

Chapter 20

Provincial Executive Authority

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20.1 Introduction

The responsibilities and functions of provincial executives, like all other provincial institutions, are largely determined by the role of provinces in South Africa's system of multi-level government. The primary responsibility of provincial executives is to implement national legislation. The system also expects members of provincial executives to play a substantial role in the adoption of national legislation that falls within the concurrent competence of provinces and the national government.

However, the distinct role of provincial executives is hardly mentioned in the constitutional provisions that determine the formal structure of South Africa's nine provincial executives. Eight of these executives are governed by the Final Constitution and, in particular, FC Chapter 6. The sole exception is the Western Cape. But, although the Western Cape provincial executive is governed by the Western Cape Constitution, there are no significant differences between the Western Cape model and the Final Constitution.

The provisions of FC Chapter 6 relating to provincial government are themselves almost identical to those governing the national executive. Like the national executive, all provincial executives operate on the parliamentary model. The Premier, who is head of the executive, is usually drawn from the majority party in the provincial legislature and selects his or her cabinet — called an Executive Council — from the legislature. The executive is accountable to the legislature and, under FC s 141, can be removed at any time by a vote of no confidence. In the language of the Westminster system, the executive 'serves at the discretion of the legislature' or needs to retain the confidence of the legislature. Even the two most substantial deviations from the national model in the provisions relating to the design of provincial governments in FC Chapter 6 are minor. First, whereas the President is both head of state and head of the national executive, the Final Constitution does not formally create two separate roles for a Premier. Secondly, a Premier remains a member of the provincial legislature after his or her election, while the national President relinquishes his or her seat in Parliament upon election.

The model set out in FC Chapter 6 is also very close to traditional forms of parliamentary government. The most important departure from the parliamentary model of other Commonwealth countries such as India, Canada or Australia is that a provincial legislature, like the National Assembly, may not usually be dissolved for three years after an election. In other words, an election cannot be called within that period. The only exception is that an election must be called if there is a vacancy in the office of Premier and the legislature is unable to reach agreement on the election of a new Premier within 30 days of the occurrence of the vacancy.¹ The three year moratorium on elections after a new legislature is constituted is intended to increase the stability of the system and to prevent governments from dissolving the legislature and calling elections in an opportunistic manner.

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However, while the Westminster parliamentary model and the system of government in South Africa's provinces set out in FC ss 125 to 141 are similar, the responsibilities and the functions of provincial executives differ fundamentally from those of the national executive and of executives in other parliamentary systems. The Final Constitution divides power both horizontally and vertically amongst the spheres of government. It is divided vertically by reference to subject matter. It is divided horizontally by reference to function. Provinces, by virtue of the vertical divide, have exclusive authority over certain subject matter (particularly that listed in Schedule 5 of the Constitution) and by virtue of the horizontal divide, have the

1 FC s 109(2).

responsibility to administer much national legislation. The implications for provincial executives of this division of authority in South Africa's system of multi-level government are profound. This division of authority affects the relationship of the provincial executive with the national executive and Parliament as well as the relationship between the provincial executive and the provincial legislature. In addition, although the Final Constitution establishes three distinct spheres of government, it anticipates a role for provincial governments in supporting and regulating local government. In short, the constitutional provisions governing provincial executives must be understood in terms of the system of multi-level government established by the Final Constitution.

This chapter discusses the constitutional role of provincial executives. As the role of the national executive is discussed fully in Chapter 18, here we focus on aspects of the role of provincial executives that distinguish them from their national counterpart. In addition, the manner in which a system of government develops cannot be understood in isolation from its political environment. Accordingly, where it is relevant, we note the way in which different provisions have been implemented in different provincial environments.

20.2 Premiers

(a) Appointment and removal

According to FC s 128, Premiers are elected by the provincial legislatures at the first sitting after the legislature's election. The election must be presided over by a judge designated by the Chief Justice. If the office of the Premier becomes vacant for any reason, the provincial legislature concerned must select a new Premier on a date determined by the Chief Justice.

In the initial version of its provincial constitution, the Western Cape attempted to alter the requirement that the Chief Justice designate a judge. It provided that the Judge President of the Western Cape or a judge designated by him or her would preside over the election of the Premier. The Constitutional Court rejected this alteration on the ground that members of the judiciary wield powers entirely independent of the powers exercised by the provinces. Provinces do not have the competence to alter the powers and the functions that have been assigned to particular judges by the national constitution.²

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There is, however, an anomaly in FC s 128 that the Western Cape Constitution did not try to rectify. One might expect a provincial constitution to stipulate that the first election in a newly-elected legislature should be that of the Speaker, and that the Speaker would then preside over all other elections. This procedure would accord with the constitutional status of legislatures as bodies which elect the head of the relevant executive and to which the executive must account. Such a variation in a provincial constitution from the provisions of FC Chapter 6 should pass constitutional muster. It would, on all but the narrowest reading of the section, constitute a 'legislative procedure' under FC s 143(1)(a).³

The constitutional requirement of an election for the office of Premier is a deviation from the practice of older parliamentary systems in which the leader of the largest party in the legislature is invited to form a government by the head of the

2 *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) at para 56.

state (or head of the subnational unit such as a province) and then becomes Prime Minister or Premier. However, the election does not itself distinguish the system in South Africa's provinces from other parliamentary systems. The largest party will still choose the Premier. In the case of coalition governments, where no single party holds the majority, an agreement must be reached amongst the parties seeking to form a governing coalition as to who should be Premier. The more significant difference between traditional parliamentary systems and that in South Africa lies in current political practice. The policy of the African National Congress (ANC), which commands the majority in all the provinces, is for Premiers to be identified by the party's president and to be 'deployed' to the premiership.⁴ This practice — combined with a closed list system of proportional representation that allows voters only a very limited opportunity to express preferences as to who their public representatives should be — weakens the democratic basis of provincial government. In effect, Premiers gain their political legitimacy from and are politically accountable to the president of the ANC and the central party structures rather than the provincial legislature or even regional party structures.

Despite the controversy that has surrounded the ANC practice of allowing the President to identify Premiers, it has been used to good effect to increase the

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number of women holding the office. After the 2004 elections, the number of women Premiers was increased to four — thus the number of male and female Premiers is almost equal.⁵ This outcome is consistent with the ANC's general policy of increasing the representation of women in prominent political posts.⁶

3 For further discussion of the extent to which provincial constitutions may vary their executive and legislature structures from those structures provided for in the Final Constitution, see S Woolman, 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

4 Prior to 1997, Premiers were selected from within the party through an electoral list process. However, at the ANC National Conference in 1997, it was decided that the ANC president in conjunction with the National Executive Committee of the ANC should be given the power to 'deploy' Premiers. See D Besdzik 'Provincial Government in South Africa' in A Venter & C Landsberg (eds) *Government and Politics in the New South Africa* (2006) 117. This power has since caused a number of conflicts within the party, with some regional party structures rejecting their appointed Premiers and appointing other candidates as provincial party leaders. It has also caused a certain degree of factionalism within party structures, particularly in cases where the Premier is different from the elected head of the party in that region. See M Malefane 'Anti-Mbeki Vote Ensures Victory for Free State's Magashule' available at <http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2600167> (accessed 12 October 2006). See also T Lodge *Politics in South Africa: From Mandela to Mbeki* (2002) 38.

5 Prior to 2004, only two women had served as Premiers, both in the Free State. Ivy Matsepe-Casaburri held the position between 1996 and 1999. She was replaced by Isabella Winkie Direko, who served from 1999 to 2004. The four current women Premiers are Beatrice Marshoff (Free State), Edna Molewa (North West), Nosimo Balindlela (Eastern Cape) and Dipuo Peters (Northern Cape).

6 See *ANC's Women's Charter for Effective Equality* (1994), available at <http://www.anc.org.za/ancdocs/policy/womchart.htm> (accessed 21 February 2007). Piombo notes that the ANC has a formal requirement that at least 30 per cent of electoral candidates be women. At present, 38 per cent of ANC MPs in both Houses of Parliament are women. See J Piombo 'The Results of the Election 2004: Looking Back, Stepping Forward' in J Piombo and L Nijzink (eds) *Electoral Politics in South Africa: Assessing the first democratic decade* (2005) 281-2.

The terms of Premiers begin when they assume office, which must be within five days after their election.⁷ The term ends when a vacancy occurs or when the next Premier assumes office.⁸ Like the national President, Premiers may not serve for more than two terms. However, if a person has assumed the office of Premier to fill a vacancy then the period between the vacancy and the next election is not counted as a term.⁹

Premiers may be removed from office in two ways. First, a Premier who has lost the support of the majority in the legislature may be removed through a vote of no confidence by the provincial legislature.¹⁰ Secondly, under FC s 130(3), a Premier who is not fulfilling his or her functions properly may be removed by a vote of at least two thirds of the members of the provincial legislature.¹¹ Removal may occur 'only on the grounds of (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office'. A Premier who has been removed from office under FC s 130(3)(a) or (b) may not receive any of the benefits of the office and may not hold any other public office in future.¹²

To date no provincial legislature has attempted to remove a Premier through the use of either of the above mentioned procedures. The Premiers that have relinquished their office were forced to resign through decisions taken by the ANC National Executive.¹³

An acting Premier may be appointed if the Premier is absent or temporarily unable to fulfil his or her duties or if the office of the Premier becomes vacant. FC s 131(1) specifies who should be appointed as acting Premier. The first choice

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must be a member of the Executive Council designated by the Premier. The second choice is a member of the Executive Council designated by other members of the Council. The third choice is the Speaker of the provincial legislature. An acting Premier has all the powers and may perform all the functions of the Premier.¹⁴

(b) Powers and functions

7 FC s 130(1). The period within which a Premier must assume office is dealt with in FC s 129.

8 FC s 130(1).

9 FC s 130(2).

10 We discuss this subject at § 20.3 *infra*.

11 FC s 130(3). Note that the section requires two thirds of all the members of the legislature to support the decision to remove the Premier, not merely two thirds of the members present.

12 FC s 130(4).

13 T Lodge (*supra*) at 42-8.

14 FC s 131(2).

Although the Final Constitution does not formally create two distinct roles for Premiers, they have two broad sets of powers and functions: (i) those that are performed by virtue of their status as the head of the province and that are similar to those performed by the President acting as Head of State; and (ii) those that they perform in conjunction with the Executive Council.¹⁵

Most of the powers of the Premier exercised by virtue of his or her status as head of the province are listed in FC s 127(2). The nature of these powers and the fact that they are listed separately from the 'executive powers' listed in FC s 125(2) suggests that they are to be distinguished from those powers and need not be exercised 'together with' the rest of the Executive Council. Instead, like the President's powers under FC s 84, they may be exercised by the Premier on his or her own. However, FC s 140 stipulates, firstly, that decisions taken by a Premier must be in writing if they are taken in terms of legislation or have legal consequences and, secondly, that written decisions that concern the portfolio of an MEC must be countersigned by that MEC. Some decisions taken under FC s 127(2), such as a decision to establish a commission of inquiry or to refer a bill back to the provincial legislature because of concerns about its constitutionality, will concern the portfolio of an MEC. So although FC s 127(2) does not require the Premier to act 'together with' the Council, under these circumstances FC s 140(2) is usually taken to require the countersignature of the MEC as an indication that the MEC is informed about the decision but not as an indication of his or her agreement.¹⁶

The powers that the Premier exercises as head of the province include assenting to and signing Bills,¹⁷ referring Bills back to the provincial legislature or to the Constitutional Court for consideration of their constitutionality,¹⁸ summoning the

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provincial legislature to extraordinary sittings to conduct special business, appointing commissions of inquiry and calling a referendum. A Premier must also dissolve the provincial legislature if it takes a resolution to dissolve — provided that at least three years have elapsed since the last election.¹⁹ When a provincial legislature has been dissolved, or if its term has expired, the Premier must proclaim the date on which new provincial elections will be held.²⁰ These powers are distinct from those powers that the Premier exercises together with the Executive Council under FC s 125. The expectation is that they will be exercised in a non-partisan

15 The functions of the Premier that are exercised in conjunction with the Executive Council are discussed in § 20.3(b) *infra*.

16 This matter is discussed in greater detail in C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18.

17 For a brief discussion on this subject, see T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19, § 19.2(c).

18 The power of a Premier to refer provincial bills to the Constitutional Court has been used only once. See *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC). For a brief discussion of this case, see T Madlingozi & S Woolman (*supra*) at § 19.6.

19 FC s 109(1).

manner. In a number of instances, such as the power to assent to Bills, the Premier possesses no discretion at all.

A number of other functions are specifically allocated to Premiers by the Final Constitution. These embrace heading the province's delegation to the NCOP,²¹ nominating a commissioner to serve on the Public Service Commission as a representative of the province and serving on the Judicial Service Commission when a vacancy on the bench in the province exists.²² In fulfilling these functions, the Premier plays a distinctly political role and acts as head of the provincial executive. In addition, as Froneman J puts it in *Magidimisi NO v Premier of the Eastern Cape*, under the Final Constitution, the Premier is vested with the 'ultimate executive authority of the province'. What Froneman J means, among other things, is that the Premier 'bears the ultimate responsibility to ensure that the provincial government honours and obeys all judgments against it'.²³ When the Premier exercises such executive authority, he or she must act 'together with the other members of the Executive Council' and thus needs the support of the Council.²⁴

20.3 Executive councils

(a) Composition, appointment and removal

The Executive Council is a province's Cabinet. It consists of the Premier and between five and ten other members (MECs) appointed by the Premier from amongst the members of the provincial legislature.²⁵ FC s 132(2) expects a Premier to choose the Executive Council for the province. However, in provinces

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controlled by the ANC, MECs, like the Premier, are 'deployed' by the national executive of the ANC.²⁶ Similarly, while the Premier also has the constitutional power to dismiss MECs, ANC control of the provinces means that dismissal occurs at the behest of the national executive of the ANC.²⁷

20 FC s 108(2). No provincial legislature has ever been dissolved so it has not been necessary to hold fresh elections in any of the provinces. Thus far, the dates on which new elections for provincial legislatures whose terms have expired have coincided with the dates for national elections.

21 FC s 60(2)(a)(i).

22 FC s 196(7)(a). This is more of a ceremonial function. In terms of FC s 196(8)(b), the commissioner must be recommended by a committee of the provincial legislature in which all political parties must be proportionally represented and selected by a majority vote of the provincial legislature.

23 Unreported, ECPD Case No 2180/04, 25 April 2006, at para 20. See § 20.3(d) *infra*.

24 FC s 125(2).

25 FC s 132. This provision is retained in s 42(1) of the Western Cape Constitution.

26 For a fuller discussion on politics in the provinces, see T Lodge *Politics in South Africa* (*supra*) at 32-53. See also J Arenstein 'Mpumalanga gets New Chief Whip' available at <http://www.lowveldinfo.com/news/showstory.asp?story=722> (accessed 22 October 2006).

Under the Final Constitution, MECs are accountable both to the Premier, since he or she holds the power to dismiss them, and to the provincial legislature. These arrangements are identical to those for the national Cabinet and, like FC s 92(2), FC s 133(2) spells out the principle of cabinet accountability.²⁸

Although FC s 132(2) gives Premiers the power to dismiss MECs, it does not spell out the circumstances under which an MEC can be removed. In keeping with the tradition in parliamentary systems, the Premier may dismiss MECs at will. This power is, of course, subject to political constraints.

The legislature can remove the Executive Council through a vote of no confidence. In terms of FC s 141(1), '[i]f a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council'. If the legislature has lost confidence in the entire Executive Council, including the Premier, then, in terms of FC s 141(2), it can pass a vote of no confidence in the Premier, who must then resign together with the MECs. FC s 141(2) captures a longstanding practice in parliamentary systems. Such a vote of no confidence usually precipitates a change of government: the vote signifies that the party in government is no longer able to command a majority in the legislature. However, FC s 141(1) is unusual — perhaps unique. It is difficult to envisage circumstances in which it would be used. A Premier, sensing discontent amongst backbenchers, is likely to reshuffle the Council before being subject to the indignity of having his or her chosen team dismissed.

The 'no confidence removal' procedure under FC s 141(2) must be distinguished from the procedure under FC s 130(3) which, as discussed above, allows the Premier to be removed for reasons other than loss of confidence. The two are different in four significant ways. First, a two-thirds majority of all the members of the legislature is required to remove a Premier in terms of FC s 130(3) whereas only a majority vote (fifty percent plus one of the members of the legislature) is required to force a resignation through a vote of no confidence. It is therefore significantly more difficult to dismiss a Premier under FC s 130(3). Second, the rest of the Executive Council need not resign if the Premier is removed in terms of FC s 130(3). Third, the consequences for a Premier who has been removed in terms of FC s 130(3)(a) or (b) are more prejudicial, as under FC s 130(4) that

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person may not receive any of the benefits of the office or assume public office again. Finally, FC s 130(3) would appear to be justiciable. Its precise wording, limiting its use to a few, narrowly defined circumstances, suggests that the Final Constitution is concerned that the process should not be misused and thus contemplates the possibility of judicial review. On the other hand, one could contend that the special majority required for removal of a Premier under FC s 130(3) suggests that the Final Constitution did not intend a court to second-guess the legislature on such matters, but, instead, was content to place full responsibility upon the legislature. This reading would avoid a three-way power struggle between the executive, the legislature and the courts. In any event, the question may be academic. A provision such as this one is likely to be used only in the context of a

27 FC s 132(2).

28 For a more detailed discussion on collective responsibility, see C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds), *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18.

breakdown of party government. Conceivably, a legislature might rely on it, rather than moving for a vote of no confidence, in an attempt to indicate that it is not calling for a change of government. However, in circumstances where two thirds of the legislature can be rallied to remove a Premier, one would ordinarily expect party structures to ensure that he or she resigns before facing that embarrassment.²⁹

Members of the Executive Council will ordinarily be members of the provincial legislature. Although the Final Constitution is silent on whether an MEC (including the Premier) may remain in office if he or she leaves the provincial legislature, the obvious interpretation of the FC s 132 requirement that the Premier and other MECs be chosen from the legislature is that, to retain their office, they should remain members of the legislature. This interpretation accords with the parliamentary system of government that the Final Constitution establishes for provinces.

There is one, narrowly circumscribed, exception to the requirement that MECs must be members of the legislature. FC s 135 deals with the situation that arises after an election but before a new Premier has been chosen. It stipulates that, after an election, 'the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office'. For this short period, it is possible that a person who no longer holds a seat in the legislature will serve as an MEC.

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(b) Powers and functions

The executive authority of a province is vested in the Premier,³⁰ who must exercise that authority 'together with the other members of the Executive Council'.³¹ As noted above, this arrangement makes the Premier the 'ultimate executive authority in the province'.³² The phrase 'together with' and the stipulation in FC s 133(2) that the Premier and other MECs are collectively accountable for the government of the province capture the idea of cabinet government that is central to parliamentary systems. In this tradition, a Premier is *primus inter pares* (first among equals). Thus, despite the fact that the executive power is formally vested in the Premier alone, the responsibility for government is shared. Of course, as studies of parliamentary government in the United Kingdom have shown, the management of cabinet and the amount of authority that a Premier actually wields depends on the particular political context of the time and the personalities involved.³³

29 FC s 106(3)(c) stipulates that members of provincial legislatures (MPLs) lose their seats in the legislature if they are expelled from their party. One consequence of FC s 106(3)(c) is that a Premier would have to relinquish office on being expelled from the party and having lost his or her seat. FC s 106(3)(c) does however contain the proviso that an MPL who crosses the floor as provided for by FC Schedule 6A — which governs floor crossing in general — will not lose his or her seat. The prospect therefore exists that a Premier could cross the floor to another party and retain the Premiership. However, to avoid being dismissed pursuant to a vote of no confidence, either a majority of the members of the legislature would have to accompany the Premier across the floor or a majority of the members of the legislature — in the form of a new coalition — would have to continue to provide him or her with the requisite level of political support.

30 FC s 125(1).

31 FC s 125(2).

32 *Magidimisi* (supra) at para 20.

FC s 125(2) outlines the general powers and functions of Executive Councils. These powers and functions are:

- (a) implementing provincial legislation in the province;
- (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
- (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- (d) developing and implementing provincial policy;
- (e) co-ordinating the functions of the provincial administration and its departments;
- (f) preparing and initiating provincial legislation; and
- (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

Much of this list captures the expected functions of a government: to develop and to implement policy for the polity over which they have authority. However, as we noted in the introduction to this chapter, the role of South Africa's provincial governments is very different from that of most of their foreign counterparts.³⁴

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FC s 125(2)(b), (c) and (g) underscores these differences and points to the extensive responsibility that provincial governments have for the development and implementation of *national laws*.

FC s 125(2)(b) is the key provision here. It sets out what is currently the main function of the provincial governments — the implementation of national laws in the areas of shared responsibility listed in Schedule 4.³⁵ Schedule 4 embraces such functions as health services, welfare services, education and housing. These functions, and many of the other functions listed in Schedule 4, are critical to the transformation of the country. In other words, the Final Constitution envisages that many, very significant national laws will be implemented by provincial governments. Currently, most of the national laws concerned are comprehensive and provide detailed instructions to their provincial implementers. Indeed, many pieces of legislation cast provincial governments in the role of implementing agents with little of the discretion that one might expect an elected government to possess. But that may simply be a function of the exigencies of the moment. In due course, and building on their experience in administering these national laws, provincial executives might assume a different role and propose provincial laws that tailor the national laws to suit local needs. The importance of FC s 125(2)(b) might recede as

33 See R Brazier *Constitutional Practice* (1994); J Simon *British Cabinet Government* (1999); N Manning *Strategic Decision-Making in Cabinet Government* (1999).

34 The role of the governments of Germany's Länder is perhaps closest to that of the provinces. Those governments have more autonomy than the provinces but, like the provinces, their main responsibility is to implement national laws. See C Saunders 'Legislative, Executive and Judicial Institutions: A Synthesis' in K le Roy & C Saunders (eds) *Legislative, Executive, and Judicial Governance in Federal Countries: A Global Dialogue on Federalism, Vol 3* (2006) p 361ff.

35 Few national laws fall under Schedule 5.

national legislation is restricted to establishing national norms and standards and provinces take fuller responsibility for achieving and maintaining such standards. However, as things stand, the limited capacity of provincial governments and the high level of agreement on what should be done make provincial innovation rare. Most provinces are content to implement programmes within the tight parameters set by the national government.³⁶

FC s 125(2)(c) extends the range of provincial governments as executors of national laws still further. It anticipates the provincial administration of national legislation that falls outside Schedules 4 and 5 but which the national government has assigned to the provincial executive. The wording of paragraph (c) suggests that the role of provincial executives in relation to assigned legislation (which they are to 'administer') might be different from that in relation to Schedule 4 and 5 laws (which they 'implement'). However, it is unlikely that this semantic distinction would mean anything in practice. When the 'administration' of legislation is assigned to a provincial government, the precise responsibilities of the province are likely to be set out in the assignment agreement.³⁷

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There is one striking omission from the list in FC s 125(2). It does not mention the participation of provincial executives in the formation of the national legislation that they will be expected to implement or in the allocation of revenue to provinces in terms of FC s 214. In fact, provincial executives have a significant national role here, both through their participation in the intergovernmental forums mandated by FC Chapter 3, and in the passage of national legislation, including the annual Division of Revenue Act, in the NCOP.³⁸

Although the main responsibility of provincial executives, at least at present, is the implementation of national laws, provinces may develop and implement their own policies and provincial laws. Following the practice of other parliamentary systems, provincial laws are usually prepared and introduced in the legislature by the executive. And, again in line with other parliamentary systems, money bills may be introduced only by the MEC responsible for finance.³⁹ The power to implement provincial legislation in terms of FC s 125(2)(a) is an exclusive power of the provincial executive and the national government may restrict it only in the circumstances laid out in FC s 100.⁴⁰ As we have already noted, provinces have made little use of their law-making power.

Some provinces have attempted to use their FC s 125(2)(d) right to develop and to implement provincial policy. This practice is uncontroversial in relation to

36 In the seven-year period between 1994 and 2000, the provincial legislatures passed between 46 (Northern Cape) and 78 (North West) Acts. Many of these provincial Acts were routine — for instance, the annual budget and laws relating to salaries. Parliament, by comparison, produced approximately 70 national Acts each year. See C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002) 74 - 75.

37 FC s 99 requires an assignment to be agreed to by the provincial MEC concerned. See § 20.4(v) *infra*. For a fuller discussion of the FC s 99 power of assignment, see C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18.

38 See § 20.4 *infra*.

39 FC s 119.

Schedule 5 matters over which provinces have exclusive responsibility. However, the power of provinces to make policy on Schedule 4 matters has been controversial, particularly in provinces that were not controlled by the same party as the national government. National government contended that it is the role of the national government to make policy and the role of provincial executives to implement it. This is simply wrong. First, the Final Constitution does not oblige provinces to implement national policy: it obliges them to implement national laws.⁴¹ That means that unless policy is enshrined in law, it does not bind the provinces. Secondly, a province can choose to depart from national policies spelt out in national laws by passing their own provincial laws. In such cases, under FC s 146, the national laws will give way to the provincial laws unless they meet the tests set out in FC s 146(2) and FC s 146(3). These provisions clearly do not anticipate that national policies bind provinces. Certainly, Chapter 3's principles of

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co-operative government contemplate that provinces will discuss any desire to depart from national policy with the national government. However, FC Chapter 3 does not privilege national policies. Nevertheless, as a general rule, provinces have not implemented policies in Schedule 4 areas that are inconsistent with those of the national government. The most significant exception has been provincial opposition to national HIV/AIDS policy. In 2001, a national policy stated that the anti-retroviral Nevirapene, effective in preventing mother-to-child transmission of HIV, would be tested at only two research sites per province. The drug was not to be made generally available. However, in 2002, Gauteng took the decision to provide Nevirapene to HIV-positive pregnant women at all public hospitals and large community centres.⁴²

(c) The role of MECs

The MECs are responsible for the specific areas that are assigned to them by the Premier — eg, finance, health, transport.⁴³ It is now also common for Acts to stipulate which MEC will be responsible for the Act's implementation. As a result, an MEC, on being allocated the health portfolio, will automatically assume responsibility for the implementation of certain laws. The Premier always has the power to reallocate portfolios. However, the Final Constitution also envisages the transfer of specific functions of MECs in two additional circumstances. First, under FC s 137,

40 FC s 125(5). FC s 100(1) empowers the national executive to intervene in a province if the provincial executive fails to fulfil any of the obligations that are imposed on it by the Constitution or legislation. See C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 18. FC s 238 may permit a province to delegate responsibility for 'implementing' legislation to another sphere of government, but technically responsibility for ensuring that the law is properly implemented would remain with the province.

41 See *Ex Parte Speaker of the National Assembly; In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at para 24 (Court seems to accept that had the impugned legislation required provinces to adhere to national education policy then the law would have been unconstitutional.)

42 N Steytler 'Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa' (2003) 33 *Publius: The Journal of Federalism* 59, 65-66.

43 FC s 132(2). See also *Magidimisi* (supra) paras 21 and 22 (MECs bear responsibility for decisions and conduct of their departments.)

responsibility for implementing a particular piece of legislation may be transferred from the portfolio of one MEC to that of another. FC s 137 thus ensures that the Premier is able to change the content of portfolios on the Executive Council and to redefine the responsibilities of MECs. In 2006, this provision caused a dispute in the Eastern Cape when the Premier sought to transfer responsibility for the implementation of an Act from the MEC designated in the Act to another MEC.⁴⁴ The legislature's legal adviser objected and suggested that the only way in which such a transfer could be made was through the amendment of the Act. In order to avert a legal dispute, the Premier eventually withdrew her proclamation and transferred the responsibilities back to the MEC designated by the Act.⁴⁵ But the objection raised in this dispute appears misconceived because FC s 137 addresses this set of circumstances directly. The section protects the Premier's right to manage the administration of the government of the province. In fact, FC s 137 introduces a limit on the powers of the provincial legislature. This limit, consistent with the doctrine of separation of powers, vests responsibility for decisions concerning how executive responsibilities should be

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allocated in the Premier. The requirement that transfers of responsibility be formally announced by proclamation is intended to check the Premier's power, albeit in a limited way, and to ensure that the public is aware of who bears responsibility for the law concerned.

FC s 138, headed 'Temporary assignment of functions', deals with a rather different situation. It allows the Premier to deal with the temporary inability of an MEC to do his or her job. Under circumstances such as the illness, travel or vacation of an MEC, another MEC may be asked to bear responsibility for the absent MEC's portfolio for a limited time.

Only two portfolios in provincial executives are identified by the Final Constitution: policing finance. In terms of FC s 206(8) the MECs responsible for policing are members of a national committee that ensures the coordination of police services. In terms of FC s 119, only the MEC responsible for financial matters is allowed to introduce a money bill in the provincial legislature.⁴⁶ So although the legislature possesses the power to decline to adopt a provincial budget, it does not have the power to introduce it.⁴⁷

44 'ECDC in Limbo after Sacking of Minister' *The Herald* (12 April 2006), available at <http://www.eherald.co.za> (accessed 14 April 2006).

45 'Premier Transfers ECDC back to Economic Affairs' *Dispatch* (14 April 2006), available at <http://www.dispatch.co.za/2006/04/14/Easterncape/abal.html> (accessed 3 February 2007).

46 FC s 120(1) defines a money bill as follows:

(1) A Bill is a money Bill if it-

- (a) appropriates money;
- (b) imposes provincial taxes, levies, duties or surcharges;
- (c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or
- (d) authorises direct charges against a Provincial Revenue Fund.'

(d) The Executive Council and provincial administration

In terms of FC s 125(2)(e), the Executive Council is responsible for co-ordinating the provincial administration and its departments. The ability of Executive Councils to control the administration in the province is limited by the fact that, in terms of FC s 197(1), there must be one, unified public administration for the whole country. This unified public administration must be structured by national legislation.⁴⁸ The provincial government may only recruit, promote, transfer and dismiss employees within the provincial administration:⁴⁹ even these powers must

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be exercised in accordance with nationally determined standards.⁵⁰

The question of the extent to which provincial governments may exercise control over the structure of the public administration in their province was considered by the Constitutional Court in *Premier, Western Cape v President of the Republic of South Africa*.⁵¹ The case concerned a dispute between the Western Cape government and the national government about certain provisions of the Public Service Laws Amendment Act,⁵² which amended the Public Service Act.⁵³ The amendments significantly restructured the public administration within the provinces. The Western

47 The question whether a provincial legislature may amend a money bill remains controversial. FC 120(3) states that '[a] provincial Act must provide for a procedure by which the province's legislature may amend a money Bill'. No province has passed such an Act and the received wisdom is that, in the absence of the Act, legislatures may not amend money bills. But this interpretation runs against both the language of the provision and its intention. The language does not suggest that the legislatures may not amend a money bill and, had the Constitution intended this one would have expected s 114(1)(a) which gives provincial legislatures the power to 'consider, pass, amend or reject any Bill before the legislature' to have expressly excluded the power to amend money bills just as, in the following paragraph, it confers on provincial legislatures the power to 'initiate or prepare legislation, except money Bills'.

48 FC s 197(1) states: 'Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.' For general comment on this aspect of public service in South Africa, see A M Sindane 'Politicisation of the Public Service: An Unavoidable Consequence of the Political History in South Africa' (2003) 1 *Journal for New Generation Sciences* 59; TJ Mokgoro 'The Public Service as Promoter and Sustainer of Democracy' (1997) 32 *Journal of Public Administration* 241. See also A Bodasing 'Public Administration' in S Woolman, T Roux, T Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

49 FC s 197(4).

50 FC s 197(4). FC s 197(2) further stipulates that '[t]he terms and conditions of employment in the public service must be regulated by national legislation.' For a more detailed discussion of the public service, see LP Dicker and GE Devenish 'Public Service' in WA Joubert (ed) *The Law of South Africa* (First Reissue, 2000) Volume 21, para 414ff. See also A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

51 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) ('*Premier, Western Cape*').

52 Act 86 of 1998.

53 Act 103 of 1994.

Cape objected to the amendments on the basis that they infringed the province's constitutionally conferred power to structure its own administration. Its principal contention was that FC s 197(1) should not be interpreted as conferring a power to the national government to structure the public administration as well as the public service. It argued that, instead, a distinction should be made between the public service and the public administration; the former could be structured by the national government, whilst the latter fell within the sphere of the provincial government. The Court rejected this argument. It held that the proper interpretation to be given to FC s 197(1) was that it empowered the national government to structure both the public service and the public administration, and that the two terms were virtually synonymous. It further held that adopting the construction of FC s 197(1) suggested by the Western Cape would be incorrect because it would result in an implied power that contradicted the express provisions of the Final Constitution and would empty FC s 197(1) of its content.⁵⁴ However, the Court did find that s 3(3)(b) of the Public Service Act, as amended, was unconstitutional insofar as it gave the Minister of Public Service and Administration the power to transfer the administration of any legislation, including provincial legislation, from a provincial department to a national department without the consent of the Premier. This section was found to be in conflict with the province's power to administer its own legislation.⁵⁵

After *Premier, Western Cape*, it is clear that the power to structure public administration within the provinces is vested in the national government. However, the *Premier, Western Cape* Court warned that, in light of the principles of co-operative government outlined in FC s 41, the power vested in the national government

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should be exercised very carefully and in a manner that does not undermine the ability of the provinces to carry out their functions.⁵⁶

Although FC s 197 places significant limits on the power of provincial executives to structure their administrations, it does not absolve them of the responsibility for 'coordinating the functions of the provincial administration and its departments' as listed in FC s 125(2)(e). This responsibility entails maintaining oversight over the actual running of the administration within the province and ensuring that their departments fulfil their responsibilities.⁵⁷

(e) Oversight by provincial legislatures

The Final Constitution is unusually emphatic in its insistence that legislatures must oversee the conduct of government. Echoing provisions relating to the national Parliament, FC s 114(2) contains direct instructions to provincial legislatures to

54 *Premier, Western Cape* (supra) at paras 44-48.

55 *Ibid* at paras 86-88.

56 *Premier, Western Cape* (supra) at para 60. On Chapter 3 and the principles of co-operative government generally, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

57 *Magidimisi* (supra) at paras 21, 22, 24 (In particular, MECs are responsible for ensuring that court orders are obeyed.)

oversee the executive. FC s 115 affords the legislatures substantial powers with which to carry out this responsibility. FC s 133(2), which makes members of Executive Councils collectively and individually responsible to the provincial legislature, complements these provisions. Lest this not be clear enough, the Final Constitution takes the unusual step in FC s 133(3)(b) of specifying that MECs must 'provide the legislature with full and regular reports concerning matters under their control'.

Although more detailed than provisions relating to oversight found in most constitutions, these provisions might suggest that the oversight relationship between the provincial legislature and its executive follows the usual pattern in parliamentary democracies. Legislatures usually pass laws introduced by the executive and then oversee their implementation.

However, this division of labour does not exist in South Africa. Because the main responsibility of provincial executives is to implement national laws, provincial legislatures do not hold them to account only for implementing laws that the provincial legislatures themselves have passed. Instead, the greater part of the oversight work of a provincial legislature is to oversee the way in which the provincial executive implements national laws. Thus, provincial legislatures may be seen to be exercising oversight on behalf of the national Parliament.

The consideration of departmental annual reports is the focus of oversight activities in most provincial legislatures. These reports are tabled in terms of s 65 of the Public Finance Management Act (PFMA).⁵⁸ The PFMA was enacted to

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comply with the requirement in FC s 215 that national legislation should ensure, amongst other things, transparency, accountability and sound financial management of national, provincial and municipal budgets. Section 65(1)(a) of the PFMA requires executive authorities to table annual reports together the financial statements and audit report of their departments in their respective provincial legislatures. If an MEC fails to submit the annual report within six months of the end of the financial year, then he or she will have to table a written explanation for the delay.⁵⁹

At the beginning of each new financial year, every provincial department tables a strategic plan and budget. The annual report focuses on service delivery by indicating the extent to which each government department has met the targets outlined in its strategic plan and in the budget for the preceding year. It provides both a record of the financial performance of the department and a non-financial performance report. It must detail the extent to which service delivery targets have been met.⁶⁰ Annual reports are prepared in accordance with guidelines issued by the National Treasury.⁶¹

(f) Ethical accountability

58 Act 1 of 1999. See R Kriel & M Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

59 Section 65(2)(a). As the financial year ends on 1 March, all reports must be tabled by no later than 30 September of each year.

60 National Treasury *Guideline for Legislative Oversight through Annual Reports* (2005) 12.

MECs and Premiers are expected to conduct themselves in an ethical way. FC s 136(2) outlines the basic principles that are applicable in this regard. It states that:

- (2) Members of the Executive Council of a province may not —
 - (a) undertake any other paid work;
 - (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

This section is not intended to be comprehensive. FC s 136(1) anticipates a more extensive code of ethics for MECs stating that '[m]embers of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation'.⁶²

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The national legislation envisaged in FC s 136(1) was passed in 1998 in the form of the Executive Members Ethics Act (Ethics Act).⁶³ Section 2 of the Ethics Act requires the President, in consultation with Parliament, to publish a code of ethics to govern the behaviour of all MECs, Premiers, and national Cabinet Ministers and deputy Ministers. The Executive Ethics Code was eventually published in July of 2000.⁶⁴ The standards outlined in the Code elaborate upon the provisions of FC s 136(2). The Code requires MECs and Premiers to submit a list of their financial interests to the Secretary of the Executive Council. The Secretary then maintains a register of financial interests.

Breaches of the Ethics Code are to be investigated by the Public Protector.⁶⁵ The Public Protector must complete the investigation and submit the report within 30

61 Section 76 of the PFMA empowers the National Treasury to make regulations concerning certain matters. This grant of power accords with FC ss 216(1) and (2), which require the Treasury to enforce compliance with nationally legislated standards regarding budgets and expenditure. The National Treasury therefore issues treasury regulations that govern the production of annual reports. These regulations are simplified in the 'Guide for the Preparation of Annual Reports by National and Provincial Departments'. The guide is issued annually by the Treasury. The Treasury also provides guidelines on non-financial reporting. Individual provinces can add their own requirements for the annual report as long as these do not conflict with those of the National Treasury. See National Treasury *Guideline* (supra) at 23.

62 Such a code could not depart from the provisions of FC s 136(2).

63 Act 82 of 1998.

64 GG No 21366 of 28 July 2000.

65 Section 3. In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

- (a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or
- (b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.'

days.⁶⁶ If a complaint is lodged against the Premier, then the report of the Public Protector is submitted to the President. However, if a complaint is lodged against an MEC, then the report goes to the Premier of that province.⁶⁷ Upon receipt of a report on a complaint against a Premier, the President must submit the report together with his or her comments within 14 days to the National Council of Provinces (NCOP).⁶⁸ A Premier who receives a report on an MEC must present it, together with a report on any action to be taken against the MEC, to the provincial legislature.⁶⁹

The requirement in the Act that reports concerning Premiers be submitted to the President is yet another reflection of the prevailing attitude that provincial politicians are accountable to the national government. As Premiers are formally chosen by provincial legislatures, and can be dismissed by them only, it would be most appropriate for the Public Protector to deliver such a report to the Speaker

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of the provincial legislature.⁷⁰ In any event, FC s 182 requires reports of the Public Protector to be made public in all but exceptional circumstances. A report that alleges unethical behaviour by a Premier could hardly warrant secrecy. The requirement that the President should submit reports concerning Premiers to the NCOP rather than to the provincial legislature concerned adds another twist. It acknowledges that it is appropriate for the President to engage with provinces through the NCOP. But, as the NCOP has no power to censure or remove a Premier, it is not clear what the NCOP would do with such a report. As far as MECs are

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant sections of the Public Protector Act 23 of 1994.

66 Section 3(2) of the Ethics Act.

67 Section 3(2)(a) and (b).

68 Section 3(5)(b). See also GG No 21366 of 28 July 2000. In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

'(a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or

(b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.'

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant section of the Ethics Act.

69 Section 3(6) of the Ethics Act.

70 The Public Protector would be empowered to take such action under s 6(4)(c) of the Public Protector Act 23 of 1994 which empowers the Public Protector

(c) at a time prior to, during or after an investigation-

...

- (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting there from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

concerned, despite the fact that the Ethics Act does not require the Public Protector to submit his report to the provincial legislature concerned, it is reasonable to assume that any such report will be brought to its attention. The Public Protector has not, however, had occasion to undertake any investigations pursuant to a complaint filed under the Ethics Act with regard to a member of an Executive Council.⁷¹

The adherence of Executive Councils to the financial disclosure requirements of the Ethics Code was examined in research conducted by IDASA in 2003.⁷² The research found that registers are being kept and updated in all the provinces. However, the IDASA report revealed a lack of awareness amongst officials in implementing offices about the requirements of the Ethics Act.⁷³ In most of the

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provinces, it was extremely difficult for members of the public to access the register. In some cases the register was wholly confidential: the Ethics Code expressly provides for both a public section and a confidential section of the register.⁷⁴ The IDASA report also notes that although registers are being kept, there is no mechanism in place for evaluating the contents to determine whether the conduct of MECs and Premiers is in order. This omission constitutes a fundamental flaw in the Code as well as the Ethics Act. Attempts by civil society and members of the public to take the initiative in this regard are hampered by difficulties in accessing the registers.

(g) Salaries

FC s 219(1)(b) requires national legislation to be enacted to determine 'the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories'. FC s 219(2) and FC s 219(4) further require an independent commission

71 Although no complaints have been made against Executive Council members under the Ethics Code, the Public Protector has in the past taken action when necessary. In 1999, prior to the promulgation of the Code, the Public Protector launched an investigation into a public statement that had been made by the erstwhile Premier of Mpumalanga, Ndaweni Mahlangu, to the effect that it was acceptable for politicians to lie. The investigation report concluded that Mr Mahlangu's statement contravened his obligation in terms of FC s 136(2)(b) not to act in a manner which was inconsistent with his office. It recommended that the Mpumalanga Legislature table the matter for debate and take appropriate action against the Premier. The report also expressed the view that, as Premiers are accountable only to provincial legislatures, legislatures have a constitutional obligation to take action against them when necessary. Office of the Public Protector 'Report No 12: Report on the Investigation of a Public Statement made by the Premier of Mpumalanga, Mr N Mahlangu' on 22 June 1999 available at http://www.publicprotector.org/reports_and_publications/report12.htm (accessed on 16 November 2006).

72 Institute for Democracy in South Africa 'Government Ethics in Post Apartheid South Africa' available at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=445> (accessed on 15 November 2006).

73 Not all the provinces have adhered strictly to the requirement in the Ethics Code that the register be maintained by the Secretary of the Executive Council. In most of the provinces, this function is performed by the Provincial Director General. Gauteng is unique in that the provincial legislature has appointed an Integrity Commissioner to maintain a register of member's interests for all members of the provincial legislature. MECs file the annual disclosures required under the Ethics Act with the Integrity Commissioner.

74 See s 7 of the Ethics Code.

to make recommendations with regard to salaries, benefits and allowances and further stipulates that the national legislation regarding salaries may be implemented by the provinces only after they have considered the recommendations of the commission.

The Independent Commission on the Remuneration of Public Office Bearers was set up in terms of the Independent Commission on the Remuneration of Public Office Bearers Act (Commission Act).⁷⁵ In accordance with the Commission Act, the Commission publishes its recommendations on the upper limit of

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salaries, benefits and allowances of Premiers and MECs in the *Government Gazette* on an annual basis after tabling the recommendations in Parliament.⁷⁶

Following these recommendations, the Remuneration of Public Office Bearers Act (Remuneration Act) requires that the upper limit of salaries of MECs and Premiers must be published by proclamation in the *Government Gazette* by the President.⁷⁷ The proclamation must take into consideration, amongst other things, the recommendations of the Commission. Although the President may determine the upper limits of salaries, the specific salaries of MECs in each province are

75 Act 92 of 1997. In terms of s 3 of the Commission Act, the Commission consists of eight members appointed by the President. Section 5(1) requires the President to determine the conditions of employment of the members of the Commission. Section 10 requires the Commission to present its annual report directly to the President, who then tables it in Parliament. Section 11(1) of the Act stipulates that the offices of the Commission are to be situated in the office of the President and the administrative requirements of the Commission are serviced by the office of the President. The Act does not provide for any oversight or approval of appointments to the Commission by Parliament or any other independent body. It also does not provide for administrative independence of the Commission and appears to make the Commission answerable to the President by requiring that it submit its activity report directly to him. The only provision in the Act that may protect the independence of the Commission is found in s 5(2) which provides members with security of tenure by stipulating that they will serve for a non renewable term of five years. In light of these provisions, it is uncertain whether the Final Commission meets the requirement of independence stipulated by FC s 219. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC) ('First Certification Judgment') the Constitutional Court held, in the context of the independent institutions established by the Constitution under Chapter 9, that the powers and functions of an institution need to be understood in order to determine whether the provisions for securing its independence are sufficient. *First Certification Judgment* (supra) at para 160. Issues to be considered include appointment, removal, tenure and institutional independence. We would suggest that the purpose of the Commission is to act as a check against government structures, including the executive, giving themselves exorbitant salaries. In light of this purpose, the Commission Act gives the President an unacceptably high degree of influence over the Commission and it is unlikely that the Act meets the standards that are necessary to secure the independence of the Commission required by the Final Constitution. In *Van Rooyen v The State*, the Constitutional Court was faced with a challenge to certain provisions of the Magistrates Court Act 32 of 1944 (2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC)). The applicants challenged, amongst other things, provisions relating to the appointment of magistrates and the determination of their remuneration and conditions of service. In coming to the conclusion that the provisions of the Act were not unconstitutional, one of the factors that the Court considered was that, even though substantial powers were vested in the Minister, in each case he or she had to consult the Magistrates Commission before taking a decision. Unlike the Magistrates Court Act, the Commission Act does not make provision for the President to consult with any independent body before taking decisions regarding the Commission. This factor, combined with those mentioned above, casts serious doubt on whether the Commission Act complies with FC s 219.

76 Section 8(4)(b) and (5) of the Commission Act.

77 Section 6(1) of Act 20 of 1998.

determined and published by the Premier of that province after the upper limits have been published by the President.⁷⁸ The Premier cannot, however, dictate his or her own salary. Instead, the provincial legislature of each province determines the salary of the Premier by a resolution taken within 30 days of the presidential proclamation. If the legislature is in recess, then the resolution must be adopted within 30 days after it resumes sitting.⁷⁹

20.4 Provincial executives and multi-sphere government

As we noted above, the South African system of multi-sphere government shapes the role of provincial governments. It draws them into national law-making, requires them to implement many national laws and demands that they support and regulate municipalities. In addition, provinces have acquired responsibilities in relation to traditional leaders.

The boundaries between the three spheres of government have been described as 'soft': there are few bright lines, many responsibilities are shared, and the obligation to cooperate is the system's driving principle.⁸⁰ Here we discuss some of the implications of the system for provincial executives.

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(a) Provincial executives and the national sphere of government

(i) Law-making

The Final Constitution expects provincial executives to be deeply involved in the adoption of national legislation on Schedule 4 and 5 matters and a number of other matters listed in FC ss 76(3), (4) and (5). The Final Constitution demands this involvement when laws are considered in the NCOP. In practice, however, provincial involvement in the law-making process starts long before bills reach the NCOP. MECs and staff in provincial departments engage their colleagues in the national government in discussions concerning policy and proposed legislation in an array of intergovernmental forums.

In its description of the system of co-operative government, FC Chapter 3 anticipates intergovernmental forums in which the national and provincial governments interact without competition and in which the different roles of each sphere are respected. In this system, MECs and provincial departmental officials are meant to contribute to the development of national legislation in order to ensure that such legislation reflects the most urgent concerns of the provinces. Intergovernmental forums ostensibly allow for the development of coherent national

78 The salaries of MECs must be published in the Provincial Gazette within 30 days after the presidential proclamation. Remuneration Act s 6(3)(a).

79 Remuneration Act s 6(3)(b).

80 For a more extensive discussion of the principles and the case law on co-operative government, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; R Simeon 'Considerations on the Design of Federations: The South African Constitution in Comparative Context' (1998) 13 *SA Public Law* 42; R Simeon and C Murray 'Multilevel Government in South Africa: An Interim Assessment' (2001) 31 *Publius: The Journal of Federalism* 65.

and provincial policies that are responsive to differing needs across the country. The Final Constitution offers provinces real leverage in such forums: the national government requires the support of the provinces in the NCOP if proposed legislation that falls under Schedule 4 or 5 is to be approved by Parliament. Should the national government not succeed in bringing provincial executives on board in the intergovernmental forums, its bills may not be passed by Parliament.⁸¹

The actual practice of intergovernmental relations in South Africa — now governed, in part, by the Intergovernmental Relations Framework Act⁸²— does not reflect the type of relationship amongst the spheres of government contemplated by the Final Constitution. The Act, adopted pursuant to FC s 41(2), seeks to formalise a number of the intergovernmental forums that have been established over the past 12 years. Under the Act the forums established for national-provincial intergovernmental relations are convened by the national government. The national government remains firmly in control of the agenda and rarely uses

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the forums as an opportunity to collaborate with the provinces.⁸³ While the degree of participation and influence of provinces in these intergovernmental forums varies, the provinces have come to accept the role of subordinate entities.⁸⁴

A number of factors led to this distortion of the system. First, all of the provinces are controlled by the ANC. As a result, MECs are willing to accept the leadership of the national government. MECs may also be more comfortable with discussion of policy matters in party structures than in more formal ones. Secondly, the capacity and the skills of provincial executives are severely limited. In no more than a handful of cases have the provinces engaged fully with proposed national legislation.

Once a national bill has been considered by the relevant intergovernmental forums and approved by the Cabinet, it is introduced in Parliament. Provincial executives have a leading role in the NCOP and are expected to participate fully in this process. The Premier of a province is the leader of the provincial delegation to

81 It is frequently asserted that the NCOP's role in Parliament is limited because, under FC s 76(1)(e), the National Assembly can override an NCOP veto with a two-thirds majority. However, this argument overlooks the likely political dynamics in such a situation. A Bill rejected by the NCOP will not have been able to secure the support of five of the nine provinces. It seems unlikely that the National Assembly will be able to, or even desire to, override the wishes of so large a part of the country.

82 Act 13 of 2005.

83 The language of ss 7 and 11 of the Intergovernmental Relations Framework Act reflects this proposition. Section 7, dealing with the President's Co-ordinating Council, describes the Council as a forum 'for *the President* to raise matters of national interest with provincial governments and organised local government and *to hear their views* on those matters' (emphasis added). Section 11 is similarly worded in relation to the Cabinet Ministers and MECs intergovernmental forums (Minmecs). It provides that Minmecs are consultative forums in which Cabinet ministers responsible for the relevant functional area can raise matters with provincial and local government in order to hear their views on those matters. The legislation does not envisage that the Minmecs or the President's Council will be available to provincial executives as forums for the discussion, formulation or pursuit of provincial goals.

84 See, eg, L Malan 'Intergovernmental Relations and Co-operative Government in South Africa: The Ten Year Review' (2005) 24 *Politeia* 226.

the NCOP.⁸⁵ Three other delegates, referred to as 'special delegates', are chosen from time to time by the provincial legislature 'with the concurrence of the Premier'.⁸⁶ In theory, the Premier and the three 'special delegates' constitute the most important part of the 10-person provincial delegation. The remaining six are 'permanent' delegates. They are based in Cape Town and are expected to manage the day-to-day business of the NCOP and to ensure that their provincial legislatures are adequately briefed on matters of importance. However, because the permanent members are based outside the province, they are often ill-equipped to deal with those matters in which the provincial government have a strong interest.⁸⁷

Each time a provincial delegation in the NCOP votes in support of a piece of national legislation that falls under Schedule 4 or 5, it also affirms its willingness and ability to implement that new law. Such laws have obvious funding and other capacity implications for the provinces — thus the mandatory participation of provincial executives in the provincial delegation. Ideally, provinces would choose specialists to send to the NCOP. Special delegates would discuss the law that

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enables their expertise in select committees. One would also expect provincial delegations to send the relevant MEC. Once again, the system does not work as it should. The participation of provincial MECs in the NCOP is largely restricted to making speeches in plenary, not to hammering out the details of laws in the committees.⁸⁸

Some argue that it is a breach of separation of powers for MECs to participate either in deliberations in provincial legislatures on those national bills on which their delegations must vote in the NCOP or in the NCOP select committees themselves. But this approach misapprehends the role of provincial MECs at the national level. The provincial delegations to the NCOP deliberately include both members of the provincial legislature and MECs to ensure that provincial interests are properly represented in the NCOP. Separation of powers concerns are irrelevant here because the issue of limiting the powers of the provincial executive does not arise in the NCOP. On the contrary, the balance of powers that the NCOP is intended to maintain is that between the national sphere and the provincial sphere of government. To ensure that this balance is maintained, provinces need to draw on the experience of both their MEC and their legislators in their participation in the NCOP.

A second common justification for minimal participation in the NCOP by MECs is that all relevant issues will have been dealt with in intergovernmental forums. Often that is true. But many pieces of legislation are altered in Parliament and provincial executives need to be alive to — and present for — such eventualities.⁸⁹

(ii) Provincial budgets, the Budget Council and the annual Division of Revenue Act

85 FC s 60(3).

86 FC s 61(4).

87 See C Murray & R Simeon 'From Paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SA Public Law* 96, 113; C Murray, Y Hoffman-Wanderer & K Saller *NCOP Second Term 1999-2004: A Review* (Report for the NCOP 2004).

88 Permanent delegates tend to dominate select committees in the NCOP.

The annual Division of Revenue Act divides revenue collected nationally amongst the national, provincial and local spheres of government and then allocates an equitable portion of the provincial share to each province.⁹⁰ As provinces have very limited revenue raising power, the allocation of revenue to provinces by the Division of Revenue Act largely determines provincial budgets. In *First Certification Judgment*, the Constitutional Court addresses the question whether the Division of Revenue Act should be passed according to the procedure prescribed by FC s 75 or s 76. It notes that the Act does not deal with the appropriation of revenue or direct charges against the national revenue fund, and thus is not a money bill.⁹¹

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Instead, as a bill which affects the financial interests of the provincial sphere of government, it must be passed according to FC s 76. FC s 76 requires the support of at least five provincial delegations in the NCOP for a bill to pass and thus gives provinces — and accordingly their executives — real influence over the law.

The role of provincial MECs responsible for finance in the adoption of the Division of Revenue Bill starts in the Budget Council. The Budget Council was established in terms of the Intergovernmental Fiscal Relations Act⁹² and consists of the finance MECs from each province, the national Minister of Finance, the Deputy Minister of Finance and officials from the provincial and national treasuries. The Council serves as a forum for negotiation on how revenue will be divided amongst the provinces.⁹³ The process is concluded when the Division of Revenue Bill is approved in the NCOP.

(iii) Subordinate legislation

Hidden away in FC s 146 are three provisions concerning provincial and national subordinate legislation on matters that fall under Schedule 4. FC s 146 deals, generally, with conflicts between national laws and provincial laws that fall within the concurrent jurisdiction of provinces and the national government set out in FC Schedule 4. It stipulates that, in the case of a conflict between a national law and a provincial law, the provincial law will prevail unless the national law meets certain criteria set out in subsections (2) and (3). Subsection (6) adds an additional requirement for subordinate legislation to prevail.⁹⁴ It states that in the case of a conflict, a piece of subordinate legislation can prevail only if it has been approved by

89 The failure of provinces to engage fully in NCOP procedures is the most important reason for the NCOP's failure to contribute as it should to the national law-making process. It seems wrong to argue, as the *1999 Intergovernmental Relations Audit* does, that the size of the NCOP is a major cause of its ineffectiveness. In fact, through the appointment of special delegates, the NCOP can draw on every member of each provincial legislature to contribute to its work. See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 4-8; S Woolman, T Roux and B Bekink 'Co-operative Government' (supra) at § 14(4)(b).

90 See FC s 214(1).

91 *First Certification Judgment* (supra) at paras 420-1.

92 Act 97 of 1997

93 For a discussion of the allocation of equitable shares to provinces, see R Kriel & M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

the NCOP. This proviso applies both to subordinate legislation adopted by provinces and to subordinate legislation adopted by the national government.

This provision places a dual responsibility on MECs. First, they should ensure that their delegation to the NCOP tables provincial regulations and other instruments of provincial subordinate legislation in the NCOP. Secondly, they should scrutinise national regulations (many of which they will have to implement) to ascertain whether or not their delegation should support them when they are referred to the NCOP for approval.

(iv) Police

FC Chapter 11 deals with the three branches of the security establishment — the defence force, the police and the intelligence services. Its opening provision states unambiguously that '[n]ational security is subject to the authority of Parliament and the national executive'.⁹⁵ However, the provisions relating to the police impose a number of responsibilities on provincial executives.

This division of powers reflects one of the compromises embodied in the Final Constitution. The Constitutional Principles with which the Final Constitution was to comply stipulated that the powers of provinces should be no less than those in the Interim Constitution. In *First Certification Judgment*, the Constitutional Court found that the powers of provinces had been reduced and identified provincial powers in relation to the police as one area in which this uncertifiable diminution had occurred.⁹⁶ In fact, the Final Constitution reflects a totally new conception of the roles of the national government and provincial governments in relation to policing. Under the Interim Constitution, provinces were responsible for most policing services. The version of the Final Constitution first presented to the Constitutional Court for certification effectively nationalised policing. It vested the responsibility for policing, and the determination of national policy with regard to all policing, with the Minister. In addition, by requiring provincial police commissioners to report directly to the National Commissioner, it gave the National Commissioner considerable influence over provincial police policy. The role of provinces was reduced to monitoring police conduct in the province, exercising an oversight role in policing including receiving reports on police service, and liaising with the national Minister with regard to crime and policing in the province.

In response to *First Certification Judgment*, the Constitutional Assembly increased the role of provinces and, in particular, provincial executives. The Final Constitution restores provincial participation in the appointment of provincial police

94 See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16, 16-25. Bronstein suggests that under FC s 239 subordinate legislation 'becomes part of' the Act in terms of which it was adopted. With respect, Bronstein misreads FC s 239. That section defines the terms 'provincial legislation' and 'national legislation' in terms that cover both Acts and subordinate legislation. That does not mean that subordinate legislation becomes part of the Act. The definition is important because some constitutional provisions require the adoption of law. When the Final Constitution requires 'legislation' rather than an Act, it implies that either an Act or subordinate legislation is acceptable.

95 FC s 198(d).

96 *First Certification Judgment* (supra) at para 401.

commissioners,⁹⁷ allows provincial executives to initiate proceedings for the 'removal or transfer of, or appropriate disciplinary action against' a commissioner in whom the province has lost confidence, and permits a province to investigate complaints against the police.⁹⁸

Despite these changes, the arrangement remains one in which the national government controls the police and the provinces fulfil what is essentially an oversight or monitoring role. Provinces have very limited authority to deal with problems that they may identify and must rely on the National Commissioner and national Minister.⁹⁹

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(v) Oversight

As we note above, the Final Constitution requires members of Executive Councils to account to provincial legislatures. However, the relationship between provincial executives and their provincial legislatures differs from that in most parliamentary systems. Under FC s 114, provincial legislatures are expected 'to maintain oversight of . . . the exercise of provincial executive authority in the province, including the implementation of legislation'. Because provincial executives are largely concerned with implementing national legislation, this provision puts provincial legislatures in the unusual position of overseeing the implementation of legislation that they have not passed.

The national executive also has an interest in overseeing the implementation of such legislation. This interest is indirectly acknowledged in FC s 100. FC s 100 authorises the national executive to intervene in provincial matters when a province does not fulfil its responsibilities. Implicit in the intervention power of the national government is a responsibility to see that provinces are functioning properly. This means that the national executive must have some power to monitor the way in which provinces carry out their functions. The Final Constitution does not address the ways in which the national sphere of government may monitor provincial governments. However, FC Chapter 3 provides a principled framework within which any such monitoring (or oversight) should occur.¹⁰⁰

A related need for interaction between the national and provincial executives occurs when provinces encounter problems in the implementation of national laws which they themselves cannot remedy. For instance, a province may discover that it does not have the resources to fulfil obligations imposed by a national law, that it cannot provide services expected within an imposed timeframe or that aspects of a

97 FC s 207(3) requires the concurrence of the provincial executive in the choice of provincial commissioner and, if agreement cannot be reached, requires the national Minister to mediate. The Final Constitution is silent on what is to happen in the face of unsuccessful mediation.

98 FC s 206(5).

99 For a description of these complicated relationships, see J Rauch 'The Role of Provincial Executives in Safety and Security in South Africa: A Policy Analysis' Centre for the Study of Violence and Reconciliation (1998) <http://www.csvr.org.za> (accessed 25 Sept 2006).

100 The responsibility of the national executive to oversee the way in which provinces implement laws is discussed more fully in C Murray & R Stacey 'National Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 18.

programme established under a national law are simply impractical in the particular context of the province. The usual practice in a parliamentary system when legislation needs revision is for the executive to introduce an amendment. But here authority to amend the law itself lies outside the jurisdiction of the province. One possibility may be for the provincial executive concerned to introduce a provincial bill that would prevail over the national law to remedy the problem. However, the solution will often lie in the hands of the national sphere of government.

Initially MECs should raise such issues at the relevant intergovernmental forum. If the national executive fails to take heed, the NCOP becomes the appropriate forum in which to articulate concerns. Indeed, in some ways the NCOP is a better forum to address such issues. It certainly avoids some of the

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problems of executive intergovernmental forums¹⁰¹ because it offers a platform for the public discussion of matters of provincial interest and the opportunity for other interested parties (including members of opposition parties and the public) to engage with the contested issue.

(vi) Assignment

We note above that FC s 125(2)(c) anticipates that a provincial executive will administer legislation that falls outside Schedules 4 and 5 but which is assigned to it in terms of an Act of Parliament.¹⁰² This provision is complemented by FC s 99, which authorises national Ministers to make such assignments. However, a difficulty arises in reading these two sections together. FC s 125(2) anticipates that functions will be assigned 'in terms of an Act of Parliament'. FC s 99 appears merely to require that the assignment be 'consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed'. One reading of the two provisions is that there are two forms of assignment — one authorised by an Act of the national Parliament without the concurrence of the provincial executive, the other agreed to by the provincial MEC but not necessarily expressly authorised by an Act. However, it would be inconsistent with the principles of co-operative government in FC Chapter 3 to suggest that a national Act could, in effect, order an independently elected member of a provincial government to fulfil functions that fall outside the constitutional mandate of the provinces. The better interpretation seems to be that, read together, FC s 125(2) and FC s 99 require that all assignments are authorised in a national Act and in an agreement with the province concerned.¹⁰³

(b) Provincial executives and the local sphere of government¹⁰⁴

FC s 152(1) spells out the role of municipalities:

101 These problems include lack of transparency and self-interested decision making. See FW Scharpf 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

102 FC s 125(2)(g) appears to repeat this provision.

103 Assignment of executive powers or functions by provinces to municipalities can take place under FC ss 126 and 156(4). Sections 9 and 10 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) set out requirements for FC s 156(4) assignments. See also Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* (undated) http://www.thedplg.gov.za/index.php?option=com_docman&task=doc_view&gid=27 (accessed 28 February 2007).

The objects of local government are—

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

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The establishment of municipalities, with special responsibility for social development across the entire country, is one of the most ambitious projects in the Final Constitution. Under apartheid, local government had been patchy at best. White urban municipalities were well serviced by representative bodies and skilled administrators. Other areas were more or less neglected. Recognising the challenge of establishing democratic structures with effective administrations at the local level, the Interim Constitution put in place a process of gradual transition to democratic local government.¹⁰⁵ This process was formally completed in 2000 with the new municipal elections.

The construction of effective administrations in the 283 newly demarcated municipalities was to take much longer than their design and formal establishment. Anticipating this, the Final Constitution accordingly places responsibility on both the national and provincial spheres of government to ensure that municipalities develop the capacity to fulfil their substantial responsibilities. The implications of such provincial oversight and assistance responsibilities are considerable. In part, the relationship between provincial governments and municipalities mirrors that between the national government and provinces. Just as under FC s 125(3) the national government is expected to assist provinces to develop their administrative

104 For more on local government, see, generally, N Steytler & J de Visser 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 22.

105 IC s 245 provided that until elections were held in terms of the Local Government Transition Act 209 of 1993 (LGTA), local government would not be restructured except in terms of the LGTA. Any 'transitional' councils established in terms of the LGTA were deemed to be institutions or bodies established by the old order Provincial Government Act 32 of 1961, and any laws applying to local authorities were to be read as applying also to transitional councils. IC s 245(2) required that any restructuring of local government after local elections in terms of the LGTA would have to be in accordance with chapter 10 of the interim Constitution. FC s 155 establishes the structures of local government, providing for different categories of municipalities. In the *First Certification Judgment*, the Constitutional Court held that the draft of the new constitutional text (NT) did not comply with the requirement in Constitutional Principle XXIV that the Final Constitution establish a framework for local government. The Court wrote:

At the very least, the requirement of a framework for LG [local government] structures necessitates the setting out in the NT of the different categories of LG that can be established by the provinces and a framework for their structures. In the NT, the only type of LG and LG structure referred to is the municipality. In our view, this is insufficient to comply with the requirements of the CP XXIV. A structural framework should convey an overall structural design or scheme for LG within which LG structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how LG executives are to be appointed, how LGs are to take decisions, and the formal legislative procedures demanded by CP X that have to be followed.

First Certification Judgment (supra) at para 301.

capacity to fulfil their functions properly, FC ss 154(1) and 155(6) require provinces to support municipalities and to promote their ability to fulfil their responsibilities. In *First Certification Judgment*, the Constitutional Court commented that the competencies of provinces in relation to local government

are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of NT schedules 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of [local government] matters.¹⁰⁶

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The constitutional relationship between provincial governments and municipalities is complex. It demands both engagement and restraint on the part of the provincial executive. The newness of municipalities, the fragility of their political and administrative structures, and the importance of the services that municipalities must provide mean that the provincial support required is considerable. But provinces must always also respect the integrity of municipalities. The Constitutional Court describes the relationship this way:

What the [final Constitution] seeks . . . to realise is a structure for LG [local government] that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.¹⁰⁷

The fact that this responsibility is shared with the national government adds a further layer of complexity to the manner in which provinces discharge their duties. Under FC s 154(1), *both* provinces and the national sphere of government must 'by legislative and other measures . . . support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'. FC s 155(7) also gives *both* the national and provincial governments 'the legislative and executive authority to see to the effective performance by municipalities of their functions'. The most explicit requirement of support for municipalities remains, however, directed exclusively at provinces. FC s 155(6) requires provinces to '(a) provide for the monitoring and support of local government in the province; and (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs'.

In practice, the national government has taken the lead. In a comprehensive set of laws governing municipal government, the national government has attempted to delineate the respective responsibilities of the national sphere and the provincial spheres towards municipalities. National legislation governing areas such as health services instructs provinces on their responsibilities towards municipalities.¹⁰⁸ In addition, a substantial programme to manage struggling municipalities,

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developed by the National Department of Provincial and Local Government in 2004, carefully stipulates the role of provinces.¹⁰⁹ Although the Final Constitution anticipates national and provincial legislation contributing to the development of

106 Ibid at para 371.

107 First Certification Judgment (supra) at para 373.

municipalities, the responsibilities of provinces are chiefly executive. The provincial responsibility for municipalities, in practice, falls on the MEC for Local Government.

(i) IGR responsibilities

As we note above, FC s 41(2) requires the national Parliament to set up institutions to 'promote and facilitate intergovernmental relations' and to 'provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes'. The Intergovernmental Relations Framework Act, which implements this provision, does not limit itself to national forums. It also establishes a Premier's intergovernmental forum in each province¹¹⁰ and identifies other forums which provinces may establish. In so doing, it spells out the specific responsibilities of Premiers and MECs responsible for local government.¹¹¹

A Premier's forum follows the model of the President's Co-ordinating Council and includes the Premier, the MEC responsible for local government affairs and mayors of metropolitan and district councils in the province. Although the Premier is free to draw up the agenda of the forum, the controlling hand of the national sphere of government is evident in the description of the role of Premier's forums set out in the Act. The forum is intended to consider 'matters arising in the President's Co-ordinating Council and other national intergovernmental forums affecting local government interests in the province; . . . draft national policy and legislation relating to matters affecting local government interests in the province; [and arrange for] the implementation of national policy and legislation with respect to such matters'.¹¹² A Premier's forum must report annually to the President's Co-ordinating Council on 'progress with the implementation of national policy and

108 For example, the Systems Act requires municipalities to draw up 'integrated development plans' (IDPs), sets out the 'core contents' of these IDPs, and establishes processes for the planning, drafting, adopting and review of IDPs. Provinces are to monitor and to support municipal activities in regard to IDPs (ss 31-3). Similarly, chapter 2 of the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') is headed 'Supervision Over Local Government Finance Management', and sets out the roles to be played by national and provincial treasuries in assisting municipalities to meet their obligations in terms of the MFMA. Section 32 of the National Health Act 61 of 2003 provides that provincial Executive Councils are to assign responsibility for such health services to municipalities as are contemplated in FC s 156(4). Some element of control or oversight is implicit in this assignment process.

109 The Department of Provincial and Local Government's initiative in this regard is known as 'Project Consolidate'. The Department describes it as a 'Hands-on Local Government Engagement Programme for 2004-2006'. The base document for the project requires the national government and the provincial governments to 'find new, creative, practical and impact-oriented modes of engaging, supporting and working with local government', and goes on to list a number of ways that this should be done. See *Project Consolidate: A Hands-on Local Government Engagement Programme for 2004 — 2006* (May 2004) http://www.projectconsolidate.gov.za/docs/Base_Document.pdf (accessed 23 February 2007).

110 Section 16.

111 For a more detailed discussion on provincial and local government relations, see Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* Department of Provincial and Local Government *A Guideline Document on Provincial Local Intergovernmental Relations* (undated) http://www.thedplg.gov.za/index.php?option=com_docman &task=doc_view&gid=27 (accessed 28 February 2007).

112 Section 18(a)(i)-(iii).

legislation within the province.¹¹³ Presumably, this report is generated by the forum's chairperson, the Premier.

These provisions in the Intergovernmental Relations Framework Act structure and direct a province's intergovernmental relations. They are also clearly drafted against the background of the current dominance of the national governing party and its 'trust' that provincial politicians will serve the national interests in their consultations with local government. It is not clear how effective these forums would be if views on appropriate policy diverged greatly. It is unlikely that the national government would want to rely on the results of a consultation process conveyed by a provincial government that is controlled by an opposition party.

There is also no reason for a provincial executive to restrict its relationships with local governments to the structures established under the Act. The Act acknowledges the provinces' discretion in a catch-all provision which 'allows' a provincial Premier to establish other intergovernmental forums in the province.¹¹⁴ The overriding constitutional responsibility of provincial executives is to support the municipalities within their jurisdiction. To do so, they need to employ whatever institutions are most effective.

(ii) FC s 139

FC ss 154 and 155(6) and (7) set out the responsibility that provinces have in monitoring and providing support to municipalities. In allowing provinces to 'regulate' the affairs of municipalities, FC s 155(7) suggests that the scope of provincial involvement is fairly wide.¹¹⁵ Nevertheless, FC s 139 goes a great deal further. It ensures that provinces may, and, in some cases must, respond to situations in which municipalities are failing to fulfil obligations.

FC s 139(1) identifies those circumstances in which a provincial executive has the discretion to intervene in a municipality: namely, when a 'municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'. The province may then take 'appropriate' steps including —

- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to—
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;

113 Section 20.

114 Section 21. For a more detailed discussion on intergovernmental forums in the different provinces, see N Steytler, Y Fesha & C Kirkby *Status quo Report on Intergovernmental Relations Regarding Local Government* (undated) <http://www.cage.org.za> (accessed 28 February 2007).

115 In the context of the power of the national government to 'regulate' the provincial taxing power the Constitutional Court has said: "'Regulation" however, is habitually used in statutes in conjunction with the word "control" to signify the object of legislative authorisation, the directing and commanding of that which has been authorised to be regulated'. *First Certification Judgment* (supra) at para 439. For a discussion of the ambit of the powers to monitor and to support, see *First Certification Judgment* (supra) at para 366ff.

- (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - (iii) maintain economic unity; or
- (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

No Constitutional Court case deals directly with FC s 139. However, the Constitutional Court discusses its national counterpart, FC s 100, in both certification judgments.¹¹⁶ In the judgments, the Court emphasises the strictness of the test for an intervention by the national government that requires the assumption of the responsibilities of a provincial government. The high threshold for intervention is reflected in the use of the word 'necessary' in FC s 139(b) and the closed list of circumstances in which such an intervention may be undertaken. The Court also notes that FC s 100(1) sets out a process in which the assumption of responsibilities by the national government cannot occur before a directive has been issued giving the province an opportunity to fulfil its obligations.¹¹⁷

These observations about FC s 100 apply to interventions under FC s 139. However, an amendment to FC s 139 in 2003 extended provincial powers and obligations considerably. The amendment confers on provinces the power (in FC s 139(1)(c)) to dissolve municipal councils and imposes an obligation on provincial executives to intervene in municipalities under certain circumstances.¹¹⁸ The obligation to intervene is contained in new ss (4) and (5). Both relate to the financial management of municipalities. Subsection (4) provides a mechanism to deal with a situation in which a municipality fails to approve a budget or raise taxes. As both the adoption of a budget and the imposition of taxes require legislative action, the provinces did not apparently possess the power to intervene under FC s 139 as it was originally drafted. Now the Final Constitution not only makes it clear that a provincial executive can put a budget in place for a municipality, it also requires the provincial executive to do so if a municipality has not

adopted its own budget or tax laws or if a municipality in a financial crisis does not adhere to a recovery plan imposed by the province. Subsection (5) provides a

116 FC s 100 gives the national government the power to intervene in provinces and its wording is very close to that of FC s 139. Before the amendment of FC s 139 in 2003, the two sections were almost identical. In 2000, the Department of Provincial and Local Government issued a Manual for the Application of FC s 139 to clarify the manner in which provinces are to apply FC s 139 and to promote a uniform procedure for intervention. The guidelines are still relevant to the extent that they have not been affected by the amendment. See N Steytler, J de Visser and J Mettler *Manual for the Application of Section 139 of the Constitution* (2000) <http://www.thedplg.gov.za> (accessed 28 February 2007).

117 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC); 1997(1) BCLR 1 (CC) at paras 111 – 127

118 For a discussion of the power to dissolve Municipal Councils under FC s 139, see Y Hoffman-Wanderer & C Murray 'Suspension and Dissolution of Municipal Councils under s 139 of the Constitution' 2007 TSAR 141.

process for replacing councils with administrators when the financial management of a municipality is in 'crisis' and, again, obliges the provincial executive to act in such cases.

(c) Provincial executives and traditional leaders

'Traditional leadership' and 'indigenous law and customary law' fall under FC Schedule 4.¹¹⁹ National government and provincial governments therefore have concurrent legislative authority over traditional leaders. The national Traditional Leadership and Governance Framework Act imposes considerable responsibilities on provinces in relation to traditional leaders.¹²⁰ Most provinces with traditional leaders have passed legislation implementing the Act.¹²¹ Among other things, the Act grants premiers an important role in granting and withdrawing recognition from traditional communities, senior traditional leaders, headmen and headwomen. The Act also enables provinces to establish (new) local houses of traditional leaders capable of settling disputes.¹²²

119 Both are 'subject to chapter 12 of the Constitution'. For a general discussion of traditional leadership, see T Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26, 26-34ff.

120 Act 41 of 2003.

121 See, for example, the North West Traditional Leadership and Governance Act 2 of 2005, the Eastern Cape Traditional Leadership and Governance Act 4 of 2005, the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, the Limpopo Traditional Leadership and Institutions Act 6 of 2005, the Free State Traditional Leadership and Governance Act 8 of 2005, and the Mpumalanga Traditional Leadership and Governance Act 3 of 2005. See also T Bennett & C Murray 'Traditional Leaders' (supra) at 26-21-26-26.

122 Sections 2, 11, 12, 17 and 21.