

Chapter 19

Provincial Legislative Authority

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19.1 Composition, election and term of provincial legislature*

(a) Composition and electoral system¹

The Final Constitution provides for single-chamber provincial legislatures in which the legislative authority of a province vests.² Provincial legislatures may consist of between 30 and 80 members. The Electoral Commission determines the actual number of legislators in each provincial legislature based upon a very simple algorithm: One seat per one hundred thousand inhabitants.³ The 30/80, min/max arrangement may, however, be altered by the provisions of a provincial constitution.⁴

1 Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC'), s 105 reads, in pertinent part:

(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that (a) is prescribed by national legislation; (b) is based on that province's segment of the national common voters roll; (c) provides for a minimum voting age of 18 years; and (d) results, in general, in proportional representation. (2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

2 FC s 104(1) reads, in relevant part: 'The legislative authority of a province is vested in its provincial legislature.'

3 See FC s 105(2). The Independent Electoral Commission determines the number of legislators of each province. See Electoral Act 73 of 1998, Item 2 of Schedule 3, as amended by Electoral Laws Amendment Act 34 of 2003. This Act's formula awards one seat per 100 000 inhabitants: with a minimum of 30 and a maximum of 80 members. It follows therefore, that the number of provincial legislators may differ from province to province depending on the size of a province's population. See also Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') (IC s 127(1) allowed provincial legislatures to have between thirty and one hundred members. The number of MPL's in different legislatures range from 30 MPL's in the Free State, Mpumalanga and the Northern Cape to 73 and 80 MPLs in Gauteng and Kwazulu-Natal, respectively. See D Besdziek 'Provincial Government' in A Venter (ed) *Government and Politics in the New South Africa* (2001) 182; C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 17. The number of members of a principal legislature ('MPLs') in the Western Cape is fixed at 42 — even though the population size of this province is just under four million See Constitution of the Province of the Western Cape s 13. The Northern Cape, with a population of just under 900 000, is still entitled to the minimum number of 30 seats fixed by the Final Constitution.

4 For the extent to which a provincial constitution may alter the provincial legislative and the executive structures and procedures set out in the Final Constitution, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

Provincial elections must take place in terms of an electoral system prescribed by national legislation.⁵ This system must produce, in general, proportional

* The authors would like to thank Christina Murray for her incisive comments and editorial 'oversight'. We would also like to thank Matthew Chaskalson and Jonathan Klaaren for permission to make liberal use of their work. See M Chaskalson & J Klaaren 'Provincial Government' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, R55, 1999) Chapter 4. Because provincial legislative authority doctrine is often parasitic on national legislative authority doctrine, we rely quite heavily on Steven Budlender's analysis of that latter body of doctrine. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. All errors remain our responsibility alone.

representation.⁶ Attempts to alter the electoral system for the provincial legislature through provincial constitutions have thus far failed.⁷

(b) Duration and dissolution

The ordinary term of a provincial legislature is five years. According to FC s 108, however, the provincial legislature may adopt a resolution dissolving the legislature prior to the expiry of its term. The resolution must be passed by a majority of the provincial legislature's members and must take place no less than three years after the previous election.⁸ According to FC s 109, the provincial legislature must be dissolved when there is a vacancy in the office of the Premier and the legislature fails to elect a new Premier within thirty days after the vacancy has occurred.⁹

(c) Qualifications, defections and membership

Membership qualifications in a provincial legislature are governed by FC s 106.¹⁰ The only genuine controversy that has arisen with regard to membership qualifications concerns the ability of MPLs to receive remuneration for other state appointments.

5 FC s 105(1)(d).

6 See Electoral Law Act 73 of 1998, s 57A read together with Schedule 1A, as amended by Electoral Laws Amendment Act 34 of 2003.

7 See *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997*. 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) ('*First Certification of Constitution of the Western Cape*') (Court rejects attempt to create multi-member, geographically defined constituencies.)

8 FC s 108 has not yet been invoked. However, between the end of 2002 and the beginning of 2003, the Inkatha Freedom Party, with the support of the Democratic Alliance and the United Democratic Movement, did threaten to dissolve the KwaZulu-Natal legislature. See 'IFP's Last-Gap Bid to Keep KwaZulu-Natal' *Mail and Guardian* (3 January 2003), available at <http://www.archive.mg.co.za> (accessed on 28 August 2003).

9 FC s 109(2). Such a vacancy can occur if the provincial legislature adopts, with a majority vote, a motion of no confidence in the Premier. See FC s 141 (2).

10 FC s 106.

The relationship between party defection and membership has been the subject of legislation and litigation that have altered significantly the political landscape in both Parliament and the provincial legislatures. In 2002, Parliament passed four acts, including two constitutional amendments, designed to permit defections by members of one political party to another at national, provincial and local government levels.¹¹ In *United Democratic Movement & Others v President of the RSA & Others*, the Constitutional Court rejected the challenges to the two constitutional amendments because both constitutional amendments satisfied the procedural

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requirements of the Final Constitution.¹² The Constitutional Court also found that the piece of ordinary legislation that allowed defections in municipal councils passed constitutional muster.¹³ The *UDM* Court did, however, uphold the challenge to the Loss or Retention of Membership of National and Provincial Legislatures Act ('Membership Act'). The Membership Act had been passed by the procedure for ordinary legislation, FC s 76(1), rather than by the procedure for constitutional amendments, FC s 74(3). While the Final Constitution granted Parliament the power to amend the transitional provisions governing membership by an ordinary Act of Parliament,¹⁴ the *UDM* Court held that this power had to be exercised 'within a reasonable period after the new Constitution took effect' and that this reasonable period had lapsed.¹⁵ Thus, the Membership Act was struck down on procedural, not substantive, grounds. Given the technical nature of the *UDM* Court's finding, Parliament was able to remedy the defect by passing a constitutional amendment to replace the Membership Act. The two original constitutional amendments, the Local Government: Municipal Structures Amendment Act and the new amendment effect an arrangement that permits defections that meet certain threshold criteria during specific periods of time.¹⁶

11 Constitution of the Republic of South Africa Amendment Act 18 of 2002, Constitution of the Republic of South Africa Second Amendment Act 21 of 2002, Local Government: Municipal Structures Amendment Act 20 of 2002 and Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 ('Membership Act').

12 *United Democratic Movement & Others v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*United Democratic Movement*' or '*UDM*'). For a discussion of this case in terms of national legislative authority, see See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. For an analysis of this case in the context of elections and constitutionally permissible electoral systems, see G Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29. Moreover, neither amendment destroyed the 'basic structure' of the Final Constitution. *United Democratic Movement* (supra) at para 17.

13 *United Democratic Movement* (supra) at para 84.

14 See *United Democratic Movement* (supra) at para 104; Item 23A(3) of Annexure A to Schedule 6 of the Final Constitution.

15 *United Democratic Movement* (supra) at para 105.

16 The defection process, in so far as it governs the composition of provincial legislatures, is set out in FC s 106(3)(c) read with Items 2, 3 and 4 of Schedule 6A.

Resignations by MPs, MPLs or MCs that take place outside these defection periods are governed by the pre-existing legal regime. A member of the National Assembly, a provincial legislature or a municipal council who ceases to be a member of the party that nominated her must vacate her seat.¹⁷ A claim of good faith error based upon an erroneous reading of the Final Constitution will not serve to rehabilitate the resignation.¹⁸ Moreover, the resignation cannot be rehabilitated even if the member and his or her 'former' party reach a subsequent agreement on the matter.¹⁹

As Steven Budlender notes, changes in the composition of the provincial legislatures may affect the composition of provincial delegations to the National Council of Provinces ('NCOP'). FC s 61(2)(b) now creates a process that enables

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the provincial legislature to alter the composition of the provincial delegations to the NCOP in light of any defections.

(d) Structures and procedures

(i) Committees

FC s 116(2)(a) obliges a provincial legislature to make rules providing for the establishment of committees. The committees contemplated by this section include portfolio committees, the provincial equivalent of parliamentary select committees. Portfolio committees are responsible for the detailed consideration and debate of Bills after their first reading. Portfolio committees also possess the power to summon any person to appear before them to give evidence or to produce documents, and to require organs of state to report to them.²⁰ In theory, these powers ought to transform committees into a species of political ombudsman. In theory, committees also execute the core functions of legislatures: law-making, oversight and public involvement. (When they do so execute these functions, committees earn their reputation for being the 'engine rooms' of legislatures.²¹) However, in many of the smaller provincial legislatures, some committees remain idle for extended periods of time.²² In addition, although FC s 119 enables committees to initiate legislation, at the time of writing, no provincial committee had invoked this power.²³

17 *Speaker of the National Assembly v Makwetu & Others* 2001 (3) BCLR 302, 308 (C) ('Makwetu')

18 *African National Congress v United Democratic Movement & Others* 2003 (1) SA 533 (CC), 2003 (1) BCLR 1 (CC) at para 24.

19 *Makwetu* (supra) at 308.

20 FC s 115.

21 See Murray & Nijzink (supra) at 63 ('[P]oliticians routinely say that their most important work is done in committee. Observers confirm this, pointing to the thorough and often non-partisan or less partisan discussion that occurs in committee meetings.') See also E Maloka 'The Gauteng Legislature: The First Five Years' in Y Muthien, M Khosa & B Mgubane (eds) *Democracy and Governance Review: Mandela's Legacy 1994-1999* (2000) 112.

The number and structure of committees vary from legislature to legislature, but only loosely correlate with the size of the legislature. Mpumalanga has 13 committees, whereas KwaZulu-Natal features 24. While the Northern Cape, with 30 MPLs, has 18 committees, Gauteng, with 73 MPLs, has only 17 committees.

(ii) Office bearers

A provincial legislature is chaired by a Speaker. The Speaker, by convention, acts on behalf of the legislature as a whole.²⁴ The Leader of the House represents the interests of the executive in the legislature and thereby provides a link between the two branches of government. Chairs run the specific committees, which makes the Chair of Chairs the third most important member of the legislature (after the Speaker and the Deputy Speaker).

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Party whips are not officials of the legislature. However, they do organize the work of MPLs in the party caucuses and decide which MPL will represent a party on a given committee.²⁵

(iii) Organization of business

The Leader of the House (sometimes referred to as the Leader of Government Business) together with the whips of various parties or the chief whip determine the schedule of the legislature.²⁶ Most of the legislature's work is conducted in committee or in party caucuses. (Unlike the committees, party caucuses are usually limited to party members and are not open to the public.) But while most of the legislature's work occurs in committee, legislative authority vests solely in the legislature's plenary. Plenaries also offer the opportunity for 'question time' and thus the discharge of the legislature's duty to engage in executive oversight.

19.2 Provincial legislative process

(a) Decisions²⁷

Unlike Parliament, the rules for decision-making in provincial legislatures are quite straightforward. All votes on Bills — ordinary or money — demand the presence of a

22 See Murray & Nijzink (supra) at 69–70 ('Some of the small provincial legislatures still have too many committees for the number of members they have available. . . . Timetabling thus becomes very difficult and members have no opportunity to develop a proper understanding of the matters that come before their committees.')

23 See Murray & Nijzink (supra) at 78 (MPL's complain of little assistance with respect to research and drafting.)

24 See, eg, *Kilian v Gauteng Provincial Legislature* 1999 (2) BCLR 225 (T) at para 30.

25 See, eg, KwaZulu-Natal Legislature's Rules of Procedure, Rule 29(1): 'The Whips and Party Representatives must ensure the attendance of members of their respective parties at committee meetings and must collectively ensure that a quorum is present, except under the circumstances when the party is exercising its right to boycott proceedings.'

26 See Mpumalanga Provincial Legislature Agenda, available at www.mpuleg.gov.za accessed on 1 March 2005). Western Cape Provincial Legislature Programme of Sittings, available at www.wcpp.gov.za accessed on 1 March 2005). See also Gauteng Legislature and NCOP Programme of Sittings, available at www.gautengleg.gov.za (accessed on 1 March 2005)

27 See FC s 112.

majority of the members. Passage of a Bill requires, in turn, a majority of the votes cast.²⁸

The presence of one-third of the legislature's members satisfies the quorum criterion for decisions on other matters. Once again, a majority of the votes cast will suffice for passage of such a measure.

Only a provincial constitution requires a special majority. Two-thirds of the members must approve a provincial constitution before it can be signed by the Premier and then sent on to the Constitutional Court for certification.

(b) Ordinary bills and money bills²⁹

Members of the legislature or members of the Executive Council can introduce ordinary Bills. Only the member of the Executive Council responsible for finance

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can introduce a money Bill.³⁰ According to FC s 120(2), a provincial Act must create a procedure that enables the provincial legislature to amend a money Bill. The Final Constitution leaves most other details of the provincial legislative process to the legislatures themselves.³¹ Ordinary Bills and money Bills take slightly different routes.

(i) Process for ordinary bills

The process for ordinary Bills is not uniform across the country. That said, the process followed in provincial legislatures share a family resemblance. Ordinary Bills are usually initiated by the relevant member of the executive, an ordinary member of the legislature or a particular committee. After being tabled on the Order Paper, the Speaker introduces the Bill to the House. Thereafter, the Bill is referred to the relevant committee and is published in the Provincial Gazette. Notices are then published in local newspapers. Thereafter the public enjoys fourteen to twenty-one days to comment on the Bill.

In committee, the responsible MEC generally defends the Bill. What makes the process followed by provincial legislatures highly unusual for a commonwealth jurisdiction is that committees often amend Bills. The committee sends this amended version to the House — and not the original submitted by the executive. Each party may voice their opinion on the Bill and request additional amendments. If the requisite majority votes in favor of the Bill, the Bill is sent to the Premier for his

28 See FC s 112(1)(b).

29 See FC s 119.

30 See FC s 120 ('A Bill that appropriates money or imposes taxes, levies or duties is a money Bill. A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies or duties. (2) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.')

31 FC s 116(1)(b).

or her assent.³² After the Premier's assent, the promulgated Act is published in the Provincial Government Gazette.

(ii) Process for money bills

The modus operandi for money Bills is somewhat more complicated, in large part because a money Bill will have a bearing on almost everything that the provincial legislature does. As a general matter, MECs for Finance introduce a Provincial Appropriation Bill by means of a budget speech. Thereafter, various committees interrogate the Bill. Only once all of the various committees have weighed in with their respective reports does the money Bill move out of committee and on to the floor for a vote. As with an ordinary Bill, a favourable majority vote in the legislature and the Premier's assent results in promulgation of the Act.

(c) Assent by the Premier³³

The Premier's assent is largely *pro forma*. There are two exceptions. If the Premier has reservations about the Bill, she can send it back to the legislature for reconsideration. If the legislature accommodates the Premier's concerns, then she

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is obliged to sign the Bill into law. However, if the revisited Bill does not accommodate the Premier's concerns, she has only two choices: (1) to assent; or (2) to refer the Bill to the Constitutional Court for a decision on its constitutionality.³⁴ Should the Constitutional Court determine that the Bill is constitutional, then the Premier has no alternative but to sign the Bill into law.

19.3 Substantive constraints on provincial legislative authority

(a) Exclusive competence, concurrent competence, conflicts and override³⁵

(i) Exclusive provincial legislative competence

FC s 104(1)(b)(ii) grants the provinces exclusive original legislative authority over all matters listed in FC Schedule 5.³⁶ 'Exclusive' might suggest that only provincial legislatures are competent to pass legislation in those domains identified in Schedule 5.³⁷ However, FC s 44(2) permits Parliament 'to intervene' — that is, to legislate — with respect to functional areas of exclusive provincial legislative competence. This override authority may only be exercised in so far as national

32 See § 19.2 (c) *infra*.

33 FC s 121.

34 See *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) ('*Mpumalanga Petitions Bill*').

35 Issues of exclusive legislative competence, concurrent legislative competence, overrides and conflicts are dealt with exhaustively in V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15 and V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2004) Chapter 16.

legislation is necessary to: (1) maintain national security; (2) maintain economic unity; (3) maintain essential national standards; (4) establish minimum standards required for the rendering of services; and (5) prevent unreasonable action taken by a province, which is prejudicial to the interests of another province or the country as a whole.³⁸

(ii) Concurrent national and provincial legislative competence³⁹

FC s 44(1)(a)(ii) and FC s 104 (1)(b)(i) confer upon Parliament and provincial legislatures, respectively, concurrent legislative powers over matters contained in FC Schedule 4.⁴⁰ Concurrence means that both Parliament and the various provincial legislatures possess the power to pass laws on the same matters.⁴¹

Concurrent legislative competence has several practical implications for the exercise of legislative authority by the national government. Parliament cannot: (1) prevent provincial legislatures from enacting legislation on any of the listed

36 Where the Final Constitution contemplates the passage of provincial legislation — say a provincial name change, FC s 104(2) — Parliament may *not* pass legislation on the same subject matter. See also *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another*; *Executive Council, Kwa-Zulu Natal v President of the Republic of South Africa & Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 28–30 (Court held that the necessary implication of FC s 164 — '(a)ny matter concerning local government not dealt with in the [Final] Constitution may be prescribed by national legislation or by provincial legislation within the frame work of national legislation' — was that Parliament did not possess concurrent legislative authority with 'provincial governments in relation to the establishment and supervision of local governments.')

37 On the relationships between functional areas of exclusive competence and concurrent competence, see *Ex Parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 61 (The Court pointed out that although the Final Constitution creates exclusive provincial legislative competences, the separation of the functional areas in Schedules 4 and 5 can never be absolute: 'Whenever a legislature's authority is limited some rule must be adopted to address the possibility that a [single] law may touch upon a subject matter [both] within and outside legislative competence.')

See also V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15.

38 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 250 ('[T]his power of intervention is defined and limited. Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament.')

39 See V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15.

40 IC s 126(1) delineated areas of concurrent legislative competence. Residual legislative powers, by implication, vested in Parliament. See D Brand 'Development of Concurrent Legislation - A New South African Perspective' (1999) 37, available at http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_5112_2.pdf (accessed on 5 December 2004) 37.

41 See E Bray 'The Constitutional Concept of Co-operative Government and its Application in Education' (2002) 4 *THRHR* 514, 516.

functional areas;⁴² (2) veto provincial legislation; or (3) block provincial initiatives that deal effectively with matters over which they possess concurrent competence.⁴³

The shared authority contemplated by FC s 44(1)(a)(ii) and FC s 104 (1)(b)(i) would seem to invite conflict. FC s 146 provides a rubric for the analysis and the resolution of such conflicts.⁴⁴ FC s 146(2) reads:

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.⁴⁵
- (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 the protection of the environment.

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Despite a decade of such concurrent competence, only one case has required the Constitutional Court to determine whether a national law or a provincial law prevailed: *Mashavha v The President of the Republic of South Africa*.⁴⁶ Though of recent vintage, *Mashavha* does not engage FC s 146. The challenge to the assignment of administrative responsibility for a national act to provincial

42 See *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).

43 See Bray (supra) at 522 (This 'sharing of powers' does not diminish a provincial legislature's ability 'to enact on its own legislation that is necessary for the effective exercise of school education.')

44 For a detailed account of conflict resolution with respect to enactments that flow from concurrent competences, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2005) Chapter 16.

45 FC s 146(2)(a).

46 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) ('*Mashavha*') at para 51.

government engaged IC s 126(3) — the predecessor to FC s 146 — and IC s 235's transitional provisions regarding executive authority.⁴⁷

That said, the *Mashavha* Court's analysis of IC s 126(3) adumbrates the general framework within which the courts will appraise conflicts that might arise in terms of FC s 146.⁴⁸ The *Mashavha* Court was asked to assess the constitutionality of a presidential proclamation that assigned the administration of the Social Assistance Act ('SAA') to provincial governments.⁴⁹ The SAA regulated, amongst other matters, the payment of grants. The High Court in *Mashavha* found that social assistance was not a matter that could be regulated effectively by provincial legislation. The Constitutional Court agreed. It reasoned as follows. First, South Africa's history of racial, ethnic and geographical discrimination compromised provincial administration of social assistance.⁵⁰ Second, because apartheid's radically inegalitarian system of distributive justice continued to be re-inscribed by differences in capacity between extant provincial governments, the provinces could not be trusted to deliver social assistance in a manner that did not offend the Interim Constitution's commitment to equality.⁵¹ As a result, IC s 126(3) — and FC 146 — required a uniform framework for the distribution of social assistance across all nine provinces. Only national legislation administered by

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the national government could ensure uniform and equal treatment. The *Mashavha* Court confirmed the High Court's order declaring the proclamation's assignment unconstitutional.

47 For more on the transitional provisions in the Interim Constitution relating to executive authority, see M Chaskalson 'Transitional Provisions on Executive Authority, Assets and Liabilities' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 28.

48 See *Mashavha* (supra) at para 38 ('The purpose of section 126(3) is to determine the extent to which an Act of Parliament prevails over a provincial law inconsistent therewith, in the case of a functional area where Parliament as well as a provincial legislature have concurrent competence.')

49 Act 59 of 1992.

50 See *Mashuvha* (supra) at para 51.

51 Ibid at para 53. The Constitutional Court rejected claims that the views of the provinces or the President on the capacity of the provinces to deliver equal and uniform access to social assistance could play a meaningful role in its assessment of the validity of the assignment. The test set out in IC s 126 and FC s 146 is objective and the assessment of competence and capacity is the sole province of the courts. It wrote:

It is for this Court to give proper meaning to section 126(3) in context. Then the Court must apply the section to the facts of the case before it. It is clear that section 126(3) contemplates that there are matters which fall within the legislative competence of provinces which nevertheless may be regulated by national legislation. One of the criteria to determine whether the matter may be regulated by national legislation is whether it will be effective to do so; another is whether it is a matter which needs uniform norms and standards to be set; a third is whether it is necessary to set minimum standards for the delivery of public services. All three criteria recognize that there are times when uniformity is appropriate. The question that arises in this case is whether any or all of these criteria are present. It may be that reasonable people may legitimately differ in the application of these standards, but it is the standards set by the Constitution which must guide this Court's determination of the case, not the political philosophy of individual judges.

Ibid.

Given that the concurrent legislative authority exercised by the national government and the provincial governments traverses such diverse terrain as agriculture and welfare, the lack of litigation may seem remarkable. The absence of conflict is largely a function of the current lay of the South African political landscape. ANC control of the national government and all nine provincial government — and the coordination of policy through party structures as well as MINMECs — eliminates the partisan politics and ideological differences that often animate such disputes.

It is also worth remembering that the Final Constitution attempts to minimize the need to resort to the courts to resolve disputes arising from the exercise of concurrent legislative authority both through a commitment to cooperative government and through express canons of statutory interpretation. With respect to such canons of interpretation, Victoria Bronstein notes that FC s 146's conflict provisions *only* become relevant when a conflict *actually* arises between national and provincial legislation on concurrent matters.⁵² FC s 150 obliges courts to prefer an interpretation or a set of interpretations that reconciles the pieces of legislation under scrutiny to one that does not. FC s 148 states that where a court cannot resolve a dispute concerning a conflict between national legislation and provincial legislation, national legislation will prevail. FC s 148, like FC ss 41(3) and (4), actively discourages the use of courts to resolve political disputes. However, while FC s 41(3) and (4) require spheres of government and organs of state to exhaust non-judicial dispute resolution forums before turning to the courts, FC s 148 stands for the proposition that where no dispute resolution mechanism in FC Chapter 6 speaks to a dispute, a provincial law will fall before a national law. In such circumstances, a province will be forced to exploit political channels to achieve its ends.

(b) Provincial constitutions⁵³

FC ss 142 and 143 grant each province a constitution-making legislative competence. This competence appears to extend the legislative competence conferred

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on a provincial legislature by FC s 104. However, the judgments of the Constitutional Court in provincial constitution certification cases suggest that this textually distinct competence may be only notionally different than the legislative competence conferred on the provinces by other sections of the Final Constitution.⁵⁴ Put pithily, FC ss 142 and 143 do not create a meaningfully independent basis for the exercise

52 See V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 15. See also *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) ('*National Education Policy*') at paras 14–16. This rule of statutory construction is similar to the 'express contradiction' doctrine in Canadian law. See *Husky Oil Operations v Minister of National Revenue* [1995] 3 SCR 453 at para 120 ('[T]he rationale behind this restrictive use of paramountcy is self-evident: governmental regulation in Canada operates through a complex web of federal and provincial legislation. The regimes structuring many areas of public policy, such as bankruptcy actively involve both levels of government. To this end, barring a situation where obeying the enactment of one level places a citizen in disobedience of the legislation of the other level, an attempt must be made to read overlapping provincial and federal regulation in a complementary manner.')

53 See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21. For reasons of economy the analysis found in that chapter is not repeated in any meaningful way here.

of power by the provinces. Unless the Constitutional Court alters fundamentally its reading of the apposite provisions of the Final Constitution or those provisions are amended, provincial constitutions will never amount to anything more than window-dressing.⁵⁵

(c) Co-operative government⁵⁶

The Constitutional Assembly — in FC ss 40 and 41 — laid out principles designed to promote co-operation and co-ordination, rather than competition, between the various tiers of government and organs of state. Indeed, to emphasize this shift in relations, ss 40 and 41 employ the term 'sphere' rather than 'level'. Sphere intimates different sets of responsibilities. (By implication, level denotes a hierarchy in structures of government). But that is as far as the break with the old order goes. Despite the emphasis on 'spheres' with particular, and sometimes exclusive, competencies, the Constitutional Assembly did not create a strong federal state. Provinces, and in particular provincial legislatures, generally remain subordinate to their national counterparts.⁵⁷

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(d) Fundamental rights and rule of law constraints

The exercise of provincial legislative authority is expressly constrained by the rights enshrined in FC Chapter 2.⁵⁸ The exercise of provincial legislative authority must also satisfy the legality principle. Although this doctrine imposes a rationality test that most pieces of provincial legislation will meet, the standard still has teeth.⁵⁹

19.4 Delegation

(a) From Parliament to Provincial Legislature

FC s 44(1)(a)(iii) allows expressly the National Assembly to assign its legislative powers to a provincial legislature.⁶⁰ This power is known as legislative inter-delegation.

The assignment of legislative competence proceeds by an Act of Parliament.⁶¹ An assignment extends legislative powers to the provincial legislature for as long as the

54 See *Ex Parte Speaker of the KwaZulu-Natal Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) ('*Certification of the Constitution of the Province of KwaZulu-Natal*'); *Ex Parte Speaker of the Provincial Legislature of the Western Cape: In re Certification of the Constitution of the Western Cape*, 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) ('*First Certification of the Constitution of the Province of the Western Cape*'); *Certification of the Amended Text of the Constitution of the Western Cape* 1997 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) ('*Second Certification of the Constitution of the Province of the Western Cape*').

55 The Constitutional Court gives the lie to its claim that provincial constitution-making power is 'significant' when it notes both that provinces need not enact a provincial constitution and that Chapter 6 of the Final Constitution — along with the rest of the Final Constitution — 'provides a complete blueprint for the regulation of government within provinces . . . [and] provides adequately for the establishment and functioning of provincial legislatures and executive.' *First Certification of the Constitution of the Province of the Western Cape* (supra) at paras 36 and 15.

56 See S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

Act of Parliament is in force. As Currie and De Waal note, however, '[o]nce the power to legislate is assigned to the province, Parliament is no longer

competent to legislate in this area, until the assignment is repealed by national legislation.⁶²

If the Act is repealed, provincial laws already made under the now repealed Act continue to be valid. However, the province would no longer possess the power to make any further laws in respect of matters covered by the Act because it would no longer possess the requisite assigned legislative competence. But neither, as the

57 The FC Chapter 3 jurisprudence of the Constitutional Court is governed by two basic principles. See *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) ('*Liquor Bill*') at para 40. First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. Second, the actual integrity of each sphere and organ of state must be understood in light of the powers and purpose of that entity. In short, while the political framework created by the Final Constitution demands that mutual respect must be paid, there are circumstances in which the basic law clearly contemplates a hierarchy of political authority. Compare *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('*DVB Behuising*') (Court held that the functional areas of concurrent legislative authority had to be interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively) with *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1360 (CC) ('*Grootboom*') at paras 39–40 ('[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other . . . [B]ut the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations.') For a good example of national authority overreach, see *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) ('*Premier, WC v President*') (Court found that a procedure requiring an agreement between the President and the Premier with respect to the legality of a proposed restructuring of the public service within a provincial administration was entirely consistent with our system of co-operative government. As a result, a section of the amended Public Service Act, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed the executive authority of the province to administer its own laws.)

58 For a detailed account of how fundamental rights curb the abuse of national legislative authority — an account that applies equally to provincial legislative authority — see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. For an account of how the substantive provisions of the Bill of Rights are to be reconciled with the exercise of powers in terms of other constitutional provisions — say, provincial legislative authority, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

59 For a comprehensive restatement of how the rule of law and the legality principle set limits on the exercise of public power, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

60 FC 44, reads, in relevant part: '(1) The national legislative authority as vested in Parliament . . . (a) confers on the National Assembly the power . . . (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.'

61 FC s 104(1)(b)(iii) provides that assignment must take place by 'national legislation'. FC s 44(1)(a)(iii) vests the power to assign legislative competence in the National Assembly. It seems reasonable to conclude, as Steven Budlender does, that since the Final Constitution vests no

Constitutional Court pointed out in *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another*, would Parliament have the power to amend or to repeal extant provincial laws.⁶³

Only by passing new national legislation would Parliament be able to overcome the existing provincial law enacted under the previously assigned competence. Given that the existing provincial law was enacted under the previously assigned competence, the new national legislation and the existing provincial legislation are not technically governed by FC s 147's conflict resolution regime. As Matthew Chaskalson and Jonathan Klaaren have argued, FC s 148 suggests that the absence of an express means of resolving this conflict results in the subordination of the provincial legislation to the new national legislation.⁶⁴ Such provincial legislation is not, technically, invalidated.⁶⁵ It remains dormant for so long as the conflict persists. In addition, Parliament does not have the legislative competence to repeal provincial laws — whether those laws are made under an original competence or an assigned competence.⁶⁶

(b) From Provincial Legislature to Provincial Executive

The Final Constitution is silent on the question of whether a provincial legislature may delegate authority to the provincial executive. The Constitutional Court has, however, held that while the national legislature may delegate subordinate regulatory authority to the national executive, it may not assign plenary legislative power.⁶⁷ As Steven Budlender notes: 'This delegation doctrine has the virtue of

corresponding power of assignment in the President or any other functionary who makes proclamations, assignment may only take place in terms of national legislation. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17.

62 I Currie & J De Waal *The New Constitutional and Administrative Law, Volume I* (2001) 209. See also *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) ('Executive Council 1995').

63 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('DVB Behuising').

64 See FC s 148: 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.'

65 FC s 149: '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.' See *National Education Policy* (supra) at para 19 ('If the conflict is resolved in favour of either the provincial or the national law, the other is not invalidated; it is subordinated and to the extent of the conflict rendered inoperative.')

66 See *National Education Policy* (supra) at paras 16-19.

67 *Executive Council 1995* (supra) at para 62 (Constitutional Court asserts that its 'delegation doctrine' was derived from the constitutional commitment to separation of powers. This commitment meant that law-making, as the proper domain of the legislature, could not be delegated excessively to the executive branch.) See also *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 136 (CC) ('Executive Council 2000') (Holding that delegation doctrine developed in *Executive Council 1995* remained good law under the Final Constitution.) See also *Van Rooyen v The State* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC), 2002 (2) SACR 222 (CC) ('Van Rooyen') at paras 118-9 (Constitutional Court applied the holding in *Executive Council 1995* in evaluating the

balancing the need for efficiency in government against the need to avoid subverting the constitutional legislative framework.⁶⁸ Although the Constitutional Court has yet to address the delegation of provincial legislative authority to a provincial executive, it seems reasonable to conclude that it will permit the provincial legislature to delegate some subordinate regulatory power to an MEC or to a provincial administrative agency.

19.5 Assignment to local government

FC s 104(1)(c) allows a provincial legislature to assign any of its legislative powers to a municipal council. The assignment proceeds by an Act of the provincial legislature. An assignment extends legislative powers to the municipal council for as long as the Act is in force. If the Act is repealed, local government by-laws which have already been made under it would continue to be valid. However, the municipal council would no longer be able to make any further laws in respect of matters covered by the Act: it would no longer possess the assigned legislative competence to do so.

Local government by-laws made under an assigned legislative competence from a provincial legislature may conflict with provincial legislation. In such circumstances, provincial legislation prevails. The local government by-law will be declared invalid and not merely inoperative.⁶⁹

19.6 Abstract review of bills and acts⁷⁰

Unlike the Interim Constitution, the Final Constitution makes no provision for abstract judicial review of provincial bills at the instance of members of the provincial legislature. However, at the end of the legislative process, the Premier may refer a Bill to the Constitutional Court for a decision on its constitutionality. The

constitutionality of a delegation of subordinate regulatory authority); Constitutional Principle XIX (Principle required inter-delegation in the Final Constitution: 'The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government'); *Ynuico Ltd v Minister of Trade and Industry & Others* 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) (Delegation doctrine could not be used to challenge delegated legislation promulgated before Interim Constitution came into effect because doctrine drew its constitutional force from IC s 37, and IC s 37 could have no bearing on the validity of regulations made before the Interim Constitution came into existence. The same logic would extend to any challenges made to pre-Interim Constitution delegated legislation challenged under FC s 44.)

68 See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. See also *National Education Policy* (supra) at paras 16–19.

69 FC s 156 (3) reads: 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid.' FC s 151(4) reads: 'The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' For more on such conflicts, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

70 FC s 122, Application by members to Constitutional Court, reads:

Constitutional Court, in *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000*, held that it does not possess jurisdiction to consider the constitutionality of any provision in a Bill raised by the premier, 'unless the Premier's reservation concerning such provision has been referred to the legislature as envisaged' by FC ss 121(1) and (2).⁷¹ That is, she must first remit the Bill to the legislature for reconsideration, and the legislature must refuse to address her concerns. A Premier cannot raise reservations about a Bill that have not been raised by her with the legislature.

FC s 122 allows one-fifth of the members of a provincial legislature to apply to the Constitutional Court for abstract review of a provincial Act within thirty days of the Premier's assent and signature.⁷² When it receives a FC s 122 application for abstract review, the Constitutional Court may grant an interim order suspending the operation of the Act, or those sections of it that are subject to review, until the main application has been decided. The discretion of the Constitutional Court with respect to interim orders is limited to cases where the application has a reasonable prospect of success and the interests of justice require the suspension of the operation of the legislation.⁷³

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19.7 Powers and privileges of provincial legislatures⁷⁴

(a) Control over the internal proceedings

FC s 116 confers on provincial legislatures the power to control their internal arrangements. This power is constrained by other provisions of the Final

(1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional. (2) An application (a) must be supported by at least 20 per cent of the members of the legislature; and (b) must be made within 30 days of the date on which the Premier assented to and signed the Act. (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if (a) the interests of justice require this; and (b) the application has a reasonable prospect of success. (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

71 *In Re: The Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC).

72 Under the Interim Constitution, the Supreme Court — now the High Court — could hear applications for abstract review of a provincial Bill. See IC s 101(3)(e). Under the Final Constitution, the Constitutional Court possesses exclusive jurisdiction over an application by the Premier for abstract review of provincial Bills. See FC s 167(4)(b).

73 FC s 122(3). For the meaning of 'reasonable prospects of success' and 'in the interests of justice', see, generally, *MEC for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC); *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (2) SACR 277 (CC), 1995 (7) BCLR 793 (CC). See M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

74 FC ss 114, 115, 116, 117 and 118. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17 (Discussion of this matter in relation to Parliament applies equally to provincial legislatures.)

Constitution, in particular FC ss 116(1)(b) and 118(a). These provisions oblige provincial legislatures to facilitate public involvement in their processes and to conduct their business openly. While legislatures may regulate public and media access to their proceedings, the general public and the media may be excluded from the proceedings of the committees of the legislatures only when it is reasonable and justifiable.⁷⁵ Exercise of the power conferred by FC s 116 is subject to the Bill of Rights.⁷⁶

(b) Rules and orders

Legislatures have the power to make rules and orders concerning the conduct of their business.⁷⁷ The Final Constitution constrains this power in two primary ways. First, the rules and order must pay due regard to such imperatives as representative and participatory democracy, accountability, transparency, and public involvement.⁷⁸ Secondly, FC s 116(2) prescribes constitutionally-mandated content for the rules and orders. The rules and orders of legislatures must provide for the establishment of committees⁷⁹ and for the participation of minority parties in parliamentary proceedings in a manner consistent with democracy.⁸⁰ The rules of the legislatures must recognize a role for the leader of the opposition⁸¹ and must ensure that all parties represented in the legislature are given sufficient financial and administrative assistance to operate effectively in the legislature.⁸²

(c) Privilege

FC s 117 provides that MPLs and the province's permanent delegates to the NCOP have freedom of speech in the legislatures, subject to the legislatures' rules and orders, and may not be held criminally or civilly liable for any statements made therein.⁸³ Although provincial legislatures are not expressly directed

75 FC s 118(2).

76 On the extent to which the exercise of such power is subject to the direct application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.5.

77 FC s 116(1)(b).

78 FC s 116(1)(b).

79 FC s 116(2)(a).

80 FC s 116(2)(b).

81 FC s 116(2)(d).

82 FC s 116(2)(c).

83 See *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 929 (C)(Rules and orders of the National Assembly subject to guarantees of freedom of speech.)

by the Final Constitution to promulgate legislation on the powers, privileges and immunities of members of their provincial legislatures, various provincial legislatures have done so.⁸⁴ Given that FC s 117(2) provides that other additional privileges and immunities of a provincial legislature and its members are to be prescribed by national legislation, and that the Powers, Privileges and Immunities Act was enacted pursuant to this provision, the provisions in extant provincial legislation on the subject of privilege are probably constitutionally infirm.⁸⁵

(d) Public participation and petitions

Public participation in the legislative process is a constitutional obligation.⁸⁶ Effective public involvement enhances representative democracy and secures the benefits of compensatory legitimation that attend to such relatively innocuous grants of power.⁸⁷ Many provincial legislative committees encourage this particular form of participatory democracy through open days, public hearings, and submissions on specific bills.⁸⁸ Petitions constitute another particularly important form of direct democracy in South Africa. The value of these pre-promulgation forms of participation would be greatly enhanced by post-enactment hearings to evaluate the impact of legislation.⁸⁹

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19.8 Provincial legislatures and the national council of provinces

The National Council of Provinces ('NCOP') is the second chamber of South Africa's national Parliament. According to FC s 42(4), the NCOP 'ensures that provincial interests are taken into account in the national sphere of government' and provides a national forum for public consideration of issues affecting the provinces. Provincial legislatures determine much of what occurs within the NCOP: they not only select its members but also control their votes.

84 See, eg, Powers, Privileges and Immunities of the Free State Provincial Legislature Act 12 of 1996, Powers, Privileges and Immunities of the Gauteng Provincial Legislature Act 2 of 1995, North-West Provincial Legislature's Powers, Privileges and Immunities Act 5 of 1994 and Powers and Privileges of the Western Cape Provincial Legislature Act 3 of 1995.

85 Act 4 of 2004. However, those provisions in provincial legislation that determine the procedures for, say, a summons fall within the competence of provincial legislatures and are surely valid. Correspondence with Christina Murray (25 July 2005).

86 FC s 118.

87 See T Rapoo 'Reflections on Provincial Government in South Africa since 1994' in Y Muthien, M Khosa & B Magubane *Democracy and Governance Review: Mandela's Legacy 1994-1999* (2000) 101-102.

88 Murray & Nijzink (supra) at 65 ('[I]n KwaZulu-Natal and Gauteng, for instance, closed meetings are rare . . . [I]n some provinces, however, the exclusion of the public is more routine — in some cases probably in violation of the Constitution').

89 The KwaZulu-Natal Legislature has initiated post-enactment hearings to determine how the legislation is affecting communities. See *KwaZulu-Natal Annual Report 2002/2003* (2004) 3.

Each of the nine provincial legislatures selects ten delegates. Six of the ten delegates are permanent delegates and four are special delegates.⁹⁰ Each delegation is led by the Premier or a member of the provincial legislature designated by the Premier.⁹¹ The special delegates represent the provinces on particular matters.⁹² The rules of most provincial legislatures make provision for the selection of special delegates.⁹³

One especially vexed question with regard to provincial control of NCOP delegations concerns mandates. With respect to 'Section 76' bills — those bills deemed to affect the provinces — each provincial delegation possesses one vote. According to FC s 65 s (1)(a), this vote must be cast in accordance with the express preference of the provincial legislature. FC s 65(2) anticipates an act of Parliament that creates a uniform procedure for the conferral of such mandates by provincial legislatures on their delegations. This Act has not yet been promulgated. At the present time, different legislatures follow different procedures. As

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Murray and Nijzink note, the provinces differ as to whether provincial parliamentary committees can confer mandates on provincial delegations or whether such a power vests solely in the provincial legislature.⁹⁴ Those opposed to committee conferrals argue that FC s 65 makes no mention of committees. Those who favour committee conferrals contend that since FC s 116 permits provincial legislatures to establish

90 Permanent delegates must be appointed by provincial legislatures, in accordance with the nomination of parties in the provincial legislatures, within 30 days after the result of an election of a provincial legislature is declared. FC s 61(2). Section 2(b) of the Constitution of the Republic of South Africa Second Amendment provides that this procedure should also be done within 30 days if a change of composition of the provincial legislature occurs as a result of a change in party membership, merger between parties, or subdivision of parties. Act 21 of 2002.

A person ceases to be a permanent delegate if, *inter alia*, that person ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent member that person has lost the confidence of the provincial legislature and is recalled by the party that nominated that person or that person ceases to be a member of a party that nominated that person and is recalled by the party. FC s 62(4)a, FC s 62(4)c, FC s 62(4)d. But see Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (Enables members who have become members of another party to retain their membership in the NCOP.)

According to FC s 61(2), parties represented in a provincial legislature are entitled to delegates in the provinces' delegation in accordance with the formula set out in Part B of Schedule 3. The number of permanent delegates to which each party is entitled in each provincial delegation is calculated according to an algorithm set out in the Determination of Delegates (NCOP) Act. Act 69 of 1998.

91 FC s 60(2).

92 See EFJ Malherbe 'The South African National Council of Provinces: Trojan Horse or White Elephant' 1998 *TSAR* 77, 88 ('Special delegates [will] . . . normally, but not necessarily . . . be members of the provincial executives.') See also C Murray and L Nijzink *Building a Representative Democracy* (2002) 46 ('[W]hen representing the province in the NCOP, the members of the executive and legislature on the delegation should not be seen as coming from separate branches of government but as partners mandated to ensure that the province's interest are properly understood in the national sphere.')

93 See, eg, Rule 77 of the Standing Rules of the KwaZulu-Natal Legislature; Rule 196 of the Standing Rules of the Western Cape Legislature.

94 Murray & Nijzink (supra) at 51-52.

their own internal procedures, FC s 116 likewise permits provincial legislatures to delegate the mandate power to a provincial parliamentary committee. Murray and Nijzink suggest that the debate over the mandate flows from very practical concerns: '[P]rovincial legislatures do not meet frequently but mandates may be needed at short notice and at a time when the provincial legislature is not sitting.'⁹⁵ So, for example, the rules of the KwaZulu-Natal Legislature allow the KwaZulu-Natal Legislature's National Council of Provinces Matters Committee to confer a mandate upon a provincial delegation provided that 75% of the committee's members agree to the content of the particular mandate.⁹⁶ The Gauteng Legislature and the Western Cape Legislature, on the other hand, only allow the provincial legislature, as a whole, to confer mandates on their respective NCOP delegations.

95 Ibid.

96 Rule 83 of the Standing Rules of the KwaZulu-Natal Legislature.