter that is 'expressly assigned to the province by national legislation'.⁴⁰ The particular wording of FC s 104(1)(b)(iii) assumed importance in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature*.⁴¹ On behalf of the majority of the Court, Justice Ngcobo states that the aim of FC s 104 is to 'ensure that the legislative authority of the provinces is clearly identifiable'.⁴² FC s 104(1)(b)(iii) gives a provincial legislature the power to deal with issues 'expressly assigned to the province by national legislation'. Ngcobo J continues:

The assignment of legislative powers pursuant to section 104(1)(b)(iii) must leave no doubt about the act of assigning and the nature and the scope of the powers assigned. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy, that when Parliament assigns its legislative powers to the provinces it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise those powers in accordance with, and within the limits of, the terms of assignment.... The public should be left with no doubt

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about which sphere of government has legislative competence with regard to the matter concerned. This is to preclude any dispute about whether the provinces have legislative competence with regard to the matter concerned.⁴³

One of the questions in *Limpopo* was whether Parliament had delegated the power to pass the Financial Management of the Limpopo Provincial Legislature Bill, 2009 to the Limpopo legislature. The provincial Bill regulated the financial management of the Limpopo legislature. Although the national Financial Management of Parliament Act 10 of 2009 contains a number of sections that assume that provincial legislatures have the power to pass Bills managing their own budgetary processes, the Court found that there was no *express* delegation to the provincial legislatures in the Act.⁴⁴ Implied delegation was insufficient and hence the Limpopo legislation was found to be incompetent for want

36 *First Certification Judgment* (supra) at paras 256 and 234, fn 163.

37 FC s 104(4).

38 The implications of FC s 104(4) are dealt with at § 15.3 infra.

39 FC s 104(5).

40 See T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19.

41 [2011] ZACC 25, 2011 (6) SA 396 (CC) ('*Limpopo*').

42 *Ibid* at para 35.

43 *Ibid* at para 36-37.

of proper or *express* legislative delegation to the province. This aspect of *Limpopo* fits with the Court's generally parsimonious attitude toward provincial legislative powers.⁴⁵

(f) Matters for which a provision of the Constitution envisages the enactment of provincial legislation

Section 104(1)(b)(iv) of the Final Constitution provides that provincial legislatures may pass legislation with regard to 'any matter for which a provision of the Constitution envisages the enactment of provincial legislation.'

(i) Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature: The Majority Judgment

In *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature*,⁴⁶ Justice Ngcobo made the following pronouncement on behalf of the majority of the Court:

Section 104(1)(b)(iv) confers a power on the provinces to pass legislation with regard to any matter for which a provision in the Constitution envisages the enactment of provincial legislation. It must be understood in the context of the broader scheme for the allocation of powers between Parliament and the provincial legislatures. As pointed out above, the defining feature of this scheme is that matters in respect of which provincial legislatures have legislative powers must be enumerated in Schedules 4 and 5, or be 'expressly assigned', or a provision in the Constitution must envisage the enactment of provincial legislation in respect of those matters.

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Consistent with this scheme, it seems to me that only those provisions of the Constitution which, *in clear terms*, provide for the enactment of provincial legislation, must be held to fall under section 104(1)(b)(iv). *Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied.* Were it to be otherwise, the constitutional scheme for the allocation of legislative power would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces.⁴⁷

The majority of the *Limpopo* Court interpreted FC s 104(1)(b)(iv) strictly, to allow the enactment of provincial legislation only when a provision of the Final Constitution expressly or 'in clear terms' contemplates provincial legislation with regard to a particular matter. It was contended in *Limpopo* that FC ss 195, 215 and 216 'envisage' provincial legislation with regard to the financial matters of provincial legislatures. At issue was the validity of the Financial Management of the Limpopo Provincial Legislature Bill, 2009, as

44 Ibid at para 58-59. For an interesting analysis of this conclusion, see R Williams and N Steytler 'Squeezing Out Provinces: Legislative Competence in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature & others I and II*' 2012 (4) *South African Law Journal* 621, 632-633.

45 V Bronstein 'Envisaging Provincial Powers, A Curious Journey with the Constitutional Court' (2014) (30) *South African Journal on Human Rights* 24.

46 [2011] ZACC 25, 2011 (6) SA 396 (CC) ('*Limpopo*').

47 Ibid at paras 51-52 (emphasis added).

enacted by the Limpopo legislature.⁴⁸ Ngcobo J held, for the majority, that nothing in FC ss 195, 215 or 216 envisages 'in clear terms' the enactment of provincial legislation.

Consequently the Financial Management of the Limpopo Provincial Legislature Bill, 2009 was held to be invalid as it was not legislation envisaged by the Constitution in terms of FC s 104(1)(b)(iv). According to Justice Ngcobo a more expansive reading of FC s 104(1)(b)(iv) which does not resist finding that the Constitution envisages the enactment of provincial legislation 'would result in the provinces having concurrent legislative competence with Parliament in respect of many matters. This is not what the drafters of our Constitution had in mind'.⁴⁹

Justice Ngcobo's starting point is that the residual legislative powers of the national legislature need to be jealously protected.⁵⁰ He elevates the idea that the constitutional scheme requires crisp clarity in the allocation of legislative functions to the level of a constitutional principle.

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One must question the foundation for this view.⁵¹ FC s 104(1)(b)(iii) is an exceptional provision only insofar as it requires legislative delegations to the provinces to be 'express'. Interpretation of the schedules and the incidental power militate against crisp clarity.⁵² Indeed, on a purely textual approach, the word 'envisage' in FC s 104(1)(b)(iv) is a much softer word than the word 'express'.⁵³ In his dissenting judgment, Justice Cameron resists Justice Ngcobo's clarion call for 'crisp clarity'. He writes:

That there is a difference [between the interpretation of sub-sections 104(1)(b)(iii) and 104(1)(b)(iv)] comes from the Constitution itself, which creates a plain contrast between the

48 Justice Yacoob gave a summary of the contents of the Bill in *Limpopo* (supra) at para 81: 'The Bill has no external effect and is concerned only with the provincial legislature and only with its very own business. It deals with:

1. the oversight committee;
2. the responsibilities of the accounting officer in relation to the money of the provincial legislature;
3. planning and budgeting in relation to the provincial legislature's own business;
4. the way in which cash belonging to the legislature is managed and invested;
5. the way in which the assets and liabilities of the legislature, its revenue, debtors and expenditure are to be managed;
6. supply chain management in relation to acquisition by the provincial legislature itself;
7. internal reporting and auditing functions of the legislature; and
8. how to deal with the financial misconduct of its own employees.'

49 *Limpopo* (supra) at para 52.

50 On the importance of this fact for the logic of the judgment, see Williams and Steytler 'Squeezing Out Provinces' (supra) at 623.

51 It has been pointed out that a general interpretation of FC s 104 does not support a parsimonious attitude toward provincial powers in the Final Constitution. *Limpopo* (supra) at para 121 ((Cameron J in dissent); Williams and Steytler 'Squeezing Out Provinces' (supra) 731-734. It is a feature of our Constitutional scheme that various domains of provincial legislative competence are not hermeneutically sealed. The interpretation of the functional areas in FC Schedules 4 and 5 creates a number of grey areas. Justice Ngcobo likewise pays no attention to the incidental power in FC s 104(4). FC s 104(4) provides that 'provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4'. The latter section inevitably not only anticipates rather malleable boundaries for provincial legislative competence, but potentially confers quite extensive powers. The openness of FC s 104(4) is at odds with the majority's insistence in *Limpopo* that provincial legislative powers be expressly conferred. As a textual matter, it is in fact inconsistent with the Final Constitution's general approach to provincial legislative competence. One might consider the degree to which the commerce clause and the taxing powers in the US Constitution have enabled the power of the federal government to spread - quite logically and necessarily - beyond their originally anticipated confines.

52 See Williams & Steytler 'Squeezing Out Provinces' (supra) at 631.

53 *Ibid* at 633-634.

two ways in which provincial legislative power may be conferred. Hence, to say that the constitutional scheme requires the removal of 'any doubt' regarding provincial legislative competence, and that only those constitutional provisions that provide in the clearest terms for enactment of provincial legislation can be said to 'envisage' legislation, is in my respectful view to assume the premise in dispute. The question is whether 'envisages' imports a different standard of power-conferral, and that question cannot be answered by presuming the premise that only the clearest provisions meet it.⁵⁴

There is a potential justification for Justice Ngcobo's position that provincial legislative powers need to be *expressly* envisaged by the Final Constitution that is not canvassed in the judgment. No specific constitutional provision engages conflicts between national legislation and provincial legislation falling outside the realm of the schedules. In other words, FC s 146 provides an elaborate mechanism for dealing with conflict between national legislation and provincial legislation falling within a Schedule 4 area.⁵⁵ Legislative overlaps in Schedule 5 areas are explicitly regulated by FC s 44(2). Conflict between a provincial constitution and national legislation is dealt with in FC s 147(1). Apart from these sections, no simple recipe appears in the constitutional text to manage conflicts between national legislation, on the one hand, and provincial legislation competent in

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terms of FC s 104(1)(b)(iv), on the other. Such an argument could lend support to Justice Ngcobo's position that concurrency was not envisaged in these areas.

However, even Justice Ngcobo's narrow reading of the FC s 104(1)(b)(iv) contemplates multiple areas of provincial competence 'envisaged' by the Constitution in terms of FC s 104(1)(b)(iv).⁵⁶ Yet the argument that conflict must be avoided between national legislation and provincial legislation 'envisaged' by a provision of the Final Constitution means, at most, that the legislative competence that the Final Constitution 'envisages' must be clearly delineated in order to avoid conflict. It does not mean, as Justice Ngcobo suggests, that only an express conferral of provincial legislative competence is acceptable under FC s 104(1)(b)(iv).

The consequence of the majority's interpretation of the constitutional provisions dealing with legislative competence in *Limpopo* was that the Limpopo legislature was held not to have had the competence to pass the Financial Management of the Limpopo Provincial Legislature Bill, 2009. The matters which the Bill purported to regulate are located deep in the heart of provincial government. That these matters were held to be in the domain of national government foists on provincial legislative bodies an extreme dependence on the national legislature, in practice and on a symbolic level.⁵⁷

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54 *Limpopo* (supra) at para 121.

55 V Bronstein 'Reconciling Regulation or Confronting Inconsistency? Conflict between National and Provincial Legislation' (2006) 22 *South African Journal on Human Rights* 283.

56 See *Limpopo* (supra) at paras 53-54 and fn 45 (Ngcobo CJ refers to FC ss 155(5) and 120(3).)

57 In 'Squeezing Out Provinces', Robert Williams and Nico Steytler focus on an interesting feature of the *Western Cape Certification Judgment* - which went remarkably unremarked upon in *Limpopo*. See *Certification of the Constitution of the Western Cape* [1997] ZACC 8, 1997 (4) SA 795 (CC). Section 61(1) of the Western Cape Provincial Constitution states that '[p]rovincial legislation must establish a provincial treasury and may prescribe in accordance with national legislation measures to ensure transparency, accountability and expenditure control'. Williams and Steytler point out that although 'the national Constitution contained no clear reference to provincial legislation in this area, the Constitutional Court did not frown on this provision at all' 'Squeezing out Provinces' (supra) at 634. They argue that this aspect of that early case is completely at odds with the findings in *Limpopo*. In their view, the outcome of *Limpopo* might have been different if the Western Cape provincial government had been one of the parties to the case. They offer the following intuition pump to illuminate their argument:

(ii) Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature: The Dissenting Opinions

Ngcobo J's judgment only provides part of the picture in *Limpopo*. Forceful dissenting judgments were handed down by both Justices Cameron and Yacoob.⁵⁸ Although he concurs in the majority order, Justice Froneman's minority judgment has more in common with the dissenting opinions. He agrees, in principle, that the power to manage the budgetary processes of a provincial legislature lies within the provincial domain.⁵⁹

Justices Yacoob and Cameron focus on FC s 116. This section allows a provincial legislature to 'determine and control its internal arrangements, proceedings and procedures'. In their view this provision envisages provincial legislative control over the budgetary processes of the provincial legislature. Justices Yacoob and Cameron take a functional and intuitive approach to federalism analysis. Both judgments start with an in-built sense of where the particular legislative powers should be situated in the overall constitutional scheme. Justice Yacoob begins:

The provincial legislature, like every other public entity must have a budget and it is obliged in budgeting for its expenditure to have budgetary processes. The question is whether a provincial legislature has the power to determine its own budgetary processes. The answer to this must be yes.⁶⁰

Justice Cameron goes on to state that 'as a matter of fundamental outlook, it would seem to me surprising if the Constitution did not envisage that provinces may legislate for the financial management of their own legislatures.'⁶¹ This axiom drives the dissent. It should be the preferred manner of reading of the constitutional text.⁶²

The functional approach to federalism endorsed in these dissenting judgments seeks the legal interpretation that will best facilitate the effective functioning of different organs of state within the framework of the Constitution.⁶³ Both judges prefer the interpretation that will 'facilitate democratic accountability' at 'the most appropriate level'.⁶⁴ Justices Cameron and Yacoob interpret the text in a way that aims, as Kate O'Regan suggests, 'to establish a coherent system of government capable of performing

Section 61(1) of the Western Cape Provincial Constitution provides for provincial legislation on financial management in the province, which includes the provincial legislature itself. Section 61(1) was sanctioned by the Constitutional Court in the 1997 *Certification* judgment [(supra)] because the provincial constitution complied with the prescription in s 143(2)(b) of the Constitution, namely it 'may not confer on the province any power or function that falls (i) outside the area of provincial competence in terms of Schedules 4 and 5; or (ii) outside the powers and functions conferred on the province by other sections of the Constitution'. Section 61(1) was assessed against this standard (as all sections of the provincial constitution were (at para 3, quoted above)). Section 61(1) was then valid because it presumably fell under the scope of s 104(1)(b)(iv) of 'envisaged' provincial legislation.

Ibid at 635. Williams and Steytler are certainly correct. However, one still needs to ask whether a provincial treasury can be shoehorned into 'legislative and executive structures and procedures' which are allowed to vary under provincial Constitutions in terms of FC s 143(1)(a). On this vexed question, see S Woolman 'Provincial Constitutions' in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, February 2006) Chapter 21, 21-11.

58 For an analysis of the reasoning in the dissenting judgments, see Williams and Steytler 'Squeezing out the Provinces' (supra) at 627-628.

59 *Limpopo* (supra) at paras 128-129.

60 Ibid at para 87.

61 Ibid.

62 Ibid at para 124.

63 Swinton (supra) at 145. See also V Bronstein 'Conflicts' (supra) at Chapter 16.

64 Tucker (supra) at 247

the complex tasks that a modern state must perform' while ensuring 'that the structures and relationships created by the Constitution work as a coherent whole'.⁶⁵

(g) Other Provincial Legislative Powers

Provincial legislatures have the power to pass and to amend provincial Constitutions.⁶⁶ They can assign any of their legislative powers to a municipal council in their province.⁶⁷ (Other specific competences in respect of local government are dealt with in the chapter on 'Local Government'.⁶⁸) The provinces possess limited provincial taxing powers.⁶⁹ FC 228(1) provides that:

A provincial legislature may impose-

- (a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and
- (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.⁷⁰

These powers 'may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour'.⁷¹ Furthermore, provincial taxes 'must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered'.⁷² Hence, provincial taxing powers are subject to national legislation that may significantly restrict their ambit. 'Restrict' should not be confused with 'extinguish'. Cognisant of this distinction, Parliament has passed the Provincial Tax Regulation Process Act 53 of 2002 to regulate provincial taxes.⁷³

15.3 Interpretation

(a) Categorisation: Allocating legislation to functional areas

According to the Constitutional Court in *DVB Behuising*, assigning legislation to functional areas 'involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is,

65 O'Regan (supra) at 14-15.

66 FC s 104(1)(a). See, further, S Woolman 'Provincial Constitutions' in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

67 FC s 104(1)(c).

68 See N Steytler & J de Visser 'Local Government' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22.

69 See T Madlingozi & S Woolman 'Provincial Legislative Authority' (supra) at Chapter 19.

70 FC s 228(1).

71 FC s 228(2)(a).

72 FC s 228(2)(b).

73 A full analysis of this Act is beyond the scope of this chapter, but for commentary on the Act when it was still in Bill form, see P Surtees 'Bill Would Allow South African Provinces to Impose Taxes' *Worldwide Tax Daily* (11 June 2001), available at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=5&ThisItem=76>.

what the [legislation] is about.⁷⁴ The Court reiterated this mode of analysis in *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of Kwazulu-Natal & Others* - where the Court was obliged to categorize the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 ('Slums Act').⁷⁵ Yacoob J writes:

The parties agree as to the approach to be adopted by a court in determining the functional area within which particular legislation falls. It is necessary for this Court to discover the substance of the legislation, which depends not only on its form but also on its purpose and effect or its essence, or true purpose and effect, that is, what the [law] is about. It is also trite that no national or provincial legislative competence can be entirely water-tight and that it may become necessary to find the main substance of legislation to ascertain whether there is provincial competence.⁷⁶

In *Abahlali Basemjondolo Movement*, the Court found it necessary to consider the Slums Act 'as a whole in order to determine its true ambit'.⁷⁷ Note that in *DVB*

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Behusing, the Court decided that an analysis of the subject matter of legislation is not a global assessment of an entire Act. Different parts of a legislative scheme may be split up and characterized in different ways. The *DVB Behusing* Court writes:

A single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.⁷⁸

74 *DVB Behusing* (supra) at para 36. In Canada, Albert Abel has argued that the process of categorization should be divided into the following three discrete steps: (1) Identify the matter of the legislation; (2) Delineate the 'scope of the competing classes' in the Constitution; (3) Determine the class into which the legislation falls. Swinton believes that it is impossible to keep the inquiries in these three steps apart. The answers to the initial questions are 'affected by the ultimate objective of linking the statute to the classes of subjects in the constitution.' Swinton (supra) at 144. The outcomes of categorisation analysis can sometimes be unexpected. In *German Television*, the Land (Province) of Hamburg had given a broadcasting monopoly to Norddeutscher Rundfunk. 12 BVerfGE 205 (1961). The problem was whether the federal government was entitled to make provision for broadcasts into the province which would have the effect of subverting this monopoly. The national government was unsuccessful despite the fact that 'telecommunications' was an area of exclusive federal authority under the Basic Law. In its interpretation the Court explored the constitutional 'text, context, structure, purpose, and history [which] combined to give the provision for exclusive federal power over telecommunications a narrower scope than an untutored observer might have expected.' D Currie *The Constitution of the Federal Republic of Germany* (1994) 38. Currie notes that as a textual matter, the Constitutional Court found that: the term 'telecommunications' [embraced only] 'the technical processes of transmitting signals,' not the field of broadcasting as a whole. This conclusion was confirmed, the Court added, by the use of the broader term broadcasting ('Rundfunk') in connection with freedom of expression in Article 5(1). Moreover, radio and television programming was a cultural matter, and the 'fundamental decision' of the Basic Law to leave cultural matters to the Lander (by omitting them from the list of federal powers) made it impossible to uphold federal authority over anything cultural in the absence of clear language. In addition, the reason for the grant of federal authority was to prevent the 'chaos' that might result from disuniform regulation of such matters as the location and strength of transmitters and the allocation of frequencies; there was no comparable need for uniformity with respect to the content of broadcasts. Tradition was not to the contrary since the Lander had disputed the exercise of federal authority over programming throughout the Weimer period; and the record of the Constitutional Convention confirmed that the cultural side of broadcasting was not within the new grant of federal power. Accordingly, the monopoly granted by Hamburg was invalid as to the technical aspects of transmitting radio and television signals but valid as to everything else; and for similar reasons the competing federal network could be authorised only to transmit signals, not to determine what was to be transmitted. *Ibid* at 37-38. It is essential to note that in German constitutional law there is a pattern of powers being construed against the central government and in favour of the provinces. *Ibid* at 38. No such pattern has developed in our law, nor does our Constitution contain any such presumption.

75 *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of Kwazulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC).

76 *Ibid* at para 21. On this point the judgment of Yacoob J is supported by all the members of the Court. Justice Moseneke's judgment in the same matter speaks of ascertaining the 'core purpose' of the Slums Act. *Ibid* at para 98). On approaching the incidental power topic, see § 15.3(c)(iii) below.

77 *Ibid* at para 27 (The Court's views are further explained at para 25).

The Constitutional Court has made it clear that the interpretive process for determining the meaning of the items in FC Schedule 4 for purposes of establishing legislative competence is not the same as the test for 'tagging'. Tagging is the determination of the legislative process according to which a national Act of Parliament should be passed.⁷⁹ FC s 76(3) provides that national legislation that in substantial measure falls within a functional area listed in Schedule 4 should be 'tagged' as a Bill to be passed through Parliament according to the procedures set out in FC ss 76(1) and (2).⁸⁰ In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*,⁸¹ Ngcobo CJ distinguishes between 'the characterization of a Bill' for purposes of a competence analysis and 'tagging':

What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4'. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This 'involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about'.

There is an important difference between the 'pith and substance' test and the 'substantial measure' test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.⁸²

The *Tongoane* Court goes on, relying on Canadian federalism jurisprudence, to refer to the test for legislative competence as the 'pith and substance' test. In

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Canadian jurisprudence, identifying the 'pith and substance' of a law involves finding 'the dominant or most important characteristic' of that law.⁸³

When characterizing legislation in terms of legislative competence, the Constitutional Court has expressly approved a purposive approach to interpretation.⁸⁴ The Court has also noted that the effects of the law are relevant and that statutes should be looked at

78 *DVB Behuising* (supra) at para 63. In *Abahlali Basemjondolo Movement*, Deputy Chief Justice Moseneke appears to be sensitive to this point. He finds it *most appropriate* to read the Slums Act as a whole. *Abahlali Basemjondolo Movement* (supra) at para 98. The court a quo correctly warns against pulling sections out of an Act and considering them in a 'piecemeal fashion'. *Abahlali Basemjondolo Movement SA v & Another v Premier of Kwazulu-Natal & Others* [2009] ZAKZHC 1, 2009 (3) SA 245 (D), 2009 (4) BCLR 422 (D&CLD), [2009] 2 All SA 293 (D) at para 32.

79 See M Bishop & N Raboshakga 'National Legislative Authority in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS2, 2010) Chapter 17. See also C Murray and R Stacey 'Tagging the Bill, Gagging the Provinces: The Communal Land Rights Bill in Parliament' in A Claasens and B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008).

80 See M Bishop & N Raboshakga 'National Legislative Authority' (supra) at Chapter 17.

81 [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC) ('*Tongoane*').

82 *Ibid* at paras 58 and 59.

83 P W Hogg *Constitutional Law of Canada* (Vol 1, 3 ed 1992) § 15.7. See also RL Watts *Federalism: The Canadian Experience* (1997) 45-46:

Many statutes have one feature or aspect that comes under a provincial, and another under a federal, head of power. For example, a law prohibiting careless driving has a criminal aspect, which is federal, and a highway regulation aspect, which is provincial. The courts make a judgment as to the most important feature of the law and characterize the law by that primary feature - its 'pith and substance'.

See further *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC, 31 [2002] 2 SCR 146 (On incidental powers.) See also § 15.3(c) below.

in historical context.⁸⁵ With respect to categorization, it is not just a matter of what the Court has said, but what it actually does. For example, a functional approach to categorisation dominates the analysis in *Liquor Bill*.⁸⁶

(i) Presumptions and politics

Federal constitutions tend to reflect pragmatic responses to political cleavages or pressures.⁸⁷ South Africa is no exception. It is fair to say that from the start of constitutional negotiations the African National Congress championed a strong national government at the expense of provincial powers. Opposition parties with strong regional support — the Inkatha Freedom Party in KwaZulu-Natal and the National Party in the Western Cape — advocated decentralized distributions of power.⁸⁸ The Constitutional Court has been strikingly even-handed in its treatment of federalism cases. The two *Certification* judgments demonstrate the Court's desire to maintain a dignified distance above the political fray.⁸⁹

The Court has correctly employed rigorous doctrinal discipline in order to insulate itself from claims that it might have a particular political agenda. The

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history of the characterization issue in *DVB Behuising (Pty) Limited v North West Provincial Government & Another* can be used to support the proposition that classification questions are not always reducible to questions of politics. The Constitution, as law, has something distinctly meaningful to say about federalism questions.⁹⁰ In *DVB Behuising*, Ngcobo J paraphrased the central findings of Mogoeng J in the court a quo as follows:

84 See *DVB Behuising* (supra) at para 36, *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*, *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC) at para 19. See also *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC) at para 49 (*Johannesburg Metropolitan Municipality CC*) at para 49.

85 *DVB Behuising* (supra) at para 36.

86 *Liquor Bill* (supra). See also §15.2(b) above. These approaches are discussed in the following four subsections. The section on different models of federalism in Chapter 16 of this work may also be relevant to characterization.

87 See DJ Elazar *Exploring Federalism* (1987).

88 See, eg, W Beinart *Twentieth-Century South Africa* (2001) 276, 279. See also S Friedman and R Humphries (eds) *Federalism and its Foes* (1993).

89 *First Certification Judgment* (supra) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997(2) SA 97 (CC), 1997 (1) BCLR 1 (CC) (*Second Certification Judgment*). South Africa has yet to have a Constitutional Court justice associated with an aggressive federalist stance. In some countries, judges develop definite profiles in division of powers matters. For example, in Canada, Swinton has contrasted the 'centralist' views of Judge Bora Laskin with the federalist or provincial vision of Judge Jean Beetz. K Swinton 'The Supreme Court and Canadian Federalism' (supra) at 229-234.

90 A level of indeterminacy exists in characterisation questions. When the different methods of interpretation fail to dispose of a matter, R Lederman suggests a last resort:

In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men [and women] of high professional attainment, and that they be representative in their thinking of the better standards of their times and their countrymen [and women].

R Lederman 'Classification of Laws and the British North America Act' in R Lederman *Continuing Canadian Constitutional Dilemmas* (1981) as quoted in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib, JD Whyte *Canadian Constitutional Law* (Vol 1 1994) 166, 169).

- (a) Provincial legislatures have a 'clearly defined and very limited legislative authority' and have to operate 'within the strict parameters' of that authority.
- (b) In construing the powers of provincial legislatures the relevant provisions of the Constitution must '...be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise the authority it does not have and thereby usurp the functions of Parliament.'⁹¹

In light of these initial conclusions, Mogoeng J had to establish whether an apartheid Proclamation made under the Black Administration Act fell under national competence or provincial competence in terms of the Interim Constitution. He found that the Proclamation was predominantly about 'land, land tenure or ownership, the registration of deeds and the establishment and abolition of townships'⁹² (national competences), rather than housing, local government, trade and industrial promotion (provincial competences).

The Constitutional Court made it clear that there is no presumption in the text that assists judges in deciding how to categorise legislation. On behalf of the majority of the Court, Justice Ngcobo wrote:

I respectfully disagree with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the schedules should be 'given a strict interpretation'. In the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.⁹³

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A minority of the Court, Justices O'Regan, Sachs and Goldstone, concurred in the majority judgment. At the same time, they expressed concern about the consequences of a finding that would place the Proclamation within the sphere of provincial competence. Despite this fear, they were unable to support Mogoeng J's finding that the predominant legal subjects of the Proclamation were national competences.⁹⁴ They could not do so because the argument that the Proclamation chiefly regulated 'local government' issues was found to be more compelling.

(ii) Functionalism

When judges use a functional approach to federalism problems, they consider how different levels of government can operate most effectively within a given constitutional scheme. Decisions are 'guided by ... beliefs about the optimal balance of power between the federal and provincial governments.'⁹⁵ Judges explicitly weigh the 'values of uniformity and diversity'⁹⁶ in specific contexts.⁹⁷ Another aspect of this approach, articulated by Kate O'Regan, 'recognises that a primary purpose of the Constitution is to

91 *DVB Behuising* (supra) at para 16. The judgment of the court a quo in *DVB Behuising (Pty) Ltd v North West Provincial Government and Another* (Bophuthatswana High Court, Case No 308/99, 27 May 1999) is unreported.

92 *DVB Behuising* (supra) at para 16.

93 *DVB Behuising* (supra) at para 17. The majority of the Constitutional Court is protective of provincial legislative power and respectful of the notion that democracy takes many forms and takes place in various spheres. Ngcobo J acknowledges that the 'North West legislature is itself a democratic institution and, it was fully entitled to make the legislative choice [that it did]' Ibid at para 69. The minority take a much more interventionist position. They engage with the situation created by the legislation and try to achieve the best substantive outcome. The majority's position is easier to defend.

94 Ibid at para 102.

95 K Swinton 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib & JD Whyte *Canadian Constitutional Law* (Vol 1 1994) 143, 145.

96 Ibid.

establish a coherent system of government capable of performing the complex tasks that a modern state must perform. The task of interpretation is thus first to ensure that the structures and relationships created by the Constitution work as a coherent whole and any particular text must contribute to this whole'.⁹⁸

The functional approach to interpretation requires that courts and other interpreters should not needlessly run the meanings of the different items in the schedules into each other. The items in the schedules are presumed to have independent meaning. According to the Constitutional Court '[t]he constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise'.⁹⁹ Hence different items in the schedules with similar names need to be given discrete definitions to enable the relevant spheres of government to exercise their independent powers properly or 'fully and effectively'.¹⁰⁰

RS6, 04-14, ch15-p21

In *Liquor Bill*, the Bill under scrutiny had been passed by the National Legislature.¹⁰¹ It was referred to the Constitutional Court by the President for a finding on its constitutionality.¹⁰² The Bill aimed to regulate comprehensively 'the manufacture, distribution and sale of liquor on a uniform basis' throughout South Africa.¹⁰³ This objective was fraught with difficulty. 'Liquor licenses' is, after all, an exclusive provincial legislative competence listed in Schedule 5.¹⁰⁴

The initial question in this case was one of characterisation. It was necessary to establish the scope of the term 'liquor licenses' in FC Schedule 5 in order to determine whether the national legislature had strayed into an area of exclusive provincial legislative competence. Categorisation is always a problem because the various subject matters traversed in the schedules are not entirely discrete. For example, the functional area 'liquor licenses' overlaps with the concurrent functional areas 'trade' and 'industrial promotion'.¹⁰⁵ Despite this natural linguistic overlap, the Court found that an analysis of the overall constitutional scheme reveals that FC Schedule 5 matters need to be

97 K O'Regan 'Text Matters' (supra) at 12.

98 Ibid at 14-15. A functional approach to interpretation has been strongly articulated by the Supreme Court of Appeal on a number of occasions. See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal Others* (SCA) [2009] ZASCA 106, 2010 (2) SA 554 (SCA), 2010 (1) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA), *Maccsand (Pty) Ltd v City of Cape Town & Others* [2011] ZASCA 141, 2011 (6) SA 633 (SCA). The former judgment is discussed in greater detail above. Both judgments were upheld by the Constitutional Court in *Johannesburg Metropolitan Municipality (CC)* (supra) and *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC).

99 *Johannesburg Metropolitan Municipality CC* (supra) at para 56.

100 Ibid at para 49. This observation provides the background to the judgment's interpretations of 'municipal planning', 'provincial planning' and 'regional planning'. Ibid at paras 49-57.

101 B 131B-98.

102 *Liquor Bill* (supra) at para 2.

103 Ibid at para 21.

104 The Western Cape government formulated the following complaint:

The Bill exhaustively regulates the activities of persons involved in the manufacture, wholesale distribution and retail sale of liquor; and that even in the retail sphere the Bill seeks to create reduce the provinces, in an area in which they would (subject to FC s 44(2)) have exclusive legislative and executive competence, to the role of funders and administrators. The province asserts that the Bill thereby intrudes into its area of exclusive legislative competence.
Ibid at para 38.

105 Ibid at para 48.

interpreted as having distinct identities which can be differentiated from other functional areas.¹⁰⁶

The Court's functional approach in *Liquor Bill* becomes even more evident when it distinguishes matters on the basis of whether they require regulation 'inter-provincially, as opposed to intra-provincially.'¹⁰⁷ It concludes 'that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.'¹⁰⁸ The functional area 'liquor licenses' is consequently interpreted to mean 'intra-provincial liquor licenses.'¹⁰⁹

The elegance of this analysis becomes evident when it is applied to the Liquor Bill's 'three-tier' structure.¹¹⁰ The Bill contains schemes of regulation for (1) control of manufacturing or production of liquor, (2) distribution, and (3) retail trade in liquor. The *Liquor Bill* Court concludes that both manufacturers and distributors of liquor are likely to operate across provincial boundaries:

If production and distribution of liquor were to be regulated by each province, manufacturers and distributors would require licences from each province for the purpose of conducting national trading, and possibly a national licence for export.¹¹¹

RS6, 04-14, ch15-p22

On the other hand, retail trade in liquor rarely operates across provinces and it is appropriate for it to be regulated provincially. As a result, retail licensing was held to be exclusively within the legislative competence of the provincial legislatures.¹¹² Thus, it could not be interfered with by the national legislature in the absence of a ground to be found in FC s 44(2).¹¹³

One should keep in mind that not all characterisation problems are the same. The fact that *Liquor Bill* involved the delineation of an exclusive provincial legislative competence had an important impact on the Court's reasoning. The reasoning in the judgment would not apply to the interpretation of FC Schedule 4 competences because the Final Constitution regulates those areas so differently.

It is interesting to note that the *Liquor Bill* Court chose not to mention the Constitutional Principles.¹¹⁴ (The manner in which the Constitutional Principles still inform our understanding of the constitutional text is discussed elsewhere.¹¹⁵) The text of Constitutional Principle XX1.1 would have made a compelling addition to *Liquor Bill*'s functional arguments. The Principle states:

The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the

106 Ibid at para 56.

107 Ibid at para 53.

108 Ibid.

109 Ibid at para 75.

110 Ibid at para 73.

111 Ibid at para 74.

112 Ibid at para 80. This category includes 'micro-manufacturers whose operations are essentially provincial.' Ibid at paras 84 and 88.

113 See § 15.3(b) infra.

114 But see *Liquor Bill* (supra) at para 52 (Alluding to the principles.)

115 See L Du Plessis 'Interpretation of the Bill of Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

The Court's reluctance to breathe new life into the Principles is understandable. However, they could have meaningful interpretive force in the context of federalism.

(iii) Purpose and effect of the legislation

The Constitutional Court 'has regard to' the purpose and effect of legislation when categorising it in terms of functional areas.¹¹⁶ The purpose of a statute is what the law 'was enacted to achieve.'¹¹⁷ Although the following statement was made in the context of Schedule 6¹¹⁸ of the Interim Constitution, the form of analysis remains the same under the Final Constitution. The Constitutional Court wrote:

If the purpose of legislation is clearly within schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a

RS6, 04-14, ch15-p23

matter within schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the provincial legislature.¹¹⁹

The preamble and the long title may prove useful in establishing the purpose of legislation.¹²⁰ Although there is no substitute for a careful look at the total legislative scheme,¹²¹ it should be kept in mind that it cannot be automatically assumed that the total Act is the correct unit for a competence analysis.¹²² The legislative history of a statute is also relevant.¹²³

In *Johannesburg Metropolitan Municipality (CC)*, the Constitutional Court adopts a purposive approach. It uses this method of interpretation to distinguish 'municipal planning' from 'provincial planning' and 'regional planning'.¹²⁴

116 *DVB Behuising* (supra) at para 36.

117 Ibid.

118 Schedule 6 of the Interim Constitution listed functional areas in which the provinces had legislative competence. The Interim Constitution did not distinguish between concurrent national and provincial legislative competence and exclusive provincial legislative competence. The legislative competence the provincial legislatures did hold, in respect of functional areas listed in IC Schedule 6, was shared with the national legislature.

119 *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature* (supra) at para 19. See also *Abahlali Basemjondolo Movement SA v and Another v Premier of Kwazulu-Natal and Others* [2009] ZAKZHC 1, 2009 (3) SA 245 (D), 2009 (4) BCLR 422 (D&CLD), [2009] 2 All SA 293 (D) at para 32 (High Court adopted a purposive approach in reading the KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act 6 of 2007 and concluded that: 'You cannot have housing without land and even though there may be some aspects that seem to deal with land that does not detract from the *main objective* of the Act which is issues of housing.')(emphasis added.)

120 See *Abahlali Basemjondolo Movement* (supra) at paras 28-29 and paras 98-99.

121 Ibid at para 25. Yacoob J states that 'all the provisions of legislation must be considered together to arrive at its true substance', and the analysis that follows at paras 28-40. Moseneke DCJ's observations on these matters of interpretation are also of interest. Ibid at paras 98-101.

122 See *DVB Behuising* (supra) at para 63, as discussed in § 15.3(a) above. See also § 15.3(c)(iii) below (Discussing 'incidental' legislative power.)

123 *DVB Behuising* (supra) at para 36.

124 *Johannesburg Metropolitan Municipality (CC)* (supra) at paras 49-57.

The effect of legislation may also be important. For example, in *Texada Mines v AG BC*, the Canadian Supreme Court decided that 'where a provincial tax has the effect of making a commodity too expensive to sell in interstate commerce, the tax should instead be found to be bound by federal powers of interprovincial commerce.'¹²⁵

(iv) Historical context

Legislative history is a useful tool to help establish the purpose of legislation and hence its characterisation.¹²⁶ The Court is also receptive to, although not necessarily persuaded by, broader historical arguments presented by the parties in a matter. In *Liquor Bill*, the Minister of Trade and Industry argued that Parliament had the competence to pass the Liquor Bill in the light of the 'history of overt racism in the control of the manufacturing, distribution and sale of liquor' in South Africa.¹²⁷ Historical arguments about apartheid land law figured prominently in all

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the opinions in *DVB Behuising*. As a more general matter, historical analysis pays close attention to an Act's social and political context.¹²⁸

(b) Scope of the FC s 44(2) override

FC s 44(2) provides:

Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary:

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

In *First Certification Judgment*, the Court held that the 'power of intervention [under FC s 44(2)] is defined and limited. ... If regard is had to the nature of the [Schedule 5] powers and the requirements of [FC s 44(2)], the occasion for intervention by Parliament is likely to be limited.'¹²⁹ This dictum implies that the five requirements for intervention will be interpreted narrowly. While the Court did hedge its bets slightly by using the word 'likely', it was somewhat less equivocal in *Second Certification Judgment* where it spoke of the 'compelling importance of the matters referred to in [FC s 44(2)]'.¹³⁰ This phrase implies that intervention will not be easily countenanced under this subsection.

There is, however, one possible interpretation of *Liquor Bill* that suggests that FC s 44(2)(b) may be more easily satisfied when economic activity is understood to take place at a national level rather than at an intra-provincial level. Cameron AJ wrote:

In the context of trade, economic unity must in my view, therefore, mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system

125 [1960] SCR 713.

126 *DVB Behuising* (supra) at para 36.

127 *Liquor Bill* (supra) at para 32.

128 On textual analysis in context, see Moseneke DCJ's opinion in *Abahlali Basemjondolo Movement* (supra) at para 101.

129 *First Certification Judgment* (supra) at para 257.

130 *Second Certification Judgment* (supra) at para 106.

for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level.¹³¹

The Justices are correct to be concerned about the possibility of provincial powers being used to create barriers to trade within the national economy. But provincial legislation need not create barriers. A province may want to deregulate a sector in order to allow operators easier access. In such a case, it is hard to imagine why, in principle, the national government would be able to intervene in order 'to maintain economic unity.' It must be remembered that the Court said that 'the desirability from the national government's point of view of consistency' cannot, on its own, warrant FC s 44(2) intervention.¹³² That said, in some cases such provincial

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deregulation could cause intervention to be justified on the basis of the need to 'maintain essential national standards' (FC s 44(2)(c)); or to 'establish minimum standards required for the rendering of services' (FC s 44(2)(d)).

Acting Justice Cameron's statements must be read against the background of an industry that most agree requires a high level of regulation. Indeed, the Minister of Trade and Industry convinced the Court that multiple regulators across the country would be inimical to the maintenance of economic unity in the context of the liquor manufacturing and distribution sectors.¹³³ Readers must locate the reasoning of the judgment in its particular context.

(c) Scope of the incidental power

(i) Current source of the incidental power

FC s 104(4) states that:

Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

FC s 44(3) reads the same with respect to national legislative authority:

Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

I refer to both of these powers as 'incidental' powers. Justice Cameron has stated that 'the phrase "reasonably necessary for, or incidental to" should be interpreted as meaning "reasonably necessary for *and reasonably* incidental to".¹³⁴

(ii) Implicit use of the incidental power in 'DVB Behuising'

The incidental power was an important factor in the outcome of *DVB Behuising*. The case arose because the North West Provincial legislature purported to repeal Proclamation R293 of 1962 in the North West Province. The Proclamation, which had been issued in terms of the Native Administration Act 38 of 1927, was a relic of apartheid land law that was based on a policy of 'residential segregation.'¹³⁵ It made provision for the establishment of special types of

131 *Liquor Bill* (supra) at para 76.

132 *Ibid* at para 81.

133 *Liquor Bill* (supra) at para 79.

134 *Ibid* at para 81 (emphasis added).

135 *DVB Behuising* (supra) at para 41.

townships on land held by the South African Native Trust in which African South Africans could only acquire inferior types of insecure tenure. The Proclamation also contained provisions relating to the control of trading and other activities in the affected townships.¹³⁶

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The constitutional analysis in *DVB Behuising* is complicated by transitional provisions that affected the Proclamation in question.¹³⁷ However, one of the central issues turns on a simple question of categorisation. Could the Proclamation be classified as fitting into the list of legislative competences of the provinces as set out in schedule 6 of the Interim Constitution?

The majority of the Court held that the Proclamation '[disclosed] an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government.'¹³⁸ The Proclamation was found in substance to be in the functional areas of 'regional planning and development, urban and rural development and local government': all are provincial competences under the Interim Constitution. However, these areas were not the only functional areas engaged by the Proclamation. The Proclamation also contained provisions that dealt with land tenure, which is a national competence. Justice Ngcobo wrote for the majority:

I am satisfied that the 'tenure' and deeds registration provisions of the Proclamation were inextricably linked to the other provisions of the Proclamation and were foundational to the planning, regulation and control of the settlements. These provisions were an integral part of the legislative scheme of the Proclamation and accordingly fell within schedule 6.¹³⁹

Hence, the tenure provisions were within the competence of the provincial government.

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136 DVB Behuising Pty Ltd sold houses to individuals in the North West. As a result of the repeal of Proclamation R293 of 1962 in the North West, the limited tenure rights known as 'deeds of grant' that new home-owners acquired could not be registered. Consequently the banks refused to provide finance for these new buyers. DVB Behuising argued that the repeal of parts of the Proclamation was beyond the legislative competence of the North West legislature. *DVB Behuising* (supra) at para 3.

137 The case illustrates the operation of IC s 235, particularly IC ss 235(6) and (8). The Constitutional Court had previously explained the role of IC s 235 as follows:

The overall purpose to be achieved through the application of s 235 [was] a systematic allocation of the 'power to exercise executive authority' in terms of each of the 'old laws', to an authority within the national government or authorities within the provincial governments. ... The purpose of this power is clearly to provide a mechanism whereby a fit can be achieved between the old laws and the new order *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 84 (emphasis in original). In *DVB Behuising*, the power to exercise executive authority in respect of Proclamation R293 of 1962 had been assigned to the North West Province by Government Notice 110 of 1994. The assignment could only have been made under IC s 235(6)(b), and was made only in respect of the parts of the Proclamation that fell within the functional areas of provincial legislative competence listed in Schedule 6 of the Interim Constitution. Schedule 6 of the Interim Constitution exhaustively listed the legislative competences of provinces. Hence the assignment only applied in the areas of concurrent competence between the national and the provincial government.

The definition of 'provincial legislation' in the Final Constitution includes 'legislation that was in force when the Constitution took effect and that is administered by a Provincial Government' (FC s 239). Consequently, in as far as the assigned Proclamation fell within the functional areas listed in Schedule 6 and did not deal with matters referred to in paragraphs (a) to (e) of IC s 126(3), it was provincial legislation and it could be validly repealed by the North West legislature. *DVB Behuising* (supra) at paras 20 and 26. The central question in *DVB Behuising* became whether the Proclamation dealt with a matter that was listed in schedule 6 of the Interim Constitution. This same type of characterisation exercise would have occurred in all cases of provincial legislative competence under the Interim Constitution. For more on provisions designed to ease the move from an Interim Constitution to a Final Constitution, see M Chaskalson 'Transitional Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 28.

138 *DVB Behuising* (supra) at para 48.

139 *DVB Behuising* (supra) at para 58 (Ngcobo J). A majority of the Court concurred in Ngcobo J's judgment. Madala J concurred in a separate judgment with this aspect of Ngcobo J's reasoning. Ibid at para 96.

In the minority judgment, Justices O'Regan, Sachs and Goldstone expressed doubt about this characterization of the subject matter:

There is much to be said, in our view, for the proposition that [the tenure provisions] are provisions regulating matters which fall outside schedule 6 of the interim Constitution. It is clear that 'land tenure and registration' are not functional areas within the scope of schedule 6 as Mogoeng J observed. We accept that regulating the allocation of sites for trading and residential purposes are matters which fall within the functional areas of local government and/or urban development. Similarly, we accept that establishing a township involves creating sites and selling them or leasing them to the public and even attaching specific conditions to title. However, the proposition that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration, seems much less certain. In our view, the functional area of urban development requires the process of land alienation and allocation within the framework of the land tenure and registration system provided nationally. We find it hard to accept that establishing novel forms of land tenure or registration is an aspect of the functional area concerned with local government or that concerned with urban development.¹⁴⁰

This statement does not really grasp the nettle of the majority judgment. The majority see the tenure issues as integral to the particular legislative scheme in the Proclamation and thus as a valid part of the assignment to North West Province. While the general proposition 'that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration'¹⁴¹ is dubious at best, (as the minority points out,) the majority of the Court does not defend this proposition. The majority holds that the tenure provisions were an integral part of a legislative scheme that was predominantly within functional areas of provincial competence.

One problem with *DVB Behuising* is that although the reasoning of the majority judgment is convincing, it elucidates no clear doctrine for establishing the scope of the incidental power.¹⁴² Readers of the judgment might think that there are no meaningful doctrinal grounds for judges to regard a particular power as incidental to a provincial power or to regard the matter as one that should be reserved for the national legislature. I argue below that there are indeed better — and worse — ways of delineating incidental powers.

A second problem with the majority judgment is that it does not identify the proper perspective for looking at a legislative scheme when assessing whether provisions — which are essentially out of place in a piece of provincial legislation — are acceptable on the basis of the incidental power. The perspective you adopt plays an important role in determining what you see. The broader your perspective, the more likely you are to see the provisions under scrutiny as necessary or incidental to a broader scheme. As you narrow your focus, the

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less likely the provisions are to appear necessary and redeemable. If you fixate exclusively on the problematic provisions, then the possibility of incidentally or necessity disappears altogether. The next section looks at how this problem of perspective can best be approached.

(iii) Approaching the incidental power

Comparative law must be used with caution in federalism cases. Each federal system reflects pragmatic and context-specific responses to political power relations in a

140 *DVB Behuising* (supra) at 102.

141 *Ibid.*

142 This result may flow from the fact that the Court was not called upon to decide a simple question of provincial legislative competence using the sections of the Constitution that provide for the incidental power. (The provision dealing with incidental power in the Interim Constitution was IC s 126(2).) Rather it was confronted with a messy case involving high apartheid legislation and transitional arrangements mediated by both the Interim and Final Constitutions.

particular country.¹⁴³ Each federation creates and responds to its own functional problems. Despite this initial caveat, a number of Canadian cases provide useful heuristic devices for exploring the limits of our incidental power.

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture) involves 'culturally modified trees' which are heritage objects of significance to many of the aboriginal peoples of Canada.¹⁴⁴ The Heritage Conservation Act is a statute of the province of British Columbia.¹⁴⁵ It provides for the protection of heritage objects in the Province and gives administrative discretion to a Minister to consent to the destruction of these artefacts in some circumstances.¹⁴⁶ In *Kitkatla Band*, the Minister had made an administrative decision allowing a logging company to cut down approximately 40 out of 120 culturally modified trees in a specific area.¹⁴⁷

The aboriginal litigants attacked the Heritage Conservation Act on federalism grounds. It was common cause that the Act was within provincial jurisdiction: 'property and civil rights' fall within the sphere of provincial legislative competence. However, in Canada, 'Indians and Land reserved for the Indians' is a national legislative competence.¹⁴⁸ Hence the litigants argued — unsuccessfully — that the power to allow for the removal or alteration of Native American cultural objects was beyond the scope of the provincial legislature. They contended that the Act should be struck down 'to the extent that it [allowed] for the alteration and destruction of *native* cultural objects.'¹⁴⁹ The province argued that the Heritage Conservation Act was within provincial competence and that 'any intrusion into federal jurisdiction [was] simply incidental and constitutionally permissible.'¹⁵⁰

In Canadian jurisprudence, subject classifications for division of powers purposes are known as 'pith and substance' analyses. Identifying the 'pith and substance' of a law involves finding 'the dominant or most important characteristic'

143 *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at paras 21-23.

144 *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC, 31 [2002] 2 SCR 146 ('*Kitkatla Band*').

145 R.S.B.C 1996, c. 187.

146 *Kitkatla Band* (supra) at para 37.

147 Ibid at para 64.

148 Ibid at para 29.

149 Ibid at para 1 (emphasis added).

150 Ibid at para 37.

of that law.¹⁵¹ Canadians also speak of 'pith and substance' describing the dominant purpose of a particular provision.¹⁵² The opposing parties in *Kitkatla Band* wanted to employ different methods of analysis. As Judge LeBel stated:

There is some controversy among the parties to this case as to the appropriate approach to the pith and substance analysis where what is challenged is not the Act as a whole but simply one part of it. The appellants [the band] tend to emphasize the characterization of the impugned provisions outside the context of the Act as a whole. The respondents and interveners take the opposite view, placing greater emphasis on the pith and substance of the Act as a whole. The parties also disagree as to the order in which the analysis should take place: the appellants favour looking at the impugned provisions first, while the respondents and interveners tend to prefer to look at the Act first.¹⁵³

This statement clearly illustrates the need for a relatively straightforward and uncontroversial method of analysis. What must be incidental or necessary to what? The Canadian Supreme Court has set out a useful analytical framework in *General Motors of Canada Ltd v City National Leasing*.¹⁵⁴

First, the *City National Leasing* test requires the court to inquire into the subject matter of the specific provisions that are being challenged (hereafter referred to as the 'impugned provisions').¹⁵⁵ The impugned provisions need to be interpreted naturally in context, but after that, their role has to be looked at in isolation for the purpose of characterisation.¹⁵⁶ If the impugned provisions 'can stand alone' because they are within the powers of the particular legislature, they need 'no other support'. If not, then it is necessary to continue with the analysis.¹⁵⁷ If the impugned provisions intrude into the exclusive legislative sphere of another level of government, then it is necessary to establish the extent of the incursion. That is, the court must determine how invasive the intrusion is.¹⁵⁸

Second, the Court must ask whether the impugned provision is part of a broader legislative scheme that is within the competence of the relevant legislature. Identifying the scheme is a conceptual matter. It may include the entire statute. It may only consist of part of a statute that could have been enacted alone and

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can be severed from the rest of the law.¹⁵⁹ In some cases a regulatory scheme may embrace a number of statutes intended to govern different aspects of a common field.

151 PW Hogg *Constitutional Law of Canada* (Vol 1 3 ed, 1992) § 15.7. See also RL Watts *Federalism: The Canadian Experience* (1997) 45-46:

Many statutes have one feature or aspect that comes under a provincial, and another under a federal, head of power. For example, a law prohibiting careless driving has a criminal aspect, which is federal, and a highway regulation aspect, which is provincial. The courts make a judgment as to the most important feature of the law and characterize the law by that primary feature- its 'pith and substance.

152 See *Kitkatla Band* (supra) at para 58 and *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 58 DLR (4th) 255 ('*City National Leasing*').

153 *Kitkatla Band* (supra) at para 55.

154 *City National Leasing* (supra) at para 54, available at http://www.lexum.umontreal.ca/csc-en/pub/1989/vol1/html/1989scr1_0641.html para 54.

155 *Kitkatla Band* (supra) at para 58.

156 *City National Leasing* (supra) at para 42.

157 *Kitkatla Band* (supra) at para 57. See also *City National Leasing* (supra) at para 44.

158 *City National Leasing* (supra) at para 46.

159 *Ibid* at para 48. Dickson CJC, for the *City National Leasing* Court, wrote:

If the legislative scheme is within the competence of the relevant legislature, then 'the relationship between the particular impugned provision and the scheme' comes under scrutiny. The court then asks '[h]ow well [is] the provision integrated into the scheme of the legislation and how important [is it] for the efficacy of the legislation'?¹⁶⁰

At this stage the Canadian courts engage in a proportionality exercise. Earlier we asked how far the impugned provision pushes the boundaries of the appropriate legislative sphere. The more the provision encroaches, the more essential the provision must be to an otherwise valid legislative scheme in order for it to be considered incidental. The less it intrudes, the easier it will be to persuade a court that it should survive.¹⁶¹

(iv) Is there a point beyond which the incidental power cannot go?

The Canadian approach seems sensible. Moreover, it coheres with the majority judgment in *DVB Behuising*. When interpreting the scope of the incidental power, it seems best to start with a broad assumption that almost any impugned provision can be saved (and found to be 'legislation with regard to a matter listed in Schedule 4' in terms of FC ss 44(3) and 104(4)) if the above tests are satisfied.

RS6, 04-14, ch15-p31

This assumption is justified because any incidental power automatically operates in an area of *de facto* provincial and national concurrency. When a court needs to draw a line beyond which a provincial legislature cannot go, it is not appropriate to limit the scope of the incidental power. FC s146 (which regulates conflicts between provincial and national legislation) is the more appropriate place for the analysis.¹⁶²

(v) Another approach

A regulatory scheme may be found in only a part of the act in question, if that part can stand alone, or it may found in the entire act. The portion of the statute necessary to establish the existence of a regulatory scheme will not always be easy to discern. In those instances where a challenged provision, taken alone, comprehends a complete regulatory mechanism, the provision itself constitutes the appropriate starting point. In other cases, it will be necessary to examine the entire statute before a regulatory scheme may be identified. Once the presence of a regulatory scheme has been shown it will be necessary to determine its constitutional validity.

Ibid. See also *Abahlali Basemjondolo Movement SA v & Another v Premier of Kwazulu-Natal & Others* [2009] ZAKZHC 1, 2009 (3) SA 245 (D), 2009 (4) BCLR 422 (D&CLD), [2009] 2 All SA 293 (D) at para 32 (High Court warns against pulling sections out of an Act and considering them in a 'piecemeal fashion'.)

160 *City National Leasing* (supra) at para 49.

161 *Ibid* at para 53. Dickson CJC wrote:

In numerous cases courts have considered the nature of the relationship which is required, between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld. In different contexts courts have set down slightly different requirements, viz.: 'rational and functional connection' in *Papp v Papp* [1970] 1 OR 331, *R v Zelensky* [1978] 2 SCR 940, and *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161; 'ancillary', 'necessarily incidental' and 'truly necessary' in *Regional Municipality of Peel v MacKenzie* (supra); 'intimate connection' 'an integral part' and 'necessarily incidental' in *Northern Telecom Ltd v Communications Workers of Canada* [1980] 1 SCR 115; 'integral part' in *Clark v Canadian National Railway Co* [1988] 2 SCR 680; a 'valid constitutional cast by the context and association in which it is fixed as a complementary provision' in *Vapor Canada* (supra); and 'truly necessary' in *R v Thomas Fuller Construction Co* (1958) [1980] 1 SCR 695. I believe the approach I have outlined is consistent with the results of this jurisprudence. These cases are best understood as setting out the proper test appropriate for the particular context in play. It does not attempt to articulate a test of general application with reference to all contexts. Thus, the tests they set out are not identical. As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.

Ibid.

162 See V Bronstein 'Conflicts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS5, January 2013) Chapter 16.

Another rule of thumb helps define the scope of the incidental power. Where the 'end' intended by the legislation is competent, the 'means' are likely to be acceptable.¹⁶³

(vi) Scope of the incidental power in relation to FC Schedule 5 competences

No specific constitutional provision regulates powers that are ancillary to FC Schedule 5 competences. However, in *First Certification Judgment*, the Court states:

[T]he provinces would necessarily also be the repository of powers incidental to the powers vested in them in terms of [Schedule 5 of the Final Constitution].¹⁶⁴

The discussion of incidental powers demonstrates that provincial legislatures may sometimes validly legislate in areas of exclusive national legislative competence. The opposite contention, that the national legislature can legislate incidentally in the area of Schedule 5 functional areas, is more controversial. In *Liquor Bill*, Acting Justice Cameron wrote:

Determining the place of section 44(3) in the constitutional scheme, and in particular its relationship to the exclusive provincial legislative competences in Schedule 5, is not free from difficulty. ... On one approach, section 44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into Schedule 5 where this is reasonably necessary for, or incidental to the effective exercise of a Schedule 4 power.¹⁶⁵

The question of the impact of FC s 44(3) on Schedule 5 competences was ultimately left unanswered.

RS6, 04-14, ch15-p32

(d) When is competence tested?

A final question in considering legislative competence is the point at which competence is tested. One argument is that competence is a once-off test that applies at the date that the legislation is passed. For example, legislation that was competent when it was passed cannot later become incompetent. This position coheres with the attitude to assignment taken by a number of commentators when they talk about assignment of legislative powers by the national legislature to the provinces.¹⁶⁶ They argue that even if the national legislature retracts an assignment of its powers, the provincial legislation properly made under the assignment remains valid.

On the other hand, *Johannesburg Metropolitan Municipality (CC)* may be seen as having the opposite effect. In that case the disputed parts of a national Act were passed when the interim Constitution was in force and powers of different levels of government were divided along different lines. The Constitutional Court simply decided to deal with the constitutionality of the legislation in terms of the Final Constitution, the Constitution in force at the time the constitutionality of the Act was raised. The Court took this approach on the basis that even if the legislation was competent under the interim

163 PM Blair *Federalism and Judicial Review in West Germany* (1981) 115. See also LH Tribe *American Constitutional Law* (3rd ed 2000) 798-799.

164 *First Certification Judgment* (supra) at para 244. The *First Certification Judgment* Court also wrote: Although the NT does not specifically authorise provinces to enact legislation authorising the imposition of user charges, such a power would be within the express or implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of an NT sch 4 or 5 competence. It cannot seriously be suggested that provinces cannot pass legislation making provision for a user charge for abattoirs, health services, public transport etc. In so far as charges might be raised which are unrelated to the actual use of services provided, they would be within the general power to impose rates and levies. *Ibid* at para 438.

165 *Liquor Bill* (supra) at para 44.

166 See M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 17.

Constitution, the provisions may have become unconstitutional for federalism reasons when the 1996 Constitution came into force.¹⁶⁷ The impugned legislation was found to violate the local government provisions of the Final Constitution and hence it was unnecessary to examine the legality of the Act under the provisions of the Interim Constitution. It now appears that legislative competence is to be tested in terms of the current Constitution irrespective of when the legislation was passed. This may well be the most tenable position but the case leaves an unsatisfactory sense that this matter, which strikes at the heart of the competence analysis, has not been sufficiently considered by the Constitutional Court.

The answers to these questions are not self-evident. For example, take the case of a legislative provision that is valid by virtue of the incidental power. What happens if that provision is left standing while the rest of the legislative scheme upon which it depends is repealed? Can the hypothetical provision survive on the basis that it was valid at the time that it was originally enacted? It is reasonable to conclude that the provision would be invalidated on the ground that it is no longer 'reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in schedule 4.'¹⁶⁸

167 *Johannesburg Metropolitan Municipality (CC)* (supra) at para 28.

168 FC s 104(4).