South African Law Reform Commission

ISSUE PAPER 40

PROJECT 145

REVIEW OF MECHANISMS OF INTERGOVERNMENTAL RELATIONS APPLICABLE TO THE SOCIAL DEVELOPMENT SECTOR

CLOSING DATE FOR COMMENTS

30 JULY 2021

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ABOUT THE SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission (Commission) was established by the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973)

The members of the Commission are:

Judge Narandran (Jody) Kollapen (Chairperson)
Professor Mpfariseni Budeli-Nemakonde
Advocate Johan de Waal SC
Professor Wesahl Domingo
Professor Karthigasen Govender
Mr Irvin Lawrence (Deputy Chairperson)
Advocate Hendrina Magaretha Meintjes SC
Advocate Anthea Platt SC
Advocate Tshepo Sibeko SC

The Secretary of the Commission is Mr Nelson Matibe. The Commissioner designated as chairperson of the advisory committee for this inquiry in terms of section 7A(3) of the South African Law Reform Commission Act is Advocate Sibeko SC. The Commission official assigned to this investigation is Fanyana Mdumbe. The Commission offices are situated at Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

The Commission has instituted an advisory committee for this inquiry in terms of section 7A(1)(b)(ii) of the abovementioned Act. The members of the aforesaid committee are:

(a) Advocate Tshepo Sibeko SC (Chairperson of the Committee)
(b) Professor Victoria Bronstein
(c) Professor Kitty Malherbe
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PREFACE

The purpose of this issue paper is three-fold:

(a) firstly, it is intended to announce the Commission's inquiry into the mechanisms through which national and provincial governments involved in the welfare services sector manage their interdependence and cooperation, and thus to generate a conversation in this regard;
(b) secondly, to aid our understanding of the current legislative framework regulating intergovernmental relations and to distil best practices that could be emulated or improved upon to resolve challenges facing the Department of Social Development, it explores cursorily international trends, paying particular attention to decision-making in multi-level political systems comparable to ours; and
(c) thirdly, and most importantly, it seeks to elicit inputs from interested parties which will serve as basis for further deliberations.

The Commission wants to hear your views on the issues raised and questions posed throughout this document. This issue paper thus invites you to make written submissions in this regard by no later than **30 JULY 2021**.

The Commission will assume that respondents agree to the Commission quoting from, referring to comments, or attributing comments to the relevant respondents. Respondents who prefer to remain anonymous should mark their representations 'Confidential'. The Commission will make every effort to protect such information. However, respondents should be aware that the Commission may be required in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) to release information contained in representations submitted to it in relation to this inquiry.

Respondents are requested to respond as comprehensively as possible. Submissions may also include issues stakeholders consider relevant to this review which are not covered in this issue paper.

In keeping with its enabling legislation and *modus operandi*, the Commission intends to consult extensively during the course of this inquiry. In addition to soliciting inputs through this issue paper, it plans to host workshops, seminars and roundtable discussions to explore the issues raised in this inquiry further. Letters will also be sent to key stakeholders (national and provincial departments of social development) to elicit their input. The Commission will also publish a discussion paper setting out preliminary proposals and draft legislation, if such legislation is deemed necessary to give effect to the Commission's recommendations. The aforesaid discussion paper will take the responses to this issue paper, and those generated through consultation processes referred to above, into account. On the strength of responses to the discussion paper, a report will be prepared which will present the Commission's final recommendations. The Commission's report, with draft legislation if necessary, will be submitted to the Minister of Justice and Correctional Services, the Minister of Cooperative Governance and Traditional Affairs and the Minister of Social Development for their consideration.

Respondents are requested to submit written comment, representation to Commission official assigned to this inquiry, Fanyana Mdumbe, by **30 July 2021** at the address/email appearing on page (ii) above.

This document is also available on the Commission's website, the details of which appear on page (ii).

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CHAPTER 1: INTRODUCTION AND CONTEXT TO THIS INQUIRY

A. What has the Commission been asked to investigate?

1 Introduction

1.1 This is one of two investigations dealing with intergovernmental relations that the South African Law Reform Commission (Commission) is currently seized with. In this context, intergovernmental relations refers to the formal and informal processes, institutional arrangements, agreements and structures for bilateral and multilateral cooperation between respective levels of government.[1] While the focus in this inquiry is on improving synergy between the national and provincial executive arms of government involved in the provision of welfare services; and in the other inquiry, in respect of which the Commission published an issue paper in 2019,[2] on enhancing the efficiency of local government by repealing or streamlining regulatory burdens imposed on this sphere of government through national legislation, the common thread between them, and the issue that figures prominently in both, is the efficacy of the Intergovernmental Relations Framework Act (IRFA).[3]

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1 See De Villiers, Bertus 'Codification of 'Intergovernmental Relations' by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' *ZaöRV (Heidelberg Journal of International Law)* Vol 72 (2012) 671 at 672. The same author explained in 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' *SAPR/PL* Vol 12 (1997) at 469 that intergovernmental relations are synonymous with cooperation, consultation and coordination of governmental activities.

2 See South African Law Reform Commission *Issue Paper 37: Review of Regulatory, Compliance and Reporting Burdens Imposed on Local Government* (May 2019).

3 Act 13 of 2005.

2 What are the issues?

(a) The remit of this inquiry as defined by the Department of Social Development

1.2 As some constitutional law experts focused on the reasons for,[4] and advantages of,[5] decentralisation of state authority; others foretold that the 'independence', protection and powers accorded by the Constitution of the Republic of South Africa, 1996 (the Constitution) to subnational governments, especially in Chapter 3 thereof, a feature probably unparalleled anywhere in the world,[6] would serve as a catalyst for these levels, and officials in them with sufficient political will, to oppose national policy and seek to influence its future formulation. Consequently, this could thwart the national government's efforts to carry out essential policies and as greater party pluralism becomes the norm in the three spheres of government, challenges to hierarchical statutory arrangements would become more prevalent.[7] These predictions, as this inquiry attests, have come to pass.

1.3 The *national* Department of Social Development (DSD or department)[8] has, in its referral letter to the Commission, summed up the incongruence that is afflicting the sector and its consequences as follows: the Minister of Social Development (Minister) has established an intergovernmental forum, Minmec, for the social development sector pursuant to section 9(1)

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4 For example, De Villiers, Bertus 'Codification of 'Intergovernmental Relations' by Way of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems' above at 677, states that the federal features in the Constitution were included to appease respective power-basis in the country.

5 According to Rautenbach, IM and Malherbe, EFJ *Constitutional Law* Second Edition (1996) at 75 and 237, these advantages included affording inhabitants of regions more autonomy, countering the concentration of power at national level, bringing democratic decision-making closer to the citizens, and ensuring more effective exercise of government authority.

6 For a comparative perspective, see Chapter 3.

7 See Woolman, Stu and Roux, Theunis 'Chapter 14: Co-operative Government and Intergovernmental Relations' in Woolman *et al Constitutional Law of South Africa* 2nd Edition, RS 1: 07-09 at 14-2; Rautenbach and Malherbe *Constitutional Law* above at 75 footnote 83; and Fessha, Yonatan T. and Steytler, Nico *Provincial Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance* (2006) as quoted in Woolman and Roux above in footnote 4.

8 It is necessary to accurately describe the department whence the law reform proposal came because 'welfare services, or as it is referred to in section 27(1)(c) of the Constitution, 'social assistance,' is a matter in respect of which both national and provincial governments have jurisdiction (a functional area of concurrent legislative competence) and in addition to national department of social development, each of the nine provinces has a department headed by an MEC that is strictly dedicated to this policy area.

of IRFA,[9] comprising, as contemplated in that legislation,[10] the Minister, the Deputy Minister of Social Development and the MECs responsible for social development in the respective provinces; which meets at least four times a year to discuss matters of common interest to the sector; and at these meetings, decisions impacting on the sector are taken from time to time. The problem arises when such decisions have to be given effect to. According to DSD:

> '...the Minister is experiencing difficulties when it comes to the implementation of the decisions taken at MINMEC and monitoring the implementation of such decisions. This difficulty, is in our view, caused by the *lack of a clear legislative authority empowering the Minister or the department to enforce a decision made at* MINMEC. This then affects the uniform implementation of social development mandates by Provinces.' [11]

1.4 Although reminiscent of similar problems that have arisen in the past,[12] very little factual information has been provided to the Commission to enable it to contextualise the

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9 This provision reads:
'(1) Any Cabinet member may establish a national intergovernmental forum to promote and facilitate intergovernmental relations in the functional area for which that Cabinet member is responsible.
(2) Any Minmec which existed when this Act took effect must for the purposes of this Act be regarded as having been established in terms of subsection (1), except if such Minmec was established by another Act of Parliament.'

10 Section 10 of IRFA provides that:
'(1) A national intergovernmental forum established in terms of section 9(1) consists of-
(a) the Cabinet member responsible for the functional area for which the forum is established;
(b) any Deputy Minister appointed for such functional area;
(c) the members of the Executive Councils of provinces who are responsible for a similar functional area in their respective provinces; and
(d) a municipal councillor designated by the national organisation representing organised local government, but only if the functional area for which the forum is established includes a matter assigned to local government in terms of Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or in terms of national legislation. '

11 Excerpt of the referral letter from the Director-General: Department of Social Development to the Commission. (Our emphasis).

12 See *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) at paras 10 and 69; and *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) paras 1-10 which deal with provision of social development services by the Limpopo and Eastern Cape provincial departments responsible for social development. In *Mashavha*, the applicant berated the provision of welfare services (administration of social grants) by the province on the basis that it was not approved and paid within reasonable time; it was subjected to the vagaries of the budgeting administration of the province and potential demands for the reallocation of social assistance moneys to other purposes. In this case, the Minister of Social Development not only confirmed that the applicant's complaints were valid but added that there was much uncertainty regarding the provision of services, the capacity of the province to fulfil its obligations was limited and that the level of service delivery varied markedly in different provinces, which called for a holistic solution. In *Vumazonke*, the court referred to a *myriad* of cases in the Eastern Cape in which applicants complained about administrative torpor in the processing of social grants and general lack of diligence by officials. In *Vumazonke* and the cases referred to therein, the courts had found unsatisfactory performance of the provincial department in the administration of the system; maladministration and tardiness in complying with constitutional and legislative duties; failure by public servants to perform their administrative duties properly and timeously; real

issues[13] and efforts to gather the necessary background information from DSD and provincial departments came to naught.[14] Nonetheless, the issue that should be the focus of this inquiry is clearly discernible and sufficiently defined in the extract above. Essentially, DSD suggests that there is a mischief, defect or gap in the statutory framework regulating intergovernmental relations that needs to be remedied. This defect results from the *lack of a statutory enforcement mechanism* that the Minister or the department itself could invoke to prevent provinces from reneging on commitments that they made in the intergovernmental structure established to foster cooperation between various spheres of government.

1.5 Because the Minmec whose efficacy is impugned, and even though DSD did not say so expressly, operates in terms of IRFA which is legislation mandated by section 41(2) of the Constitution,[15] it necessary to locate this review and lacuna in this Act. In fact, as will become apparent below, DSD itself brings this inquiry within the purview of the Act by urging the Commission, twice in its referral letter, to propose a model that the Minister can utilise '*to enforce decisions agreed upon at MINMEC*' and '*to achieve uniform compliance by Provinces to resolutions taken at MINMEC*.' Cursory assessment of few provisions of this Act bolsters this approach. It contains laudable provisions that seek to promote intergovernmental relations, empowers intergovernmental forums to adopt resolutions and internal rules regulating their operations, discuss performance and detect failures and to initiate preventive and corrective measures, and binds all spheres government.[16] The overarching objective of this Act is, inter alia, to provide mechanisms and procedures to facilitate the settlement of intergovernmental disputes.[17] The Minmec for Social Development, which is at the centre of

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hardship through the ineffectiveness of the public service at provincial level; inefficiency of officialdom; a tale of lamentable failure on the part of officials of the provincial department; and referred to this state of affairs as a 'sorry saga.' Some of the challenges experienced by provincial governments have been attributed to failure by national government to provide assistance to provinces; and generally lack of know-how by provinces. See Malherbe, Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' *TSAR* No 4 (2006) 810 at 813; and Malherbe, Rassie 'Centralisation of Education: Have Provinces Become National Agents?' *TSAR* Vol 2006, Issue 2 237 at 250.

13 For instance, it is not clear whether the inertia and disconnectedness complained of relates to some or all the provinces. Any generalised intervention is likely to attract flak for failure to allow for differentiation and asymmetry. See Malherbe, Rassie 'Centralisation of Education: Have Provinces Become National Agents?' above at 250 where the he discusses this aspect, the 'generalised approach' adopted by the national government when intervening in provinces, in the context of section 125(3) of the Constitution.

14 In July 2019, the Commission wrote letters to the national department of social development and to provincial departments responsible for this policy sector requesting information relating to this inquiry and this effort was unsuccessful.

15 Section 41(2) of the Constitution provides that: 'An Act of Parliament must-
(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.'

16 Section 2 of IRFA.

17 See the long title,

this inquiry, was established pursuant to section 9(1) of this Act. However, it is silent on what the consequences would be should a party to an intergovernmental structure refuse to cooperate; or fail to implement a resolution or adhere to internal rules or implementation protocols, including the dispute resolution procedure and mechanisms.

(b) Should we look beyond IRFA in an effort to address gaps in the statutory framework?

1.6 The issues in this inquiry are not as straight-forward as the previous paragraph seems to suggest. First, the department did not single out a specific mandate as being particularly implicated. We therefore assume that all matters falling within the scope of work of DSD[18] have been affected by the conduct complained of. Secondly, in a draft policy document[19] prepared by the department in an effort to address the deficiencies in the legislative framework regulating intergovernmental relations, which it later abandoned as a result of the complexity of the issues, it laments that *provinces continue* to provide services in a *disintegrated, non-standardised and unequal manne*r despite Minmec decisions and applicable legislation. However, most importantly, it impugns the entire machinery created by IRFA, stating in this regard that 'Minmec in its current form has not achieved its intended purpose'; and adding that 'it has thus become important to review the current arrangement so as to strengthen intergovernmental relations with specific reference to Social Development Services.'[20]

1.7 More light is shone on these issues by the *Report on the Review of the White Paper for Social Welfare 1997* where the following is stated:

> 'The legislative and policy environment in South Africa is both comprehensive and aspirational. There are many individual pieces of legislation and policies which guide the country in its efforts to fulfil its mandate in respect of social development. *However, the absence of an overarching legislation opens door to fragmentation*. *National DSD's Strategic Plan 2015/2019 states that it will develop a Social Development Act*. The danger of fragmentation is exacerbated by the limited role played by the national DSD in ensuring coordination and sequencing of policy priorities as well as standardisation of structures and staffing throughout the sector.'[21]

1.8 Although the department is not prescriptive in this regard, it does appear from the preceding paragraphs, coupled with the approach it adopted to pursue a sectoral intergovernmental legislation, that it anticipates something more than a review of IRFA. We

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18 For a detailed discussion of the mandate of DSD, see the last section of this Chapter.

19 Department of Social Development *Draft Policy on the National Social Development Council...04/2013* at 4.

20 *Ibid*.

21 Department of Social Development *Comprehensive Report on the Review of the White Paper for Social Welfare, 1997* (31 March 2016) at 250.

revert to this aspect below. For now it suffices to say, when the department submitted its draft policy on the National Social Development Council and the draft National Social Development Council Bill predicated on it to the Office of the Chief State Law Adviser and provinces for consideration, serious concerns about the constitutionality of the Bill and its necessity arose, prompting DSD in the end to approach the Commission to conduct an investigation into and recommend:

> '...the best model that Minister responsible for Social Development can utilise to *enforce* the decisions agreed upon at MINMEC.'[22]

3 Intended outcome

1.9 As can be gleaned in the preceding paragraph, DSD makes no bone about what it hopes the outcome of this inquiry would yield, a *mechanism to enforce decisions* made in Minmec. While the choice of words used by DSD points to what is at the heart of this inquiry, namely whether the Constitution embodies cooperative intergovernmental relations which assumes parity of power between national government and subnational constituents or 'coercive federalism', with national government largely dominating provinces and local government,[23] the manner in which this law reform proposal is couched must be seen, firstly, against the backdrop of a commitment by the department, among others, to strengthen social welfare services through legislative reforms, including social welfare service delivery framework,[24] of which formal mechanism of intergovernmental relations is a crucial part; and secondly, in the context of its conception of the role of national government in comparison with provincial and local governments which it has summarised as follows:

> 'National government bears the *main responsibility* for making and formulating policy, the development of national standards and norms, as well as rules and regulations. The functions of provincial DSD are *to implement and comply* with legislation, policies and related norms and standards, and in particular to ensure that services are delivered in line with these instruments. Provinces may also prepare and initiate provincial legislation.
>
> The local sphere does not have direct responsibility for social development. However, local government may play a role in ensuring compliance with national standards for service delivery. For example, in respect of ECD municipalities are required to ensure that facilities used meet health and safety standards.'[25]

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22 Excerpt from the referral letter from DSD to the Commission.

23 Woolman and Roux above at 14-6 examine both forms of federalism in detail,

24 Department of Social Development *Annual Report for the Year Ended 31 March 2015* at 15.

25 Department of Social Development *Comprehensive Report on the Review of the White Paper for Social Welfare, 1997* (31 March 2016) at 249.

1.10 Towards the end of its letter of referral to the Commission, the language used by DSD is somewhat measured. It states:

> 'In light of the above the Department requests assistance with a study or research to establish what would be the most effective model to achieve uniform compliance by Provinces to resolutions taken at MINMEC.'

1.11 A number of complex issues arise from this proposal. For example, should the Commission limit its inquiry to IRFA, or should it explore and propose legislation contemplated in section 146(2)(a) – (c) of the Constitution[26] and to which the *Report on the Review of the White Paper for Social Welfare 1997* above seems to be referring? What would be the advantages and disadvantages of adopting either approach? Whether the legislative reform DSD is yearning for and pursuing is constitutionally permissible? Is DSD's conception of power relations between national and provincial governments on which this quest is premised, compatible with the Constitution? These are complex issues relating to the scope of this inquiry and meaning of constitutional provisions to which this inquiry must provide definite answers and in respect of which the Commission seeks your input.

B. Context to this inquiry

1 Pervasive nature of the problem

1.12 Although the Commission's brief does not extend beyond the social welfare sector, it is necessary to point out that the issues that prompted DSD to advocate for legislative reform

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26 Section 146(2) of the Constitution provides:
'National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—
(i) norms and standards;
(ii) frameworks; or
(iii) national policies.
(c) The national legislation is necessary for—
(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.'

are widespread, not new, limited to this sector, or confined to vertical dimension of intergovernmental relations.

1.13 A little more than a decade ago, the Department of Provincial and Local Government, as the Department of Cooperative Governance and Traditional Affairs (COGTA), was called then, grappled with the question whether decisions of Minmec are binding on provincial executives or not.[27] Needless to say, as is the case now, there was no definite answer to this question. At the time practice, had taken root that in instances where a decision of Minmec had been approved by extended cabinet and funds allocated in the division of revenue process for its implementation, it was incumbent upon the Minmec concerned to follow up on the decision and ensure that it was implemented by provincial EXCOs.[28] Why this matter needed to be addressed, conclusively, was because, as COGTA explained, it had given rise to unreasonable expectations, inconsistent practices and unconstitutional conduct.[29]

1.14 In its report on the review of the White Paper for Social Welfare, DSD highlights, inter alia, the debilitating effect that lack of authority to ensure that sectoral work agreed upon is followed through has on the work of (horizontally) interdepartmental forum established to coordinate and integrate the activities of various spheres involved in the social welfare sector in the following terms:

> 'The Framework for Social Welfare Services outlines responsibilities of national departments that provide complementary services to facilitate the holistic delivery of developmental social welfare services. However, *managers lack authority to ensure that agreed-upon sectoral work is followed through.* DSD initiated an interdepartmental forum for social welfare services, but the *forum* [interdepartmental forum] *has not been successful due to lack of clear mandate*.'[30]

1.15 What inference, if any, should be drawn from the persistence (or re-emergence) of this problem of dissonance between national and provincial governments? What is clear is that despite the express inclusion of a framework in the Constitution and the adoption of IRFA both of which are intended to foster cohesiveness between the three spheres of government; national government's control of the purse[31] and superior administrative capabilities which

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27 Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (13 March 2008) at 24.

28 *Id* at 63.

29 *Id* at 24.

30 Department of Social Development *Comprehensive Report on the Review of the White Paper for Social Welfare, 1997* at 339. (Our emphasis).

31 For a detailed discussion on how revenue could be used to control provincial governments, see Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents' *TSAR* Vol 2006, Issue 2 237 at 242 *et seq*.

puts it in a dominant position vis-à-vis provinces;[32] its constitutional power to override decisions by provincial and local government,[33] and the dominance of the same political party at national and provincial levels of government, which many believed would obviate incongruence and polarisation,[34] these challenges persist. In fact, whilst the dominance of the ANC in national and provincial government has facilitated the resolution of some of the intergovernmental conflicts, having officials of the same party in different levels of government does not necessarily translate into a harmonious relationship, as other conflicts involving ANC officials have persisted.[35] This in turn could well mean, as DSD has convincingly argued in its draft policy document, that the legislative framework regulating intergovernmental relations needs overhaul, albeit in the context of welfare services sector.

2 Legislative context - salient provisions of the Constitution and IRFA and preliminary issues arising therefrom

(a) Constitutional principles underpinning intergovernmental relations

1.16 To set the scene, DSD prefaced its law reform proposal with reference to a few provisions of Chapter 3 of the Constitution.[36] This Chapter tells us that South Africa has a multi-level political system consisting of national, provincial and local spheres of government.[37] But, it goes beyond that, and clearly shows that the Constitutional Assembly, which drafted the Constitution, was not oblivious to the prospects alluded in para 1.2 above. Whilst, Chapter 3 of the Constitution acknowledges the *distinctiveness* of each sphere, and urges each sphere not to encroach on the terrain of another,[38] in matters of common interest, such as those over

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32 Leonardy, Uwe and Brand, Dirk 'The Defect of the Constitution: Concurrent Powers Are Not Co-operative or Competitive Powers' *TSAR* Vol 4 (2010) 657, at 662.

33 Woolman and Roux above at 14-2. See also De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' above at 693 who argues that members of the same political party are often more comfortable with each other and can either make decisions without great formality or wait for senior leadership of the party to make a decision.

34 *Ibid*.

35 For anecdotal accounts of these conflicts between national government and ANC led provinces, see De Villiers, Bertus 'Intergovernmental Relations in South Africa' above at 200.

36 Section 40(2) and 41(2) of the Constitution urging spheres of government to adhere to the principles of cooperative government set out in that chapter and instructing Parliament to provide statutory underpinning for intergovernmental relations respectively.

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

38 The relevant provisions of section 41 of the Constitution provide that all spheres of government and all organs of state in within each sphere *must* respect the constitutional status, institutions, powers and functions of government in the other spheres (ss (1)(e)); not assume any power not or function except those conferred on them in terms of the Constitution (ss (1)(f)); and

which national and provincial governments have jurisdiction, including welfare services, it recognises that some level of *cooperation* would be necessary and prevails upon government in the three spheres not to act in *silos* but as a *united front* through cooperation.[39] Most importantly, although it does not prohibit institution of legal proceedings by organs of state inter se, it clearly states this must be a measure of last resort.[40] Moreover, the Constitution leaves it to Parliament to refine the mechanisms for intergovernmental relations. Section 41(2) of the Constitution states in this regard:

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

(i) Comments and questions arising therefrom

1.17 In contrast to the South African Local Government Association (SALGA) which has attributed incoherence in government to overlapping powers and functions outlined in Schedules 4 and 5 of the Constitution which it argues leads to duplication and has called for the review thereof,[41] DSD has neither impugned, nor advocated for the amendment of any provision of the Constitution.

1.18 Nonetheless, the question ought to be asked: what is the import of the constitutional provisions alluded to in the preceding paragraph? In other words, what do they actually mean in the context of this inquiry? Do the provisions referred to above requiring government to work in unison, for example, empower national government to act coercively if cooperation is withheld? Could any of them be used as a constitutional basis for pursuit of sectoral legislation to regulate intergovernmental relations in the welfare services sector? What about the protection accorded to the 'independence' and functional and institutional integrity of

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exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, institutional integrity of government in another sphere (ss (1)(g)).

39 This inference is drawn from the following provisions of Chapter 3 of the Constitution: spheres of government are *interdependent* and *interrelated* (s40(1)); must provide effective, transparent, accountable and *coherent* government (s41(1)(c)); and section 41(1)(h) which requires spheres of government and organs of state within these spheres to:
'co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.'

40 Section 41(3) and (4) of the Constitution.

41 See South African Local Government Association *15 Years of Developmental and Democratic Local Government: 2000-2015* (December 2015) at 52, 53 and 115.

subnational governments; could these provisions be invoked by subnational government to ward off any perceived encroachment on their powers and functions by national government? And, now that the obligation placed on Parliament by section 41(2) of the Constitution has been fulfilled, would it be permissible to 'side-step' the provisions of this exalted piece of legislation through the creation of a parallel mechanism, albeit in the context of social development sector? These questions relating to the necessity of parallel intergovernmental relations legislation were also raised by the Office of the Chief State Law Adviser and the Gauteng Provincial Government, an aspect we discuss below.

1.19 These questions, which relate to legality, the rule of law and competence, are central to this inquiry and seek to establish definitively, and to answer a fundamental issue, dealt with by the Constitutional Court in numerous decisions,[42] namely whether DSD has the constitutional mandate to pursue this legislative reform. These are necessary gateway issues to ask because if DSD is held not to have had the competence to initiate and have legislation passed to address the *lacuna* in IRFA, the resulting law will be invalid;[43] and as the Constitutional Court held in *S v Makwanyane*[44] *the Constitution is the sources of legislative and executive authority ...it defines the powers of the different organs of state, including the executiv*e. These are complex matters that can only be answered through systematic interpretation of the Constitution – taking into account all relevant provisions – and other contextual considerations such as the social and political environment, including an incessant complaint that there is a strong tendency on the side of national government to centralise power over concurrent matters.[45] We deal with these issues in some detail in Chapter 2; it suffices for now to flag them up.

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42 This approach is necessitated by numerous Constitutional Court decisions where it emphasised that the legislature and the executive can only exercise a power or perform a function conferred on them by law. See in this regard, *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) in para 27 and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 68; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; F*edsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58; and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 20.

43 Bronstein, Victoria 'Legislative Competence' in Woolman et al *Constitutional Law of South Africa* 2nd Ed OS 06-04 at 15-2. Section 2 of the Constitution makes this clear when it states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.

44 1995 (3) SA 391 (CC) at para 15.

45 See in this regard, Malherbe, Rassie in 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' *TSAR* Vol 2006 Issue 6 810; and 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006 Issue 2 237.

(b) Intergovernmental Relations Framework Act

(i) Background

1.20 The overarching norms outlined in Chapter 3 of the Constitution are not, however, the last word on the conduct of intergovernmental relations. As stated above, the Constitutional Assembly delegated the further refinement of these tersely drafted principles to Parliament through an Act of Parliament. IFRA, the effectiveness of which DSD impugns, is intended, therefore, to give flesh to the broad and skeletal framework contained in Chapter 3 and to give effect to section 41(2) of the Constitution. This makes it a quintessential constitutional Act akin to the Promotion of Access to Information Act (PAIA),[46] Promotion of Administrative Justice Act (PAJA),[47] and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[48] and many other similar laws, the importance of which we discussed below. There are numerous provisions in this Act that are germane to the issues at hand that are neither mentioned nor discussed in DSD's referral letter which merit attention. We refer to some of them hereunder.

(ii) Apparent contradictions in IRFA

1.21 Expectedly, IRFA is concerned with promoting synergy between the three spheres of government.[49] To that end, it binds all spheres of government;[50] urges them, when conducting their affairs, to take into account the financial and material circumstances of governments in other spheres; to consult with one another; to coordinate their actions; to avoid unnecessary and wasteful duplication or jurisdictional contests; to share information; to participate in structures created by this Act and efforts to settle disputes.[51] It also stresses that intergovernmental structures are not *executive decision-making bodies*; they are intended for

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46 Act 2 of 2000.

47 Act 3 of 2000.

48 Act 4 of 2000.

49 The preamble, for instance, provides that government could address pervasive legacy of apartheid, poverty and underdevelopment through concerted effort *by government in all spheres working together and integrating as far as possible their actions* in the provision of services, alleviation of poverty and the development of the people. The express purpose provision of this Act - section 4(a) and (b) - provides: 'The object of this Act is to provide within the principles of cooperative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including: (a) coherent government; and (b) effective provision of services.

50 Section 2(1) of IRFA states, it applies to the national, all provincial and all local governments. Subsection (2) of this section expressly excludes Parliament, provincial legislatures, courts and judicial officers, tribunal or forum contemplated in section 34 of the Constitution, Chapter 9 institutions, and any other public institution that does not fall within any of the three spheres of government, from the application of this Act.

51 Section 5(a) to (f) of IRFA.

discussion and consultation.[52] On the basis of these provisions, it appears that the omission DSD is complaining about, the enforcement mechanism, was actually not an oversight, but deliberate, compatible with and intended to further these objectives of the Act.

1.22 However, IRFA also cites as one of its objectives the fulfilment of *national priorities*.[53] To give effect to this objective in the context of section 9(1) intergovernmental forums,[54] IRFA authorises the Minister to bring to the attention of provincial representatives matters of national interest pertaining to the sector and to solicit their input, including impending and adopted *national policy and legislation* on concurrent matters.[55] It appears that the purpose of the provisions referred to above, and those requiring national and provincial governments to collectively devise a strategy to obviate and address shoddy service delivery[56] and to coordinate and align their efforts[57] in respect of overlapping responsibilities, is to promote unity and cohesion in government underscored by the Constitution.[58] But what happens if such coherence is unattainable as this inquiry demonstrates? Could national government completely ignore provincial government and press ahead with its programmes, legislation and policies? Is that power implied in these provisions of IRFA, in particular in sections 4(a), which states that the objective of IRFA is to facilitate the realisation of national priorities; and 11(c) which empowers Minmec to initiate preventive and corrective measures?

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52 Section 32(1) and (2) of IRFA.

53 Section 4(d) of IRFA.

54 IRFA makes provision for the establishment of the following intergovernmental forums:
(a) the President's Co-ordinating Council (s6);
(b) sectoral intergovernmental forums (s9);
(c) Premier's intergovernmental forum (s16);
(d) other provincial intergovernmental forum (s21);
(e) interprovincial forum (s22);
(f) district intergovernmental forum (s24);
(g) inter-municipality forum (s28)

55 Section 11(a) and (b) of IRFA provides in this regard: 'A national intergovernmental forum established in terms of section 9 is a consultative forum for the Cabinet member responsible for the functional area for which the forum is established-
(a) to raise matters of *national interest* within that functional area with provincial governments and, if appropriate, organised local government and to hear their views on those matters
(b) to consult provincial governments and, if appropriate, organised local government on–
(i) the development of *national policy and legislation relating to matters affecting that functional area*,
(ii) implementation of national policy and legislation with respect to that functional area
...'.

56 Section 11(c) of IRFA.

57 See section 11(b)(iii)(aa) and (bb) above.

58 Section 41(1)(a) and (b) of the Constitution underscore such unity and coherence in government.

(iii) Comments and questions arising therefrom

(aa) <u>Cause for amending IRFA</u>

1.23 On the basis of these palpable contradictions in IRFA, perhaps the most prudent course of action is a complete overhaul of IRFA. Although faint, there have been rumblings of discontent and calls to review and amend IRFA. The most scathing criticism of this piece of legislation came from the courts as far back as 2007 when Classen J, in *National Lotteries Board v Robin Leslie Bruss and Others*[59] stated, in passing:

> *'...in respect of the Intergovernmental Relations Framework Act, I agree with all counsel that it is amazingly poorly drafted and should be revisited by the Legislature with the greatest of urgency.*'

1.24 In the context of challenges faced by local government, it has been described as a:

> *'...toothless bulldog which merely exists in theory but practically non-existent and also have a lot of loopholes and grey areas which need clarification if it had to promote cooperative government'.*[60]

1,25 Furthermore, the loophole identified by DSD in the Act, that 'it contains no clause criminalising deliberate sabotaging of IGR by individuals or public entities' became worrisome as far back as 2012.[61]

1.26 The point DSD, the court and commentator referred to above, appear to have succeeded to drive home is that, unlike the Constitution which clearly provides that national government may dictate to provincial governments or take over their responsibilities in specified circumstances;[62] IRFA is wishy-washy on whether national interests should trump

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59 Unreported judgement of Classen J in the Transvaal Provincial Division of the High Court, delivered on 2 November 2007.

60 Haurovi, Maxwell *The Role of Cooperative Government and Intergovernmental Relations in Promoting Effective Service Delivery: A Case Study of the Amathole District Municipality* (November 2012) at 168.

61 *Ibid*. see also *Id* at 172 and 186.

62 Section 100 of the Constitution provides:

'(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) maintain economic unity;

(iii) maintain national security; or

the interests of subnational governments. Moreover, it does not appear that this 'gap' could be satisfactory addressed through or is an ideal candidate for creative interpretation.[63] What is clear though is that it could render some of the provisions of this Act nugatory. It is difficult to see how national priorities, preventive and corrective measures relating to the provision of services could be actualised if national government lacks coercive power.

(bb) Potential ineffectiveness of IRFA

1.27 IRFA prescribes three or four mechanisms that are intended to obviate the type of challenges DSD is complaining about. Firstly, it states unequivocally that Minmecs are established to *detect failures in the provision of services and to initiate preventive or corrective action when necessary*.[64] When DSD states that 'provinces continue to provide services in a fragmented way *despite Minmec decisions and applicable legislation*'[65] it is probably referring to failed efforts undertaken in terms of this section. Secondly, IRFA *requires* Minmecs, including that for Social Development, to adopt rules by which to conduct their business, including how resolutions or recommendations will be made,[66] and by *implication*, the power to enforce them. These rules, like the rules of courts are subordinate legislation[67] and binding[68] unless they are *ultra vires*[69]- inconsistent with IRFA itself or other applicable legislation, including the Constitution.[70] Thirdly, where implementation of a power or function or provision

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(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.'

63 First, because of a well-known rule*, casus omissus* rule, that the courts may not supply an omission in legislation as this is the function of the legislature. Secondly, because it is not the language that is modified when legislation is interpreted creatively, but the meaning which is adapted while the law remains as it was originally promulgated. See Botha, Christo *Statutory Interpretation: An Introduction for Students* Third Edition (1997) at 31 and 116.

64 Section 11(c) of IRFA.

65 See para 1.6 above.

66 The relevant parts of section 31(1) of IRFA provide:
'Every intergovernmental structure must adopt rules to govern its internal procedures, including –
(f) procedures for the adoption of resolutions or recommendations;
(g) procedures for the settlement of intergovernmental disputes –
(i) between the parties; or
(ii) that are referred to the intergovernmental structure for settlement; and
(h) procedures for the amendment of its internal rules.'

67 Botha *Statutory Interpretation* at 27.

68 Section 33(3) of IRFA expressly states:
'A party participating in an intergovernmental structure, and any person representing that party, must adhere to the provisions of the internal rules of that structure.'

69 According to Hoexter, Cora *Administrative Law in South Africa* 2nd Edition (2012) at 117 the term 'ultra vires' is used to indicate that the action is outside its lawful parameters, illegal and of no force or effect. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58 the Constitutional Court held that the common law principles of ultra vires remain under the new constitutional order and they are underpinned and supplemented where necessary by the constitutional principle of legality.

70 Section 33(2) of IRFA.

of service would involve and require coordination of various spheres, IRFA *encourages* the spheres concerned to *consider* concluding an implementation protocol – an agreement.[71] Such an agreement *must* provide, inter alia, for oversight mechanisms and procedures for monitoring the effective implementation of the protocol; and dispute settlement procedures to address disputes should any arise.[72] As is the case with the internal rules, the implementation protocol must not be *ultra vires*.[73] Last, IRFA contains elaborate provisions dealing with dispute resolution.[74]

1.28 Undoubtedly, the mechanisms alluded to above are germane to the issues at hand. However, DSD's reticence about their use or effectiveness in this instance speaks volumes. While most of the provisions above are prescriptive and couched in peremptory language and thus require exact compliance, IRFA fails to spell out what the consequences of non-compliance with them would be. And, this is the crux of the issue in this inquiry. Other than a declaration of an intergovernmental dispute, adherence to convoluted process relating thereto prescribed by the Act, and ultimately the institution of judicial proceedings, which both the Constitution and IRFA explicitly state must be a measure of last resort, DSD has no other recourse.

(cc) *Status of IRFA vis-à-vis other Acts of Parliament dealing with intergovernmental relations*

1.29 As stated above, IRFA is actually a constitutional Act, which raises complex issues relating to its status. There is a view that legislation mandated by the Bill of Rights, which is a component of the Constitution, has a higher status than other original legislation.[75] In our view, such an inference must be anchored in the express wording used in legislation concerned. To illustrate, section 5(2) of PEPUDA[76] and section 5(a) and (b) of PAIA,[77] state that provisions contained in these Acts rank above provisions in other legislation in *pari materia*. In contrast, IRFA does not contain similarly worded provisions to those referred to above. It expressly states, instead, in line with the rule *generalia specialibus non derogant*, the essence of which

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71 Section 35(1) and (2) of IRFA, read in conjunction with the definition of 'implementation protocol' in section 1 of the Act.

72 Section 35(3)(e) and (g) of IRFA.

73 Section 35(4)(a) of IRFA.

74 Sections 39-45 of IRFA.

75 Botha, Christo *Statutory Interpretation: An Introduction for Students* Fifth Edition (2012) at 22.

76 This provision provides that:
'(2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act prevail.'

77 This provision reads: 'This Act applies to the exclusion of any provision of other legislation that-
(a) prohibits or restricts the disclosure of a record of a public body or private body; and
(b) is materially inconsistent with an object, or a specific provision of this Act.'

is that general enactments are not intended to interfere with special laws,[78] that in the event of conflict between its provision and a provision of another Act of Parliament regulating intergovernmental relations, the provision of that other Act prevails.[79] A related but different issue is whether section 41(2) of the Constitution precludes enactment of parallel legislation to regulate intergovernmental relations. This question arose in the context of PAJA with the Constitutional Court deciding in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[80] that:

> 'Nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA.'[81]

1.30 What this means is that in the event that the Commission proposed sectoral legislation to address the intergovernmental challenges experienced in this sector, such legislation would supersede IRFA. The fundamental question remains, however, and that is whether such legislation would pass the constitutional muster.

3 Efforts by DSD to address alleged deficiency in the legislative framework regulating intergovernmental relations

1.31 Before referring the matter to the Commission, DSD, emulating the approach adopted by the Department of Trade and Industry in the mid-1990s to the manufacture, distribution and sale of liquor,[82] and acting within its constitutional mandate to initiate policy and legislation in respect of issues falling within social welfare sector,[83] tried to address the deficiency referred to above by developing a *Draft Policy on the National Social Development Council*[84] and a draft Bill, the *National Social Development Council Bill,*[85] which was predicated on the said policy. It later abandoned these initiatives as a result of complex issues that arose relating to

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78 For a discussion of this rule, see Devenish, GE *Interpretation of Statutes* (1992) at 280 *et seq*.

79 Section 3(1) of IRFA.

80 2008 (2) SA 24 (CC).

81 *Id* at para 91 and 92. In this case, the court remarked that this was an appropriate case for the application of the principle that specialised provisions trump general provisions, which we referred to in Chapter 1. See Klaaren, Jonathan and Penfold, John 'Just Administrative Action' in *Constitutional Law of South Africa* OS 06-08 at 9.

82 DTI developed and published the *Liquor Policy and Bi*ll in General Notice 1025 of 1997, in *Government Gazette* No. 18135 of 11 July 1997 for public comments.

83 Section 85(2)(b) and (d) of the Constitution empower Cabinet members to *develop* and implement *national policy* and to *prepare and initiate legislation* in respect of matters falling within the functional areas. (Our emphasis).

84 Department of Social Development *Draft Policy: National Social Development Council ...04/2013*.

85 Reference will be made to the version of the Bill scrutinised by the Office of the Chief State Law Adviser, dated June 2013 which DSD has provided to the Commission.

the constitutionality and necessity of the Bill. These issues are critical to this inquiry for two reasons: firstly, they add more context to the issues bedevilling the sector; and secondly, they are indicative of the course of action, both in terms of policy response and legislative reform, that DSD would prefer. We consider the salient issues in these documents below.

(a) Draft Policy on National Social Development Council

1.32 As one would expect a government department to do,[86] confronted with what it perceived to be a gap in the statutory framework regulating intergovernmental relations, DSD first asked what its policy on this issue should be. Mindful that policy formulation process determines how effective the policy will be in practice,[87] it appears DSD paid particular attention, inter alia, to two aspects during the policy development process,[88] namely precise identification of the issues that the policy sought to address and consultations. To ensure that the policy was supported or accepted, DSD arguably debated it with provinces and it was eventually approved at Minmec for social development sector.[89] For our purpose, the significance of this draft policy lies in that it highlighted, under the rubric 'problem statement' and 'rationale for the intervention', two problems besetting this sector which this policy sought to address:

(a) firstly, that provinces continue to provide services *in a disintegrated, non-standardised and unequal manner* despite MINMEC decisions and applicable legislation; and

(b) secondly, that MINMEC in its current form has not achieved its intended purpose.[90]

1.33 Taking its cue from initiatives introduced by the *national* Departments of Education, Finance, Health and Trade and Industry prior to the enactment of IRFA to put their relations with provinces on sound statutory footing, the policy proposed the establishment of a new

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86 Glanfield, Laurie 'Law Reform Through the Executive' in *The Promise of Law Reform* Opeskin, Brian and Weisbrot, David (eds) explains that although government activity and decision-making is underpinned by legislation, most of it flows from administrative policies. Consequently, governments confronted with challenges consider what the policy would be to a particular matter than what law it should develop or amend.

87 *Id* at 291 and 292.

88 According to Glanfield above, critical steps in the formulation of a sound policy include identifying the issues clearly, establishing the general nature of the outcome sought, weighing up the extent of consultation required, determining who should be consulted, deciding who will advise on and who will develop the policy, options and solutions; setting timeframe; considering and settling the policy; and settling the implementation strategy.

89 As discussed below, Gauteng Provincial Government disputes this assertion.

90 *Draft Policy: National Social Development Council* at 4.

structure to replace Minmec. The structure would be called the National Social Development Council and would be underpinned by legislation. It would serve as a consultative, advisory and decision-making body in the social development sector.[91] To ensure that this new structure discharged its mandate effectively, the policy expressly stated that while this structure would have same powers as Minmec under IRFA, *additional powers and functions would be conferred on it*.[92] We consider below various aspects of the draft Bill intended to effectuate, inter alia, this objective.

(b) National Social Development Council Bill

(i) Creating a parallel mechanism for social welfare sector

1.34 Having determined the policy, DSD also deemed it appropriate to develop legislation to enact the policy. The result was the formulation of the National Social Development Council Bill.[93] What jumps out when one reads this Bill, is the deliberate choice by DSD to steer clear of IRFA, to which it proposed no amendments. The approach adopted by DSD, out of abundant caution, cannot be faulted as amendments to IRFA would have had implications beyond the social welfare sector. Moreover, although nothing stops it from initiating them, amendments to IRFA have to be promoted by the Department of Cooperative Governance and Traditional Affairs (COGTA) as the department responsible for the implementation of this Act.[94] Instead, DSD modelled its proposed Bill on the National Education Policy Act,[95] Intergovernmental Fiscal Relations Framework Act,[96] the Liquor Act[97] and Chapter 3 of the National Health Act.[98] These Acts, all of which, as stated above, predate IRFA, established intergovernmental forums for the respective functional areas to which they relate and entrusted them with certain responsibilities. We examine these forums and their constitutive legislation in Chapter 2. For now the focus is on the salient features of the Bill developed by DSD.

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91 *Id* at 5 and 6.

92 *Id* at 6.

93 As stated above, because DSD did not publish this draft Bill for public comment, we will refer to the version scrutinized by the Office of the Chief State Law Adviser, dated June 2013, which DSD has provided to the Commission.

94 COGTA is responsible for the implementation of IRFA. Moreover it was developed and promoted by it, or its predecessor, the Department of Provincial and Local Government. See *Government Gazette* No. 26970 of 5 November 2004, General Notice 2484 of 2004 and Annual Report of the Department of Cooperative Governance and Traditional Affairs for 2010/2011 Financial Year at 17 and 18.

95 Act 27 of 1997.

96 Act 97 of 1997.

97 Act 59 of 2003.

98 Act 61 of 2003.

(ii) Objectives of the Bill

1.35 While it referred to the provision of services to the people of South Africa and determination of policy,[99] in reality, this Bill had only one objective: to set up a ministerial council (National Council for Social Development) and to provide supporting architecture for it by establishing contemporaneously a technical committee called the Heads of Social Development Departments Committee. Unsurprisingly therefore, it dedicates a disproportionate number of provisions to this aspect.[100] All other matters dealt with in the Bill were ancillary to this goal, for example, the provisions[101] that sought to address an age-old problem which has afflicted this sector, the fragmentation in the provision of social welfare services.[102] And, one provision merely rehashed the power already conferred on the Minister by the Constitution to determine national policy[103] and elaborated on this slightly, and thus merit no further comments, except to the extent that it explains how such policy should be implemented. [104]

(aa) National Social Development Council

1.36 The solution chosen by DSD to transform the policy above into effective action was to establish an executive structure for the sector called the National Social Development Council. This structure would be akin to the Council of Education Ministers,[105] Budget Council,[106] the National Health Council,[107] and the National Liquor Council.[108] Like these antecedents,[109] the

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99 The long title of this proposed legislation provided that it was intended: 'To provide measures to promote social development services to the people of South Africa; to provide for the determination of national policy for social development; to provide for the establishment of the National Social Development Council; and for matters connected therewith.'

100 Clauses 5-10 of the 11 clauses contained in the Bill.

101 Clauses 2 and 3 of the Bill. These clauses stated that the object of this Bill was, inter alia, to provide uniformity in respect of social development services by ensuring that policies and legislation are implemented in an integrated, coordinated, cost-effective and uniform manner; and enjoined all organs of state to cooperate to achieve the implementation of this Act in an integrated, cost-effective and uniform manner.

102 See discussion above relating to the remit of this inquiry.

103 Clause 4 provided that the Minister must determine national policy for social development, a power the Minister has in terms of section 85(2)(b) of the Constitution. Subsection (3) stated that the aforesaid policy must be determined with the concurrence of the Minister of Finance in as far as the implementation thereof involves or is likely to involve public funding.

104 For example through the determination of targets and priorities, norms and standards, promotion of efficient, coordinated and integrated implementation and monitoring of social development services provided by different spheres of government (clause 4(1)(a)-(c)).

105 Section 9 of the National Education Policy Act 27 of 1996.

106 Section 2 of the Intergovernmental Fiscal Relations Act 97 of 1997.

107 Section 22 of the National Health Act 61 of 2003.

108 Section 37 of the Liquor Act 59 of 2003.

109 There would have been slight variation of course. The Director-General of Basic Education attends the meetings of the Council of Education Ministers to report on the proceedings (s 9(2) of the National Education Policy Act). The National Liquor Council includes the Director-General of Trade and Industry and two persons nominated by provinces. These officials have no vote

National Council on Social Development would have been a quintessential intergovernmental structure comprising the Minister of Social Development, as chairperson; the Deputy Minister of Social Development, as deputy chairperson; members of the Executive Councils responsible for social development in their respective provinces and other persons invited by the Minister.[110] Like the councils referred to above which play a crucial role in policy and legislative development and implementation and in facilitating intergovernmental coordination,[111] the National Council on Social Development would have had the power to:[112]

(i) consider recommendations made to it;

(ii) approve draft policies, strategies and programmes relating to the provision of social development services in all spheres of government;

(iii) ensure coordination and integration of all matters relating to the provision of social development services at all spheres of government;

(iv) ensure the promotion and implementation of the policy contemplated in the Bill;

(iv) ensure that social development services are provided in an efficient and cost-effective manner;

(v) determine the norms and standards for the delivery of services;

(vi) advise the Minister on any matter regulated by this Act and any legislation administered by the Department;

(vii) determine national policy for social development services;

(viii) ensure the development of a uniform approach aimed at planning, implementation, co-ordination, integration and monitoring of social development services;

(ix) equitably prioritise the provision and funding of social development services;

(x) determine eligibility for social development services;

(xi) consult with or receive representations from any person, organisation, institution or authority;

(xii) determine and control its internal arrangements and procedures for its meetings; and

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on the Council (s 38(1)(c) and (d) of the Liquor Act). The National Health Council is chaired by the Minister *or his or her nominee*. It also consists of a municipal councillor representing organised local government, the Director-General of the Department of Health, one person employed and appointed by the National Organisation contemplated in section 163(a) of the Constitution, and the head of the South African Military Health Service (s 22 of the National Health Act).

110 Clause 5(2)(a)-(d) of the Bill.

111 See section 9(4) of the National Education Policy Act; section 39(2) of the Liquor Act; and section 23(1) of the National Health Act.

112 Clause 6(a)-(k) and 7(2)-(4) of the Bill.

(xiii) establish one or more committees to advise it on any matter regulated by this Act.

1.37 For our purposes, the most important aspect of the Bill, is the clause dealing with decision-making powers of the National Council. Having experienced first-hand the shortcomings of strict adherence to 'consensus principles', in particular inertia,[113] and mindful that 'unilateralism'[114] was not an option, DSD broke with the norm in IRFA, for example, of leaving it to the intergovernmental structure to determine its processes, choosing instead the approach adopted by the drafters of the National Health Act[115] and Liquor Act[116] by expressly stipulating in the clause regulating decision-making that: [117]

> '(1) The National Council must strive to reach its decisions by consensus, *but where a decision cannot be reached by consensus, the decision of the majority of the National Council is the decision of the National Council, and in the event of an equal number of votes, the chairperson must have a casting vote*.
>
> ...
>
> (5) A *quorum for the National Council is constituted by six members* referred to in section 5(2)(a) to (c) of this Act.'

(bb) <u>*Heads of Social Development Departments Committee*</u>

1.38 For obvious reasons, most intergovernmental forums are *supported*, formally and informally, by bureaucrats.[118] Depending largely on the requirements of the forum concerned,

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113 In the context of this inquiry, 'inactivity' by provinces is the nub of the problem facing DSD. However, there are other facets of 'consensus principle' that have attracted attention of commentators in other parts of the world. For example, it has been slated for allowing constituent governments to 'hold out' or 'exercise veto powers'. See in this regard, Phillimore, John 'Understanding Intergovernmental Relations: Key Features and Trends' *Australian Journal of Public Administration* Vol 72, No 3, (September 2013) 228 at 232.

114 *The Oxford Dictionary* defines 'unilateralism' as a process of acting, reaching a decision, or espousing a principle unilaterally. For a discussion of this model, see in general Banting, Keith G. 'The Three Federalisms: Social Policy and Intergovernmental Decision-Making'.

115 Section 23(3) of the National Health Act provides: 'The National Health Council must strive to reach decisions by consensus but where a decision cannot be reached by consensus, the decision of the majority of the members of the National Health Council is the decision of the National Health Council.'

116 The relevant provisions of section 40 of the Liquor Act read:
'(5) As a body through which the national and provincial spheres of government seek to co-operate with one another in mutual trust and good faith, the Council must attempt to reach its decisions by consensus.
(6) If the Council fails to reach consensus on a decision, it may resolve the matter by formal vote on a motion.
(7) A motion in terms of subsection (6) passes only if it is supported by
(a) the Minister; and
(b) at least five other voting members of the Council.'

117 Clause 7(1) and (5) of the draft Bill. (Our emphasis).

118 See in this regard, the Department of the Prime Minister and Cabinet *Handbook for COAG Council Secretariats: A Best Practice Guide* (November 2019) at 7; McEwen, Nicola et al

this function is either discharged by a single functionary[119] or a group of officials.[120] The National Health Act entrusts the responsibility of implementing the decisions of the National Health Council to the Director-General of Health.[121] IRFA, although it does not stipulate their functions, empowers intergovernmental forums to establish technical support structures.[122] Other than that this aspect has to a great extent been neglected, with most South African legislation instituting mechanisms and processes of IGR being silent on the matter,[123] while instituting committees below the political level.[124]

Reforming Intergovernmental Relations in the United Kingdom (November 2018) at 22 and 43 for position in Canada (the Canadian Intergovernmental Conference Secretariat) and Spain respectively; section 12 of the Intergovernmental Relations Act No. 2 of 2012 (Kenya); and section 10 of our own National Education Policy Act 27 of 1996. Whether they are underpinned by legislation or not the following are typical functions of technical structures: developing issues for upcoming meetings, implementing the work plan in accordance with directions of the intergovernmental forum, ensuring that objectives are met and implementation is followed through; sharing information and views; coordinating administrative action on matters of mutual interest; facilitating the development of the sector; convening meetings of the forum; performing any other function assigned to it by the forum or legislation; relieves client departments of technical and administrative tasks associated with planning and conducting multilateral conferences thereby enabling participants to concentrate on policy issues; present interests of their own governments; and to attend to and resolve problems at technical discussions which precede inter-ministerial negotiations.

119 For example, section 21 of the National Health Act of 2003 assigns this responsibility to the Director-General of Health.

120 In Australia, for example, COAG and Ministerial Forum Secretariats are supported by COAG Secretariat. Whereas, COAG itself, and each Council and Ministerial Forum, are supported by a senior officials group and a deputy senior officials group. While these forums have discretion to make arrangement that best suit their requirements, there are limitations. The supporting architecture must be kept to a minimum; and clearly defined roles and responsibilities must be assigned to support staff. See in general, Department of the Prime Minister and Cabinet *Handbook for COAG Council Secretariats: A Best Practice Guide* (November 2019).

121 First, among the responsibilities entrusted to the National Health Council by section 23(1) and (2) is the task of advising the Minister of policy, including targets, priorities, norms and standards relating to equitable provision and financing of health services; proposed legislation; the implementation of national health policy; and determination of time frames, guidelines and the format for the preparation of national and provincial health plans. But the duty of ensuring that the national health policy is actually implemented; that norms and standards on health matters are promoted and adhered to; and identification of national health goals and priorities and monitoring progress of their implementation; the coordination of health services rendered by the national department with those rendered by provinces, rests with the Director-General. See section 21(1) and (2) of the National Health Act.

122 Section 30 of IRFA reads:

‘(1) An intergovernmental forum may establish an intergovernmental technical support structure if there is a need for formal technical support to the forum.

(2) An intergovernmental support structure –

(a) must consist of officials representing the governments or organs of state participating in the intergovernmental forum which established the technical support structure; and

(b) may include any other persons who may assist in supporting the intergovernmental forum.’

123 For instance, the Liquor Act 59 of 2003 and the Intergovernmental Fiscal Relations Act 97 of 1997.

124 Section 10 of the National Education Policy Act established the Heads of Education Departments Committee but does not assign secretariat support function to it.

1.39 The draft Bill departed from the norm in this regard and emulated the National Education Policy Act[125] and Intergovernmental Relations Act of Kenya.[126] Besides making it clear that the National Council would receive technical support from the Heads of Social Development Departments Committee[127] established by the Bill[128] and comprising numerous functionaries,[129] it also expressly stated that this *committee would be responsible for the implementation of the decisions of the National Council.*[130] Moreover, like the Heads of Education Departments Committee[131] and the National Health Council,[132] this committee would have had the power to establish subcommittees to assist it in the execution of its duties.[133]

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125 Section 10(2) of this Act sets out the functions of the Heads of Education Departments Committee as being:
(a) facilitate the development of a national education system in accordance with the objectives and principles provided for in this Act;
(b) share information and views on national education;
(c) co-ordinate administrative action on matters of mutual interest to the education departments; and
(d) advise the Department on any matter contemplated in sections 3, 4, 5, 6, 7, 8, and 11 in respect of education, or any other matter relating to the proper functioning of the national education system.

126 Section 12 of the Intergovernmental Relations Act 2 of 2012 (Kenya) provides that: '12. The Technical Committee shall-
(a) be responsible for the day to day administration of the Summit and of the Council and in particular-
(i) facilitate the activities of the Summit and of the Council; and
(ii) implement the decisions of the Summit and of the Council;
(b) take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity;
(c) convene a meeting of the forty-seven County Secretaries within thirty days preceding every Summit meeting; and
(d) perform any other function as may be conferred on it by the Summit, the Council, this Act or any other legislation.'

127 Clause 9 dealing with this aspect stated: '9(1) The functions of the Committee must be to-
(a) develop uniform approach aimed at the implementation and monitoring of social development services;
(b) develop strategies for the provision of social development services;
(c) advise the National Council on any matter contemplated in section 4 in respect of social development services;
(d) ensure coordination, integration and joint planning in the provision of social development services at all spheres of government; and
(e) implement decisions of the National Council.'

128 Clause 8(1) of the Bill.

129 In terms of clauses 8(1)(a)-(f) of the Bill, the committee would have comprised the Director-General of DSD as Chairperson, his or her counterparts in the provinces, the Chief Executive Officer of the South African Social Security Agency, the Registrar of the South African Council of Social Services, the Chief Executive Officer of the South African Local Government Association, and the Chief Executive Officer of the National Development Agency.

130 Clause 9(1)(e) above.

131 Section 10(3) of the National Education Policy Act.

132 In the absence of a committee operating below the level of minister and MECs, section 23(5) of the National Health Act entrusts this power to the National Health Council itself.

133 Clause 9(2) of the Bill.

(iii) Reasons for referring the inquiry to the Commission: comments of the Office of the Chief State Law Adviser and Gauteng Government

(aa) Office of the Chief State Law Adviser

1.40 Pursuant to a Cabinet decision of 2009 that all Bills must be accompanied by the opinion of the Office of the Chief State Law Adviser (OCSLA) attesting to constitutionality and quality, DSD submitted its draft Bill to this office for certification. It is the concerns raised by the OCSLA that eventually prompted DSD to refer the matter to the Commission. Among the many issues flagged by the OCSLA, two merit brief discussion, namely the duplication or overlap between the powers and functions of the National Council and those of other advisory bodies created by legislation administered by DSD; and the necessity for the proposed legislation.

Duplication and overlap of powers and functions

1.41 The powers and functions of the National Council as stipulated in the draft Bill coincided with those entrusted to the National Development Agency[134] the South African Social Welfare Council;[135] and many other bodies set up by legislation administered by the department that provide development services to identifiable groups.[136] The OCSLA noted that it seemed the National Council was intended to be the overarching council to oversee the roles of these bodies; consequently putting in place another level of authority from which all other councils and bodies need to obtain approval for any strategies, policies and programmes. The problem was that none of the laws regulating these councils made provision for this or even anticipated it. And this, the OCSLA warned, could lead to power struggles, duplication and redundancy; and could even frustrate the process of service delivery. To address this, it proposed consequential amendments to legislation administered by DSD to cater for the objects of the Bill.

134 In section 3(2)(a)(ii); 4(1)(c); and 4(2)(b) of the National Development Agency Act 108 of 1998.
135 Section 3(1) of the National Welfare Act 100 of 1978.
136 See Fund-raising Act 107 of 1978; the Probation Services Act 116 of 1991; the Non-profit Organisations Act 71 of 1997; and the Advisory Board on Social Development Act 3 of 2001.

Necessity of proposed legislation

1.42 The OCSLA noted, citing express legislative purpose provisions of IRFA, that a mechanism or system already exists that provides substantially for the proposed purpose for which the National Council was being established. It further asked, relying on the Constitutional Court's decision in *New National Party of South Africa v Government of the Republic of South Africa and Others*[137] which was quoted with approval in *Affordable Medicines Trust v Minister of Health and Others*[138] case, whether the reasons provided by DSD passed the rational connection test espoused by the court in these cases. In other words, whether it was rational to establish another council to perform functions substantially similar to those already performed or provided for in IRFA. In the *New National Party* case the court stated:

> 'The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.'[139]

(bb) *Gauteng Provincial Government*

1.43 Although Gauteng Provincial Government was of the view that the proposed legislation would not impact adversely on its provincial Acts dealing with welfare services,[140] and its main concern was failure of the Bill to bestow voting rights on MECs participating in the National Council which would have effectively allowed the Minister to usurp the legislative function of provinces. The perceived unconstitutionality of the Bill arising from that omission[141] was subsequently addressed. The province's reservations about three aspects of the Bill need to be highlighted.

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137 1999 (3) SA 191 (CC).

138 2006 (3) SA 247 (CC).

139 *New National Party* case, para 19.

140 Gauteng Street Children Shelters Act 16 of 1998 and Gauteng Regional Welfare Institutes Act 15 of 1998.

141 The version submitted to Gauteng for comments required provincial governments to submit all Bills dealing with welfare issues to the National Council for approval which meant that provincial legislative processes would no longer be undertaken independently and, the national department through the National Council would play a supervisory role. Furthermore, it restricted the capacity of MECs to participate in the legislative process by depriving them of voting rights. This meant that the National Council would discuss and vote on the Bill without the involvement of the relevant MEC. And, the rationale for such exclusion was never explained. The Gauteng government justifiably challenged the constitutionality of these provisions.

1.44 Firstly, Gauteng Government concurred with the OCSLA that most of what the Bill sought to achieve through the establishment of the National Council was already catered for by the Advisory Board on Social Development Act and noted that the draft Bill did not seek to amend or repeal the aforementioned Act. To recap, this Act established the Advisory Board on Social Development, a consultative forum for the Minister, whose mandate includes giving advice to the Minister on measures to promote social development initiatives and proposals for a new legislative framework for the sector; introduction of new policy and implementation of policy in government and non-governmental environment; and effective review of formulation, implementation and evaluation of social development policies, programmes and legislation.

1.45 Secondly, it warned that the Bill proposed new roles for Heads of Departments which could have an impact on existing contractual obligations, performance targets and overall functioning of provincial departments.

1.46 Thirdly, it appears from the memorandum prepared by Gauteng Government that when the Bill was submitted to it, it was not accompanied by problem statement, policy or other supporting background documents setting out the rationale for the proposed legislation, an omission it bemoaned. As a result, it was left in the dark about the actual purpose and necessity of the Bill.

(iv) Commission's take on the draft Bill

1.47 Three cursory comments in respect of the abovementioned aspects of the draft Bill are apposite. Firstly, the essence of comments by the Gauteng Executive Council that most of what the Bill sought to achieve through the National Social Development Council was already catered for in the Advisory Board on Social Development Act (Advisory Board Act)[142] was intended to drive home the point that the proposed legislation was not necessary. This conclusion was erroneous. Firstly, although this legislation (the Advisory Board Act) has been assented to and promulgated, it has not yet come into operation.[143] Secondly, admittedly there is a great deal of overlap between the objectives, functions and duties of the Advisory Board[144]

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142 Act 3 of 2001.

143 Section 14 of the Advisory Board on Social Development Act provides that it comes into operation on a date to be determined by the President by Proclamation. That date has not yet been determined or proclaimed.

144 In terms of section 3, read with section 4 of the Advisory Board Act, the objectives and duties of the Board include advising the Minister on legislative proposals; acting as a consultative forum to discuss (a) introduction of new policy and policy implementation in government and non-governmental environment; (b) facilitate consultation between stakeholders and government regarding implementation of social development; (c) ensuring effective review of

and those envisaged for the National Council by the draft Bill,[145] but the foci of the two are not the same, and the distinction between them is crucial. The National Social Development Council would have been a *co-ordinating body* proper, comprising *ex officio* members; formed for the sole purpose of establishing *vertical bridges* between the national and the provincial spheres of government; and it would have been authorised *to make binding decisions itself*.[146] Whereas, the Board on the other hand, like its predecessor, the South African Welfare Council,[147] is a quintessential '*policy and advisory body*' comprising 'experts' appointed by the Minister and representatives of the national executive, with the remit to advise the Minister on matters enumerated in its enabling legislation, *with the latter deciding on the course of action to be adopted*.[148] Conspicuously, one should add, there is no mention in the Advisory Board on Social Development Act of 'cooperation', 'coordination', 'intergovernmental relations' or 'cooperative governance'. Neither does the Act empower the Board to mediate between the Minister and his or her provincial counterparts should concerns or an impasse relating to separation of powers arise.[149] The unavoidable conclusion is that Advisory Board on Social Development Act was not intended to foster intergovernmental relations and that it cannot be used to plug the gap in the statutory framework is unavoidable. This principle, enunciated by the Constitutional Court in *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the Education Policy Bill 83 of 1995*,[150] that '*a power given for a specific purpose may not be misused in order to secure an ulterior purpose*,' equally applies here.

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formulation, implementation and evaluation of social development policies, programmes and legislation; and (d) facilitating dialogue between government and civil society.

145 The National Council too would have ensured the promotion and implementation of social development policies; advised the Minister on any matter relating to social development. See clause 6(d) and (g) of the draft Bill.

146 These traits distinguish 'coordinating bodies' from 'policy and advisory bodies'. See Baxter, Lawrence *Administrative Law* (1984) 177 and 184.

147 The Welfare Council was established by the National Welfare Act of 1978. Its members (experts or persons with special knowledge or experience of problems) were appointed by the Minister of Welfare and Population Development and their function was to advise government in relation to policy matters relating to; measures necessary for; provisions of; research in connection with; provide guidance to welfare organisations in connection with, social welfare services. See in general, sections 2 and 3 of the National Welfare Act.

148 Baxter, Lawrence *Administrative Law* above at 177.

149 Seedorf, Sebastian and Sibanda, Sanele 'Chapter 12: Separation of Powers' in Woolman *et al Constitutional Law of South Africa* at 12-13 refers to this division of power between different levels of government as 'vertical separation of powers' to distinguish it from classical (Montesquieu's division of powers) and contemporary constitutional discourse which relates to separation of powers between different actors in the same sphere of influence.

150 1996 (3) SA 289 (CC) at para 33.

1.48 Secondly, the approach adopted by DSD to initiate sectoral-based legislation to address the shortcomings in the intergovernmental legislative framework is not novel.[151] The provenance of the national Health Council[152] and Education Council,[153] for example, can be traced to pre-1994 legislation and the influence of some of these laws on the DSD draft Bill is palpable.[154] However, when the overhaul of the statutory framework regulating coordinating bodies was deemed necessary after the advent of our constitutional democracy care had to be taken to ensure, among other things,[155] that the new laws promoted in the mid-1990s and early 2000s by the Departments of Education, Finance, Health and Trade and Industry,[156] did not encroach on functional and institutional integrity of provinces as some forerunner of these laws did. Apprehension that one of the Bills piloted at the time, the National Education Policy Bill 83 of 1995, did exactly that was eventually settled by the Constitutional Court in *Speaker, National Assembly: re National Education Policy Bill,*[157] with the court finding that the impugned provisions were capable of interpretation that was consistent with the Constitution, as a result they did not offend the Constitution.

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151 Baxter, Lawrence *Administrative Law* above at 184 dispels any misconception that coordinating bodies are a new phenomenon that only came into being after the advent of our new democracy. Prior to 1994, there were numerous coordinating bodies underpinned by legislation forming vertical bridges between tiers of government especially in the areas of education, housing, health services and environmental conservation.

152 Section 14 of the National Policy for Health Act 116 of 1990 established the Health Policy Council consisting of the Minister of Health and administrator of each province.

153 See Grant, ML *The National Education Policy Act. 1967* available at SA History Online, who, among other things, states that the measure was intended to achieve uniformity and coordination; made provision for the appointment of a committee of educational heads who are superintendent general of Education of the Cape Province and the Directors of Education of the other provinces with the Secretary for Education, Arts and Science as Chairman; and despite opposition, empowered the Minister to cause an inspection to be carried out in schools to ascertain whether the national education policy was being carried out.

154 Clause 6(a) of the Bill which states that 'The National Council must (a) consider recommendations referred to it' appears to have been taken verbatim from section 15(a) of the National Policy for Health Act of 1967 which states: 'The Council – (a) shall consider any recommendation referred to in section 5(1)(a)(i) and make recommendations to the Minister.'

155 The National Policy Education Act of 1967 for example was criticised for excluding from its scope Black people which was interpreted to mean they were not regarded as part of the South African nation. See Grant, ML 'The National Education Policy Act. 1967.'

156 As stated elsewhere in this issue paper, these departments enacted the National Education Policy Act 27 of 1996; Intergovernmental Fiscal Relations Act 97 of 1997; Chapter 3 of the National Health Act 61 of 2003; and the Liquor Act 59 of 2003.

157 1996 (3) SA 289 (CC).

1.49 Thirdly, although empowering an intergovernmental structure, in this instance the National Council, to take decision by means of a majority vote and bestowing on its chairperson the casting vote would not have been novel,[158] it was still a huge departure from the norm. It did not go far enough though. And its inadequacy lies in that it did not explain what the effect of a decision by the majority of members would be on those provinces that either object to it or agree but later renege. From a legislative drafting point of view, this omission cannot be faulted, it is common practice. Our own Constitution makes provision for decisions to be taken by majority vote in numerous provisions.[159] It is taken for granted that such decisions would be given effect to and are equally binding even on those who did not support such decisions.[160] In jurisdictions where legislation makes provision for decisions to be reached on the basis of the majority vote of members, for example in Australia[161] and Ethiopia,[162] the consequences of failure to toe the line are usually not expressly set out in the legislation either. And, neither is there uniformity in this regard. In Australia, for example, it is generally accepted, in line with COAG operational process, that parties that are not agreeable to a decision *are not bound to implement the decision in question*.[163] In certain instances, to remove any doubt, this general principle is incorporated into the terms of reference of an

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158 The Department of Trade and Industry published the Liquor Bill in 1997 which established the National Liquor Advisory Committee comprising of organs of state, representatives of the industry, community members and civil organisations. Clause 23(6) of this Bill provided that a decision of the committee shall be taken by a majority of votes and the chairperson shall have a casting vote. The idea of the committee was abandoned. Instead, the Liquor Act 59 of 2003 established the National Liquor Policy Council comprising the Minister responsible for liquor matters, his or her counterparts in the provinces responsible for liquor licensing (MECs), Director-General of the relevant department and other designated provincial officials; and gave it the power to take decisions by majority of votes. The casting vote of the Minister was also abandoned. See in general Chapter 7 of the Liquor Act. The relevant provisions of section 40 of the Liquor Act state:

'(5) As a body through which the national and provincial spheres of government seek to co-operate with one another in mutual trust and good faith, the Council must attempt to reach its decisions by consensus.

(6) If the Council fails to reach consensus on a decision, it may resolve the matter by *formal vote* on a motion.

(7) A motion in terms of subsection (6) passes only if it is supported by-

(a) the Minister; and

(b) at least five other voting members of the Council.'

159 See sections 37(2), 50(1)(a), 54(4), 53(1)(c), 75(2)(c), 76(5), 102(2), and 141(2) of the Constitution

160 A Bill approved by the majority of provinces in terms of section 75(2)(c) or 76(5) of the Constitution would also apply to the provinces that did not support it.

161 See section 139 of the National Disability Insurance Scheme Act 20 of 2013 which regulates decision making processes of the Council of Australian Governments (COAG) Disability Reform Council, an intergovernmental body comprising of the Minister responsible for disability, Minister responsible for Treasury and a Senior Minister from each jurisdiction.

162 See section 7(1)(d) of the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010.

163 Department of the Prime Minister and Cabinet *Handbook for COAG Council Secretariats: A Best Practice Guide* (November 2019) at 10.

intergovernmental structure.[164] Even in instances where there is an agreement, underpinned by legislation, promises embodied therein are considered to be of a political nature and thus unenforceable.[165] In contrast, the standard practice in Ethiopia is that the decision of an intergovernmental forum *is binding on those who supported it, dissented and those who were absent during deliberations*.[166] No such precedent, practice or 'understanding' exist in South African law. However, in view of the decision of the Constitutional Court in *Mashavha v President of the Republic of South Africa*[167] that '*social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be coordinated by uniform norms and standards that apply generally throughout the country'*, and because the whole purpose of this endeavour was to put to bed the question whether decisions of the forum are binding, DSD should have grasped the nettle and nailed its colours to the mast by expressly dealing definitively with this aspect in the draft Bill.

1.50 Regrettably, and despite commendable strides it made in this regard, the process of developing a policy and a Bill ran into challenges and had to be abandoned in favour of an in-depth study by the Commission.

4 Other (less drastic) avenues available to DSD to address inertia and incoherence

1.51 In the ensuing paragraphs, we consider briefly courses of action short of legislative reform available to DSD to address the issues bedevilling the social development sector, but which, for some or other reasons, it did not pursue. To gain more insight into why it did not invoke these measures, we have addressed a separate enquiry to DSD to elicit its views in this regard. Having said that, our own preliminary assessment of the interventions discussed below has revealed that they have the following traits which could have dissuaded DSD from relying on them, first, they are reactive and thus do not establish ground rules (normative rules) in advance for the conduct of intergovernmental relations which is what legislation would

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164 The COAG Disability Reform Council 2018 Terms of Reference expressly provide that the council will make decisions in accordance with the National Disability Insurance Scheme Act of 2013 and on the basis of consensus wherever possible. Where the council makes a decision on the basis of majority because consensus cannot be reached, *jurisdictions in the minority are not bound to implement the decisions that have been made*.

165 See *South Australia v The Commonwealth (1962) 108 CLR 130.* The reasons for such approach were summarised as followed: 'Their performance necessarily requires executive and further parliamentary action. It is a matter for the discretion of the respective governments to take such action if and when they see fit to do so.' *Id* at 149.

166 Afesha, Nigussie 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' *Mizan Law Review* Vol 9 No 2 (December 2015) 341, at 358.

167 2005 (2) SA 476 (CC) at para 57.

achieve; and secondly, although they all have statutory basis, not all of them create constitutional and statutory obligations and justiciable rights for both national and provincial governments. In the context of IRFA, as we have shown elsewhere in this issue paper, the last mentioned characteristic, the unenforceability of norms of intergovernmental relations, has engendered calls for it to be reviewed and amended.

(a) Declaration of a dispute in terms of IRFA

1.52 The drafters of IRFA, much like the drafters of the Constitution, were far-sighted; they anticipated that the new constitutional structure would generate territorial conflicts between organs of state, especially in respect of concurrent matters. They incorporated provisions aimed at obviating and resolving these. In the context of relations between national and provincial governments, the following provisions of IRFA are noteworthy:

- It stipulates how conflicting national and provincial legislation in *pari materia* should be dealt with;[168]
- enjoins organs of state to be considerate when exercising their powers or performing their functions and to cooperate with one another;[169]
- requires organs of state involved in the provision of services relating to the same functional area to *collectively* detect failures and devise preventive and corrective measures;[170]
- instructs intergovernmental forums to adopt *binding* rules dealing, among others, with procedures for settlement of intergovernmental disputes between the parties;[171] and
- demands that implementation protocols (agreements between organs of state) must provide for dispute-settlement procedures and mechanisms.[172]

1.53 Given that the issues that have given rise to this law reform proposal have all the hallmarks of an intergovernmental dispute, it begs the question whether DSD ever invoked the provisions of Chapter 4 of IRFA to address lethargy and inconsistency in the provision of social development mandates by provinces. As stated above, DSD is reticent about this aspect. Chapter 4 of IRFA stipulates how intergovernmental disputes should be handled. First, the definition of 'intergovernmental dispute' in section 1 of IRFA bolsters the conclusion we

168 Section 3(1) and (2) of IRFA.
169 Section 5 of IRFA.
170 Section 7(c) and 11(c) of IRFA.
171 Section 33(1)(g) and (2) of IRFA.
172 Section 35(3)(g) of IRFA.

make that the issues have all the characteristics of an intergovernmental dispute. Section 1 of this Act defines a dispute between organs of state as follows:

> 'intergovernmental dispute means a dispute between different governments or between organs of state from different governments concerning a matter –
>
> (a) arising from-
>
> (i) a statutory power or function assigned to any of the parties; or
>
> (ii) an agreement between the parties regarding the implementation of a statutory power or function; and
>
> (b) which is justiciable in a court of law,
>
> and includes any dispute between the parties regarding a related matter.'

1.54 This chapter urges organs of state to avoid intergovernmental disputes, to find a way to settle disputes without resorting to the courts; and to include dispute settlement mechanisms or procedures in formal agreements between organs of state, including implementation protocols envisaged in section 35 of IRFA and agency agreements.[173] However, if problems persist or prove insurmountable, IRFA prescribes the following *elaborate* and *convoluted* dispute resolution procedure that the aggrieved party must follow.[174]

(a) Before initiating formal intergovernmental dispute, the organ of state in question must make every reasonable effort to settle the dispute, including initiating direct negotiations with the other party or negotiations through an intermediary.

(b) If these initial attempts to resolve the disagreement do not work, the aggrieved party must declare a dispute by notifying the other party of such a dispute in writing.

(c) Once a dispute has been declared, the parties must convene a meeting themselves or through their representatives.

(d) If they fail to convene the aforesaid meeting, the Minister of Cooperative Governance and Traditional Affairs could convene such a meeting.

(e) If the parties fail to attend the meeting, the Minister of COGTA could designate a facilitator to assist the parties to settle the dispute and to submit a report to

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173 Section 40(1) and (2) of IRFA.
174 See sections 41-44 of IRFA.

the Minister concerning the nature and issues in dispute; the mechanisms used to settle the dispute; and progress reports.

(f) Either of the parties could request the Minister of COGTA to intervene.

1.55 While these provisions are couched in peremptory language, which suggests that they require strict or exact compliance, IRFA fails to stipulate what the consequences will be if they are not followed.[175] This is a flaw. As Woolman observed, measures to foster cooperation are only as good as the penalties in place for their non-compliance.[176] This flaw is even more palpable in the implementation protocol guidelines and guidelines for managing joint projects published by the Minister of COGTA in terms of section 47(1)(d) of IRFA in 2007.[177] These documents explicitly and unambiguously state that the 'guidelines are not obligatory' and that 'the protocol does not make any legal or otherwise enforceable commitments on behalf of any statutory powers and functions of the parties.' The lack of punitive provision in IRFA to criminalise failure to cooperate has led to appeals for it to be amended.[178] If these procedures fail, only then can the disgruntled party institute legal proceedings to settle the dispute. Even then, none of the efforts to settle the dispute would constitute admissible evidence in such proceedings.[179]

(b) Referral of the issues to the President's Coordination Council

1.56 The inertia and disintegration DSD is complaining of could have been referred to the President's Coordinating Council for resolution. This structure has the same powers and functions as a Minmec and is used to obtain provincial perspectives on issues of national importance; challenges to, and effectiveness of, national policy and legislation and direction

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175 See Botha, Christo *Statutory Interpretation: An Introduction for Students* Fifth Edition (2012) at 175.

176 Woolman, Stu 'L'etat, Cést Moi: Why Provincial Inter-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' *Law, Democracy and Development* Vol 13 (May 2009) 62 at 74.

177 *Implementation Protocol Guidelines and Guidelines for Managing Joint Programmes* published under GN 696 in Government Gazette of 3 August 2007.

178 Haurovi, Maxwell *The Role of Cooperative Government and Intergovernmental Relations in Promoting Effective Service Delivery – A Case Study of the Amathole District Municipality* (Masters Dissertation) *University of Fort Hare* (November 2012) at 172 and 186.

179 Section 45 of IRFA titled 'Judicial proceedings' provides:

'(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

(2) All negotiations in terms of section 4, discussions in terms of section 42 and reports in terms of section 43 are privileged and may not be used in any judicial proceedings as evidence by or against any of the parties to an intergovernmental dispute.'

national intends taking in respect of certain issues and collaboration in general.[180] It is an apex structure in intergovernmental relations presided over by the President[181] and consists of premiers of provinces.[182] It has the power to consider matters relating to any functional area referred to it by the minister responsible for the functional area in question.[183] However, like Minmec, this structure is not an executive decision-making body[184] and thus has no coercive powers. Nevertheless, it is not clear whether DSD ever requested the PCC to assist in resolving intergovernmental fall-outs between itself and relevant provincial governments and what the outcome of such intervention was.

(c) Addressing capacity issues in provinces

1.57 Section 125(3) of the Constitution renders it obligatory for provinces to implement, in addition to their own legislation, national legislation dealing with welfare services. However, provinces have such a responsibility 'only to the extent that a province has administrative capacity to assume effective responsibility.' Furthermore, this provision places a duty on national government to assist provinces to develop necessary capacity for the effective exercise of their powers and performance of their functions. Anticipating disagreements in this regard, the Constitution provides that any dispute regarding administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of referral to the Council.[185] National government has been criticised for not doing much to assist provinces to develop their administrative

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180 Section 7(a)-(d) of IRFA provides that: 'The Council is a consultative forum for the President-
(a) to raise matters of national interest with provincial governments and to organised local government and to hear their views on those matters;
(b) to consult provincial governments and organised local government on-
(i) the implementation of national policy and legislation in provinces and municipalities;
(ii) the co-ordination and alignment of priorities, objectives and strategies across national, provincial and local governments; and
(iii) any other matters of strategic importance that affect the interests of other governments;
(c) to discuss performance in the provision of services in order to detect failures and to initiate preventive or corrective action when necessary; and
(d) to consider –
(i) reports from other intergovernmental forums on matters affecting the national interest, including a report referred to in section 21; and
(ii) other reports dealing with the performance of provinces and municipalities.'

181 Section 6(2) of IRFA.

182 Section 6 of IRFA provides that the PCC consists of the President, the Deputy President, the Minister in the Presidency, the Minister of Cooperative Governance and Traditional Affairs, the Minister of Finance, the Minister of Public Service and Administration, the Premiers of the nine provinces, and a municipal councillor designated by the national organisation representing organised local government.

183 Section 12(2) of IRFA.

184 Section 32 of IRFA.

185 Section 125(4) of the Constitution.

capacity.[186] Instead, it takes upon itself the responsibilities that should vest in the province. This approach has been justified on the basis that at times provinces are unable to exercise their powers and perform their functions effectively.[187] Nevertheless, two problems arise from it. First, the national government has a constitutional duty to assist provinces and by taking responsibility upon itself, it does not discharge this constitutional duty. Secondly, not all provinces suffer from this lack of capacity in respect of human, administrative, and financial resources, but the generalised approach followed by national government does not allow for differentiation or asymmetry among provinces. As a result, the weakest link becomes the standard with which all provinces are treated.[188]

1.58 It is not clear whether the problems afflicting this sector are attributable to lack of capacity in the provinces. And, for this reason, we specifically asked the department whether it has made an effort to establish the cause of non-compliance with decisions taken at Minmec from provinces concerned? Whether this could, in any way, be linked to lack of administrative capacity contemplated in section 125 of the Constitution? If it is, what interventions were, could, or should be introduced to address this situation?

(d) Recourse to the courts

1.59 We stated elsewhere that the Constitution does not prohibit the institution of legal proceedings by the spheres of government *inter se* but explicitly states that this should be a measure of last resort,[189] an injunction also contained in IRFA. In fact, it empowers the courts to refer intergovernmental disputes back to the organs of state involved if they are not satisfied that all available avenues to settle the dispute have been exhausted.[190] In *Maccsand (Pty) Ltd v City of Cape Town and Others*,[191] the Constitutional Court stated:

> 'It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power,

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186 Malherbe Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance' TSAR Vol 2006, Issue 4 810 at 813 and Malherbe Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' above at 244.

187 See Malherbe above at 250.

188 *Ibid*.

189 Section 41(1)(h) and 41(3) of the Constitution.

190 Section 41(3) of the Constitution provides:

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

191 2012 (4) SA 181 (CC).

> which does not extend to the power of the other functionary. This is so, in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'[192]

1.60 There may be cogent reasons why DSD did not seek to resolve these issues through the courts. In *Uthukela District Municipality and Others v President of the Republic of South Africa and Others*,[193] the Constitutional Court held that political disputes should be resolved between the spheres of government rather than through adversarial litigation.[194] In *National Gambling Board v Premier of KwaZulu-Natal*,[195] the Court refused to grant direct access to the parties on grounds that they did not exhaust all options to resolve the dispute.[196] It would have encountered the following hurdles had it chosen this option. First, convincing the court that it has exhausted all available avenues to resolve the issues, which includes seeking intervention of the President's Coordinating Council;[197] persuading the courts that despite having adopted and invoked binding internal rules that regulate the procedure for the adoption of resolutions and settlement of disputes, inertia on the part of reneging provinces persists;[198]and that the invocation of implementation protocols and dispute resolution mechanisms provided for by IRFA have not assisted either. Additionally, it would have had to persuade the court that despite it being characterised as a forum for consultation and discussion and not an executive decision-making body, [199] resolutions taken by Minmec for social development are binding. Secondly, the Constitutional Court already insinuated in the *National Education Policy Bill* case that a *mandamus* would not be ideal to enforce what is clearly a political obligation,[200] and therefore this remedy would have beyond the reach of DSD. The only option available to it would have been to argue that IRFA is under-inclusive in that it does not explicitly provide an enforcement mechanism, that there is *casus omissus*, and to ask the court to read it in. As argued above, the danger with this approach is that it effectively

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192 *Id* at para 48.
193 2003 (1) SA 678 (CC).
194 Id at para 13.
195 2002 (2) SA 715 (CC).
196 *Id* at paras 18-24.
197 Section 12(2) of IRFA provides that: 'The Cabinet member responsible for the functional area for which a national intergovernmental forum is established may in consultation with the President refer any matter discussed in the forum to the Council.'
198 Section 33(1)(f) and (g) of IRFA, read together with subsection (3), provide that every Minmec must adopt rules to govern its internal procedures including adoption of resolutions and settlement of intergovernmental disputes, and that these rules are binding on all participants in the aforesaid structure.
199 Section 31(1) and (2) of IRFA.
200 See *National Education Policy Bill* case at para 33.

allows the courts to rewrite legislation and undermines the separation of powers. So, it appears, the decision by DSD to approach the Commission cannot be faulted.[201]

(e) Demanding compliance with executive obligation or taking over such function

1.61 Another provision DSD could have invoked is section 100 of the Constitution.[202] This provision authorises national government to intervene in provincial affairs if there has been *failure by a province to fulfil an executive obligation in terms of the Constitution or legislation*. First, the implementation of national legislation regulating a matter listed in Part B of Schedule 4, including any law dealing with social development mandate, is an executive obligation entrusted to the provincial government by section 125(2)(b) of the Constitution. Secondly, as pointed out in the last section of this chapter dealing with the mandate of DSD, various strands of welfare services for which DSD is responsible are, without exception, regulated by national legislation. On the basis of these factors any failure by provincial government to implement DSD legislation would attract the application of section 100 of the Constitution, unless such failure is due to lack of administrative capacity. This view is bolstered by both the *restrictive interpretation* adopted by the court in *Mnquma Local Municipality and Another v The Premier*

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201 Klaaren, Jonathan and Penfold, John 'Chapter 63: Just Administrative Act' in Woolman *et al Constitutional Law of South Africa* at 13. See discussion above under 'ineffectiveness of IRFA-failure to prescribe consequences.'

202 Section 100 of the Constitution reads:

'(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
  (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
  (b) assuming responsibility for the relevant obligation in that province to the extent necessary to—
    (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
    (ii) maintain economic unity;
    (iii) maintain national security; or
    (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

(2) If the national executive intervenes in a province in terms of subsection (1)(b)—
  (a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
  (b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
  (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

(3) National legislation may regulate the process established by this section.'

of the Eastern Cape and Others[203] where the court interpreted the phrase 'executive obligation' in section 139(1) of the Constitution[204] to mean *failure to fulfil an obligation in terms of the Constitution* and proffered alternative interpretation, which is equally narrow, that it actually refers to a *binding legal obligation, traceable to legislation and failure to adhere to compulsory or essential norms in legislation*.[205]

1.62 Another aspect of section 100 clarified by the courts is the meaning of 'appropriate steps'. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, *(Second Certification judgment*)[206] the Constitutional Court explained that 'appropriate steps' must first be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power between different levels of government. The court further explained that if regard was had to the constitutional scheme, it would not be appropriate for the national executive to attempt to intervene in provincial affairs in a manner other than that authorised by the Constitution or *by legislation* enacted in accordance with the Constitution. In its view 'appropriate steps' would thus include action such as a resort to the procedures established under section 41(2) for the promotion of intergovernmental relations and settlement of intergovernmental disputes; but would not include resort to means that would be inconsistent with chapter 3 of the Constitution, and in particular, with the obligation under section 41(1)(g) to exercise its powers in a manner that does not encroach on the geographical, functional or institutional integrity of provincial governments.[207]

1.63 As can be gleaned from the preceding discussion, the executive authority of a province must implement national legislation dealing with welfare services issues. The only basis on which a province could *refuse* to do so is if it lacks administrative capacity.[208] In the event such a situation arose, national government and not just DSD would be obligated to assist the provincial department affected to develop administrative capacity to enable it to discharge its functions and exercise its powers. It is not clear to the Commission whether the challenges which have given rise to this inquiry could be attributed to the lack of administrative capacity;

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203 Case No. 231/2009 (unreported).

204 This provision provides: '(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation...'

205 For discussion of these divergent meanings ascribed to section 139(1) of the Constitution, see Ntliziywana, Phindile 'Court Rejects Traditional Method of Intervention in Municipalities' *Local Government Bulletin* Vol 12 No 1 (February 2010) 17 at 18-19.

206 1997 (2) SA 97 (CC).

207 *Id* at paras 122-127

208 Section 125(2)(b) and (3) of the Constitution.

and if so, whether assistance contemplated in section 125(3) of the Constitution was provided. The question we asked above applies here as well.

(f) Enforcement of values underpinning public administration

1.64 The assertion by DSD that failure to adhere to decisions taken at Minmec has resulted in fragmented and unequal provision of social development services brings this matter within the scope of section 195 of the Constitution. Section 195 of the Constitution stipulates that in discharging its mandate, the public administration, which includes provincial governments,[209] must strive, inter alia, to provide services impartially, fairly, equitably and without bias; to be responsive to the needs of the people; and most importantly must be accountable.[210] Surely, the alleged conduct of provinces seems to fly in the face of these provisions. The Constitution gives the power to *promote* and to deal with *infractions* of these norms to the Public Service Commission.[211] Therefore, these matters could, and should, have been referred to the PSC as the court held in *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases*.[212] We think the PSC would have been ideal to deal with these issues because besides its power to investigate, it also has the constitutional power to monitor and evaluate the administration of public service and to propose measures to ensure effective and efficient performance within the public service.[213] Furthermore, it has enormous powers in terms of the Public Service Commission Act (PSCA)[214] to enable it to discharge its functions. Three of these powers deserve mention:

(a) the Commission may inspect departments and other organisational components in the public service and have access to such official document from heads of those departments or organisational components;

(b) may conduct inquiries in any matter in respect of which it is authorised by the Constitution; and[215]

(c) may, in addressing infractions, if any are found, offer advice, make recommendations and/or issue directions. However, if the executive authority

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209 Section 195(2) of the Constitution.
210 Section 195(1)(b), (d)-(f) of the Constitution.
211 Section 196(4)(a) of the Constitution.
212 2005 (6) SA 229 (SE).
213 Section 196(4)(b) and (c) of the Constitution.
214 Act 46 of 1997.
215 Section 9 and 10 of the Public Service Commission Act.

concerned decides, for whatever reason, not to implement remedial measures, it must provide reasons to the Commission.[216]

1.65 However, while emphasising the central role that PSC could play in the resolution of issues relating to the provision of social development services by provinces, the court in *Vumazonke* also held in respect of these infractions, that the buck stops with the Minister of Social Development in the national sphere of government, who is responsible for the maintenance of norms and standards in the provisions of social assistance.[217]

(g) Withholding financial resources

1.66 How a sphere of government discharges its mandates depends ultimately on a number of factors, chief among them, the legal allocation of powers, their scope, oversight over those powers and financial and managerial capacity.[218] Provinces are by and large dependent on national government for financial resources they need to fulfil their duties in respect of concurrent powers.[219] Section 227 of the Constitution[220] gives national government the power to make resources available to provinces *conditionally* and concomitantly the power to influence how things are done. This means that national government through Parliament determines funds it makes available to the provinces and thus has all the cards to play with, including turning off the tap if it considers the provinces to be incapable or if it does not approve of the way in which the province handles a particular concurrent matter.[221]

1.67 This is not a theoretical assumption. One of the concerns in the *National Education Bill*[222] case was that cooperation of a provincial head that refuses to prepare a remedial plan aimed at aligning provincial education to national norms and standards would be sought, among other things, through a threat to withhold financial support for the province's education

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216 See rule 12 of the Public Service Commission Rules on Conducting Investigations published in General Notice 22 of 2017.

217 See *Vumazonke* at para 13.

218 De Villiers 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' *SAPR/PL* Vol 12 (1997) 469 at 473.

219 Malherbe Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006 Issue 2 237 at 242 et seq.

220 This provision reads: '(1) Local government and each province—
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
(b) may receive other allocations from national government revenue, either conditionally or unconditionally.'

221 *Ibid*.

222 1996 (3) SA 289 (CC).

system or some other coercive action.[223] The court left this issue open, holding that it was not clear:

> '...that the offering or withholding of financial incentives (if otherwise lawful) would be open to objection. If the financial incentives or other action taken to persuade the provinces to agree to national policy are not legitimate, they can be challenged under the Constitution or under the well-established principle that a power given for a specific purpose may not be misused in order to secure an ulterior purpose. If they are legitimate, then they are not open to objection. These are not, however, issues that need trouble us in this case.'[224]

1.68 In Australia, the provision for conditional grants, section 96 of the Australian Constitution, has been slated on the basis that it transforms states into mere agencies of federal government, allows the Commonwealth to have influence in matters over which it has no direct power to pass laws, it is deviously used to invade functional areas reserved for states, it is used to substitute national priorities for state priorities, and that conditions are far too onerous. The courts have, however held that there is nothing coercive about section 96. In *Victoria v Commonwealth (Second Uniform Tax Case)*[225] the court stated:

> 'In sec. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being, no power of course to compel acceptance of the grant and with it the accompanying term or condition.'[226]

1.69 The courts have also held that conditions imposed on section 96 grants must not constitute coercion, i.e demand obedience, but that there is no objection to their acting as a strong inducement to State action.[227]

(h) Possible enforcement of cooperation indirectly through performance agreements

1.70 Although the feasibility of this approach in the circumstances under consideration is not entirely clear, we deem it necessary to refer to it. We have learned that in most Minmecs, and there is no reason to believe Minmec for DSD is any different, quite a lot of work happens behind the scenes (before, during and after meetings) and is done by officials.[228] They prepare

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223 *Id* at para 33.

224 *Ibid*.

225 (1957) 99 C.L.R 575.

226 *Ibid*.

227 Cranston, Ross 'From Co-operative to Coercive Federalism and Back' *Federal Law Review* Vol 10 (June 1979) 121 at 133. The distinction between 'coercion' and 'inducement' is considered artificial.

228 Section 14(3) of IRFA, for instance, which provides 'the department of the relevant cabinet member is responsible for providing administrative and other support services to the forum [Budget Forum]' confirms this view.

policy documents for their principals (MECs of Heads of Departments) well in advance of Minmec meetings and accompany ministers to Minmecs or in certain instances even attend ministerial meetings on their behalf.[229] They prepare agreements eventually entered into by political heads (MECs) or sometimes enter into these on their behalf. Implementation of these agreements is the responsibility of these functionaries and officials in their respective departments. The involvement of functionaries and officials in Minmecs as described begs the following questions:

- whether participation in intergovernmental relations forums established in terms of section 9(1) of IRFA by the Minister of Social Development is made a key performance area in the contracts of provincial officials participating in this structure;
- if it is, whether these are monitored by heads of departments, MEC or the Premier, or supervisors of the aforesaid officials, as the case may be;
- if they are, how failure to achieve key performance indicators within this performance area is treated?

1.71 We ask these questions because it has been argued, persuasively, in another context, that of 'horizontal intergovernmental disputes', that performance agreements could be used indirectly as an effective tool to enforce cooperation between organs of state.[230] It has been contended in this regard that reduced bonuses, lack of promotion, re-assignment or even dismissal could serve as an impetus to take intergovernmental relations seriously.[231] This is an aspect the Commission intends exploring further with both DSD and provincial government.

5 Commission's preliminary inquiry and findings

1.72 As is the case with all law reform proposals submitted to it, the Commission subjected this inquiry to a scoping exercise. The results, which not only lent support to legislative reforms pursued by DSD but also swayed the Commission to take on this inquiry, were illuminating. Some of these findings are summarised below.

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229 De Villiers, Bertus 'Intergovernmental Relations in South Africa' *SAPR/PL* Vol 12 (1997) 197 at 209.

230 Woolman, Stu '*L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' at 72. It has been argued in the context of these intergovernmental relations that because it is not possible to create binding agreements between provincial departments, the alternative is to use a contract of employment of heads of departments or senior officials within the province to enforce memoranda of cooperation.

231 *Ibid*.

1.72.1 After thorough analysis of Chapter 3 and other provisions of the Constitution; IRFA; a myriad other statutes administered by DSD,[232] and relevant case law, and leaving aside for a while the question whether the intervention DSD seeks would be constitutional, the Commission was convinced that there seemed to be cogency in the argument by DSD that there is a *lacuna* in the statutory framework regulating intergovernmental relations. This view was based on the fact that *none of these laws referred to above deal, remotely or categorically, with the effect of the decisions reached at intergovernmental forums*. It found, instead, that some of these laws contain provisions urging different spheres to work together,[233] although in certain cases these have been rendered nugatory by court decisions;[234] while others contain provisions that tilt the scales in favour of more centralised control by:

- unequivocally stating that overarching principles contained therein bind *all* organs of state and should inform their decision-making;[235]

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232 For example, the Children's Act 38 of 2005, Fund-raising Act 107 of 1978, Non-profit Organisations Act 71 of 1997, National Development Agency Act 108 of 1998, Older Persons Act 13 of 2006, Prevention and Treatment of Drug Dependency Act 20 of 1992, Prevention and Treatment for Substance Abuse Act 70 of 2008, Social Assistance Act 13 of 2004, Probation Services Act 116 of 1991, Social Service Professions Act 110 of 1978, National Welfare Act 100 of 1978, the South African Social Security Agency Act 9 of 2004 and Advisory Board on Social Development Act 3 of 2001.

233 Section 11(1) of Older Persons Act, for example, provides that the Minster may in collaboration with MEC in a province develop community-based programmes. Section 4 of the Children's Act states:

'(1) This Act must be implemented by organs of state in the national, provincial and, where applicable, local spheres of government subject to any specific section of this Act and regulations allocating roles and responsibilities, in an integrated, co-ordinated, and uniform manner;

(2) Recognising that competing social and economic needs exist, organs of state in the national, provincial and, where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act.'

Section 5 of the Children's Act provides that: 'To achieve the implementation of this Act in a manner referred to in section 4, all organs of state in the national, provincial and, where applicable, local sphere of government involved with the care, protection and well-being of children must co-operate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children.'

Section 3(1)-(3) of the Older Persons Act of 2006 contains similar provisions.

234 Section 24 of the South African Social Security Agency Act of 2004 which is couched in a peremptory language requires the Minister of Social Development to enter into memoranda of understanding with MECs responsible for the administration of social assistance in terms of the Social Assistance Act, 1992 in so far as it had been assigned to the provincial sphere of government. As stated in this report, the Constitutional Court in *Mashavha v President of the Republic of South Africa* set aside the assignment of this legislation to provincial governments on the basis that social assistance was not a matter that could be regulated effectively by provincial legislation, which rendered these provisions unnecessary.

235 Section 5 of the Older Persons Act provides that:

'(1) The general principles set out in this section guide

(a) the implementation of all legislation applicable to older persons, including this Act;

- empowering the Minister to prescribe norms and standards[236] and more detailed procedures or standards of conduct by means of regulations;[237]
- explicitly stating that their purpose is to promote, inter alia, the *realisation of national priorities;*[238]
- empowering the Minister to delegate his or her powers to an MEC in a province,[239] but contemporaneously giving him or her the power to withdraw the delegation and perform the act or exercise the power himself or herself.[240]

1.72.2 A number of approaches lend themselves to remedy this deficiency in statutory framework, each with its own pros and cons,[241] namely the amendment of IRFA itself; or the adoption of legislation envisaged in section 146(2) of the Constitution[242] or sectoral legislation modelled on the National Education Policy Act, the Intergovernmental Fiscal Relations Act, the Liquor Act or Chapter 3 of the National Health Act, for the sector. A note on IRFA is apposite. Apart from criticism levelled against it by DSD, local government, and in the *National Lotteries Board v Robin Leslie Bruss and Others* already alluded to, this legislation contains a few contradictory provisions, which in turn strengthen the case for its review. For example, it states that intergovernmental forums are not *executive decision-making bodies*,[243] which means they cannot make decisions, let alone carry them out or ensure they are carried out;[244] but in the same breath empower these bodies to adopt resolutions, which are in fact

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(b) all proceedings, actions or decisions by any organ of state in any matter concerning an older person or older persons in general.'

236 Section 6 of the Older Persons Act reads:
'(1) The Minister may, from time to time, by notice in the Gazette, prescribe norms and standards in order to define acceptable levels of services that may be provided to older persons and in terms of which services must be monitored and evaluated.
(2) Any person who provides a service to an older person must comply with the norms and standards contemplated in subsection (1).'

237 Section 21 of the National Welfare Act of 1978; section 16 of the Probation Services Act of 1991; section 12 of the Advisory Board on Social Development Act of 2001; section 21 of the South African Social Security Agency Act of 2004; section 32 of the Social Assistance Act of 2004; sections 90, 103, 142, 160, 179, 212, 227, 253, 306 of the Children's Act of 2005; section 34 of the Older Persons Act of 2006; and section 65 of the Prevention of and Treatment for Substance Abuse Act of 2008.

238 Section 4(d) of IRFA.

239 In terms of section 18(2)(a) and (b) of the Probations Services Act of 1991; section 29(1)(a) of the Social Assistance Act of 2004; section 32(2)(a) and (b) of the Older Persons Act of 2006;

240 See section 18(8)(b) and (c) of the Probation Services Act of 1991; section 29(4)(a) and (b) of the Social Assistance Act of 2004; section 32(8)(b) and (c) of Older Persons Act of 2006.

241 Inevitably, the amendment of IRFA will impact on all Minmecs established in terms of that Act, whereas proposing sectoral-based legislation will only apply to the sector in question.

242 See footnote 26 above.

243 Section 32(2) of IRFA provides that 'Although it is not an executive decision-making body, it may adopt resolutions and recommendations in terms of agreed procedures.'

244 Collins English Dictionary defines 'executive' when used as an adjective as follows: 'The executive sections and tasks of an organization are concerned with the making of decisions and with ensuring that decisions are carried out.'

decisions.[245] Furthermore, IRFA professes to be concerned with fostering synergy between the spheres of government, but also states, bizarrely, in the express legislative provisions, that it also seeks to promote national priorities.[246] To this end, it requires provinces to take into account *national priorities* when developing provincial legislation.[247] No similar obligation is imposed on national government, which suggests there is a hierarchy between the spheres with national government dominating.

1.72.3 Intrigued by DSD's reticence about implementation protocols and guidelines for implementation of joint projects, and to ascertain whether these provide panaceas to the issues central to this investigation, the Commission examined these measures. It transpired, the Ministry of COGTA, seemingly adhering to international best practice in this regard,[248] (a) advised organs of state intending to use implementation protocol[249] to include a clause explicitly stating that the said agreement '*does not create legally enforceable commitments between the parties*';[250] (b) the guidelines for managing joint projects issued by the Minister around the same time also expressly state that they are *not obligatory*, but should in the interest of sound intergovernmental relations and of effective, accountable and co-ordinated achievement of national development goals be followed by all organs of state involved in implementing joint programmes.[251] Surely, if intergovernmental agreements are as good as the penalties in place for non-compliance,[252] these characteristics constitute a major disincentive to the use.

1.72.4 Our research further revealed that two Constitutional Court decisions actually bolster DSD's stance and pursuit of legal reform of this area of the law. In the first case,

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245 See section 32(2) above.

246 Section 4(d) of IRFA.

247 Sections 4(d) and 36(1)(a) of IRFA.

248 In Australia, for example, intergovernmental arrangements are not subject to adjudication, they are considered to be of a political nature, not cognisable by courts of law, *nor create legal rights and duties*, and depend for their performance on good faith between parties involved. See Cranston, Ross 'Co-operative to Coercive Federalism and Back' 121, at 125.

249 Section 35(1) of IRFA provides the following in respect of implementation protocol: 'Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.'

250 See Clause 8(2), Annexure A, Implementation Protocol Template in Implementation Protocol Guidelines and Guidelines for Managing Joint Programmes Published under GN 696 in GG 30140 of 3 August 2007 by the Minister of Provincial and Local Government in terms of section 47(1)(d) of IRFA.

251 Clause 3 of the Guidelines for Managing Joint Programmes.

252 Woolman, Stu *L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' at 74.

Speaker, National Assembly: re National Education Policy Bill,[253] the court confronted head on the question that is central to this inquiry, namely whether provinces could, in the light of government structure envisaged in the Constitution, be compelled by means of statutory enforcement mechanism to comply with national policies and legislation.[254] The court warned in that case that if provincial policies were in conflict with national policies and that conflict was in respect of a matter that fell within the purview of section 126(a)-(e) of the interim Constitution,[255] the forerunner to section 146 of the final Constitution, the Minister *could, if there was an agreement or legislation in place, require provinces to amend their policies*. In *Mashavha v President of the RSA*,[256] the court held that social assistance, one of the strands of social security, was a matter that could not be regulated effectively by provinces. The court did not deal with the question whether 'welfare services' referred to in Schedule 4 of the Constitution could be regulated effectively by provinces.[257] It is conceivable that the court could take the view that social welfare services refer to the same or similar competence. However, it

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253 1996 (3) SA 289 (CC).

254 In that case, which we discuss in detail in Chapter 2 of this issue paper, two challenges were mounted against various provisions of the National Education Policy Bill. The first was that the provisions of this Bill, once enacted, would oblige members of provincial executive councils to promote policies that might be inconsistent with provincial policy, require them where necessary to amend their laws to bring them into conformity with national policy, and that in effect they would empower the Minister of Education to impose national government's policies on provinces. Secondly, participation in structures created by this legislation, namely the Council of Education Ministers and the Committee of Heads of Education Departments, by members of provincial authorities would interfere with their executive authority, among others, in that they would be required to promote policy they do not support.

255 Section 126(3)(a)-(e) of the interim Constitution read:

'(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.'

256 2005 (2) SA 476 (CC).

257 This case concerned the assignment of Social Assistance Act 59 of 1992 to provinces to administer.

is also conceivable that social welfare is a narrower competence than social assistance.

1.72.5 Among the many benefits, the Commission believes undertaking this investigation will bring about, the following deserve specific mention.

- Firstly, this inquiry will provide much needed clarity on whether the Constitution created *integrated cooperative governance*, which assumes relative parity of power between national and subnational constituents, *viz* provincial and local government; or *coercive intergovernmental relations* which involve: a hierarchical distribution of power where national government largely dominates other spheres of government, and one sphere of government, especially national, determines the objectives of other spheres and prescribes how these objectives ought to be achieved.
- Secondly, it will culminate in recommendations aimed at ensuring that the provision of social development services does not fall foul of section 9 of the Constitution, which guarantees the right to equality for all South Africans. The centrality of equality in the provision of social welfare services was summed up by the Constitutional Court in *Mashavha* case above as follows:

> 'Not only were there richer and poorer provinces, but there were 'homelands', which by no stretch of imagination could be seen to have been treated on the same footing as 'white' South Africa, as far as the resources are concerned. These inequalities also applied to social assistance – an area of government responsibility very closely related to human dignity. The history of our country and the need for equality cannot be ignored in the interpretation and application of section 126(3) [of the interim Constitution]. Equality is not only recognised as a fundamental right in both the interim and the 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworths than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.'[258]

- Thirdly, as stated, the Constitution does not prohibit litigation between organs of state; it clearly states that it should be a measure of last resort.[259] The

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258 *Mashavha* case para 51.

259 Section 41(1)(h)(vi) of the Constitution provides that organs of state must avoid legal proceedings against one another. And, section 41(1) states: 'An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'

outcome of this investigation will obviate the institution of legal proceedings by organs of state inter se and thus strengthen this constitutional principle.

- Fourthly, it will also clarify whether any legislation that sought to bestow powers on the Minister of Social Development or DSD to order authoritatively how provision of services relating to sector should be discharged would encroach on the legislative powers of the provinces, or impinge on the provincial legislature's capacity or right to legislate independently.

C. Scope of this Inquiry

1 Review of Intergovernmental Relations Framework Act

1.73 At first glance, as can be gleaned in the preceding paragraphs, the issue central to this investigation and how it should be addressed, seems fairly straight-forward. The legislative framework regulating intergovernmental relations failed to provide a *statutory enforcement mechanism* the Minister or the Department could use to *enforce* decisions taken at Minmec for social welfare sector. And, in view of the fact that this body has been instituted, performs its functions, and discharges its mandate, in terms of IRFA,[260] any law reform proposals (amendments), deemed necessary, must be located within the four corners of this Act. Therefore, on the face of it, it appears that this review must be confined, and yield constitutionally-compliant reforms, to IRFA. However, in view of the discussion that follows, it appears that a complete overhaul of the intergovernmental relations legislative framework, at least in so far as it applies to the social development sector, is intended.

2 Broader inquiry

1.74 However, in determining the ambit of this investigation regard must be had to two other documents developed by DSD in an effort to address the gap referred to in the preceding paragraph, which documents it has provided to the Commission, namely the *Draft Policy on Social Development Council* (Draft Policy) and the *National Social Development Council Bill* (Bill). These documents are significant in three respects: firstly, they provide more context to the issues raised in this inquiry; secondly, they shed more light on the type of intervention DSD

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260 Sections 10, 11 and 14 of IRFA prescribe who should serve in this forum, what its functions are, and who convenes the meetings and determines the agenda.

would prefer; thirdly, and perhaps most importantly for our purpose, upon closer scrutiny, they reveal that something more expansive than a review of IRFA is anticipated by DSD.

1.75 The Draft Policy, which, according to DSD, was debated with provinces and eventually approved by Minmec, starts off by describing the problem it seeks to address as being: '*the provision of services by provinces in a disintegrated, non-standardised and unequal manner despite Minmec decisions and applicable legislation*.*'* It goes further and states, under the rubric 'Rationale for Intervention':

> 'However, Minmec *in its current form has not achieved its intended purpose*. It has thus become important *to review the current arrangement* so as to strengthen intergovernmental relations with specific reference to Social Development Services.'

1.76 Of significance is the choice of instrument DSD opted for to transform this policy into effective action. It adopted a precautionary approach intended to avoid imposing a burden on those not affected by the problem by not proposing an amendment to IRFA, but rather by drafting sectoral based legislation modelled on the National Education Policy Act[261] and Chapter 3 of the National Health Act in order to address the shortcomings alluded to.[262] Both those statutes predate IRFA. This process was aborted as a result of complex policy issues and the matter was then referred to the Commission. Taking its cue from this approach, the Commission's **preliminary view** is that, in its search for constitutionally-compliant law reform proposals to address the challenges faced by DSD, it should **cast its net wider**.

1.77 To bolster the conclusion that a broader inquiry is intended, DSD neither alleged that the failure to implement decisions taken at Minmec has given rise to intergovernmental disputes, nor has it impugned the dispute resolution mechanism provided for by IRFA. Any attack relating to these two aspects would have narrowed the scope of this inquiry and compelled the Commission to focus exclusively on IRFA and its regulations, for example, Chapter 4 of IRFA and the Intergovernmental Dispute Prevention and Settlement: Practice Guide, Guidelines for Effective Conflict Management.[263]

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261 Act 27 of 1996.

262 Act 61 of 2003.

263 These guidelines were published by the then Minister of Provincial and Local Government pursuant to section 47(1)(f) of IRFA under cover of Government Gazette No. 29845, Government Notice 491, of 26 April 2007.

3 Matters falling outside the purview of this inquiry

1.78 While the Commission's tentative view regarding matters referred to hereunder is that they fall outside the scope of this inquiry, at this inchoate stage of the investigation, the Commission is trawling for all the necessary information, and would therefore welcome views to the contrary.

1.78.1 First, this inquiry is not a veiled attempt to revisit relative merits of federal and unitary systems,[264] but to find, within the framework provided by the Constitution, a solution to the incoherence that afflicts executive arms of government involved in the social welfare sector.

1.78.2 Secondly, the Constitution saddles provincial executives with the responsibility to implement, in addition to their own legislation, national legislation emanating from DSD relating to social security.[265] However, no averment or proof has been provided to the Commission that this challenge could be attributed to administrative difficulties contemplated in section 125(3) of the Constitution,[266] or conflicting laws, both of which are, in our view adequately addressed by the Constitution[267] and require no legislative intervention.

1.78.3 As can be gleaned from the preceding paragraphs, the scope of this review is quite narrow. It does not seek to examine South Africa's social security system; that has already been done by the Taylor Committee.[268] Nor is it intended to address discriminatory nature of the system. That has already been addressed by the Constitution itself, through the equality provision; and by the legislature through the enactment of laws such as the Promotion of

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264 Although in the end, South Africa did not become a strong federal state, it appears from literal reading of the provisions of the Constitution that the proponents of federalism, that each level of government should be allocated specified and entrenched powers and that any encroachment of such powers should be considered should be deemed unconstitutional, won the debate over advocates of unitary state who believed that provincial and local governments should be subordinate to the national government. See Woolman, Stu and Roux, Theunis 'Co-operative Government and Intergovernmental Relations' para 14.1 footnote 3 in Woolman et al *Constitutional Law of South Africa* Second Edition.

265 Section 125(2)(b) of the Constitution provides that MEC exercise executive authority in a province by implementing *all national legislation within functional areas listed in Schedule 4* of the Constitution.

266 Section 125(3) of the Constitution states: 'A province has executive authority in terms of subsection (2)(b) only to the extent that the province has administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).'

267 Sections 125(3) and (4); and 146 to 149 of the Constitution.

268 The mandate of the Taylor Committee headed by Prof Viviene Taylor was appointed to propose solutions to address short comings in the social security system identified in the White Paper by the Department of Social Development. Consequently, its terms of reference were very broad and included the review the national pensions system, social assistance grants, social insurance schemes, unemployment insurance system, health funding and health insurance. See Strydom, Elize 'Introduction to Social Security Law' in Strydom et al *Essential Social Security Law* (December 2005) 1 at 23.

Equality and Prevention of Unfair Discrimination Act[269] and the Employment Equity Act.[270] But, it seeks to address lack of cohesiveness between national and provincial executives involved in the social welfare sector.

1.78.4 The Constitution is undoubtedly sacrosanct. However, that does not mean it cannot be amended. In fact our Constitution has been amended time and again since its adoption in May 1996. DSD could easily have invoked this fact and the decision of the Constitutional Court in *Mashavha v President of the RSA*,[271] which as stated earlier, held that social assistance was a matter that could not be regulated effectively by provinces, to advocate for the review of allocation of powers in Schedules 4 of the Constitution. DSD has not impugned the allocation of welfare services, or any other matter falling within the mandate of social development, to provinces. It is not therefore, as SALGA has done albeit for different reasons,[272] advocating for the review of Schedules 4 and 5, or any other provision, of the Constitution. As far as it is concerned, the exercise of legislative and concomitant executive powers, contemporaneously or asynchronously, in respect of this functional area by both national and provincial governments, is not at issue. As we pointed out in Issue Paper 37, exercise of these powers cannot be faulted as it is sanctioned by the Constitution itself, or as Steytler and Fessha put it, 'concurrent jurisdiction' is intended.[273]

4 Constitutional constraints

1.79 It is important, at this rudimentary stage, and throughout this inquiry, to be cognizant of express and implied constitutional strictures to the exercise of power by national government. The Constitution itself states,[274] and the jurisprudence emanating from the Constitution Court emphasises, that any law or conduct that contravenes any of these

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269 Act 4 of 2000.

270 Act 55 of 1998.

271 2005 (2) SA 476 (CC) at para 51.

272 SALGA has argued that as the local government system in South Africa has matured, it has become evident that a review of legislation, including the Constitution, is necessary, to resolve the overlap, and lack of definitions, of the powers and functions of the three spheres of government. Of course, this comes on the tail of a research report commissioned by COGTA which concluded that the functions that the functions listed in Schedules to the Constitution are unclear and create confusion. See in this regard, SALGA *15 Years of Developmental and Democratic Local Government: 2000- 2015 – Celebrating Achievements Whilst Acknowledging Challenges* (December 2015) at 52; and Human Sciences Research Council *Review of Schedules 4 and 5 Research Report Submitted to the Department of Provincial and Local Government* (2003) at paras 7.4 and 7.5 of the Executive Summary.

273 Steytler, Nico and Fessha, Yonatan Tesfaye 'Defining Local Government Powers and Functions' *SALJ* Vol 124, Issue 2 (2007) 320, at 321.

274 Section 2 of the Constitution states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

limitations,[275] is invalid and of no consequence or effect. But, what are these rules and what is their import to the current investigation? At the very minimum, these include the supremacy of the Constitution; the rule of law, the principle of legality which is an incidence of the rule of law, and the principle of *ultra vires*,[276] which entail that the Legislature and the Executive can exercise no power or perform any function not conferred on them by law;[277] the rationality test; cooperative government and the devolution of power.[278] Generally, these provide certainty and protection for subnational government.[279] In the context of this inquiry, these foundational principles of our new constitutional order must have the implication that whatever the outcome of this inquiry is, it must neither be anchored nor bestow on the Minister or DSD power they do not have, and it must be rationally connected to a legitimate government purpose. In other words, the proposals for law reform emanating from this review must be constitutionally sound; otherwise, they would be ignored by government, impugned down the line and most likely set aside by the courts.[280] This, in turn, presupposes that this inquiry must be thorough; especially the exposition of the law relating to intergovernmental relations and recommendations must have a firm legal basis.

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275 See *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) at para 27; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 68; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58; and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 20.

276 According to Hoexter, Cora *Administrative Law in South Africa* 2nd Edition (2012) at 117, the term '*ultra vires*' is used by the courts to indicate that action is outside its lawful parameters, illegal and of no force or effect. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 59 the Constitutional Court held that the common law principles of *ultra vires* remain under the new constitutional order and they are underpinned (and supplemented where necessary) by the constitutional principle of legality.

277 See, in addition to cases referred to in note 206 above, *Affordable Medicines Trust* case at paras 48 and 49.

278 Currie, Ian and De Waal, Johan *The Bill of Rights Handbook* Fifth Ed (2005) at 7.

279 Phillimore, John at 236. He furthermore makes the point that incorporating these protections in the constitution reduces the temptation and opportunity for national government to engage in coercion, opportunism, poor behaviour and capriciousness.

280 Section 172(1)(a) of the Constitution states: 'When deciding a constitutional matter within its power, a court, must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

D. The Commission's approach to this inquiry

1.80 The Commission is a creature of statute whose *raison d'ętre* is to improve South African law on continuous basis.[281] As such, the process it will employ in this inquiry which has already been alluded to in the preface, including seeking input from the general public and experts in the area of law under review and presenting its findings and recommendations in study documents and reports, is delineated in its enabling legislation. There are two or three elements of this process that are the mainstay of law reform that need to be underscored.

1.80.1 Firstly, at this inchoate stage of the inquiry, the focus is on gaining thorough understanding of this area of the law, in particular the formal and informal mechanisms of intergovernmental relations applicable to the welfare services sector, legislation underpinning these relations, relevant case law, and getting our heads around the challenges and deficiencies in the statutory framework identified by DSD. This process has been fraught with difficulties. Although South Africa has certainly broken new ground by providing constitutional and statutory basis for intergovernmental relations,[282] the reality is that this area of the law is fairly new and still developing.[283]

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281 The Commission owes its existence to the South African Law Reform Commission Act, 1973 (Act 19 of 1973). Section 4 of this Act states the following in respect of the mandate of the Commission:
'The objects of the Commission shall be to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including-
(a) the repeal of obsolete or unnecessary provisions;
(b) the removal of anomalies;
(c) the bringing about of uniformity in the law in force in the various parts of the Republic;
(d) the consolidation or codification of any branch of the law; and
(e) steps aimed at making the common law more readily available.'

282 As will be shown in Chapter 3, this model has been emulated by Kenya. In contrast, in older federations such as Canada, USA, Australia, and few African countries, for example, Ethiopia, the instruments and mechanisms of intergovernmental relations have neither constitutional status nor basis in law or legislation. In the UK calls to provide statutory underpinning for intergovernmental relations are gaining momentum. The House of Lords Select Committee on the Constitution *Devolution: Inter-Institutional Relations in the United Kingdom* Session 2002-03 (17 December 2002) at 12 sums up the challenge in the UK as follows: 'The arrangements for intergovernmental relations in the United Kingdom rest on a non-statutory basis. The institutions created for them have no legal basis; they exist by virtue of a set of intergovernmental agreements, chief among them the Memorandum of Understanding and Supplementary Agreements, whose own legal status is unclear. The devolution statutes – the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998 – create the various devolved bodies and establish the framework within which they exercise their powers, but do not set out how the governments will deal with each other.'

283 Woolman, Stu and Roux, Theunis 'Chapter 14: Co-operative Government and Intergovernmental Relations' in Woolman *et al Constitutional Law of South Africa* 2nd Edition, RS 1: 07-09 at 14-1 observed that before 1994 cooperative government and intergovernmental relations were largely foreign in South African political lexicon. The newness of cooperative

Expectedly, therefore, there is a dearth of case law and scholarly treatise dealing with the issues under review. This, coupled with the opaque nature with which the current intergovernmental forums operate,[284] which is not unique to South Africa,[285] makes understanding this area of the law particularly challenging.[286] The purpose of this issue paper, which is the first in a series of papers the Commission will publish during the course of this inquiry, is therefore to plug this gap by *consulting and eliciting the views* of those with direct personal experience of or professional expertise in the issues relevant to this inquiry; including the current operation of the law and how it could be developed. Throughout this paper, we pose a series of questions intended to achieve this purpose.

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governance was described by the Constitutional Court in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 40 as follows: 'This introduced a 'new philosophy' to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of section 40(2) to observe and adhere to the principles of cooperative government set out in chap 3 o the Constitution.'

284 The reports to Parliament on general conduct of intergovernmental relations referred to in section 46 of IRFA are hard to come by and the much anticipated robust oversight it was thought the National Council of Provinces would exercise over these forums has not materialised. In respect of the latter, see De Villiers, Bertus 'Intergovernmental Relations in South Africa' *SAPR/PL* (1997) Vol 12 197 at 212. This lack of transparency is further perpetuated by section 45(2) of IRFA which provides that none of the efforts to settle intergovernmental disagreement or dispute would be admissible as evidence in judicial proceedings instituted to settle such dispute.

285 McEwen, Nicola; Kenny, Michael; Sheldon, Jack and Swan, Coree Brown in *Reforming Intergovernmental Relations in the United Kingdom* (November 2018) at 11 and 12, lament the lack of transparency and accountability in relation to the operation and outcomes of intergovernmental relations in the United Kingdom as follows:

> 'IGR often operates in a relatively opaque fashion, given the executive-dominated, closed-door nature of negotiations, and the abiding requirement for confidentiality. The lack of transparency can have implications for the ability of both parliaments and the electorate to hold governments to account, and to judge between competing accounts and interpretations of the conduct of intergovernmental meetings. The implications for democratic accountability may become more pronounced if the use and functions of intergovernmental forums increase after the UK leaves the EU.
>
> The lack of routinised IGR processes also potentially hinders scrutiny, with limited advanced information about the timing and agendas of meetings, and little information in post-meeting communiqués regarding the content and outcome of discussions. Minutes, where they are taken, are generally not published. The JMC 'annual report' is not always published annually, and the level of detail it provides is typically limited to dates of meetings, agenda items and notifications of disputes invoked under the dispute protocol. Neither the communiqués nor the annual report offers much insight into the substance of discussions or disputes, or the contributions of each administration.'

286 Understanding the current state of the law is the first step in any law reform project. And this is accomplished through careful and thorough analysis of case law, detailed consideration of relevant statute and the history of how that branch of the law developed. See in this regard, Partington, Martin 'Chapter 9: Research' in Opeskin, Brian and Weisbrot, David (eds) *The Promise of Law Reform* (2005) 134, at 136.

1.80.2 Secondly, while the Constitutional Court warned against reliance on foreign jurisprudence[287] and urged us that the Constitution, its language and context, including our history, must be the first port of call[288] when dealing with intergovernmental issues peculiar to South Africa, extensive reference is made in this paper to intergovernmental systems in comparable multi-level political systems. This approach is intended to achieve two things: first, to aid our understanding of the overarching principles underlying intergovernmental relations set out in Chapter 3 of the Constitution and IRFA, both of which are modelled on the machinery of intergovernmental relations found in these jurisdictions'; and secondly, to distil from our comparators useful insights relevant to the current challenges faced by the welfare services sector. Undoubtedly, we must be wary of transplanting ideas or principles developed in other jurisdictions[289] particularly because IGR arrangements often reflect the political and constitutional context within which they have been established.[290] Nonetheless it is sensible to see how particular issues have been dealt with in other jurisdictions.[291]

1.80.3 Thirdly, the Commission will veer off the approach adopted by most law reform agencies, that of developing and proposing policy options to address issues referred to them for investigation[292] for two reasons. First, the Commission's constitutive Act explicitly empowers it to include draft legislation in its report.[293] This power, to propose actual reform of the law, entails that where various options to address a problem exist, the Commission must weigh up the pros and cons of adopting each option, sift through them so to speak, and choose one that in its wisdom would definitively deal with the matter and translate it into a binding law, and not delegate this responsibility to

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287 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) at para 22 and 23.

288 See *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 61. See also Bronstein, Victoria 'Chapter 15: Legislative Competence' in Woolman et al *Constitutional Law of South Africa* 2nd Ed OS 06-04 at 15-17, who argues that comparative law must be used with caution in federalism cases because each system reflects pragmatic and context-specific responses to political power relations in a particular country.

289 As Partington above at 136 points out cultural differences, even among nations that share common legal tradition and language are often so great that simple transplantation would neither be practical nor desirable.

290 McEwen *et al* above at 5.

291 Partington above at 136.

292 Notable proponent of this approach is the Australian Law Reform Commission which does not include draft legislation in its reports, but provides policy options for consideration by government. See Blackman, Lani 'Chapter 13: Products of Law Reform Agencies' in *The Promise of Law Reform* Opeskin and Weisbrot (eds) 187 at 194.

293 Section 5(5) of the South African Law Reform Commission Act reads: 'If after investigating any matter the Commission is of the opinion that legislation ought to be enacted, with regard to that matter, the Commission shall prepare draft legislation for that purpose.'

government. Secondly, this approach would give the Commission's recommendations teeth, should government decide to implement them. As the court pointed out in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*[294] which was quoted with approval by the Constitutional Court in *Minister of Education v Harris*:[295]

> '...laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend, or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear.'

1.81 In the context of this inquiry, following the approach alluded to above would have the implication that if the Commission finds that there is indeed a *gap* in the legislative framework regulating intergovernmental relations in the social welfare sector, it will, in line with its mandate,[296] and assuming that such intervention will be constitutionally permissible, formulate a new regulatory framework for this sector or propose amendment of existing statutory framework, to address this challenge. There would be other spin-offs, should such proposed legislation be promoted by DSD. Such legislation would need to be considered by the National Council of Provinces as a forum for issues affecting provinces, and because the Bill would relate to a Schedule 4 matter,[297] it would also be subjected to a more stringent procedure stipulated in section 76 of the Constitution which the court in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* case described as giving more weight to the National Council of Provinces.[298] In contrast to policy options,[299] once enacted, Parliament would be able to exercise oversight - oversee the implementation of this law by the national executive,[300] and by extension improve accountability and transparency.

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294 2001 (4) SA 501 (SCA) at para 7.

295 2001 (4) SA 1297 (CC) at para 10. In this case the court held that policy made by the Minister of Education in terms of the National Education Policy Act 27 of 1996 does not create obligations of law that bind provinces.

296 Section 5(5) of the South African Law Reform Commission Act provides that: 'If after investigating any matter the Commission is of the opinion that legislation ought to be enacted with regard to that matter, the Commission shall prepare draft legislation for that purpose.'

297 See Budlender, Steven 'Chapter 17: National Legislative Authority' in *Constitutional Law of South Africa* 2nd Ed OS 06-04 at 17-3 and 17-11.

298 2000 (1) SA 732 (CC) at para 26.

299 As Murray, Christina and Stacey, Richard 'Chapter 18: The President and the National Executive' in Woolman *et al Constitutional of South Africa* 2nd Edition, OS 06-08, at 18-31 point out, members of the executive and bureaucrats have argued that Parliament has no role (or has a limited role) in relation to government policy and its engagement with new policy has been relatively weak. Its functions are to consider bills and oversee the executive in its implementation of the law.

300 This would include, as Murray and Stacey above at 40 persuasively argue, the power of the National Council of Provinces to call the relevant Cabinet member to account, which would in turn ensure that provincial governments can engage with national government on its responsibilities in the provinces. This approach would also obviate criticism levelled against the

1.82 At the conclusion of this inquiry, the Commission will present its report to the Minister of Justice and Correctional Services, as a member of Cabinet to whom the administration of the Constitution has been assigned[301] and to whom the Commission is required by law to report;[302] the Minister of Cooperative Governance and Traditional Affairs, as political head charged with improving coordination across the three spheres of government, promoting and monitoring mechanisms, systems and structures to enable integrated service delivery and monitoring the implementation of IRFA;[303] and to the sponsor of this inquiry, DSD whose operational practices, and those of provincial departments of social development, this law reform seeks to improve.

E. About the sponsor of the investigation

1.83 Having accepted social security as a policy[304] and the responsibility for the welfare of its citizens and provided mechanisms for delivery of services required to meet basic needs, South Africa has established itself as a welfare state.[305] While it has not yet ratified the Social Security (Minimum Standards) Convention 102 of 1952,[306] by explicitly including social security rights in its Constitution, and the most important strand of these, the right to have access to social assistance;[307] making it obligatory for the state to promote and enforce these

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National Assembly and the Senate during the subsistence of the interim Constitution for failure to take active steps to become involved in controlling and checking the activities of Minmecs which, it was argued at the time, led to a democratic deficit. See in this regards De Villiers, Bertus 'Intergovernmental Relations in South Africa' *SAPR/PL* (1997) above at 210.

301 See Proclamation No. 26 of 26 April 2001.

302 Section 7(1) of the SALRC Act expressly instructs the Commission to 'prepare a full report in regard to any matter investigated by it, and to submit such report together with draft legislation, if any, prepared by it, to the Minister for consideration.'

303 See Annual Report of the Department of Cooperative Governance and Traditional Affairs for 2014/15 Financial Year at 17 and 18.

304 This policy is important for poverty prevention, ensures basic minimum standard of living of people, and contributes to achieving a more equitable income distribution in society. See Triegaardt, Jean D, Accomplishments and Challenges for Partnerships in Development in the Transformation of Social Security in South Africa *DBSA* (undated paper).

305 Strydom, Elize 'Chapter 1: Introduction to Social Security Law' in Strydom, EML *et al Essential Social Security Law* (2005) at 2.

306 Social Security (Minimum Standards) Convention 102 of 1952 which was adopted in 1952 and came into force on 27 April 1955. South Africa has expressed intention to become a member. See Strydom *Essential Social Security Law* above at 21.

307 Section 27 of the Constitution, titled 'Health care, food, water and social security' provides:

'(1) Everyone has the right to have access to—
  (a) health care services, including reproductive health care;
  (b) sufficient food and water; and
  (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'
(3) No one may be refused emergency medical treatment.'

rights;[308] entrusting the responsibility to legislate in respect of 'welfare services' matters to both national and provincial governments;[309] and by enacting a panoply of measures to ease the burden on those who have fallen on hard times through the payment of benefits to persons who do not receive earnings or whose level of earnings has been reduced,[310] South Africa has complied with the most important requirement set by the Convention that signatories should statutorily provide for the payment of benefits to those who do not receive any earnings or whose level of earnings has been reduced.[311]

1.84 In contrast to the Convention which lumps together medical care, sickness benefits, unemployment benefits, employment injury benefits and other benefits under the rubric 'social security', [312] in the South African context, the concept 'social security' excludes health benefits.[313] As stated, this investigation is not about improving the cohesiveness in the social security system, but coherence among executive organs of state involved in the provision of social assistance and welfare services. But what is meant by 'social assistance' and 'social welfare' both of which are used in the Constitution?[314] While these concepts are sometimes considered synonymous,[315] in the South African context, the former actually relates to the payment of grants[316] by the state, through the South African Social Security Agency, which is overseen by DSD, formerly known as the Department of Welfare; and social relief of distress.[317] The latter refers to panoply of services, activities and programmes of government directed at the prevention, alleviation or elimination of social problems of individuals, groups, and communities, in order to enhance their social functioning as well as basic well-being of

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308 Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

309 Part A of Schedule 4 of the Constitution identifies 'welfare services' as an area of concurrent national and provincial legislative competence.

310 On obligations of governments that have ratified Convention 102 of 1952, see Strydom, Elize 'Chapter 1: Introduction to Social Security Law' above at 5.

311 See Strydom above at 5.

312 The International Labour Organisation has in various publications attempted to define the concept 'social security' to refer to 'measures provided by society against economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings as a result of sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care and provision of subsidies for families with children.' See Strydom, Elize 'Chapter 1: Introduction to Social Security Law' at 4.

313 In the introduction to Chapter 7 of the *White Paper on Social Welfare*, the Department of Social Development states that 'social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at an unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.'

314 See section 27 and Part A to

315 See Strydom, Elize 'Chapter 1: Introduction to Social Security Law' at 7.

316 Older person's grants, disability grants, various child grants and social relief of distress.

317 See the Social Assistance Act 13 of 2004 and the South African Social Security Agency Act 9 of 2004.

people in need. Both social assistance and social welfare, together with social insurance, form the main components or branches of social security and are both regulated by legislation[318] and funded through taxes. This distinction matters because when the *Mashavha* case referred to above came before the courts, the Social Assistance Act of 1992, in force at the time, covered both social assistance and subsidies or financial awards to welfare organisations under the umbrella term of 'social assistance'. But things have changed. Social assistance is now regulated exclusively in terms of national legislation, the Social Assistance Act and the South African Social Security Agency Act which create a national framework provided by a national agency. Social welfare services, on the other hand, are identified in the Constitution as a matter of concurrent legislative competence and regulated by a myriad other legislation. As stated above, it is conceivable that the Constitutional Court could take the view that social assistance and welfare services refer to the same or similar competence. However, it is also conceivable that social welfare is a narrower competence than social assistance.

1.85 While social insurance and health are the responsibilities of other national government departments,[319] DSD is responsible for the provision of social assistance and social welfare referred to above and it has a long history. It was established in 1933 and its responsibility to provide social assistance was delegated to the various provinces and for a long time the provision of services based on policy of discrimination. After 1990, laws administered by this department lost all their discriminatory character.[320] The current DSD derives its core mandate to provide social development services[321] to the people of South Africa from the various

318 For examples of legislation regulating social welfare services, see the Children's Act 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act 70 of 2008.

319 Departments of Labour and Health respectively.

320 Strydom, Elize 'Chapter 1: Introduction to Social Security Law' at 19.

321 Social development services relate to services, organised activities and programmes of government directed at the prevention, alleviation or elimination of social problems of individuals, groups, communities in terms of the Fund Raising Act, the Social Assistance Act, the Children's Act, Older Persons Act, and the Prevention and Treatment of Substance Abuse Act, among others, in order to enhance their social functioning as well as the basic wellbeing of people in need.

constitutional provisions[322] and is responsible for the administration of numerous laws.[323] It also offers a variety of services to the public.[324]

1.86 In discharging its constitutional mandate and in implementing the aforesaid legislation, DSD is required to act *in tandem* with provincial government, [325] and in certain circumstances, with local sphere of government.[326]

1.87 Furthermore, DSD programmes are geared towards meeting the goals espoused in the *National Development Plan* which aims to eliminate poverty and inequality by 2030 and the newly inaugurated Outcome 13: An Inclusive and Responsive Social Protection System, which seeks to address the dimensional nature of poverty and inequality. Social assistance and social welfare form part of an important government's strategy to fight the triple challenge of poverty, inequality and unemployment. DSD contributes to this programme by:

(a) reviewing and reforming social welfare services and financing;

(b) improving and expanding early childhood development provision;

(c) deepening social assistance and extending the scope of the contributory social security system;

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322 Sections 27(1)(c), right of access to social security, including appropriate social assistance to those unable to support themselves and their families; 28(1), the rights of children to appropriate care, basic nutrition, shelter, healthcare, and social services; 85(2), initiation and implementation of national policy and legislation; and Schedule 4, which identifies welfare services as a functional area of concurrent national and provincial legislative competence.

323 Advisory Board on Social Development Act 3 of 2001; Children's Act 38 of 2005; Fund-raising Act 107 of 1978; Non-profit Organisations Act 71 of 1997; National Development Agency Act 108 of 1998; Older Persons Act 13 of 2006; Prevention and Treatment of Drug Dependency Act 20 of 1992; Prevention of and Treatment of Substance Abuse Act 70 of 2008; Probation Services Act 116 of 1991; Social Assistance Act 13 of 2004; Social Service Professions Act 110 of 1978; National Welfare Act 100 of 1978; and South African Social Security Agency Act 9 of 2004.

324 National Food Relief Programme, Funding for Early Childhood Development Centres, Admission to an Old Age Home, Home Based Community Based Care (People living with HIV/AIDS), Foster Care, Admission to Children's Home, Child Protection Services, Adoption Services, Maintenance, Services to the Youth, Services to Women and Gender Issues, Services to Older Persons with Disabilities, Funding of Non Profit Organisations, Registration of Shelters and Drop in Centres, Training of Non Profit Organisations, Older Person's Grant, War Veterans Grant, Child Support Grant, Foster Child Grant, Care Dependency Grant, Grants in Aid, Disability Grant, Early childhood development (ECD) programmes, and Registration of partial care facility (ECD).

325 Section 41 of the Constitution.

326 The regulation of child care facilities, referred to in section 197 of the Children's Act as child and youth care centre is a functional area that falls squarely within the mandate of the Department of Social Development. However, it is also a matter over which local government has concurrent legislative competence in terms of Schedule 4B of the Constitution.

(d) enhancing the capabilities of communities to achieve sustainable livelihoods and household food security; and

(e) strengthening coordination, integration, planning, monitoring and evaluation of services.

Questions

Besides the questions in paragraphs 1.11, 1.15 and 1.58 above, the Commission would appreciate receiving your views on the specific questions below relating to the scope of this inquiry, legality of the legislative reform pursued by DSD, the approach the Commission should follow, and power relations between spheres of government, arising from the preceding discussion.

(a) An exalted Act of Parliament contemplated in section 41(2) of the Constitution has been enacted, namely Intergovernmental Relations Framework Act 13 of 2005. In the light of this, is it necessary, and permissible, to establish a parallel framework to regulate intergovernmental relations, albeit in the welfare services sector? If so, should it be modelled on similar legislative frameworks in other sectors such as health or education or should it be *sui generis*? If not, how should the challenges related by DSD afflicting this sector be addressed?

(b) Should the Commission confine its inquiry to the effectiveness or otherwise of the Intergovernmental Relations Framework Act or it should, as DSD seems to suggest, explore formal and informal structures and mechanism of IGR applicable to this policy sector and fashion, if necessary, a new parallel legislative framework for this sector?

(c) What, in your view, would be the advantages and/or disadvantages of adopting either of the two approaches above?

(d) If the Commission decides to explore the possibility of fashioning a new Act to regulate IGR for the social welfare sector, what would be the constitutional basis for such an approach? Doesn't section 41(2) of the Constitution,[327] which is couched in peremptory language, impliedly prohibit (close the door on) the adoption of *further* (or parallel sectoral) legislation to regulate intergovernmental relations? Or could the constitutional basis for exploring such parallel legislation to regulate IGR for this sector be located in section 44(1)(b)(ii) of the Constitution,[328] read in conjunction with section 44(3);[329] or even section 85(1)[330]? Please elaborate.

(e) Or, should the Commission focus its attention on, and address, what most consider to be the source of these challenges, namely the functional uncertainty occasioned by the overlap between functional areas of state, provinces and local government listed in Schedules 4 and 5 of the Constitution?

(f) While no averment has been made in this regard, particularly by Provinces, could the incoherency complained of by DSD be attributed to administrative difficulties contemplated in section 125(3) of the Constitution or to conflicting laws?

(g) All social development mandates are regulated by various and diverse pieces of legislation. Should all this legislation be amended or overarching legislation, for example IRFA or another sectoral legislation, be amended or promoted to address the issues referred to the Commission by DSD? What would be the pros and cons of adopting either of the approaches alluded to above?

(h) Which of the two approaches should the Commission explore in its quest to address the conundrum afflicting the sector: (a) amend IRFA, or (b) propose legislation contemplated in section 146(2) of the Constitution setting norms and standards, national policies and promoting equal access and opportunities to government services?

(i) Is there another intervention, statutory or otherwise, that the Commission should consider to address incoherence in the national and provincial governments responsible for social development?

(j) What in your view would be the advantages and disadvantages of adopting either approach?

(k) Do you agree with the DSD's understanding of power relations between national and provincial governments? Is such a view compatible with, or supported by, the Constitution?

(l) Should the Commission confine its inquiry to the welfare services sector, or do the questions raised by COGTA and by DSD in respect of horizontal intergovernmental relations provide sufficient cause to expand it?

(m) As we argue above, 'social assistance' does not equate 'welfare services'. The Constitutional Court decision in *Mashavha* relates to the former and the court made it clear that 'social assistance' was not a matter that could be regulated effectively by provinces. Consequently, the Social Assistance Act and the South African Social Security Agency Act were enacted which aligned the legislation with the abovementioned decision. However, the question remains whether 'welfare services' could be regulated effectively by provinces. Would deletion of reference to 'welfare services' in Schedule 4 not address this problem once and for all but making this functional are a matter of exclusive national competence?

(n) Is legislation really necessary to address these issues? If not, what would you suggest as an alternative?

(o) As the issue the Commission is seized with in this inquiry is a constitutional matter within the meaning of section 167(7) of the Constitution, should it not be left to the

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327 This section reads: 'An Act of Parliament must -
(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.'

328 Section 44(1)(a)(ii) of the Constitution provides that: 'The national legislative authority as vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5.'

329 Section 44(3) of the Constitution reads: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.'

330 While only subsection (2)(b) and (d) are relevant, we quote section 85 of the Constitution in its entirety hereunder:
'**Executive authority of the Republic**
(1) The executive authority of the Republic is vested in the President.
(2) The President exercises the executive authority, together with the other members of the Cabinet, by—
(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrations;
(d) preparing and initiating legislation; and
(e) performing any other executive function provided for in the Constitution or in national legislation.'

courts to settle? What would be the consequences (advantages and disadvantages) of adopting such an approach?

(p) In *Premier, Western Cape v President of the Republic of South Africa* the Constitutional Court held that the purpose of section 41(1)(g) of the Constitution seems to be to prevent one sphere of government from using its powers in ways which would undermine other spheres of government and prevent them from functioning effectively. Does conduct of provinces complained of by DSD, inertia, not fly in the face of this constitutional principle? If it does, how could this norm be enforced? Is there a constitutional provision that directly deals with the enforcement of this or other core principles of intergovernmental relations? If not, is this a lacuna that could be addressed by an amendment of the Constitution?

(q) In *Premier, Western Cape v President of the Republic of South Africa* case, the court further stated that legitimate provincial autonomy does not mean that provinces can ignore constitutional framework or demand to be insulated from the exercise of power by national government that transcend provincial boundaries and competences. Nor does it mean, the court added, that provinces have a right to veto national legislation with which they disagree. On the basis of this decision of the court, is it permissible for provincial government to ignore decisions taken at Minmec?

CHAPTER 2: THE EVOLUTION OF INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICAN LAW

A. Introduction

2.1 Successive policies adopted by South Africa's democratic government have emphasised the importance of cooperation and coordination in government. The Reconstruction and Development Programme required 'collaborative, integrated planning and decision-making'.[331] The long-term vision established in the Growth, Employment and Redistribution strategy suggested that such integration must be enhanced to achieve key objectives of social and economic policy.[332] The National Development Plan too, lists as one of its objectives, the improvement of relations between the three spheres of government and coordination problems through proactive approach.[333] But it is through legislation, including the Constitution, that these goals are solidified. In the ensuing discussion we consider this legislative framework intended to foster cooperation and coordination between spheres of government, the jurisprudence emanating therefrom, highlight its positive and negative features, what it allows and proscribes, and consider whether it offers any useful hints on how to resolve the issues bedevilling the welfare services sector, if not, how it could be improved.

B. The position before 1994

2.2 Prior to 1994, different levels of government existed. Of necessity, and despite assertions to the contrary,[334] various coordinating and liaising bodies were formed most with

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331 The Reconstruction and Development Programme: A Policy Framework (1994) at para 6.4.5.

332 See Department of Trade and Industry *Liquor: Policy Document and Bill,* General Notice, Notice 1025 of 1997, Government Gazette No. 18135 of 11 July 1997 at 20.

333 National Planning Commission *National Development Plan 2030: Our Future –Make it Work* at 74 and 430 *et seq*.

334 De Villiers, Bertus 'Intergovernmental Relations in South Africa' *SAPR/PL* Vol 12 (1997) 197 at 198 argues, for example, that the concept of intergovernmental relations was unknown and foreign to South Africans prior to 1994; it was never a topic of scientific analysis; and although ad hoc structures existed, no overall strategy, institutions or national policy existed on what basic principles should direct intergovernmental relations. In De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' *ZaöRV* 671 at 675, the author qualifies this statement by stating that *Democratic* South Africa's first taste of intergovernmental relations followed the enactment of the 1993 interim Constitution.

statutory underpinnings.[335] Some of these provided vertical links between national and regional governments, for instance, the National Education Council, the Housing Advisory Council and the Council for the Environment.[336] But, because at the time regional and provincial governments were legally and politically subordinate to Parliament and to central government,[337] all meaningful decision-making power was concentrated in the national government.[338]

C. Intergovernmental relations under the 1993 Constitution

1 Interim Constitution's reticence about intergovernmental relations

2.3 Due to various reasons,[339] there was in principle no opposition to decentralisation or the creation of a multitiered form of government in South Africa, as long as it would not limit the power of national government to address the ills of the past.[340] In the multiparty negotiations which led to the adoption of the 1993 Constitution (interim Constitution)[341] there were conflicting approaches as to what the future relationship between the various levels of government ought to be.[342] The issue was particularly fraught in respect of national and provincial governments, with *centralists* arguing on the one hand that provincial and local

335 Baxter Lawrence, *Administrative Law* (1984) at 184.

336 *Ibid*. Interestingly, after the advent of our constitutional democracy, the National Education Council was given a new lease on life by the National Education Policy Act 27 of 1996.

337 *Id* at 134. The subjugation of regional governments was quite extensive. For example, Institutions of central government maintained regional offices and government departments invariably acted in supervisory capacity over the institutions of regional government. *Id* at 122.

338 Woolman, Stu and Roux, Theunis 'Chapter 14: Co-operative Government and Intergovernmental Relations' in Woolman et al *Constitutional Law of South Africa* 2nd Edition, RS 1: 07-09 at para 14-1. See also De Villiers, Bertus 'Intergovernmental Relations in South Africa' above at 198 who points out that regional governments were at the mercy of central government with little integration, coordination and consultation in policy matters.

339 De Villiers, Bertus Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 673 cites geographical size of South Africa, the size of its population, the need to deepen democracy, the importance to involve local and provincial leaders in decision-making, leadership development, and bringing government closer to the people as some of the reasons that justified the creation of a multitiered system.

340 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 673.

341 Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution).

342 De Villiers, Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' (1994) *SA Publikreg/Public Law* at 430.

government should be totally subordinate to the national government, with some powers allocated to them, but all decisions and actions being subjected to a national override; and *federalists* positing that each level should be allocated guaranteed and watertight powers and functions, and that any encroachment on these should be nullified by the Constitutional Court.[343] Consequently, although the interim Constitution provided, for the first time in the history of South Africa, for constitutionally entrenched provincial government on the basis of principles associated with federations,[344] there was so much focus on dogmatic federal-unitary debate[345] with the result that no consideration was given to the options to facilitate, structure or encourage intergovernmental relations.[346] In other words, insufficient attention was given as to how the various levels of government would cooperate, coordinate and integrate in the discharge of their functions.[347]

2.4 It should come as no surprise that while some recognition was given to the conduct of intergovernmental relations through the Senate, the establishment of the Financial and Fiscal Commission and the Commission on Provincial Government;[348] and few provisions relating to pre-eminence of legislation[349] and police service, [350] specifically made reference to the words

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343 *Ibid*.

344 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 675.

345 De Villiers, Bertus 'Intergovernmental Relations in South Africa' at 198.

346 De Villiers, Bertus 'Intergovernmental Relations in South Africa' at 198 and De Villiers Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' at 430.

347 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 672-673.

348 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 676.

349 Section 126(3) of the interim Constitution read as follows:
'A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-
(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or *co-ordinated* by uniform norms or standards that apply generally throughout the Republic;
(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies. (Our emphasis). '

350 Section 220 of the interim Constitution provided: 'Co-ordination and co-operation
(1) A committee consisting of the Minister referred to in section 216 (1) and the respective members of the Executive Councils referred to in section 217 (1) shall be established to ensure the effective co-ordination of the Service and effective co-operation between the various Commissioners.

'co-ordination' and 'co-operation', when the interim Constitution came into operation in April 1994, it was by and large silent on rules, procedures and systems to facilitate intergovernmental relations. However, it was not unique in this regard.[351] This omission was attributed, among other things, to the lack of familiarity with how multi-tiered dispensations operate and aversion to anything that related to federalism by two major parties, the ANC and the National Party.[352] As indicated above, coordinating bodies existed under apartheid albeit with limited powers.

2 Expansion of intergovernmental forums and challenges for provinces

2.5 The establishment of the three spheres of government by the interim Constitution naturally brought about the need for consultation and coordination.[353] It was assumed that cooperation and consultation, if any between the three spheres of government would be spontaneous and *ad hoc* as the need arises.[354] Expectedly, and in no time, intergovernmental forums burgeoned. With the exception of 'formal' forums with constitutional base, namely the senate, which ultimately and for a variety of reasons failed as an institution for intergovernmental relations;[355] the Financial and Fiscal Commission;[356] Intergovernmental Forum, which consisted of Premiers and national ministers and sometimes the President

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(2) The Act referred to in section 214 (1) shall provide for the appointment of a Board of Commissioners, consisting of the National Commissioner and the Provincial Commissioners and presided over by the National Commissioner or his or her nominee, in order to promote co-operation and co-ordination in the Service.'

351 The constitutions of well-established federal states such as the US, Canada, Australia, Germany, and Switzerland do not refer to intergovernmental relations either. See De Villiers, Bertus 'Intergovernmental Relations in South Africa' above at 199 footnote 7.

352 De Villiers, Bertus 'Intergovernmental Relations in South Africa' above at 198. According to De Villiers, the first scientific study of intergovernmental relations was commissioned in 1993 by the Development Bank of Southern Africa.

353 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 675.

354 *Id* at 676.

355 Although members tried to use it to liaise with provincial counterparts, it failed as an institution of intergovernmental relations because it had no explicit or implicit mandate to engage in such relations; the perception was that senators adopted 'national agenda'; it failed to establish a special parliamentary committee to monitor and evaluate intergovernmental relations nor did it raise issue pertaining to intergovernmental relations in the normal parliamentary standing committees - thereby checking the functioning of numerous Minmecs that had been established; and intergovernmental relations were considered the domain of the executive, with little or no scope for national and provincial legislative intervention or control resulting in members of the national and provincial executives engaging in intergovernmental relation without any checks and balances by the legislatures. See De Villiers 'Intergovernmental Relations in South Africa' at 202.

356 In terms of section 200(1)(b) of the Interim Constitution, the FFC included persons designated by each of the provinces and appointed by the President.

developed.[357] 'Informal' intergovernmental forums aimed fostering both vertical and horizontal channels of communication,[358] also developed with no statutory base or clear philosophical vision,[359] among them the Premiers Forum; Minmecs, established for all schedule 6 matters;[360] and the Technical Intergovernmental Committee which was established to provide administrative support to intergovernmental forums.[361] There were also technical committees of the various Minmecs, which served as preparatory forums for these bodies.[362] Even then, participating in Minmecs was an arduous task for provinces. One of the difficulties provinces experienced was summarised as follows:

> 'Where at national level a particular function such as health is allocated to a single department, the provincial governments have to combine numerous functions within a single department. Thus, in some provinces functional areas such as health, welfare and culture are combined in one department, while at national level there are three separate departments. Some of the consequences of this asymmetry are that provincial departments in many cases do not have the know-how to provide policy inputs that equal those of national departments; that policy initiatives are de facto under the control of national departments, and that provincial departments are stretched to their limits to attend and prepare for all the monthly meetings with their national counterparts.'[363]

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357 This body lacked clear mandate, was overshadowed by Minmecs, its agenda was determined by the Department of Constitutional Development which led to criticism that it was not an honest broker and favoured national government, and there was a perception that it was used to inform provinces rather than to consult them on new policy options.

358 For a detailed discussion of these forums and entities, see De Villiers, Bertus Intergovernmental Relations in South Africa' at 201 *et seq*.

359 It has been observed, for example, that although meetings took place with varied regularity between the President and provincial premiers; between national and provincial ministers; between directors-general and technical experts; and between provincial premiers and local governments within their respective provinces, the system of intergovernmental relations was rather disorganised and lacked reliability (or predictability?). The meetings were largely ad hoc, spontaneous and without clearly spelt out agendas and objectives. And in a way reflected the practice in many multitier systems where intergovernmental relations are conducted with maximum flexibility and little, if any, public accountability. See De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 677.

360 More than 20 Minmecs were established pursuant to a Cabinet decision in all areas of shared competence, with no formal rules for operation.

361 It comprised permanent members, namely the directors-general of Constitutional Development, Finance, Public Service and part-time members whose attendance was determined by issues under consideration.

362 These consisted of senior officials of national and provincial departments. Directors-Generals of provinces could not attend because provinces only have one director general and a provincial department has more than one national department with which it has to cooperate. It thus became difficult for the head of department to attend all meetings. Consequently junior officials were sometimes sent which in turn caused frustration among some other provinces and especially within the national department.

363 De Villiers, Bertus 'Intergovernmental Relations in South Africa' above at 208. Other challenges were that one head of the department had to attend Minmecs of various national departments held in various parts of the country, which makes travel arrangements and days out of the office a serious dilemma; and provinces received agendas too late leaving insufficient time to prepare.

3 Constitutional Court's contribution to jurisprudence relating to this area of law

2.6 The vesting of concurrent legislative and executive powers in the three spheres of government provided enough impetus to the Constitutional Court to develop this area of the law. Despite the lack of a provision similar to section 40(1) of the Constitution, the court confirmed in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[364] which concerned the powers of local government under the interim Constitution, that the interim Constitution recognised three distinct[365] but interdependent,[366] levels of government. In *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*,[367] to which we refer extensively throughout this issue paper, and which was decided before the adoption of the final Constitution,[368] the court stated:

> 'The vesting of concurrent law-making powers in Parliament and the provincial legislatures is an arrangement which calls for consultation and co-operation between the national Executive and the provincial executives. The Commission on Provincial Governments and the Financial and Fiscal Commission, which are important constitutional structures, contemplate that there will be consultation between representatives of the provinces and the national government in regard, inter alia, to the allocation of funds and the rationalisation of statutory enactments. The Bill, which makes provision for such consultation and co-operation in the field of education, is wholly consistent with the constitutional scheme. Indeed, where both Parliament and the provincial legislatures have exercised or wish to exercise Schedule 6 competences, such consultation and co-operation would appear to be essential.'[369]

2.7 It reiterated in the same judgment the importance of such cooperation:

> 'Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation. And this applies as much to policy as to any other matter. It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary co-operation will be offered, and which requires a provincial administration to participate in co-operative structures and to provide

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Consequently, some provincial departments had up to twelve formal meetings per month, not counting informal contacts between officials.

364 1999 (1) SA 374 (CC).

365 *Id* at para 35.

366 See Woolman and Roux above at 14-7 footnote 2.

367 1996 (3) SA 289 (CC).

368 This case was heard on 7 March 1996 and the judgment delivered on 3 April 1996. The final Constitution was adopted by the Constitutional Assembly on 8 May 1996

369 *National Education Policy Bill* case para 27.

> information or formulate plans that are reasonably required by the Minister and are relevant to finding the best solution to an impasse that has arisen.'[370]

2.8 And, germane to the issues at hand, the Court added:

> 'Parliament is entitled to make provision for such co-operation and co-ordination of activities in respect of Schedule 6 matters, and the objection to such provisions on the grounds that they encroach upon the executive competence of the provinces cannot be sustained.' [371]

2.9 On the heels of this decision, came the *First Certification* judgment[372] where the Constitutional Court held that intergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirements of Constitutional Principle XX that national unity be recognised and promoted and that the mere fact that the New Text of the Constitution made explicit what would otherwise have been implicit could not in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.[373]

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370 *Education Policy Bill* case, para 34.

371 *Id* at para 38.

372 *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).

373 *Id* at para 290.

Comments and Questions

Participating in intergovernmental forums –challenges faced by provinces

In Chapter 1 we flagged, and sought inputs on, the possibility that problems that have given rise to this inquiry could be attributed to capacity constrained in the provinces. If this is indeed the case, we further enquire whether the interventions contemplated in section 125(3) of the Constitution have been initiated and what the out the outcome was. However, it also appears that the manner in which provincial departments are structured in comparison to national department also impacts adversely on their ability to participate meaningfully in intergovernmental forums, let alone implement the decisions taken in these structures. The research above reveals that a province has one Director-General, who in terms of the Public Service Act[374] is responsible, inter alia, for intergovernmental relations between the province and national government, among others. Surely, in discharging this responsibility, this functionary relies on provincial departments. However, there are challenges there too. A single provincial department, while dealing at times with numerous functional areas, has one Head of Department and this functionary cannot be an expert in all matters his or her department deals with and cannot attend all intergovernmental meetings. Consequently, this responsibility is delegated to other officials. And, there are other problems at this level too that officials must contend with, namely the frequency of meetings, travelling, shoddy arrangements of meetings, for example distributing agendas too late leaving insufficient time for officials to prepare, which raises the question:

- Could the problem afflicting the sector be attributed to the factors above? If so, how could they be resolved?

Constitutional Court's jurisprudence

The following inferences can be drawn from *National Education Policy* and *First Certification* judgments referred to above, both of which appear to provide support to the legislative reform DSD is pursuing.

(a) Whilst decided in the context of the interim Constitution, at a time when there were no overarching constitutional principles and legislation regulating intergovernmental relations, both dealt with features of the interim Constitution that have been retained in the 1996 Constitution, namely concurrent matters and mechanisms necessary to nurture cooperation in respect of these matters, and the protection of provincial autonomy. The reasoning in these judgments is, therefore, equally applicable to the 1996 Constitution, and stands.

(b) It appears from the *National Education Policy* case that actually it is not necessary to justify the pursuit of legislation to regulate intergovernmental relations on the basis of, for example, plenary legislative power of Parliament;[375] classification of legislation as reasonably necessary for or incidental to a matter in Schedule 4 of the Constitution;[376] initiating and policy and legislation.[377] The mere fact that welfare services is a concurrent matter over which both national and provincial governments have jurisdiction in terms of Schedule 4, is sufficient justification for DSD to initiate legislation to foster cooperation and coordination in respect of this functional area.

(c) Moreover, it further appears from the *National Education Policy* case that such legislation could include any provision *reasonably necessary* to promote the objects of the Act, including imposing obligations on provincial governments. And such legislation, once enacted, would not be considered an encroachment upon the

executive competence of provinces. The National Education Policy Bill contained a provision that has been retained in the Act[378] imposing an obligation on a provincial department whose standard of provision of education falls short to submit a report with a plan to remedy the situation.

Questions

(a) Is the conclusion drawn by the Commission from the aforementioned case (the *National Education Policy* judgment) correct? If it is, does it still stand notwithstanding elaborate provisions in the Constitution affording protection to institutional and functional integrity of provincial government, and the enactment of IRFA, which was enacted to regulate intergovernmental relations?

(b) Would the imposition of obligations on provinces not fly in the face of provisions of section 41 of the Constitution that are intended to safeguard functional and institutional integrity of provincial government?

D. Constitutional underpinnings of IGR – the 1996 Constitution

1 Deliberations during the drafting of the Constitution

2.10 To fully understand the provisions of the Constitution dealing with intergovernmental relations, it is necessary to refer to *travaux préparatoires* – discussions– during the drafting of the Constitution. As the Constitutional Court held in *S v Makwanyane*,[379] this background material provides context for the interpretation of the Constitution. Despite having championed strong national government at the expense of provincial powers[380] and its apprehension about

374 Section 7(3)(c)(i) of the Public Service Act, 1994.

375 Section 44(1)(a)(ii) of the Constitution provides that national legislative authority vested in Parliament confers on the National Assembly the power to pass legislation with regard to any matter, including a matter within Schedule 4; and subsection (2)(b)(ii) confers power on the National Council of Provinces the power to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

376 Section 44(3) of the Constitution provides that: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in Schedule 4.'

377 Section 85(2)(b) and (d) provides that executive authority, which the President exercises together with other members of the Cabinet includes developing and implementing national policy, and preparing and initiating legislation.

378 Section 8(6) of the National Education Policy Act 27 of 1996.

379 1995 (2) SACR 1 (CC) at para 17.

380 Bronstein, Victoria 'Legislative Competence' in Woolman *Constitutional Law of South Africa* 2nd Ed OS 06-04 at 15-8.

fully devolved federal state,[381] the ANC proposed a multi-level system of government during the drafting of the 1996 Constitution.[382] And, in spite of the fact that there was no constitutional injunction compelling it to do so, and to counter what it perceived as negative aspects of multi-level government,[383] the ANC further proposed:

> '...the development of institutions and mechanisms of cooperative governance. Cooperative governance is therefore an integral part of the ANC's proposals on the division of competences between national, provincial and local levels of governance, as well as the proposals on the new Senate as a Council of Provinces: a body having real provincial representation and increased powers.'[384]

2.11 It strongly argued at the time that mutual cooperation was not only essential to nation building, but also to coordinating policy making processes. Unsurprisingly, its proposals that government be constituted as national, provincial and local spheres; that different spheres should assist and support one another; share information, consult each other, co-operate in

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381 Woolman and Roux at 14-6 and 14-7, especially footnote 3, and 14-55. According to Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006, Issue 2 at 237 the ANC believed political power should be centralised as far as possible in order for the government to be able to act quickly and decisively and to prevent the entrenchment of existing privileges or the possibility of delaying tactics by those still clinging to apartheid ideology. See also De Villiers, Bertus 'Intergovernmental Relations in South Africa' SAPR/PL (1997) Vol 12 197 at 199 who states that none of the major parties in the multiparty negotiating forum really lobbied for federalism: the ANC reacted in a knee-jerk fashion to anything that resembled federalism, the IFP was dogmatically attached to the notion of 'competitive federalism', in terms of which national and provincial governments view each other as adversaries, that cooperation and interaction did not appear on their horizon, and the National Party was a newcomer to the federal debate, having rejected it until 1992. The 'competitive federalism' approach of the IFP is similar to 'dual intergovernmental relations' which is used to describe uncoordinated coexistence or even hostility between federal and subnational states. In terms of this approach, levels of government are in competition and even conflicting with each and view each other as competitors rather than partners. See De Villiers, Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' at 431. See also De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 677 where it is stated that even '*the concept of intergovernmental relations was initially regarded with some suspicion by ANC in the debates leading to the interim Constitution as being typical only of 'federations*'.'

382 For a detailed discussion, see African National Congress, Office of the Secretary General *Intergovernmental Relations Provisional Submission to the Theme Committee 3 Phase 3* para 2 (undated).

383 These were additional costs of governance; mutually destructive norms in the provinces, that is policies and legislation in one province which adversely affect another province's welfare; perpetuation of regional distortions and disparities in resources; the marginalisation of provincial influence in respect of national legislation and the national executive; a system of government which seeks to resolve problems only from the perspective of a particular province and in which provinces are precluded from understanding the broader picture in the absence of a forum to promote this; inability to focus resources on, or develop policies for, problems and needs which are national in nature or origin, and which require national remedies; and inconsistencies and contradictions between different provinces' legislation or between national and provincial legislation, unproductive competition between provincial government and between levels of government. *Ibid*.

384 *Ibid*.

the development and execution of their policies, and adhere to agreed procedures and maintain friendly relations[385] are all reflected in Chapter 3 of the Constitution. Despite this, it has been argued that its initial aversion towards a decentralised system rears its head from time to time and exerts some influence on its interpretation of the Constitution and the way it sees the relationship between national and provincial governments.[386]

2 Other considerations that led to the inclusion of explicit provisions relating to IGR in the 1996 Constitution

2.12 Other factors also played a crucial role, first, in the cooperation between levels of government that developed following the coming into operation of the 1993 Constitution; and secondly, in the principles of intergovernmental relations receiving more attention in the negotiations leading to the adoption of the 1996 Constitution and their ultimate incorporation in Chapter 3 and other provisions thereof. Among them, the realisation by key negotiating parties that regardless of the classification of our constitutional order (as federal, unitary or quasi-federal), without proper functioning intergovernmental relations, the entire multitiered system would grind to a halt;[387] appreciation by the ANC-dominated government of national unity that it could realise socio-economic and other political goals through a decentralised system of government; ANC provincial politicians flexing their muscles and insisting on being heard in national policy formulation; cognisance by national and provincial governments that they are interdependent and that cooperation and mutual respect was key in intergovernmental activities;[388] intergovernmental conflict and competition that ensued,[389] some of which was settled through political agreements, and others through the courts; realisation by provinces that their autonomy had to be limited by national norms and standards in order to ensure uniformity across the nation; overlapping governmental functions and the

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385 *Ibid*.

386 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006, Issue 2 237 at 250.

387 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 679.

388 Or as De Villiers, Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' at 430 puts it: 'The simple truth is that no level of government can function effectively without the cooperation and coordination of the other levels of government. Modern-day societies require such cooperation.'

389 Anecdotal evidence of these conflicts included assertions that 'national government knows that it has the power to implement its will and there are few incentives for real cooperation'; and 'provinces feel that they are treated as children.' See De Villiers Bertus 'Intergovernmental Relations in South Africa' at 200.

integrated nature of the economy;[390] the influence of the German principle of *Bundestreue*;[391] the confusion and misunderstanding that characterised intergovernmental relations after the coming into operation of the interim Constitution which necessitated guidelines to shape attitudes and expectations.[392]

390 De Villiers, Bertus 'Intergovernmental Relations in South Africa' at 199 and 200.

391 It is said that this principle which signifies trust, partnership and comity upon which federal-type systems and the relationship between the respective spheres of government are based changed the ANCs thinking in the early 1990s. See De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 679-680.

392 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 682.

3 Relevant constitutional provisions and their meaning

(a) The web of constitutional provisions directing intergovernmental relations and their meaning in the context of this inquiry

(i) South Africa's constitutional structure and its implications for intergovernmental relations

2.13 Pursuant to several constitutional principles contained in Schedule 4 to the interim Constitution,[393] with which the final Constitutional text had to comply,[394] the Constitution contains a myriad of provisions that regulate the interplay between different spheres of government.[395] These are so diverse that they have engendered, as was the case in respect

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393 These were:

- CPXIV (government shall be structured at national, provincial and local levels);
- CPXIX (the powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis);
- CPXX (each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity);
- **CPXXI.2. (where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services**, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as whole, **the Constitution shall empower national government to intervene through legislation or such other steps as may be defined in the Constitution)**;
- **CPXXI.4. (Where uniformity across the nation is required for a particular function**, the legislative power over that function should be **allocated predominantly, if not wholly, to the national government)**;
- CPXXI.6. (Provincial governments shall have the powers, either exclusively or concurrently with the national government);
- CPXXI.7. (where mutual cooperation is essential or desirable or where it is required to guarantee equality of opportunity or access to government service, the powers should be allocated concurrently to the national government and the provincial governments); and
- CP XXV (The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. the framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government).

394 Section 71(1)(a) and (2) of the interim Constitution which was couched in a peremptory language required the new constitutional text to comply with the constitutional principles, and to be certified by the Constitutional Court. These principles were specifically entrenched. Section 74(1) proscribed the amendment or repeal thereof.

395 These are **Chapter 3**, constituting government as national, provincial and local spheres; imploring organs of state and spheres of government to adhere to and observe overarching principles of intergovernmental relations set out therein; and stipulating the said principles **(section 40 and 41)**; **section 43** bestowing legislative power on Parliament, provincial legislatures and municipal councils; **section 44(2),** specifying when national legislature may

of the interim Constitution,[396] divergent opinions about the nature of South African state.[397] The central issue with which these expositions are concerned is whether the Constitution expressly or impliedly sanctions the domination of subnational government by national government, as was the case prior to 1994. The emerging consensus seems to be that our constitutional structure is definitely not a strong or so-called divided federal state,[398] but an innovative hybrid combining some federal features with some constitutionally entrenched decentralised unitary features; or creates space for both cooperative (assumes relative parity of power between the national government and subnational constituents, provinces and local

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intervene and pass legislation in relation to a matter falling exclusively within provincial competence; **section 99**, setting out requirements for assignment of powers or functions emanating from national legislation to provincial MECs; **section 100**, setting out circumstances which would justify national intervention in provincial affairs; **section 104(1)(b)(i) and (iii)**, empowering provincial legislatures to pass legislation on concurrent competences in Schedule 4 and matters outside Schedules 4 and 5 that have been expressly assigned to a province; **section 125(2)(b) and (c)**, imposing a duty on provincial executive to implement national legislation dealing with schedule 4 or 5 matter, and national legislation outside these schedules assigned to provinces by an Act of Parliament; **section 126**, which authorises MECs to assign their powers or functions to municipal councils; **section 146**, dealing with how issues relating to conflicting national and provincial legislation must be resolved; **section 154**, regulating the role of municipalities in cooperative governance; **section 156**, giving municipalities power to administer matters in Part B of schedules 4 and 5 and any matter assigned to them by national or provincial legislation, regulating conflicts between by-laws and national or provincial legislation, assignment to municipalities of matters in Part A of Schedule 5 by national or provincial governments; **section 238**, enabling executive organs of state in any sphere to delegate statutory powers or functions to other executive organs of state, or to exercise any power or perform any function on an agency or delegation basis; and **Schedules 4 and 5** of the Constitution which stipulate matters of concurrent and exclusive legislative competences.

396 While it was conceded that the interim Constitution incorporated elements of cooperative federalism, it neither reflected classical federalism nor incorporated all the elements of centralised unitary form of state. See De Villiers 'Intergovernmental Relations in South Africa' at 199.

397 South Africa has been described as a 'single, decentralised unified state, one that recognises centrifugal focus and operates within a quasi-federal system'; 'composite state with federal characteristics'; and 'integrated federal state'. See De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation' above at 678; Malherbe Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Issue No 2, (2006) at 237 who relies on constitutionally entrenched distribution of power between national and provincial spheres of government, along with the power of the judiciary to adjudicate jurisdictional issues between these spheres for his view that South Africa is a 'composite state'; and Bronstein, Victoria 'Chapter 15: Legislative Competence' in Woolman et al *Constitutional Law of South Africa* 2nd Ed OS 06-04 at 15-1 has described South Africa as a state with federal characteristics. She also argued that only governmental practice married to judgments of the Constitutional Court will, over time, determine where South Africa rests on a continuum of states with different degrees of decentralisation. *Ibid*.

398 According to Woolman, Stu and Roux, Theunis 'Co-operative Government and Intergovernmental Relations' in Woolman et al *Constitutional Law of South Africa* 2nd Edition, RS 1: 07-09 at 14-3 divided federal states are marked by a clear division of functions between the national and provincial governments, independent taxing powers for regions or provinces, and few formal mechanisms of co-operation between various levels of government. Separate levels of government must negotiate agreement on issues of mutual concern. These authors also argue that the Constitution reflects a linguistic turn away from a hierarchical relationship between national and provincial governments. *Id* at 14.7.

government) and coercive (which reflects a hierarchical distribution of power with national government largely dominating the nation's subnational constituent parts) federalism.[399]

2.14 Why does this nomenclature matter? As Woolman and Roux persuasively argue, taxonomy is often misleading and obscures what is truly interesting: the conventions and institutions that make federal system work.[400] For our purpose, a definitive answer to the question which amongst the systems of governance referred to above is contemplated by the Constitution is crucial because each of these models reflect a different conception of intergovernmental relations and cooperative governance.[401] As stated above, so far there is no definite answer to this question. Consequently, others have looked beyond the provisions of the Constitution, to national legislation regulating intergovernmental relations enacted to date, which reflect government's conception of the model of intergovernmental relations encapsulated by the Constitution. And, have concluded that laws enacted since the coming into operation of the Constitution namely Intergovernmental Relations Framework Act,[402] Provincial Tax Regulation Process Act,[403] and Intergovernmental Fiscal Relations Framework Act[404] tipped the scales in favour of national government (or coercive approach).[405]

Question

As can be gleaned from the preceding discussion, the question as to which of the two broad conceptions of federalism, cooperative or coercive, is envisaged in the Constitution is far from being settled. Because of the centrality of this issue to this investigation, the Commission would appreciate receiving your opinion on which of the two views should prevail.

(ii) Origins of overarching principles in Chapter 3 of the Constitution and its interpretive value

2.15 As will be seen in Chapter 3 of this issue paper, in older federations, intergovernmental relations have no constitutional or statutory basis, which raises the question: what is the provenance of principles underpinning intergovernmental relations contained in Chapter 3 of the Constitution; and most importantly, if they were modelled on norms which underlie intergovernmental relations in other countries, what do they mean in those countries?

399 Woolman, Stu and Roux, Theunis above at 14-6, including footnote 2.
400 *Ibid*.
401 *Ibid*.
402 Act 13 of 2005.
403 Act 53 of 2001.
404 Act 97 of 1997.
405 Woolman and Roux above at 14-6.

2.16 The principles of intergovernmental relations outlined in Chapter 3 of the Constitution derive from the German principle of *Bundestreue*[406] which regulates the relations between the *Bund* (national government) and *Länder* (regions) in that country. It is an unwritten constitutional norm developed by the German Constitutional Court which signifies trust, partnership and comity upon which federal-type systems are based. It entails, inter alia, the duty of the respective levels to cooperate with each other on matters of common concern; to take each other into account in the exercise of constitutionally allocated powers and the way that may affect others; and generally to respect the interests of other *Länder* and/or of the *Bund* whenever a matter has implications wider than those affecting one particular *Land*.[407] This brief exposition makes it clear that coercion in Germany is not an option.[408] However, two more elements of this principle must be considered before such an inference can be drawn. First, this principle also represents a constitutional obligation and a justiciable right for both the *Bund* and the *Länder* and the legal basis from which to view, evaluate and conduct the activities of government; and should the obligation to consult, cooperate and communicate not be adhered to, the aggrieved party has the right to legal recourse.[409] Secondly, another important element of this principle, which does not often receive attention in treatises on the subject, is that it obliges both the *Bund* and the *Länder* to behave loyally towards the union, which the German Constitutional Court has treated as a constitutional duty to act in a *pro-federal* manner.[410] Although the meaning of this constitutional duty is not entirely clear, the prefix used, which means 'in favour of', is telling. As a result of this principle, among others, cooperative federalism in Germany, characteristics of which have undoubtedly been emulated in IRFA,[411] has resulted in '*Einheit trotz Vielfalt'* (unity in spite of diversity).

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406 See De Villiers, in 'Intergovernmental Relations: the Duty to Co-operate – A German Perspective' 430 at 431; 'Intergovernmental Relations in South Africa' at 201; and 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 680. De Villiers explains that this notion appealed to the ANC because it dissuaded spheres of government from engaging in litigation and thus addressed the concern that the ANC had that an adversarial relationship between the respective spheres similar to those in the US and Australia would not be in South Africa's best interests

407 De Villiers, Bertus 'Intergovernmental Relations: the Duty to Co-operate – A German Perspective' at 433.

408 See Auel, Katrin 'Intergovernmental Relations in German Federalism: Cooperative Federalism, Party Politics and Territorial Conflicts' Comparative European Politics Vol 12 (2014) at 430 who states categorically that in Germany coercion is, due to constitutional and political reasons, not an option in the joint policy making between *Länder* and federal government.

409 *Id* at 433-434.

410 Auel, Katrin 'Intergovernmental Relations in German Federalism: Cooperative Federalism, Party Politics and Territorial Conflicts' above at 432.

411 Which consists of (a) horizontal and vertical cooperation between various levels of government; (b) bilateral and multilateral co-operation; (c) involvement of legislative, executive and judicial branches of government; and (d) a combination of voluntary and obligatory co-operation. See De Villiers Bertus 'Intergovernmental Relations: the Duty to Co-operate – A German Perspective' at 432.

2.17 Our own commentators, whilst acknowledging that intergovernmental relations is not a mere convenient channel for national government to convey instructions to provinces in a top-down fashion or where subnational governments can be bludgeoned into submission,[412] have also concluded that one of the standards set by the Constitution for the conduct of intergovernmental relations is that 'the spheres must work in unison to address the challenges facing South Africa as a development state.'[413]

2.18 On the basis of this brief exposition of the principle of *Bundestreue*, which among other things is an enforceable right, it appears that it is within DSD's right to explore ways to ensure that national and subnational constituents involved in the provision of social development services act in unison and in a 'pro-national' manner, including legislative reform.

(iii) Constitutional provisions regulating the distribution of governmental authority in respect of 'welfare services' and their implication for intergovernmental relations

2.19 What is beyond dispute is that the Constitution bestows governmental authority[414] in respect of 'welfare services' or, as it is called in the Bill of Rights, 'social security', on both the national and provincial governments.[415] In the ensuing paragraphs we consider in some detail the constitutional provisions dealing with this vertical distribution of power, offer our perspective on what they mean in the context of this inquiry and their implications for both spheres involved (intergovernmental relations). The role of local government in respect of welfare services appears to be tenuous. It is not considered further in this paper.[416]

2.20 First, it has been said that the use of the word 'sphere' instead of 'tier' or 'level' to refer to the three spheres of government[417] signifies 'equality and respect' between them rather than a hierarchical arrangement where one sphere is the senior of another. It also indicates

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412 De Villiers 'Codification of Intergovernmental Relations by Way of Legislation' at 681.

413 *Id* at 681.

414 Rautenbach, IM and Malherbe, EFJ *Constitutional Law* Second Edition (1996) at 63 define 'government authority' as a competence of government bodies at various levels to act coercively and is expressed in directives that create or amend legal rules in respect of a particular functional area.

415 Section 7(2), read in conjunction with sections 27(1)(c) and 40(1) and Part A of Schedule 4, of the Constitution.

416 See the discussion in para 1.9 in Chapter 1 above. The *Framework for Social Welfare Services* (August 2011) states that the Constitution locates responsibility for social welfare services on national and provincial governments, and while potential role of local government in social development is being explored, this function could be delegated to local government by provincial government. For this purpose, a strategy needs to be developed and the rendering of this service by municipalities must be in line with delegated responsibilities and consistent with the Constitution. See also White Paper for Social Welfare (August 1997) at para 21 and Comprehensive Report on the Review of the White Paper for Social Welfare, 1997 at 51-52.

417 Section 40(1) of the Constitution provides that: 'In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.'

that the Constitution enables each sphere to conduct its activities within the framework of the Constitution is protected and has to be respected.[418] Flowing from this, and the meaning ascribed to sections 41(1) in general and 41(1)(e), (g) and (h) in particular,[419] is the view that the organisation of is more of a cooperative, matrix model than a rigid, top-down model found in classical unitary states which entails that central government may grant, revoke or limit the powers of lower tiers of government.[420] In terms of this approach both DSD and provincial departments responsible for social development are *coordinate* and *independent* in the respective spheres. However, the provisions of the Constitution must be read systematically, in conjunction with other provisions.[421] The interpretation given to the constitutional provisions referred to above becomes unsustainable upon further reading of the Constitution. Not only does the Constitution expressly say that these spheres are 'interdependent', require them to preserve national unity and the indivisibility of the Republic and provide a coherent government for the Republic as a whole,[422] but also contains a myriad of other provisions which are intended to achieve exactly the opposite, to allow national government to dominate and override the decisions of provincial.[423] On the basis of these provisions, it has been conceded that a top-down hierarchical model is also contemplated by the Constitution,[424] which has led to a conclusion that 'we currently operate with an integrated federal state that employs a coercive form of IGR and cooperative government.'[425] The latter view, bolstered by Constitutional decisions on intergovernmental relations,[426] to which we revert shortly, seem to

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418 De Villiers, Bertus 'Local-Provincial Intergovernmental Relations: A comparative Analysis' *SAPR/PL* Vol 12 (1997) 469 at 471-472 and De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 678.

419 For instance Woolman and Roux at 14-14 argue that: 'The principles set out in section 41(1) stand for two basic propositions. First, cooperative government does not diminish the *autonomy* of any given sphere of government. It simply recognizes the place of each within the whole and the need for coordination in order to make the whole work. Second, FC ss 41(1)(e), (g) and (h) re-inforce the notion that each sphere of government is distinct. (Our emphasis)

420 De Villiers, Bertus 'Local-Provincial Intergovernmental Relations: A Comparative Analysis' above at 471-472.

421 For a detailed discussion on contextual approach to constitutional interpretation, which includes historical factors that led to the adoption of the Constitution, fundamental rights and other considerations such as the social and political environment in which the Constitution operates, see Botha Christo *Statutory Interpretation: An Introduction for Students* Fifth Edition (2012) at 193.

422 Section 41(1)(a) and (b) of the Constitution.

423 Sections 44(2)(a)-(d), 100, 125(2)(b), 146, 147, 216(2) and 227(2), of the Constitution.

424 Woolman and Roux at 14-6 and 14-55; De Villiers 'Local- Provincial Intergovernmental Relations: A Comparative Analysis' at 472 footnote 5.

425 Woolman and Roux at 14-6.

426 For instance, in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 295 (CC) the court held that the functional areas allocated to each sphere cannot be seen in isolation. They are interrelated and none of the spheres of government have any independence from each other. While they do not tread on each other's toes, they must understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Section 40 and 41 were designed to achieve this result. *Id* at para 26. In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 40 the Constitutional Court

advance the stance taken by DSD on this issue to pursue legislative reform to rein in provinces.

2.21 Secondly, the Constitution makes it clear that government has a duty to protect, fulfil and promote welfare services or the right of access to social security.[427] And, as stated above, governmental authority functional area has been distributed between national and provincial spheres of government. Besides criticism levelled at this system of concurrency that it blurs the lines of accountability; causes confusion over responsibilities between national and provincial governments; gives rise to intergovernmental contestation and disputes; creates policy tension; and makes alignment of policy, implementation and financing complicated,[428] which may well be the root causes of the problem related by DSD; this constitutional arrangement, or 'overlapping functions',[429] has other (constitutional) implications. In the context of this inquiry, the following consequences are worth noting. First, when exercising a power or performing a function relating to social development, both spheres must be cautious not to intrude on institutional and functional integrity of the other.[430] Secondly, both spheres

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emphasised that whilst the housing programme must be determined by all spheres of government and each must accept the responsibility for the implementation of particular parts of the programme, national government must assume the responsibility to ensure that laws, policies, programs and strategies are adequate to meet the State's section 26 obligations and must ensure, together with provincial governments, that executive obligations imposed by housing legislation are met.

427 Section 27 of the Constitution, titled 'health care, food, water and social security', reads in relevant parts:

'(1) Everyone has the right to have access to-

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.'

428 Department of Provincial and Local Government *The Implementation of Intergovernmental Relations Framework Act: An Inaugural Report 2005/06 -2006/07* at 15 and 21. It has been argued, for example in the context of provincial and local spheres of government that bestowing on both these spheres authority over 'health' matters resulted in a degree of confusion about who does what. See Steytler, Nico and Fessha, Yonatan Tesfaye below at 321.

429 According to Steytler, Nico and Fessha, Yonatan Tesfaye 'Defining Local Government Powers and Functions' *SALJ* Vol 124 Issue 2 (2007) 320, overlap of functions occurs where more than one level of government has authority (be it legislative, executive, or both) over the same functional area.

430 This Chapter reads:

'Government of the Republic

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

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

Principles of co-operative government and intergovernmental relations

41. (1) All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

can legislate[431] and exercise concomitant executive power, including development of and implementation of policies,[432] contemporaneously or asynchronously in respect of this subject and such policies and legislation should coexist.[433] Having said that, it is worth noting contrary to the assertion by DSD[434] and in contrast to national legislation,[435] the Constitution does not contain a provision expressly imposing an obligation on provinces to implement national policy. Such a duty is implied in section 146(2)(b)(iiii),[436] arises when there is conflict between national and provincial legislation, and national policy is contained in legislative instrument. In these circumstances, national legislation prevails (must be applied) if it provides uniformity

(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—
(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

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

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

431 See sections 44(1)(a)(ii), 44(1)(b)(ii), 44(3), 104(1)(b)(i) and 104(4) of the Constitution. See also *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) at para 362.

432 Sections 85(2)(a)-(d) and 125(2) of the Constitution.

433 Leonardy, Uwe and Brand, Dirk 'The Defect of the Constitution: Concurrent Powers are not Cooperative or Competitive Powers' *TSAR* Issue No 4 (2010) 657 at 659. The exercise of these powers by both national and provincial governments cannot be faulted since it is sanctioned by the Constitution, or as Steytler and Fessha above at 321 put it 'concurrent jurisdiction is intended.'

434 See para 1.9 in Chapter 1.

435 Section 125(2)(c) of the Constitution expressly state that one of the obligations of executive authority of a province is '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.'

436 This inference is drawn from section 146(2)(b)(iii) of the Constitution which reads: 'National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if ...the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing...national policies.'

across the Republic by establishing *national policies*. This seems to be an attempt to codify the Constitutional Court jurisprudence in *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* case that national policy is not binding on provinces unless it is reflected in legislative instruments.[437] Thirdly, besides the exception above, national legislation promulgated by DSD prevails over provincial legislation provided certain prerequisites are met.[438] Fourthly, provincial executive has a constitutional duty to *implement*, in addition to its own policy and legislation, *national* legislation dealing with welfare services initiated by national government and promulgated by Parliament[439] provided, of course, it has

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437 *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) at para 30, which was decided under the interim Constitution, the Constitutional Court stated in this regard: 'The provincial political head of education can been called upon to prepare a plan to bring standards of education in his or her province into line with what may be required by the Constitution or *national policy* if a report has been made under clause 8(5) that such standards are not being met. There is, however, no obligation imposed on the province by the Bill to implement that plan if it chooses not to do so. That obligation could possibly be imposed by other legislation...' See also paras 26, 29 and 31 of this decision. This line of reasoning was also employed by the court in *Minister of Education v Harris* 2001 (4) SA 1297(CC) at para 7. However, in the *National Education Policy Bill* case at para 36, the court *insinuated* that national policy could supersede provincial policy by means of an *agreement* between the parties.

438 The relevant parts of section 146 read:

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

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

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

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

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.'

439 Section 125(2)(a) and (b) of the Constitution.

administrative capacity to assume effective responsibility.[440] Moreover, the Constitution prescribes how disputes relating to capacity issues must be dealt with.[441]

2.22 So far, no assertion has been made that the incoherence between DSD and provincial governments is attributable to conflicting national and provincial legislation or policies. If this was the cause of the problem, no legislative reform would have been necessary because, as can be garnered from the preceding paragraph, the Constitution adequately addresses these issues. This, as Steytler aptly puts it, shifts the focus to the monitoring implementation of national legislation.[442] As stated above, section 125(2)(b) of the Constitution expressly requires provincial governments to *implement national legislation dealing with welfare services matters*. If state authority extends to ensuring that laws are not only made, but *executed as well*,[443] does section 125(2)(b) not empower, by implication,[444] DSD to ensure that legislation dealing with social development mandates is implemented, and to issue directives about how it should be implemented? Following a thorough analysis of numerous Constitutional Court decisions on intergovernmental relations, Woolman and Roux conclude that an organ of state could have such power. They state in this regard:

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

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440 Section 125(3) of the Constitution provides: 'A province has executive authority in terms of subsection (2)(b) only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2). '

441 Section 125(4) reads: 'Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.'

442 Steytler, N 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in Intergovernmental Relations: A Festhschrift for Ronald Watts as quoted in Woolman and Roux above at 14-6.

443 Rautenbach and Malherbe above at 63.

444 The following rules of extensive interpretation come to mind in this regard: *ex consequentibus* (if legislation demands or allows a certain result or consequence, everything which is reasonably necessary to bring about that result or consequence is implied); *ex accessorio eius de quo verba loquuntur* (if a principal thing is forbidden or permitted, the accessory thing is also forbidden or permitted); and *anatura ipsius rei* (which refers to implied inherent relationships – for example, the power to issue a regulation implies the power to withdraw it). See Botha, Christo *Statutory Interpretation: An Introduction for Students* Fifth Edition (2012) at 173.

another sphere of government or an organ of state and to dictate the means by which those objectives are achieved.'[445]

2.23 Furthermore, section 100 of the Constitution too, whilst a transient measure, answers this question affirmatively.[446] Of course, what DSD has in mind by instituting this inquiry is a permanent and enduring solution. A caveat must be added to this equation. The aforesaid solution must not displace the role of Parliament and provincial legislatures in holding the executive accountable for the performance of their functions.[447]

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445 Woolman and Roux above at 14-8. (Our emphasis).

446 To recap, section 100(1) reads: 'When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.' Subsection (2)(b) and (c) provide that:

'(b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.'

447 Sections 92(2) and 133(2) of the Constitution.

Questions

(a) Are the problems related by DSD in this inquiry ascribable to the system of concurrency (allocation of welfare services to both national and provincial governments) prescribed by Part A of Schedule 4 of the Constitution read with section 44(1)(a)(ii), (b)(ii) and 104(1)(b)(i)? In other words, to the blurring of lines of accountability, overlapping of roles, confusion over responsibilities between national and provincial governments, policy tensions between the spheres? If so, how could this be resolved, considering that this 'concurrent jurisdiction is intended' by the Constitution itself? Would an amendment of Schedule 4 of the Constitution, for example, resolve this problem? If so, how could it be amended?

(b) Undoubtedly, the three spheres of government have the power to act coercively. Does that authority extend to spheres of government *inter se* as Woolman and Roux opine? In other words, does section 125(2)(b) of the Constitution empower, by implication, DSD to ensure that its laws are implemented, and to order or prescribe how they should be implemented by provinces? Does the refusal by a provincial government to adhere to the prescripts issued by Minmec in respect of provision of social development services not undermine the effective functioning of the national department of social development? Conversely, do these commands not weaken the ability of provincial governments to perform their function?

(c) Members of provincial executives are accountable to the provincial legislatures in respect of the performance of their functions, including functionaries responsible for social development. Would giving power to Minmec to make binding decisions not impact on this constitutional principle? Furthermore, what role do you envisage Parliament could play in strengthening intergovernmental relations in this sector?

4 Constitutional Court's jurisprudence relating to intergovernmental relations

2.24 As some had predicted,[448] the Constitutional Court has, over the years, developed an extensive reservoir of jurisprudence reflecting its understanding of the principles of cooperative government;[449] and provided model answers to general or specific questions relating to this area of the law.[450] Whilst it has been criticised for not bringing greater clarity on the boundaries and possibilities of the constitutional distribution of powers,[451] the law reform

448 In 1994, De Villiers, Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' at 435-436 stated that the Constitutional Court would play a crucial role in the formulation of legal rules regarding the obligations and rights that all governments would have in respect of one another; would manage the relationships between governments; and that it would be responsible for providing the ground rules for unity and autonomy.

449 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents' *TSAR* Vol 2006 Issue 2 237 at 245.

450 Du Plessis, Lourens 'Chapter 32: Interpretation' in *Constitutional Law of South Africa* at 24-25.

451 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents' *TSAR* Vol 2006 Issue 2 237 at 246.

proposals emanating from this inquiry must be anchored in this jurisprudence.[452] It has been suggested, for example, that the court's initial gloss on Chapter 3 of the Constitution suggests cooperative form of intergovernmental relations and relative parity between the country's three spheres.[453] This section seeks to establish, inter alia, whether such a view is borne out by the Constitutional Court decisions; and if it is, whether it has been sustained by the court, especially in the context of social development. We consider some of the most important cases that have a bearing on issues relevant to this inquiry decided by the court to date below.

(a) Threshold requirement: rationality

2.25 Analysis of the case law emerging from the Constitutional Court relating to the exercise of all power by organs of state reveals two interrelated, but separate questions[454] that must be answered affirmatively before this inquiry can proceed. The first issue, to which we have already alluded in Chapter 1, is whether DSD is acting within its constitutionally defined space by pursuing this legislative reform. As we have said, this relates to legality. The second issue, with which we are concerned here, and assuming that the answer to the first issue is in the affirmative, is whether the rationale proffered by DSD, that a statutory enforcement mechanism is necessary to ensure coordination and uniformity in the provision of social development services by provinces and to advance commitment to equality entrenched in the Constitution, is sufficient to pass the rationality test. This test has been espoused by the court in numerous decisions, notably *New National Party of South Africa v Government of the Republic of South Africa and Othe*rs;[455] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*;[456] and *Affordable Medicines Trust and Others v Minister of Health and Others*[457] where the court held that there must be a rational connection between exercise of power by Parliament, the Executive and other functionaries and the achievement of a legitimate government purpose, otherwise it is arbitrary and capricious. Of significance, in the context of legislation, is what the court said in

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452 The Constitutional Court is the highest court in all constitutional matters; its judgements are final and binding; and only this court may decide disputes between national and provincial governments concerning constitutional status, powers or functions of these organs of state. See sections 165(5) and 167(3) and (4) of the Constitution.

453 Woolman and Roux at 14-6.

454 The two issues are conflated at times, for example in *Pharmaceuticals* case referred to below, the court stated: 'As long as the purpose sought to be achieved by the exercise of public power is *within the authority of the functionary*, and as long as the functionary's decision, viewed *objectively, is rational*, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.' (Our emphasis). The first part of the italicised text relates to legality, and the second part, to the rational connection test.

455 1999 (3) SA 191 (CC).

456 2000 (2) SA 674 (CC) para 85-86.

457 2006 (3) SA 247 (CC) para 74 *et seq*.

New National Party decision above that the absence of such rational connection would result in the measure being unconstitutional. At the very least, a legitimate government purpose is one that is not inimical to, or does not contravene, the Constitution.

Question

Are the reasons advanced by DSD in support of its quest for a model statutory enforcement mechanism to enforce decisions agreed upon at Minmec for social development sector and to ensure uniform compliance by provinces to these resolutions, sufficient to discharge the rationality test expounded by the court in the cases referred to in the preceding paragraph? As indicated in Chapter 1, DSD has argued that such an intervention is necessary to ensure that social development services are provided in a coordinated, uniform, standardised and equal manner across the country.

(b) Stifling provincial autonomy

2.26 For guidance as to the type of conduct would encroach on the institutional and functional integrity of provinces, one needs to look no further than the decision of the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (First Certification judgment)*.[458] In this case, whilst considering challenges that various framework provisions of the new text of the constitution either individually or collectively constituted an invasion of provincial autonomy, the court pointed out that:

> 'Provincial governments, like other levels of government, have to conduct their affairs within the prescribed framework. *As long as the framework does not constrain the exercise of provincial powers in ways which would prevent the provinces from effectively exercising the powers* vested in them by the NT, the framework is not relevant to their autonomy.'[459]

2.27 We interpret the above statements to mean that in respect of matters over which they have jurisdiction, provinces cannot be deprived of the power to make decisions in relation to those matters, prevented or unduly constrained from exercising their power. Such deprivation or constraint, if it occurred, through whatever means, would be unconstitutional.[460] In

458 1996 (4) SA 744 (CC).

459 *Id* at para 293.

460 In para 278, the court reiterated this stance, stating: 'If the PSC has advisory, investigatory and reporting powers which equally apply to the national and provincial governments, and the provinces remain free to take decisions in regard to the appointment of their own employees within the framework of uniform norms and standards, the changes will neither infringe upon their autonomy nor reduce their powers. But if the provinces are deprived of the ability to take such decisions themselves, that would have material bearing on these matters.'

fashioning law reform proposals, care must be taken to ensure that powers of provincial government are not rendered nugatory.[461]

(c) Do provinces have equal status with national government?

2.28 In two premier decisions dealing with the distribution of power between national and provincial governments and concurrency matters, namely *Premier, Western Cape v President of the Republic of South Africa*[462] and *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*[463] the court underscored the constitutional injunction to cooperate, lending credence to the notion that the Constitution envisages 'cooperative government' as opposed to 'coercive federalism'.

2.29 In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, the court stated:

> 'The first provision of the Constitution constitutes the Republic of South Africa as 'one, sovereign, democratic State'. The unitarian emphasis of this provision is, however, not absolute, since it must be read in conjunction with the further provisions of the Constitution, which show that governmental power is not located in national entities alone. That appears particularly from s 40(1), in terms of which 'government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated', and from s 43, in terms of which the legislative authority is vested in Parliament for the national sphere, in the provincial legislatures for the provincial sphere and in municipal councils for the local sphere. Section 40 is part of chap 3. This introduced a 'new philosophy' to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of s 40(2) to observe and adhere to the principles of co-operative government set out in chap 3 of the Constitution.'[464]

2.30 However, in *Premier, Western Cape v President of the Republic of South Africa,* a case in which the Western Cape provincial government raised objection to legislative scheme introduced by amendments to the Public Service Act on the basis that it infringed the executive power vested in provinces by the Constitution and detracted from the legitimate autonomy of provinces recognised in the Constitution, and in which the court had to answer the question whether Parliament could prescribe how provincial administrations should be structured and

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461 See also *Premier, Western Cape v President of the Republic of South Africa* at para 60 where the court made exactly this point.

462 1999 (3) SA 657 (CC) at paras 50, 53, 54 and 59.

463 2000 (1) SA 732 (CC).

464 *Id* at para 40.

whether such a scheme fall foul of the provisions of Chapter 3 of the Constitution,[465] the court went further than just explaining the meaning of various provisions of Chapter 3 of the Constitution;[466] and why cooperation is important in intergovernmental relations.[467] It focused on the meaning of section 41(1)(g) of the Constitution. First, it traced the origins of this provision to Constitutional Principle XX.[468] Secondly, it explained that it is concerned with the way power is exercised not with whether or not the power exists. Thereafter, it added that its purport:

> '...*seems to be to prevent one sphere of government using its power in ways which would undermine other spheres of government, and prevent them from functioning effectively'*

2.31 As we stated elsewhere in this issue paper, this principle begs the question whether the conduct of provinces does not thwart national government from fulfilling its mandate, and thus violate this cardinal principle of intergovernmental relations

(d) Accretion of power by national government through interpretation

(i) General

2.32 A survey of more decisions emanating from the court, and further reading of the cases referred to above or commentary on them, suggests that the domination of national government in intergovernmental relations has displaced 'cooperative intergovernmental relations'. For example, in *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In*

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465 *Id* at paras 1-7. The main contention of the Western Cape government was that it was part of the executive power of a province to structure its own administration and that this legislative scheme which sought to impose such structure on the provinces infringed this provincial power.

466 First, in relation to section 40, which describes spheres of government as distinct, interdependent and interrelated, it explained first that this was consistent with the way powers have been allocated between different spheres of government; and further that 'distinctiveness' lies in the provision made for elected governments at national, provincial and local levels; that 'interdependence' and 'interrelatedness' flow from the founding provision that South Africa is one sovereign and democratic state and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.

467 First, it observed that principles of cooperative government set common goals for all spheres of government. Secondly, it emphasised that *in the fields of common endeavour, the provisions of Chapter 3 are designed to ensure that the different spheres of government cooperate with each other* to secure the implementation of legislation in which they all have a common interest. Thirdly, it explained why cooperation was necessary, holding in this regard that in the field of concurrent implementation of laws, such cooperation was necessary to avoid conflicting provisions, to determine the administration that will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments. *Id* at para 55.

468 This constitutional principle required that 'national government shall not exercise its powers (exclusive and concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.' *Id* at para 56.

re Certification of the Constitution of the Province of KwaZulu-Natal 1996,[469] the Constitutional Court insinuated that provinces are subordinate to the national government and Parliament. Responding to the arrogation by the KwaZulu-Natal legislature of powers it did not have, including an attempt by that province to define its status within the Republic in its draft Constitution, the court held that provinces '*are the recipients and not the source of powe*r' and that the provisions purporting to usurp powers and functions of Parliament and the national Government '*appear to have been passed by the KwaZulu-Natal legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly*.'[470]

2.33 In *Premier, Western Cape v President of the Republic of South Africa* referred to above, the court, after holding that the national legislature is more powerful than other legislatures, made the following remarks which confirm the view above.

> '*The national government is also given the responsibility for ensuring that other spheres of government carry out their obligations under the Constitution*. In addition to its powers in respect of local government, it may also intervene in the provincial sphere in circumstances where a provincial government 'cannot or does not fulfil an executive obligation in terms of legislation or the Constitution.''[471]

2.34 The court did not qualify the statement in the first sentence in the quotation above; it is therefore a general statement. And, this is borne out by its reference to, and quoting with approval, what it said in the *First Certification* judgment,[472] that:

> '...the CPs contemplated that the national government would have powers that *transcend provincial boundaries and competences* and that 'legitimate *provincial autonomy does not mean that provinces can ignore [the constitutional] framework or demand to be insulated from the exercise of such power*.' Nor does it mean that provinces have the right to veto national legislation with which they disagree, or to prevent national sphere of government from exercising its powers in a manner to which they object.'[473]

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469 1996 (4) SA 1098 (CC).

470 *Id* at para 14 and 15.

471 *Id* at para 53.

472 In the *First Certification* judgment it considered the question whether the requirements of CP XX calling for 'legitimate provincial autonomy' had been complied with. It held that: 'the CPs do not contemplate the creation of sovereign and independent provinces; on the contrary, they contemplate the creation of one sovereign State in which the provinces will have only those powers and functions allocated to them by the NT. They also contemplate that the CA will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. Legitimate provincial autonomy does not mean that provinces can ignore that framework or demand to be insulated from the exercise of such power.'

473 *Premier, Western Cape v President of the Republic of South Africa* at para 59.

(ii) Firmly establishing dominance of national government over provinces – National Education Policy, Liquor Bill and Mashavha (and Vumazonke) cases

2.35 In the light of the various decisions referred to above, and after considering sections 100 and 146 of the Constitution and reflecting on the decisions of the Constitutional Court and Eastern Cape Provincial Division discussed below, there appears to be a tilting of the scales in favour of national government. And, it does appear that in respect of welfare services, the decisions of DSD prevail.

(aa) National Education Policy case

2.36 One decision of the Constitutional Court on point in relation to the issues raised in this investigation is *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 (National Education Policy case)*.[474] In 1995, the national Department of Education promoted the National Education Policy Bill[475] to which a number of parties represented in Parliament objected on the basis that that it trenched on the powers of provinces.[476] As the matter arose during the subsistence of the interim Constitution, it was dealt with in terms of that Constitution. But, why does this decision matter? The Bill impugned in this case concerned a functional area *over which both the national and provincial governments had jurisdiction* [477] as is the case in this inquiry and the Bill was challenged on the basis that it encroached on the autonomy and executive authority of provinces as may well be the case in this investigation. The case provides answers a number of issues germane to this inquiry, for instance, whether provinces could be compelled to align their welfare services to national prescripts and

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474 1996 (3) SA 289 (CC).

475 National Education Policy Bill 83 of 1995.

476 The Democratic Party, National Party and Inkatha Freedom Party raised constitutional issues relating to this Bill. As a consequence, the Speaker of the National Assembly referred it to the Constitutional Court in terms of section 98(2)(d) and 98(9) of the interim Constitution.

477 For a detailed discussion of the implications of vesting concurrent legislative power on two legislatures, see *National Education Policy* case at para 13-16. For now, it suffices to say that Schedule 6 of the interim Constitution itemised 'education at all levels, excluding university and technikon education' as a matter of legislative competence of provinces. this provisions must, however, be read in conjunction with section 126 of the interim Constitution which provided that:
'126 Legislative competence of provinces
(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.
(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.
(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).'

commands and whether they could be forced to participate in intergovernmental structures emanating from this inquiry.[478]

Can provinces be required to align the provision of services to national prescripts and commands through legislation?

2.37 Objections were taken to clauses of the Bill relating to the development and implementation of national policy and its application to provinces;[479] participation of provinces in intergovernmental structures created by the Bill (the Council of Education Ministers and the Heads of Education Departments Committee);[480] empowering national government to monitor and evaluate the standard of education provided by provinces; and the enforcement mechanism intended to ensure compliance with national policy on education and constitutional injunctions relating to this functional area. Now that it is settled law that national policy (and norms, standards and frameworks) contained in legislation is binding on provinces and supersedes provincial law,[481] aspects of the judgment relating to this facet will not be considered further. We now turn our attention to the enforcement mechanism. Clauses 8(6) and (7) of the Bill provided:

> '(6) If a report prepared in terms of ss (5) indicates that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with the policy determined in terms of s 3(3), the Minister shall inform the provincial political head of education concerned and require the submission within 90 days of a plan to remedy the situation.
>
> (7) A plan required by the Minister in terms of s ss (6) shall be prepared by the provincial education department concerned in consultation with the Department (of Education), and the Minister shall table the plan in Parliament with his or her comments within 21 days of receipt, if Parliament is then in ordinary session, or, if Parliament is not in ordinary session, within 21 days after the commencement of the first ensuing ordinary session of Parliament.'[482]

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478 This is important because the interim Constitution provided in section 92(2) and (3) that the Minister *must* administer his or her portfolio in accordance with the policy determined by the Cabinet, and gave the President necessary power to ensure there was conformity with such policy. This explains why the National Education Policy Bill, and the Act subsequently, states that the Minister of Education *shall determine national education policy*. Section 85 of the 1996 Constitution is much clearer in this regard, stating in subsection (2)(b) that the President exercises executive authority *together with other members of the Cabinet*, *by developing policy*.

479 Clause 3(3) of the Bill provided that: 'Whenever the Minister wishes a particular national policy to prevail over the whole or a part of any provincial law on education, the Minister shall inform the provincial political heads of education accordingly, and make a specific declaration in the policy instrument to that effect.'

480 Clauses 9 and 10 of the Bill.

481 Section 146(2)(b) of the Constitution.

482 As quoted in para 10 of the *National Education Policy Bill* judgment.

2.38 Whilst conceding that Parliament had the authority to enact the legislation in question establishing consultative structures and enabling the department to procure information from provincial education departments,[483] two broad challenges[484] were mounted by the petitioners against these clauses. The first challenge was that:

> '...the provisions of the Bill read together went further than that: they would oblige members of provincial executive councils to promote policies that might be inconsistent with provincial policy, require them where necessary to amend their laws to bring them into conformity with national policy, and in effect would empower the Minister to impose the national government's policies on the provinces...insofar as the Bill imposed such obligations on the provincial administrations, it would be inconsistent with the Constitution.'[485]

2.39 The second challenge, which did not beat about the bush, was that if the 'policy' referred to in the Bill:

> 'was used in the sense of a mere wish or expectation on the part of the national Minister it would be unobjectionable, but the term as used appears to go beyond this as it is given a sanction in the form of an *enforcement mechanism*.'[486]

2.40 The third challenge also confronted the impact the abovementioned provisions would have on provinces. It was contended that provinces could formulate and regulate their own policies and the imposition of a national policy *would encroach upon their autonomy and executive authority*.[487]

The court's response to these challenges

2.41 On the whole, the court held that there was nothing untoward about this Bill.[488] The Bill addressed policy issues in a situation in which Parliament exercises concurrent legislative power with the provincial legislature in respect of Schedule 6 matters. Of course, this must be seen in the context of the interim Constitution which, in contrast to the final Constitution,[489]

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483 *Id* at para 6.

484 See paras 6 and 8 of *the National Education Policy Bill* case supra.

485 *Ibid*.

486 *Id* at para 8. (Our emphasis).

487 *Ibid*.

488 The court held that: (a) none of the objectives of the Bill was inconsistent with the Constitution; (b) Parliament had the competence to make laws in respect of education, and the determination of policy was necessary for that purpose; (c) consultation prior to the determination of policy served to restrict rather than to increase the power of the Minister; and that the publication and implementation of national education policy and the monitoring and evaluation of education were also not open to challenge, *unless if they were done in a manner which infringed the powers of provinces*.

489 Section 85 of the final Constitution provides that:

'(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

entrusted the policy making responsibility to Cabinet;[490] and was reticent as to whether national policy was binding on provinces. In the course of its judgment, the court also dealt with the elephant in the room in that case, a central issue in this inquiry too, namely whether an Act of Parliament could require a provincial political head of education to cause a plan to be prepared as to how national standards can best be implemented in the province.[491] In other words, whether national government can, through an Act of Parliament, require provinces to align the provision of services to national prescripts and commands. Dealing with clauses 8(6) and (7), the court first held that these provisions of the Bill:

> '...also gives rise to no obligation on the part of provinces to adopt national education policy in preference to their own policy, or to amend their legislation to bring it into conformity with national policy. The provincial political head of education can be called upon to prepare a plan to bring standards of education in his or her province into line with what may be required by the Constitution or national policy if a report has been made under clause 8(5) that such standards are not being met. There is, however, no obligation imposed on the province by the Bill to implement that plan if it chooses not to do so. *That obligation could possibly be imposed by other legislation which passes the test of s 126(3) and (4)*, but the Bill itself makes no specific provision for that to be done. It contemplates that such legislation may be enacted, but only after consultation has taken place.'[492]

2.42 And, further explained that:

> 'Clauses 8(6) and (7) of the Bill contemplate a situation in which a provincial political head of education may be called upon to secure the formulation of a plan to bring education standards in the province into line with the Constitution. *If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must also be complied* with. The effect of clauses 8(6) and (7) is therefore to give the province concerned an opportunity of addressing the alleged shortfall in standards itself, and of suggesting a remedial action that should be undertaken. *And this is so even if the national standards have been formulated, but have not yet been made subject of legisla*tion. The alternative would be for government to act

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(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrations;
(d) preparing and initiating legislation; and
(e) performing any other executive function provided for in the Constitution or in national legislation.'

490 Section 92(2) of the interim Constitution provided that: '(2) A Minister shall administer his or her portfolio in accordance with the policy determined by the Cabinet. (3) If a Minister fails to administer his or her portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with such policy.'

491 *Id* at para 33.

492 See para 30.(Our emphasis).

> unilaterally and to take decisions without allowing the province this opportunity.'[493]

2.43 Neither the court nor the parties explained the importance or purpose of tabling the remedial plan intended to address shoddy standards in the provision of education in the provinces. It may well be that this provision was intended to promote transparency and to ensure that the executive is accountable to Parliament. The problem with this clause is that it rendered not just the Minister of Education accountable to Parliament, but members of the provincial executive responsible for education too.

Can a member of the provincial executive be coerced to participate in an intergovernmental structure?

2.44 Lastly, the court responded to the argument that the structures created by the Bill would interfere with the executive authority of provincial political heads in that they would be required to participate in these structures in which they would wish not to participate and to promote policies that they may not wish to promote. The court held that the Bill did not interfere with executive authority in the province to administer their own laws; it only established bodies the purpose of which was to formulate mutual policies, coordinate matters of mutual interest, and exchange information. There was no compulsion on provincial political heads or officials to participate in the affairs of the council or committee. The Bill gave them the right to do so, but if they chose not to, the only sanction was that national policy could be formulated without them. And, neither the council nor the committee could require a province to change its laws or policies or to refrain from implementing provincial laws.[494] The following response in respect of this challenge is apposite:

> 'These [the Council and Committee] are fora for the discussion of mutual problems and for the development of national policy along lines that would be acceptable to the national government and the provinces. The decisions of these bodies are not binding on the provinces or the national government, and any participant is free to distance his or her government from such decisions. The fact that the functions of these bodies include the development and promotion of a national policy does not give rise to any obligation on the part of a provincial administration to approve of or adopt such policy. Provinces are free to develop and implement their own education policies. If they do so in a way that conflicts with national education policy, and that conflict is in respect of matters falling within the purview of s 126(3)(a)-(e) of the Constitution, the province concerned may possibly be required by the Minister to amend their policies. But, in the absence of agreement or legislation lawfully enacted by Parliament that requires them to do so, they have no obligation to comply with

493 *Id* at para 35.
494 *Id* at para 37.

> any demand that might be made by the Minister, the council or the committee for them to implement national policy.[495]'

2.45 In mounting its challenge to the constitutionality of the Bill on the grounds that it obliges provinces to adhere to national education policy, counsel for one of the petitioners relied heavily on the majority decision of the United States Supreme Court in *New York v United States*[496] which concerned the question whether the federal government could issue directives to states. We deal with this judgment in some detail in the last chapter of this issue paper.[497] For now, it suffices to highlight the dichotomous response this question engenders in all multitiered systems. The majority in that case concluded that 'congress had no power to compel states', while the minority held that 'principles of federalism have not insulated states from mandates by the national government' and that the 'notion that Congress does not have the power to issue a simple command to state governments to implement legislation is incorrect and unsound'. By virtue of the differences between the two systems, the court held that the decisions of the courts of the US dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution.

Court's decision

2.46 The court concluded that none of the provisions of the Bill was inconsistent with the Constitution, in a sense giving permission to Parliament to proceed and enact this law. And, Parliament did just that. It passed the National Education Policy Act in April 1996. We discuss the salient provisions of this Act below under the rubric 'model laws enacted by other departments.'

(bb) Liquor Bill case

2.47 After the *National Education Policy* case, came the *Liquor Bill* case which saddled the court with the responsibility to adjudicate on the constitutionality of a measure to regulate the liquor trade.[498] The Liquor Bill was introduced in Parliament by the Department of Trade and

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495 *Id* at para 36.

496 505 US 144 (1992).

497 See Chapter 3 para 3.59.

498 The Liquor Bill divided the economic activity relating to the liquor industry into three categories, namely production, distribution and retail sales; and divided the responsibility for this 'three-tier registration system' between national and provincial governments. The distribution and manufacturing of liquor was treated as a national issue, whilst the retail sales were to be dealt with by provinces. The national liquor authority was to have the responsibility of considering whether statutorily prescribed requirements for registration as a wholesaler or distributor had been met and with considering the merits of an application, and determining the terms and conditions applicable to the registration that conformed to the prescribed criteria, norms and standards, pertaining, among others, to limiting vertical integration, encouraging diversity of

Industry. A few issues arose in this case which are relevant to the matter under consideration. First, it was contended that the Liquor Bill encroached on exclusive provincial competence;[499] and that the Constitution envisaged that the provincial system of government with its attendant exclusive legislative powers would lead, over time, to differences between provinces' approaches to the matters within their legislative and executive competence.[500] Secondly, it prescribed in detail how provinces should discharge their mandate in retail licenses, which raised the question whether these provisions, which clearly intruded on a subject of exclusive provincial competence, were reasonably necessary for, or incidental to, as contemplated in section 44(2) or (3) of the Constitution. Thirdly, in response, the Minister of Trade and Industry disputed that the Bill was a licensing measure, arguing instead that it was directed at trade, economic and competition issues on the one hand, and health and social welfare issues on the other. Furthermore, making a case for the national system of regulation, the Minister of Trade and Industry stated:

> '...that duplicated or varying provincial licensing requirements would be 'unduly burdensome' for manufacturers and that it was therefore 'economically imperative that control over the activities of manufacturers should take place at national level'...that major industries, including the liquor industry 'as a single integrated industry' should not have to run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces...including deleterious effect of 'cross-border arbitrage between competing provinces. *Without a national system of regulation and a national standard to which wholesalers will have to adhere the result would be chaotic*. The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa.'[501]

Court's determination of the scope of national and provincial powers and their interconnectedness

2.48 In its response to these contentions, the court inferred from section 44(2) of the Constitution, which it said entrusted national government with overriding powers, inter alia, to establish and maintain essential national standards for the provision of services; and section 146, which provides that legislation within the concurrent terrain of Schedule 4 that applies uniformly throughout the country, takes precedence over provincial legislation:

> '...*where a matter requires regulation inter-provincially*, as opposed to intra-provincially, the Constitution ensures that *national government had been*

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ownership and facilitating the entry of new participants into the industry. See paras 34 and 35 of the *Liquor Bill* case.

499 Part A of Schedule 5 of the Constitution lists 'liquor licences' as a functional are of exclusive legislative competence.

500 *Id* at para 82.

501 See para 77 of the judgment.

> *accorded the necessary power*, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by s 44(2).'[502]

Implications of the constitutional structure on intergovernmental relations and significance of section 44(3) of the Constitution

2.49 In the course of its judgment, the court made three comments that equally apply to the issue at hand. The first comment relates to the structure our Constitution. It stated in this regard:

> '... the national government has...in any event shown that, if the exclusive provincial legislative competence in respect of 'liquor licences' extends to licensing production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under s 44(2). Economic unity as envisaged in s 44(2) must be understood in the context of our Constitution, which calls for a system of co-operative government, in which provinces are involved largely in the delivery of services and have concurrent legislative authority in everyday matters such as health, housing, and primary and secondary education. They are entitled to an equitable share of the national revenue, but may not levy any of the primary taxes and may not impose any tax which may 'materially and unreasonably' prejudice national economic policies, economic activities across provincial boundaries or the national mobility of goods, services, capital or labour. Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another. In the context of trade, economic unity must, in my view, therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial level).'[503]

2.50 The second comment relates to the meaning of section 44(3) of the Constitution,[504] which, as we pointed out, could be used as basis for the intervention pursued by DSD. As stated above, the Bill contained provisions which in minute detail prescribed how provinces should discharge their mandate relating to the award of retail licences, a functional area of exclusive provincial competence. It prescribed structures that should be set up, and how these structures should go about considering and awarding licences and could therefore be justified if were necessary for or incidental to the substance of the Bill. In relation to these provisions, the Minister of Trade and Industry averred that consistency of approach was important. The court warned that '*importance does not amount to necessity and the desirability from the*

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502 *Id* at para 51 and 52.

503 *Id* at para 75.

504 Section 44(3) of the Constitution provides: 'Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.'

national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence and no other sufficient grounds for such an intrusion were advanced.'[505] Although in the end, the court decided that an inquiry in terms of this section was not necessary, it stated in respect of this phrase that:

> (a) On one approach, it authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into Schedule 5 where this is reasonably necessary for, or incidental to, the effective exercise of a Schedule 4 power. On another approach, s 44(3) is not directed to the Schedule 5 competences at all, but is designed to specify the ambit of national legislation covered by s 146, which regulates conflict between national and provincial legislation falling within functional area in Schedule 4. The express allusion in s 44(3) to Schedule 4 legislation may provide support for this approach.'[506]
>
> (b) It should be interpreted as meaning 'reasonably necessary for and reasonably incidental to.'[507]

2.51 Thirdly, the court insinuated that if there was no provincial law regulating a matter within its jurisdiction, a national scheme stipulating national standards would be 'necessary'; and that if there was already national legislation in place which provided for minimum standards in respect of certain functional area, the enactment of another Act to do exactly the same would be unwarranted. It stated in this regard:

> 'This is not to say that in the absence of provincial legislation a national scheme providing for minimum standards in the field of retail sales, to operate in default of provincial provisions in this regard, would not be competent as being 'necessary' within s 44(2). It was common cause that none of the provinces had in the exercise of their exclusive legislative competence enacted any legislation in the field of 'liquor licences'. If Parliament deems it necessary to repeal the existing liquor legislation, including the Liquor Act of 1989, in the exercise of its national competence, the resulting void, if not filled by provinces, may well entitle Parliament to provide by way of legislation for such minimum standards and procedures, It is at present, however, unnecessary to consider that question.'[508]

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505 *Id* at para 80. In respect of retail liquor sale, the court held that national government failed to show that the retail structures sought to be erected by the Bill were reasonably necessary for or incidental to the national system created for producers and distributors. The same considerations applied to the Bill's provisions regarding micro-manufacturers, manufacturers of sorghum beer. The court held that these provisions conferred national permission for retail sales in circumstances where national government had not made a case under section 44(2) for intervening in the provinces' exclusive legislative competence. *Id* at para 82 and 83

506 *Id* at para 44.

507 *Id* at para 81.

508 *Id* at para 85.

2.52 The similarities between section 44(2), on which the court located the view above, and section 146(2)(c) of the Constitution,[509] renders the above interpretation applicable to the latter provision. Section 146(2)(c) of the Constitution provides another justification for the legislative reforms sought by DSD.

The court's decision

2.53 The court concluded that given the history of liquor trade, the need for vertical and horizontal regulation, the need for *racial equity* and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, the 'economic unity' requirement of section 44(2) had been met and that the manufacture and distribution of liquor required national, as opposed to provincial, regulation'; that in respect of the manufacturing and distribution of liquor the Constitution entrusts the legislative regulation to the national Parliament; that it was obvious these trades required control and the most effective way of doing so was through national regulatory system; that this would enable government to regulate the trade vertically and horizontally, to set common standards for all traders and enables traders to conduct their activities with a single licence, according to a single regulatory system. [510]

(cc) *Destabilising the notion of coordinate spheres - Mashavha case*

2.54 In *Mashavha v President of the Republic of South Africa*,[511] the Constitutional Court dealt *coup de grace* to the idea that national and provincial governments were coordinate spheres of government, at least in the context of welfare services. This case concerned the assignment of the administration of certain provisions of the Social Assistance Act (SAA)[512] to provinces by the President in accordance with the provisions of the interim Constitution.[513] This Act repealed and replaced several statutes dealing with the payments of grants to people in need and to welfare organisations that cared for them and consolidated them into a single legislation.

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509 This section provides: 'Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.'

510 See paras 76 and 78 of the *Liquor Bill* case.

511 2005 (2) SA 476 (CC).

512 Act 59 of 1992.

513 Section 238(8) of the interim Constitution.

2.55 The applicant in this matter contended that had it not been for the purported assignment of the administration of this Act to Limpopo Province, his grant would have been approved and paid within a reasonable period; he would have been able to rely on a consistent standard of the definition of disability; and his grant would not have been subjected to the vagaries of the budgeting administration of Limpopo or potential demands for the reallocation of social assistance moneys to other purposes.[514] He further argued that the assignment of the SAA to provinces gave rise to confusion and fragmented approaches, a contention disputed by some provinces.[515]The question that arose sharply in this case therefore was whether the SAA dealt with a matter that, to be performed effectively, required to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the country.[516]

2.56 First, the court assumed without deciding the matter that the SAA falls within 'welfare services', a functional area over which both national and provincial governments had jurisdiction,[517] which brought the SAA within the purview of section 235(6)(b) of the interim Constitution.[518] This provision excluded laws with regard to matters specified in section

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514 See *Mashavha* case at para 10.

515 One respondent disputed this, pointing out that the situation is not the same in all provinces and that there was no proof that national government would be able to do any better that the provinces as far as the administration of SAA was concerned. It was further argued that the division of the Republic into nine provinces recognises that different areas have vastly different needs that can be dealt with differently, for example, the Northern Cape needed to deal with problems arising from asbestos mining, that are not present in KwaZulu-Natal, where AIDS dictates a different focus; the extent of rural poverty in the Eastern Cape or Limpopo would have different consequences and create greater needs than, for example in Gauteng where feeding schemes may be required. It was further submitted that a person who believes in strong central government would take the view that certain matters require uniform norms and standards, whilst a proponent of a more devolved approach to government would take a different view. See *Mashavha* at para 46, 48, 49 and 52.

516 *Mashavha* at para 52.

517 Schedule 6 of the interim Constitution listed 'welfare services' as one of the functional areas over which provinces had jurisdiction. Section 126 confirmed this by stating:

'(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.'

518 Section 235(6)(b) of the interim Constitution read:

'(6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:

(a) All laws with regard to matters which-

(i) do not fall within the functional areas specified in Schedule 6; or

(ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126 (3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which

126(3)(a) – (e)[519] from being assigned to the provinces. It was in this context that the applicant made the argument that the President did not have the power to assign the administration of

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subsection (8) shall apply mutatis mutandis), shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing function which but for subparagraph (ii) would have been performed subject to the directions of a member of the Executive Council of a province in terms of section 219 (1) shall be performed after consultation with the said member within that province.

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126 (3) shall-

(i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1) (a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or

(ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1) (c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a)..

519 The relevant provisions of section 126 of the interim Constitution read:

'126 Legislative competence of provinces

(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

SAA to the provinces because it had to be nationally regulated in order to be regulated effectively and because it required to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic in order to be performed effectively.[520]

Implications of our constitutional scheme on concurrent matters

2.57 In responding to the contention above, the court held, first that:

> 'It is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.
>
> The interim Constitution indeed recognises provinces and provincial as well as national government and in doing so, allows for differences. Therefore s 126(1) provides for concurrent competence of provincial legislatures to make laws with regard to matters which fall within the functional areas specified in Schedule 6. However, the interim *Constitution also clearly recognises the need for uniformity in certain circumstances*; hence s 126(3) provides that national legislation will sometimes prevail over otherwise competent provincial legislation.'[521]

Utility of models adopted in other jurisdictions

2.58 Secondly, the court turned its attention to the submission that South Africa must emulate other countries and entrust the provision of welfare services to provincial governments. As in the National Education Policy case,[522] the court took a dim view of transplanting ideas developed in other countries. It pointed out that this approach ignored the political, social and economic history of our country. And, added that:

> 'Our history is well known. It is one of colonisation, apartheid, economic exploitation, migrant labour, oppression and balkanisation. Gross inequalities were deliberately and legally imposed as far as race and also geographical areas are concerned. Not only were there richer and poorer provinces, but there were 'homelands', which by no stretch of the imagination could be seen to have been treated on the same footing as 'white' South Africa, as far as the resources are concerned. These inequalities also applied to social assistance – an area of governmental responsibility very closely related to human dignity. The history of our country and the need for equality cannot be ignored in the interpretation and application of s 126(3). Equality is not only recognised as a fundamental right in both the interim and 1996 Constitutions, but also as a foundational value. To pay, for example, higher old pensions in Johannesburg

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(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).'

520 *Mashavha* at para 40.

521 *Id* at para 49 and 50. (Our emphasis).

522 See paragraph 2.45 above.

> in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.[523]

Centralising social assistance

2.59 As to the question whether the SAA dealt with a matter that to be performed effectively required to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the country, the court stated:

> 'One of the criteria to determine whether the matter may be regulated by national legislation is whether it will be effective to do so; another is whether it is a matter which needs uniform norms and standards to be set; a third is whether it is necessary to set minimum standards for the delivery of public services. *All three criteria recognise that there are times when uniformity is appropriate*...It may be that reasonable people may legitimately differ in the application of these standards, but it is the standards set by the Constitution which must guide this...determination...not political philosophy...'[524]

2.60 Applying this to this case, the court held:

> '...social assistance to people in need is indeed the kind of matter referred to in s 126(3)(a), and in a wider sense envisaged by the meaning of the need for minimum standards across the nation in ss (c). Social assistance is a matter that cannot be regulated effectively by provincial legislation and that requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic, for effective performance. Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality, for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be antithesis of effective regulation and performance.'[525]

2.61 Having observed that the Minister of Social Development and Director-General of Social Development are central in virtually all sections of the SAA, the court further held that there was nothing in the SAA which could justify entrusting the administration of some of its provisions to provinces.[526] The court concluded that the proclamation was not valid insofar as it purported to assign the administration of the SAA to the provinces.

2.62 This decision is often cited when a charge is made that the Constitutional Court has failed to bring about clarity on the boundaries and possibilities of the constitutional distribution of power and that it has done very little to arrest the tendency of national government to

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523 *Mashavha* at para 51.
524 *Id* at 53.
525 *Id* at para 57.
526 *Id* at para 65.

centralise power over concurrent matters. The effect of this decision, it has been argued, is that 'social assistance is being centralised, despite it being a concurrent matter according to the Constitution.'[527]

2.63 The far-reaching implications of this decision become even more apparent when one considers that the meaning of 'social assistance'[528] at the time of the *Mashavha* case covered the entire mandate of DSD.[529]

(dd) Vumazonke v MEC for Social Development

2.64 Equally important is the decision of the South Eastern Cape Local Division in *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases*[530] to which we have referred previously, which laid bare maladministration and inefficiency in the administration of social assistance in the Eastern Cape and the attendant impact on the rights to equality and human dignity of people in that area in the early 2000s. In this case, the court held that section 195 of the Constitution and the Public Service Act were also crucial in dealing with infractions involving provincial departments of social development. But, most importantly, the court also held that the buck stops with the national Minister who is responsible for the maintenance of norms and standards in the provision of welfare services. It stated in this regard:

> 'Those who are principally responsible for addressing the breakdown in proper administration, in compliance with the provisions of the Constitution, in the respondent's department – apart from the respondent herself who is, after all, the political head of the department, responsible to the Premier and the legislature for the performance of her functions – are the Premier of the province, in whom the executive authority in the province is vested; the Social Development Standing Committee of the provincial legislature, which is responsible for overseeing the performance of executive and administrative functions of the respondent's department; and the Minister of Social

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527 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' at 246.

528 For example, the Social Assistance Act 13 of 2004 defines this concept to mean 'social grant including social relief of distress' which in turn defines 'social grant' as child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid; and the 'social welfare services' in the National Welfare Act 100 of 1978 is defined broadly. Both definitions accord with general definition of the concept to mean assistance regulated through legislation, is the exclusive responsibility of the state, financed through taxes and afforded by government to inhabitants who have met contingencies recognised by law for instance assistance to older persons, to caregivers of children and foster parents who are unable to provide sufficiently for their children and to disabled persons. See Strydom, Elize 'Chapter 1: Introduction to Social Security Law' in Strydom et al *Essential Social Security Law* Second Edition (2001) at 7 *et seq*.

529 As stated elsewhere in this issue paper, the Social Assistance Act only deals with payment of grants by SASSA. Other legislation referred to throughout this document, such as the Older Persons Act now regulate 'social welfare services.'

530 2005 (6) SA 229 (SE).

> Development in the national sphere of government, who is responsible for the maintenance of norms and standards in the provision of social assistance.'[531]

(e) Summary of rules, principles and guidelines emerging from case law

2.65 We can distil the following rules, principles and guidelines from the jurisprudence alluded to in the preceding paragraphs.

2.65.1 Although it is clear from the case law above that national and provincial governments are not coordinate partners; and that in general, and in respect of welfare services in particular, a matter which requires regulation inter-provincially, national government has the upper hand, DSD in its pursuit of legislative reform must act within the constitutional framework. This has the following implications:

(a) if DSD does not have the constitutional mandate to pursue this legislative reform, or there is no connection between the legislative reform DSD seeks to introduce and the achievement of a legitimate government purpose, the outcome of this inquiry will be invalid, arbitrary, *ultra vires* and outright unconstitutional; and

(b) if the legislative proposals emanating from this inquiry would prevent provincial governments from effectively exercising their powers (legislative or executive) in respect of matter over which they have jurisdiction, they would be unconstitutional.

2.65.2 It is clear from the *National Education Bill* case that there would be nothing untoward about enacting a law establishing an intergovernmental structure to enable DSD to obtain information from provinces. But, the thorny issue in this inquiry is whether provincial governments could, through national legislation, be called upon to align the provision of services to national prescripts, commands and standards; and whether such prescripts could be enforced. The Constitutional Court stated on more than one occasion in the *National Education Policy* case, that such an obligation could be imposed by legislation contemplated in section 146(2) of the Constitution. Furthermore, it suggested that national standards could be made applicable to provinces even if they have not yet been converted to legislation. Of course, in terms of section 146(2) norms and standards, national policy and frameworks must be contained in legislation for it to be binding on provinces and supersede provincial law. The reasoning adopted by the court, especially in the *National Education Policy* case, which has

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531 *Vumazonke* at para 13.

now been codified in section 146(2) of the Constitution, seems to remove all the hurdles for DSD.

E. Intergovernmental Relations Framework Act

2.66 The South African constitutional structure has been slated on the basis that national government dominates provinces with the result that the latter have become nothing more other than delivery agents for the national government.[532] This has been attributed to the centralising tendency of the ruling party, incorrect interpretation of the relevant constitutional provisions, inability of provinces to perform satisfactorily, and most importantly, to the Intergovernmental Relations Framework Act 13 of 2005 (IRFA).[533]

1 Historical context of IRFA

2.67 Circumstances leading to the enactment of a measure are crucial in its understanding.[534] To ascertain whether the criticism of IRFA above is well-founded, we examine the historical background to IRFA, in particular deliberations during its enactment and how it is generally perceived.

2.68 Two phases are often identified in the development of intergovernmental relations in South Africa; the first phase (1994-2005) when intergovernmental relations were predominantly informal and spontaneous and at the discretion of national ministries; and the second phase (2005 – date) which is statute driven.[535] This characterisation is to a large extent true. However, long before the coming into operation of the 1996 Constitution and the

532 Malherbe, Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' *TSAR* Vol 2006, Issue 4 810.

533 *Id* at 811.

534 Botha, Christo *Statutory Interpretation: An Introduction for Students* Fifth Ed (2012) at 97 and 152.

535 De Villiers, Bertus 'Codification of 'Intergovernmental Relations' by Way of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems' *ZaöRV* 72 (2012) 671 at 672-673.

enactment of IRFA, various executive,[536] legislative,[537] judicial and administrative[538] instruments of cooperation, including specialised agencies that would act as facilitators between levels of government[539] and advisory commission on intergovernmental relations that would have *arbitration, monitoring*, research and *general facilitation* functions,[540] were proposed as options that South Africa could consider to foster intergovernmental relations.[541] Needless to say that some of these have actually found their way into IRFA. But before then, shortly after the commencement of the interim Constitution, a panoply of informal intergovernmental forums had sprung up in which governments and administrative agencies co-operated on a bilateral and multilateral basis.[542] But, how did these forums, in general, and ministerial forums in particular, fare? De Villiers has concluded in this regard that:

> 'Unfortunately the discretion of ministers to decide if meetings were to be called, what would be the agenda, and who would attend the meetings meant that intergovernmental relations functioned far below the required standard and the forums that existed often became forums of dominance by the national ministries and the Party, rather than forums of cooperation and consultation.'[543]

2.69 Besides decrying the domination of national government in these structures, he also stated in relation to decision-making:

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536 The Presidential conferences where the President and Premiers could meet once a year; the Premiers conference where the premiers could meet to discuss matters of common interest; the Ministers conferences where line function ministers at national and provincial levels discuss policy matters on an ongoing basis; and provincial ministers conferences where respective provinces meet without national government to discuss matters of provincial interest.

537 Parliamentary technical committees (composed of national and provincial representatives to formulate policy for areas of common concern as well as provide opportunity for provinces to provide inputs when national legislation is debated); provincial technical committees (where provincial representatives could meet to discuss draft provincial and national legislation and harmonise activities); new legislation forum (where provinces could exchange views and share experience on newly promulgated legislation); and provincial offices to serve as linkages between the respective provinces and national role players.

538 It was envisaged that cooperation at administrative level would not be confined to cooperation between civil servants on national and provincial levels, but would include cooperation between line function departments and specialised agencies to enable the respective departments at national and provincial levels to solve problems, share manpower and other scarce resources and embark on joint planning exercises.

539 The thinking at the time was that specialised agencies could provide inputs to all levels and *also serve as facilitators between levels of governments* involved in various functional areas.

540 This body would provide macro-policy inputs regarding intergovernmental relations (render advice on ways and means to ensure closer cooperation between various levels of government, including *arbitration, monitoring*, research and *general facilitation* as in the case Nigerian commission.

541 For detailed discussion of these options, see De Villiers, Bertus 'Intergovernmental Relations: The Duty to Cooperate – A German Perspective' at 435-437.

542 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006 Issue 2 237 at 244.

543 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 682.

> 'Uncertainty was rife about the status of intergovernmental relations 'decisions' and 'recommendations', as well as who was responsible for follow-up of recommendations; who could be held accountable if there was a failure to implement recommendations; and uncertainty in general about accountability of those serving in intergovernmental structures.'[544]

2.70 By 2005, there was consensus that South Africa needed more certainty and consistency in intergovernmental relations as far as structures, process, representation, objectives, *decision-making*, accountability and reporting were concerned.[545] This followed several reviews of intergovernmental relations which were critical of the lack of uncertainty, reliability and predictability; the wide discretion of ministers; the lack of predictability in consultation and implementation in intergovernmental relations; and the lack of integrated planning and policy implementation as a result of weak intergovernmental relations processes.[546] In fact, an investigation into intergovernmental relations commissioned by government in 2003 found:

> 'IGR forums function optimally when there is clarity on their status, role, governing principles and the relationship between them and the executive authorities they comprise of. Uncertainty and confusion about the ground rules result in inconsistent practices, unreasonable expectations and unconstitutional conduct. These consequences are, unfortunately, not uncommon. A practice has developed where decisions of a MinMEC are taken to be binding decisions on the executive of provinces. MECs do not always table important MinMEC decisions to their executive for approval (or even noting). Not only does it undercut the executive authority of the Executive Council, but it also creates confusion about whether a policy has really been adopted by a government. Moreover, it opens national government to continual claims of unfunded mandates. Clarity on the ground rules of IGR forums is thus essential for the stability and predictability of the system of intergovernmental relations.'[547]

2.71 Therefore, the legislation anticipated in section 41(2) of the Constitution, the Intergovernmental Relations Framework Act of 2005, in addition to providing mechanisms of intergovernmental relations – structures and processes- was supposed to address these defects and propose solutions to them.

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544 *Ibid*. The author further states that as a result of the dominance of the ANC within intergovernmental relations, the state and party became fused as a result decisions would be taken within the Party and communicated via intergovernmental forum.

545 *Id* at 683.

546 *Id* at 684.

547 See Layman, T *Intergovernmental Relations and Service Delivery in South Africa, Report Commissioned by the Presidency* (August 2003) at 21.

(a) The delay in the enactment of the Act

2.72 For almost 10 years, Parliament failed to make good on the promise contained in section 41(2) of the Constitution for legislation to regulate intergovernmental relations which initially vexed even the Constitutional Court.[548] There was generally a concern that legislation would remove ministerial discretion, flexibility and spontaneity to a system that had hitherto operated informally.[549] However, the other reason for the delay was to allow for 'best practices to emerge which could later be captured in legislation'[550] or upon which such legislation might draw.[551] In essence, therefore, IRFA codifies informal arrangements that had been developing since 1994 in the field of intergovernmental relations to ensure certainty, predictability and accountability of those institutions in a manner that was not achieved whilst the institutions operated informally.[552] It also reflects the wisdom of the Constitutional Court on how intergovernmental conflicts should be resolved. [553]

(b) Background discussions

2.73 During the public hearings on the Intergovernmental Relations Framework Bill in 2005,[554] numerous questions arose which are pertinent to this inquiry. Among them: whether the provisions of the Bill were enforceable; whether structures it made provision for would replace informal structures in place; whether it fitted in with the concepts of South Africa as a federal state; the extent to which it would address key national priorities in the implementation of transformation programme, especially with regard to development; whether it captured best practices; and whether it incorporated concepts of a unitary state that clearly defined the powers of the central government and the provinces; and whether the Bill encapsulated the provisions of section 146 of the Constitution that sought to attain uniformity of standards

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548 Woolman, Stu '*L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' *Law, Democracy and Development* Vol 13, (May 2009) 62 at 63.

549 *Ibid*.

550 Malherbe, Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' at 812.

551 Woolman, Stu '*L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' above at 65.

552 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 683 and 685.

553 Woolman, Stu '*L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' above at 66.

554 Provincial and Local Government Portfolio Committee *Intergovernmental Relations Framework Bill: Public Hearings – Meeting Report* (15 March 2005).

across the nation.[555] We understand the last question to mean whether there were principles relating to the unitary state that were incorporated into the Constitution and could thus be included in the Bill.

2.74 To the first question, Professor Steytler responded that:

> '...the Bill needed to be careful because Chapter 3 of the Constitution did not stipulate a 'hard instrument of enforcement', and the co-operation provided in the Bill was a soft form of enforcement. Due to the distinctiveness of each sphere of and the division of power, there was not a top-down approach to the giving of instructions.'[556]

2.75 Turning his attention to the second question, Professor Steytler stated:

> '...the structures included in the Bill displayed a very important principle that the Bill dealt with the relationship between executive authorities...Although the Bill stipulated that the Intergovernmental Relations Forum was not a decision-making body it could make decisions, recommendations and resolutions which could be implemented not by the intergovernmental forum but rather by the constituent members.'[557]

2.76 To the form of South African state, Professor Steytler responded, firstly, that:

> '...the very nature of Chapter 3 was an agreement for South Africa not having a totally centralised state. It was decided that South Africa would have a form of decentralisation that created provinces as well as a strong local government, but this would be done on the basis that South Africa was not a competitive decentralised state but instead a co-operative state. Chapter 3 was thus critical to the nature of the South African state and it was thus crucially important that the Bill captures the notion of co-operation. Emphasis was placed on avoiding disputes through political solutions as opposed to legal solutions.'

2.77 He added:

> 'The Constitution clearly established that South Africa was not a unitary state as a unitary state would have one Parliament as the single source of authority, whereas South Africa had nine provincial Parliaments and 284 municipalities with their own democratic legitimacy. South Africa was clearly a centralised state but working within the framework of Chapter 3 which stipulated that the three distinctive spheres of government were ascribed certain powers, were interdependent and interrelated.'[558]

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555 *Ibid*.
556 *Id* at 6.
557 *Ibid*.
558 *Ibid*.

2.78 Officials of the department added that the Bill sought to address the proliferation of institutions of intergovernmental relations[559] and provided the opportunity to really integrate government around achieving key priorities for the country. Generally, the Bill was seen as an instrument necessitated by conflict between structures of government and thus was an attempt to regulate relations between these, which in turn would ensure effective service delivery.[560]

2 Provisions of IRFA relevant to this inquiry

2.79 The super-ordinate legislation contemplated in section 41(2) of the Constitution, IRFA, came into force on 15 August 2005. This Act is not only intended to provide mechanisms contemplated in the aforementioned constitutional provision, but also to *facilitate*, inter alia, *the realisation of national priorities*.[561] Broadly, this Act deals with three key issues, namely the establishment of intergovernmental forums,[562] how they are supposed to function,[563] and dispute resolution.[564] As stated above, whilst these forums may adopt resolutions or make recommendations, the Act describes them as forums for consultation and discussion, and as lacking executive decision-making powers.[565]

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559 At the time, the Department of Land Affairs was contemplating establishing intergovernmental forums. And when asked whether the Bill would assist in this regard, the Department of Land Affairs responded that 'the objectives could be achieved without the Bill.' *Id* at 5.

560 *Id* at 10.

561 Section 4(d) of IRFA.

562 Chapter 2 of IRFA makes provision for the establishment of the following intergovernmental forums: the President's Coordinating Council (s6); national intergovernmental forums (s9(1)); Premier's intergovernmental forum (s16); other provincial intergovernmental forum (s21); interprovincial forum (s22); district intergovernmental forum (s24); inter-municipal forum (s28)

563 Sections 30, 33, and 34 respectively provide that they may establish intergovernmental technical support structures consisting of officials representing the governments participating in the forum; they *must* adopt rules to regulate the operations, including procedures for the functioning of the forum, the frequency of meetings, procedure for adoption of resolutions or recommendations, and for settlement of intergovernmental disputes; could adopt standard draft internal rules issued by the Minister of Cooperative Governance; and may enter into implementation protocols.

564 It defines an intergovernmental dispute as a dispute between different governments or organs of state from different governments which is justiciable in a court of law (s 1); provides how conflict with other legislation should be handled (s 3); urges parties to participate in efforts to settle intergovernmental disputes (s5(f)); requires, where implementation protocols, internal rules and agency agreement have been adopted or used, dispute resolution mechanisms to be spelt out (s 33(1)(g), 35(3)(g) and 40(2)); urges all organs of state to avoid intergovernmental disputes and institution of legal proceedings inter se (s 40(1)(a) and (b)); implores organs of state to make every reasonable effort to settle the dispute by initiating negotiations with the other party or through an intermediary (s 41(2)); stipulates in detail the consequences of a declaration of a formal dispute by an organ of state, including identification of mechanisms and procedures available to assist in the resolution of the dispute in question, the designation of a facilitator and his or her role, and intervention by the Minister of Cooperative Governance (s42,43 and 44)); and generally discourages organs of state from instituting legal proceedings against each other (s 45).

565 Section 32(1) and (2) of IRFA.

2.80 The problem with this Act, at least as far as the social welfare sector is concerned, is that whilst it seeks to further the realisation of national priorities; empowers forums, including the President's Co-ordinating Council to which we have said issues central to this investigation could have been referred and the Minmec for Social Development Sector, to detect failures and to initiate corrective measures, instructs them to adopt rules, adhere and observe to them; provides dispute resolution mechanisms in the internal rules and implementation protocols,[566]it does not provide any recourse if these are wilfully ignored. These structures have neither coercive power nor are they executive decision-making bodies. And this is the crux of the issue DSD has referred to the Commission for investigation. As stated in Chapter 1, failure by this Act to prescribe what should happen to those who disregard duty to cooperate – lack of a punitive clause - was identified in 2012 already as one of the areas of IRFA needing to be reviewed and reformed.[567]

3 Criticism of IRFA - dominance of national government

2.81 It has been said that IRFA, read with Chapter 3 of the Constitution, lays the basis for the spirit of cooperation and that effective intergovernmental relations require an *all of government* approach – the involvement of all departments and especially civil servants; and that it is the human factor that determines ultimately if the fine legal principles contained in these laws are turned into reality.[568] According to DSD, IRFA itself falls short and some role-players have not lived up to these expectations. There seems to be credence to this assessment. Besides criticism for its silence with regard to horizontal intra-governmental relations,[569] scrutiny to which IFRA has been subjected since its enactment has revealed not only strengths,[570] but the following weaknesses as well. The weaknesses are that communication between the respective spheres principally takes place in a *top-down* way, with the ANC playing a dominant role. There remains *ambivalence about the binding nature*

566 Section 7(c), 11(c), 33(1) and (3), 33(1)(g) and 35(3)(g) of IRFA.

567 Haurovi, Maxwell at 172 and 186.

568 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 689-690.

569 This is a phrase coined by Woolman to describe the problem of how cooperation between provincial departments within any given province should be regulated. Woolman, Stu '*L'etat*, *C'est Moi*: Why Provincial Intra-governmental Disputes in South Africa Remain Ungoverned by the Final Constitution and the Intergovernmental Relations Framework Act – And How We Can Best Resolve Them' at 66.

570 The following strengths have been identified: the philosophy, aim and purpose of intergovernmental relations are well understood; the codification of intergovernmental relations has contributed to greater certainty and transparency; the organisation of government around clusters within functional areas that belong together has been very successful; the clusters have facilitated horizontal and vertical cooperation between governments at all spheres. See De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 688.

of decisions and/or recommendations and the *inability of forums to supervise and enforce decisions*.[571] These weaknesses strikingly accord with the challenges identified by DSD. It has also been conceded that the Act is only a legal framework and will not, by itself, make things happen. *Follow-up of decisions* has been cited as one of factors on which the success of intergovernmental relations would ultimately depend.[572]

2.82 As stated above, the enactment of IRFA was delayed to allow for 'best practices to emerge which could later be captured in legislation'.[573] This delay itself has attracted a lot of criticism. But, most attention has gone to sections 4 and 36 of IRFA. It has been said that section 4 has been clearly drafted from a national perspective.[574] It has been argued though that this section should not be used by national government as an instrument to bring other spheres in line and to force its views upon them.[575] Section 36 which requires provinces to take into account national priorities when developing provincial policies has been described as 'somewhat suspect', [576] with commentators asking why this duty has been imposed on provincial government only and not simultaneously on national government; and concluding that the only logical explanation is that the Act's primary purpose is not to regulate the relationship among the spheres of government, but to ensure the smooth feeding down of national policies and legislation for implementation by other spheres.[577] The reticence of the Act on the role of the National Council of Provinces has also raised some suspicion.[578] On the basis of these, and other provisions,[579] it has been concluded that IRFA is less concerned with intergovernmental relations per se but with national concerns and priorities, specifically the implementation of national policy and legislation; that the purpose of the Act seems to be to secure smooth implementation of these by other spheres; and that there is simply nothing in the Act that that serves as any check on the national government to overrun the other

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571 Baatjies, R and Steytler, N District Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Act, Local Government Project (2006) as quoted in De Villiers Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 688.

572 Other factors are political commitment, training, seniority of person attending meetings.

573 Malherbe, Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' at 812.

574 *Id* at 814.

575 *Ibid*.

576 *Id* at 816.

577 *Ibid*.

578 *Id* at 817.

579 In particular sections 4(d), 7(a) and (b), 11(a) and (b), 18(a)(i), (iii) and (iv), 20(a) and (b), 35(2)(a) and 36(1)(a).

spheres.[580] However, as this inquiry attests, IRFA leaves much to be desired even in respect of this aspect.

F. Intergovernmental relations in social development laws

1 General overview

2.83 As is the case in other national departments, DSD, is responsible for the administration of numerous laws dealing with social development mandates, namely the Advisory Board on Social Development Act,[581] the Children's Act,[582] the National Development Agency Act,[583] the National Welfare Act,[584] Older Persons Act,[585] the Prevention of and Treatment for Substance Abuse Act,[586] the Social Assistance Act,[587] the South African Social Security Agency Act,[588] the Social Service Professions Act,[589] and the Fund-Raising Act;[590] some of which simultaneously establish management,[591] advisory[592] and other structures which perform miscellaneous functions.[593] The existence of several of these structures in the department

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580 Malherbe, Rassie 'Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?' at 817 and 818.

581 Act 3 of 2001. This Act was assented to by the President on 16 May 2001 but has not yet come into operation.

582 Act 38 of 2005.

583 Act 108 of 1998.

584 Act 100 of 1978. The sections of this Act not assigned to provinces by Proclamation R7 published in Government Gazette 16992 of 23 February 1996 have been repealed by section 13 of the Advisory Board on Social Development Act.

585 Act 13 of 2006.

586 Act 70 of 2008.

587 Act 13 of 2004.

588 Act 9 of 2004.

589 Act 110 of 1978.

590 Act 107 of 1978.

591 Section 2 of the South African Social Security Agency Act established the South African Social Security Agency to manage and administer the payment of social assistance. Section 3 and 17 of the Fund-raising Act empowers the Minister to appoint the Director of Fund-raising and boards to manage the Disaster Relief Fund, the South African Defence Force Fund, the Refugee Relief Fund, the State President's Fund, and the Social Relief Fund established by that Act.

592 The Advisory Board on Social Development; the National Development Agency; the South African Welfare Council, the Central Drug Authority; Inspectorate for Social Assistance; Council for Social Service Professions.

593 For example, the Professional Boards for the Social Service Profession contemplated in section 14A of the Social Service Professions Act, among other things, control and exercise authority in respect of all matters affecting the training of persons in the profession and the manner of the exercise of the practices pursued in connection with the professions falling within the ambit of the professional board; communicate to the Minister information on matters of public importance acquired by the professional board in the course of the performance of its functions; to determine minimum standards of education and training of persons practising professions

should be no cause for alarm[594] as long as the remit of each is clearly delineated and each stays in its lane. At the helm of most of these structures, one finds experts appointed by the Minister.[595] Of course, there are exceptions.[596] These have been established to conduct investigations,[597] advise Government[598] and the Minister of Social Development on diverse matters;[599] to act as consultative forums;[600] and to contribute towards the eradication of poverty.[601] Three attributes that these bodies have makes it clear that they are not intended

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falling within the ambit of the professional board; and to assist in the promotion of social services to the population of the Republic.

594 Almost every national department has one or more and sometimes several of these bodies established to gather information, furnish advice and assist in policy formulation. See Baxter *Administrative Law* at 176.

595 The Advisory Board on Social Development consists of not less than nine but not more than 11 members appointed by the Minister of whom one, but not more than three must be a representative of the office of the Minister, the Department of Social Development or the Heads of Social Development; eight are experts with knowledge or experience in social development sector; the National Development Agency acts through a board consisting of five members representing government and six members representing civil society appointed by the Minister of Social Development. The Welfare Council consists of 21 members who are experts who are experts in social problems. The Council for Social Service Profession consists of not less than 19 and not more than 34 members comprising of social workers, 13 other persons appointed by the Minister, and three representatives from professions in respect of which professional boards have been established.

596 The Central Drug Authority is an inter-sectoral structure comprising representatives of 17 national government departments the National Youth Commission, the Medicines Control Council, the National Prosecuting Authority and 13 experts

597 The remit of the Inspectorate for Social Assistance established by section 24 of the Social Assistance Act is, inter alia, to conduct investigations to ensure the maintenance of the integrity of the social assistance frameworks and systems; to execute internal financial audits; to investigate fraud, corruption and other forms of financial and service mismanagement; and the South African Social Security Agency comprises a Chief Executive Officer appointed by the Minister.

598 In terms of section 3(1) of the National Welfare Act, the function of the Welfare Council is to advise government on policy, measures to prevent and combat social problems, measures to improve social welfare services, rendering of social welfare services by welfare and other organisations, research, and any social welfare matter. Section 56(j) lists one of the powers and duties of the Central Drug Authority as being to 'advise government on policies and programmes in the field of substance abuse and drug trafficking.'

599 The Advisory Board on Social Development Act established the Advisory Board on Social Development to advise the Minister on measures to promote transformation and continuous improvement of social development services; measures to promote social development initiatives; measures to include local government in the provision of integrated service delivery at local government; proposals for new legislative framework; introduction of local and international best practices in social development services. the Council for Social Service Profession, inter alia, advises the Minister on matters affecting professions in respect of which professional boards have been established and amendment or adaptation of the Social Service Professions Act; consults and liaises with relevant authorities on matters affecting professional boards in general; to determine standards of professional conduct of social workers;

600 The Advisory Board acts as a consultative forum for the Minister to discuss improving the quality of provincial and national social development; the introduction of new policy and successful policy implementation; facilitating consultation between stakeholders and government regarding the implementation of social development; ensuring effective review of formulation, implementation, evaluation of social development policies, programmes, legislation, as informed by the needs and priorities of society.

601 Section 2 of the National Development Agency Act establishes the National Development Agency; and section 3 defines its remit as being to contribute towards the eradication of poverty

to act as coordinating and liaising bodies forming vertical bridges between tiers of government.[602] First, as can be gleaned above, none of them comprise of representatives of the three spheres of government. Secondly, although they owe their existence to legislation, these bodies do not take executive decisions, they furnish advice.[603] They are, therefore, not fit-for-purpose when it comes to the promotion of intergovernmental relations. The enormous powers the Minister enjoyed in respect of regional welfare boards[604] ceased when the President assigned the administration of the National Welfare Act to the provinces in 1996.

2.84 Social development laws enacted recently that actually contain provisions relating to intergovernmental relations are tersely drafted and they do not, as stated above, create structures comprising representatives of the three spheres of government to coordinate overlapping functions; and thus do not provide a solution to the issues afflicting the sector. Instead, they:

- require, for example, the Minister to submit regulations which affect provinces to the National Council of Provinces for approval;[605]
- empower the Minister to prescribe national norms and standards for evaluating, monitoring and provision of services[606] and to delegate powers to MEC;[607]
- impose a duty on organs of state in national, provincial, and where applicable, local government, to implement provisions contained therein in an integrated, coordinated and uniform manner;[608] and to cooperate in the development of a uniform approach aimed at coordinating and integrating the services rendered;[609] and
- require the Minister and all organs of state to adopt a multifaceted and integrated approach to enhance coordination and cooperation;[610]

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and its causes by granting funds to civil society organisations; and to promote consultation, dialogue, and sharing of development experience between civil society organisations and organs of state and debate on development policy.

602 On nature of coordinating bodies, see Baxter *Administrative Law* at 184

603 It is often argued that bodies established for the purpose of furnishing advice, formulating policy and gathering information do not require statutory authority if they will not require coercive powers and will not take decisions. See Baxter *Administrative Law* at 176.

604 The Minister had the power to appoint regional welfare boards and appoint their members. These regional boards reported to the Minister on their activities. Moreover, their programmes had to be approved by the Minister.

605 Section 3(3) of the Children's Act.

606 Section 6(1) of the Older Persons Act. See also section 6(1) and 12(2) of the Prevention of and Treatment for Substance Abuse Act in relation to norms and standards relating to substance abuse and community-based services respectively.

607 See sections 32(2) of the Older Persons Act; 64(2) of the Prevention of and Treatment for Substance Abuse Act; 18(2) of the Probation Services Act; 29(1) of the Social Assistance Act.

608 See section 4(1) of the Children's Act, and section 3(1) of the Older Persons Act.

609 Section 3(3) of the Older Persons Act.

610 Section 3(2) of the Prevention of and Treatment for Substance Abuse Act.

2.85 These laws do not prescribe 'how' these provisions should be given effect to; and most importantly, they are reticent on what the consequences will be if they are not followed.

2 Enforcement mechanism in the Prevention of and Treatment for Substance Abuse Act

2.86 Although the Prevention of and Treatment for Substance Abuse Act does not say much either about intergovernmental relations, its enforcement mechanism deserves special mention. The Central Drug Authority, an inter-sectoral forum, established by the Prevention of and Treatment for Substance Abuse Act has statutory authority to request Provincial Substance Abuse Forums to submit annual reports and such other reports as may be required. Where entities do not comply, *it could request Cabinet, through the Minister of Social Development to intervene*. Furthermore, it is required to *develop systems and monitoring mechanisms to ensure the implementation* of the national drug master plan and reporting by all government departments, entities and stakeholders.[611]

3 Norms and standards

2.87 What sets the Social Assistance Act and the South African Social Security Agency Act apart from other Acts referred to above, is that they explicitly provide in the preambles, and in respect of the Social Assistance Act, in the express legislative purpose as well,[612] that they are intended to provide uniform norms and standards for the provision of social assistance and social security respectively; and standardised delivery mechanisms and a national policy for the efficient , economic and effective use of limited resources available for social assistance and social security and for the promotion of equal access to government services; and to prevent the proliferation of diverse laws, policies and approaches to the execution of this mandate. Therefore, achieving uniformity in the provision of welfare services is the express object of these laws. To give effect to these laudable goals, the Minister is empowered to issue regulations.[613] Noticeably, besides making few references to the provinces, these Acts contain no antecedent requirements to foster intergovernmental relations, for instance, that the issuing of such regulations must be preceded by consultation between national and provincial governments. The reason for this may be that SASSA was created as a national agency; there are no provincial structures involved in the payment of grants.

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611 Section 62(1)-(3) of the Prevention of and Treatment for Substance Abuse Act.
612 Section 3 of Social Assistance Act.
613 See, for example, section 32 of the Social Assistance Act.

G. Model laws enacted by other departments – what could go into the law regulating intergovernmental relation in the welfare sector?

2.88 Numerous laws intended to foster intergovernmental relations have seen the light of day since the advent of our constitutional democracy. While a number of these laws were enacted after the commencement of the 1996 Constitution, with its set of principles on how the system of intergovernmental relations should operate, most came into operation before the passing of the Intergovernmental Relations Framework Act, and it is in this context that they must be viewed.

2.89 With the exception of broadly formulated norms contained in Chapter 3 of the Constitution, at the time of the enactment of these laws there was really nothing in place to regulate intergovernmental relations. This temporary void, and whilst IRFA was being formulated, provided impetus to national government departments to experiment. As will become apparent, the approach adopted by DSD to address challenges afflicting the social development sector described in Chapter 1, namely development of policy and draft legislation, and its pursuit of a parallel framework is not, however, novel and not without parallel; its provenance can be traced to these laws and the procedure adopted when they were initiated and eventually passed.

2.90 Moreover, the constitutionality of some of these laws, especially provisions perceived to trench functional and institutional integrity of provincial governments, has been tested in court. This is important because, as the Constitutional Court stated in the *Liquor Bill* case,[614] while constitutional challenges could be pursued after their enactment, provisions already considered and declared by the court to be constitutional would be insulated from such challenge. The only basis on which the court would depart from its earlier decision regarding constitutionality, is if it shown to have been clearly wrong.[615] The implication of this principle is profound, it entails that where a provision was challenged, for example, the enforcement mechanism in the National Education Policy Act which empowers the national Minister of Education to require provincial counterpart to prepare a remedial plan if the standards of education in the province are found to be shoddy, and passed the constitutional muster, it could be emulated or incorporated in subsequent legislation.

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614 See the *Liquor Bill* case at para 20.

615 *Ibid*.

1 Cooperation on fiscal, budgetary and financial matters

2.91 The first national government department to experiment with putting mechanisms of intergovernmental relation on statutory footing after the advent of our constitutional democracy was the Department of Finance. It enacted the Intergovernmental Fiscal Relations Act (IFR Act) [616] to promote cooperation between the three spheres of government on fiscal matters; and to prescribe a process contemplated in section 214 of the Constitution[617] for the determination of an equitable sharing and allocation of revenue raised nationally to the three spheres of government. We only focus on the first of these objectives.

2.92 Following the trend at the time,[618] to give effect to the first objective above, IFR Act established, inter alia,[619] the Budget Council consisting of the Minister, whom it also designated chairperson of this council, and MECs for finance of each province. [620] It explicitly stipulates that the council is a body through which the national and provincial governments will consult on:

(a) fiscal, budgetary and financial matters affecting provinces;

(b) proposed legislation or policy which has financial implications for provinces;

(c) any matter concerning financial management or the monitoring of finances of the provinces or any specific province or provinces; and

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616 The Intergovernmental Fiscal Relations Act 97 of 1997 was assented to on 12 November 1997 and came into operation on 1 January 1998. .

617 Section 214 of the Constitution provides:

'(1) An Act of Parliament must provide for—

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.'

618 See section 2, 4(1) and 6(2)(a) of the National Arts Council Act 56 of 1997; section 2, 3(1)(a) and 9(1)(e) of the South African Geographical Names Council Act 18 of 1998; section 3, 5(1)(b) and 10(1) of the National Heritage Council Act 11 of 1999, and section 2, 3 and 6(2)(a) of the National Advisory Council on Innovation Act 55 of 1997 which established councils (the National Arts Council, South African Geographical Names Council, National Heritage Council, and National Advisory Council on Heritage) appointed by, and to advise, the relevant Minister in the respective functional area, which comprised representatives of provinces.

619 For the sake of completeness it is necessary to state that this Act also established the Local Government Budget Forum comprising the Minister of Finance, the MEC for finance of each province, representatives nominated by SALGA, representative nominated by each provincial organisation recognised in terms of the Organised Local Government Act of 1997 to deal with fiscal matters affecting local government. See sections 5-7 of this Act.

620 Section 2(1) and (2) of the IFR Act.

(d) any other matter which the Minister of Finance has referred to the Budget Council.[621]

2.93 Disappointingly, in contrast to elaborate provisions stipulating its functions referred to above, this Act is silent on the workings of the Budget Council in general and decision-making in particular. The few notable exceptions that the drafters of this Act deemed necessary to include are that it expressly designates the Minister as chairperson of this body, bestows on the Minister the power to convene meetings; requires the council to meet at least twice a year; and allows the Chairperson of the Financial and Fiscal Commission or his delegate and other invited guests to attend the meetings of the council.[622]

Question

In the event, the Commission deems the enactment of parallel legislation to regulate intergovernmental relations in this sector and to establish a coordinating structure for this purpose, should it leave the working methodology, including decision-making, to the proposed new structure, as the Department of Finance seems to have done or should it explicitly set these out in the legislation? Would the omission of these rules not defeat the purpose of this inquiry, encourage secrecy, have implications for legislature to hold government accountable as contemplated in sections 55(2)(a) and (b), 92(2) and (3), 114(2)(a) and (b) and fly in the face of section 1(d); and 41(1)(c) of the Constitution which seek to promote openness and transparency in government?

2 Regulation of manufacture and distribution of liquor - Department of Trade and Industry

2.94 Shortly thereafter, the Department of Trade and Industry (DTI) improved on the precedent set by Department of Finance by publishing, in July 1997, the Liquor: Policy Document and Bill[623] predicated on the said policy,[624] to regulate the manufacture, distribution and sale of liquor;[625] maintain economic unity and essential national standards in the liquor trade and industry; and to promote the spirit of cooperation and shared responsibility within all spheres of government.[626] Seven years later, the Liquor Act,[627] which differs markedly from

621 Section 3(a)-(d) of IFR Act.
622 See sections 2(2), 4(1) and (2)(a) and (b) of IFR Act.
623 See Department of Trade and Industry *Liquor: Policy Document and Bill* General Notice, Notice 1025 if 1997, *Government Gazette* No. 18135 of 11 July 1997.
624 *Id* at 10 and 22.
625 See the long title of the Bill in Government Gazette above at 39.
626 See *Liquor Bill* case at para 64.
627 The Liquor Act 59 of 2003 was assented to by the President on 20 April 2004 and came into operation on 13 August 2004.

the Bill as a result of the *Liquor Bill* case, was duly enacted. Expectedly, the Liquor Act, as its long title proclaims, seeks to establish *norms and standards in order to maintain economic unity*, to provide *essential national standards* and *minimum standards* required for the rendering of services; and to provide for *measures to promote cooperative government*. We consider the provisions of both the Bill and the Act relating to intergovernmental relations with a view to distil best practices.

2.95 Moreover, the work done by DTI constitutes an ideal case study for a number of reasons. First, certain provinces felt that legislation to regulate the manufacture, distribution and sale of liquor was not necessary.[628] Of course a similar argument was made by the OCSLA and Gauteng Government when DSD sought to promote the National Council for Social Development legislation. Secondly, as the court in the *Liquor Bill* case confirmed, large number of the provisions of the Liquor Bill, and by extension the Act, concerned Schedule 4 matters namely 'trade' and 'industrial promotion'[629] as is the case in this inquiry. Lastly, as is the case with welfare legislation, there are various pieces of legislation relating to the liquor industry, some of which are administered by other national government departments which had to be consolidated as a result of the promulgation of the Liquor Act.[630]

(a) The intergovernmental structure created by the Bill - National Liquor Advisory Committee

2.96 The most conspicuous feature of the policy and Bill published by DTI was, among others, the creation and the inclusion in the envisaged institutional framework of the National Liquor Advisory Committee. As the name of this regulatory structure suggests, its primary responsibility would have been to advise on all liquor policy matters.[631] This committee, which would have been appointed by the Minister of Trade and Industry[632] and comprised representatives of the liquor industry; representatives of several government departments including DSD, community; and civil organisations,[633] was not intended to be a coordinating structure *per se*. The most important aspect relating to this body for our purposes is decision-

628 See *Liquor Bill* case in para 4.

629 *Id* at para 28, 29 and 57.

630 For example, the Liquor Products Act and the Wine and Spirits Control Act falling under the Department of Agriculture.

631 See *Liquor: Policy Document and Bill* above at 25. Clause 24 of the Liquor Bill provided that: 'Functions of the National Liquor Advisory Committee- The Committee shall advise the Minister of Members of the Executive Council on any matter referred to the Committee by the Minister or Member concerned for consideration and arising from the application of this Act or relating to the distribution, or control over the distribution of liquor or the socio-economic implications relating to the use of abuse of liquor.'

632 Clause 22(2) of the Liquor Bill.

633 Clause 22(1) of the Liquor Bill.

making powers it would have had. The Bill prescribed the following procedure to facilitate decision-making:

> 'A decision of the Committee shall be taken by a majority of votes of the members present at a meeting, and in the event of an equality of votes on any matter, the Chairperson shall have a casting vote in addition to his/her deliberative vote.'[634]

2.97 Notably, when the constitutionality of the Bill was challenged in the *Liquor Bill* case, these provisions were neither among those impugned nor did the court find, of its own accord, that they were constitutionally suspect. Instead, the court referred to them in passing in the context of the scheme to achieve the objects of the Bill.[635] Of course, this does not mean that subsequent challenges once the Act is enacted are completely excluded. On the contrary, as the court held in the *Liquor Bill* case, unless a specific provision was specifically considered by the court and a determination made, it is not insulated from future constitutional challenge.

(b) National Liquor Policy Council

2.98 However, when the Liquor Act was passed it had abandoned the idea of a Committee and replaced it with an intergovernmental forum proper, the National Liquor Policy Council, comprising the Minister of Trade and Industry, who acts as chairperson of the council; his or her Deputy; MECs responsible for liquor licensing in the respective provinces; the Director-General of DTI or his or her designate; and for each province, one person designated in terms of provincial legislation or by the aforesaid MEC.[636] We hasten to add that voting in the council is exclusively reserved for the political heads of national and provincial governments.[637] Besides the provision establishing the Council and prescribing how it should be constituted; the Liquor Act contains two other provisions relevant to this body, namely those setting out its remit and processes to which we revert below.

(i) Functions of the Council

2.99 This Act explicitly states that the Council is a forum for intergovernmental cooperation contemplated in section 41(1)(h) of the Constitution. It spells out its functions as being to promote and facilitate intergovernmental relations in this sector (liquor industry); to facilitate the settlement of intergovernmental disputes relating to this sector; and serve as a vehicle for consultation on:

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634 Clause 23(6) of the Liquor Bill.
635 *Liquor Bill* case at para 65.
636 Section 38(1) and (2) of the Liquor Act.
637 Section 38(3) of the Liquor Act.

- *national norms and standards* for the liquor industry;
- *national policy* in respect of the liquor industry;
- liquor *legislation or regulations*, including the promotion of uniform national and provincial legislation in respect of liquor norms and standards;
- *any matter* concerning the liquor industry within national and provincial spheres of government;
- any matter concerning the *management or monitoring* of the liquor industry in the Republic, or licensing in any province; and
- any matter that may be referred to it by a Member of the Council.[638]

2.100 So, in this Act the process of issuing of regulations regarding norms and standards and consultation the must precede the said regulations are intertwined.

(ii) Procedure of the Council

2.101 The Minister has certain powers in terms of this legislation, to convene the meetings of the Council and to exclude non-voting members from certain meetings by designating a meeting to be a meeting of all the members or only of voting members.[639] The Council, on the other hand, could invite non-voting members to attend meetings.[640] The Act locates decision-making powers of the Council within the broader framework of intergovernmental relations contained in the Constitution. It states in this regard:

> '(5) As a body through which the national and provincial spheres of government seek to co-operate with one another in mutual trust and good faith, the Council must attempt to reach its decisions by consensus.
> (6) If the Council fails to reach consensus on a decision, it may resolve the matter by formal vote on a motion.
> (7) A motion in terms of subsection (6) passes only if it is supported by
> (a) the Minister; and
> (b) at least five other voting members of the Council.
> (8) Subject to subsections (1) and (7), the Council may adopt its own rules for the conduct of its meetings.'[641]

2.102 The meaning and import of subsection (8) above is not clear. On the one hand, its purpose seems to be to empower the Council to deviate from the rules prescribed in subsection (5) and (6) and not (7). However, subsections (5)-(7) are so inextricably linked that it is difficult to envisage changes to the first two subsections that would not contemporaneously, or in some way, have an impact on subsection (7).

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638 Section 39(1) and (2) of the Liquor Act explicitly provides that the Director.
639 Section 40(1) and (2) of the Liquor Act.
640 Section 40(4) of the Liquor Act.
641 Section 40(5) – (8) of the Liquor Act.

Questions

(a) Would the inclusion of a provision similar to section 40(5)-(8) of the Liquor Act quoted in the preceding paragraph, either in IRFA or new regulatory framework for the sector, obviate difficulties alluded to by DSD?

(b) What would be the implications of decision reached by a vote on those who do not support such a decision? In Ethiopia, for example, decisions of intergovernmental forums are binding on those who support them, oppose them or those who were absent when they were taken. See in this regard, paragraphs 1.49 and 3.9 in this issue paper. A similar approach subsists in this country in respect of decisions the Constitution stipulates must be taken by majority vote. See paragraph 1.49.

(c) Or, should those provinces that do not support the decision be given the opportunity to opt-out? See paragraph 3.22 below for a discussion of this option.

3 Education policy – the Department of Education

(a) Salient features of the National Education Policy Act

2.103 Following the decision of the court in the *National Education Policy Bill* case, which removed any doubts about the constitutionality of the National Education Policy Bill, Parliament proceeded and passed this law in the form of National Education Policy Act of 1996 (NEPA).[642] This Act was assented to and came into operation a month before the adoption of the 1996 Constitution by the Constitutional Assembly and almost nine years before the enactment of Intergovernmental Relations Framework Act.

2.104 It is one of those laws that broke new ground in relation to intergovernmental relations, albeit in respect of the education sector. Because of this, and the fact the constitutionality of the most 'controversial' provisions of this Act which were slated on the basis that they encroached on executive powers of provinces, provisions that may well prove influential and decisive in this inquiry, has already been determined,[643] makes it crucial to the matter at hand.

642 Act 27 of 1996.

643 In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 20 the court, responding to a question it asked whether the Court's finding regarding the Bill's constitutionality or otherwise precludes or restricts later constitutional adjudication regarding its provisions once enacted, stated that even if this court decided that the Bill was constitutional, supervening constitutional challenges were not excluded, except to the extent that in deciding issues placed before it, it already determined them. It added that it would only depart from its earlier decisions if they are shown to have been clearly wrong. For the application of this principle to constitutional provisions, see *Premier, Western Cape v President of the Republic of South Africa* above at para 17.

2.105 Its purpose is, among others, to establish certain bodies for the purpose of consultation; the monitoring and evaluation of education;[644] and, as the Constitutional Court pointed out in *Minister of Education v Harris*,[645] to *complement* other laws regulating 'education' (a functional area of concurrent national and provincial legislative competence) and administered by the national department of basic education. The court in the aforementioned case also said NEPA must be understood in the light of section 146(2) of the Constitution which stipulates that national legislation intended to ensure uniformity by setting norms and standards, frameworks and national policies prevails over provincial legislation.[646] NEPA contains measly 13 provisions, and we consider the most significant of these below.

(i) National education policy matters

2.106 This Act, rehashing section 85(2)(b) of the Constitution, gives the Minister of Education the power to determine national education policy.[647] But, it goes further than that; it prescribes *how* such policy is to be determined. In addition to consultation which must precede policy formulation,[648] it requires the Minister to take into account the competence of provincial legislatures in terms of section 146 of the Constitution; and relevant provisions of provincial law relating to education.[649] It will be recalled that the Constitutional Court in *National Education Policy Bill* case held that this meant that the national education policy should not contradict provincial law, save where it would be permissible for Parliament to authorise this through legislation which in terms of section 146 would prevail over provincial law.[650] Furthermore, although the court in *National Education Policy Bill* case found nothing untoward about section 3(3) of the Bill which stipulated steps the Minister could take if he or she wanted the national policy to prevail over provincial law, this provision was reformulated in the Act to state that *national policy trumps provincial policy*[651] whether such policy is contained in legislation or not. This provision therefore addresses an aspect that even section 146 of the Constitution fails to address. NEPA also stipulates areas in relation to which the Minister is empowered to make policy. These include planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation, and well-being of the

644 Section 2 of NEPA.
645 See *Minister of Education v Harris* above at para 8.
646 *Ibid*.
647 Section 3(1) of NEPA provides that
648 Section 5(1) of NEPA provides that 'Policy contemplated in section 3 shall be determined by the Minister after consultation with such appropriate consultative bodies as have been established for that purpose in terms of section 11 or any other applicable law, and with the Council.'
649 Section 3(2) of NEPA.
650 *National Education Policy* case at para 26.
651 Section 3(3) of NEPA.

education system.[652] And, where policy will have financial implications, it must be determined with the concurrence of the Minister of Finance. Furthermore, the said policy must be published.[653] Lastly, it is necessary to point out that the exercise of power or performance of functions in terms of legislation dealing with this functional area must take into account policy determined in terms of this provision of NEPA.[654]

2.107 In *Minister of Education v Harris*, the Constitutional Court provided more clarity to a few provisions of NEPA referred to above. First, it highlighted two flaws in NEPA. It was not clear (a) from section 3(3) of NEPA whether the Minister himself or herself determined the policy or merely lays down the policy; and (b) what the effect of a policy determination made by the Minister in terms of the aforementioned provisions of NEPA is.[655] Secondly, it reaffirmed the power of provinces to enact legislation for school education in the respective provinces in accordance with the Constitution and other applicable legislation.[656] Thirdly, and most importantly for our purpose, relying on *Akani Garden Route* and *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill,* it drew a distinction between policy and legislation, stressing that policy made by the Minister in terms of NEPA *does not create obligations of law that bind provinces*. The court continued and stated:

> 'There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of division of powers contemplated by the Constitution... the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners.'[657]

2.108 The court concluded that to the extent that the Minister purported to impose legally binding obligations upon independent schools and upon MECs, his conduct was *ultra vires* as he did not have those powers in terms of section 3 of NEPA. It noted though that this case raised complex constitutional issues of whether the Minister was permitted to oblige MECs to enforce national policy, which the court held it was premature to consider.[658]

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652 Section 3(4) of NEPA. For more areas, see section 3(4)(a)-(r) of NEPA.

653 Section 7 of NEPA.

654 For example, section 2(2) of the South African Schools Act 84 of 1996 provides that: 'A member of the Executive Council and a Head of Department must exercise any power conferred upon them by or under this Act, after taking full account of applicable policy determined in terms of the National Education Policy Act 27 of 1996.'

655 In this case the issue was the determination of age of admission to school. And, it was not clear whether the Minister determined this or laid down policy in this regard. See *Minister of Education v Harris* at para 9 and 10.

656 *Ibid*.

657 *Id* at paras 10 and 11.

658 *Id* at para 13.

Questions

(a) Should the Commission decide that sectoral legislation is necessary to address issues referred to it by DSD, would it be advisable, in the light of section 85 of the Constitution and Constitutional Court decision in *Minister of Education v Harris*, to include in such legislation elaborate provisions dealing with policy development and implementation similar to the ones contained in NEPA?

(b) If such a provision is deemed necessary, would it also be advisable to include consequential amendments to all laws dealing with social development mandates to enjoin functionaries on whom certain obligations are imposed by these laws 'to take full account of the applicable policy determined in terms of new (proposed) legislation'?

(c) Furthermore, quite a number of laws administered by DSD create structures to assist in the determination policy on diverse matters relating to social development, among other things. These laws invariably leave it to the Minister to decide which course of action to take. The inclusion of a provision referred to above in the new regulatory framework would also give rise to other complex issues, namely the question of overlapping policy development mandates and the issue of 'pre-eminence' between policy developed in terms of these laws and policy determined in terms of the new (proposed) sectoral legislation. How should these matters be addressed?

(d) A novelty introduced by NEPA in section 3(3) is to make it clear that national policy supersedes provincial policy. Should a similar provision be included in the new regulatory framework for this sector? What purpose would such a provision serve in the context of the issues raised in this inquiry?

(ii) Intergovernmental forums

2.109 The Act establishes two bodies to foster intergovernmental relations – consultation and cooperation – between national executive and the provincial executives involved in the basic education sector, the Council of Education Ministers and Heads of Education Departments Committee.[659]

(iii) Council of Education Ministers

2.110 The Council of Education Ministers comprises the Minister, who is also the chairperson of this body, the deputy Minister of Education, MECs for education in the provinces, and the Director-General of Basic Education. NEPA further provides that the chairpersons of the Portfolio Committee on Education in the National Assembly and Select Committee on Education *may attend* the meetings of this body. It describes the functions of this Council as being to promote the national education policy, share information and views on all aspects of education in the Republic, and to coordinate action on matters of mutual interest to the national

659 See sections 9(1)(a) and 10(1) of NEPA.

and provincial governments.[660] How this body conducts its affairs is a matter left entirely to it.[661]

(iv) Heads of Education Departments Committee

2.111 This Committee consists of the Director-General of Basic Education, the Deputy Directors General of the Department of Basic Education, and the heads of the provincial education departments.[662] The functions of this structure are similar to those of the Council with one important exception, it also advises the department on all matters contemplated in the Act.[663] This committee too has *carte blanche* with regard to how it conducts its affairs. Administrative support to the two forums is provided by the officials of the Department of Basic Education.[664]

(v) Enforcement mechanism

2.112 To ensure that the provisions of the Constitution relating to basic education and the national education policy contemplated in this Act are complied with, the national Department of Basic Education has the responsibility to monitor and evaluate the standards of education provision, delivery and performance throughout the Republic annually and at specified intervals.[665] To that end, the department gathers and analyses data in cooperation with provincial departments of education. It is further required to prepare and publish a report in this regard after providing an opportunity to affected authority for comment, which comment must be published with the report.[666] If it transpires that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with the national education policy determined in terms of section 3(3) of NEPA, *the Minister shall inform the provincial political head of education concerned and require the submission within 90 days of*

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660 Section 9(4)(a)-(c) of NEPA.

661 Section 9(5) of NEPA provides that: 'The Council may draw up such rules regarding the convening of its meetings, the frequency of its meetings, the procedure of its meetings, including the quorum of its meetings, and any other matter it may deem necessary or expedient for the proper performance of its functions or the exercise of its powers.'

662 Section 10(1)(a)-(c) of NEPA.

663 In terms of section 10(2) of NEPA, the functions of the Committee are to:
(a) facilitate the development of a national education system in accordance with the objectives and principles provided for in this Act
(b) share information and views on national education;
(c) co-ordinate administrative action on matters of mutual interest to the education departments; and
(d) advise the Department on any matter contemplated in sections 3 to 8 and 11 in respect of education, or any other matter relating to the proper functioning of the national education system.

664 Section 13 of NEPA.

665 Section 8(1) of NEPA.

666 Section 8(5) of NEPA.

a plan to remedy the situation.[667] The aforesaid *plan must be prepared by the provincial education department concerned* in consultation with the department of basic education; and once finalised, *the Minister must table the plan in Parliament* with his or her comments within 21 days of receipt.[668]

2.113 One comment is apposite in respect of the enforcement mechanism provided for by NEPA. It is not certain what the rationale for tabling the remedial action in Parliament is. Neither did the court in *National Education Policy* case provide any clues in this regard. As stated elsewhere in this issue paper, Parliament has a duty to hold the national executive accountable, not provincial executives; this is a responsibility the Constitution assigns to provincial legislatures.[669] This provision, by design or unintentionally, renders provincial executives accountable to Parliament.

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667 Section 8(6) of NEPA.

668 Section 8(7) of NEPA.

669 Section 133 of the Constitution provides:

'(1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must—

(a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

(b) provide the legislature with full and regular reports concerning matters under their control.'

Questions

The intergovernmental forum established by NEPA differs from others considered so far in that it includes representatives of Parliament, albeit at the invitation of the Minister of Education. Furthermore, NEPA requires the remedial plan to be submitted to Parliament. This cannot be faulted considering that the norms of our intergovernmental relations contained in Chapter 3 of the Constitution derive from the German principle of *Bundestreue* which defines the role-players in intergovernmental relations as executive, *legislative* and judicial branches of government; section 92(2) and 133(2) provide that executive members of government are accountable to Parliament and provincial legislature; and that IRFA itself places a duty on the Minister of Cooperative Governance to report to Parliament on the conduct of intergovernmental relations; and that democratic accountability and transparency of these structures is achieved through, inter alia, access to relevant information relating to intergovernmental relations. The factors above raise the following questions:

(a) Should the legislative branch of government be included in intergovernmental structures for this sector?
(b) If so, which legislative branch should be included, both Parliament and provincial legislatures?
(c) What role do you envisage representatives of the legislative branch will play in these forums?

(b) Criticism of NEPA and Constitutional Court decisions

2.114 Both the National Education Policy Act and the *National Education Policy Bill* case have been the subject of much criticism. As we grapple with issues raised in this inquiry, we must therefore be cautious. It has been argued that as 'education' is a concurrent matter over which national and provincial governments have jurisdiction, the starting point in matters relating to the administration of education should be the Constitution. In practice, however, the argument goes, the starting point is the National Education Policy Act which gives the Minister of education power to determine 'sweeping policies affecting all authorities responsible for education including provinces.'[670] It has been pointed out that this Act, and many others passed by Parliament,[671] have resulted in the dominance of national government in matters over which both spheres have jurisdiction, including the provision, regulation and administration of education.[672] To bolster this view, it has been said that:

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670 Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' *TSAR* Vol 2006, Issue 2 237 at 246.

671 For example, the South African Schools Act 84 of 1996, the Further Education and Training Act 98 of 1998, the Higher Education Act 101 of 1997, the Adult Basic Education and Training Act 52 of 2000, the South African Qualifications Authority Act 58 of 1995, the Employment of Educators Act 76 of 1998, and the South African Council of Educators Act 31 of 2000. The author points out that higher education is not a concurrent matter but like other laws mentioned here it is being regulated from the top. See Malherbe, Rassie 'Centralisation of Power in Education: Have Provinces Become National Agents?' at 247.

672 *Ibid*.

(a) NEPA is so detailed that it usurps all legislative and executive authority provinces may have in respect of education;[673]

(b) Intergovernmental forums intended to foster cooperation and coordination, are used by national government as structures through which the consent of provinces for these national initiatives is obtained;

(c) the dominant view is that national government is responsible for making policy and provinces are merely responsible for implementing those policies[674] which has resulted in a top-down approach, which is inconsistent with the clear provisions of the Constitution and which does not fit into the modern notion of cooperative federalism and which poses danger to provincial autonomy;[675] and

(d) by making these laws, the national government has usurped constitutional law-making powers of the provinces in a manner inconsistent with federal arrangement in terms of which provinces should be allowed scope to experiment and to devise different solutions to the same policy issues.[676]

2.115 Criticism has also been levelled against national policy and other directives issued by the national department of education. It has been stated in this regard:

> 'Numerous policy documents and similar directives are being issued by the national department of education on matters that may often be regarded as very detailed aspects of education. Examples of such detailed educational issues are school funding, curricula statements on every subject in school, teacher guides, language policy, admission and access, outcomes based-education, religion in education, assessment, HIV/Aids, rights and responsibilities of parents and first aid. Clearly these are matters which in terms of a more decentralised approach would have been left to the provinces to handle themselves, if not in some cases to individual schools.'[677]

2.116 It has been asked why centralisation exists; why the Constitution is being distorted and ignored to this extent; and why the measure of autonomy that the provinces enjoy is being subjected to national domination.[678] This trend[679] has been attributed to the incorrect interpretation of the Constitution; how national government perceives power relations between

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673 *Id* at 250.
674 Malherbe 'Centralisation of Power in Education: Have Provinces Become National Agents?' at 247.
675 *Id* at 249.
676 *Id* at 248.
677 *Ibid*.
678 *Id* at 249.
679 For detailed discussion of reasons for this phenomenon see 249-250.

national and provincial governments;[680] the ANC's initial aversion towards federal or decentralised systems of government which, it has been argued, still exert some influence on the interpretation of the Constitution;[681] the inability of some provinces to exercise their powers and perform their functions effectively;[682] formal and informal intergovernmental structures that favour national domination;[683] and the ANC's domination in government.[684]

2.117 Whilst the Constitutional Court's decision in National Education Policy case, that policies made in terms of the National Education Policy Act are not enforceable upon provinces and should be implemented through a process of negotiation and cooperation has been hailed; this, and other decisions of the court dealing with intergovernmental relations, has received a lot of flak for its failure to encourage provincial autonomy.[685]

4 Provision of integrated health services

2.118 That a variety of structures and approaches could be used to foster intergovernmental relations is amply demonstrated by the National Health Act.[686] This Act, as its preamble, long

680 This interpretation, according to the author, is that the national government has legislative and policy making powers in respect of the concurrent matters such as education, whereas the provinces are only responsible for the implementation of national priorities. It is argued, in response that no reasonable construction of the Constitution can accommodate this interpretation because concurrency means that both the national and provincial governments may legislate on a concurrent matter and implement that legislation themselves. It is simply incorrect that the national government may take over all policy-making functions in respect of education without further ado.

681 The author points out in this regard that naturally a government hostile to the decentralisation of power will not be eager to support provincial autonomy and reinforcing this tendency is the fact that more emphasis is still being put on transformation policies than on lesser priorities such as provincial autonomy.

682 In many cases in order to ensure the continuation of services or functions the national government feels obliged to take upon itself the responsibilities that should vest in the province. Two problems with this approach have been highlighted. First, the national government has a constitutional duty to assist provinces and by taking responsibility upon itself it does not discharge this constitutional duty. Secondly, not all provinces suffer from this lack of capacity in respect of human, administrative, and financial resources, but the generalised approach followed by national government does not allow for differentiation or asymmetry among provinces. As a result the weakest link becomes the standard with which all provinces are treated.

683 An argument posited in this regard is that in the case of education, the national minister and the department use these mechanisms simply to obtain consent and support of provinces for their initiatives or, as also stated euphemistically, to ensure alignment of policy. Unless these mechanisms are truly employed in pursuance of the principle of cooperative government as aids in the promotion of consultation, coordination and cooperation among the spheres of government, they will continue to constitute a one-way traffic system simply channelling policy initiatives from the national government through to the provinces.

684 It is argued that provincial politicians will think twice before risking their future by taking a stand regarding competence issues against more politically influential national ministers.

685 *Id* at 251.

686 Act 61 of 2003.

title and express legislative purpose state, was enacted, inter alia, to provide a framework for a uniform provision of health services throughout the Republic; to unite various elements of the national health system; to provide for a system of co-operative governance and management of health services; and to promote the spirit of co-operation and shared responsibility within the context of national, provincial and district health plans. To achieve these objectives, it makes provision for, and establishes, miscellaneous structures[687] and assigns responsibilities to them, and to other organs of state involved in providing health services. For our purposes, we focus on the powers and functions of the National Health Council, the Director-General of the national department of health, and the Minister.

(a) Minister of Health

2.119 Whilst the Act creates mechanisms for intergovernmental cooperation, the ultimate responsibility with regard to the provision of health services in the Republic rests with Minister of Health. It comes as no surprise therefore that the National Health Act bestows extensive powers on the Minister of Health in this regard.[688] The reach of these powers, especially in the realm of intergovernmental relations, becomes clear when one looks at the Minister's power to make regulations. For example, the Minister may, *after consultation with the National Health Council*, make regulations regarding the *norms and standards* for the national health system; national health information systems; processes and procedures to be implemented by the Director-General: Health in order to obtain prescribed information from stakeholders relating to health financing, the pricing of health services, business practices within or involving health establishments, health agencies, health workers, and health care providers, and the formats and extent of publication of various types of information in the public interest and for the purpose of improving access.[689] Besides these responsibilities, the Minister also has a role to play in the promotion of cooperation between national government and other spheres as the convener and chairperson of the National Health Council to which we turn our attention.

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687 The National Health Council, National Consultative Health Forum, Provincial Health Council, Provincial consultative bodies; district health councils, Forum of Statutory Health Professional Councils, National Health Research Committee, National Health Research Ethics Council, and the Office of Health Standards Compliance

688 These include the power to determine policies and measures necessary to protect, promote, improve and maintain the health and wellbeing of the population; ensure provision of essential health services as may be prescribed after consultation with the National Health Council; to determine who would be eligible for free health services; classifies health establishments; prescribes quality requirements; prescribes minimum standards and requirements for the provision of health services in locations other than health establishments and penalties for contravention thereof. See in this regard sections 4, 35, 39, 43(1) and 90 of the National Health Act.

689 Section 90(1)(c), (t) and (u) of the National Health Act.

(b) National Health Council

(i) Composition and remit

2.120 As hinted in the preceding paragraph, the National Health Act established the National Health Council,[690] comprising of the Minister, or his or her nominee, who acts as chairperson; the Deputy Minister of Health; members of the Executive Councils responsible for health in respective provinces; a representative of organised local government; the Director-General and Deputy-Directors General of the national department of health; the head of each provincial department of health; the head of the South African Military Health Services; and one person employed and appointed by the national organisation contemplated in section 163 of the Constitution (South African Local Government Association).[691] The National Health Council is an advisory body. It advises the Minister, among other things, on:

- policy concerning any matter that will protect, promote, improve and maintain the health of the population, including targets, priorities, norms and standards relating to the equitable provision and financing of health services; efficient coordination of health services, equitable financial mechanisms for the funding of health services;
- proposed legislation pertaining to health matters prior to such legislation being introduced into Parliament or a provincial legislature;
- norms and standards for the establishment of health establishments;
- guidelines for the management of health districts;
- the implementation of national health policy;
- an integrated national strategy for health research; and
- the performance of any other function determined by the Minister.[692]

(ii) Decision-making

2.121 Besides other powers endowed on the council by this legislation,[693] including the power to determine the procedure for its meetings, the Act explicitly stipulates that:

> 'The National Health Council must strive to reach its decisions by consensus but where a decision cannot be reached by consensus, the decision of the

690 Section 22(1) of the National Health Act.
691 Section 22(2) of the National Health Act.
692 Section 23(1) of the National Health Act.
693 In terms of section 23(4) and (5) of the National Health Act, the council may consult or receive representations from any person or entity; and may create committees to advise it on any matter.

majority of the members of the National Health Council is the decision of the National Health Council.'[694]

(c) Role of Director-General: Health in intergovernmental relations

2.122 The powers and functions of the National Health Council alluded to above must be read in conjunction with those bestowed on the Director-General of the national Department of Health and provincial health authorities. The Act provides, inter alia, that the Director-General of the Department of Health *must* ensure the implementation of national policy in so far as it relates to the national department; issue and promote adherence to norms and standards on health matters. It is noteworthy that there is no qualifier in respect of the latter function of the Director-General. The Act also states that it is the responsibility of the Director-General to co-ordinate health services rendered by the national department with the health services rendered by provinces. Furthermore, he or she must integrate health plans of the national department and provincial departments annually and submit them to the National Health Council.[695]

(d) MECs for health in provinces

2.123 The MECs for health in the provinces *must*, among other things, ensure the implementation of national health policy and the norms and standards determined by the Minister on the advice of, and after consultation with the National Health Council, in their respective provinces.[696] Furthermore, the heads of provincial departments must submit, within the time frames and in accordance with guidelines determined by the National Health Council, strategic, medium term health and human resources plans relating to the exercise of the powers and performance of duties in respect of provision of health services in their respective provinces to the Director-General.[697] The aforementioned plans must conform to the national health policy.[698]

2.124 Bizarrely, although the powers of the Director-General and obligations imposed on MECs are couched in peremptory language and thus appear to require exact compliance, these provisions have not only endured, but also appear not to have led to acrimonious relationship between the spheres of government and constitutional litigation.

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694 Section 23(3) of the National Health Act.
695 See in general section 21 of the National Health Act.
696 Section 25(1) of the National Health Act.
697 Section 25(3) of the National Health Act.
698 Section 25(4) of the National Health Act.

5 Functions of a Provincial Director-General under the Public Service Act

2.125 The Public Service Act, 1994 (PSA) differs from the other legislation considered up to now. It does not contain elaborate provisions relating to intergovernmental relations like the other laws referred to above. Neither does it address the question whether national government could impose its will on provincial government. However, it does contain provisions relating to the functions and duties of the head of a provincial administration, referred to in the *Premier, Western Cape v President of the Republic* case as the provincial Director-General[699] that we need to take note of. The PSA provides that this incumbent shall be responsible, inter alia, for:

> '...intergovernmental relations on an administrative level between the relevant province and other provinces as well as national departments and national government components and for the intra-governmental co-operation between the relevant Office of the Premier and the various provincial departments and provincial government components, including co-ordination of their actions and legislation.'[700]

2.126 In *Premier, Western Cape* case referred to above, the court explained that there are good reasons why there should be a functionary in the provincial administration charged with this responsibility. It stated that provinces are required to implement national legislation and in areas of concurrent competences ongoing cooperation is a necessity; the functions entrusted to the provincial Director-General are consistent with the principles of good government and cooperative government; and the establishment of a post within the public service to discharge these functions does not infringe any provincial power or encroach upon provincial autonomy.[701] The court further held that the aforementioned legislation regulating the public service must be complied with by both the national and provincial governments and that *no member of the executive in any sphe*re can ignore it. *This reasoning, we submit, should apply to other constitutional legislation, like IRFA, and to decisions taken by structures established by these laws. The question of course is what recourse is available should it be ignored*.

2.127 Documents relating to this inquiry received from DSD are silent on whether it ever requested the Directors-General of provinces who disregard their commitments made at Minmec, and who are in terms of section 7(3)(c)(ii) of PSA senior civil servants in the province

699 Section 7(7) of the PSA provides that 'Only the head of a national department and the Office of a Premier may bear the designation of Director-General'

700 Section 7(3)(c)(ii) of PSA.

701 *Premier, Western Cape v President of the Republic of South Africa* at para 65 and 66.

responsible for coordinating intergovernmental relations, and what the outcome of such intervention was.

Questions

(a) The question which arises in the light to this provision is whether DSD ever requested the DGs of the provinces whose executives reneged on their promises? If not, why was such intervention deemed unnecessary?

(b) Should the powers of the Directors-General of provinces be amplified in any way to obviate the types of problems experienced by DSD? If so, how should they be expanded? Or should the responsibility to promote cooperative government be entrusted to another functionary in the province? Who should that functionary be and why should this statutory function be taken away from the Director-General of a province? And, which framework would be suitable to deal with these matters, the PSA or IRFA or another legislation?

CHAPTER 3: LESSONS FROM OTHER JURISDICTIONS

A. Introduction

3.1 Intergovernmental relations may be relatively new phenomenon in South African law, but they have been a feature in most, if not all, multi-level systems of government including federations,[702] and decentralised unitary systems,[703] presidential or parliamentary. The conduct of intergovernmental relations in these countries has developed into a unique, albeit, complex and confusing art-form of interaction between governments with extensive policies, institutions, protocols, conventions and practices in place to facilitate contact and interaction between respective levels of government.[704] Some are also informal, spontaneous, and *ad hoc* with no constitutional or statutory basis,[705] which makes the detailed nature of our Constitution and IRFA in relation to intergovernmental relations quite unique.[706] In our quest to find solutions to the problems afflicting the social development sector, these countries are a treasure trove, more so because most of them have, for diverse reasons,[707] undergone, or are currently going through, periods of transition and adaptation.

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702 Woolman, Stu and Roux, Theunis 'Co-operative Government and Intergovernmental Relations' in Woolman *et al* *Constitutional Law of South Africa* (2008) at para 14.2.

703 De Villiers, Bertus 'Codification of Intergovernmental Relations by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 672. He cites the United Kingdom, Kenya and Italy as examples of countries where extensive intergovernmental relations forums exist.

704 *Id* at 673 and 687. As the author explains, in these jurisdictions there are generally no prescriptive statutory requirements regarding the type of intergovernmental relations, the institutions, their composition, powers, and frequency of meetings or dispute resolution mechanisms.

705 *Ibid*.

706 It has been observed that while some federal or unitary constitutions include some provisions establishing intergovernmental structures, the South African Constitution is virtually unique in setting forth in Chapter 3 a specific set of directive principles for intergovernmental cooperation. See De Villiers above at 679.

707 Some federations such as Australia and the USA are gradually becoming more centralised, whilst some unitary countries are becoming more decentralised, with increased autonomous decision-making power and financial independence; and in some, constituent units regard the promotion and protection of their policy and administrative autonomy as more important than promoting national interests or ensuring harmonisation of service delivery across the country. See Phillimore, John 'Understanding Intergovernmental Relations: Key Features and Trends' *Australian Journal of Public Administration* Vol 72 (September 2013) at 228-229.

B. Rationale for and analysis of various jurisdictions

3.2 The main purpose of the survey of countries in the ensuing paragraphs such as Australia, Belgium, Brazil, Canada, Germany, Kenya, Spain and the US, is to identify mechanisms – both institutional and procedural – that are relevant to intergovernmental relations. We have paid attention to countries that have embarked on reviews of intergovernmental relations and explored proposed reforms pertinent to *decision-making*, *implementation* and *dispute resolution* that could be adopted or adapted to address the complex institutional constitutional law issues that have given rise to this inquiry. We also consider, *mero motu*, approaches in these countries to transparency and accountability of structures of intergovernmental relations. This has been necessitated by the opaque nature in which intergovernmental relations operate in this country which in turn makes studies such as this arduous.

1 Kenya

3.3 Intergovernmental relations in Kenya are not *ad hoc* and informal, but underpinned by the Constitution of Kenya of 2010[708] and the Intergovernmental Relations Act of 2012.[709] Like the South African Constitution, the Constitution of Kenya provides that national and county governments are distinct, interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.[710]

3.4 To ensure this becomes a reality, the Constitution not only places a duty on these levels to cooperate[711] and to make every reasonable effort to settle disputes,[712] but also

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708 Section 189 of the Constitution of Kenya.

709 Act 2 of 2012.

710 Section 6(2) of the Constitution of Kenya.

711 Section 189(1) and (2) of the aforementioned Constitution provides that:

'(1) Government at either level shall—

(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.'

712 Section 189(3) of the Constitution of Kenya reads: 'In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.'

requires legislation to be enacted to settle intergovernmental disputes 'by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.'[713] Unsurprisingly, therefore, decisions of intergovernmental structures created by this Act are by consensus;[714] and the dispute resolution mechanism provided for in the Intergovernmental Relations Act referred to above puts high premium on alternative dispute resolution and relegates the institution of judicial proceedings to a measure of last resort.[715] Of significance for our purpose is section 33(1) which provides that:

> '(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.
>
> (2) Where negotiations under subsection (1) fail, parties to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.'

3.5 Once seized with the matter, the relevant body must, within 21 days, convene a meeting with the parties to determine the nature of the dispute; identify the mechanism available to the parties to assist in settling the dispute; agree with the parties on appropriate mechanism and procedure for resolving the dispute, including *mediation or arbitration* contemplated by Article 159[716] and 189 of the Constitution. Where all efforts fail, including resolution of the matter by the Summit, which is akin to Presidential Coordinating Council, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.[717]

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713 Section 189(4) of the Constitution of Kenya.

714 See clause 6 of the Schedule to the Intergovernmental Relations Act of 2012.

715 Mitullah, Winnie V. 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps' *FES Kenya Occasional Paper, No 6,* December 2012 at 8.

716 Section 159(2)(c) of the Constitution of Kenya expressly provides that: 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted.'

717 Section 35 of the Intergovernmental Relations Act of 2012.

Question

Would an amendment to the Intergovernmental Relations Framework Act to make provision for Alternative Dispute Mechanism obviate the kind of problems experienced by DSD? Which model of ADR would be ideal for this purpose: bilateral negotiations, facilitated negotiation, or arbitration?[718] What in your view would be the advantages, or disadvantages, of adopting this approach?

2 Ethiopia

(a) Basis for intergovernmental relations

3.6 While there is ongoing crisis in Ethiopia between the government in Addis Ababa and one of the regional governments, it is nevertheless useful to look at the intergovernmental structure it has designed in order to see if it could have any relevance to us. The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) is supreme. It guarantees fundamental rights and freedoms, including the right to equal access to public funded social services.[719] It imposes a duty on government to allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged and to children left without parents or guardian[720] and makes provision for a dual governmental structure comprising federal government and member states with distinctly delineated powers.[721] It is silent on the mechanism and principles through which collaboration between the two spheres of government is to be achieved. And, in this regard, it is considered deficient.[722] Nonetheless, the need to cooperate, consult, coordinate and collaborate is deemed to be implied[723] by two

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718 According to McEwen *et al* at 29, the differences between the various forms of alternative dispute resolution mechanisms are the following:

- where parties to a dispute remain entirely in control of the outcome, with no external intervention that is bilateral negotiation;
- facilitated intervention involves a third party who intervenes to assist with the process of resolving a dispute. The role of such a mediator can range from being a passive observer, acting as a go-between, or actively promoting compromise but has no powers to impose an outcome, it remains for the parties to a dispute to decide whether to agree to any proposals that are presented; and
- in arbitration the power over the outcome of a dispute is transferred to a third party (either an individual or a panel) and the basis for the intervention is the joint invitation of the parties rather than a legal process.

719 Articles 9 and 41(3) of the FDRE Constitution.

720 Article 41(4)-(5) of the FDRE Constitution.

721 Article 50(1) of the Constitution of Ethiopia. For a detailed discussion of this provision, section 51(1) and 52(2)(a) and their significance for IGR in Ethiopia, see also Afesha, Nigussie 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' *Mizan Law Review* Vol 9, No 2 December 2015 341 at 343.

722 *Id* at 344.

723 *Id* at 343.

constitutional injunctions to both tiers of government to form 'one economic community...with sustainable and mutually supportive conditions' and to preserve and maintain constitutional order throughout the federation.[724]

(b) Intergovernmental forums

3.7 Consequently, and despite the abovementioned gap in the legislative framework, various formal and ad hoc, spontaneous, irregular, informal governmental relationships and forums have been established through time to ensure integration, coordination and efficiency. [725] Two key entities that have fostered intergovernmental relations are the House of Federation; and the Ministry of Federal Affairs whose objective is to promote cooperation based on mutual understanding.[726] At sectoral level, the Ministry of Health and the Ministry of Agriculture have played equally significant role.

(c) Do forums established by above-mentioned entities have coercive powers?

3.8 First, the power of the House of Federation to act coercively derives directly from the Constitution. The Constitution provides that State border disputes must be settled by agreement of the states concerned, but where this has failed, the House of Federation (the upper house of the Bicameral Parliament of Ethiopia comprising representatives of regional states)[727] is *empowered to make a final decision* within two years, inter alia, on the basis of wishes of the peoples concerned.[728]

3.9 Secondly, intergovernmental forums organised by the House provide a platform to discuss differences and to reach consensus. However, dissenting opinion is not encouraged. Effort is made to convince parties with dissenting views. However, the opinion of the majority prevails over any dissenting opinion. Furthermore, decisions taken in forums organised by the House are *binding on participating and absent states*.[729] In practice, as soon as the strategy and action plan in respect of an issue are finalised, they are sent to regions for

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724 See Preamble and sections 51(1) and 52(2)(a) of the FDRE Constitution.

725 Afesha, Nigussie above at 354-356.

726 Which derives its power to 'serve as a focal point in creating good federal-regional relationship and cooperation based on mutual understanding and partnership thereby strengthening the federal system' from Proclamation No.610/2010 read with article 14(1)(e) of Proclamation 691/2010 (*A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Republic of Ethiopia*). See in this regard, Afesha, Nigussie at 359.

727 Article 61 of the FDRE Constitution.

728 Article 48(1) and (2) of the FDRE Constitution.

729 Afesha, Nigussie at 358.

implementation.[730] This rule applies to sectoral forums referred to above. States that fail to attend intergovernmental forums organised by the Ministry of Health and the Ministry of Agriculture are *bound by the decisions* of the said forums irrespective of their non-appearance.[731]

3.10 Thirdly, and although it is frowned upon as an erosion of the autonomy of regional governments,[732] regional government officials are required to submit periodic reports on their performance. Their achievements are evaluated by federal officials who give feedback and direction about things that should be done and the way forward. These federal officials could also report inefficiencies of regional representatives which may result in the removal of the person in charge of the office concerned. [733] In the context of health, this power is exercised by a technical committee, the Federal Ministry of Health and Regional Health Bureaus Joint Steering Committee. This committee collects information; identifies areas of priority, regions which need capacity building, financial support and experience sharing; offers recommendations which are binding on regions. Pursuant to the work of the committee, each region submits reports both to its respective regional council and to the Ministry every month. Failure to submit the aforesaid report constitutes a ground for evaluation by the federal government.[734] This is possible, probably because of the top-down nature of the federal system of Ethiopia.[735]

730 *Ibid*.
731 Afesha, Nigussie at 361 and 363.
732 The obligation to submit reports has been criticised on the basis that it erodes the autonomy of the regions and it flies in the face of constitutional integrity of regional states. See Afesha, Nigussie 367.
733 *Id* at 361 and 367.
734 *Id* at 361.
735 *Id* at 366-367.

Questions

(a) Should Minmecs established in terms of section 9(1) of IRFA or any other law be empowered to make *final decisions*? If you agree, which mechanism would be best suited for this purpose, an amendment of IRFA, new or amendment to sectoral legislation or agreement between parties? Would such an approach/ amendment not render MECs for social development in provinces accountable to National Executive or forum concerned instead of Provincial Legislature as contemplated in section 114(2) of the Constitution? In other words, would such power pass constitutional muster?

(b) How should inefficiency in provinces be addressed? Would the introduction of reporting requirements akin to those used in Ethiopia, where officials and not political heads account to national government, be ideal for this purpose? Would such an intervention be constitutional?

3 Germany

3.11 As stated in the previous chapter, one of the integrated federal states that was influential during the drafting of our Constitution was the Federal Republic of Germany. Even though only a small fraction of intergovernmental relations are underpinned by the Constitution or legislation in that country, a number of factors make the German federal system necessary and ideal for comparative purposes.

3.12 First, it is characterised by intergovernmental sharing of resources and responsibilities and vertical and horizontal joint policy making to generate common nation-wide standards of public policy resulting in its description as 'cooperative' and 'unitary' federalism. Second, the *Länder* have a right and a duty to execute federal laws. Third, the German system is geared towards eliminating territorial differences not only by levelling out financial differences between *Länder*, but also through a uniform provision of public services and nation-wide standards of public policy.[736] Fourth, although a concurrent matter, the Federation has a right to legislate on 'public welfare' if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.[737]

3.13 As stated in the previous chapter, many of the best practices of the German system have been replicated, for example, the *Bundestreue* and vertical and horizontal cooperation; bilateral and multilateral cooperation and involvement of legislative, executive and judicial

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736 Auel, Katrin 'Intergovernmental Relations in German Federalism: Co-operative Federalism, Party Politics and Territorial Conflicts' *Comparative European Politics* 2014 at 3.

737 Article 72(2) of the Basic Law for the Republic of Germany, read in conjunction with Article 74.

organs of state in intergovernmental relations; have found their way into the Constitution and IRFA. Three aspects of the principle of *Bundestreue* need to be underscored. The first is the obligation on federal and regional governments to act loyally towards the union, which the court in that country has treated as a constitutional obligation to act in a pro-federal manner. In Belgium, a similar principle, of federal loyalty, is entrenched in the Constitution and it means that constituent units of the state (including federal government) must consider the effects of their activities on others and should abstain from activities which could cause undue detriment.[738] Secondly, it is important to emphasise that there is no checklist to measure compliance with the principle of *Bundestreue*, it is a constitutional norm given content by the demands of specific circumstances. And, thirdly, *Bundestreue* is a right enforceable by both national and regional governments.[739] In addition to this principle, it is important to emphasise that agreements between the *Länder* and federal level have to be negotiated, *coercion* is due to constitutional and political reasons not an option.[740]

3.14 Also worth noting is that in one of the networks through which cooperation and coordination takes place at *Länder* level, the Conference of Ministers (MPK), decisions had to be taken by unanimity, but this was changed during federal reforms to a qualified majority of 13 out of the 16 *Länder*.[741] However, it is not clear whether a *Land* that does not support a decision has the option to opt-out.

738 McEwen at 14.

739 See Woolman, Stu and Roux, Theunis 'Co-operative Government and Intergovernmental Relations' in Woolman *et al Constitutional Law of South Africa* 2nd Edition RS 1: 07-09 at 14-5.

740 *Id* at 13.

741 Auel, Katrin at 10.

Questions

The strands of the principle of *Bundestreue* referred to above have been expressly incorporated into our Constitution. In addition to imploring spheres of government to cooperate, section 41(1)(a), (c) and (d) of the Constitution explicitly enjoin organs of state in the three spheres of government to preserve *national unity* and *indivisibility* of the Republic; to provide *coherent* government; and to be loyal to the Republic and its people.[742]And, in contrast to the principle espoused in Germany that coercion is out of the question, our Constitution recognises, in section 100,[743] that where there has been failure to fulfil an executive obligation in terms of the Constitution or legislation by a province, national government could act coercively to ensure compliance.

In view of the foregoing, the following questions arise:

(a) If a province dissents at an intergovernmental forum, could the decision of that forum be imposed on the province and on what legal basis?

(b) Does the refusal by provinces to implement decisions taken at Minmec not fly in the face of the constitutional injunctions above to act in a pro-national manner or loyally towards the Republic?

(c) In these circumstances, and considering that we are not concerned here with coordination of varying policy initiative (or legislation), but the implementation of social development mandates contained in national legislation by provinces,[744] is it not within the rights of national government to explore ways to ensure that these mandates are implemented, including legislation which makes provision for majority voting or to act coercively?

(d) Or, is the only option available to government the intervention envisaged in section 100 of the Constitution?

4 United Kingdom

(a) Introduction

3.15 Despite being a unitary state, with Westminster Parliament having authority to legislate for all four regions, England, Wales, Scotland and Northern Ireland,[745] the United Kingdom

742 Section 41(1)(a), (c) and (d) of the Constitution.

743 Section 100 of the Constitution provides that: '(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

has had machinery for intergovernmental relations for some time.[746] Devolved legislatures and executives were created for Scotland, Wales and Northern Ireland in the late 1990s.[747] Some matters were reserved for Westminster and other matters devolved. The UK has exited the European Union and at the same time intergovernmental relations have gained momentum and assume greater importance in the UK.[748] Calls to reform the system have been gaining traction as well. Before we consider how the UK system works and whether there are any best practices we can distil, we consider cursorily why calls to overhaul the system of intergovernmental relations have been growing and we examine proposals that have been put forward. The purpose of this exercise is to determine whether there are parallels in the challenges confronting the UK and whether we can learn or emulate any of the proposed or possible models.

(b) Reforming intergovernmental relations in the UK

(i) Basis for reform

3.16 Initially, the need to reform intergovernmental relations never really arose because the same political party was at the helm in the UK and devolved governments or policy agendas

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(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—
  (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
  (ii) maintain economic unity;
  (iii) maintain national security; or
  (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.'

744 In his exposition of the Intergovernmental Relations Framework Act, Steytler, as quoted in Woolman and Roux 'Chapter 14: Co-operative Government and Intergovernmental Relations' in Woolman et al *Constitutional Law of South Africa* 2nd Edition, RS 1: 07- 09 at 14-6 described the impact of national legislation on concurrent matters has had on power relations between national and provincial governments as follows:

> 'While the object of providing 'coherent government may seem a neutral goal, the coherence is, however, premised on the 'realisation of national priorities'...Given that the nature and extent of these [provincial and municipal] services are prescribed in national policies and legislation, the focus then shifts to [the] 'monitoring implementation' of [national] policy and legislation and not the coordination varying policy initiatives.'

745 Hogg, Peter in *Constitutional Law of Canada* 3rd Ed (1992) at 98, 99 and 101 describes the United Kingdom and New Zealand as unitary states because governmental power is vested in one national authority. In contrast to federal states such as the United States of America, Australia and Canada where governmental power is distributed between central and regional authorities which are coordinate and the law of central authority trumps that of regional authority in the event of inconsistency between the two; and the authority of each unit is guaranteed.

746 For historical account of the origins of intergovernmental relations in the UK, see Torrance, David *Intergovernmental Relations in the United Kingdom: Briefing Paper* (25 July 2018) at 26.

747 Through the Northern Ireland Act 1998, Scotland Act of 1998, and Government of Wales Act of 1998.

748 McEwen, Nicola; Kenny, Michael; Sheldon, Jack and Swan, Coree Brown *Reforming Intergovernmental Relations in the United Kingdom* (November 2018) at 3.

were broadly aligned and political parties were the conduits through which relations between governing administrations could be managed,[749] with the exception of Northern Ireland. Intergovernmental relations worked relatively well.[750] This state of affairs led the Lords' Constitution Committee and commentators to predict that intergovernmental relations would be really tested when they have to be conducted across deeper political divide.[751]

3.17 As they predicted, the structures and practices underlying intergovernmental relations, including lack of statutory framework and transparency, the process of resolving disputes and too much decision-making power resting with the UK government, have become the subject of much criticism from a diverse group of functionaries and entities[752] and inquiries.[753] Reports emanating from some of these inquiries (the House of Lords Constitution Committee; Welsh Assembly Constitutional and Legislative Affairs Committee; the Scottish Parliament Devolution (Further Powers) Committee; and other independent commissions) found, among others, that:

- intergovernmental relations should be put on a more formal, statutory footing with the Joint Ministerial Committee becoming a genuine decision-making body;
- existing arrangements were no longer fit for purpose;
- dispute resolution mechanisms were deficient, lacked teeth and should include greater independent arbitration; and that
- generally, there was lack of transparency and accountability in agreements reached between governments by legislatures and electorate.[754]

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749 McEwen at 16.

750 Torrance, David 'Intergovernmental Relations in the United Kingdom: Briefing Paper' 25 July 2018 at 18.

751 *Ibid*.

752 McEwen, Nicola *et al Reforming Intergovernmental Relations in the United Kingdom* November 2018 at 3.

753 Torrance, David *Intergovernmental Relations in the United Kingdom: Briefing Paper* 25 July 2018 at 4 and 23. See also McEwen at 7 where an argument is made that emphasis on confidentiality carries too high a price in terms of lack of transparency, with implications for the ability of legislatures to hold governments to account for their actions in the intergovernmental arena.

754 *Id* 23-25. McEwen at 11 expands on this theme, the opaque nature of how intergovernmental relations operate in the UK. She points out lack of transparency can have implications for the ability of both Parliament and the electorate to hold governments to account and to judge between competing accounts and interpretations of the conduct of intergovernmental meetings.

(ii) Proposed reforms

(aa) Principle of equality

3.18 Besides calls to provide statutory underpinning for intergovernmental relations to deal with issues such as membership, meetings and a requirement to report to Parliament;[755] to make the system fit for purpose; robust and transparent, whilst retaining flexibility required to adapt to changing circumstances;[756] it has also been argued that as part of strengthening IGR, the principles underlying intergovernmental machinery, which it is believed informs the design, process and practice of IGR[757] must be bolstered and included as part of the statutory framework for IGR in the UK,[758] Including the following principles:

- parity of esteem;[759]
- proportionality;[760] and
- transparency, mutual trust, respect, and subsidiarity.

3.19 The first principle, parity of esteem, needs some explanation. What it entails can be inferred from a statement by the Deputy First Minister of the Scottish Government who stated that '*good intergovernmental machinery must be based on parity of esteem, and mutual respect and trust'*, noting that '*the UK government and devolved administrations are equals in their areas of competence*.'[761] This notion that the UK Government and devolved administrations are *equals* in their areas of competence has further been bolstered by assertions that respecting authority and democratic legitimacy of each government to determine their own policy priorities in their respective spheres of competence entails recognising that they may generate divergent policy preferences.[762] This principle has no

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755 McEwen at 16 and 17.

756 McEwen 4.

757 McEwen 16.

758 McEwen at 13.

759 What this principle entails can be inferred from a statement by the Deputy First Minister of the Scottish Government that 'good intergovernmental machinery must be based on parity of esteem, and mutual respect and trust', and that the UK government and devolved administrations are equals in their areas of competence.' Reference is made to a description of these forums by the First Minister of Wales as: 'basically a Westminster creation that is designed to allow Westminster to discuss issues with the devolved Administrations. It is not jointly owned...and it is not a proper forum of four Administrations coming together to discuss issues of mutual interest.' Another described meetings of one forum as a 'vehicle... to hand out announcements to the devolved administrations...without any negotiation, protest was heard, but this was not a place for negotiation and agreement.' See McEwen at 10.

760 According to McEwen et al, proportionality principle would ensure that intergovernmental mechanisms and forums are established only when necessary to serve mutually agreed purpose and that their reach and remit should not have a debilitating effect on the authority of participating administrations. *Id* at 16.

761 McEwen at 14.

762 McEwen 13-16.

equivalent in chapter 3 of our Constitution or in IRFA. In contrast, the Constitution contains elements of centralised state and the national government retains the dominant position.[763]

(bb) Perception of the scope and functioning of an intergovernmental forum

3.20 Reviews conducted in the UK reveal that clarity of purpose or clearer rationale and remit, efficient organisation and shared understanding of the scope is of utmost importance if an intergovernmental forum is to be effective.[764] Research has warned that even where an intergovernmental forum has a relatively clear purpose in place, there might be a gap in the perception of the scope and functioning of participants.[765]

(cc) Decision-making and enforcement

3.21 Each country has a peak intergovernmental forum, the equivalent of PCC in South Africa, and intergovernmental relations councils can serve as a tool of centralisation and/or centrally-coordinated countrywide action and as a vehicle for sub-state governments to influence policies of central government that intersect with, or have impact upon, sub-state domain. The Joint Ministerial Committee (JMC) fulfils both these roles and thus, in its plenary format, did not need to be replaced with a new heads of government forum. However, some changes were recommended to its function and operation, including incorporating a decision-making role and a more robust system of dispute resolution.[766]

Co-decisions rules

3.22 A review of intergovernmental relations in other countries[767] revealed that in most countries, for example Australia, Belgium, Canada and Spain, decision-making by consensus is the norm in intergovernmental forums. This approach, it is said, preserves the autonomy of governments in policy areas within their competence by ensuring that agreements cannot be imposed on governments against their will. However, in some of the countries mentioned above, namely Australia, Spain and Canada, some sectoral councils do allow for non-unanimous decisions; some sectoral forums allow majority voting; where consensus is not possible, governments that are able to reach agreement can proceed, with those who object given the right to 'opt out'. In the UK, however, none of these procedures (co-decision and majority voting or opting out) are known and consequently no formal rules exist in this regard. The memorandum of understanding (MOU) expressly states that the JMC is not a decision-

763 Woolman and Roux above at 14-5.
764 McEwen at 8 and 9.
765 *Ibid*.
766 *Id* at 18.
767 *Id* at 24 and 25.

making body.[768] Although emphasis is placed on seeking consensus, where that proves impossible a voting procedure: the support of the UK and at least one devolved government, has been proposed *to help conclude agreements*. Because adopting a voting formula to ensure that decisions could be reached by a majority would impose policy or regulatory requirements on one or more devolved governments without their consent, in areas that are within their competence, adopting a voting formula has been rejected. Instead, where it is impossible, after negotiations, to reach agreement, those governments that wish to proceed do so, with other parties having the right to opt out.[769]

Status of agreements reached in intergovernmental forums

3.23 The abovementioned recommendations and challenges relate to the process of reaching a decision. What happens to defaulting or reneging party after a decision has been reached? What mechanisms exist to enforce the decision? In Belgium and Spain, some agreements are afforded legal status that makes them binding and enforceable in the courts. In Belgium, agreements must also be approved by legislatures. In the UK, it has been proposed, with little support,[770] that decisions made within a reformed intergovernmental relations (IGR), including framework agreements, be binding on all member administrations.[771]

(dd) Dispute resolution process

3.24 The chairing of JMC when it is in dispute resolution mode by the UK creates conflict of interest and is out of step with normal dispute resolution practice settings in the UK and in other multilevel political systems. To remedy this deficiency, a call has been made for the protocol to be revised to make provision for independent intervention in disputes, by agreement of the disputing parties. Mediation is preferred given that it preserves the disputing parties' autonomy in deciding whether or not to accept any proposed resolution. Furthermore, it has been suggested that it may be possible for a government not a party to a dispute to perform the role of a mediator. Alternatively a suitably qualified mediator could be appointed to facilitate the agreement between disputing parties and present compromise proposals for the parties to consider.[772]

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768 McEwen at 23.
769 *Id* at 25.
770 McEwen *et al* at 26 argue that such an approach would require a fundamental shift in the prevailing political culture and practice of the UK.
771 *Ibid*.
772 *Id* at 34-35.

(c) Current workings of intergovernmental relations - the Joint Ministerial Committee

(i) The Joint Ministerial Committee

3.25 Although quite a number of intergovernmental forums exist, some fairly new, while others date back to the 1980s, only one has been described as a 'central pillar of the UK's intergovernmental architecture,[773] the Joint Ministerial Committee (JMC). The JMC owes its existence to a memorandum of understanding (MOU).[774] This MOU established a Joint Ministerial Committee (Plenary) comprising of heads of government of the administrations and chaired by the UK. The JMC has subcommittees and a secretariat. The MOU sets out broad principles for cooperation and coordination[775] and a process for dispute resolution. As can be gleaned above, its terms of reference include resolution of disputes between administrations.[776]

3.26 The aforementioned MOU itself has been amended several times since its promulgation in the late 1990s. In 2018, the UK Prime Minister, Theresa May, and First Ministers of Scotland and Wales:

> 'agreed that officials should review and report to Ministers on the existing intergovernmental relations structures, including the MOU, to ensure they are fit for purpose in light of UK's exit from the EU.'[777]

(ii) Status of intergovernmental agreements

3.27 For our purpose, it is important to note that the aforesaid MOU expressly states that it is a statement of political intent and not a binding agreement and that it does not create binding obligations between the parties. The JMC is described as a 'consultative body rather than an executive body' which will reach agreements rather than decisions, and may not bind any of the participating administrations which are free to determine their policies while taking into account JMC discussions.'[778] This wording is strikingly similar to that used in section 32 of

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773 McEwen at 8.

774 See *Devolution Memorandum of Understanding and Supplementary Agreements Between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committees – Presented to Parliament by Command of Her Majesty and Presented to the Scottish Parliament and the Northern Ireland Assembly and Laid Before the National Assembly for Wales* (October 2013).

775 These are good communication between governments especially where one administration's work may have some bearing upon the responsibilities of another administration; cooperation where appropriate on matters of mutual interest; exchange of information, statistics and research; and confidentiality. See Memorandum of Understanding at 5-7.

776 See Memorandum of Understanding 12 et seq.

777 *Joint Ministerial Committee (Plenary*), 14 March 2018, No 10 Downing Street at 2.

778 Devolution Memorandum of Understanding at 4 and 13.

IRFA and Clause 8(2) of Annexure A of the Implementation Protocol Template in Implementation Protocol Guidelines and Guidelines for Managing Joint Programme. Some have concluded that emphasis upon *consideration* in the terms of reference of the JMC is indicative that this forum was not intended to be a forum for co-decision nor even routine coordination.[779]

(iii) Dispute resolution mechanisms

3.28 Informal IGR is the norm in the UK.[780] In relation to dispute resolution, there are numerous provisions in the MOU which imply that resolution ought in the first instance be attempted on a bilateral basis,[781] and quite a number of 'disputes' have been resolved in this way,[782] while others expressly enjoin parties to a disagreement to try and resolve matters bilaterally.[783] Even when a matter is eventually referred to the JMC Secretariat, and to the

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779 McEwen, Nicola *et al Reforming Intergovernmental Relations in the United Kingdom* November 2018 at 7 and 8.

780 *Ibid*.

781 For example, paragraphs 25 and 26 of the Memorandum of Understanding and paragraph 1 of the Protocol for Avoidance and Resolution of Disputes: the 2001 Memorandum of Understanding provide that:
'25. The UK Government and the devolved administrations commit themselves, wherever possible, *to conduct business through normal administrative channels*, either at official or Ministerial level. The Secretaries of State for Scotland, Wales and Northern Ireland, whose functions include the promotion of good relations between the UK Government and the respective devolved administrations, *should be consulted in any significant case of disagreement*.
26. Where a dispute cannot be resolved bilaterally or through the good offices of the relevant territorial Secretary of State the matter may formally be referred to the JMC Secretariat *subject to the broader principles and arrangements for dispute avoidance* and resolution set out at Section A:3 of this Memorandum of Understanding.'

782 Torrance, David at 8.

783 The following relevant paragraphs state:
'A3.6 *All efforts should be made to resolve differences informally and at working level* if possible. Where this fails, the issue should be brought to the attention of more senior officials, including, if other steps are unsuccessful, members of the JMC officials' framework i.e. JMC(O) or senior officials supporting the JMC(D) or JMC(E) as appropriate. *All should fully commit themselves to achieving agreement if possible*. If no agreement is reached at official level, *Ministers should make every effort to resolve the problem without the need formally to invoke the JMC process*. These steps should proceed in a timely manner.

A3.7 The MoU recognises the key responsibility of the relevant territorial Secretary of State for promoting effective working relations and helping resolve disputes [paragraph 24, A1.7]. The relevant territorial Secretary of State or his/ her officials *should always be made aware of any dispute that threatens to be incapable of informal resolution*, and involved in relevant discussions. Where discussions involving the parties do not achieve agreement, *the relevant territorial Secretary of State or officials may by agreement convene further talks between the parties at ministerial or official level*.

A3.8 The Statement of Funding Policy sets out the UK Government's rules for resolving financial issues. Before the JMC process set out in the Statement of Funding Policy is invoked for *differences about financial issues including the interpretation of the Statement of Funding Policy, these should generally be first discussed bilaterally between the Treasury and the*

JMC Plenary, the process is intended to find, and not to impose, a solution.[784] At the level of the JMC, two important factors should be highlighted: first, the meeting is chaired by a senior UK minister *with no direct departmental interest in the issue in dispute*; and second, the consideration of a dispute by the JMC Plenary is *final*.[785] This does not in any way preclude the courts from dealing with disputes where a devolved institution acted *ultra vire*s or beyond its legal competence.[786]

(iv) Transparency and accountability

3.29 Another aspect about the workings of the JMC that is worth highlighting, and that seems to have received no attention in the conception of intergovernmental forums in our country and in the discourse, is transparency. In the UK, the outcomes of meetings of the JMC, sub-committee meetings, and annual reports, are published in the website of all four governments involved.[787]

relevant devolved administrations or if appropriate at a timely Finance Quadrilateral meeting bringing together Treasury ministers and finance ministers of the devolved administrations.'

784 See in this regard paragraphs A3.10-A3.13 of the Devolution Memorandum of Understanding.

785 Paras A3.12 and A3.14e of the Devolution Memorandum of Understanding

786 Torrance, David at 11.

787 Torrance, David at 10.

Questions

Arbitration and mediation

We mooted above, the possibility of introducing *Alternative Dispute Resolution* to current intergovernmental dispute mechanisms. Sections 33(g), 35(3)(g) and 40(2) of IRFA leaves it to respective intergovernmental structures to determine how they will resolve disputes. Where procedures and mechanisms for settlement of disputes prove ineffective, parties to the dispute could invoke *facilitated negotiation* process provided for in 42(1)(d), 43 and 44 of IRFA. These provisions make provision for the designation of a facilitator, defines his or her role; and enlisting assistance of the Minister of Cooperative Governance. As stated above, a facilitator (or mediator) is not empowered to impose an outcome. However, no provision is made in this Act, or in other laws regulating intergovernmental relations, for arbitration or mediation, aspects that are receiving attention in the UK. In respect of the latter, which is a strand of facilitated negotiation, a mediator is able to propose a solution to the parties.[788]

(a) Would the inclusion of arbitration or mediation, as measures of last resort, to be used where all other avenues to resolve a dispute have failed, obviate the type of challenges bedevilling the social development sector?

(b) Would arbitration be suitable considering that it has the potential to take away the autonomy of parties to decide whether or not to accept the proposed solution?

(c) Should these forms of ADR be incorporated into IRFA or included in sectoral legislation, should the Commission propose that either one be enacted to address issues referred to it by DSD?

Transparency and accountability

Among the values upon which our constitutional democracy is founded are the values of openness and transparency. In the context of intergovernmental relations, these values find expression in section 46 of IRFA, which gives the Minister of Cooperative Governance discretion to table reports in Parliament with regard to the general conduct of intergovernmental relations and the incidence and settlement of intergovernmental disputes. However, a search by the Commission of information relating to the work of Minmec for Social Development Sector yielded no results, which, as is the case in the UK, attests to the opaque nature in which intergovernmental forums operate. Little, if any, information relating to these forums is contained in annual reports, of DSD or Cogta, for example. This has implications for the ability of both Parliament and the electorate to hold governments accountable.[789]

(a) How could transparency in intergovernmental relations in South Africa be enhanced?

(b) Would publication, on online platforms and websites of national and provincial government websites participating in these forums, of reports, agendas and outcomes of meetings of intergovernmental forums, contribute to broader understanding of intergovernmental relations?

Parity of esteem principle

Is the principle of parity of esteem implied in our Constitution? If so, what implications does it have for the issues raised in this inquiry?

Decision-making and enforcement of decisions

Which of the following options relating to decision-making and enforcement of decisions would assist to resolve the problems afflicting the social development sector that have been referred to the Commission:

(a) The status quo must be retained (amendments to IRFA and new sectoral legislation to regulate intergovernmental relations is not necessary) - parties to the Minmec for welfare sector should strive to reach consensus and no agreement should be imposed on a participant of an intergovernmental forum against its will.

(b) IRFA should be amended, or new sectoral legislation enacted, to make provision for non- unanimous decisions - governments that are able to reach agreement should proceed and implement such agreements, and those who object should be given the right to opt out.

(c) IRFA should be amended, or new sectoral legislation enacted, to make provision for a voting formula similar to that contained in numerous provisions of the

788 See McEwen at 30.

789 McEwen at 11 and 40. Reference is made to Australia where the peak intergovernmental forum (COAG) and sectoral ministerial councils have websites which include information about their composition, terms of reference, published announcements, communiqués and agreements. In Italy too, the main intergovernmental conferences have websites. Spain, Italy and Belgium maintain registers of intergovernmental agreements. In other countries, once agreements have been signed, they must be published in the government gazette.

Constitution[790] and the Liquor Act and the National Health Act– entrenching decision-making by consensus a norm; but where this is impossible, allow the matter to be resolved by formal vote; and where there is equality of votes, the Minister should have a casting vote; and a decision by the majority is the decision of the forum binding on all the members.

5 Australia

(a) Introduction

3.30 There are many reasons why Australia is relevant to this inquiry. Besides parallels between our constitutional structure and that of Australia,[791] and characterisation of intergovernmental forums as being similar to Minmecs,[792] Australia has a multitiered system of government and most competences, including pensions and welfare benefits, are exercised concurrently by the Commonwealth (central government) and states (regional governments).[793] The country has over the years vacillated between coordinate, cooperative, coercive and co-ordinative federalism;[794] and relations between governments have been acrimonious, especially when different parties are in power.[795] This makes it an ideal case study. Moreover, whilst Australia's Constitution makes no mentioned of intergovernmental relations, numerous Australia-state bodies for consultation on matters of common interest have been in existence for quite some time.[796] It is the power that these bodies have that we are mostly interested in. Secondly, and because of parallels with certain provisions of the South African Constitution, we consider the claim that conditional grants have been used to

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790 See for example, sections 50(1), 53(1), 53(2), 65 and 75(2) of the Constitution.

791 The Commonwealth is the most powerful partner in the federation. Firstly, in respect of concurrent matters, Commonwealth legislation trumps state legislation in the event of conflict. Secondly, states have no power to impose taxes of customs and excise; they receive grants of financial assistance from the Commonwealth. Thirdly, the Commonwealth has the power to impose conditions on how the money is spent by the states which allows it to influence the way things are done in areas over which it has no power to pass laws. See in this regard, sections 96 and 109 of Australia's Constitution.

792 Woolman and Roux at 14-4 footnote 1.

793 *Australia's Constitution: With Overview Notes by the Australian Government Solicitor* Produced by the Parliamentary Education Office and Australian Government Solicitor at iv.

794 See Cranston Ross 'From Co-operative to Coercive Federalism and Back' *Federal Law Review* Vol 10 (1979) 121. Cranston explains these phases as follows: **coordinate federalism**, Australian and state governments were each coordinate and independent in their respective spheres; **cooperative federalism**, saw the establishment of intergovernmental bodies to achieve uniform action, to coordinate policies and to exchange information; coercive federalism enabled the Australian government to dominate states; and **coordinative federalism** is an attempt by Australian governments to introduce cooperative planning, reduce conditions attached to section 96 grants, and is seen as an advanced form of cooperative federalism.

795 McEwen et al 'Case Study Annex' in *Reforming Intergovernmental Relations in the United Kingdom* at 8.

796 See Cranston, Ross above at 123.

concentrate decision-making power in the hands of national government and explore how effective this has been.

(b) Powers of intergovernmental bodies - decision-making and dispute resolution

(i) The norm: consensus

3.31 In Australia, government agreements are reached by consensus, and are susceptible to being reneged upon. Where it is impossible to reach consensus, it is permissible for an agreement to be signed by some of the governments. Some COAG councils allow for non-unanimous agreements. Where an agreement has been reached, it does not have *legally enforceable status unless this is provided for by subsequent statute*.[797] In the absence of such legislation, disputes relating to the implementation of intergovernmental agreements are resolved through negotiations, either informally or in meetings of the relevant ministerial council. What happens if negotiations fail? Very few agreements make provisions for mediation or arbitration. In cases where this procedure has been used, recommendations, which were considered only advisory, were ignored by the Commonwealth.[798]

3.32 With the exception of financial agreements discussed below, the courts' approach to intergovernmental agreements is that they are u*nenforceable*. The reasoning of the court in *South Australia v Commonwealth,*[799]considered the only decision directly on the matter,[800] could aid our understanding of the nature of these agreements.[801] In this case South Australia asked for a declaration that the Australian government was in breach of an agreement relating to the standardisation of certain railway lines in South Australia. Judges in the aforementioned case considered agreements as giving rise to *political obligations* only and not *legal obligations enforceable by a court*. They also held that the agreement was not enforceable on other grounds, for example, no specific breach of the terms of the agreement was made out, or the agreement was simply an agreement to enter into other specific agreements at some future time. However, the court also acknowledged that such agreements could be enforceable, but provided no guidance as to how these could be identified.[802]

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797 *Id* at 8.
798 *Id* at 9.
799 (1962) 108 C.L.R 130
800 Cranston 126.
801 For detailed discussion of this decision, see Cranston above.
802 Cranston at 126.

(ii) Exceptions to the norm

(aa) COAG Disability Reform Council

3.33 COAG Disability Reform Council is one such intergovernmental body underpinned by legislation.[803] Although quite a number of aspects relating to this intergovernmental body such as the scope of its responsibility;[804] accountability;[805] priorities,[806] are important, for present purposes, we will focus only on two: membership and operations. This forum is chaired by the Commonwealth Minister for Social Services and comprises, among others, two ministers from each jurisdiction, one responsible for disability policy and one for Treasury. This council makes decisions in accordance with the National Disability Insurance Scheme Act 2013 and on the basis of consensus wherever possible. Where consensus cannot be reached, the council makes decisions on the basis of a majority of members.[807] In these circumstances, *jurisdictions in the minority are not bound to implement the decision* that has been made.[808]

(bb) Financial Agreement Act

3.34 Another exception to the general principle referred to above is the Financial Agreement Act of 1927, the only intergovernmental agreement treated by the courts as being definitely enforceable,[809] by virtue of section 105A of the Constitution of Australia.[810] The use of this

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803 National Disability Insurance Scheme Act 2013.

804 For instance, it considers policy matters that relate to national disability insurance scheme, including views on amendments to the NDIS Act; advises the Commonwealth Minister and makes recommendations to COAG on these matters; it is responsible for intergovernmental relations; considers impact of regulation on individuals, community organisations and businesses, identifies opportunities to reduce or remove such burdens wherever possible.

805 It is reviewed annually by COAG comprising the Prime Minister and state and territory First Ministers and President of the Australian Local Government Association.

806 Its priority actions include providing policy advice, monitoring implementation plans, monitoring implementation and reporting under national disability agreement.

807 COAG Disability Reform Council 2018 Terms of Reference.

808 *Ibid*.

809 Cranston at 125.

810 This provision of the Australian Constitution reads: 'Agreements with respect to State debts

(1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including:
   (a) the taking over of such debts by the Commonwealth;
   (b) the management of such debts;
   (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
   (d) the consolidation, renewal, conversion, and redemption of such debts;
   (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
   (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

agreement has been described pejoratively as 'dragooning' and 'dictatorship'.[811] The courts in that country have interpreted the phrase 'carrying out' in section 105A to include enforcement.[812]

(cc) Enforceable intergovernmental agreement [813]

3.35 As stated above, the court in *South Australia v Commonwealth* stated that agreements between organs of state could be enforceable but provided no guidance as to how these could be identified. Commentators have elaborated on this aspect. They have argued that whether an intergovernmental agreement is binding or not depends on whether the parties have the necessary *animus contrahendi* (intent to contract - an intention to be bound by contractual obligations); or whether Parliaments can limit the freedom of future Parliaments,[814] noting that these approaches are not conclusive, and seem out of place in view of the courts' approach that intergovernmental agreements are covered by special rules. Consequently, they have argued that what the agreement says could be helpful; the degree of specificity and that the circumstances in which the agreement is made could remove it from the regime of contract and establish it as an agreement of a political nature. To illustrate they have used the River Murray Waters Agreement of 1914 and the Offshore Petroleum Resources Agreement. The River Murray Waters Agreement between Australian federal government and various states, established a Commission with power to make regulations in respect of its functions, provided for certain works and the sharing of financial and building responsibilities between contracting governments, and provided a formula for the division of water. In the event of a party failing to perform works or to contribute its share of the costs the other contracting governments could perform those works and:

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(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.
(4) Any such agreement may be varied or rescinded by the parties thereto.
(5) *Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto* notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.
(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.' (Our emphasis).

811 Cranston at 125.

812 According to Cranston above, these so-called *Garnishee cases* arose when the New South Wales Labour Government defaulted on the payment of certain interest on its public debt. The Australian government enacted legislation along the lines of garnishee proceedings. The New South Wales sought a declaration that the legislation was not authorised by section 105A. The High Court held that 'carrying out' included enforcement and that Australian legislation did not violate the general constitutional principle that only State Parliament can appropriate State revenues.

813 See Cranston 126 et seq.

814 *Ibid*.

> 'may in court recover as a debt from the Contracting Government so refusing or neglecting the share of such costs to be provided by such Contracting Government in pursuance of this Agreement together with interest on any sums expended at a rate to be determined by the Commission.'

3.36 In contrast, Offshore Petroleum Resources Agreement states:

> 'The Governments acknowledge that this Agreement is not intended to create legal relationship justiciable in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof.'[815]

3.37 In Australia a clause is often included in intergovernmental agreements, particularly those underpinned by legislation that each party 'agrees to provide for and secure performance of the obligations under this Agreement.' It has been argued that the implication of such a clause is that it is the responsibility of the parties to implement the agreement to the exclusion of the courts.[816]

(c) Coercive federalism: conditional grants in terms of section 96 of Australia's Constitution

3.38 One provision of Australia's Constitution has been slated for being responsible for the concentration of decision-making powers in the hands of national government, coercive federalism, and consequently transforming the States into mere agencies of federal government, namely section 96,[817] the equivalent to section 214[818] and 227[819] of South Africa's Constitution. It allows the Commonwealth to make conditional grants of money to the States. This power to impose conditions on how the money is spent by the States allows the Commonwealth to influence the way things are done in areas over which it has no direct power

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815 *Ibid*

816 *Id* at 128.

817 Section 96 reads: 'Financial assistance to States
During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'

818 Section 214 of South Africa's Constitution provides that: 'An Act of Parliament must provide for—
(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
(b) the determination of each province's equitable share of the provincial share of that revenue; and
(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, *and any conditions on which those allocations may be made*.' (Our emphasis).

819 Section 227 reads: 'Local government and each province—
(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
(b) may receive other allocations from national government revenue, either *conditionally* or unconditionally.'(Our emphasis).

to pass laws. For example, the Commonwealth has exerted significant control over universities in this way even though it has no specific power in relation to education.[820] Criticism that has been levelled at the use of this provision includes a charge that it is deviously used to invade functional areas reserved for the States;[821] that specific purpose grants substitute national priorities for State priorities;[822] and that conditions are far too onerous.[823]The courts, however, have held that there is nothing coercive about section 96. In *Victoria v Commonwealth (Second Uniform Tax Case)*[824] the court stated:

> 'In sec. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being, no power of course to compel acceptance of the grant and with it the accompanying term or condition.'[825]

3.39 The Court held that the Australian Government can require that financial assistance provided under section 96 be applied to a specific object, although the object is outside its powers. Furthermore, the courts have held that conditions imposed on section 96 grants must not constitute coercion, i.e demand obedience, but that there is no objection to their acting as a strong inducement to State action.[826] The view that specific purpose grants are not coercive is based on the fact that the federal government could not obtain judicial remedies requiring the state to observe any condition. By contrast, judicial enforcement of conditions attached to grants to the States has occurred.[827]

3.40 But practically, how does this provision work? Conditions on section 96 grants are sometimes set out in legislation, occasionally they are left to the Ministerial regulation or discretion, but in the main they are contained in an agreement with the State concerned.[828] The Auditors-General check whether the States observe conditions attached to section 96 grants; States undertake to furnish to the federal government any information it may reasonably require in relation to compliance; the States also furnish annual statements and

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820 Commonwealth of Australia 2010, *Australia's Constitution with Overview and Notes by the Australian Government Solicitor* at 24.

821 Cranston 129.

822 Cranston 130.

823 Cranston 131.

824 (1957) 99 C.L.R 575.

825 *Ibid*.

826 Cranston 133. The distinction between 'coercion' and 'inducement' is considered artificial.

827 According to Cranston at 134, welfare recipients, for example, successfully challenged rules imposed by State welfare departments, through which funds are channelled as being in breach of the Constitution and the standards contained in federal legislation, after the responsible federal department failed to take effective action.

828 Cranston, at 132, stated that a statute may approve the agreement (which is annexed as Schedule to the Act) and make the necessary appropriations, or alternatively it may make the appropriation and authorise the federal government to enter into an agreement with the State or States substantially along the lines of the agreement in the Schedule. The legal nature of such agreements has been alluded to above.

reports. If breach is detected through these procedures, the federal government remedy is extra-legal, for example, cut off of funds, mobilising those affected by the State's non-compliance.[829] Other States, for example Queensland, have rejected specific purpose matching grants related to social welfare.

829 Cranston 135.

Questions

In the previous segment, we suggested that introduction of non-unanimous decisions and arbitration and the possibility of opting out should be explored, all of which are also pillars of the Australian intergovernmental relations. We will therefore not repeat these proposals here.

Enforceability of, and wording used in, intergovernmental agreements

However, there are two aspects that the Australian jurisprudence puts a spotlight on. The first, which has received little attention so far, in IRFA, judicial decisions and academic comments relating to intergovernmental relations, which we believe should be explored further, and tightened up if necessary, to obviate the problems which have given rise to this inquiry, is the *enforceability of, and wording used in, intergovernmental agreements*, whether these have statutory basis or not. Reviews of intergovernmental relations in South Africa, which as we demonstrated above are based on the principle of *Bundestreue* that creates, inter alia, a constitutional obligation and a justifiable right,[830] following the codification of IGR by IRFA have highlighted that '*there remains ambivalence about the binding nature of decisions/recommendations and the inability of forums to supervise and enforce decisions*.' In respect of this aspect, the following question arises:

- What could, and should, be done to ensure that agreements entered into by organs of state give rise to legal obligations and not just political obligations, and are enforceable?

Use of conditional grants contemplated in s 214 and 227 of the Constitution to induce provincial action

In chapter 1, we stated that in the *National Education Policy* case it was argued that provinces would be coerced to conform with national policies and standards through a threat of to withhold financial support. We also stated that the court left the question whether the use of such leverage by national government would be constitutional and permissible. As can be gleaned in the preceding discussion, in Australia, attacks to provisions similar to section 214 and 227 of the Constitution that they empower national government to act coercively have been dismissed by the courts, which raises the following questions:

(a) Whether the power to withhold funding to a province is implied in sections 214 and 227 of the Constitution, considering that these provisions provide that 'other allocations' may be made conditionally; the Act making provision for division of national revenue must take into account national interests, the needs and interests of national government, and obligations of provinces in terms of national legislation?

(b) Would the use of such power by DSD to ensure alignment of provision of welfare service by provinces with national norms and standards pass constitutional muster?

6 Belgium

3.41 Belgium has a federal system of government. And, the constitutional distribution of powers is very detailed and to obviate conflicts of jurisdiction, nearly all legislative powers are exclusive which means that a particular matter is either governed by federal law, or by regional or community decrees and/or ordinances *but never by more than* one.[831]There is however a great deal of overlap between powers allocated to the federal government and communities. For example, social security and social protection is the competence of federal government,[832] whilst social and family support and family allowances are matters that reside with communities.[833] Where matters are split, as is the case in respect of social security, it increases policy interdependence which requires coordination,[834] otherwise policy making and public administration could be rendered completely paralysed.[835]

3.42 The following aspects of intergovernmental relations are worth noting. In Belgium there is a strong preference for legal instruments as opposed to mere political agreements, which explains why many forms of intergovernmental relations have a statutory foundation and are justiciable.[836]Inter-ministerial conferences, however, cannot take binding decisions.[837]

3.43 An *ad hoc* tribunal can be established in the case of disputes relating to the implementation of intergovernmental agreements. Members of the tribunal are nominated by the parties to a dispute, or by the President of the Constitutional Court, in the event that members cannot agree. The tribunal President is a professional magistrate. Members of the tribunal seek to negotiate an agreement (enable parties to reach consensus). If this fails, litigation takes place before the same members. Decisions are binding and final.[838]

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830 See in this regard, De Villiers in 'Intergovernmental Relations: The Duty to Co-operate – A German Perspective' at 433, and 'Codification of 'Intergovernmental Relations' by Way of Legislation: The Experience of South Africa and Potential Lessons for Young Multitiered Systems' at 688.

831 Poirier, Johanne 'Formal Mechanisms of Intergovernmental Relations in Belgium' *Regional and Federal Studies* Vol 12 (September 2002) 24 at 28.

832 Poirier at 28

833 McEwen 'Case Study Annex 'at 11.

834 *Id* at 12.

835 Poirier at 28

836 Poirier, Johanne 'Formal Mechanisms of Intergovernmental Relations in Belgium' *Regional and Federal Studies Frank Cass Journal* at 25.

837 McEwen at 14.

838 *Id* at 18.

Question

Currently, all intergovernmental disputes must be resolved by the courts if the parties cannot resolve the matters amicably or if intervention by facilitator or Minister the matter remains unresolved. None of the laws regulating intergovernmental forums make provision for appointment of a tribunal at the behest of the parties to a dispute, which raises the questions:

- Should the inclusion of a tribunal in the dispute resolution mechanism for welfare sector be explored? If so, what value would such reform add to the dispute mechanisms? And, what should be the remit of such a tribunal?

7 Canada

(a) Cooperative federalism in Canada

3.44 Canada is a federal state, with power distributed between central and regional governments. Whilst the Canadian constitution contains a number of elements that are indicative of a strong central government or a centralised system,[839] it also creates the impression that the constituent units of the Canadian state are coordinate structures acting independently of each other,[840] which would have had devastating consequences.[841] In fact at some stage, provinces were elevated to *coordinate* status through judicial interpretation by the Judicial Committee of the Privy Council.[842] However, after the abolition of appeals, there has been some accretion of federal power. But because in many fields effective policies require joint or at least complementary action of more than one legislative body, cooperative

839 For instance, in the event of inconsistency between federal law and that of regional authority, the former prevails; powers of provinces are enumerated and the residue is given to federal government; functional areas over which federal government has authority are matters left to the states in the US and Australia; the power to levy direct and indirect taxes is left to federal government while provinces are confined to direct taxation; federal government could disallow provincial legislation; and the appointment of judges rested with federal government. See Hogg Peter *Constitutional Law of Canada* 3rd Edition (1992) at 108-111.

840 As Hogg in *Constitutional Law of Canada* at 130 puts it: the formal structure of the Constitution carries a suggestion of eleven legislative bodies each confined to its own jurisdiction and each acting independently of the others...eleven separate fiscal systems, with each province levying taxes to raise the revenue it needs for its legislative policies, and the federal government doing the same

841 In respect of fiscal system, for example, Hogg points out that *silos* approach would have resulted in poorer provinces being forced to provide much lower standards of public services, and much less economic opportunity, for their residents.

842 *Id* at 110-111.

federalism[843] has taken root in Canada. In Canada, cooperative federalism is understood to mean the following:

> 'The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process. These relationships are also the means by which consultations occur on the many issues of interest to both federal and provincial governments.'[844]

3.45 Expectedly, as in other jurisdictions referred to in this paper, managing intergovernmental relations is an important aspect of Canadian federalism because there are very few issues in public policy that do not cross jurisdictional lines and few areas in which actions of one government do not affect other governments.[845] However, neither the Canadian Constitution, nor legislation or conventions of parliamentary government make explicit reference to intergovernmental relations. As a result intergovernmental relationships depend upon informal arrangements. [846] Consequently, intergovernmental relations mechanisms too have evolved on an *ad hoc* basis and in response to changing political dynamics and requirements of the time.[847] But, as stated above, cooperative federalism, coordination and collaboration has been deemed inevitable especially in respect of concurrent matters. With concurrent matters and overlaps in jurisdictions come intergovernmental disputes.

(b) Intergovernmental forums- their powers

3.46 Canadian jurisdictions and government have developed mechanisms to coordinate their response to intergovernmental issues. The most visible and important forums created for this purpose are the *'first ministers' conferences'* which are federal-provincial conferences of Premiers and the federal Prime Minister. It is at these conferences that federal-provincial relationships are settled. The significance of these forums derives from the fact that the Premiers, the Prime Minister, and their delegations are able to make commitments, including commitments which require legislative action.[848] In addition to these, there are several

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843 See Hogg 130-131. According to Hogg cooperate federalism is intended to give effect to humanitarian and egalitarian sentiments calling for national minimum standards of health, education, income maintenance and other public services; to counter disparities in regional wealth in Canada.*Ibid*.

844 Hogg at 131.

845 See *Intergovernmental Relations in the Canadian Context* available at: https://www.canada.ca/en/intergovernmental-affairs/services/relations-canadian-context.html (accessed on 16 September 2020).

846 Hogg at 131.

847 Intergovernmental Relations in the Canadian Context at: https://www.canada.ca/en/intergovernmental-affairs/services/relations-canadian-context.html

848 For a discussion of these forums, see Hogg at 131 and 132.

standing federal-provincial committees of ministers (sectoral conferences) which enable every cabinet minister to meet with his counterparts in the other governments from time to time.[849] The most active of which are forums for housing, labour market, and social services,[850] and these federal-provincial conferences are used to resolve many of the problems of a divided jurisdiction that would otherwise need to be settled by the courts.[851] At federal level, the Prime Minister is assisted by the Minister of Intergovernmental Affairs and supported by a secretariat within the Privy Council Office to manage intergovernmental relations.[852] Provinces and territories have either a department, a secretariat or a coordinating unit within the Executive Office responsible for intergovernmental relations. There is also the Canadian Intergovernmental Conference Secretariat which provides support for intergovernmental engagements, including organising conferences, distributing documents and press releases.[853]

3.47 The forums operate in much the same way as forums in other jurisdictions. Canadian intergovernmental relations rely on finding a *consensus* between federal government, the provinces and the territories. *There are no mechanisms for bringing decisions to a vote*. While each government is expected to honour commitments, *agreements are not binding, they are essentially political agreements*.[854] Disputes over both jurisdictional competences and funding are common.[855] The Supreme Court of Canada decided that intergovernmental *agreements are not legally enforceable*, and the federal government could not be constrained by them, and had a constitutional right to make unilateral changes to such agreements.[856] To reduce conflict, intergovernmental agreements often include dispute resolution process.[857] It is therefore common for an agreement to stipulate a dispute resolution process, including consultation, request for a panel, establishment of a presiding body, an appeal process to an appellate panel.[858]

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849 *Ibid*.
850 McEwen at 24.
851 Hogg at 123.
852 See *Intergovernmental Relations in the Canadian Context* above.
853 *Ibid*.
854 McEwen at 25.
855 *Ibid*.
856 *Ibid*.
857 *Id* at 26.
858 See Chapter 10 of the *Canadian Free Trade Agreement – Consolidated Version* (2017) at 107-119.

(c) Proposals for reform – creating a tribunal to deal with intergovernmental disputes

3.48 Settlement of intergovernmental disputes, or federalism disputes, by the courts has been criticised.[859] This is viewed as the sole responsibility of, and has been performed by, various federal-provincial conferences. This has engendered two radical proposals for reform: a constitutional amendment removing federal disputes from the jurisdiction of the courts and remitting them for solution to direct negotiations between interested governments; or the establishment outside courts of a specialised tribunal for constitutional disputes, which could include non-lawyers, and which could be consciously composed so as to reflect different cultural and regional interests; or less radical proposal of dividing the supreme court of Canada into specialised divisions – common law division, a civil law division, and a constitutional law division.[860]

(d) Use of federal grants to dictate to provinces

3.49 Lastly, we consider how conditional federal grants[861] are utilised by federal government in Canada as leverage over the provinces. Conditional grants or, as the called in Canada, shared-cost programmes, have assured Canadians high minimum level of some important services. It is believed that without these, some of these services would have come later, at standards which varied from province to province, or not at all in some provinces.[862]These transfers of funds on condition that funds allocated should be used in accordance with stipulations of federal government are used quite a lot in Canada. To date only Quebec has opted out of a shared-cost programme, including the Canada Pension Plan.[863] Some of these programmes only last a short duration, while others are of a continuing nature. The Canada Assistance Plan to share the cost of various social services introduced in 1966 and still in existence to this day, is one example.[864] How does it work? The federal government decides upon desirability of a programme, works out the details and proposes it as a joint venture to

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859 It has, for example, been argued that some other better way of resolving federal disputes needs to be found. See Hogg at 123.

860 *Id* at 123-124.

861 A conditional grant is a transfer of funds which is made on condition that the grantee uses the funds in accordance with the stipulations of the grantor. See Hogg at 145.

862 Hogg at 146.

863 *Id* at 148.

864 Other examples are the post-secondary education programme to assist in the financing universities run by provinces; hospital insurance programme under which hospitals are made universally available. See Hogg at 145-146.

the province on the basis that it would carry half of the cost. If the province agrees, it must comply with the terms laid down in federal legislation.[865]

3.50 These programmes have been criticised on the basis that they amount in substance to federal dictation of provincial spending priorities. To address this concern, two federal policies have been developed: first, federal shared-cost programmes should be established only after broad national consensus in favour of the programme has been demonstrated to exist; and secondly, the decision of a province not to participate in the programme should not result in a fiscal penalty being imposed on the people of the province.[866]

3.51 As can be gleaned above, opting out of these arrangements is possible, and is regulated statutorily, for example in respect of hospital insurance and special welfare. These opting-out arrangements **bind the opting out province to continue with the programme**, or in the case of a new programme, **to establish or continue comparable provincial programmes**. All that opting-out really does, is to transfer the administrative responsibility to the province. It does not give the province the right to divert resources which would otherwise be committed to the programme into other programmes.[867] It is therefore not surprising that of the two provinces and three territories that make up the Canadian federation, only one has availed itself of this option, Quebec.[868]

865 *Ibid*.
866 Hogg at 147.
867 Hogg at 147-148.
868 *Id* at 148.

Questions

In the preceding paragraphs, we asked whether it would be constitutionally permissible for national government to withhold other allocation of national or equitable share of revenue contemplated in section 227 of the Constitution as leverage over provinces that refuse to adhere to national policies, norms and guidelines relating to the provision of social development services. Related, but different, questions arise from the exposition of Canadian jurisprudence on conditional federal grants, considering that in Canada, social security and social services are exclusive provincial competences, and that is:

(a) Whether *conditional grants*, for which section 227(1)(b) of the Constitution makes provision, could be used in the provision of social welfare services which section 7, 27 and Part A of Schedule 4 of the Constitution unequivocally assigns to both national and provincial governments?

(b) Whether conditional grants could be used by DSD as leverage over provinces?

(c) If they could be used for the purpose above, how would refusal by provinces to participate in the scheme be handled?

8 Italy

(a) Background

3.52 Italy is a quasi-federal state[869] with central government having exclusive powers on matters such as basic level of social benefits, social security, public order, security and regions exercising residual powers. Whilst central-state's framework legislation is so detailed that it prevents regions from enacting complementary legislation, disputes often arise over the management of concurrent policies arising from Italy's unitary tradition which makes coordination vital.[870]

869 It comprises 20 regions, divided into two categories of 15 ordinary regions and five special regions. And, with the exception of one, all regions are sub-divided into provinces. See McEwen et al 'Case Study Annex' in *Reforming Intergovernmental Relations in the United Kingdom* at 28.

870 *Id* at 28.

(b) Decision-making[871]

3.53 Quite a number of forums of intergovernmental relations exist.[872] These forums are advisory bodies to national government and serve as vehicles within which regions can be consulted on matters affecting their competence. Generally, these work on consensual basis; have no binding powers and decisions can be overruled by central government. Where agreements cannot be reached, national government presses ahead. Intergovernmental conferences are underpinned by the constitutional principle of 'loyal cooperation' and the principle of subsidiarity. Inevitably, intergovernmental disputes are invariably settled by the Constitutional Court.[873] The standard mode of decision-making is to resolve problems in technical meetings, then bring the matters to the agenda of the State-Regions and United Conferences on where there is already an agreement. Furthermore, in contrast with the South African system, central government has no obligation to consult sub-state units. Regions can articulate their positions regarding state polices in these intergovernmental forums, but can be overruled by central government.

3.54 Although Italian law defines which instrument shall be used by which conference on which occasion, only one of two types can be used, namely *intese* and *accordi* (used to coordinate policies of the state and regions in policy fields that are attributed to different levels of government). Under both mechanisms, unanimity is the norm, but majority voting can determine the outcome when a unanimous decision cannot be achieved. However, as indicated above, if the matter is urgent, implementation takes place without prior consultation. Moreover, intergovernmental agreements, are signed by central government and regions, but they do not have legal status, although the Constitutional Court has ruled that the wider constitutional principle of 'loyal cooperation' means that they should be considered binding.[874]

871 *Id* at 30 et seq.

872 The State-Regions Conference, Unified Conference, Bilateral Commissions, and Conference of Regional Presidents. *Id* at 32.

873 *Id* at 36.

874 *Id* at 35-36.

Questions

(a) Are the principles of intergovernmental relations contained in section 41(1)(a) and (c) of the Constitution that spheres of government must preserve national unity and indivisibility of the Republic and provide coherent government for the Republic as a whole akin to the principle of 'cooperative loyalty' contained in Italian Constitution?

(b) And, should agreements reached by parties (national and provincial governments) in Minmecs be considered binding on the basis of the abovementioned principles as seems to be the case in Italy?

9 Spain

(a) Background

3.55 Spain is a quasi-federal state with central state having exclusive jurisdiction, inter alia, over social security,[875] and autonomous communities assuming responsibility for matters such as social assistance and health.[876] Residual matters do not automatically reside with autonomous communities, [877] they must be claimed. As can be gleaned in respect of functional areas referred to above, concurrent jurisdiction is inevitable. The central government has used framework legislation to set out principles, bases and guidelines within certain policy areas, resulting in limitations on the exercise of competences by self-governing communities.[878]

(b) Evolution of sectoral intergovernmental forums

3.56 There is little reference to intergovernmental relations in the Constitution of Spain. However, an elaborate system of intergovernmental relations has evolved the purpose of which is to coordinate national programming and legislation, ensure that legislation respects the constitutional division of powers, and develop common positions and to promote multilateral cooperation.[879] There are more than 40 sectoral conferences (forums), with the forum for social services being one of the most active. These forums are chaired by the relevant minister and most are underpinned by legislation.[880] The unique feature of these sectoral forums is that the vice chairperson come from autonomous communities (regions) with the selection of this incumbent set out in the statute of each conference. A number of

875 Section 149 of the Constitution of Spain.
876 Section 148 of the Constitution of Spain.
877 Section 149(3) of the Constitution of Spain.
878 McEwen et al 'Case Study Annex' in *Reforming Intergovernmental Relations in the United Kingdom:* at 37.
879 *Id* at 39 and 42.
880 *Id* at 40 and 43.

agreements inter alia on social care and social services have emerged from these conferences. Efforts to institutionalise some of these conferences were challenged *as an unconstitutional intervention in the sphere of autonomy of self-governing communities*. The Constitutional Court rejected this claim, but decided that sectoral conferences *could not impose a cooperation agreement on these communities*.[881]

(c) Decision-making

3.57 The principle of voluntary cooperation underpins intergovernmental relations and in line with this principle, consensus is required for decision-making in intergovernmental forums.[882] However, some sectoral conferences allow for decision-making by majority, even if consensus is the preferred outcome. Formal agreements, inter alia, in social security and social services are quite common.[883] Generally, bilateral agreements require approval of both Spanish and autonomous government and they are *binding and legally enforceable*.[884] Furthermore, within sectoral conferences, one finds agreements adopted with approval of all members and those reached by a favourable vote by the central government minister and the majority of self-governing communities. Importantly, a single or several autonomous communities cannot block cooperative agreements, as these are drafted on an opt-in basis which allows autonomous communities to opt-in to agreements at a later date. Each agreement must state objectives, actions of each administration, the contributions of personnel, material and financial resources, and mechanisms for monitoring, evaluation, and modification. And, most importantly, these agreements are *binding on consenting parties*.[885]

(d) Dispute resolution

3.58 Although intergovernmental agreements invariably include dispute resolution mechanisms, jurisdictional disputes are common and often end up at the Constitutional Court.[886]

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881 Id at 43. Our emphasis.
882 *Id* at 44.
883 *Id* at 44 and 45.
884 *Ibid*.
885 *Id* at 45.
886 *Ibid*.

Question

How useful would the option to opt-in to an agreement be if it were to be included in intergovernmental agreements between spheres of government?

10 United States

3.59 In the US, the power of the federal government is such that there are few areas of legislative and executive competence that are not at least shared by federal, state, and local authorities. Consequently, coordination is achieved through mediation and not institutional arrangement.[887]

(a) Seminal decision in New York v United States

360 It is necessary to refer to a seminal case of the United States Supreme Court, *New York v United States*,[888] which dealt with the question whether federal government could issue directives to states. This case concerned federal legislation which dealt with the disposal of radioactive waste. In terms of this legislation, each state was responsible for the disposal of waste generated within its territory either by itself or in cooperation with other states. Three incentives were provided by this law to encourage states to comply with their obligations, namely monetary incentives; gradual increase of costs to their sites by states with disposal sites and ultimately denial of access to waste generated in states that did not meet federal guidelines; and states which had not made arrangements for the disposal of waste, *either to regulate the disposal of the waste in accordance with instructions of Congress* or, if required to do so by the generator or owner of the waste, to assume ownership, possession and ultimate responsibility for the waste and any damage caused by it. This legislation was challenged on the basis that it interfered with state rights. The majority held:

> 'We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.'[889]

887 Woolman, Stu and Roux, Theunis 'Cooperative Government and Intergovernmental Relations' in *Constitutional Law of South Africa* Second Edition (2008) at para 14.2

888 505 US 144 (1992).

889 *Id* at 149.

(i) Majority decision

3.61 On the basis of this reasoning, the court held that the first two incentives were within the Constitution whilst the third was not. As the latter could be severed from the rest of the statute, the Act containing only the two incentives remained operational.

(ii) Minority decisions

3.62 The minority took a different view. It held that:

> 'Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congressional statutes that impose clear directives on state officials...'[890]

3.63 Stevens J, concurring with the minority judgment, said:

> 'The notion that Congress does not have the power to issue *"a* simple command to state governments to implement legislation enacted by Congress," *ante,* at 176, is incorrect and unsound. There is no such limitation in the Constitution.'[891]

11 Brazil

3.64 In Brazil, the three tiers of government have distinct and concurrent competencies. The areas in which the three spheres share competence is health, welfare, public assistance, housing, poverty, social marginalisation.[892] Well, the Brazilian federal government can override state legislation, for example, where national interest is threatened, where there is extreme public disorder, or where state finances are seriously in arrears.[893] But, such intervention must be certified by the Brazilian Supreme Court. However, such a decision must be preceded by mediation between parties involved.[894]

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890 *Ibid* 207 fn 3.
891 *Id* at 211.
892 Woolman Stu and Roux Theunis 'Cooperative Government and Intergovernmental Relations' in *Constitutional Law of South Africa* Second Edition (2008) at para 14.2
893 *Ibid*.
894 *Ibid*.