# Co-operative Government

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Prior to 1994, co-operative government and intergovernmental relations were largely foreign terms in the South African political lexicon. While different levels of government existed, all meaningful decision-making processes were concentrated in the national government.

The MPNF at Kempton Park apparently gave little consideration to the institutions or the processes necessary to facilitate and to structure intergovernmental relations. According to De Villiers, the consequent lacuna in the Interim Constitution reflects:

(a) a lack of familiarity with how other multi-tiered dispensations operate; and  
(b) a politically charged debate between the ANC and NP on the relative merits of federal and unitary systems.

The absence of express rules, procedures and systems for intergovernmental co-operation in the Interim Constitution did not preclude various government departments from developing both vertical and horizontal channels of communication. These ad hoc rules and practices, as well as the pragmatism of government actors necessitated by the allocation of concurrent powers under the Interim Constitution, had a knock-on effect with respect to the drafting of the Final Constitution.

The Constitutional Assembly — in FC ss 40 and 41 — laid out principles designed to promote co-operation and co-ordination, rather than competition, between the various tiers of government and organs of state. Indeed,
emphasize this shift in relations, ss 40 and 41 employ the term ‘sphere’ rather than ‘level’. Sphere intimates different sets of responsibilities. (By implication, level denotes a hierarchy in structures of government). But that is as far as the break with the old order goes. Despite the emphasis on ‘spheres’ with particular, and sometimes exclusive, competencies, the Constitutional Assembly did not create a strong federal state.\(^1\) As other chapters in this work indicate,\(^2\) the national government retains both the power of the purse and the ability to override provincial and local government decisions. Moreover, the current dominance of the ANC means that technically independent political actors will be subject to the internal party discipline of the ANC. Of course, the ANC is a broad church. The independence of spheres of government secured by the Constitution ensures that provincial and municipal officials with sufficient political will can take decisions that simultaneously oppose current national policy and influence its future formulation.\(^3\)

14.2 **COMPARATIVE CONCEPTS OF CO-OPERATIVE GOVERNMENT**

Comparative constitutional law throws up a whole range of models of co-operative governance. At one end of the spectrum, so-called divided federal states are generally marked by a clear division of powers and functions between the national and regional governments, independent taxing powers for regions or provinces, and few formal mechanisms of co-operation between the various levels of government. Separate levels of government must negotiate agreement on issues of mutual concern. The United States,\(^4\)

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\(^1\) De Villiers suggests that multi-tiered levels of government ensure greater public participation in societies riven by ethnic, religious or racial strife. See De Villiers ‘A German Perspective’ (supra) at 430-431.


\(^3\) For example, the resistance of the Gauteng provincial government to national government policy regarding the distribution of the anti-retroviral drug Nevirapine to prevent mother-to-child transmission of HIV/AIDS influenced the AIDS debate, led to a shift in national policy. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (‘TAC’).

\(^4\) A good example of a very weak divided federal dispensation was the post-revolutionary war government of the United States. The Articles of Confederation granted the federal government little more than the power to defend the thirteen states against foreign enemies. The federal government lacked an executive, a judiciary and the power of the purse. Nor did it possess any authority to intervene or override the 13 sets of laws contrived by the founding States. The carefully calibrated system of shared and divided power crafted by the Constitutional Convention in 1787 was largely an answer to problems of co-ordination that threatened the very existence of the new nation. The federal government possessed only those powers articulated by the US Constitution. Article I, Section 8. All other powers vested in the states that made up the union. Tenth Amendment. Two hundred years later, the constitutionally recognized power of US federal government is such that there are relatively few areas of legislative and executive competence that are not at least shared by federal, state and local authorities. However, sharing competence does not mean coordinated action. Coordinated action is generally a function of mediation and not institutional arrangement.
CO-OPERATIVE GOVERNMENT

Canada\(^1\), Australia\(^2\)

The US is not without institutional arrangements designed to ensure that the national government takes cognisance of regional and local concerns. One house of Congress, the Senate, is made up of representatives from each of the 50 states. The other house, the House of Representatives, is made up of representatives from generally smaller constituencies — read local communities — from each of the 50 states. As a result, regional and local concerns feature prominently in national debate. See Garcia v San Antonio Metropolitan Transit Authority 469 US 528, 550-551, 105 SCt 1005 (1985)\(^3\)\(\) The principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by the Congress\(^3\)\(\). Indeed, political careers at the national level are often measured by the ability of representatives to bring home the ‘pork’ — that is, to ensure that local or regional communities benefit from national government largesse. See L Tribe ‘Model I: The Model of Separated and Divided Powers’ American Constitutional Law (3rd Edition, Volume I, 2000) 118 - 206.

\(^1\) See P Hogg Constitutional Law of Canada (4th Edition, Volume I, 2001) 5-43–5-45. Hogg describes the Canadian system as one of ‘co-operative federalism’. He notes that while ‘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 . . . in many fields, effective policies require the joint, or at least complementary, action of more than one legislative body.’ However, ‘the essence of co-operative federalism is a network of relationships between the executives of central and regional government. 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. The area where cooperative federalism has been most dominant is in the federal-provincial financial arrangements. At any given time, there are over 150 organizations, conferences and committees involved in intergovernmental liaison, indicating a vast array of consultative organisms within the Canadian federation.’ Hogg’s description of the Canadian system sounds remarkably similar to the South African model. Indeed, an architect of the South African system, F Cachalia, has described the system as one of ‘co-operative federalism’. See De Villiers ‘IGR in SA’ (supra) at 199. See also Report of the Commission of Inquiry Into Constitutional Problems (‘Tremblay Report’) (1956, Volume I) 97–131 (Discussion of the nature and the goals of the Canadian federal state).

\(^2\) See, generally, T Blacksmith & G Williams Australian Constitutional Law and Theory (2nd Edition, 1998) 213–244; Constitutional Commission Final Report of the Constitutional Commission (1988) 53–54 (‘The minimum essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the government institutions of the Commonwealth and the States, a division of power between these organizations, and a judicial umpire.’ The Constitution protects the States from discrimination through taxation, duties, tariffs or regulation of trade, commerce or revenue by the Commonwealth. Likewise, it ensures that citizens of one State are not discriminated against by another. Finally, the equal representation of the States in the Commonwealth Senate ensures a certain even-handedness in the formation of national government policy); ‘Australia’s System of Government’ Department Of Foreign Affairs and Trade (2004) www.dfat.gov.au/facts. Much like the United States, Australia’s federal government powers are enumerated. See ss 51 and 52 of the Australian Constitution. The states’ plenary powers find their source in ss 107. See also R Watts ‘Intergovernmental Councils in Federations’ Constructive and Co-operative Federalism: A Series of Commentaries on the Council of the Federation (2003). Watts notes that Australia, like South Africa, combines federal and parliamentary institutions. While intergovernmental relations are not expressly provided for in the Constitution, Australia has established a number of major formal intergovernmental councils. The Council of Australian Governments (COAG) is Australia’s primary intergovernmental institution. COAG consists of the Prime Minister all the State Premiers and Territory Chief Ministers and the President of the Australian Local Government Association. Perhaps more importantly, and similar to South Africa’s MINMECS, are the 30 odd intergovernmental ministerial councils charged with various sectoral responsibilities. Several of these councils have decision-making mandates assigned by legislation. This assigned authority — along with articulated deliberative and voting processes — makes them genuine intergovernmental co-decision mechanisms. For more on IGR in Australia see DM Brown Market Rules, Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada (2002) 162, 204-11, 226, 259 – 262; R Wilkins & C Saunders ‘Intergovernmental Relations in Australia’ in P Meekison (ed) Intergovernmental Relations in Federal Countries (2002) 17-23.
India, Brazil and Switzerland are good contemporary examples of divided

1 See HM Seervai 'Federalism in India' Constitutional Law of India (4th Edition, Volume 1, 1991) 281–303. India’s Constitution provides expressly for the functional interdependence of various tiers of government. Article 263 of the Constitution provides for an Inter-State Council (ISC) designed to harmonize federal and state policies. Despite this constitutional dictate, the ISC only came into being in 1990. The delay, justified in part by a desire to develop a set of best practices for federal-state relations, sheds at least some light on the South African government’s delay in bringing into being IGR dispute resolution legislation in terms of FC s 41(2). The National Development Council, created in 1952, is the setting for intergovernmental debate for Union five-year plans. The Finance Commissions provided for by Article 280 of the Constitution governs constitutionally mandated transfers between Union and State governments. Much like the South African Constitution, the Indian Constitution assigns government competencies according to a Union list, a State list and a Concurrent list. See Article 246, Schedule VII, Lists I, II, III. The Union’s list of powers embraces such standard national responsibilities as defence, foreign affairs, banking, currency control, taxes and levies. The State list contains such competencies as public order and police, local government, public health, education and state taxes. However, the Union’s legislative powers may pre-empt state authority with respect to matters enumerated in the Union and concurrent list of competencies. The Union government may also intervene directly in the affairs of the states. Subject to a two-thirds majority of the Council of States (a body similar in function to South Africa’s National Council of Provinces), the Union may declare a state of emergency and appropriate the power to legislate with respect to matters covered by the State list. See Article 249. All state governors are appointed by the President of the Union. As a result, the federal government retains oversight powers vis-à-vis the affairs of any given state.

2 See C Souza Constitutional Engineering in Brazil (1997). According to the 1988 Brazilian Constitution, the three tiers of government (federal, state and local) have both distinct and concurrent competencies. To get a sense of the relative power of each tier, Souza looks at both the fiscal and expenditure responsibilities of each tier. Ibid at 37-53. The federal government retains the lion’s share of responsibility for taxation: through income tax, large fortunes tax, import/export duties, rural property and industrial products taxes. States possess the ability to tax incomes, inheritances, capital gains and motor vehicles as well as to create value-added tax. Local governments enjoy the right to tax property, services and fuel. Interestingly, once the distribution of fiscal revenue occurs, the federal government receives 36.5% of the total. States receive 40.7% and local governments 22.8%. With respect to areas of expenditure, the federal government exercises authority over such expected fields as defence, international trade currency, national highways, postal services, federal police, social security and water. The federal, state and local government share competence over health, welfare and public assistance, culture and education, housing and sanitation, poverty and social marginalization, traffic safety and tourism. The states have residual powers over areas not assigned to the federal or municipal levels by the constitution. Local governments possess exclusive competence over local transport, primary schooling and land use. Despite the constitutionally prescribed competencies of the states, the Brazilian federal government can override state legislation in a set of prescribed circumstances (quite similar to those found in the South African Constitution in FC s 44(2)): (1) where the national interest is threatened, (2) where there is extreme public disorder or (3) when a state’s finances are seriously in arrears. Such interventions must be certified by the Brazilian Supreme Court. In general, such an override will only take place after mediation between the federal government and the state government involved has failed. IGR in Brazil is largely informal and relies on extensive political lobbying and brokered deals between the different tiers of government. While much of the lobbying flows upwards from municipal councillors and mayors to state legislatures and from state officials to congressmen, senators, federal ministers and the president, the ‘federal government [post-1988] cannot take decisions about national issues without negotiating with the sub-national spheres’. Ibid at 172.

3 See JF Aubert & E Griesel ‘The Swiss Federal Constitution’ in F Dessemontet & T Ansai (eds) Introduction to Swiss Law (1995) 15–26. Switzerland has a unique federal structure. The Federal Council is a collegial executive elected by the federal legislature. It sits for a fixed term and is composed of seven councillors. This structure is mirrored in cantonal political arrangements. Two things set this arrangement apart: (1) the guaranteed representation of the four major political parties in the Federal Council; (2) the possibility of dual membership in the cantonal and federal legislatures; and (3) a constitutional provision that potentially subjects all federal legislation to challenge by referendum. As a result of these unique features, Swiss politics reflects both a high degree of co-operation and a high
Co-operative government and the final constitution

(a) The General Framework of Co-operative Government

Co-operative governance is reflected in any number of different ways in the Final Constitution. As noted above, FC ss 40 and 41’s use of the terms ‘spheres’ reflects a linguistic turn away from a hierarchal relationship between national, provincial and local government. Moreover, all spheres of government, be they national, provincial or local, must co-operate vertically and horizontally. For example, municipalities must not only co-operate with one another but also with national and provincial governments. According to the 1999 Constitution, provision is made for cantonal participation in decision-making processes at the federal level with respect to federal legislation (Article 45(1)) and foreign policy (Article 55), while inter-cantonal co-operation is promoted through treaties, common organizations and institutions (Article 48). Federal Constitution of the Swiss Confederation, 1999.

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1 See De Villiers ‘A German Perspective’ (supra) at 432 fn 6 (co-operative federalism is described as follows: (i) horizontal and vertical co-operation between the various levels of government; (ii) bilateral and multilateral co-operation; (iii) the involvement of the legislative, executive and judicial branches of government; (iv) a combination of voluntary and obligatory co-operation.) The partnership between the German national government (Bund) and the various regions (Länder) is based on the principle of federal trust (Bundestreue). According to the German constitutional court, Bundestreue is a right enforceable by both the national and regional governments. B Verf GE 1, 300. See also B Verf GE 12, 205, 256. That said, there is no exact checklist to measure compliance with the principle of Bundestreue. It is a constitutional norm given content by the demands of the specific circumstances with which the court is confronted. See De Villiers ‘A German Perspective’ (supra) at 432.

The principle of Bundestreue has informed South Africa’s commitment to co-operative government and intergovernmental relations. However, notwithstanding the many shared elements of an integrated model, the South African national government retains a dominant position in intergovernmental relations. The South African model is far more centralised in comparison with its German counterpart. For more on German co-operative governance, see D Kommers The Constitutional Jurisprudence of the Federal Republic of Germany (1989) 78–92; D Currie The Constitution of the Federal Republic of Germany (1994) 77–80; Bertus De Villiers B ‘Bundestreue: The Soul of an Inter-governmental Partnership’ Konrad Adenauer — Stiftung Occasional Papers (March 1995), B De Villiers ‘Foreign Relations and the Provinces — International Experience’ (1996) 11 J.APL./PR 204; B De Villiers ‘Local-Provincial Intergovernmental Relations: A Comparative Analysis’ 1997 12 J.APL./PR 469. To show up the limits of these conceptual categories, it is worth noting that an exemplar of the divided model, the US, has much stronger regional and local representation at the national level than does South Africa.
co-operate with provincial governments and the national government. Finally, FC ss 40 and 41 require that different spheres of government and different organs of state should exhaust all political means of dispute resolution before turning to the courts.

The chapter 3 jurisprudence of the Constitutional Court suggests that this ‘new philosophy’ of co-operative government is governed by two basic principles.

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2 The constitutional framework of co-operative government is not exhausted by the provisions of ss 40 and 41 of chapter 3.

FC Schedules 4 and 5 specifically provide for concurrent and exclusive legislative competencies for the national and provincial governments. See V Bronstein, ‘Legislative Competence’ in M Chaskalson, J Kenridge, J Klaaren, G Marcus, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) chapter 15. Although the Interim Constitution made no express reference to co-operative government, the Constitutional Court appeared to recognize the need for just such a system. See *In re: The National Educational Policy Bill No. 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) at para 34 (A national education policy bill that called for the (executive) co-operation between the provinces and the national government was subject to abstract review. The Court wrote: ‘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.’ The Court held that Parliament was entitled to make provisions for such co-operation of matters set out in IC schedule 6 and that the objection to such provisions on the grounds that they encroached upon the executive competence of the provinces could not be sustained.) See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (*Fedsure*).(Court confirmed that the Interim Constitution recognized three distinct, but interdependent, levels of government: namely national, provincial and local.) The Court confirmed this line of reasoning with respect to the Final Constitution in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1458 (CC)(*First Certification Judgment*). It 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 requirement of CP XX that national unity be recognised and promoted. The mere fact that the NT has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.

Ibid at para 290.

Other provisions crosshatch national, provincial and municipal powers. Section 146 and 44 delineate the desiderata for national intervention and override of provincial legislative prerogatives. Section 100 sets out the guidelines for national executive supervision and intervention in provincial administrative affairs, but is subject to approval, to review and to termination by the National Council of Provinces. The NCOP, as a general matter, represents provincial interests in the national legislature. See FC s 42(4). FC s 125 (3) requires that national government must assist the provinces ‘by legislative or other measures to develop the administrative capacity required for the effective exercise’ of their functions, powers and duties. National and provincial governments have similar obligations to assist local governments throughout the country. See FC s 154. FC s 238 enables any organ of state in a sphere of government to delegate executive functions from one organ of state to another, and to perform any function for any other organ of state. Parliament may also delegate legislative powers to governments in other spheres, except the power to amend the Constitution. See FC s 44. Provincial legislatures may assign any legislative power to a municipality. See FC s 104. A member of cabinet may assign to a member of a provincial executive council or municipality a power or a function that must be performed in terms of an act of parliament. See FC s 99. A member of the executive council of a province (MEC) may assign any power (executive) to a municipality. See FC s 126.

3 See *Ex parte President of the Republic of South Africa: in re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC)(*Liquor Bill*) at para 40 (chapter 3 ‘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.’) See also *First Certification Judgment* (supra) at paras 287-288.
First, one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state. Second, the actual integrity of each sphere and organ of state must be understood in light of the powers and purpose of that entity. In short, while the political framework created by the Final Constitution demands that mutual respect must be paid, a sphere of government or an organ of state may able to dictate the ends of another and the means by which those ends are carried out.¹

(b) Section 40

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.

(i) Section 40(1): Distinctive, Interdependent and Interrelated

The phrase ‘distinctive, interdependent and interrelated’ seems tailor-made for conceptual confusion. And yet, despite the inapt wording, the courts have made sense of it. The phrase stands for the following propositions. First, ‘interdependent’ and ‘interrelated’ must be understood in light of FC s 1’s provision that South Africa is ‘one sovereign, democratic state’.² (Emphasis added). Second, while the different

¹ See Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) (‘DVB Behuising’) (Court held that the functional areas of concurrent legislative authority had to be interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively); Premier, Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 at paras 54-55, 83 (CC) (‘Premier, WC v President’) (The Court wrote that ‘the provisions of chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. Co-operation is of particular importance in the field of concurrent law-making and implementation of laws. [As a result, a procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration is entirely consistent with the system of co-operative government prescribed by the Constitution]; in National Educational Policy Bill (supra) (Court held that the principles of co-operative government must be understood such that the powers assigned to an organ of state for one purpose — read education — may not be employed by the organ of state for another). But see Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1360 (CC) (‘Grootboom’) at paras 39–40 (‘[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other [B]ut the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State’s s 26 obligations’); Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others 2002 (1) SA 76 (SCA) (National and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary).

² See Premier, WC v President (supra) at para 50 (‘Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is ‘one sovereign, democratic State’, and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.’)
spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfill its constitutional mandate. Third, despite the textual intimations that the spheres are equal, there is a hierarchy that runs from national government down to provincial government down to local government.

(ii) Section 40(2): Parties Bound by chapter 3

Another potential source of conceptual confusion is FC s 40(2). It reads, in pertinent part: ‘All spheres of government must observe and adhere to the principles in this chapter.’ FC s 41(1), however, applies to ‘all spheres of government and all organs of state.’ To further complicate matters, FC s 41(3), in reference to intergovernmental disputes, uses the term ‘organ of state’ without reference to spheres of government. The text thereby raises thorny questions as to which of chapter 3’s obligations apply to state institutions and functionaries and when. As we shall see, it is not enough to parrot the text and simply say that chapter 3’s obligations are sometimes imposed solely on spheres of government, sometimes on both spheres of government and organs of state, and sometimes on organs of state alone.

One way of reconciling this terminological confusion is to insist that the term ‘spheres of government’ should be reserved for relations between the different spheres of government (so-called vertical intergovernmental relations), whereas the term ‘organs of state within each sphere’ should be used in the context of to

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1 See Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) (‘IEC v Langeberg’) at para 26 (‘All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and independence is such that they must ensure that, while they do not tread on each other’s toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 were designed in an effort to achieve this result’); in Grootboom (supra) at paras 39–40 (‘[A] co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chapter 3 of the Constitution. . . . Each sphere of government must accept responsibility for the implementation of particular parts of the program, but the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State’s s 26 obligations.’)

2 See Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development & Others 1999 (11) BCLR 1229 (T) at para 29 (‘Cape Metro Council’) (The High Court wrote that ‘apparent autonomy and independence’ of the local government sphere ‘relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres which make up the government of the country.’) The Constitutional Court had reached a similar conclusion in Fedsure (supra). (While the Court confirmed that the Interim Constitution recognized and provided for three distinct levels of government and that each level of government derived its powers from the IC, local government’s powers were subject to definition and regulation by either national or provincial governments.) See Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others 2002 (1) SA 76 (SCA) (Although ss 40 and 41 contemplate distinct spheres of government, the national and provincial governments have the responsibility to ensure that municipalities function effectively and to intervene in their affairs if necessary.)
describe relations within a particular sphere (so-called horizontal intergovernmental relations). The problem with this reading, however, is that at least two of the principles in s 41(1) — which purports to bind all spheres of government and all organs of state — do not apply to horizontal intergovernmental relations. They are ss 41(1)(e) and 41(1)(g). The absence of any textual support for creating such exceptions — other than convenience — gives the lie to this particular attempt to reconcile ss 40 and 41.

The courts have made a gallant effort to make sense of the text's conceptual confusion and give meaningful content to its distinctions. In IEC v Langeberg, the Constitutional Court began somewhat tentatively by remarking that 'the national sphere of government comprises at least Parliament and the national executive including the President' but that Parliament and the national executive were not organs of state as defined in s 239 'because they are neither departments nor administrations within the national sphere of government.'1 Left unqualified, this dictum might have been read to imply that Parliament and the national executive were not bound by s 41(3) since that provision applies only to organs of state. However, in National Gambling Board, the Court held that its aforementioned remarks in IEC v Langeberg should be construed narrowly, such that 'Parliament, the President and the Cabinet are not organs of state within the meaning of paragraph (a) of the definition [in s 239].2' Qualified in this manner, the dictum in IEC v Langeberg left open the possibility that Parliament, the President and the Cabinet might be regarded as organs of state in terms of s 239(b). Since none of these state institutions or functionaries was party to National Gambling Board, the Court did not have to decide this point. It did, however, endorse as being correct the parties’ agreement that the Minister of Trade and Industry and the Premier of KwaZulu-Natal were organs of state as contemplated in s 239(b)(i).3

The qualification placed by the Court in National Gambling Board on the dictum in IEC v Langeberg was recently revisited in Uthekela District Municipality v President of the Republic of South Africa.4 In Uthekela District Municipality, three municipalities sought an order from the Constitutional Court confirming a High Court order directing the President, the national Minister of Finance and the national Minister

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1 IEC v Langeberg (supra) at para 25.
3 Given that National Gambling Board (supra) bound provincial premiers in terms of s 239(b), the President, as head of the national executive, was almost certain to be regarded as an organ of state for the purposes of s 239(b), and therefore bound by s 41(3). Premier, WC v President provided additional support for this proposition. In Premier, WC v President (supra) the Constitutional Court assumed exclusive jurisdiction under s 167(4)(a) of the Constitution to hear a dispute between a provincial premier and the President. FC s 167(4) provides that ‘[o]nly the Constitutional Court may — (a) decide disputes between organs of state in the national or provincial sphere concerning the status, powers and functions of any of those organs of state.’ The Court’s decision to assume jurisdiction was based upon an express finding that the President was an organ of State in the national sphere. Ibid at para 2. It followed that the President would be bound by the general duty in s 40(2) to adhere to the principles in chapter 3, the specific duties attached to these principles in s 41(1) as well as the duty to engage in extra-judicial dispute-resolution in s 41(3) prior to any litigation.
4 2003 (1) SA 687 (CC) (‘Uthekela District Municipality’).
of Provincial Government — and several other respondents — to pay them their equitable share of national revenue as required by FC ss 214(1)(a) and 227(1)(a). Although the matter had been settled prior to the confirmation hearing, the Court used the hearing as an opportunity both to clarify the extension and the application of the terms used in chapter 3 and to offer an assessment of the chapter’s requirements. Municipalities were expressly identified as ‘organs of state in the local sphere of government.’

The three respondents — the President, the national Minister of Finance and the national Minister of Provincial Government — were expressly identified as ‘organs of state in the national sphere of government.’ All parties — as organs of state — were found to be subject to the dispute resolution requirements of s 41(3) and 41(1)(h)(vi). Finally, the two sets of organs of state thus identified were found to have failed to make use of the dispute resolution mechanism created by the Intergovernmental Fiscal Relations Act ‘for fiscal disputes between organs of State in the national and local spheres.’

Despite the Constitutional Court’s view that the President and the national Cabinet are organs of state as defined in s 239(b), the distinction drawn in ss 40 and 41 between spheres of government and organs of state within a particular sphere may still turn out to be significant. In particular, if it is decided that Parliament is not an organ of state, the duty imposed by s 41(3) to engage in extra-judicial dispute resolution will not bind the National Assembly and the National Council of Provinces and, by extension, provincial legislatures and municipalities qua legislatures. It seems difficult, however, to believe that the drafters of the Final Constitution intended to immunize these bodies from the dictates of s 41(3).

The decision in Uthekela District Municipality does seem to resolve the issue of whether provincial executive councils are to be treated as organs of state for purposes of s 41. While Executive Council, WC — which involved two provincial Executive Councils - was inconclusive on the issue of whether a provincial cabinet should be regarded as an organ of state, it is authority for the proposition that

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1 Ibid at para 18 citing, in support, IEC v Langeberg (supra) at para 19.
2 Ibid at para 18 citing, in support, National Gambling Board (supra) at paras 19–21.
3 Ibid at para 19.
4 Ibid at para 22.
5 Ibid at paras 20–23.
6 FC s 239(b) (‘In the Constitution, unless the context indicates otherwise, . . . ‘organ of state’ means (b) any other functionary or institution: (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or ii. exercising a public power or performing a public function in terms of any legislation.’)
7 One potential explanation for this choice is that disputes between national and provincial legislatures are governed by other sections of the Constitution, primarily ss 146 and 44. It may also be that disputes between legislatures — over the content of legislation — invariably become disputes between executives. The execution of the will of the legislatures — by the executive or some organ of state — would invariably be subject to the dictates of s 41(3). But perhaps the best argument is that following Uthekela District Municipality, s 41(3) is to be read with s 41(1)(b)(vi), and the latter section does apply to spheres of government. Only the most formalistic and hidebound of readings would exclude legislatures from the ambit of s 41(3).
CO-OPERATIVE GOVERNMENT

a provincial government, represented by its executive council, will be regarded as a sphere of government for the purposes of s 41(1)(e) and (g). Given that Uthekela District Municipality holds that members of the national cabinet are organs of state for the purposes of s 41, it seems unlikely that provincial cabinets would not be similarly bound.

In IEC v Langeberg, the Court suggested, in something of a throwaway line, that ‘[a]n intergovernmental dispute is a dispute between parties that are part of government in the sense of being either a sphere of government or an organ of State within a sphere of government’. Taken at face value, this dictum might make the distinction between these two types of party irrelevant for the purposes of s 41(3). The problem with this remark, however, is that it contradicts the clear wording of the subsection. Section 41(3) refers only to ‘organs of state’. However, after Uthekela District Municipality, and the Court’s clear holding that the President and the members of the Cabinet should be regarded as organs of state, the elision between organs of state and spheres of government begins to look a bit less significant. The elision should, however, be treated with caution, at least in so far as it may be read as authority for the proposition that national or provincial legislatures are bound by 41(3).

The aforementioned misgivings aside, IEC v Langeberg and National Gambling Board do provide clear authority for two propositions.

First, IEC v Langeberg holds that the Independent Electoral Commission referred to in FC ss 190 and 191 is not ‘an organ of State which can be said to be within the national sphere of government.’ Three reasons are advanced for this proposition: (1) the Commission is not a department or an administrative agency that is subject to the national executive’s co-ordination function in terms of s 85(2); (2) the Commission is expressly described in chapter 9 as being a state institution strengthening ‘constitutional democracy’: ‘State’ is a broader concept than ‘national government’; and (3) the Commission is described in s 181(2) as ‘independent’, a description that is incompatible with the notion of ‘interdependence’ in s 40(1).

All three reasons apply equally to the other institutions listed in s 181(1): the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality and the Auditor-General. One can therefore assert, with a certain amount of confidence, that: (a) none of these institutions is bound to observe the principles in chapter 3; and (b) a dispute between any one or more of these institutions, either inter se or involving other parties, is not an intergovernmental dispute for the purposes of s 41(3).

1 Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC); Executive Council, WC at paras 29 and 79.
2 IEC v Langeberg (supra) at para 21.
3 Ibid at para 27.
Second. Most national and provincial regulatory authorities will probably be regarded as organs of state within the national or provincial sphere of government and therefore bound by ss 40 and 41(1) and (3). In National Gambling Board, the Court endorsed the parties’ agreement that the National Gambling Board and the KwaZulu-Natal Gambling Board were organs of state in the national and provincial spheres respectively.\(^1\) Once again, the reason for this finding (that the boards exercised a public power or performed public functions in terms of legislation in one or the other of these spheres) is wide enough to apply to all similarly situated regulatory bodies. For example, the long-standing dispute between the City of Cape Town and the National Electricity Regulator over the former’s power to cross-subsidise the provision of free electricity will probably be regarded as an intergovernmental dispute to which s 41(3) applies. On the other hand, the constitutional status of the Independent Communications Authority (ICASA) is closer to that of the chapter 9 institutions. Although not mentioned in the list of state institutions strengthening constitutional democracy in s 181(1), at least some of ICASA’s regulatory powers derive from s 192 of the Constitution. Section 192 — part of chapter 9 — provides for ‘an independent authority to regulate broadcasting.’\(^2\) Following IEC v Langeberg, ICASA, as the successor to the IBA, should not be regarded as an organ of state within a particular, ‘interdependent’ sphere of government.

(c) Section 41

Principles of co-operative government and intergovernmental relations:

(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;
(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;

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\(^1\) National Gambling Board (supra) at paras 19–21.

\(^2\) FC s 192 reads: ‘National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.’
(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 intergo-
vernmental relations; and
(b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-
governmental disputes.1

(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 re-
fer a dispute back to the organs of state involved.

(i) Section 41(1)
The principles set out in s 41(1) stand for two basic propositions. First, they do
not diminish the autonomy of any given sphere of government.2 They simply
recognize the place of each within the whole and the need for co-ordination in
order to make the whole work.3 Second, subsections 41(1)(e), (g) and (h) re-inforce
the notion — articulated in s 40 — that each sphere of government is distinct.4

(aa) Section 41(1)(d): The Rule of Law
Interestingly, the majority of cases in which the principles of co-operative govern-
ment have been invoked have not been disputes between different spheres of
government and/or organs of state. Many of them have involved private parties
suing some arm of the government. As a result, s 41(1)(d)'s injunction that ‘all
spheres of government and all organs of state within each sphere must . . . be
loyal to the Constitution, the Republic and its people’ has been interpreted much
like an adjunct to the Constitution’s commitment to the rule of law and the
legality principle. For example, in Permanent Secretary, Department of Welfare, Eastern
Cape, & Another v Ngcusa & Others, the court wrote:

1 The Constitution is clear that Parliament must create the overall institutional system of co-operative
government and intergovernmental relations. Although such legislation has not yet been enacted, several
other structures already exist which enable the different spheres of government to address aspects of
general importance and to co-ordinate common activities. Such structures include, amongst others,
NCOP, PPC, MINMECS, and FOSAD. See S 14.3 (infra).
2 See, eg, First Certification Judgment (supra) at para 292 (the principles set out in FC s 41 ‘are not
invasive of the autonomy of a province in a system of co-operative government.’)
3 See Van Wyk v Uys NO 2002 (5) SA 92 (C)(The Court held that because s 41(1) of the Constitution
enjoins the central, provincial and local spheres of government to support and assist each other, the
MEC for local government could not act \textit{mero motu} in a case where the municipal council had already
taken definite steps to investigate an alleged breach of the code of conduct by councillors. Rather, FC's
41(1) required the provincial MEC to await the outcome of the council’s own investigation and take
cognisance of the council’s recommendations before acting in terms of item 14 of Schedule 1 to the
Local Government: Municipal Systems Act 32 of 2000.)
4 See Cape Metro Council (supra) at para 34 (Sections 41(1)(e), (g) and (h) reinforce the protection
afforded to municipalities by s 154(1).)
When an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies [s 41(1)(d) and 195(1)(e) of the Constitution, which commands all organs of State to be loyal to the Constitution and requires the public administration to be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.\footnote{1}


It would seem reasonable, if not obvious, then to read s 41(1)(d) — along with s 41(1)(b) and s 41(1)(c) — as designed to promote justice and fairness in the administration of the state. In a similar vein, the *Hardy Ventures v Tshwane Metropolitan Municipality* court wrote that s 41(1), when read as a whole, required 'all spheres of government and all organs of state within each sphere' to provide 'effective, transparent, accountable and coherent government.'\footnote{2}


(bb) Section 41(1)(e): Respect for Institutional Integrity

At least one court has held that this provision can be read to re-inforce the separation of powers doctrine. In *Bushbuck Ridge Border Committee v Government of the Northern Province*, the court held that s 41(1)(e) bolstered 'the constitutional separation of powers — in particular the principle that the courts should not usurp the function of the legislature.'\footnote{3} How exactly this provision accomplishes this feat is difficult to discern. While it may prevent different spheres of government from violating each other's institutional integrity, the subsection does not refer to the courts, nor are the courts generally thought to be engaged by these principles of co-operative government. They are, after all, the arbiters of disputes between spheres of government and organs of state, and not parties to such disputes.


(cc) Section 41(1)(f): Enumerated Powers

According to the Constitutional Court in *Liquor Bill*, the chapters following chapter 3 should be 'read and understood' in light of the subordination of all spheres of government to the constitutional obligation to respect the requirements of co-operative government.\footnote{4} These requirements include the duty imposed by s 41(1)(f) 'not to assume any power or function except those conferred on them in terms of the Constitution.' Section 41(1)(f) is of a piece with ss 41(1)(e) and (g). The three subsections would seem designed to remind each sphere of government and every organ of state that the best way to realize co-operative governance is to ensure that all branches do exactly what they are empowered to do — and no more.

\footnote{1} 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA)("Ngxusa").

\footnote{2} 2004 (1) SA 199 (T) ("Hardy Ventures").

\footnote{3} *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193, 200-202 (CC)

\footnote{4} *Liquor Bill* (supra) at para 41.
Section 41(1)(g) provides that ‘[a]ll spheres of government and all organs of state within each sphere must 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.’ Because all the intergovernmental disputes that have come before the courts to date have concerned the proper allocation of powers and functions between the different spheres of government, it is important to understand exactly what this provision means. In short, the provision requires one to distinguish between legitimate disputes about the ambit of a particular organ of state or sphere of government’s powers and functions, and the constitutionally forbidden encroachment by one organ of state or sphere of government onto the terrain of another.

In *Premier, WC v President*, the Court articulated this distinction as being one between ‘the way power is exercised’ and the question ‘whether or not a power exists.’ In theory, this approach means that s 41(1)(g) becomes relevant to the determination of the dispute only once it is established that the powers on which the parties are relying indeed exist. If a particular power does not exist, the dispute must be resolved on the basis that the party concerned is acting unlawfully. Only once it is established that the parties are acting lawfully may the further question arise as to whether any of the parties is exercising its powers in such a way as to ‘encroach on the geographical, functional or institutional integrity’ of the others as contemplated in s 41(1)(g). In relation to this question, the Court held that:

The functional and institutional integrity of the different spheres of government must be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.

Unfortunately, this passage blurs the neat distinction between ‘the way power is exercised’ and the question ‘whether or not a power exists’ by implying that the question as to whether s 41(1)(g) has been infringed must be answered *relationally*: that is, by looking at the place of the parties in the co-operative government system, including their respective powers and functions. In practice, this means that the lawfulness of the exercise of a power and the alleged abuse of that power may not be as easy to separate as the Court at first indicates. Although the Court does not go so far as to say this, it appears that the more constitutionally dubious an alleged power, the greater the likelihood that it will be found to have been abused.

1. *Premier, WC v President* (supra) at para 57.
2. Ibid at para 58.
3. See *Cape Metro Council* (supra) at para 122 (Section 41(1)(g) places a limitation or constraint on the manner in which a sphere of government or an organ of State may exercise its powers or perform its functions. It may be interpreted to mean that no interference with, or encroachment upon, the inviolate sphere of activities of another organ of State is to be tolerated. This is consonant with the spirit of co-operation based on mutual trust and good faith, as envisaged in section 41(1)(h) . . . [Section 41(1)(g) appears to be directed at preventing one sphere of government from undermining others, thereby
In *Premier, WC v President*, the Constitutional Court was asked to resolve a dispute between the Western Cape provincial government and national government relating to the constitutional validity of certain amendments to the Public Service Act Proclamation 103 of 1994 as introduced by the Public Service Laws Amendment Act 86 of 1998. The Court held that the provisions of chapter 3 of the Final Constitution were designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all had a common interest. In particular, s 41(1)(g) was crafted so as to prevent one sphere of government from using its powers in ways that could undermine other spheres of government. In this respect, the national legislature’s constitutional power to establish and structure a single public service had to be exercised so as not to encroach on the ability of the provinces to carry out the functions that are constitutionally entrusted to them.

The Court further held that a procedure requiring, as in this case, an agreement between the President and the Premier with respect to the legality of a proposed restructuring of the public service within a provincial administration was entirely consistent with the system of co-operative government. The Court held that section 3(3)(b) of the amended Public Service Act, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed the executive authority of the province to administer its functions in a manner that prevents them from functioning effectively. Such conduct could, indeed, be regarded as an abuse of power. In deciding whether or not there has been conduct constituting an abuse of power, however, all relevant facts and circumstances should be considered. This would include, as the said dictum suggests, the complainant sphere of government’s position in the constitutional order or hierarchy and the relative weight of their applicable powers and functions.

1 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

2 Ibid at para 58 (‘Although the circumstances in which s 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section 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. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.’)

3 Ibid at paras 54–61

4 Ibid at para 83 (‘A procedure requiring the President and the Premier to seek agreement concerning the legality of a proposed restructuring of the public service within a provincial administration cannot be said to invade either the executive power vested in the Premier by the Constitution, or the functional or institutional integrity of provincial governments.’)
own laws and was therefore inconsistent with the Final Constitution to the extent that it empowered the Minister to make the determination without the consent of the Premier concerned.

**(ee)** Section 41(1)(b): The Duty to Avoid Litigation

Section 41(1)(b)(vi) reads, in relevant part, that:

all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another.

This principle is reinforced by s 41(3). Section 41(3) provides that:

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.

Section 41(4) provides that ‘[i]f 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.’ The meaning and relationship of these provisions have been closely considered in three cases to date: First Certification Judgment, National Gambling Board, and Uthekela District Municipality.

In First Certification Judgment, the Constitutional Court held that s 41(1)(b)(vi) had to be read together with s 41(3). It seemed to imply that the latter provision was the primary source of the duty to avoid litigation. In particular, s 41(3) meant that ‘disputes should where possible be resolved at a political level rather than through adversarial litigation.’

The inclusion of this provision did not, however, oust the courts’ jurisdiction to hear intergovernmental disputes or ‘deprive any organ of government of the powers vested in it under [the Constitution].’

In National Gambling Board, the Court effectively reversed the normative hierarchy it had established between s 41(1)(b)(vi) and s 41(3) in First Certification Judgment. The stated reason for the reversal was that, in the five years separating the two decisions, the Act of Parliament contemplated in s 41(2) had not been passed. As a consequence, no formal ‘mechanisms and procedures’ had been put in place to resolve intergovernmental disputes. Given the absence of such mechanisms and procedures, some doubt was expressed as to whether, in the absence of s 41(2) legislation, the Court could enforce s 41(3). In order to avoid

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1 Ibid at para 99.
2 First Certification Judgment (supra) at para 291.
3 Ibid. Although the Langeberg Court was not asked to decide on the relationship between s 41(1)(b)(vi) and s 41(3) — and ultimately found s 41(3) not to apply to the organs of state before the Court — it appeared to assume that had the IEC been an organ of state within the national sphere of government, s 41(3) would have applied. IEC v Langeberg (supra) at paras 30–31.
4 Ibid.
5 National Gambling Board (supra) at para 33.
having to decide this point, the Court held that the duty to avoid litigation could be independently founded on s 41(1)(b)(vi). The Court then enunciated what this duty entailed.2

The first two judgments on the duty to avoid litigation can be reconciled by reading National Gambling Board as giving content to the Court’s statement in First Certification Judgment that intergovernmental disputes should be resolved at a ‘political level’. In both decisions, the Court drew a line between political and legal forms of dispute resolution. The question as to whether or not s 41(1)(b)(vi) has been violated, and by extension whether the requirements of s 41(3) have been met, depends on whether all extra-judicial avenues for resolving the dispute have been exhausted. Three factors are relevant to this inquiry: (1) the seriousness of each party’s commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike comprises (i.e. each party’s duty ‘to re-evaluate its position fundamentally’).3

Two more years passed before the Court was again asked to consider the relationship between s 41(1)(b)(vi) and s 41(3). In Úthekela District Municipality, the Court first analysed the dispute between several municipalities and the national government in terms of s 41(3). After setting out s 41(3)’s two-fold obligations on intergovernmental disputes, and finding that a statutory dispute resolution mechanism exists for fiscal disputes between organs of State (in the form of the Intergovernmental Fiscal Relations Act), the Court addressed the issue of what an organ of State is to do if the dispute resolution mechanism in question does not actually apply to the conflict in question. (The Court found it unnecessary to decide the actual merit of the contention that the Act did not apply to the dispute in question.) The Court held that according to s 41(1)(b)(vi) organs of state are obliged ‘to avoid litigation against one another irrespective of whether special structures exist or not’.5

Úthekela District Municipality would seem to confirm the above reading of the fleshed-out requirements of s 41(1)(b)(vi) and s 41(3) and strengthen the view that the two sections re-inforce one another. Úthekela District Municipality would also seem to stand for two further propositions. First, neither s 41(1)(b)(vi) nor s 41(3) has primacy of place. Second, and more importantly, s 41(3) analysis can take place without the legislation contemplated by s 41(2). What matters, for s 41(3) analysis, is whether there is a dispute-resolution mechanism in place. Thus, the fact that the Intergovernmental Fiscal Relations Act expressly required parties to

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1 National Gambling Board (supra) at para 31.
2 Ibid at paras 35-36
3 National Gambling Board (supra) at paras 35-6 (The Court wrote that disputes about ‘questions of interpretation’ should be resolved ‘amicably’. . . ‘If organs of state’s obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state [involved in the dispute] to re-evaluate its position fundamentally.’
5 Úthekela District Municipality (supra) at para 22.
use structures such as the Budget Forum prior to approaching a court was more than sufficient to justify the imposition of the obligations of s 41(3).

Section 41(1)(b)(vi) also has other implications for litigation flowing from intergovernmental disputes. In particular, should a party request direct access to the Constitutional Court to adjudicate an intergovernmental dispute, the Court in MEC for Health, KZN v Premier, KZN indicated that it will refuse such an application if the applicant has failed to comply with the duty to avoid litigation.1

(ii) Section 41(2)

At the time of writing, the Act of Parliament envisaged by s 41(2) had yet to tabled, let alone passed. Initially, the courts and commentators seemed vexed by Parliament’s failure to act. The National Gambling Board Court wrote that:

[I]t could be argued that the failure of Parliament to comply with its obligations in terms of [s 41(2)] has rendered the important provisions of [ss 41(3) and 41(4)] inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasises the urgent need for the envisaged legislation. Co-operative government is foundational to our constitutional endeavour. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development.2

As the discussion of Uthekela District Municipality above indicates, the Court appears to have backed away from this aggressive stance. Section 41(3) — and by necessity s 41(4) — would appear to be operational even in the absence of a s 41(2)-mandated Act.

There are a number of compelling explanations for the absence of such an Act — and hence the willingness on the part of the Constitutional Court not to be overly sanctimonious about the state’s ‘failure’. First, many parties seem inclined to allow a significant period to pass in order for various government actors and sectors to develop a regime of ‘best practices’ upon which any legislation might draw. Second, as the decision in Uthekela District Municipality appears to confirm, many parties believe that government sectors are better served by having sector-specific dispute-resolution mechanisms crafted to meet their particular needs than they would be by a general dispute-resolution framework. An audit undertaken by the Department of Provincial and Local Government — formerly the Department of Constitutional Development — reflects both lines of thought:

1 MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health and Others v Treatment Action Campaign 2002 (5) SA 717 (CC), 2002 (10) BCLR 1028 (CC)(MEC for Health, KZN v Premier, KZN)(Constitutional Court held that it will rarely grant direct access to organs of state who have not duly performed their co-operative governmental duties under chapter 3. Such duties are privileged factor in deciding whether it is in the interests of justice to grant an organ of state leave to appeal directly to the court. Ibid at 720A-C. Because the matter before the Court involved a political dispute and the parties had not complied with their obligation to effect co-operative government, leave to appeal was denied.)

See also National Gambling Board (supra) at paras 33 and 37 (‘If this Court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of state involved in litigation with one another.’)

2 Ibid at para 32.
An act of Parliament is required under s 41(2)(b) of the Constitution to provide for such alternative [non judicial] mechanisms. In the absence of such an Act, disputes have to be settled politically and/or by means of intergovernmental relations. The Audit addresses these and recommends that legislation be *delayed*. It sees no compelling *urgency* to enact this legislation. Moreover, delay might allow best practices to emerge which can later be captured in effective legislation. The duty to exhaust all procedures before resorting to judicial remedies will obviously continue to apply. Sectorally-based legislation is however encouraged for settling disputes within a sector [eg, the National Environmental Management Act]. Such legislation is essentially issue-sensitive and can give content to a normative framework in terms of which disputes can be settled.¹

Even if one agrees with the general sentiments of this 1999 Audit, it is reasonable, in 2004, to ask two questions. First, hasn’t a reasonable amount of time elapsed in which to pass constitutionally mandated legislation? The Audit suggested delaying enactment so that best practices might have time to emerge. The Audit could not — in face of express constitutional dictates — put forward the case for permanently shelving the legislation.² (However, the Audit’s emphasis on sectoral legislation intimates just that.) Second, is it not possible to set out a basic set of principles — and perhaps a default forum — designed to govern intergovernmental disputes, without displacing the sectoral legislation that caters to the specific needs of a particular governmental domain? Such a two-track approach would appear to best fit the relationship already established between s 41(1)(b)(vi) and s 41(3). That is, if sectoral legislation provides an adequate forum for dispute resolution, then it ought to be the first port of call for potential litigants.³

¹ *Executive Summary* *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (DPLG) (1999) 6. See also *Conclusions and Recommendations* *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 11. (The audit revealed that intergovernmental disputes include constitutional issues, legislative interpretation and policy, and factual disagreements. The nature of the disputes differs as well as the need for expeditious settlement. It would neither be desirable nor practicable to prescribe a uniform mechanism and procedure for the settlement of all these disputes. The fear was expressed by interviewees that legislation should not make the process of dispute resolution inflexible or too cumbersome which would then defeat the object of the exercise. Examples were mentioned where a dispute had to be resolved within 24 hours. In view of the wide variety of disputes that may arise between a wide array of organs of state, the Act should list the broad range of dispute settlement mechanisms and procedures available to parties rather than attempt to shoehorn all disputes into a single rubric.)

² As noted above in S 14.2, India took several decades to create the Inter-State Council — an intergovernmental relations body designed to mediate federal-state disputes and to provide a forum for the discussion of policy initiatives of national and/or regional interest — despite the express mandate of Article 263 of the Indian Constitution. One important difference between FC s 41(2) and Article 263 is that the former is mandatory and the latter is permissive.

³ Indeed the DPLG Audit contemplates just that. When discussing both formal and informal MINMECS, the Audit contemplates a broadly principled framework, rather than a highly detailed code, so that various its provisions may be applied asymmetrically to each structure, provided that any asymmetries are not inconsistent with the basic principles of the legislation. The Audit views the MINMECs as optimal sites for the settlement of political-sectoral disputes. See *Conclusions and Recommendations* *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4.
However, if no such sector-specific forum exists, then a more general dispute-resolution structure would be desirable. A combination of best practices and arbiters familiar with intergovernmental disputes would seem preferable to (1) an absence of fora in which disputes might be better ventilated, and (2) a complete reliance on political processes that might be subject to the kinds of power-plays that foreclose debate rather than facilitate discussion.

If Parliament does eventually enact the s 41(2)-mandated Act, it should track the language of chapter 3 as closely as possible. It should use the phrase ‘all spheres of government’ in relation to the general duty in s 40(2) to adhere to the principles of co-operative government. It should employ the phrase ‘all spheres of government and all organs of state within each sphere’ in relation to the duty to comply with the principles of co-operative government in s 41(1). It should avail itself of ‘organ of state’ simpliciter in relation to the duty to attempt to settle intergovernmental disputes in s 41(3).

The major intergovernmental disputes resolved by the Court thus far also suggest at least some of the basic contours of any draft legislation. Five ‘pure’ intergovernmental disputes involve challenges to the constitutionality of legislation allegedly impinging on the powers and the functions of an organ of state in another sphere of government. The first four, Premier, WC v President; Cape Metro Council, Executive Council, WC and Uthekela District Municipality concern challenges by provincial or local governments to national legislation. In the fifth, National Gambling Board, the dispute turns on regulations promulgated under a provincial statute. National Gambling Board may be further distinguished from the others on the grounds that the challenge was brought by organs of state in the national sphere and the fact that private companies were party to the dispute. This last point indicates that the mere fact that a private citizen or body is party to a particular dispute does not mean that it should not be classified as an intergovernmental dispute. It only becomes or remains an intergovernmental dispute if the main dispute lies between organs of state. The sixth case, MEC for Health, KZN v Premier, KZN, presented the Constitutional Court with a conflict between two members of the same provincial executive, each seeking to represent the province in another matter. The Court rapped both parties across the knuckles for ‘proceed[ing] with an issue that should not have been brought before this Court and for failing to comply with their obligations to co-operate in government.’

Although Parliament ought not to limit the ambit of the s 41(2)-mandated Act based upon the limited sample of intergovernmental disputes litigated thus far, one can adduce at least three guiding principles from the case analysis above. First, the main type of dispute that the s 41(2) Act of Parliament should attempt to regulate is a clash between organs of state over legislation passed by one sphere of government that allegedly impinges the powers and functions of an organ of state in another sphere if government. Second, the s 41(2) Act ought not to

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1 MEC for Health, KZN v Premier, KZN (supra) at para 13.
displace sector-based dispute resolution mechanisms more finely attuned to the kinds of issues raised in a given governmental domain. Third, the s 41(2) Act ought to provide for expedited dispute resolution so that a matter that has yet to be politically engaged, and thus is not yet ripe, does not get placed before a court. Fourth, the s 41(2)-mandated Act ought to distinguish clearly between disputes between state actors — to which it must apply — and disputes between the state and private persons.1

(iii) Section 41(3)

In the absence of a s 41(2)-mandated Act of Parliament, FC s 41(3) appeared, for a time, to be something of a dead letter. In National Gambling Board, the Constitutional Court wrote that ‘in the absence of the Act of Parliament contemplated in s 41(2), the obligation on organs of state to avoid litigation against one another is founded on s 41(1)(b)(vi) rather than s 41(3) and (4).’2 As we have already noted, the Uthekela District Municipality Court rejected the notion that the desiderata of s 41(3) do not obtain absent a singular s 41(2) Act.3 Indeed, Uthekela District Municipality stands for the principle that s 41(3)’s requirements have purchase even where only a statutory dispute resolution mechanism specific to a given sector applies to the parties to the dispute in question.4

As we have already noted, the requirements of s 41(3) — along with s 41(1)(b)(vi) — have been spelled out in a number of cases.5 Section 41(3) expressly demands that organs of state (1) make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose; and (2) must exhaust all other remedies before they approach a court to resolve the dispute. The case law has put the following gloss on this two-part inquiry. A court interrogating the behaviour of parties to an intergovernmental dispute will appraise: (1) the seriousness of each party’s commitment to the extra-judicial resolution of the dispute; (2) the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and (3) the preparedness of the parties to strike compromises which would require that they fundamentally re-evaluate their positions.

1 See Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Unions and Others 2002 (1) SA 76 (SCA)(Supreme Court of Appeal held that although national and provincial governments had responsibility to ensure that municipalities functioned effectively, such responsibility could not turn a dispute between the province and its employees into an intergovernmental dispute for the purposes of FC ss 41(3) and (4).)

2 National Gambling Board (supra) at 33.

3 See S 14.3(af)(ae)(supra).

4 It seems reasonable to extend Uthekela District Municipality’s holding vis-à-vis s 41(3) to informal dispute resolution within a given sector. After all, s 41(3) reads, in pertinent part, that parties ‘must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose’. It does not say that the mechanisms must be creatures of statute or a statute enacted as required by s 41(2).

CO-OPERATIVE GOVERNMENT

Who is, and who is not, bound by the dictates of 41(3) has been covered in some detail in the discussion of parties bound by s 40(2). To the extent that there was any doubt prior to *Uthekela District Municipality*, it now seems clear that the President, members of the national Cabinet, municipalities, as well as provincial premiers and MECs should be regarded as organs of state for the purposes of s 41(3) analysis. It also seems clear from the decision in *IEC v Langeberg* that chapter 9 institutions supporting constitutional democracy are not organs of state ‘which can be said to be within the national sphere of government.’

National Gambling Board supports the proposition that most national and provincial regulatory authorities will be regarded as organs of state within the national or provincial sphere of government. None of the cases thus far has addressed the question of whether national or provincial legislatures are bound by s 41(3).

(vi) **Section 41(4)**

Now that s 41(3) has been recognized by the courts as an ineradicable part of the apparatus for settling intergovernmental disputes involving organs of state, s 41(4) will be invoked whenever a court is not satisfied that the aforementioned requirements of s 41(3) have been met.

14.4 **INTERGOVERNMENTAL RELATIONS**

(a) **Defining intergovernmental relations**

Up until now, this chapter has been concerned almost entirely with dispute resolution. It goes without saying that the main business of governance is primarily policy construction and that the various arms of the state generally execute policy without dispute. The engines, mechanisms, procedures and structures by which spheres of government and organs of state co-operate to achieve their various ends are collectively known as intergovernmental relations. An array of institutions have greased the wheels of intergovernmental relations (‘IGR’) in the last

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1 See S 14.3(b)(ii)(bb)(supra).
2 *IEC v Langeberg* (supra) at para 27.
3 *National Gambling Board* (supra) at paras 19-21.
4 A 1999 audit undertaken by the Department of Provincial and Local Government defined intergovernmental relations ‘as an interacting network of institutions at national, provincial and local levels, created and refined to enable the various parts of government to cohere in a manner more or less appropriate to our institutional arrangements.’ ‘Executive Summary’ *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 1. See also C Mentzel & J Fick ‘Transformation Perspectives on Policy Management: Dynamics of Intergovernmental Relations with Specific Reference to the Eastern Cape’ (1996) 2 *Afrikaans* 26

Intergovernmental relations are a set of mechanisms for ‘multi- and bi-lateral, formal and informal, multi-sectoral and sectoral, legislative, executive and administrative interaction entailing joint decision-making, consultation, co-ordination, implementation and advice between spheres of government at vertical as well as horizontal levels and touching on every governmental activity’; P Brynard & L Malan ‘Conservation Management and Intergovernmental Relations: The Case of South African National and Selected Provincial Protected Areas’ (2002) 21 *Politéia* 101.
ten years. These institutions include: (1) the National Council of Provinces (‘NCOP’); (2) the Intergovernmental Forum (‘IGF’); (3) the Presidential Co-ordinating Council (‘PCC’); (4) Statutory and non-Statutory MINMECs; and (5) the Forum for South African Directors’ General (‘FOSAD’). This section is not meant to be an exhaustive overview of the various engines of IGR. It is, rather, an attempt to show how the South African constitution, a burgeoning body of statutes and the government actors at the coalface have attempted to make manifest the concept of co-operative governance.

(b) The National Council of Provinces

The NCOP is charged with articulating and promoting provincial interests through the legislative process.\(^1\) The NCOP’s role with respect to constitutional amendments — s 74 — and legislation deemed not to affect the provinces — s 75 — is marginal. With respect to many amendments, s 74 contains provisos designed to avoid NCOP consideration. With respect to legislation deemed not to affect the provinces, s 75 allows the National Assembly to pass legislation with a simple majority — with or without NCOP approval. As a result, the primary function of the NCOP is the introduction and consideration of s 76 bills — legislation deemed to affect the provinces.\(^2\)

Because the NCOP members are selected by the Provinces — some by the legislature, some by the Premier — this chamber, even with its diminished powers, exercises an important communicative function. It is the national forum for debate of provincial issues. The NCOP also provides a structure within which national officials can draft and introduce national laws over which there is shared or concurrent jurisdiction with the provinces.\(^3\)

The legislative work of the NCOP is not inconsequential. Approximately 20% of the bills passed from 1999 through 2001 were s 76 bills. Perhaps the most important piece of s 76 legislation is the Division of Revenue Bill. According to

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\(^2\) The NCOP has 90 members — 10 member delegations from each of the 9 provinces. See FC s 60. Of the ten members from each delegation, only six are permanent. Four special delegates serve at the pleasure of the Premier of the province. Additional provision is made in FC s 67 for 10 part-time, non-voting representatives of local governments. The actual formula for political party representation in the NCOP is set out in FC Schedule 3.

\(^3\) See FC s 68 (In exercising its legislative power, the National Council of Provinces may consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this chapter; and initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(5), but may not initiate or prepare money Bills). See also FC s 42(4) (the NCOP ‘represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.’)
FC s 227(1)(a), each province is entitled to an ‘equitable share of the revenue raised nationally to enable it to provide basic services and functions allocated to it.’ Five out of nine NCOP provincial delegations must approve the bill.\(^1\)

Critiques of the NCOP as an IGR structure are legion. Reddy has suggested that the NCOP lacks focus, suffers from a lack of internal cohesion created by the presence of permanent and special delegates, allows the national Cabinet to dictate its agenda, does not challenge either national ministries or the National Assembly on matters of permanent interest and fails ‘to express distinctive regional interests.’\(^2\) De Villiers, while slightly more sanguine about the capacity of the NCOP, likewise notes its legislative impotence, its largely advisory function and the manner in which MINMECS usurp the second chamber’s role in the formation of policy.\(^3\) The Audit conducted by the Department of Provincial and Local Government (‘DPLG’) observes that not only are MINMECS the primary venue for ‘productive discussion of new legislation and policy affecting the provinces,’\(^4\) but that even when NCOP delegation votes must be cast on legislation, the decision on how to vote is made at the provincial level by MPLs and Premiers. Thus emasculated, the NCOP is divested of a meaningful role in determining either the means or the ends of provincial governance. The Audit elucidates a number of other structural problems. First, the 90-member NCOP cannot meaningfully review all s 75 and s 76 bills. Second, because the 4 special delegates in each delegation do not participate adequately in the committee system, the assessment of most bills rests with the permanent delegates. The 54 permanent delegates simply lack the time to engage in an adequate review of pending legislation. Third, provincial legislatures, which often take the important decisions for their respective NCOP delegations, likewise lack the capacity ‘to cope with the exacting demands of legislative scrutiny or to deal with bills expeditiously within the legislative cycle.’\(^5\) Thus, neither the NCOP nor the Provinces are able to offer considered opinions on matters that affect them. Fourth, in addition to being a rubber-stamp for the National Assembly, the Audit suggests that the NCOP’s limited resources impair its capacity to carry out its oversight responsibilities competently. This concatenation of flaws leads Reddy, De Villiers and the Department of Provincial and Local Government to describe the NCOP as an insignificant IGR actor.

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1 See ‘The NCOP: A Forum for Intergovernmental Relations’ *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* Department of Provincial and Local Government (1999) 4 (‘The NCOP and Intergovernmental Relations Audit’)(The Audit makes the case that the NCOP should spend less time debating the finer points of the national Appropriations Bill, and more time engaging the ‘conditional grants that the Division of Revenue Bill allocates to provinces.’)


3 De Villiers ‘IGR in SA’ (supra) at 202-204.

4 DPLG ‘The NCOP and Intergovernmental Relations Audit’ (supra) at 4–8.

5 Ibid at 8.
The IGF was, until recently, the most representative consultative body on IGR. Its members numbered the Ministers and Deputy Ministers of the national government, provincial Premiers and MECS, representatives from SALGA and the NCOP, Directors-General of all national and provincial departments, Chairpersons from select parliamentary committees as well as the Chairpersons from the Financial and Fiscal Commission and the Public Service Commission. While it quite consciously concerned itself with the business of co-operative governance, the IGF was abolished because it was unwieldy, met too infrequently, cost too much, was mainly an information-sharing exercise and had a quite marginal influence on the construction of national, provincial and local government policy. The IGF has been replaced by the PCC. The PCC is both leaner and more focused than its predecessor. It is composed of the President, the Minister of Provincial and Local Government and the nine provincial Premiers. It has been charged with the more limited task of developing provincial policy and ensuring adequate provincial administration of concurrent functions. As with the IGF, the success of the PCC will turn, at least in part, on its ability to work effectively with the various MINMECs.

Intergovernmental Relation Committees of Ministers and Members of Executive Councils (MINMECs)

Intergovernmental Relation Committees of Ministers and Members of Executive Councils consist of the national line-function Ministers and the equivalent provincial Members of the Executive Council of provinces. Some MINMECs are informal, advisory executive structures. Other MINMECs are formal creatures of statute with clearly delineated responsibilities. As a rule, MINMECs concern themselves with drafting intergovernmental line-function policies, guiding the different spheres of government in the formulation of their own sector-specific policies, harmonising legislation that engages concurrent competencies, transferring information and ensuring the optimal utilisation of financial resources.

A good example of a statutory MINMEC is the Budget Council. The Council...
was established by the Intergovernmental Fiscal Relations Act.\textsuperscript{1} It consists of the Minister of Finance and the MEC of Finance for each province.\textsuperscript{2} It meets at least twice annually and is charged with ensuring adequate consultation between the national and provincial governments on 'any fiscal, budgetary or financial matter affecting the provincial sphere,' 'any proposed legislation or policy which has a financial implication for the provinces,' and 'any matter concerning the financial management, or the monitoring of the finances, of the provinces.'\textsuperscript{3} One strength is that a panel was set up to determine the 'best practices' for national-provincial fiscal relations prior to the passage of the enabling legislation for the Council. One weakness, consistent with other MINMECs, is that the Council is under-resourced and less able to provide the anticipated benefits of co-ordination. Because no formal procedures, as might be laid down in a § 41(2) Act, govern the establishment and the operation of MINMECs, they vary in structure and competence.\textsuperscript{4} Not surprisingly, however, several problems surface across the MINMEC spectrum. First, departments may be organized differently at the national and provincial level. For example, discrete national ministries of culture, health and welfare may be combined into one department at the provincial level. The provincial MEC is thus left with responsibility for three MINMECs. Not surprisingly, this asymmetry may mean that the provinces lack the time and the energy necessary to make meaningful interventions. The result is that policy may be determined de facto by the national government.\textsuperscript{5} Second, under-resourced provincial MECs often do not have sufficient time to attend all meetings or to respond to all communique\textquotesingle s designed to set agendas. Once again, the result may be that shared national-provincial policy decisions fall primarily within the purview of the national government.\textsuperscript{6}

\textbf{(c) Forum for South African Directors-General (\textquoteleft FOSAD\textquoteright )}

FOSAD is made up of national and provincial Directors-General. Its broad terms of reference are to ensure the requirements of good governance in the public


\textsuperscript{2} The Act also makes provision for a Budget Forum. The Forum is charged with oversight of national-local fiscal relations. The Forum consists of the Minister of Finance and the MEC for Finance for each province, five representatives from SALGA and one representative of local government from each of the nine provinces.

\textsuperscript{3} Section 3 (a)–(c) of Act 97 of 1997.

\textsuperscript{4} See De Villiers \textquoteleft IGR in SA\textquoteright (supra) at 207–210. See also Reddy (supra) at 32.

\textsuperscript{5} De Villiers \textquoteleft IGR in SA\textquoteright (supra) at 208.

\textsuperscript{6} See De Villiers \textquoteleft IGR in SA\textquoteright (supra) at 209. See also Reddy (supra) at 32.
service as set out FC ss 41 and 195. Its five cluster committees co-ordinate policy implementation between national and provincial departments and offer advice to the national Cabinet and the provincial Executive Councils.