SOUTH AFRICA

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I. OVERVIEW

There was profound antipathy towards the notion of a federal state amongst the liberation organisations such as the African National Congress (ANC) and this manifested itself in positions assumed during the negotiations process of the South African constitution. As a consequence, the Constitution of the Republic of South Africa 1996 studiously avoids describing the system of governance in South Africa as federal. The 'grand design' of the Apartheid government involved the fragmentation of the country into self-governing, and later, independent entities based on ethnic groups or tribal affiliations. The ultimate goal was that African South Africans would be stripped of their South African citizenship and afforded the citizenship of one of these 'independent' entities in which they would exercise their civil and political rights.[2] The Apartheid government described this as a process of internal decolonisation. In reality, it was nothing other than denationalisation. These homelands were impoverished parcels of land cobbled together to create 'independent states'. They were totally dependent on the South African state for their financial survival and were provided with monthly grants. The ANC and its allies were concerned that a federal system would result in the resurrection of the despised homeland system in a different guise. There were also concerns that a rigid division of powers between the central government and the various component spheres would inhibit and frustrate the developmental and egalitarian objectives of the central state.

Prior to 1994, South Africa had a unitary system of government. While provincial and local spheres of government existed, they were subservient to and subject to the control of a strong central government where all meaningful decisions were made.[3] The legal system prior to 1994 was thus a unified one with little divergence in laws between the various provinces. Towards the end of the 1980s, most of the independent homelands had collapsed into military dictatorships and were dysfunctional. The Apartheid grand design had unravelled before formal negotiations began.

During the process of negotiations, the ANC leadership started seeing the benefit and advantages of strong regional government for the delivery of services and the political empowerment of the citizens. It seemed that exposure to models of federalism such as the German Constitution assisted in convincing the liberation organisations that effective regional government could be combined with strong central leadership.[4] Some of the political groups such as the predominantly Zulu party, the Inkatha Freedom Party (IFP), favoured a strong federal arrangement and advocated an asymmetrical arrangement with maximum devolution of original power to the KwaZulu-Natal (KZN) region. It was the inability to reach consensus on this and other issues that caused them to boycott the constitutional drafting process.

In South Africa, there was a two-stage constitutional drafting process. The unelected leaders of the various political groupings drafted the Interim Constitution,[5] which was in effect a cessation of hostilities. It was agreed that the Interim Constitution would last for two years and that during this period the Final

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[2] The National States Citizenship Act 26 of 1970 provides that every black person would become a citizen of the tribal entity to which he or she had a tribal or cultural affiliation and would simultaneously cease to be a citizen of South Africa. The fact that they did not live in that entity nor desired the new citizenship was irrelevant.
[3] S. Woolman et al. 'Co-operative Government' in *Constitutional Law of South Africa* (2nd edition) at 14-1.
[4] N. Haysom 'Federal Features of the Final Constitution.' In P. Adrews and S. Ellmann (eds.) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 504.
[5] Constitution of the Republic of South Africa, Act 200 of 1993.

Constitution would be drafted by the democratically elected representatives. An important aspect of the negotiated settlement was that the Final Constitution had to be consistent with 34 Constitutional Principles agreed to by the various parties and enshrined in schedule 4 of the Interim Constitution. The relevant principles dealing with structures of government provided that government shall be structured at national, provincial and local levels,[6] that the powers and functions of the various spheres be defined in the Constitution, that these powers not be substantially inferior to those provided for in the Interim Constitution[7] and that the functions of the national and provincial levels of government include exclusive and concurrent powers.[8]

In addition, the allocation of a competence to either the national or provincial spheres had to be in accordance with listed criteria.[9] Further, the national sphere was precluded from exercising its powers so as to encroach upon the geographical, functional and institutional integrity of the provinces.[10] All the provisions of the Final Constitution had to comply with all the constitutional principles.

South Africa has a central government, nine provincial governments, six metropolitan local councils and various district councils and local municipalities. Having provincial spheres of government played a vital role in accommodating the aspirations of smaller political groupings that were strong regionally but insignificant at a national level. In the early and somewhat fragile days, having all the parties participating within the system enhanced its legitimacy and provided invaluable stability. After the elections in 1994, the IFP, despite boycotting the negotiations, won control of the KZN legislature and participated in the new process. This in turn resulted in a much more stable political environment within the province and contributed to ending the low intensity civil war between the IFP and ANC supporters in the province.

Presently eight of the nine provinces as well as the national government are controlled by the ANC. After the April 2009 elections, the Democratic Alliance won control of the Western Cape Province. There is a view within the ruling party that there should be a reduction in the number of provinces in order to facilitate effective delivery. The ANC‘s dominance of the various legislatures and its firm internal discipline has resulted in a very high degree of uniformity of laws.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

1. *Central Legislative Jurisdiction*

Chapter 3 of the Constitution lays down the principles of co-operative governance and provides that ‘government is constituted at national, provincial and local spheres of government which are distinctive, interdependent and interrelated.’[11] It has been argued that the term ‘sphere’ conveys the impression of co-equals as opposed to a term such as ‘level’ which denotes a more hierarchical arrangement.[12]

The subject matter of the legislation or legislative functional area is the main criteria used in determining the allocation of legislative authority between the central and provincial spheres. The central legislature is situated in Cape Town and each of the nine provinces has its own legislative assembly. The central and provincial spheres share concurrent legislative competence over functional areas listed in Schedule 4 of

[6] Principle XVI of Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993.
[7] Principle XVIII.
[8] Principle XIX.
[9] Principle XXI.
[10] Principle XXII.
[11] Section 41(1) of the Constitution.
[12] S. Woolman, *supra* note 3 at 14-1.

the Constitution. Subject to a limited central override,[13] the provincial spheres have exclusive competence over functional areas listed in Schedule 5 of the Constitution.

A. *Legislative Areas Formally Allocated to the Central Government*

While Schedule 5 allocates exclusive powers to the provinces, it allows the central sphere to legislate over these matters in certain circumstances. Thus the only truly exclusive powers are those vested in the central sphere and which are not listed in either Schedules 4 or 5. Important functional areas such as defence, justice and foreign affairs are not listed either in Schedule 4 or 5 and thus fall within the exclusive competence of the central sphere.

In addition, section 44(2) of the Constitution permits the central legislature to pass legislation dealing with functional areas falling within Schedule 5 when it is necessary to maintain national security; to maintain economic unity; to maintain essential standards; to establish minimum standards required for the rendering of services or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.

B. *Concurrent Powers*

The areas of concurrent legislative competence listed in Part A of Schedule 4 of the Constitution are: administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases; Casinos, racing, gambling and wagering, excluding lotteries and sports pools; Consumer protection; Cultural matters; Disaster management; Education at all levels except tertiary education; Environment; Health Services; Housing; Indigenous law and customary law; Industrial promotion; Language policy and the regulation of official languages to the extent permitted by section 6 of the Constitution; Media services directly controlled or provided by the provincial government subject to section 192; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police subject to the provisions of Chapter 11; Pollution control; Population development; Property development; Property transfer fees; provincial public enterprises; Public transport; Public works; Regional Planning and development; Road traffic regulation; Soil conservation; Tourism; Trade; Traditional leadership subject to chapter 12; Urban and rural development; Vehicle licencing and welfare services.

The central sphere has concurrent competence over all functional areas listed in Schedule 4 and in respect of matters that are reasonably necessary for, or incidental to, the effective exercise of a Schedule 4 competence.[14]

C. *Important Sources of Central Government Authority to Regulate*

The source of the central legislative authority's law-making power is section 44(1)(a)(ii) of the Constitution, which allows it to pass laws 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. Since 1994, the central sphere has engaged in a programme of frenetic law making as it sought to transform the society. By way of contrast, very few acts are passed each year by the provinces.

[13] Section 44(2) of the Constitution.
[14] Section 44(3) of the Constitution.

D. *Areas of Central Regulation of Practical Importance*

The Central legislature during the first thirteen years of democracy passed laws that impacted directly on most facets of life. Laws and legal norms had to be changed to make them consistent with the provisions of the Constitution. Laws that directly and indirectly discriminated had to be changed. Systematic patterns of discrimination had to be dismantled. The vision of a more egalitarian society had to be realised and the marginalised and previously disadvantaged sections of our community had to be provided with greater legal protection.

2. *State Legislative Jurisdiction*

A. *Exclusive and Concurrent State Regulation*

In addition to the areas of concurrent jurisdiction in Schedule 4, a list of exclusive functions is assigned to the provinces in terms of Schedule 5 of the Constitution. The following relatively minor areas are within the exclusive legislative competence of the provinces: - Abattoirs; Ambulance Services; Archives other than national archives; Libraries other than national libraries; Liquor Licences; Museums other than national museums; Provincial Planning; Provincial Cultural matters; Provincial recreation and amenities; Provincial sport; Provincial Roads and Traffic and Veterinary Services, excluding regulation of the profession. The central legislature can intervene and pass laws in respect of functional areas falling within Schedule 5 if the requirements of section 44(2) are satisfied.

The states may pass laws even if the central legislature has enacted a law in the specific functional area. The deadlock or dispute resolving mechanism comes into effect if there is an irreconcilable conflict between the central and provincial laws.

B. *Important Areas of Exclusive State Regulation*

As indicated earlier, laws regulating areas such as education, safety and security, social welfare, planning and development, culture, and sport are passed by the central legislature and supplemented and implemented at provincial level. The provincial implementation of education and dispensing of social welfare grants is particularly important.

C. *Important Areas of Coexisting Regulation*

When some of the provincial legislatures were not controlled by the ANC, there were areas such as education, social welfare, traditional authorities, and town and regional planning in which there were co-existing regulations which sometimes had to be reconciled.

3. *Residual Power*

The residual power is, in terms of section 44(1)(a)(ii) of the Constitution, allocated to the central sphere of government.

4. *Resolving Conflicts among the Spheres of Government*

As stated earlier, Chapter 3 of the Constitution articulates the principles of co-operative governance which requires the various spheres to exercise their powers in a manner which does not encroach upon the geographical, functional or institutional integrity of other spheres. A positive duty is imposed on organs of state involved in disputes to make every reasonable effort to settle their disputes and avoid legal proceedings against each other. The Constitutional Court (CC) has held that the failure to make

meaningful attempts to settle the matter would be sufficient grounds for refusing direct access to the court.[15] Direct access is a process where a litigant seeks a hearing directly before the CC as a court of first instance. It would appear that courts will require litigants to demonstrate that a genuine attempt had been made to comply with the prescripts of Chapter 3 before they will be entitled to litigate. In addition, section 150 of the Constitution directs that the courts must prefer any reasonable explanation that avoids a conflict between central and provincial laws over an interpretation that results in a conflict.

Conflicts between central and provincial laws are dealt with by reference to the following enquiries:[16]

- Does the central legislature have the legislative competence to pass its law?
- Does the provincial legislature have the legislative competence to pass its law?
- If the both legislatures have the legal competence to pass the laws then the issue would be whether the different laws can be reconciled.
- If there is an irreconcilable conflict then the central law will prevail if the provisions of section 146 of the Constitution are satisfied.
- If the provisions of section 146 of the Constitution are not met then the provincial law will prevail.

If any one of the criteria listed in section 146 is met, the national law will prevail.[17] Criteria permitting the central override are divided into two categories. If one of the criteria listed either in section 146(2) or (3) is satisfied, then the conflicting provincial law is rendered inoperative for the period of the conflict.[18] All the criteria listed in section 146(2) are subject to the additional requirement that the central legislation be applied uniformly to the country as a whole. Thus national law that targets a particular province will not prevail in terms of section 146(2).

In terms of section 146(2), central law will prevail if any one of the following three conditions is established:

- The central legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.[19]
- The central legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and national legislation provides that uniformity by establishing norms and standards, frameworks or national policies.[20]
- The central legislation is necessary for the maintenance of national security, the maintenance of economic unity; the protection of the common market in respect of the mobility of goods, services, capital and labour; the promotion of economic activities across provincial boundaries; the promotion of equal opportunities or equal access to government services; or the protection of the environment.[21]

In Mashavha,[22] the CC had to consider the constitutionality of the President assigning to the provinces the administration of the Social Assistance Act 59 of 1992 in its entirety. In terms of the Interim Constitution, the President could only assign the administration of the Act over to the provinces if the provisions of

[15] *National Gambling Board v. Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 (CC).
[16] *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature* 1996 (4) SA 653 (CC). Victoria Bronstein 'Conflicts' in Constitutional Law of South Africa (2nd edition) at 16-4.
[17] J Klaaren 'Federalism' in M. Chaskalson et al. CLOSA (1st edition) 5-12.
[18] Section 149 of the Constitution.
[19] Section 146(2)(a) of the Constitution.
[20] Section 146(2)(b) of the Constitution.
[21] Section 146(2)(c) of the Constitution.
[22] *Mashavha v. President of the Republic of South Africa and others* 2005 (2) SA 476 (CC).

section 126(3) of the Interim Constitution[23] were not applicable. The court found that the assignment was invalid as the administration dealt with a matter that could not be regulated effectively by separate provincial legislation. In order for the administration of social welfare grants to be fairly and equitably administered, it needed to be regulated or coordinated by uniform norms or standards that applied throughout the Republic. To achieve equity and effectiveness, it was necessary to set minimum standards across the nation.[24] The primary objection of the court was that if the province of Gauteng, the richest in the country, paid a higher old age pension than Limpopo then the dignity of people in Limpopo would be offended as different classes of citizenship would be created. Thus in order to prevent inequality and unfairness in the provision of social assistance to people in need, there had to be uniform norms and standards that applied throughout the country.

In terms of section 146(2), central law will prevail over provincial law if it is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole or impedes the implementation of national economic policy.

In the Liquor Bill[25] case, the CC provided useful guidance on how to navigate between and apply the various clauses that demarcate competencies and how to resolve conflicts. The central legislature passed the Liquor Bill, which sought to comprehensively regulate the liquor industry. The bill divided the economic activity of the liquor industry into three categories: manufacturing; distribution and retail sales. The bill treated manufacturing and distribution as national issues and retail sales as provincial issues to be dealt with by provincial liquor authorities. Yet, even in respect of retail sales, the bill prescribed detailed mechanisms as to how the provincial legislatures should establish their retail licensing systems. The Western Cape government, then controlled by the New National Party, challenged the constitutionality of the bill by arguing that it exhaustively regulated issues concerning manufacturing and distribution and that even in the retail sphere, it relegated the provinces to the role of funders and administrators. The central sphere contended that the bill primarily dealt with trade, economic and social welfare issues. These are competencies that fall within the functional areas of concurrent competence. The provincial government argued that the bill dealt with liquor licences, an exclusive competence of the province in terms of schedule 5. The bill in fact impacted on both concurrent and exclusive provincial competencies.

The court emphasised that under the post-apartheid constitutional developments, governmental power is not located in the national sphere alone.[26] Legislative authority is vested in the Parliament for the national sphere, in the provincial legislature for the provincial sphere and in municipal councils for the local sphere. Any interpretation must recognise and promote this new philosophy of cooperative governance at various levels. Yet given the breadth of the competencies listed in the various schedules, their parameters of operation will, of necessity, overlap. The Constitution allows for provincial exclusivity in respect of matters falling within schedule 5, subject to an intervention by the central sphere that is justified in terms of section 44(2) of the Constitution. The functional competencies in schedule 4 should be interpreted as being distinct from, and excluding schedule 5 competencies. The court found that the primary purpose of schedule 4 is to enable the national government to regulate inter-provincially. Conversely, the provinces, whose jurisdiction is confined to their geographical territory, are accorded exclusive powers in respect of matters that may be regulated intra-provincially.

The main substance and character of the legislation determines the field of competence in which it falls. A single piece of legislation may have various parts and more than one substantive character. On this reasoning, it was concluded that the central sphere has the power to regulate the liquor trade in all

[23] This was the predecessor of section 146 of the Final Constitution.
[24] V. Bronstein *supra* note 15 at 16-19.
[25] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC).
[26] Ibid. at para 55 ff.

respects other than liquor licensing. The manufacturing and distribution segments of the legislation impact on inter- as opposed to intra- provincial competencies, and this would suggest that the competence of liquor licensing in Schedule 5 was not intended to encompass manufacturing and distribution of liquor. In any event, the court was prepared to conclude that even if the provincial competence in respect of liquor licences extends to licensing, manufacturing and distribution, 'its [the central sphere's] interest in maintaining economic unity authorises it to intervene under section 44(2) of the Constitution.'[27] Yet the court adopted a much stricter approach to the national regulation in respect of retail sales. A relatively uniform approach to liquor licensing in the country may be desirable but this did not amount to a necessity that justified an intrusion into the exclusive provincial competence. Thus, those aspects of the law that regulated manufacturing and distribution were deemed constitutional and the segment of the central law regulating the retail industry was deemed unconstitutional.

5. *Municipal Law-making Powers*

Municipalities are assigned original law-making powers over defined areas by section 151 of the Constitution. Municipalities may legislate on and administer matters listed in Part B of Schedule 4 and Part B of Schedule 5. The following competencies are listed in Part B of Schedule 4: Air Pollution; Building regulations; Child Care facilities; Electricity and Gas reticulation; Fire-fighting services; Local tourism, Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Municipal public works in so far as it applies to the needs of the municipality; pontoons, ferries etc; Storm water management systems in built up areas; Trade regulations and Water and sanitation. Part B of Schedule 5 lists the following competencies: Beaches and amusement facilities; Billboards; Cemeteries; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport amenities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise pollution; Pounds; Public places; Refuse removal; Street trading; Street lighting and Traffic and parking.

Subject to section 151(4), a municipal by-law that conflicts with national or provincial legislation is invalid.[28] Section 151(4) provides that neither the national nor the provincial government may compromise or impede a municipality's ability or right to exercise its powers. Thus, while the municipalities have original legislative authority, this power cannot be exercised in a manner that conflicts with provincial or national laws. Nonetheless, the national and provincial legislatures must ensure that their laws do not compromise or impede a municipality's ability to exercise its powers or performs its functions.[29] It would thus appear that if the primary effect of the national or provincial law is to compromise or impede a municipality's ability to exercise its power, then those laws will not take precedence over conflicting by-laws. Both the national and provincial governments are required, by agreement, to assign to municipalities the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government.[30] Such assignments are to be made only if the matter could be most effectively administered locally and if the municipality has the capacity to do so. Municipalities are empowered to make by-laws for the effective administration of matters over which they have capacity to administer.[31]

The Constitutional Court has held that local governments under the democratic order are constitutionally entrenched and are therefore fundamentally different entities to the vulnerable local authorities of the

[27] Ibid. at para 76.
[28] Section 156(3) of the Constitution.
[29] Bernard Bekink, *Principles of South African Local Government Law* (Lexis Nexis 2006) 164.
[30] Section 156(4) of the Constitution.
[31] Section 156(3) of the Constitution.

past, which governed subject to central parliamentary control.[32] The Constitutional Court in City of Johannesburg v Gauteng Development Tribunal and Others considered the demarcation of responsibilities between the provinces and local authorities.[33] The Development Facilitation Act of 1995 created a provincial tribunal to hear applications involving the rezoning of land and the development of townships. The Town Planning and Townships Ordinance gave the same power to the municipality of Johannesburg. There was a perception that the Gauteng Provincial Tribunal was more lenient in granting approval than the City which applied its town planning policy more vigilantly. This resulted in applicants engaging in forum shopping. The issue was whether the municipality or the provincial sphere had competence over these matters or whether it was a concurrent competence. The municipality argued that municipal planning is a competence assigned to local government in terms of Part B of Schedule 4 read with section 156 of the Constitution. The respondent argued that the law fell under urban and rural development which was a competence located under Part A of Schedule 4 and thus within the competence of the provincial legislature. The court considering the constitutional scheme emphasized that the various spheres of government were distinct, but interdependent. In addition each sphere was given authority to exercise its power within the parameters of competence and no sphere was permitted to intrude into the domain of another sphere except in circumstances permitted by the Constitution. The competences listed in Parts B of Schedule 4 and 5 fell within the executive competence of local government. The court held that municipal planning had acquired an established meaning which included the zoning of land and the establishment of township and declined to give the urban and rural development competence the broad interpretation contended for by the respondent. As section 151(4) of the Constitution precluded the provincial government from compromising or impeding the municipality's right to exercise its powers or perform its functions, the province could not give itself powers to exercise adjudicative powers over municipal planning. Consequently the law was deemed to be unconstitutional. This is an explicit recognition that the legislative and executive competence of local government must be recognised and respected and local government is not to be regarded as a subservient sphere of government. The City of Cape Town, one of the six metropolitan councils, is now controlled by the DA. These decisions could lay the foundation for successful and confident provincial and local spheres asserting their legislative and executive power and resisting national encroachment in their jurisdiction.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *Legal Unification through the Exercise of Central Power*

A. *Unification via Applicable Constitutional Norms*

The national Constitution is the most powerful source of legal unification and harmonisation. Section 2 of the Constitution recognises the Constitution as the supreme law of the land and provides that law or conduct inconsistent with it is invalid and that the obligations it imposes must be fulfilled. Thus, laws passed by both the central sphere and the various provincial spheres must be consistent with the national constitution. Inconsistent laws will be deemed invalid and set aside by the courts.[34] In Matatiele Municipality,[35] the CC set aside a constitutional amendment and law incorporating the municipality into another province on the basis that the provincial legislature had failed to facilitate public participation in the consideration and approval of the legislation and amendment.[36] The court emphasized that the Constitution entrenches both representative and participatory democracy and the views of the affected citizens ought to have been canvassed prior to the decision being made to incorporate the municipality

[32] *Fedsure Life Assurance v. Greater Johannesburg TMC* 1999 (1) SA 374.
[33] . City of Johannesburg v Gauteng Development Tribunal and others 2010 (6) SA 182 (CC)
[34] Section 172 of the Constitution.
[35] *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).
[36] Section 118 of the Constitution was interpreted as requiring public participation in the process.

into the Eastern Cape. Thus all organs of state function within the discipline of the national Constitution and can exercise no power or perform any function beyond that conferred upon them by law.[37]

In addition, section 8(1) of the Constitution is wide-ranging and provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state in all spheres. There is thus a constitutional imperative on all public entities to act in accordance with the provisions of the Bill of Rights.

The national Constitution allows the provinces to promulgate their own constitutions. Provincial constitutions must be adopted by a two-thirds majority of members of the provincial legislature. Before a province brings a constitution into effect, the CC must certify that the text of the provincial constitution is not inconsistent with that of the national Constitution.[38] Yet provincial constitutions may provide for legislative and executive structures and procedures different from that provided for in the national Constitution.[39] Thus far, only the Western Cape has successfully adopted a provincial constitution.[40] The space created for provincial constitutions is very limited; given the detailed regulation of the governance by the national constitution, their usefulness is therefore questionable.

Organs of state are defined widely to include a functionary or institution exercising a public power or performing a public function in terms of legislation.[41] This effectively means that the exercise of public power at both the central and provincial spheres must be in accordance with the provisions of the Bill of Rights and must be consistent with the other provisions of the Constitution.

B. *Unification via Central Legislation* (*or Executive or Administrative Rules*)

a. Creating Directly Applicable Norms or Mandating Conforming State Implementing Legislation

Much of the major restructuring of the legal order has occurred at the central sphere with the provinces then passing implementing legislation. As an illustration, reference will be made to education, which is a concurrent competence of both the central and provincial spheres. All the important laws regulating education first emanate from the national legislature. The National Education Policy Act[42] indicates how national education policy is to be determined: the national government must give regard to the relevant constitutional provisions and to a set of directive principles dealing with education. There must also be a prior consultation with a host of bodies, including the Council of Education MEC's[43] representative bodies of educators, students and other stakeholders before the policy is adopted.[44] Subject to the Constitution, section 3 of the Act provides that national policy shall prevail over the whole or part of any provincial policy on education in the event of a conflict. Thus the process, while consultative and inclusionary, is centrally driven. Once decided upon, it is binding on the entire country.

In order to deal with the legacy of segregated education, the central Parliament passed the South African Schools Act (SASA).[45] The primary objective of the Act is to set up a system that will redress past injustices and provide a high quality of education for all learners. It sets in place norms and practices to regulate the delivery of education in South Africa. The SASA envisages that the provincial legislatures

[37] *Fedsure supra* note 31 at para 58.
[38] Sections 142-144 of the Constitution.
[39] Section 143(1) of the Constitution.
[40] Constitution of the Western Cape, 1997 1 of 1998.
[41] Section 239 of the Constitution.
[42] National Education Policy Act 27 of 1996 ("NEPA").
[43] MEC refers to the Member of the Executive Council of the Province. The Executive Council is the cabinet of the province.
[44] Section 5 of the NEPA.
[45] Act 84 of 1996.

will supplement aspects of the Act. For instance, SASA stipulates the processes that must be complied with before a learner can be suspended and expelled from state schools.[46] It then provides that the provincial MEC responsible for education must by notice in the provincial gazette determine the behaviour that would constitute serious misconduct and the procedure for determining culpability in individual cases.[47] SASA provides that every public school shall elect a governing body which is tasked with promoting the best interests of the school. The governing body is required to function in terms of SASA and any applicable provincial law.[48] Other central laws follow a similar pattern. Detailed legislation is enacted and the provinces are invited to implement the norms with supporting or implementing legislation after their input is obtained in respect of the national norms. This is the pattern that is adopted in respect of most competencies. With the ANC controlling both the national and all the provincial legislatures, agreed national norms are enforced. In addition, a number of laws passed by the central legislature have been assigned to the provinces for implementation.

b. Indirectly Forcing State Regulation by Threatening to Take Over the Field in Case of State Inaction

As indicated earlier, the central legislature can legislate over competencies listed in schedule 5 if the requirements of section 44(2) are satisfied.[49] In respect of concurrent competences listed in schedule 4, a national law predominates in the absence of any provincial law. The Constitution also allows national intervention in and the assumption of control over provincial administrations.

Such an intervention is permitted in terms of Section 100 of the Constitution if the province cannot or does not fulfil an executive obligation required of it. Prior to intervening, the province concerned must be put on notice that it is failing to fulfil its obligations and must be required to remedy the situation in a prescribed manner. Interventions must be justified on the basis that it is necessary to maintain essential national standards; maintain economic unity; maintain national security or prevent the province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole. Certain process requirements are also imposed on the central sphere.[50] Written notice must be given to the National Council of Provinces (NCOP) within 14 days of the intervention. The intervention will cease unless it is approved by the NCOP before the end of a period of 180 days of the intervention. Prior to that period, the NCOP may adopt a motion disapproving of the intervention, in which event the intervention must cease forthwith. In addition, section 139 of the Constitution permits provincial intervention in local government in instances where local government is failing to fulfil its constitutional or legal obligations. In the event of the provincial executive failing to exercise this authority, the central sphere may intervene on the same grounds and subject to the same procedural constraints.[51]

C. *Unification via Judicial Creation of Uniform Norms by the Central Supreme Courts*

South Africa has a unitary judicial system. The Constitutional Court is the highest court of the land in respect of constitutional matters and may decide issues connected with a constitutional matter.[52] The Supreme Court of Appeals has constitutional jurisdiction and is the highest appellate court in respect of all non-constitutional matters.[53] Appeals from the various High Courts are generally heard by the SCA and if there are constitutional issues, a further appeal may be lodged with the Constitutional Court. The High Courts have jurisdiction within their territory of operation, but their legal rulings are applicable

[46] Section 9 of the South African Schools Act 84 of 1996.
[47] Section 9(3) of the South African Schools Act.
[48] Section 18 of the South African Schools Act.
[49] The contents of section 44(2) of the Constitution are discussed at *supra* note 13 and accompanying text.
[50] Section 110(2) of the Constitution.
[51] Section 139(7) of the Constitution.
[52] Section 167 of the Constitution.
[53] Section 168 (3) of the Constitution.

throughout the country. Thus an interpretation of the Constitution made by the Natal Provincial Division would be binding on state employees in Cape Town. A single judiciary contributes significantly to the high degree of harmonisation and uniformity of laws that presently exists in South Africa. Section 167(5) of the Constitution requires any declaration of invalidity of a national act, provincial act or conduct of the President made by the High Court and SCA to be confirmed by the CC before it has any force or effect. This confirmatory jurisdiction of the CC allows it to control declarations of invalidity made against the highest organs of state in the country.

D. *Unification via Centrally Controlled Means*

Over the last fourteen years, intergovernmental institutions have been set up to facilitate and coordinate policy development amongst the various spheres of state. The central legislature comprises the National Assembly (NA) and the National Council of Provinces (NCOP). One of the important functions of the NCOP is to promote and protect the interests of the provinces at the central legislature. Different processes are prescribed for the passage of bills affecting the provinces (s76) and in respect of bills not affecting the provinces (s75). In respect of bills not affecting the provinces, the NCOP must consider and pass the bill approved by the NA. In the event that the NCOP rejects or amends the NA's version of the bill, then the NA is only required to reconsider the bill taking into account the version passed by the NCOP.[54] Much greater powers are given to the NCOP when considering bills that affect the provinces. If the version of the bill passed by the NCOP does not accord with the version passed by the NA, then the bill must be referred to a mediation committee comprising nine members of each house. If agreement cannot be reached, then the bill becomes law only if it is passed by a two-thirds majority of the NA.

Determining whether a bill should follow either the section 75 or 76 route is referred to as tagging by Parliament. In Tongoane v Minister of Agriculture, the Constitutional Court held that the test is whether the provisions of the bill substantially affect the interests of the province. This is a much wider enquiry than ascertaining whether the provincial legislatures have concurrent legislative power. A bill must be tagged as a section 76 bill if it substantially affects the provinces even if it deals with matters outside the legislative competence of the provinces.

The President's Co-ordinating Committee comprises the President, the Minister for Provincial and Local Government and the nine provincial premiers. The main function of the body is to develop provincial policy and ensure adequate provincial administration of the concurrent functions.[55] Intergovernmental Relations Committees of Ministers and Members of Executive Councils (MINMECS) are advisory executive structures that are concerned with drafting intergovernmental line-function policies and harmonising concurrent legislation. The Forum of South African Directors-General (FOSAD) comprises national and provincial Directors-General.[56] Its main function is to co-ordinate policy implementation between the central and provincial spheres and to advise the national Cabinet and the provincial Executive Councils.

Chapter 3 of the Constitution entrenches the notion of co-operative governance which recognises the distinctiveness, interdependence and interrelatedness of the national, provincial and local spheres of government. This chapter obliges the different spheres not to use their powers in a manner which undermines the effective functioning of another sphere and to co-operate with each other in mutual trust and good faith. The Intergovernmental Relations Framework Act 13 of 2005 was passed in order to establish structures to promote and facilitate intergovernmental relations and to provide mechanisms to settle intergovernmental disputes. The Act creates a number of forums such as the President's Co-

[54] Section 75 of the Constitution.
[55] S. Woolman *supra* note 3 at 14-27.
[56] The director-general is the administrative head of the department.

ordinating Council, the Premier's Intergovernance Forums and the District Intergovernmental Forums and the purpose of these forums is to foster sound intergovernmental relations in respect of a particular competence or within a geographical area. In addition power exists to form optional forums. Thus the national minister of education can establish a forum dealing with this competence and the various political role-players from the various spheres would be members of this forum. The purpose of these forums is to facilitate effective consultations and they are not deemed to be executive decision making bodies. Finally the Act requires that intergovernmental disputes must be formally declared and attempts must be made to conciliate and mediate them before recourse is had to the courts and the judicial process.

2. *Legal Unification through Formal or Informal Voluntary Coordination among the Component States* (*Bottom Up*)

A. *Unification via Component State Legislatures*

The provincial legislatures have little influence on legal unification. As indicated earlier, South Africa was, prior to 1994, a unitary state; and since 1994, the central sphere's legislative enactments have provided the uniform law that has applied throughout the country. The process of legal unification has been most decidedly centrally driven.

B. *Unification via Component State Judiciary*

The concept of a state or provincial judiciary does not exist in South Africa. There is a single judicial system. Magistrates' courts are creatures of statutes with defined criminal and civil jurisdiction. The High Courts are courts of inherent jurisdiction and function within the boundaries of the provinces, but function as part of a national unified judicial system.

C. *Unification via Component State Executive Branches*

There does not appear to be a co-ordinating structure of the provincial executive branch that excludes the central structures.

3. *Unification through Non-State Actors*

Restatements by non-state actors do not occur in South Africa. Model laws are generated by agencies of the central government such as the Law Reform Commission. There are also a number of labour bargaining councils comprising employers and the various recognised trade unions formed with the objective of reaching agreements in order to foster industry peace. These bargaining councils are structured at national and provincial levels and a fair amount of delegated power, especially in respect of resolving disputes, is afforded to the provincial entities. Yet in most instances, the substance and core provisions of the agreement are negotiated at central level.

4. *The Role of Legal Education and Training on Legal Unification*

Law schools draw students from all parts of the country. Because of South Africa's segregated history, some Law Schools are only able to attract students that reside in close proximity to it. Nonetheless, most of the leading schools attract students from the different provinces.

The focus of legal education is on teaching principles and norms that are applicable throughout the Republic. None of the leading law schools offer courses that focus exclusively on principles that are only applicable within a particular province. Reference may be made to supporting and supplementing provincial legislation in specific areas such as consumer affairs, the regulation of casinos, or planning

legislation, but this would be considered as part of a broader reflection on norms that are applicable nationally.

The legal profession is divided into advocates and attorneys. After students graduate from Law School, they are required to do a period of articles (attorneys) and pupillage (advocates) and then write the professional examinations set by the respective professional body that they wish to join. Assessments and testing are centrally controlled with candidates being tested on general law applicable throughout South Africa. The Law Society of South Africa, the oversight body for the attorneys, sets and assesses the admission examinations. The Bar Council of South Africa performs the corresponding function for the advocates. While the examinations are set nationally, they are taken in various centres around the country. The distinction between attorneys and advocates replicates that between solicitors and barristers in the UK.

Law graduates work throughout the country, and both attorneys and advocates are deemed to be officers of the High Court of South Africa. Thus, once a person is admitted, they do not have to write any other examination to practice in another province. Nevertheless, they are required to belong to their provincial societies and to be formally admitted to the court in which they regularly practice. This facilitates oversight and ensures that there is better control of the profession. There is a rule of civil practice that a litigant must have a firm of attorneys based within a certain radius of the court in which he or she is litigating. This often means where attorneys are based beyond the radius of 8 kilometres of the court, they will engage correspondents to serve and receive documents. Advocates appear in all courts in the country.

In addition, the Law Society of South Africa runs nine practical training schools throughout the country. While the schools are situated in the various provinces, the syllabi and examinations are agreed upon and set centrally. After completing their four year LLB degrees, students may register for a course of practical training lasting for a period of six months. Students that complete the professional training course need to undertake 12 months of articles of clerkship with a firm of attorneys. Those that do not complete the course or choose not to take it must complete a period of 24 months of articles. The tuition offered at the various Schools for Legal Practice prepares them for their practice and procedure examination, which is a necessary prerequisite to practice.

The Bar Council has a programme of lectures for pupil advocates and one year period of pupillage with a practising advocate. Upon the completion of the pupillage, candidates write the Bar examination, which is set nationally. Training of judicial officers occurs intermittently, but plans are being made for more co-ordinated training in the future.

5. *External Influences on Legal Unification*

The signing of international agreements is the responsibility of the national executive.[57] Agreements other than those of a technical nature must be approved by resolution in both the NA and NCOP. Agreements other than self-executing provisions become law when they are enacted by the central legislature.[58] Customary international law that is consistent with the Constitution or an act of the central Parliament[59] is applicable in the country. Thus international law is absorbed through the central sphere. A conscious effort is made to ensure that laws passed by the central Parliament accord with binding international law principles. Reference is sometimes made in national laws to the need to comply with international

[57] Section 231 of the Constitution.
[58] Section 231(3) of the Constitution.
[59] Section 232 of the Constitution.

obligations. One of the objectives of the Equality Act,[60] a national act which is applicable throughout the country, is to give effect to the obligations specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All forms of Racial Discrimination. International law also aids the courts in the interpretation of provisions of the Bill of Rights. Central laws, some of which incorporate principles of international law, are generally binding on provinces. This also contributes to the high degree of legal unification within the country

IV. INSTITUTIONAL AND SOCIAL BACKGROUND.

1. *The Judicial Branch*

There is a single judiciary which is empowered to declare any law or conduct inconsistent with the Constitution invalid to the extent of the inconsistency.[61] Thus the High Courts, the Supreme Court of Appeals (SCA) and the Constitutional Court (CC) have the power to ensure that lawmakers act within the powers allocated to them by the Constitution. Any challenge to the constitutionality of laws will normally commence in the High Court and declarations of invalidity of national and provincial laws have to be confirmed by the CC before it has any force or effect.[62]

The Constitutional Court has exclusive jurisdiction over disputes between organs of state in the National or Provincial sphere concerning the constitutional status, powers or functions of those organs of state.[63] If the President has concerns about the constitutionality of laws passed by the central legislature, he may refer it to the CC for a decision on its constitutionality.[64] The NA may also submit an application to the CC that is supported by at least one-third of its members to challenge a law within 30 days of being signed by the President.[65]

A challenge to a provincial law will commence in the High Court situated within that province and the decision may then be appealed to the SCA and finally to the CC. There are no state courts and differences of interpretation by the various High Courts are resolved on appeal either to the SCA or to the CC. The SCA has both constitutional and non-constitutional jurisdiction and the CC is the highest court in the land in respect of constitutional matters and issues connected with decisions on constitutional matters. Finally, the CC decides whether a matter is a constitutional matter or not. Given the width and range of the Constitution, litigants wishing to convert a matter into a constitutional matter have ample scope to do so. Yet a non-constitutional interpretation of provincial law will be finally determined by the SCA.

2. *Relations between the Central and Component State Governments*

A. *Forcing Component States to Legislate*

There is no constitutional provision enabling the central legislature to compel the provinces to legislate. Given its own exclusive competencies and the expansive list of concurrent competencies, the central legislature can legislate over all important matters and its law will be applicable and binding in the absence of any provincial law dealing with that subject matter. The executive co-ordination and the dominance of the ANC at both central and provincial levels results in greater co-operation in the respective legislative programmes of the central and provincial legislatures.

[60] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[61] Section 172(1) of the Constitution.
[62] Section 172(2) of the Constitution.
[63] Section 168(4) of the Constitution.
[64] Section 79(4) of the Constitution.
[65] Section 80 of the Constitution.

B. *Execution of Central Government Law*

All organs of state within the central sphere and provinces are required to execute central government law to the extent that the law is binding and applicable. For example, all the educators and managers of education in the province are required to execute and implement the South African Schools Act 1996. The Preferential Procurement Policy Framework Act[66] obliges all organs of state to adopt either the 80/20 or 90/10 formula in deciding and implementing their preferential procurement policies. This national law provides that organs of state can allocate no more than 10 points or 20 points out of 100, depending on the value of the contract, to affirmative action and black empowerment criteria in evaluating tenders to supply goods or services to the state. All provincial tender processes have to abide by and be within this national framework, even if the provinces would prefer a higher allocation of points to affirmative action criteria. There are many other similar national laws directly binding on central, provincial and local government officials.

C. *Representation of the Component States at the Central Level*

The NCOP, the second chamber of the central legislature, is meant to protect the interests of the provinces. The NCOP comprises a single delegation from each province and each delegation consists of 10 delegates.[67] The composition of the delegation must reflect the political composition of the provincial legislature that it represents. The NCOP thus has 90 members as the country has 9 provinces.

D. *Appointment of Component State Representatives to the NCOP*

The percentage of seats that a party secures in the provincial legislature determines the number of delegates that it is entitled to in the provincial delegation to the NCOP. Thus if a party has sixty percent of the seats in the KZN Provincial Legislature, it will be entitled to 6 of the 10 seats allocated to the delegation. The political parties determine who represents them in the NCOP. A formula is prescribed in the Constitution as to how the provincial delegation is to be composed.[68]

E. *The Power to Tax*

The power of the provinces to levy taxes is extremely limited. In terms of section 228 of the Constitution, the provincial legislature may impose taxes, levies and duties other than income tax, value added tax, general sales tax, rates on property or customs duties. Given these exclusions, provinces have very limited powers to raise taxes. In addition, they are prevented from imposing taxes if to do so may materially and unreasonably prejudice national economic policy, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour.[69]

Multiple taxation is not an issue in South Africa. Given the far-reaching constitutional limitation on the taxation powers of the provinces, taxes are in effect levied by the central sphere and conflicts have not arisen.

F. *Revenue Sharing*

The Constitution[70] requires that an Act of Parliament be enacted to provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. Each province

[66] Act 5 of 2000.
[67] Section 60 of the Constitution.
[68] Part B of Schedule 3 of the Constitution.
[69] Section 228(2) of the Constitution.
[70] Section 214 of the Constitution.

is entitled to an equitable share of the revenue. In deciding on the allocation, a variety of factors are taken into account, including the national interest, the needs and interests of the national government determined by objective criteria, the need to ensure that provinces and municipalities are able to provide basic services and perform the functions allocated to them and the fiscal capacity and efficiency of the provinces and the municipalities. Parliament and each of provincial legislatures are required to appropriate money for each financial year for the requirements of the state and the province.[71] Each year, the central legislature enacts the Division of Revenue Act in order to equitably divide the revenue raised. The expenditure of funds is regulated by the Public Finance Management Act 1 of 1999.[72]

3. *Other Formal or Informal Institutions for Resolving Intergovernmental Conflicts*

In terms of chapter 3 of the Constitution, organs of state have a constitutional duty to foster co-operative governance. The essence of the duty is to avoid legal proceedings and, where possible, to resolve duties through political discussion rather than through litigation. If a court is not satisfied that the duty has been properly discharged, it may refer the matter back to the organs of State involved to exhaust the constitutional requirement to mediate and negotiate fully.

In Uthukela District Municipality,[73] the CC held that it 'will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level.'[74]

4. *The Bureaucracy*

The Constitution provides for a public service for the Republic which is to be structured in terms of national legislation.[75] The Public Service Act 1994 is a single piece of legislation which applies to officers and employees employed in the public service by national, provincial and local governments.[76] The terms and conditions of service of the various ranks are determined nationally. Annual pay increments are negotiated nationally and are applicable to public servants employed in all three spheres. The provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service.[77] This must be done within the terms of the Public Service Act. Thus an employee leaving a provincial position and assuming a position in national department and vice versa continues to be employed in the public service.

Given the integrated nature of the civil service, there is considerable movement of staff from provincial posts to national government. In my opinion, there is greater willingness for civil servants to move from posts within the provinces to posts in the national government than the other way around.

5. *Social Factors*

A. *Important Racial, Linguistic, and Cultural Cleavages*

During apartheid, white and black people resided in all provinces. Within each province, areas were demarcated for the exclusive use of a specific racial group. The consequence was that local residential and business areas were rigidly segregated. The geographical division of the country into nine provinces

[71] Section 26 of the Public Finance Management Act 1 of 1999.
[72] The Public Finance Management Act 1 of 1999.
[73] *Uthukela District Municipality and Others v President of the RSA* 2003 (1) SA 678.
[74] Ibid. at page 684.
[75] Section 197(1) of the Constitution.
[76] Section 2 of the Public Service Act 1994.
[77] Section 197(4) of the Constitution.

has resulted in some provinces having a disproportionate number of residents who identify themselves with a particular linguistic, cultural or tribal group. For instance, in the Eastern Cape, approximately 83.3% of the residents speak isiXhosa, 9.3% speak Afrikaans and 3.6% speak English. By way of contrast, 80.9% of the residents in KwaZulu-Natal speak isiZulu, 13% speak English and just over 1% speak Afrikaans.[78] Thus in the Eastern Cape and in KwaZulu-Natal, the vast majority of residents identify themselves as belonging to the Xhosa or Zulu cultural and tribal groupings.

B. *Dispersion of Racial, Cultural and Tribal Groups*

Many of the nine provinces have disproportionate percentages of specific cultural or tribal groupings within its boundaries. While whites are dispersed throughout the country, the largest percentage of Indians is found in KwaZulu-Natal and small numbers have settled in various parts of the country. There is a large coloured community in the Western Cape, giving them a significant political voice in the running of the province. People identifying themselves either as Xhosa or Zulu reside throughout the country. The population of the country is about forty six and a half million. Ethnically, the population is divided as follows: Africans 79.0%; Whites 9.6%; Coloureds 8.9%; and Asians 2.5%.[79] The Inkatha Freedom Party, whose membership is predominantly Zulu, argued for a maximum devolution of power to the provinces during the constitutional negotiations. In addition to their political interests being best served by a strong federal system, they were concerned that a strong ANC government at national level would dominate the constituent provinces.

The fear that the provincial administrations will promote parochial tribal interests led to measures such as the national override provisions. Given the ANC's dominance of both the national and provincial governments, it is unlikely that racial, ethnic, religious or linguistic cleavages will become manifest in the foreseeable future as pivotal policy decisions are likely to be centrally driven for a while yet.

The lives of many South Africans are comprehensively regulated by norms and principles of African Customary law. Customary law applies in many rural or traditional areas within the various provinces. Aspects of customary law differ markedly from legal principles generally applicable in the country. Much of it is unwritten and is overseen by traditional leaders functioning within traditional structures, including courts. The Constitution recognises the institution, status and role of traditional leaders as a part of customary law, provided that these principles are in accordance with the Constitution.[80] Courts are obliged to apply principles of customary law provided that they are applicable and consistent with the Constitution and any relevant legislation. In Bhe,[81] the CC declared invalid customary norms that prevented intestate succession by women and extra-marital children on the basis that they were unfairly discriminated against. Much more dramatically, the CC recently held in Shilubana[82] that traditional authorities had the duty to develop their own law in line with the Constitution. In the past, the principle of male primogeniture prevented a woman from becoming chief of the tribe. The CC held that the tribal authority could develop the existing customary law in order to achieve equality and allow women to ascend to the chieftainship. Thus the process has started of testing customary law against the provisions of the Constitution. This will no doubt result in many of the more egregious customary norms that discriminate on the basis of gender or sex being changed. It will also result in the constitutional values having broader application and relevance.

C. *Asymmetry in Resources*

[78] SA Yearbook 2006/2007 (GCIS) 8 to 26.
[79] Africa South of the Sahara 2006 (36th Edition) 1081.
[80] Section 211 of the Constitution.
[81] *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC).
[82] *Shilubana and Others v. Nwamitwa* CCT 3/07.

There is significant asymmetry in natural resources, development, wealth and education between the component provinces. Guateng, by far the richest province, is the site of the gold and diamond trade and is the industrial heartland of the country. Gauteng contributes 33.3% to the total GDP while Mpumalanga, Limpopo, North-West and Northern Cape contribute 6.8%, 6.7%, 6.3% and 2.2% respectively to the total GDP.[83] This significant difference in wealth is reflected in the development levels of the various provinces. The poorest are heavily subsidized by the wealthier provinces. The better job opportunities, schools and universities are found in the wealthier provinces and it is often a challenge to secure able and competent personnel to fill administrative positions in the poorer and less developed provinces. There is thus more robust political discourse in the wealthier provinces. The ANC has initiated a debate on whether the number of provinces should be reduced in order to ensure better delivery of services.

V. CONCLUSION

Despite some federal features, South Africa exhibits a very high degree of uniformity of laws between the constituent parts. The present order emerged from a strong unitary system with complete uniformity of laws. The apartheid order was driven by the central legislature and the provincial and municipal components were indisputably subservient. The negotiating parties opted for a more balanced and nuanced division of powers between the central and provincial spheres of government. Real and defined power was given to the provincial sphere of government. In the early days of the new dispensation, the Western Cape was controlled by the New National Party and KwaZulu-Natal by the IFP. All the other provinces and the central government were firmly controlled by the ANC. On a number of occasions, both the Western Cape and the KZN provincial governments tested the boundaries of provincial power. It appeared that we were about to witness robust assertions of jurisdiction by the provinces for the first time. The ANC's subsequent electoral victories in the Western Cape and KZN, which saw it gaining control over these provincial legislatures, resulted in the embryonic assertion of provincial power being short lived.

Nevertheless, the DA's victory in the 2009 elections in the Western Cape will enable that province to assert its constitutional competences more robustly and it is likely that there will be more contestation between the spheres of government.

After the ANC gained control over the nine provincial legislatures, it sought to drive and achieve its vision of a developmental state from the central sphere. The rigid party discipline resulted in nationally agreed policies being implemented uniformly at both national and provincial levels. During this period South Africa was a de facto unitary state with the necessary constitutional basis, capacity and potential to develop federal features. Various administrative and executive mechanisms contributed to this uniformity. In addition, the national legislature engaged in a process of frenetic law making as it sought to transform the apartheid society into one which more accorded with the vision of the new Constitution. Correspondingly, very few laws were passed by the provincial sphere. Finally, the existence of a centrally structured judiciary interpreting a supreme constitution binding on all organs of state has further contributed to the high levels of uniformity in laws that we experience.

In the last few years some significant developments have occurred. At a political level, the opposition has gained control of the Western Cape and the City of Cape Town. There have also been judgments of the Constitutional Court affirming the importance of respecting the jurisdictional integrity of the various spheres. It seems that this nascent federal system is beginning to stir and awaken.

[83] Ibid.