

Chapter 16

Conflicts

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146. (1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing —
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
- (c) The national legislation is necessary for —
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.

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

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for

resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

16.1 Introduction

(a) Textual background

The Final Constitution¹ allocates legislative powers between central and provincial governments on the basis of the subject matter of the legislation. According to the Final Constitution, the nine provincial legislatures in South Africa are entitled to legislate on a number of subjects listed in FC Schedule 4.² FC Schedule 4 contains areas of concurrent national and provincial legislative competence. As a result, both Parliament and the provincial legislatures may pass legislation on these topics.³ This chapter focuses on conflicts between national legislation and provincial legislation in functional areas listed in Schedule 4.

As we shall see, the Final Constitution contemplates four discrete phases of Schedule 4 conflict's analysis. First, one must establish the competence of the national legislation. Second, the provincial legislation must be subjected to the same test.⁴ Third, once both the national legislation and the provincial legislation have passed the test of competence, one must establish whether a conflict between them exists. The latter question is called 'the threshold question'. Fourth, if the answer to the threshold question is affirmative, then the analysis proceeds to FC s 146.⁵

(b) Political background

Although the vast and important areas of concurrent legislative competence listed in FC Schedule 4 create the theoretical possibility of frequent significant legislative conflict, the political reality is rather different. At the time of writing [2013], the African National Congress ('ANC') exercises control over eight of the nine provinces.

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

2 FC s 104(1)(b)(i).

3 The national legislature has the power in terms of FC ss 44(1)(a)(ii) and 44(1)(b)(ii) while the provincial legislature has the same power in terms of FC s 104(1)(b)(i). Schedule 4 powers are also deemed to include incidental powers. FC s 104(4) reads: '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) provides: '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.' For detailed treatment of the incidental power, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

4 For a discussion of competence, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

5 See, generally, G Devenish 'Federalism Revisited: The South African Paradigm' 2006 (1) *Stellenbosch Law Review* 129, 154-157.

The Western Cape is currently in the hands of the Democratic Alliance ('DA'). In 2001, when the ANC dominated only seven of the nine provinces, Nico Steytler observed:

[T]he dominance of the ANC ... does not result in the passing of competing [provincial] legislation. This party has a very centralised system of political governance... .
Questions of

RS 5, 01-13, ch16-p3

policy and its implementation through legislation are dealt with in a closed party hierarchy rather than in the open political and legislative processes. ⁶

ANC dominance, and the centralization of power within the party's National Executive Committee, has meant that when the central government issues instructions, most provincial executives and legislatures simply accede to its demands. ⁷

Another dimension of the problem is that the provincial legislatures are simply not performing their expected roles. ⁸ In 2004, the DA Provincial Leader of the Free State, Andries Botha, was quoted as saying: 'The legislature is not functioning at all. It's comatose.' ⁹ Another commentator asked whether the Eastern Cape Provincial Legislature, with a budget of R95 million as of 2005, served any purpose at all:

To what extent does it serve any real function other than generally being a rubber stamp for executive action? Certainly it is a comfortable billet with a certain amount of somewhat ill-founded status, but given the socio-economic challenges facing the Eastern Cape, should it not perhaps be reduced to a part-time institution? ... The bulk of the laws are passed in Cape Town and apply to South Africa as a whole. There is very little that the provincial legislature can do by way of passing laws. ¹⁰

Little has changed in the intervening years.

Because of the centripetal force and the centrifugal force exerted by the ANC's NEC through the central government, constitutional provision for legislative conflict has created little dynamic tension between the national government and the provinces. This state of affairs will only change if and when control over the citadel becomes more hotly contested.

6 N Steytler 'Concurrence and Co-operative Government: The Law and Practice in South Africa' (2001) 16 *SA Public Law* 241, 245. See also S Choudhry "'He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1 (Discusses the consequences of continued ANC dominance for constitutional law generally); H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision Making' (2010) 3 *Constitutional Court Review* 1.

7 See R Simeon & C Murray 'Multi-level Governance in South Africa' in B Berman, D Eyoh & W Kymlicka *Ethnicity and Democracy in Africa* (2004) 277, 288-89.

8 See Simeon & Murray (supra) at 290-91.

9 See J Rademeyer & S Ndlangisa 'Free State Governance Crisis Reaches Breaking Point' *Sunday Times* (14 November 2004).

10 P Cull 'All Has Been Said and Done before in Bisho' *Eastern Province Herald* (6 December 2005).

How might our conflicts jurisprudence shape 'cooperative' federal relationships in a more politically polycentric South Africa? The courts could play a dual role in relation to conflict resolution:

First, they should continue to support the provinces. Provincial diversity needs to be viewed as a healthy manifestation of democracy. (Regional differences have already played an important role in the dispute about the distribution of nevirapine to combat mother-to-child transmission of HIV/AIDS.) Second, they need to protect national unity and the indivisibility of the Republic. This chapter suggests that the courts should retain a residual power to invalidate protectionist provincial legislation even in the absence of conflicting national legislation.

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16.2 Overview of legislative conflict in areas of concurrent competence

Four questions have to be answered when solving problems of legislative conflict in terms of FC Schedule 4:

1. Is the national legislation competent and valid? If yes:
2. Is the provincial legislation competent and valid? If yes:
3. Is there conflict between the national and the provincial legislation? If yes:
4. Does the national legislation prevail in terms of FC s 146?

The first two questions deal with legislative competence. It is logically impossible to have conflict in the absence of competent and valid provincial legislation and national legislation.¹¹ Once both pieces of legislation have independently passed the test of competence, it is necessary to establish whether a conflict between them exists. (I call question 3 the 'threshold question'.) Only once 'conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4'¹² has been established, can the fourth question engaging FC s 146 be asked.

But it is not so easy to establish genuine conflict. Indeed, FC s 150 is designed to avoid such a finding.¹³ It reads:

11 For a more detailed examination of this issue, see V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. It is also important to keep in mind that FC s 146 applies only to conflicts in FC Schedule 4 areas. See *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC), [2012] ZACC 7 at para 50 ('Section 146 finds no application to the present dispute for the reason, among others, that the MPRDA is not legislation falling within a functional area listed in Schedule 4 of the Constitution.').

12 FC s 146(1).

13 Compare the much softer language of other interpretation clauses in the Final Constitution. For example, FC s 39 reads:

'(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

Iain Currie and Johan de Waal argue that:

A court will, and indeed must, prefer an interpretation of legislation that avoids conflict, rather than one that results in conflict The Constitutional provisions relating to conflict only apply when it is *not possible* to resolve the conflict through interpretation.

¹⁴

RS 5, 01-13, ch16-p5

FC s 150 can be read as yet another manifestation of the spirit of reconciliation, compromise, harmonization and co-operation that marked South African politics in the 1990s. It could also be read as consistent with Chapter 3 of the Final Constitution's commitment to co-operative government.¹⁵

FC s 150 may not, however, be as innocuous as it seems. The routine harmonization of conflicting legislation could have deleterious effects. Later on in the chapter, I offer a gloss on FC s 150 that coheres with my preferred reading of the Final Constitution's approach to legislative conflict.

16.3 The threshold question: when does conflict exist between national legislation and provincial legislation?

(a) A preliminary issue: the relevance of comparative jurisprudence

The Constitutional Court has warned against over-reliance on comparative law in federalism cases.¹⁶ The Court is justified in being cautious because regional arrangements are generally pragmatic responses to specific political pressures, and basic principles of federalism differ dramatically from country to country.¹⁷

(b) Test for direct conflict

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

14 I Currie & J de Waal *The New Constitutional and Administrative Law: Volume 1* (2001) 221.

15 See S Woolman and T Roux 'Co-operative Government and Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, July 2009) Chapter 14.

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

17 Vicki Jackson points out that:

How do we establish that conflict exists between national legislation and provincial legislation? The most tempting solution is a simple test for direct conflict. The test asks whether both the national legislation and the provincial legislation can be obeyed at the same time. Citizens have a duty to obey the laws promulgated by both their national legislature and their provincial legislature. Consequently '[w]here the two laws can be obeyed at the same time there is no inconsistency' or conflict.¹⁸

The Constitutional Court has already employed the test for direct conflict. In *Certification of the Constitution of the Province of Kwazulu-Natal, 1996*,¹⁹ the Court had to deal with inconsistencies between a Bill of Rights in the proposed provincial Constitution of KwaZulu-Natal and the Bill of Rights in the Interim Constitution.²⁰ The Court wrote:

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For purposes of the present inquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either. There is no principal or practical reason why such provisions cannot operate together harmoniously in the same field.²¹

The Court has thus far limited use of the direct conflict test to the specific context of certification of a provincial constitution.²²

The test for direct conflict minimizes conflict. This effect emerges clearly from Higgins J's defence of the test in the Australian case of *Clyde Engineering*. In his dissenting judgment, Higgins J writes:

When is a law 'inconsistent' with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. When two Legislatures operate over the same territory and come into collision, it is necessary that

[F]ederalism questions are particularly likely to raise difficult comparability problems, for two related reasons. First, federalism arrangements are, by nature, interdependent and complex package deals. Second, these packages are likely to be the result of specific, historically contingent compromises, serving as a practical rather than a principled accommodation of competing interests and thus arguably less amenable to transnational understandings.

V Jackson 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *International Journal of Constitutional Law* 91.

- 18 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 504 ('Clyde Engineering').
- 19 *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) ('Certification of the Constitution of the Province of KwaZulu-Natal, 1996').
- 20 Constitution of the Republic of South Africa, Act 200 of 1993 ('IC' or 'Interim Constitution').
- 21 *Certification of the Constitution of the Province of KwaZulu-Natal, 1996* (supra) at para 24.
- 22 The allusion to operating 'harmoniously in the same field' also shows that the Court does not regard direct conflict as the only possible test. For a discussion of field pre-emption, see § 16.3(c) infra

one should prevail; but the necessity is confined to actual collision, as when one legislature says 'do' and the other says 'don't.' But in the present case the [Federal] award says 'don't work the employee beyond 48 hours, 'and the State law says, as to the State citizens, 'don't work the employee beyond 44 hours. 'By obeying the State law the award is obeyed also. ²³

In the same case, Powers J makes a similar point in the following hypothetical example:

If 9s. a day is allowed by a State law as a minimum wage and 10s. a day by a Federal award as a minimum wage, they are not inconsistent laws and both can be obeyed, because the payment of a minimum wage of 9s. required by the State Act is obeyed by paying 10s. under the Federal award. In the same way, if a State law fixes 10s. a day as a minimum wage and the Federal award fixes 9s. a day as a minimum wage..., they are not inconsistent laws and both can be obeyed by paying 10s. minimum under the State Act. That being the case, if the State Act in question only adds one-eleventh to the Federal minimum rate (12s. instead of 11s.), how can it be held to be inconsistent with the Federal award in question, as both orders can be obeyed by paying 12s.? The test usually adopted by this and other Courts is whether both laws can be obeyed. ²⁴

In both of the fact patterns described above the provincial (or state) legislature has a more benign policy towards employees than the national legislature. Exponents of the test for direct conflict find no conflict in these cases. The direct conflict test requires employers in the province to comply with the more regulated environment because both laws can be obeyed. However, while the direct conflict

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test minimizes legislative conflict, it also tends to maximise regulation. For example, it often conduces to multiple licensing requirements for businesses. ²⁵

If such cases were to arise in South Africa, and one assumed (perhaps erroneously) ²⁶ that the legislation in question was competent, the test for direct conflict would screen out the inconsistencies. In the absence of direct conflict, the questions posed by FC s 146 would never be reached. The substantive issues implicated in raising the minimum wage or lowering working hours in one region of the country would remain constitutionally invisible. (Considerations that relate to the national government's conscious trade-off between minimum conditions of employment and unemployment would be deemed irrelevant.) And they would

23 *Clyde Engineering* (supra) at 503.

24 *Ibid* at 517.

25 On the effect of the direct conflict test on multiple licensing requirements by both national government and the relevant provincial government, see *A Raptis and Son v State of South Australia* (1977) 138 CLR 346, 357 ('The State Act forbids any person to take fish unless he holds a licence under the State Act. The Commonwealth Act forbids any person to engage in fishing unless he holds a license under the Commonwealth Act. It is of course possible to obey both laws without disobeying either, by obtaining the licences necessary under both Acts, but since *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 that has not been the test of the inconsistency of the two laws.') For a recent treatment of this problem, see *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453, *Commercial Radio Coffs Harbour Limited v Fuller & Another* (1986) 161 CLR 47. For more South African jurisprudence on multiple licensing requirements in the context of our quasi-federalist state, see § 16.3(d)(i) infra.

26 See V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

remain invisible despite the fact that FC s 146 was created to deal with precisely these types of concerns.

The following hypothetical example should help to illustrate the potential problem with the test for direct conflict. Imagine that a legislative scheme could be depicted as a spider's web with each individual provision comprising a strand of the web. A laboratory technician cuts every strand of silk individually and organizes each one thematically. He then pastes each strand onto the bottom of a card so that the fragments of web take the form of a bar graph. Eventually all the rules in the legislative scheme are shown on a bar graph with the vertical lines reflecting legal obligations. Imagine further that all of the pieces of extant national legislation are charted on one graph while all extant pieces of provincial legislation in the same field are charted on to another. What happens when the national grid is superimposed on the provincial grid?

The test for direct conflict tells us that where national and provincial legislation overlap, they should be obeyed at the same time. Where legislative provisions overlap, the bars on the new superimposed graph would often automatically lengthen or the longer lines would automatically prevail. (I will argue later that it is precisely this lengthening that conduces to over-regulation.) In cases where the lines on the grid conflict, the Final Constitution tells us that FC s 146 would be used to determine which legislative provision should prevail. Either the national line or the provincial line on the bar graph would be chosen. In cases of conflict, citizens would never be expected to conform to an elongated combination of the two lines. (In the USA or Australia, the national lines on the grid would normally displace the conflicting provincial lines.)

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The test for direct conflict seems to resonate with FC s 150 by ensuring that 'any reasonable interpretation of the legislation ... that avoids a conflict' is preferred 'over any alternative interpretation that results in a conflict'.²⁷ The direct conflict test read together with FC s 150 would ensure that the minimum number of cases would undergo scrutiny in terms of FC s 146. From one point of view, this non-interventionist approach possesses the virtue of keeping the judiciary out of politics. On the other hand, the direct conflict test tends to function in a manner that leads to the proliferation of regulation in a mechanical, unconsidered manner. The direct conflict test is also difficult to square with the FC s 146 imperative that provincial legislation should prevail unless the national legislative override is specifically justified.

Another potential problem with the direct conflict test arose elliptically in *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*.²⁸ The applicants mounted a challenge to s 16 of the KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act²⁹ ('the KZN Slums Act') on the basis that the section's procedures for eviction violated the Constitution and were in conflict with the Prevention of Illegal Eviction from and Unlawful

27 FC s 150. For a correct finding on absence of conflict, see the facts of *Bingo (KZN) (Pty) Ltd v The Premier, KwaZulu-Natal Province* [2008] 4 All SA 416, 420G (N).

28 2010 (2) BCLR 99 (CC), [2009] ZACC 31.

29 Act 6 of 2007.

Occupation of Land Act³⁰ ('PIE'). Justice Yacoob (dissenting) interpreted s 16 of the KZN Slums Act benignly. On his account, both acts conformed to the Constitution and the KZN Slums Act incorporated the principles of PIE.³¹ He therefore avoided the possibility of a conflict between the provincial and national laws. Yacoob J's interpretation relied on two basic premises. First, legislation should be interpreted in a way that conduces to constitutionality.³² Second, the KZN Slums Act expressly referred to PIE. Section 16 therefore incorporated the protections given to illegal occupiers by PIE. FC s 150 was irrelevant because the express mention of PIE in the KZN Slums Act allowed the two to be reconciled. The majority never reached the question of conflict between the Slums Act and PIE because it found s 16 of the KZN Slums Act to be unconstitutional.

However, the exchange between Moseneke DCJ's and Yacoob J foreshadows the type of problems that could easily arise when applying FC s 150. Moseneke DCJ found Yacoob J's interpretation of the Slums Act 'excessively strained' and 'intrusive'. He held that 'the rule of law requirement that the law must be clear and ascertainable' and 'separation of power considerations' do not allow courts to 'embark on an interpretative exercise which would in effect re-write the text under consideration'.³³ The majority cautioned courts against bending over

RS 5, 01-13, ch16-p9

backwards to rescue legislation — whether from unconstitutionality, or FC s 150 conflict — by interpretive means. Even the direct conflict depends, ultimately, on the proper or 'reasonable interpretation' of the two statutes. The questions of 'reasonable interpretation' will occasion further debates regarding the application of FC s 150.³⁴

(c) Pre-emption

What are the alternatives to the test for direct conflict? Pre-emption — known in the US as 'field pre-emption'³⁵ and in Australia as 'covering the field'³⁶— is another way of establishing whether conflict exists in a concrete situation.

30 Act 19 of 1998.

31 His approach is similar to that adopted by Tshabalala JP in the High Court. *Abahlali Basemjondolo Movement SA v and Another v Premier of Kwazulu-Natal and Others* 2009 (3) SA 245 (D), 2009 (4) BCLR 422 (D), [2009] 2 All SA 293 (D), [2009] ZAKZHC 1.

32 FC s 39(2) read with *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), [2000] ZACC 12 at para 23.

33 *Abahlali Basemjondolo* (supra) at paras 123-125.

34 For more on the limits of statutory interpretation, see M Bishop & J Brickhill "'In the Beginning Was the Word": The Role of Text in the Interpretation of Statutes' (2012) 129 SALJ 681. See also *National Credit Regulator v Opperman and Others* [2012] ZACC 29 (Contains fascinating debate between Van der Westhuizen J (majority) and Cameron J (minority) on how to interpret a vague or meaningless statute); and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), [2012] 2 All SA 262 (SCA), [2012] ZASCA 13.

35 See LH Tribe *American Constitutional Law* (3rd Edition, Volume 1, 2000) 1172 ff.

Pre-emption is a fairly indirect technique for determining whether legislative conflict exists in a specific situation. It is, at bottom, an approach to statutory interpretation. Suppose that, in some imaginary country, the national legislature passes a competent National Housing Act. It passes the National Housing Act despite the fact that one of the provincial legislatures has already passed its own valid Housing Act. In systems that employ a pre-emption doctrine, the adjudicator will ask two questions that should determine whether the national legislature intended to cover the field when it passed the National Housing Act. Did the national legislature intend to regulate the entire area of 'housing' comprehensively and exclusively? Alternatively, did the national legislature intend to allow the provincial legislature to co-regulate the area so that provincial provisions could augment the national legislation?

In the USA and Australia, the pre-emption doctrine is based on the premise that competent national legislation automatically overrides conflicting provincial legislation. Hence it is only relevant to ask about the intention encoded in the national legislation. If the national legislature evinced an intention to cover the field, then the provincial legislation is subordinate.

However, there is, in fact, nothing automatic about pre-emption. The approach only applies where the national legislature expresses or implies its intention to cover the field. In the United States, the courts display some 'reluctance ... to infer pre-emption in ambiguous cases'.³⁷ State (provincial) action will generally only be pre-empted 'where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'.³⁸

RS 5, 01-13, ch16-p10

What happens if a court finds that the national legislature did have an intention to cover the field and exclude provincial legislation in the area? Once there is an intention to cover the field, the national regulation can be visualized as a beautiful, intact spider's web. All the strands of the spider's web are significant. The spaces between the strands that give the web its shape are seen as architecturally significant and deliberate. The web covers the legislative field and bits of provincial legislation are not allowed to randomly poke through and damage or disrupt the spider's web. The web is to be viewed as seamless, and provincial legislation in the area must be rendered dormant or invalid.

Pre-emption is not a universally popular doctrine. For instance, it has systematically been rejected by Canadian courts in favour of the test for direct conflict.³⁹ Provincial powers are jealously guarded in Canada and pre-emption is seen as an interpretive approach that increases the power of the national legislature at the expense of the provincial legislatures.⁴⁰ Pre-emption is also perceived by some as granting the judiciary too much discretion with respect to national legislative overrides of provincial legislation.⁴¹ In South Africa, however, the doctrine of 'federal paramountcy' has been displaced by FC s 146. As a result, neither pre-emption nor the test for direct conflict should have any meaningful role to play.

36 See *Clyde Engineering* (supra) at 478-99 (Isaacs J). See also *Ex parte McLean* (1930) 43 CLR 472, 483; K Booker, A Glass & R Watt 1 (2nd Edition, 1998) 293-296; A Murray-Jones 'The Tests for Inconsistency under Section 109 of the Constitution' (1979) 10 *Federal Law Review* 25.

37 Tribe (supra) at 1175.

38 Ibid at 1176 quoting *Hines v Davidowitz* 312 US 52, 67 (1941).

From what has been said, it must already be clear that the doctrine of pre-emption cannot simply be adopted in South Africa. In terms of the Final Constitution, national legislation does not automatically prevail in areas of conflict. Take the following simple example. The treatment of HIV/AIDS falls within the legislative competence of 'health services' listed in FC Schedule 4. Assume that Parliament passes a National HIV/AIDS Act. The Act contains a provision that expressly states that the National HIV/AIDS Act is intended to comprehensively cover the entire field of HIV/AIDS care in South Africa. Despite this statement, the province of Mpumalanga passes its own HIV/AIDS statute. How would such a situation be analyzed? Assuming that Parliament's express intention to cover the field passes constitutional muster in the first place,⁴² the effect of covering the field would be to create a conflict between the entire Mpumalanga HIV/AIDS Act

RS 5, 01-13, ch16-p11

and the national legislation. In the USA or Australia, the national legislation would automatically prevail. In South Africa, the conflict would have to be resolved using FC s 146.

(d) How should the question of a conflict between provincial legislation and national legislation be handled under the Final Constitution?

I have argued that the strict test for direct conflict is too crude a measure for establishing whether legislative conflict exists. Long-term use of the test (in a more politicized federalist environment than the one that exists at the moment) conduces to mechanical over-regulation. It also filters out precisely the type of case that FC s 146 was designed to tackle. Although no coherent rationale for defending the direct conflict test in South Africa exists, one could argue that FC s 150 requires its use.⁴³

39 See P Hogg *Constitutional Law of Canada* (3rd Edition, RS 1, 2004) 16-8, 16-13. See also E Colvin 'Legal Theory and the Paramountcy Rule' (1979) 25 *McGill Law Journal* 82; J Leclair 'The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity' (2003) 28 *Queen's Law Journal* 411, 420-21 (Argues that field pre-emption has recently become part of Canadian law.) I doubt whether the cases cited really back up the argument. For example, in my view, *Husky Oil Operations Ltd v Minister of National Revenue* [1995] 3 SCR 453 reads more like a case of direct conflict than one of field pre-emption.

40 See Leclair (supra) at 420-421.

41 Ibid.

42 The competence of such legislation would be questionable because health services are explicitly included in the list of concurrent legislative competences. One could even take the problem further and imagine a situation that would be unthinkable in the US or Australia. Could a province successfully evince an intention to cover the field in an area of concurrent legislative competence? Would such an intention create explicit conflict that would have to be resolved in terms of FC s 146? See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill 1995; In Re the Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC), [1996] ZACC 15 at para 36.

43 In this way, South Africa differs significantly from Canada. The structure of Canadian constitutional law ensures that the test serves as a bulwark that protects provincial powers.

The doctrine of pre-emption is not an antidote to the test for direct conflict. Advocates of pre-emption have the tools to protect both the coherence of a legislative scheme and the spaces deliberately left open by a legislature. However, they face profound conceptual difficulties because the Final Constitution provides for concurrent legislative competence in the absence of a doctrine of 'federal paramountcy'.⁴⁴

There is a third way. Certain interpretive methods can be used to assist a court charged with establishing whether legislative conflict exists. South African jurists, practitioners and academics need to be taught how to 'hear' legislative silence as deliberate in appropriate circumstances.

(i) Protecting deliberate regulatory space

Like spaces in a spider's web, regulatory gaps sometimes reflect a deliberate pattern: a structured silence. On this approach, silence in national legislation is capable of having sufficient texture to conflict with provincial legislation. Gaps in provincial legislation can also conflict with Acts of Parliament. (Once a conflict is found, FC s 146 analysis can take place.)

This method differs markedly from the direct conflict test. For proponents of direct conflict, regulatory spaces are simply holes. On their view, cluttering up the space is always preferable to precipitating conflict. The following paragraphs offer a few examples of the benefits associated with my theory regarding protected regulatory space.

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Assume that the national legislature passes legislation requiring businesses that provide literacy training to be properly accredited. The accreditation process is complex and s 4 of the Act exempts small and micro-enterprises from the requirement. One day the Limpopo legislature passes a law requiring small and micro-enterprises to gain provincial accreditation after undergoing a procedure similar to the one found in the national legislation. Is there conflict between the national legislation and the provincial legislation with regard to small and micro-enterprises? Using the direct conflict test, one could argue that no conflict exists between the national exemption and the provincial accreditation requirement. They can both be obeyed at the same time. An alternative interpretation would treat the national statute's regulatory space as deliberate. Section 4 intentionally creates a regulatory gap for small and micro-enterprises. Thus, the national statute conflicts with the provincial statute in a manner that requires resolution in terms of FC s 146.

Imagine that the national government introduced measures to 'streamline' Environmental Impact Assessments (EIAs) and fast-track 'small, non-destructive projects' so that they could get official approval more easily.⁴⁵ Crispian Oliver, the Director-General of the national Department of Environment was quoted as saying: 'We are trying to unclog a system that has virtually ground to a halt. Some developers ... wait three years for their plans to be approved.'⁴⁶ Some

44 Rassie Malherbe argues that pre-emption is not part of South African law. See R Mahlerbe 'The Role of the Constitutional Court in the Development of Provincial Autonomy' (2001) 16 *SA Public Law* 255, 271-272.

45 See *Business Report* 'Ministry Proposes Changes to EIA Rules' (June 25 2004), available at www.busrep.co.za/general/print_article.php?fArticleId=2126649&fS (accessed on 21 April 2006).

environmental groups expressed displeasure at this loosening up of the existing regulatory scheme.

Moving again from fact to fantasy, imagine that an environmental group successfully lobbies the KwaZulu-Natal provincial legislature to pass a new law subjecting small projects to special environmental scrutiny at the provincial level. Is there conflict between the national legislation and the provincial legislation? It's patently irrelevant that both the national legislation and the provincial legislation can be obeyed at the same time. The national Department is attempting to prevent over-regulation. The KwaZulu-Natal legislation may constitute over-regulation. A clear conflict between the 'purpose' of the national legislation and the 'purpose' of the provincial legislation exists. Of course, a direct conflict would obviously exist if Parliament explicitly stated in the legislation itself that it supercedes all other pieces of legislation. However, even in this hypothetical example, a clear conflict exists, qua purpose, irrespective of whether a specific provision in either piece of legislation expressly creates that conflict. The conflict between national ends and provincial goals needs to be resolved using FC s 146.

It is also possible for spaces in provincial legislation to conflict with specific provisions in national legislation. Imagine South Africa had no comprehensive national legislation requiring EIAs. The Western Cape legislature (which finds itself in an excellent position to evaluate the trade-off between development and environmental control in that province) passes a new Environmental Management Act that requires EIAs for a range of projects. The Act provides

RS 5, 01-13, ch16-p13

that promoters of certain types of small project do not have to apply for consent from the Department. At a later date, the national legislature passes a much more comprehensive Environmental Protection Act. The latter Act requires very rigorous EIAs for all small developments. In this case, one could argue that the gaps in the Western Cape legislation that allow some small projects to proceed without scrutiny conflict with the National Environmental Protection Act. This conflict exists irrespective of whether promoters of small projects can comply with both regulatory systems at the same time. A finding that a conflict exists is a good result because such a conflict is just the type of issue that should be considered under FC s 146.⁴⁷

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Judges open to the possibility that some regulatory space should be defended possess the tools within our constitutional conceptual framework to undertake the type of analysis that the doctrine of pre-emption affords courts in other systems. However, given the structured silence of a regulatory space, a finding that the space reflects a deliberate regulatory space would have to be the result of an interpretive exercise specific to the individual case.

Some evidence exists for the proposition that the Constitutional Court recognises the value of maintaining regulatory spaces. As discussed earlier,⁴⁸ the *Abahlali Basemjondolo* Court was confronted with a potential conflict between a provincial statute and a national statute regulating evictions. The majority never reached the question of conflict because it found the offending provision of the provincial law — s 16 — unconstitutional. There may, however, be a subtle indication in the majority judgment that the Court has some sympathy for the view that in the correct set of circumstances a 'carefully established' legislative framework by one sphere of government can overcome the need to assess whether a conflict even exists, let

alone which piece of legislation ought to be given preference. As Deputy Chief Justice Moseneke writes:

There is indeed a dignified *framework* that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework. Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives. The compulsory nature of section 16 *disturbs this carefully established legal framework* by introducing the coercive institution of eviction proceedings in disregard of these protections.⁴⁹

While the Court was not engaged in conflict analysis, the value it places on a 'carefully established legal framework' suggests that it recognizes the danger of over-regulation.

(ii) Finding inconsistency where the 'limits are shifted'⁵⁰

47 Although overregulation should be avoided, instances obtain in which it is completely appropriate for companies to have to contend with different licensing requirements in different spheres of government. Two cases — *Maccsand* and *Wary Holdings* — raise an array of issues surrounding appropriate multiple regulation. (At the same time, the reader should be aware that they turn on findings about municipal executive competence and not questions of national and provincial legislative conflict already surveyed.) In *Maccsand (Pty) Ltd v City of Cape Town and Others* 2011 (6) SA 633 (SCA), [2011] ZASCA 141 ('*Maccsand SCA*'), a mining company had been granted an appropriate mining permit from the national government in terms of the Minerals and Petroleum Resources Development Act 28 of 2002. ('MPRDA'). The court had to decide whether the company also had to obtain re-zoning approval from the municipality under the provincial Land Use Planning Ordinance 15 of 1985. ('LUPO') before it could begin to mine. Plasket AJA held that LUPO and the MPRDA were 'directed at different ends' and hence 'no duplication' existed. *Maccsand SCA* (supra) at para 34. He continued: '[D]ual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle — even if this results in one of the administrators having what amounts to a veto.' Ibid. This position was effectively upheld by the Constitutional Court. *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC), [2012] ZACC 7 ('*Maccsand CC*'). The *Maccsand* Court also dismissed the argument that national legislation and provincial legislation which might give rise to contradictory licensing requirements in different spheres of government amounted to legislative conflict that fell to be dealt with in terms of FC s 146. Ibid at para 51 ('[FC ss 146 and 148] do not apply because there is no conflict between LUPO and the MPRDA. Each is concerned with different subject matter.') In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC), 2008 (11) BCLR 1123 (CC), [2008] ZACC 12, the case turned on the definition of 'agricultural land' in the Subdivision of Agricultural Land Act 70 of 1970. The primary issue was the continued role of the national government in regulating land use in light of the increased role of municipalities in the new constitutional structure. Kroon AJ rejected an interpretation that would limit the national government's role. He argued as follows: 'There is no reason why two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of "agricultural land", the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations.' *Wary Holdings* (supra) at para 80. This judgment can be contrasted with *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA), 2010 (2) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA), [2009] ZASCA 106 at para 1 (Nugent JA correctly had no tolerance for legislative schemes that cause chaos by creating 'parallel authority in the hands of two separate bodies, with ... potential for the two bodies to speak with different voices on the same subject matter'.)

48 See §16.3(b) above.

49 *Abahlali Basemjondolo* (supra) at para 122 (my emphasis).

50 *Clyde Engineering* (supra) at 493.

I have argued that regulatory spaces should sometimes be regarded as deliberate and capable of conflict with other legislation. But take the facts of the Australian case of *Clyde Engineering*.⁵¹ The dispute arose because a full working week in the engineering industry constituted 48 hours in terms of federal (national) law. The New South Wales Forty-Four Hours a Week Act provided that the working week would be forty-four hours.⁵² The effect of the legislation was that workers would earn the same minimum for 44 hours in New South Wales as they would for 48 hours elsewhere in the country. Higgins J, in dissent, applied the direct conflict test. He found no conflict between the New South Wales legislation

RS 5, 01-13, ch16-p15

and the national legislation. Employers in New South Wales could obey both provisions at the same time by giving employees the benefit of the 44-hour week.

In a judgment particularly useful for South African purposes, Knox CJ and Gavan Duffy J rejected the crude direct conflict test without resorting to the doctrine of pre-emption.⁵³ They found a conflict between the national legislation and the New South Wales legislation on the grounds that legislation of this type does not simply 'impose duties' on employers.⁵⁴ It also confers rights:⁵⁵

[O]ne statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.⁵⁶ ... An award that a person shall pay a certain minimum rate of wage involves, in its negative aspect, that he need pay no more.⁵⁷

Isaacs J expresses the same idea in *Clyde Engineering* in somewhat different terms when he says that inconsistency exists where the 'limits are shifted'.⁵⁸

Let us return to the hypothetical example offered above by Powers J. In that intuition pump, the minimum wage set by provincial law is 10s, while the national minimum wage is 9s. The worker's right to receive 10s in one province contradicts the employer's right to pay only 9s under national law. The conflict between the national minimum wage and the provincial minimum wage cannot be cured simply

51 Ibid at 475.

52 *Clyde Engineering* (supra) at 503.

53 Ibid at 474-78. Isaacs J authors a separate judgment on covering the field at 278-99.

54 Ibid at 478.

55 Ibid. See Booker, Glass & Watt (supra) at 292 (The authors call this test the 'denial of rights test' and cast it as a development of the direct-conflict test. It is a subsidiary test in Australia. If my argument is accepted, this test should do much more work in South Africa.)

56 *Clyde Engineering* (supra) at 478.

57 Ibid at 525 (Starke J).

58 Ibid at 493.

by requiring the employer to pay the higher amount. This penetrating example shows that the minimum wage cannot just be conceptualized as an entitlement. It is also deliberately gives employers the legal space to pay *only* the smaller, national minimum. Such limits or entitlements create a different type of regulatory space.

The majority of the Court in *Clyde Engineering* views the specific amount or limit that a legislature sets as significant. It is appropriate that the judiciary treat this limit with respect because the setting of a minimum wage or minimum conditions of employment is a delicate matter. It does not only have an impact on the quality of life of employees. It also has an overall impact on growth and employment in a given sector of the economy. Assuming that this case arose in South Africa (and that the legislation was competent), it would be an appropriate case for resolution

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in terms of FC s 146.⁵⁹ It would be far less sound to find that no conflict exists on the basis of the direct conflict test.

(e) Justifying this approach in the light of FC s 150

The strict version of the direct conflict test has severe limitations and it should not be used exclusively. Judges need to be amenable to seeing legislative silence as deliberate in appropriate cases: they need to be open to finding conflict where 'limits are shifted'.⁶⁰ But can this approach be squared with FC s 150? FC s 150 reads:

When considering an apparent conflict between national and provincial legislation ... every court *must* prefer any reasonable interpretation of the legislation ... that avoids a conflict, over any alternative interpretation that results in a conflict.

A literal interpretation of FC s 150 appears to favour a strict test for direct conflict. The strict FC s 150 test minimizes conflict. However, the section cannot be properly understood in isolation. It needs to be read with FC s 146. FC s 146 anticipates a judiciary that plays an active and substantive role in adjudicating legislative conflict. Eventually judges will have the opportunity to build a body of jurisprudence that clarifies the meaning of FC s 146 and its relationship to FC s 150. However, if FC s 150 is interpreted mechanically, numerous cases will be excluded from principled evaluation merely because there happens to be no finding of direct conflict.

Although the direct conflict test often allows judges to avoid playing politics, in the long term it will hamper the judiciary's ability to discharge its duty to create institutions and doctrines that serve a well-functioning democracy. When the problems discussed above are screened out by a direct conflict approach, judges do

59 Isaacs J treats this approach with scorn. He writes:

If an award fixes the obligation of an employer at (say) £5 as 'the' minimum wage and a State Act then fixes 'the' minimum wage at another sum, whether £4 or £6, there is necessarily inconsistency. Apply the question to the ordinary affairs of life. If I contract to buy a horse for £5, that is the minimum price. I can be compelled to pay that, but not more. It is not the maximum I may give. I can, no doubt, give more if I please. But if some competent authority says I must pay £6 as minimum, it seems to me hardly possible any person could be found to assert there was no inconsistency between my obligation as stated by the contract and my obligation as declared by the outside authority. But that is precisely what is maintained for by the respondent in the present case; that is, that there is no inconsistency. And the reason given is that I could obey both by giving £6.

Clyde Engineering (supra) at 493.

60 *Ibid* at 493.

not have an opportunity to consider the relative merits of 'uniformity and diversity'⁶¹ in important federalism matters. Moreover, given our express commitment to cooperative government, the courts are denied the opportunity consider whether 'one level [or sphere] of government is undermined in its

RS 5, 01-13, ch16-p17

essential functions by the laws of another level of government'.⁶² A direct-conflicts test silences meaningful federalism analysis.

One might contend that identifying a pattern of deliberate legislative silence and finding conflict when limits are shifted requires no more than a nuanced form of interpretation that can take place during the direct conflict test. Such considerations could then be incorporated into the test rather than being regarded as part of an entirely separate approach. Not much turns on this semantic distinction. What matters is that the mode of analysis allows for ventilation of a full array of federalism issues.

16.4 Does the national legislation prevail in terms of FC s 146? Creating a meaningful form of federalism

It is counter-productive to routinely harmonize legislation and thereby preclude FC s 146 analysis from taking place. Furthermore, FC s 146 should not become a means for the increased centralization of power. It should, instead, facilitate 'democratic accountability at the most appropriate level' of government.⁶³

(a) General

FC s 146 'gives preference to provincial legislation, and protects it against national legislation, unless circumstances exist in which a national override can be justified'.⁶⁴ National legislation prevails if 'the substantive requirements of at least one of the override clauses' are met.⁶⁵ In addition, '[a] decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.'⁶⁶ In other words, if a provision of national legislation prevails over Limpopo legislation, the

61 KE 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.

62 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, 261.

63 Ibid at 246.

64 *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), [1996] ZACC 24 ('*Second Certification Judgment*') at para 109.

65 J Klaaren 'Federalism' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, OS, 1996) 5-12.

66 FC s 149.

Limpopo legislation becomes ineffective, but not invalid. If the national legislation were to be repealed, then the conflict would fall away and the Limpopo legislation would automatically be revived.

(i) Language

FC s 146 is formulated in strong language. National legislation will prevail:

- in specific cases of necessity;⁶⁷
- if the national legislation deals with a matter that '*cannot* be regulated *effectively*' by the provinces on an individual basis;⁶⁸

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- in matters that *require* '*uniformity* across the nation' in order to '*be dealt with effectively*';⁶⁹
- to prevent '*unreasonable*' provincial action.⁷⁰

The emphatic language of FC s 146 implies that national override has to be properly justified.⁷¹

(ii) The drafting history

The original version of FC s 146 possessed two major problems that 'weighed heavily' on the *First Certification Judgment* Court when it decided that the 'powers and functions of the provinces in the New [Constitutional] Text as a whole were substantially less than or substantially inferior to their corresponding powers and functions in the Interim Constitution.'⁷²

First, the original FC s 146(4) was rejected by the Constitutional Court because it included a presumption of necessity that would tilt the analysis in favour of the national government in FC s 146(2)(c) analysis. It provided:

National legislation that deals with any matter referred to in subsection (2)(c) and has been passed by the National Council of Provinces, must be presumed to be necessary for the purposes of that subsection.⁷³

67 FC s 146(2)(c).

68 FC s 146(2)(a).

69 FC s 146(2)(b).

70 FC s 146(3).

71 But see *Mashavha v President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 47.

72 Constitutional Principle XVIII.2. See *Second Certification Judgment* (supra) at para 153.

73 *Second Certification Judgment* (supra) at para 152.

The Court found that this presumption might be difficult or even impossible to displace in practice.⁷⁴ Thus it was an unacceptable enhancement of the powers of national government at the expense of the provinces. The Constitutional Assembly responded by jettisoning the presumption in favour of a watered-down FC s 146(4).⁷⁵

Second, the original text of FC s 146(2)(b) — which allowed national legislation to prevail 'in the interests of the country as a whole' — was also held to substantially reduce provincial powers. The Constitutional Assembly redrafted the subsection to reflect the 'more stringent criterion' that 'the national legislation must deal with a matter that, to be dealt with effectively, requires uniformity across the nation.'⁷⁶

The alterations in the language of FC s 146 indicate that provincial legislation should not be lightly regarded. The tone of the two *Certification Judgments* fortifies the view that FC s 146 ought not to become a rubber stamp for centralism.

RS 5, 01-13, ch16-p19

(iii) Function and democracy

The judiciary has, as yet, not had an opportunity to explore the various interpretive questions raised by FC s 146. Given how the courts have responded in the first two decades of constitutional democracy, they are more likely than not to use a functional approach to interpretation when they analyze questions of legislative conflict.⁷⁷ The functional approach to constitutional interpretation is canvassed in the chapter on legislative competence.⁷⁸ In essence, such an approach demands that an appropriate balance be struck between preserving national unity on the one hand and promoting diversity on the other.⁷⁹

How will judges know where exactly to strike that balance? One useful question that courts can ask themselves when confronted with conflicts and competence issues is what outcome will facilitate 'democratic accountability at the most

74 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 at para 336.

75 FC s 146(4) reads: 'When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.'

76 *Second Certification Judgment* (supra) at para 154.

77 V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) § 15.3(a)(ii).

78 *Ibid.*

79 KE 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* (Volume 1, 1994) 143, 145.

appropriate level'.⁸⁰ When confronted with a question of conflicts, courts should be inclined to protect provincial autonomy where 'no collective choice is necessary'.⁸¹

Tucker argues that judges 'assist in the democratic process' by allowing the legislators 'who have the best claim to make the decision' to regulate the contested area of competence.⁸² The most successful judgments in federalism cases manage to keep these axiomatic principles within their line of vision.⁸³

(iv) Form of analysis

In order to arrive at a finding as to which piece of legislation prevails, it is necessary to thoroughly analyse both the national legislation and the provincial legislation. Once a conflict has been established, FC s 146 analysis takes place.

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In *Corrans v MEC for the Department of Sport, Legislation Recreation, Arts and Culture, Eastern Cape Government and Others*,⁸⁴ both the national legislation and the provincial legislation were found wanting.⁸⁵ In deciding whether the National Heritage Resources Act⁸⁶ prevailed over the Eastern Cape Heritage Resources Act,⁸⁷

80 Tucker (supra) at 246-247.

81 Ibid.

82 Tucker (supra) at 259. See also R Malherbe 'Grondwetlike Bevoegdheidsverdeling: 'n Stap Agteruit vir Provinsiale Regering?' *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (KH) (2005) 4 TSAR 862, 869.

83 See for example, *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA), 2010 (1) BCLR 157 (SCA), [2010] 1 All SA 201 (SCA), [2009] ZASCA 106 (Nugent JA); *Maccsand (Pty) Ltd v City of Cape Town and Others* 2011 (6) SA 633 (SCA), [2011] ZASCA 141 (Plasket AJA). See also *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* 2011 (11) BCLR 1181 (CC), 2011 (6) SA 396 (CC), [2011] ZACC 25 (Yacoob J and Cameron J dissenting). For more on the negative consequences of *Premier: Limpopo*, see R Williams & N Steytler 'Squeezing out Provinces' Legislative Competence in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature & Others I & II* (2012) 129 *South African Law Journal* 621. See also J Brickhill & M Bishop 'Constitutional Law' (2009) *Annual Survey of South African Law* 143, 198. Based on the premise that a functional approach to federalism needs to be kept in mind by judges, Brickhill and Bishop criticise *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government and Others* 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 (discussed in the next section) for failing to consider the potentially strong argument that 'those closest — physically and culturally — [to objects and buildings] important to their heritage [should be allowed] to determine their fate'.

84 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 ('*Corrans*').

85 The judgment dangerously dismisses the provincial Act as an 'aberration'. Ibid at para 17. See also Brickhill & Bishop 'Constitutional Law' (supra) at 198 (Criticizing the judgment for failing to closely consider the provincial Act both for purposes of establishing whether conflict existed and also for deciding which legislation should prevail.).

86 Act 25 of 1999.

87 Act 9 of 2003.

the judgment examined the long title of the national Act. The long title states that the Act is designed to promote the following objectives:

To introduce an integrated and interactive system for the management of the national heritage resources; to promote good governance at all levels, and empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations; *to lay down general principles for governing heritage resources management throughout the Republic; to introduce an integrated system* for the identifications, assessment and management of the heritage resources of South Africa; to establish the South African Heritage Resources Agency together with its Council to co-ordinate and promote the management of heritage resources at national level; *to set norms and maintain essential national standards for the management of heritage resources in the Republic* and to protect heritage resources of national significance; to control the export of nationally significant heritage objects and the import into the Republic of cultural property illegally exported from foreign countries; *to enable the provinces to establish heritage authorities which must adopt powers to protect and manage certain categories of heritage resources*; to provide for the protection and management of conservation-worthy places and areas by local authorities; and to provide for matters connected therewith.⁸⁸

The emphasis on the objects of the national Act raises a possible pitfall of FC s 146 analyses: The long titles and preambles of large swathes of national legislation are generally framed in a way that purports to meet the requirements of FC s 146 in cases of legislative conflict. The language of FC s 146 is often imported into Acts precisely for that reason. For purposes of deciding which legislation prevails in conflict cases, it is not enough to show that the Act *purports* to fulfil the requirements for national override in FC s 146. The judgment needs to analyse the content of the legislation carefully in order to show that the Act does indeed do so.⁸⁹

RS 5, 01-13, ch16-p21

(b) Interpreting the constituent clauses of FC s 146

(i) Uniform application of national legislation

In terms of FC s 146(2), only national legislation that applies 'uniformly with regard to the country as a whole' is capable of prevailing over provincial legislation. Jonathan Klaaren has suggested that a law purporting to apply nationally, but crafted to pertain only to a manufacturing process in the Western Cape, may well fail to satisfy the requirement of uniform applicability. Should the province choose to regulate such a matter, its legislation would prevail.⁹⁰

88 *Currans* (supra) at para 10 (emphasis on sections of Act added).

89 This approach follows the lead of *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*, *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), [1996] ZACC 15 at para 19 (Chaskalson P held that If the purpose of legislation is clearly within [IC] 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 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.' In essence, the Court held that a 'provincial legislature would exceed its competence where it enacted legislation purporting to deal with a functional area listed in the said [IC] schedule 6, but the true purpose and effect of which was to achieve a different goal falling outside the functional areas listed in schedule 6.') G Devenish 'Federalism Revisited: The South African Paradigm' 2006 (1) *Stell LR* 129. The same would be true of national legislation which claimed to fulfil the grounds in FC s 146 but in substance failed to do so.

When FC ss 146(2) and 146(3) are read together, it appears that national legislation that is selectively targeted at one or more provinces may not prevail in terms of FC s 146(2). However, selectively targeted legislation may prevail where, in terms of FC s 146(3), it prevents unreasonable provincial action.

(ii) National overrides

(aa) Deference

Who decides whether a matter 'requires uniformity across the nation' to be dealt with effectively⁹¹ or if national legislation is 'necessary'⁹² for specific purposes? The Constitutional Court has held that 'political' questions are objectively justiciable.⁹³ The Court is, however, mindful of the need to treat the subjective intention of the national legislature with caution and respect:⁹⁴

The test in each case is ultimately objective because it is not the subjective belief of the national authority which is the jurisdictional fact allowing the national legislation to prevail over the provincial legislation, but there is inherently some subjective element involved in the assessment of what the interests of the country require or what is necessary. Some deference to the judgment of the national authority in these areas is inevitable.⁹⁵

(bb) Matters that cannot be regulated effectively by individual provinces

In terms of FC s 146(2)(a), national legislation prevails if it 'deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually'. In terms of FC s 146(2)(b), national legislation prevails if it engages matters that require 'uniformity across the nation'.

When interpreting FC s 146(2)(a) and (b), the courts should not advance uniformity for uniformity's sake. While the judiciary has a duty to promote national unity,⁹⁶ that duty does not require identical regulatory regimes throughout the country. In the United States, Regan contends that there is no 'judicially

RS 5, 01-13, ch16-p22

enforceable constitutional interest in uniformity of commercial regulation' and that the 'idea that there is a general interest in uniformity is inconsistent with our decision to have separate states with separate legislative competences, including

90 *Klaaren* (supra) at 5-13.

91 FC s 146(2)(b). Logically FC s 146(2)(a) should be treated in the same manner.

92 FC s 146(2)(c).

93 *Second Certification Judgment* (supra) at paras 155, 157.

94 *Ibid* at para 157.

95 *First Certification Judgment* (supra) at fn 277.

96 See FC s 1.

separate competences to regulate commerce.'⁹⁷ However, since the 1930s, the US Supreme Court has read the US Constitution's Commerce Clause so as to ensure that virtually all national legislation that has an affect on the country's economy — no matter how local — passes constitutional muster.

The Constitutional Court appeared to acknowledge Regan's point in *Mashavha v President of the Republic of South Africa & Others* ('*Mashavha*')

It is inherent in our constitutional system, which is a balance between centralized government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.⁹⁸

However, areas of competence exist in which the need for uniformity is absolutely compelling. Transport and communications are two such domains. For example, the United States Supreme Court prevented Wisconsin from prohibiting the operation of trucks longer than 55 feet on their highways because of the burden such a prohibition would place on interstate commerce.⁹⁹ An Arizona law that aimed to limit the length of trains to 14 passenger cars or 70 freight cars could not be applied for the same reason.¹⁰⁰ These laws, which would have been extremely disruptive with respect to interstate commerce, could not be successfully defended on safety grounds. In South Africa, FC s 146(2)(a) and (b) should enable national legislation to prevail in similar situations.

The only meaningful authority on the reach of FC s 146(2)(a) and (b) is a case that neither deals with legislative conflict nor engages FC s 146.¹⁰¹ In *Mashavha*, the applicants challenged the presidential assignment to the provinces of almost the whole of the Social Assistance Act.¹⁰² This assignment could only have been validly made in respect of powers that fell within the legislative competences listed in Schedule 6 of the Interim Constitution¹⁰³ and did not fall within the parameters of IC

97 DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1881.

98 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) ('*Mashavha*') at para 49.

99 See *Raymond Motor Transportation, Inc v Rice* 434 US 429 (1978).

100 See *Southern Pacific Co v State of Arizona ex Rel Sullivan* 325 US 761 (1945).

101 *Mashavha* illustrates the operation of IC s 235(8). The Constitutional Court previously explained the role of IC s 235 by saying:

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 & Others v President of the Republic of South Africa & Others 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 84.

102 Act 59 of 1992.

103 IC Schedule 6 listed the legislative competences of provinces.

s 126(3). (IC s 126(3) was the predecessor of FC s 146(2).) The *Mashauha* Court assumed, without deciding, that the social grant system fell within the functional

area 'welfare services',¹⁰⁴ but found that the administration of the social grant system was not validly assigned to the provinces because such administration dealt with a matter (a) that could not be regulated effectively by provincial legislation, (b) that needed to be regulated or coordinated by uniform norms or standards that applied generally throughout the Republic in order to be performed effectively, and (c) that was necessary to set minimum standards across the nation for the rendering of public services.¹⁰⁵

Despite the fact that the issue in the case was the *administration* of the system of social grants rather than the amount of the grants, the Court noted that:

Equality is not only recognized as a fundamental right in both the interim and 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.¹⁰⁶

This statement is rather curious. Different amounts of grant money paid throughout the country are likely to be related not to considerations of equality — or systemic discrimination — but to convenience, administrative workability and the desire to prevent regional distortions. The most tenable basis for social assistance grants is *need* and, in theory, if the cost of living is different in different parts of the country, then it is not clear why it would be unacceptable to pay different amounts. The greatest problem with variation in the value of social grants is that such variation could set off a race to the bottom as provinces tried to pay the least attractive welfare grants so as to minimize the number of poor people who might otherwise be attracted to the province. In such circumstances, a standardised rate for social grants may well be necessary. (Of course, even that hypothetical state of affairs fails to account for the possibility that a given province might offer a panoply of other more attractive benefits.)

But once again, such pragmatic concerns are not what drive the *Mashavha* Court. Instead, the Court offers the following justification for requiring uniform grant administration:

In my view social assistance to people in need is indeed the kind of matter referred to in section 126(3)(a), and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in subsection (c). Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices

104 See *Mashavha* (supra) at 34.

105 See IC s 126 (3)(a), (b) and (c).

106 *Mashavha* (supra) at para 51.

and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance.¹⁰⁷

The judgment, like the applicants, appears not to have accurately identified the problem. The real issue in the case seems to have been inefficient *administration* of social grants. The intractable problems with grant administration may have caused litigants to aim at the wrong target. Social grant systems must be administered in places where poor people actually are. It matters not whether the administration is controlled regionally or nationally. The ANC government has always had the power and the ability to deploy proper management in the affected provinces. One assumes that the personnel who currently administer the grant system in the provinces will continue to do so under national authority. The Court should have grappled with the question of how the administrative problems of litigants like Mr Mashavha would be solved by the introduction of a national system of administration.

The reasoning in *Mashavha* was shaped, at least in part, by the lack of real opposition to the contention that the grant system should be administered nationally. ANC dominance meant that no provincial MECs resisted the application. The only opposition was contained in one renegade brief from KwaZulu-Natal. The consensus between the litigants on the desired outcome weakens the reasoning in the judgment and ultimately undermines its authority.¹⁰⁸

One hopes that the *Mashavha* Court's optimism about national grant administration is justified. However, the national government's failure to effect the transition from provincial administration to national administration within the required 18 months suggests that such optimism maybe misplaced.¹⁰⁹

(cc) Framework legislation

FC s 146(2)(b) allows national framework regulation to prevail over provincial legislation when —

[t]he national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing —

- (i) norms and standards;
- (ii) frameworks; or
- (iii) national policies.

However, the Constitutional Court has indicated that framework legislation will not automatically prevail as 'the criterion of uniformity is a *significant limitation* of the

107 Ibid at para 57.

108 See R Malherbe 'Grondwetlike Bevoegdheidsverdeling: 'n Stap Agteruit vir Provinsiale Regering? *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (KH)' (2005) 4 *Journal of South African Law* 862.

109 See *Ex parte Minister of Social Development & Others* 2006 (5) BCLR 604 (CC).

range of national policies and frameworks which may override provincial legislation.'

110

FC s 146(2)(b) was controversial at the time of certification because it seemed to extend the scope of the corresponding provision in the Interim Constitution

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and diminish provincial autonomy. The Interim Constitution only allowed for framework legislation that established 'norms or standards and minimum standards'. FC s 146(2)(b) embraces, in addition, 'frameworks and national policies'.¹¹¹ The *Second Certification Judgment* Court rejected objections to FC s 146(2)(b). It wrote:

One of the definitions of 'uniform' given in the Concise Oxford Dictionary is 'conforming to the same standard, rules or pattern'. The achievement of uniformity in the context of AT 146(2)(b) therefore requires the establishment of standards, rules or patterns of conduct which can be applied nationally. As we have stated above, this is an objectively justiciable criterion. Under the IC, an override for the purpose of uniformity is permitted where legislation contained norms or standards. Neither of these words is capable of precise definition. The Concise Oxford Dictionary defines 'standard' as 'an object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged'. 'Norm' is defined as 'a standard or pattern or type'. Given the ill-defined import of the words norms and standards, and the governing criterion of uniformity, it is likely that even under the IC, framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of norms and standards.¹¹²

I have argued above that courts should be prepared to view legislative silence as deliberate in some circumstances and thus open to finding a conflict between national legislation and provincial legislation in cases where regulatory space has been intentionally left open by a legislature. Given the possibility of such 'silence', a national 'policy', a 'norm' or a 'standard' might be implicit in legislation rather than explicit.

(dd) Necessity

FC s 146(2)(c) provides that:

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

- (a) ...
- (c) The national legislation is necessary for
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;

110 *Second Certification Judgment* (supra) at 157 (my emphasis). But see *Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape Government and Others* 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17 (High Court loses sight of this point.) See also J Brickhill & M Bishop 'Constitutional Law' (2009) *Annual Survey of South African Law* 143, 198.

111 *Second Certification Judgment* (supra) at para 159.

112 *Ibid.*

- (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
- (iv) the promotion of economic activities across provincial boundaries;
- (v) the promotion of equal opportunity or equal access to government services; or
- (vi) the protection of the environment.

The *Second Certification Judgment* Court clearly stated that the conditions set out in FC s 146(2)(c) were objectively justiciable:

The issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection

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of the common market or any of the others factors listed in NT 146(2)(c) is now objectively justiciable in a court without any presumption in favour of such national legislation.¹¹³

FC s 146(4) provides that:

When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

The *Second Certification Judgment* Court placed the following gloss on FC s 146: 'The obligation to pay 'due regard' means simply that the court has a duty to give to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances.'¹¹⁴

FC s 146(c)(2)(ii), (iii) and (iv) reflect functional issues that occur in every federation. For example, what happens when a province passes legislation that smacks of economic protectionism? Such legislation is generally condemned in the USA in the absence of compelling justification. Interprovincial (or state) protectionism has a disintegrating effect on the nation as a whole because it encourages retaliation by other provinces.¹¹⁵ Interprovincial protectionism also 'diverts business away from presumptively low-cost producers' without 'justification in terms of a benefit that deserves approval from the point of view of the nation as a whole'.¹¹⁶

Existing case law indicates, however, that FC s 146(2)(c)(ii) does not only allow national legislation to prevail over protectionist provincial legislation. In an obiter dictum in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, national legislation that regulated the manufacture and distribution of

113 *Second Certification Judgment* (supra) at para 155.

114 *Ibid.*

115 DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1114.

116 *Ibid* at 1118.

liquor was held to be 'necessary to maintain economic unity' for purposes of FC s 44(2)(b).¹¹⁷ (The language of FC s 44(2)(b) is echoed in FC s 146(2)(c)(ii).) Cameron J held that it would be too inconvenient to allow provinces to regulate the manufacture and the distribution of liquor.¹¹⁸ The *Liquor Bill* Court held:

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 intraprovincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level. Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the economic unity requirement of section 44(2) has been satisfied ... The Minister's affidavit states in this regard that duplicated or varying provincial licensing

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requirements would be unduly burdensome for manufacturers and that it was therefore economically imperative that control over the activities of manufacturers should take place at national level. He states that major industries, including the liquor industry as a single integrated industry should not have to run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces, including what he described as the deleterious effects of cross-border arbitrage between competing provinces. He avers that [w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic. The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa. For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature's intervention in requiring a national system of registration in these two areas.¹¹⁹

Liquor Bill implies that protectionism is not the only thing that would necessarily trigger FC s 146(2)(c)(ii). However, the idea that national regulation of the manufacture and the distribution of liquor is necessary for the maintenance of economic unity seems to overstate the case. (If the matter had arisen in the context of FC s 146, FC s 146(2)(c)(iii) and (iv) would have formed the basis for more suitable challenges.)

Similarly, the drafters of the Final Constitution could never have anticipated that the 'protection of equal opportunity or equal access to government services'¹²⁰ might require identical treatment between citizens of all provinces in all circumstances. Rassie Malherbe makes a similar point in his assessment of the *Mashavha*:

117 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) ('*Liquor Bill*').

118 V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15, § 15.3(a)(ii).

119 *Liquor Bill* (supra) at paras 75-78.

120 FC s 146(2)(c)(v).

Per slot van rekening is elke provinsie beter in staat as die nasionale regering om die behoeftes en omstandighede binne sy jurisdiksiegebied gesaghebbend vas te stel, wat goedsdiks daartoe kan lei dat differensiasie tussen die provinsies ter wille van substantiewe gelykheid nodig blyk te wees. Dit is dus moontlik dat die oogmerk van substantiewe gelykheid meer doeltreffend nagestreef kan word deur die provinsies hulle regmatige plek in die regulering van sosiale bystand as konkurrente saak te gee as om alle gesag oor sosiale bystand te sentraliseer. ['After all, each province is in a better position than the national government authoritatively to determine the needs and circumstances within its jurisdiction, from which it may easily be concluded that differentiation between the provinces could be necessary in the interests of substantive equality. It is thus possible that the objective of substantive equality could be more effectively pursued by giving the provinces their rightful place in the regulation of social welfare as a concurrent competence rather than centralizing all power over social welfare.']¹²¹

Access to state services is one of the most contentious issues in all modern societies. Delivery always involves trade-offs at regional and local levels of government. The model of federalism on display in the Final Constitution requires space for legitimate diversity in service provision by democratically elected governments at provincial

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and municipal spheres of government.¹²² Diversity means that 'protection of ... equal access to government services' cannot be taken literally in any individual case. It needs to be understood as *aggregate* access to services rather than equal access to individual services. Unfortunately, it also needs to be appreciated that, like the socio-economic rights provisions in the Final Constitution, FC s 146(2)(c)(v) has an aspirational quality. The main barriers to equal access to government services are infrastructural rather than legal. Courts need to be realistic about the capacity of national legislation to promote 'equal opportunity or equal access to government services' before they decide that national legislation should override provincial legislation.

Realism does not, of course, entail abdication. FC s 146 contemplates a number of specific instances in which national intervention in provincial affairs is a necessity. For example, judges have to be especially vigilant about protection of the environment, in terms of FC s 146(2)(c)(v), in circumstances where provinces may create environmental burdens or negative externalities for other provinces whose citizens are not represented in the provincial legislature.

(ee) Preventing unreasonable action by a province

'Unreasonableness' — a famously difficult legal concept to understand — raises important questions regarding separation of powers and deference.¹²³ There have, as yet, been no decisions that interpret 'unreasonable action by a province' in the context of FC s 146(3). That does not mean that we are without academic or judicial guidance as to its extension. Jon Klaaren describes the standard of

121 *Malherbe* (supra) at 862.

122 *First Certification Judgment* (supra) at para 24 ('[T]he national legislation authorised by NT 146(2)(c)(v) does not per se preclude the provincial governments from also taking such measures as are required to guarantee equality of opportunity or access to a government service.')

123 On unreasonableness in administrative law, see C Hoexter *The New Constitutional and Administrative Law: Volume 2* (2002) 170-187.

unreasonableness as a 'high threshold' aimed at 'renegade or out-of-place provincial legislation'.¹²⁴ He argues that 'provincial legislation which either directly discriminates against out-of-province actors or does so indirectly without justification' is most likely to be overridden by national legislation in terms of this section.¹²⁵

The question of legislative unreasonableness arose in *New National Party v Government of the Republic of South Africa & Others*.¹²⁶ In a dictum that will no doubt be enthusiastically invoked by advocates of subsidiarity, the majority of the Court pronounced: 'Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament.'¹²⁷ Although this statement may seem appealing on the surface, it is difficult to see how it could be successfully applied in the particular context of FC s 146(3). Does it mean that the reasonableness of provincial legislation is ordinarily a matter within the exclusive competence of the provincial legislature? Alternatively, should a court

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defer to Parliament's assurance that 'national legislation is aimed at preventing unreasonable action'¹²⁸ by a province? The words 'aimed at' might lend credence to the latter view. However, the better interpretation is that the national legislation should prevail over provincial legislation if it is intended to prevent unreasonable action by a province and it is 'objectively probable' that it will achieve that end.¹²⁹ Excessive deference to the national legislature does not resonate with the strength of the word 'unreasonableness' and the Court's insistence that that the matters raised by FC s 146 are objectively justiciable.¹³⁰

16.5 FC s 148 when the court cannot decide whether national legislation prevails

124 *Klaaren* (supra) at 5-16.

125 *Ibid.*

126 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (National legislation that required citizens to have bar-coded identity documents in order to vote was challenged, but ultimately upheld.)

127 *Ibid* at para 24 (Yacoob J). O'Regan J adopts an alternative approach consistent with meaningful powers of judicial review and thoroughly appraises the reasonableness of the legislation in a powerful dissent. *Ibid* at paras 108-16.

128 FC s 146(3).

129 See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 46-48.

130 In the context of socio-economic rights, national government programmes to provide housing and to prevent mother to child transmission of HIV have been subjected to scrutiny and found to be unreasonable by the courts. See *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

FC s 148 provides: 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.' In the *First Certification Judgment*, the Constitutional Court stated that it could not really envisage a situation in which the section would apply.¹³¹ No meaning has yet been assigned to FC s 148.

16.6 Subordinate national legislation and provincial legislation

The general rule is that subordinate legislation validly made in terms of empowering legislation becomes part of that legislation for the purposes of FC s 146.¹³² This rule is subject to the proviso that subordinate legislation 'made in terms of an Act of Parliament or a *provincial act* can prevail only if that law has been approved by the National Council of Provinces'.¹³³ Without such approval, the subordinate law lacks the capacity to prevail.¹³⁴

16.7 Conflicts between national legislation and a provincial constitution

FC s 147(1) regulates conflict between national legislation and provincial constitutions. In cases of conflict, provincial constitutions have no special status

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that elevates them above ordinary provincial legislation. In the *First Certification Judgment*, the Court held that:

Preference [over the provisions of a provincial constitution] is given to national legislation which is specifically required or envisaged by the [Final Constitution] and to national legislative intervention made in terms of [FC s] 44(2). Conflicts between national legislation and provisions of a provincial constitution in the field of the concurrent legislative competences set out in [FC Schedule] 4 are to be dealt with in the same manner as conflicts in respect of such matters between national legislation and provincial legislation.¹³⁵

FC s 147(1) was controversial at the time of certification. It was, however, ultimately deemed certifiable.

131 *First Certification Judgment* (supra) at para 246.

132 See the definitions of 'national legislation' and 'provincial legislation' in FC s 239.

133 FC s 146(6) (my emphasis). That the NCOP should approve subordinate provincial legislation may be counter-intuitive to some readers. See C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 106-108.

134 What happens when neither the national subordinate laws nor the provincial subordinate laws have been approved by the National Council of Provinces? Jonathan Klaaren has suggested that FC s 148 might be used in such cases. The national legislation would prevail. See Klaaren (supra) at 5-17.

135 See *First Certification Judgment* (supra) at para 269.

While conflicts between national legislation, provincial constitutions and provincial legislation should formally be treated in the same manner, the substantive position may be subtly different. When interpreting FC ss 146(2) and 44(2), courts need to be sensitive to the fact that provincial constitutions are created by a super-majority of the provincial legislature. The need for such sensitivity flows, as Stu Woolman notes, from the fact that:

FC s 147 limits, even if it does not quite defeat, the Constitutional Court's efforts to guarantee that the certification of a provincial constitution is both final and certain [A] strong reading of FC 147 would make a provincial constitution's certification contingent upon its consistency with the extant legislation identified in categories (b), (c) and (d). Any such conflict resolved in favour of the national legislation would render the provision of the provincial constitution inoperative, as an objective matter, from the very moment that the provision of the provincial constitution was certified. Any provision of a provincial constitution that will be stillborn at the moment of birth hardly satisfies the general conditions of finality and certainty said to govern this [certification] process.¹³⁶

In addition, Woolman correctly observes that, while a conflict decided in favour of national legislation will render the particular provision in the provincial constitution inoperative in terms of FC s 147, it will not affect the certifiability of the provincial constitution.¹³⁷ As Woolman writes, two good reasons ground this conclusion:

First, ... certification of a provincial constitution or a provincial constitutional amendment only requires that they not be inconsistent with the Final Constitution... . Second, were the Constitutional Court to treat provisions of a provincial constitution that could be inconsistent with national legislation in the same manner as it has treated suspensive clauses and consistency clauses in provincial constitutions, it would make the certification process inordinately more complicated. Provincial constitutions would have to be tested against the text of the Final Constitution, and the texts of existing pieces of national legislation. FC s 147 should be read, therefore, as recognizing the potential for such conflicts with national legislation, but wisely disaggregating such assessments from the certification process.¹³⁸

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16.8 Conflicts in schedule 5 areas

Conflict in Schedule 5 areas is dealt with in the chapter in this work on legislative competence.¹³⁹

16.9 Building genuine co-operative government: Do courts possess a residual power to invalidate legislation

136 S Woolman 'Provincial Constitutions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21, 21-18-21-19 (citations omitted).

137 Ibid at 21-19-21-20.

138 Ibid.

139 V Bronstein 'Legislative Competence' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15.

on federalism grounds in the absence of legislative conflict? ¹⁴⁰

Judges might possess a residual power to invalidate legislation on federalism grounds even in the absence of legislative conflict. FC s 41(1) states:

All spheres of government and all organs of state within each sphere must —

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic ...

FC s 41(1) can be read in a manner that grants courts the power to invalidate provincial legislation on the grounds that such legislation seeks to advance the ends of a particular province at the expense of another province. Such protectionism may lead to 'a debilitating and destabilizing spiral of protectionist measures and anti-competitive countermeasures'. ¹⁴¹ The United States Supreme Court has found it necessary to assume the power to prevent certain types of protectionism in the absence of specific textual support in the US Constitution. ¹⁴² While our courts are hardly in the thrall of American jurisprudence, our Constitutional Court could well find itself compelled to invalidate provincial legislation on FC s 41(1) grounds.

140 For more on co-operative governance, see S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 14 (In general, cooperative governance — in terms of the both the Final Constitution and various pieces of legislation — requires that all parties to a conflict exhaust every possible means of dispute resolution before a court will consider hearing a matter.)

141 LH Tribe *American Constitutional Law* (3rd Edition, Volume 1, 2000) 1040. On protectionism, see DH Regan 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1112-18.

142 See Tribe (supra) at 1030. For example the dormant commerce clause has been used to prevent Wisconsin from prohibiting the operation of trucks longer than 55 feet on their highways because of the burden on interstate commerce. *Raymond Motor Transportation, Inc v Rice* 434 US 429 (1978). An Arizona law that aimed to limit the length of trains to 14 passenger cars or 70 freight cars could not be applied for the same reason. *Southern Pacific Co v State of Arizona ex Rel Sullivan* 325 US 761 (1945). A law that made it illegal to sell milk as pasteurized unless it had been pasteurized and bottled at an approved plant within 5 kilometres of the central square of Madison was invalidated. *Dean Milk co v City of Madison, Wis* 340 US 349 (1951). Alaska was barred from requiring timber taken from state land to be processed within the state before export. *South-Central Timber Dev, Inc v Wunnicke* 467 US 82 (1984). For a detailed analysis of the dormant commerce clause jurisprudence, see Tribe (supra) at 1029ff. See also MA Lawrence 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework' (1998) 21 *Harvard Journal of Law and Public Policy* 395.