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TITLE OF DISSERTATION.

DEFINING THE LIMITS OF PARLIAMENT'S POWERS TO INTERVENE IN THE EXCLUSIVE PROVINCIAL SCHEDULE 5 COMPETENCES IN TERMS OF SECTION 44(2) OF THE CONSTITUTION OF SOUTH AFRICA ACT, ACT NO.108 OF 1996, WITH REFERENCE TO THE LIQUOR BILL CASE.

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1. INTRODUCTION

Constitutional law prescribes how power is exercised by the different branches of government and organs of state. In a federal state or a unitary state in which there is a devolution of power to the regions, the allocation or distribution of specific powers between the centre and the provinces is of fundamental importance. Uncertainty about the legislative authority of either can lead to chaos, instability and threaten the survival of the nation. In constitutional states, whether federal or unitary, the powers of each branch of government are clearly spelt out. Generally speaking, infringements of one another's legislative powers are not allowed, except under certain clearly defined circumstances, as will be demonstrated later on herein.

In South Africa, the Constitution of South Africa, Act 108 of 1996, defines the legislative functions and powers of Parliament and the provinces. These are listed in Schedules 4 and 5. Schedule 4 details the functional areas of concurrent national and provincial legislative competence, while Schedule 5 lists the functional areas of exclusive provincial competence. The residuary powers, i.e., the powers not listed in those schedules, vest exclusively in the national parliament.[1] Examples of residuary powers are foreign affairs and justice matters.

This distribution of power between the centre and the provinces is common in most countries of the world. The way in which the distribution occurs varies from country to country. In some countries, the residuary powers vest in the states or provinces,

[1]. Section 44(1)(a)(ii).

as for example, in the United States of America and Australia[2], while in others those powers reside with the central government, as in Canada and the Republic of South Africa.

Section 44(2) is unique in the sense that it specifically authorises Parliament to legislate in respect of exclusive provincial competences under certain circumstances. Although, with the exception of India, no other country appears to have a similar provision, many countries have used various sections in their constitution to legislate on matters reserved for the provinces. In Canada, by way of illustration, the Peace. Order and Good Government powers (the so-called P.O.G.G.) have been used.

Parliament can only intervene by passing legislation in respect of Schedule 5 matters, in accordance with section 44(2), when it is necessary for the reasons mentioned in that section. Earlier this year, Parliament passed the Liquor Bill, amidst great controversy and opposition by elements within the liquor industry, the Western Cape Provincial Government and various opposition parties. Liquor licences and the control of undertakings which sell liquor to the public are functional areas of exclusive provincial legislative competence listed in Schedule 5. The objections were based on the assumption that the form of regulation proposed by the Liquor Bill was a sophisticated licencing system. Nevertheless, the national government decided to intervene in the regulation of the manufacture, distribution

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[2]. Hogg (1992) p5-12 mentions that when the Australian colonies united in 1900, they followed the American precedent.

and sale of liquor, despite the opposition. It did so, however, in consultation with the provinces, the liquor industry and other role players in a spirit of cooperation as prescribed by Chapter 3 of the Constitution[3]. The President had reservations about the Bill's constitutionality which he referred to the Constitutional Court for a decision. The matter was heard in that court on 31 August 1999 and judgement was delivered on 11 November 1999.

This dissertation intends to examine the criteria which have to be followed in order to justify section 44(2) interventions. This will be done with reference, firstly, to the relevant constitutional provisions, second, comparative jurisprudence, and finally, the Liquor Bill case.

[3]. Chapter 3 deals with cooperative government. The relevant sections are sections 40 which relates to the structure of government and 41 which deals with the principles of cooperative government and intergovernmental relations.

2. CONSTITUTIONAL PROVISIONS APPLICABLE AND RELEVANT TO THE INTERPRETATION OF SECTION 44(2)

Section 44(2) must be interpreted in the light of a number of constitutional provisions which have a bearing on the division of powers doctrine.

2.1 THE PROVISIONS OF SECTION 44(2).

Section 44(2) has to be examined in the context of the national legislative authority as vested in Parliament. In addition to its wide general powers to pass legislation, with regard to any matter, Parliament is specifically empowered to pass legislation, in respect of Schedule 5 matters, which are reserved exclusively for the provinces, under certain limited circumstances. In the Certification[4] and Liquor Bill[5] judgements, the Constitutional Court confirmed that the powers of intervention are limited and defined. This aspect is dealt with later on herein.

Section 44 reads:

(1) The national legislative authority as vested in Parliament -

(a) confers on the National Assembly the power-

(i) to amend the Constitution

(ii) to pass legislation with regard to any matter, including a matter within a functional area mentioned in Schedule 4, but excluding, subject to subsection (2), a matter falling within a

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[4]. *In Re: Certification of the Constitution of the Republic of South Africa*, 1996. 1996(10) BCLR 1253 (CC).

[5]. *Ex Parte the President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill.* Case CCT 12 / 99. (As yet unreported.)

functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power -

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene by passing legislation in accordance with section 76(1), with regard to any matter falling within a functional area listed in Schedule 5, when it is necessary-

(a) to maintain national security

(b) to maintain economic unity

(c) to maintain essential national standards

(d) to establish minimum standards for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country

as a whole.

The intervention has to be "necessary" otherwise it will not be valid. This qualification has clearly been added to the section to ensure that Parliament may only use its powers of intervention under *extreme circumstances*.

It is noteworthy that two of the grounds for intervention in terms of section 44(2) are the maintenance of essential national standards and the establishment of minimum standards for the rendering of services. These are not defined at all and no clue as to how they should be interpreted is contained in the Constitution itself. These probably relate to the public service. Section 126(3)(c) of the Interim Constitution[6] which also deals with the override provisions, in relation to the rendering of services, specifically referred to public services.

At first blush it would seem that a section 44(2) intervention should apply uniformly and nationally throughout the country. However, Parliament may also intervene to prevent unreasonable action being taken by a province which may prejudice another province or the country as a whole[7]. That will only apply to the province concerned. If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must be complied with. The same would apply to legislation passed in accordance with section 44(2).

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[6]. "The Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services."

[7]. Section 44(2)(e).

2.2 SCHEDULE 4 AND 5 FUNCTIONAL COMPETENCES

The Constitution distributes power between the centre and the provinces. These powers are listed in two of the schedules, viz., 4 and 5. The provisions of these schedules are briefly discussed hereunder.

(a) SCHEDULE 4

Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Both Parliament and the provincial legislatures may pass legislation in respect of any of the matters listed in this schedule. The Constitution, however, contains various override provisions which deal with conflicts between national and provincial legislation dealing with the same matters. Schedule 4 also has a bearing on Schedule 5.

According to the Constitutional Court, the functional areas in Schedule 5 must be given meaning within the backdrop of the express concurrency of national and provincial legislative power in respect of certain Schedule 4 functional areas which may have a bearing on those Schedule 5 matters. In the *Liquor Bill* case, it specifically mentioned, in relation to liquor licences that:

> "It is in the light of the allocation of provincial and national legislative powers that the inclusion of the functional area "liquor licences" in Schedule 5A must be given meaning. That backdrop includes the express concurrency of national and provincial legislative power in respect of the functional area of "trade" and "industrial promotion" created by Schedule 4."[8]

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[8]. *Liquor Bill* case para 53.

(b) SCHEDULE 5

Schedule 5 lists functional areas of exclusive provincial legislative competence. It reserves, amongst other functions, the issuing of liquor licences and the control of undertakings that sell liquor to the public exclusively for the provincial legislatures and local government. Therefore, objections were lodged against the Liquor Bill. Those who opposed the Bill argued that Parliament did not have the power at all to interfere in liquor matters, especially as the provinces have the capacity to deal with such matters. Schedule 5 relates to both provincial and local government competences. Part A of that schedule relates to only provincial legislative competence, while Part B relates to local government matters to the extent that they are set out for the provinces in terms of sections 155(6)(a) and (7)[9].

The Constitutional Court has held that it is of some importance that Section 104(1)(b) confers power on each provincial legislature to pass legislation for its province within a functional area of Schedules 4 and 5[10]. That means that Schedule 5 competences must be interpreted as conferring power on each province to

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[9]. Section 155(6)(a): "Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (1) and (2) and, by legislative and other measures, must-
(a) provide for the monitoring and support of local government in the province; and
(b) promote the development of local government capacity to enable municipalities to manage their own affairs."

(7) "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

[10]. *Liquor Bill* case para 51.

legislate in the exclusive domain only in its own province[11]. However, legislation that applies uniformly throughout the country takes precedence over provincial legislation, even in the circumstances contemplated by section 44(2).

According to the Court, the allocation of powers proceeded from a vision of what was appropriate to each sphere of government and that the ambit of the provinces' exclusive powers must be determined in the light of that vision.[12]

In the *Liquor Bill* case, the Constitutional Court held that the wide power of Parliament to pass legislation with regard to any matter is subject only to the override provisions of section 44(2)[13]. The court recognised that the powers, accorded to parliament, may cause an overlap, not only with the provinces' concurrent Schedule 4 powers, but also with their exclusive Schedule 5 powers. The court gave "road traffic legislation" as an example of a Schedule 4 competence which could overlap with "provincial roads and traffic" in Schedule 5. It stated that:

> "the wide ambit of the functional competences concurrently accorded to the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5.[14]

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[11]. Ibid para 51.

[12]. Ibid para 51.

[13]. Ibid para 46.

[14]. Ibid para 70.

2.3 SECTION 76: ORDINARY BILLS AFFECTING PROVINCES

Various procedures have to be followed to pass Bills.[15] If an ordinary Bill, which affects the provinces, is passed by the National Assembly, it must be referred to the National Council of Provinces and dealt with in terms of the procedures laid down in section 76(1). When the National Assembly passes a Bill referred to in subsections 76(3), (4) or (5), the provisions of section 76(1) must be followed.

Section 76(4) enables the National Council of Provinces to impose a two - third majority requirement on the National Assembly. If the National Assembly refuses to pass a Bill which has been rejected or amended by the National Council of Provinces, it must be referred to mediation. If the mediation committee cannot arrive at a decision within 30 days, the Bill lapses, unless the National Assembly passes the Bill again, but with a two -third majority.[16]

The provisions of this section are important. In the Liquor Bill case the Court held that under certain circumstances a Bill, passed in accordance with the wrong procedure, would be invalid, although it would be formalistic to say that would be the position in every case.

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[15]. Section 76(3): "A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:
(a) Section 65(2);
(b)section 163;
(c)section 182;
(d)section 195(3) and (4);
(e)section 196; and
(f)section 197."

[16]. Section 76(1)(e).

Schedule 5 legislation has to be passed in accordance with section 76(1). Such legislation has to be introduced in the National Assembly and passed by that body before it can be referred to the National Council of Provinces. If the Bill was wrongly introduced in the National Council of Provinces, then it may not necessarily be invalid.

2.4 SECTION 100: NATIONAL SUPERVISION OF PROVINCIAL ADMINISTRATION

In terms of section 100(1), the executive may take appropriate steps, when a province cannot or does not fulfill an obligation in terms of the Constitution or legislation[17]. The provisions of section 100(1)(b) are significant. The national executive may only assume responsibility for an obligation, in the province concerned, when it is necessary for reasons which are identical to the provisions authorising Parliament to intervene in terms of section 44(2) in Schedule 5 matters.[18] A dual intervention right, therefore, exists to ensure that, despite the division of powers, both Parliament and the national executive may intervene in exclusive provincial matters in the interests of the country as a whole.

Section 44(2) has to be considered together with the principles of co-operative government as specified in Chapter 3 and national supervision of provincial administration as set out in section 100(1) of the Constitution. Both Parliament and the national executive are permitted to intervene in provincial matters by the

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[17]. Section 100(1): "When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking appropriate steps to ensure fulfilment of that obligation, including-

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

[18]. Section 100(1)(b): ... "assuming responsibility for the relevant obligation in that province to the extent necessary to-

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

(ii) maintain economic unity;

(iii) maintain national security; or

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

Constitution. The relevance of these sections is that the Constitutional Court would have to interpret both sections in the same way, when considering the constitutionality of section 44(2) legislation or national executive supervision in terms of section 100(1).

The Constitution itself appears to recognise that an intervention in terms of section 44(2) is a drastic measure, requiring careful consideration by Parliament. Once a decision has been taken to pass legislation in accordance with that section, then there must obviously be some mechanism for enforcing compliance therewith, even if the provinces are unable or unwilling to do so. The Constitution imposes on the Premiers and the Executive Councils, the obligation to implement all national legislation relating to functional areas listed in schedules 4 and 5, except where the Constitution or an Act of Parliament provides otherwise.[19]

The powers of the national government to intervene in provincial affairs appear to be far-reaching, but are strictly defined and obviously intended to be exercised only in exceptional circumstances.[20]

[19]. Section 125(2)(b).

[20]. Rautenbach Malherbe (1998), 258.

2.5 IMPLEMENTATION OF NATIONAL LEGISLATION-SECTION 125(2)(b)

Section 125(2)(b)[21] empowers the provinces to implement legislation passed in terms of schedules 4 and 5, unless an Act of Parliament or the Constitution itself directs otherwise. Section 125(3)[22] is of special significance, as it stipulates that the provinces have executive responsibility for legislation, in terms of Schedules 4 and 5, only to the extent that it has the administrative capacity to assume effective responsibility. This section also imposes a duty on the national government to assist the provinces, through legislative and other measures, to develop the necessary capacity.

Section 125(2)(b) gives Parliament the implied right, when intervening in terms of section 44(2), to decide whether to allow the provinces to implement the legislation so passed, or to leave its implementation to the national government. Neither section 44(2), or the Certification judgement itself, however, prevents Parliament from creating a joint or participative role for the provinces in terms of legislation passed in terms of section 44(2). The Liquor Bill, by way of illustration, provides for the Member of the Executive Committee of a province, to whom the Premier has assigned responsibility for liquor matters in that province, to determine the official

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[21]. Section 125(b): "The Premier exercises the executive authority, together with other members of the Executive Council, by-
(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise."

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

name of the provincial liquor authority, to appoint the members of that authority and a panel of appeal for the province.[23] Various powers are retained for the national government as well. There appears to be a division of powers between the centre and the provinces. The Bill also appears to provide a legislative framework within which the provinces can exercise their administrative responsibilities in terms of the Bill.[24]

The Liquor Bill confers various powers on the provinces. If it had not, then the provisions of section 125(2)(b) would apply and the provinces would assume the right to implement the Bill, unless the provisions of the Bill or the Constitution provide otherwise. In the case of the *Premier of the Western Cape v President of the RSA and others*[25] the Court held that sections 125(2)(b) and(c) contemplate that determinations as to whether or not laws will be implemented by provincial governments will be made in terms of Acts of Parliament, and not by executive direction of a Minister.

[23]. Sections 14(2), 15(1) and 19(1)(b), at para 86.

[24]. In the *Liquor Bill* case, the Court accepted that the provincial boards which the Bill will establish are entrusted with considerable leeway in applying "community considerations". However, licensing is a provincial competence and any interference in that competence must be *necessary* - para 79.

[25]. 1999 (4) BCLR 382 (CC).

2.6 CONFLICT BETWEEN NATIONAL AND PROVINCIAL LEGISLATION - THE PROVISIONS OF SECTION 146.

The Constitution envisages that there may, from time to time, be conflicts between national and provincial legislation falling within a functional area listed in Schedule 4. Section 146 stipulates how the disputes are to be resolved and needs to be considered.

The Constitutional Court has given some guidance as to how conflicting laws should be dealt with. In the *National Education Policy Bill* case[26] the Court held that:

> "The legislative competences of the provinces and Parliament to make laws in respect of Schedule 6 matters do not depend upon section 126(3)[27]. Section 126(3) comes into operation only if it is necessary to have resort to it in order to resolve a conflict. If the conflict is resolved in favour of either the provincial or the national law, the other is not invalidated; it is subordinated and to the

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[26]. 1996 (4) BCLR 518 (CC) para 16

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

extent of the conflict rendered inoperative."

The same principle applies to the provisions of section 146. To the extent that it is possible to do so, conflicting provincial and national laws should be construed as being consistent with each other. If that cannot be done, to the extent that the criteria provided by section 146 (2) and (3) of the Constitution have been met, the provisions of an Act of Parliament which is of general application shall prevail, or to the extent that such criteria are not met, the provisions of the provincial law will prevail.

The Constitution specifically details the circumstances under which national legislation will prevail over provincial legislation. Generally, national legislation will prevail, if it applies uniformly with regard to the country as a whole and various other factors, mentioned in section 146(2), are present. This section provides that:

> "(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is (are) met:
>
> (a) the national legislation deals with a matter that cannot be effectively regulated by legislation enacted by the respective provinces individually.
>
> (b) the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and that national legislation provides that uniformity by establishing -
>
> (i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for -

(i) the maintenance of national security.

(ii) the maintenance of economic unity

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

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

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

(vi) the protection of the environment."

In terms of section 146(4), when there is a dispute about whether national legislation is necessary for a purpose set out in section 146(2)(c) and that dispute has to be resolved by a court, the court doing so must have due regard to the approval or rejection of the legislation by the National Council of Provinces[28]. This only imposes a duty upon the court to consider the decisions of that body, but suggests that the decision could be a material factor in deciding whether to uphold national legislation. It would appear that the mere approval of the legislation should render the legislation constitutional. However, such a view would be simplistic.

[28]. Section 146(4).

Section 44(2) permits an encroachment upon powers reserved exclusively for the provinces. Therefore, such a legislative intervention will conflict with a Schedule 5, provincial law dealing with the same subject matter, for example liquor licencing. The Constitutional Court has held that:

> "...the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences, and that conflict will ordinarily arise between Schedule 5 provincial legislation and national legislation only where the national legislature is entitled to intervene under section 44(2)."[29]

The provisions of Section 146 could serve as a guide to resolve such conflicts, as section 44(2) is similar to section 146(2). This aspect has been dealt with by the Constitutional Court which held that:

> "From section 146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly throughout the country takes precedence over provincial legislation in the circumstances contemplated by section 44(2), as well as when -
>
> (a) deals with a matter that cannot be effectively regulated by provincial legislation;
>
> (b) provides necessary uniformity by establishing norms and standards, frameworks or national policy;
>
> (c) is necessary for the protection of the common market in respect of the mobility of goods, services, capital and labour, for the promotion of

[29]. *Liquor Bill* case para 48.

economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services or the protection of the environment.

From this it is evident that where a matter requires regulation inter-provincially as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2)."[30]

Section 146 could, therefore, assist a court to determine the concept "necessary" in section 44(2) in relation to the different grounds of intervention and clarify the role of the National Council of Provinces when adjudicating on such conflicts. It should be noted, however, that in contrast to Schedule 4 legislation, in terms of section 147, national legislation passed in terms of section 44(2) prevails over a conflicting provision in a provincial constitution and over provincial legislation in respect of schedule 5 matters. No additional requirements need to be met.

[30]. *Liquor Bill* case paras 51 and 52.

2.7 CO-OPERATIVE GOVERNMENT- CHAPTER 3

The Constitution has a special chapter which deals with this subject and imposes an obligation on all spheres of government to cooperate.[31] It specifically obliges all spheres of government to respect the constitutional status, institutions, powers and functions of government in other spheres;[32] not to assume any power or function except those conferred upon them in terms of the Constitution[33] and to exercise their powers and functions in a way that does not encroach upon the geographical, functional or institutional integrity of government in another sphere.[34]

These provisions of necessity have to be examined in order to determine whether the Liquor Bill was a valid intervention in terms of section 44(2).[35] The obligation on all governmental levels to consult with and cooperate with each other has been reinforced by the Constitutional Court. The Constitutional Court has held that section 40 introduced a new philosophy to the Constitution, namely that of cooperative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged to cooperate in terms of section 40(2) and to observe and adhere to the principles of cooperative government. It also held that each sphere of government is subordinated

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[31]. Section 41(1)(h).

[32]. Section 41(1)(e).

[33]. Section 41(1)(f).

[34]. Section 41(1)(g).

[35]. The Constitutional Court has already stated that cooperation and consultation are necessary when concurrent powers are exercised by Parliament. (*In Re: National Education Policy Bill No 83 of 1995,* 1996 (4) BCLR 518 (CC) 525 B.)

to the constitutional obligation to respect the requirements of cooperative government.[36] Spheres of government are prohibited from assuming powers not specifically conferred upon them by the Constitution.

The National Education Policy Act[37] is of some relevance to any enquiry related to the provisions of section 44(2), although it deals with a matter, which in terms of both the Interim and 1996 Constitutions may be legislated upon by both the provinces and Parliament. Its relevance is premised on the fact that the Constitutional Court has held that in respect of concurrent powers, *consultation and cooperation* serve not only to restrict, rather than to increase the Minister's powers, but are also essential for the proper exercise of power to make policy.[38] In the Court's view, where both Parliament and the provincial legislatures have exercised or wish to exercise concurrent competences, such consultation and cooperation would appear to be essential.[39] Therefore, any intervention in terms of section 44(2) would have to be preceded by consultations with the provinces concerned, because Parliament would be exercising concurrent power with the provinces.

[36]. *Liquor Bill* case paras 40 and 41.

[37]. Act 83 of 1995.

[38]. *In Re: National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC) 525B.

[39]. Ibid 530D.

3. THE CONSTITUTIONAL PRINCIPLES WITH REFERENCE TO SECTION 44(2)

In order to interpret section 44(2), it is important to have regard to the drafting history of the section and its interpretation by the Constitutional Court in the Certification judgement.

3.1 THE CONSTITUTIONAL PRINCIPLES.

The allocation of powers to the national and provincial levels of government had to be in accordance with Constitutional Principle XIX which requires the powers allocated to the national and provincial spheres of government to include exclusive and concurrent powers. This principle has to be read with Constitutional Principle XXI.2 which stipulates that where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution. In this regard, the Constitutional Principles do not distinguish between Parliament and the National Executive.

Because of our fractured, apartheid past and the fear of the provinces seceding, it was necessary to empower the national government to intervene to ensure that its transformation objectives are achieved and to take steps in the interests of the country as a whole. In the *Liquor Bill* case, the Court accepted that, amongst other things, the need for racial equity, will satisfy a section 44(2) intervention. It specifically stated that:

"Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the "economic unity" requirement of section 44(2) has been satisfied. Indeed, many of the considerations mentioned earlier in relation to the primary signification of "liquor licences", suggest the conclusion that manufacture and distribution of liquor require national, as opposed to provincial regulation."[40]

A similar point was made by the Constitutional Court in relation to the equality clause in the interim constitution. [41] Huge inequalities in the provision of services, resources

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[40]. *Liquor Bill* case para 76.

[41].In *Brink v Kitshoff* 1996 (6) BCLR 752 (CC), the Constitutional Court mentioned at [40] that "As in other constitutions, section 8 is the product of our own history. Perhaps more than any other provisions in Chapter 3, its interpretation must be based on the specific language of section 8, as well our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people, in all aspects of social life. Black people were prevented form becoming owners of property or even residing in areas classified as white, which constituted 90% of the landmass of South Africa, senior jobs and access to established schools and universities were denied to them; civic amenities including transport systems and public parks, libraries and many shops were also closed to black people. Instead separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted. Although our history is one in which the most visible and vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric."

and financial assistance to black and white areas in South Africa still exist. Although apartheid as an institution has been abolished, its effects will be felt for a long time yet. The provisions of section 44(2) are also designed to achieve "equality" and should be considered in the light of the comments made by the Court. This point appears to have been accepted in the *Liquor Bill* case.[42]

Goldstone J, recognised that the government has to intervene to redress past inequalities, even when the measures taken discriminate against others.[43] His comments were, of course, also made in the context of the "equality" clause, but are, nevertheless, appropriate in this context as well. The comments of Chaskalson P in relation to statutes also need to be taken into account, when considering section 44(2).[44] That section, therefore, must be considered in the context of the

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[42]. Para 76.

[43]. In *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 41, he said that "section 8(3) recognises the need to develop measures to redress the disadvantages of past discrimination. Therefore, we need to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved."

[44]. In *S v Makwanyane and another* 1995 (3) SA 391(CC) Chaskalson P stated that "our courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question. Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary dictionary meaning, is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the "context" here used, is not limited to the language of the rest of the statute regarded as throwing light of the dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits, its background." [para 13].

Constitution as a whole, our "history and the enduring legacy that it bequeathed"[45] and the need to address the aspirations of all South Africans.

It is perhaps noteworthy that the Constitution, in section 44(2) does not follow the order of CP XXI.2. It would, therefore, be fair to assume that the order in which the criteria are mentioned in that section, reflect the order of importance of each ground for intervention, as determined by the Constitutional Assembly. The debate around the distribution of powers to the provinces has not yet been settled. There is also renewed talk about the creation of a "volkstaat" and violence in many parts of the country. These factors were also present at the time that the Constitution itself was being debated and probably explains why national security was given such priority in terms of section 44(2).

Given the fact that the residuary powers vest entirely in the national government or Parliament, one would have thought that the emphasis on national security would have been unnecessary. However, a closer examination of the section suggests that intervention to maintain national security may well be necessary and that to achieve that objective, encroachment on provincial powers may well be required. In times of war or in emergencies, Parliament may well have to legislate in terms of section 44(2) to ensure that the country's efforts to deal with those situations are not jeopardised. It should be noted, though, that in accordance with international practice, such an intervention may have to be for a limited period only, otherwise the constitutionality of such interventions could be challenged. This appears to be the

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[45]. *Brink v Kitshoff* supra para 40.

situation, in Canada, for example.[46] There may, however, be situations where the intervention may have to remain in place indefinitely.

In the Certification Judgement, which is discussed more fully later, it was held that:

> "more powers are given to the provinces in the sense that a category of exclusive powers is introduced that does not exist under the Interim Constitution. What this means is that the National government cannot legislate at all, except in the special circumstances identified in NT 44(2)."[47]

According to Devenish the provision is intended to address a situation where there is a crisis in the provinces resulting from a lack of capacity or will to govern effectively. Section 44(2) is designed to allow the central government to intervene in these circumstances.[48] He does, however, point out that Parliament will not be able to

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[46]. War Measures Act. Repealed by Emergencies Act S.C. 1988.

[47]*In re: Certification of the Constitution of Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 335.

[48]. 1998, 114. He incorrectly cites *Constitutional Talk* 30 June to 10 August 1995 No 9,3. His reference is to "*The Provinces and Constitutional Crisis*" which is contained in *Constitutional Talk* 22 September 1995 to 2 November 1995. No. 13, 3. In that article, the ANC's Prof. Kader Asmal is quoted as having questioned what would happen if a provincial government lacks the capacity or the will to govern effectively. He warned that a situation where there is a crisis between the central government and a province should be dealt with in the constitution. Devenish assumes that section 44(2) was designed to take those fears into account.

However, Devenish's assertion that section 44(2) is intended to address a situation where a crisis exists, in a province, due to a lack of capacity or will to govern effectively cannot be correct. If one considers the five circumstances under which Parliament may intervene, then it is apparent that Parliament can intervene even if a crisis such as that described by Devenish does not exist.

Devenish's contention is also contradicted by section 146(4) which compels a court to take the rejection or approval of the National Council of Provinces into consideration

override provincial statutes in an arbitrary way or with impunity, since the criteria set out above are justiciable and the courts have the exacting task of ensuring that the fundamental interests of the provinces, as set out in the Constitutional Principles, contained in the Interim Constitution, are not eclipsed or eroded by the central government.[49] As has already been pointed out, a very stringent necessity test has also been introduced in the section.

The drafters of the Constitution acknowledged that Parliament may well have to pass legislation from time to time in respect of Schedule 5 competences, essentially in the national interest.[50] The words "national interest" are not used in section 44(2). An intervention in terms of that section will, however, only be justified, if it is in the national interest, otherwise it will amount to an unlawful or unconstitutional usurping of the provinces' powers as listed in schedule 5.

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when considering certain disputes. Clearly the mere approval of a Bill, by the National Council of Provinces, in terms of section 44(2) will not necessarily render the Bill valid.

[49] 1998, 114-5

[50]. In the *Liquor Bill* case reference was made to the "national interest" (para 80).

3.2.THE CERTIFICATION JUDGEMENT

In the *Certification of the Constitution of the Republic of South Africa, 1996*[51], the Constitutional Court held that:

> "CP XXI.2 contemplates a situation in which the national level of government has no legislative competence and has to be specifically empowered to legislate. It applies pertinently in the areas of exclusive provincial legislative competence and qualifies the requirements of CP XIX".[52]

The Court rejected the argument that CP XXI.2 should only apply to areas of concurrent national and provincial competence.[53] That argument was probably based on Article 72 of the German Basic Law which permits the national government (the Federation) to pass legislation in respect of concurrent powers only under certain limited conditions.[54] It may, for example, only do so if the Lander cannot effectively regulate a matter, or the other Lander may be prejudiced or for the maintenance of economic or legal unity, amongst other things.

In examining the issue, the Constitutional Court held that the CP deals with national priorities which are applicable to all functional areas. These priorities are national, not provincial competences, and on the plain language of the CP they are of

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[51].1996 (10) BCLR 1253 (CC).

[52]. Para 254.

[53]. Para 255.

[54]. Currie 1994, 43, where he states that Article 72 was redrafted to ensure that the concurrent federal powers could only be exercised upon a showing of special need.

general application. This is borne out not only by the subject matter of the particular competences but by the use of the word "intervene". In the field of concurrency, the national level of government has the power to make laws and does not need to be specifically empowered to intervene. This is necessary only in situations in which the national level would not otherwise have the power to legislate or to act.[55]

The fact that exclusive powers vest in the national government was reaffirmed by the Court.[56] Schedule 5 lists functional areas of exclusive provincial legislative competence, and these functional areas are excluded from the ordinary legislative authority of the national sphere of government. The provinces also enjoy power in respect of the following matters: the adoption of provincial constitutions, making provision for provincial legislative and executive structures and procedures and a traditional monarch; the summonsing of persons to report to or give evidence before the provincial legislature; the imposition of provincial taxes; the establishment, monitoring and promotion of the development of local authorities; and the spending power in respect of money in the provincial revenue fund.[57]

The exclusive power of the provinces in respect of schedule 5 matters is, however, subject to section 44(2). Parliament is empowered to intervene by passing legislation under the circumstances mentioned in that section. However its power to do so is defined and limited. The Court held that:

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[55]. *Certification* judgement para 255.

[56]. At para 256 the Court held that it was not disputed that the national level of government has exclusive power in respect of all matters other than those specifically vested in provincial legislatures.

[57]. Para 256.

"Outside that limit, the exclusive provincial power remains intact and beyond the legislative competence of Parliament. If regard is had to the nature of NT, schedule 5 powers and the requirements of NT 44(2), the occasion for intervention by Parliament is likely to be limited. NT 44(2) follows precisely the language of CP XXI.2, and goes no further than CP XXI.2 requires it to do. We are of the opinion that the NT complies with CP XIX read with CP XXI.2, that provision is made for exclusive provincial powers within the contemplation of the CPs, and that the contentions to the contrary must be rejected."[58]

Although the Court held that such intervention is likely to be limited, it did not deal with the period for which such intervention would be valid. One can perhaps assume from that, that an intervention may well be permanent. In Canada, for example, it appears that any similar intervention by the Dominion Parliament has to be of a temporary nature.

The importance of the Court's decision in this regard is that it specifically settles the debate around national intervention. The Court acknowledged that Parliament may intervene, if it so chooses, provided the provisions of section 44(2) are complied with. What this means is that Parliament may pass legislation at any time, without considering the provinces, if it so wishes, even though the legislation is in respect of a competence reserved exclusively for the provinces, provided the subject is covered by section 44(2).

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[58]. Para 257.

The Court also held that:

> "NT 44(2) empowers Parliament to pass legislation concerning NT, schedule 5 matters when it is necessary for any of the purposes set out in subsections (a) to (e) of that provision. It has already been pointed out that this is a specific requirement of CP XXI.2 and in so far as this could be said to infringe on the powers of the provinces, it is an infringement authorised and required by the CPs themselves. It is not part of the legitimate autonomy of the provinces contemplated by the CPs to be immune from such intervention".[59]

The Constitutional Court in coming to this conclusion, acknowledged that there may well be circumstances, albeit limited, when Parliament may have to intervene in the provincial affairs by passing laws in accordance with its powers in terms of section 44(2), as authorised by the Constitutional Principles. One needs to bear in mind, as Devenish has correctly pointed out, that the criteria listed in section 44(2) are justiciable.[60] Parliament will have to convince the Constitutional Court that its intervention was necessary.

In respect of liquor matters, the Minister of Trade and Industry wants to regulate all aspects of the liquor industry. He hopes to do so through the Liquor Bill which was referred to the Court for a decision. Although, in his affidavit in the case, the Minister

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[59]. *Certification* judgement para 262.

[60]. Devenish 1998, 115.

outlined in detail why it was necessary to regulate the manufacture and wholesale distribution of liquor, he failed to advance any reasons as to why it was necessary to regulate the retail sale and the micro manufacturing of liquor.

4. COMPARATIVE JURISDICTIONS

Any examination of section 44(2) would not be complete without references to how other countries have had to deal with the allocation of powers between the centre and the provinces. In most countries the provinces enjoy exclusive and concurrent powers. Occasionally the centre has to intervene in the national interest and pass legislation in respect of matters reserved for the provinces. This leads to conflict which has to be adjudicated upon by the courts. More often than not, the courts have upheld such interventions. We need to consider these lessons for South Africa.

4.1 INDIA

Section 44(2) appears to be unique. No other country has a similar provision, except perhaps for India. The Indian Constitution makes provision for concurrent powers, exclusive Union (central government) powers and State powers.

The history of India and South Africa is similar. Both countries engaged in writing constitutions after many decades of protracted struggle against colonialism. In addition, language and cultural differences and inequalities in the distribution of resources, played a significant part in formulating provisions which had to be included in their constitutions. The Indian experience is, therefore, relevant to an examination of the scope of section 44(2).

The Constitution of India distributes legislative powers between the Union[61] and the

[61] Section 245 reads: EXTENT OF LAWS MADE BY PARLIAMENT AND BY THE LEGISLATURES OF STATES.

States[62]. The schedules to the Indian Constitution resemble Schedules 4 and 5 of the Constitution of South Africa very closely. *The Union List* mentions, amongst other things, defence, railways and national highways, shipping, navigation, posts and telegraphs. *The State List* mentions amongst other things *intoxicating liquor*, that is to say the *manufacture, production, possession, transport, purchase and sale of intoxicating liquor* and duties of excise on alcoholic liquor for human consumption. In this regard, then, the State List in respect of liquor matters is similar to the "liquor" provisions in schedule 5 of the Constitution of South Africa. Both countries reserve the legislation of liquor matters for the provinces. The concurrent powers which may be

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(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole of, or any part of the territory of India, and the legislature of any State may make any law for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

[62] Section 256 reads: SUBJECT MATTER OF LAWS MADE BY PARLIAMENT AND BY THE LEGISLATURES OF STATES.

(1) Notwithstanding anything contained in clauses (2) and (3), Parliament has exclusive power to make any law with respect to any of the matters enumerated in List 1 in the seventh schedule (in this constitution referred to as the Union List)

(2) Notwithstanding anything contained in clause (3), and subject to clause (1), the legislature of any State also has power to make laws with respect to any of the matters enumerated in List III of the seventh schedule (in this constitution referred to as the Concurrent List)

(3) Subject to clauses (1) and (3) the Legislature of any State has exclusive power to make legislation for such state or any part thereof with respect to any of the matters enumerated in List II in the seventh schedule (in this constitution referred to as the State List)

(4) Parliament has the power to make laws with respect to any matter for any part of the territory of India not included in a State, notwithstanding that such a matter is a matter enumerated in the State List.

exercised by both the States and the Union are mentioned in List III.

The Union Government may intervene, in the interests of the country as a whole, by passing legislation in respect of matters, such as liquor, which are reserved for the States. Section 249 deals with the power of Parliament to legislate with respect to matters on the State list, in the national interest.[63] This power is limited and restricted. It may only be exercised, if a resolution to that effect has been passed by the Council of States, by a two-thirds majority. The laws passed remain in force for a period of one year only, unless the resolution is renewed. Theoretically, the law may remain in place indefinitely, provided the resolution is renewed each year. In terms of section 250, while a proclamation of emergency is in force, Parliament may legislate in respect of any State matter without a Council of State resolution.

There are differences between this section of the Indian Constitution and section 44(2) of the South African Constitution. In India the Council of States has to pass a resolution with a two thirds majority before Parliament can enact legislation. In South Africa, Parliament may intervene by passing legislation in terms of section 44(2). That legislation has to be tabled in the National Council of Provinces which can force

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[63]. Section 249 reads as follows:

"(1) Notwithstanding anything in the foregoing provisions of this chapter, if the Council of States has declared by resolution supported by not less than two thirds of its members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List, specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force."

Parliament to pass it with a two thirds majority.

The Council of States, which consists of 250 members, is the second chamber of the Indian Parliament. Its powers are diluted, by comparison with the House of the People (the Assembly). Like the National Council of Provinces (NCOP), its members are elected by the Legislative Assembly of each state by means of a system of proportional representation. It protects the interests of the states and has to pass a resolution seeking intervention in terms of section 249. Its provisions appear to have been utilised only once.

According to Dash[64], the first session of the unicameral Provisional Parliament, passed such a resolution for extending parliamentary competence to items 26 and 27 on the State List which deal with trade and commerce and the production, supply and distribution of goods. The resolution was extended annually until 1954 when the Constitution (Third Amendment) Act permanently vested this power in the Union. Items 26 and 27 were subject to and had to be read with entry 33 of the Concurrent List.[65]

Bhandari[66] states that the Constitution of India is federal and not unitary. He also

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[64] . 1968, 166.

[65]. 33. Trade and commerce in, and the production, supply and distribution of,-
(a) The products of industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
(b) Foodstuffs, including edible oilseeds and oils;
(c) Cattle fodder, including oil cakes and other concentrates
(d) Raw cotton, whether ginned or unginned, and cotton seed; and
(e) Raw jute."

[66]. 1993, 285.

mentions that the provisions of article 249 adversely affects the federal nature of the Constitution.[67] It is, however, not the only provision which allows Parliament to intervene.[68]

In terms of article 35 of the Indian Constitution, Parliament has the power to legislate with regard to any matter, under articles 16(3), 32(3), 33 and 34, which is reserved for the states. According to Mahajan,[69] article 35 embodies two rules. The first is that wherever the constitution prescribes that a law shall be made for giving effect to any fundamental rights or where a law to be made for making an action punishable which interferes with fundamental rights, that power shall be exercisable by Parliament, in spite of the fact that such a law may fall within the exclusive legislative power of the State.[70] The second rule is that the object of section 35 is that fundamental rights shall be applied uniformly throughout India and for that purpose Parliament alone is authorised to make such laws.

Section 252 permits Parliament to make laws, if the Legislatures of two or more states request Parliament to do so, in respect of State matters in which it has no power, except as provided for in sections 249 and 250. It shall then be lawful for Parliament to pass

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[67]. 1993, 289.

[68]. Section 102 of the *Government of India Act, 1935,* also authorised Parliament to make laws for the provinces, if the Governor-general has declared an emergency. In the case of *Majamdur vs King Emperor* (1942) 5 FLJ (F.C.) 47, the constitutionality of an Act of Parliament relating to a criminal matter reserved for the provinces was challenged. The provisions were upheld.

[69]. 1991, 350.

[70]. 1991, 350.

an Act for regulating that matter accordingly. Any other state may by resolution adopt the Act.

4.2 CANADA

In Canada, two important heads of power in the Constitution[71], viz., "Property and Civil Rights in the Province" [72] and "Generally all Matters of a merely local or private Nature in the Province"[73], are conferred on the provinces. In Canada, an argument was raised in connection with the federal Parliament's power to make laws for the peace, order and good government (the so-called p.o.g.g. power) of Canada[74] that it applied only to concurrent powers. Section 91 reads:

> "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces: and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated ... And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

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[71]. Constitution Act, 1867.

[72]. Section 92(13).

[73]. Section 92(16).

[74]. Section 91 of the Constitution Act, 1867.

Section 91 specifies a number of issues in respect of which parliament may legislate.

Abel[75] argues that the existence of section 92(16)[76] means that there are no residuary powers in Canada and that the peace, order and good government (p.o.g.g.) provisions in the Constitution Act, were two complementary grants of power which distributed the residue between the two levels of government. In other words, either level of government may legislate on the topic, in the interests of the province or the Dominion. It was also argued that the so-called "trenching doctrine" applied to the peace, order and good government section and that it authorised encroachments on provincial powers. According to Hogg this doctrine "has faded into well deserved obscurity."[77] But, as will be seen later on herein, the p.o.g.g. power has indeed been used to legislate in respect of matters reserved for the provinces.

The p.o.g.g. power is a residuary power which vests in the federal government, unlike Australia and the United States of America where the residuary power resides with the provinces. "Peace, order and good government" appears not to have been defined. The courts have , therefore, had to determine the circumstances under which that power can be exercised by the federal government. Hogg points out that the Privy Council has ruled that only an emergency would justify the invocation of the

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[75]. Abel 1968, 7 quoted in Hogg 1992, 17-2

[76].Section 92(16): "Generally all Matters of a merely local or private Nature in the Province."

[77]. 1992, 17-5 footnote 13.

p.o.g.g. power.[78] He also points out that the courts have reverted to a situation in which "larger use of the principal federal powers" is allowed.[79]

Whilst p.o.g.g. powers do not specifically permit the federal government to intervene in provincial affairs, under circumstances such as those mentioned in section 44(2) of the South African Constitution, the federal government has used those provisions to intervene in the national interest or in times of emergencies as will be shown later. The courts have by and large condoned such interventions.

During the First World War, the federal government passed the War Measures Act, a statute which came into force when the federal government issued a proclamation that war, invasion or insurrection, real or apprehended, exists. The Act which was passed in 1914 and repealed by the Emergencies Act, S.C. 1988, empowered the federal government to make regulations on almost any conceivable matter, even if the regulations remained in force after the war, invasion or insurrection had ended or passed. Thus in the case of *Fort Frances Pulp and Power Co. V Man. Free Press Co.,*[80] the Privy Council held that price control, which was introduced during the First World War and which continued temporarily after the war, was indeed constitutional.

According to Hogg, in a sufficiently great emergency, such as that arising out of war, the p.o.g.g. power would authorise laws which in normal times would be competent

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[78]. 1992, 17-20 para 17.4(a)

[79]. 1992, 17-21.

[80]. [1923] A.C. 695.

only to the provinces.[81] This contradicts Hogg's own statement that the "trenching doctrine" "is not useful and has fallen into well-deserved obscurity."[82] The Canadian courts have said that very clear evidence would be required to justify a court overruling the decision of the federal government that exceptional measures were still requisite.[83] A very strong argument can, therefore, be made for stating that the federal parliament in Canada has the power to intervene in provincial affairs in limited circumstances. Hogg assumes that matters which come within the federal or provincial heads should be located within those heads and that the purpose of the p.o.g.g. power is to accommodate those matters which do not come within any of the provincial or federal heads.[84]

The distribution of power has evidently proved to be problematic in Canada and therefore the power of p.o.g.g has been used to deal with matters of national concern, emergencies and whenever there have been "gaps" in the distribution of powers arrangements.

The gap theory is perhaps the most easily explained as it would appear that a mechanism has to be found for dealing with such gaps, otherwise a government's efforts to rule effectively would be severely hampered. More difficult to deal with are the national concern and emergency aspects of the p.o.g.g. power, the history of

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[81]. 1992, 17-23.

[82]. 1992, 17-5 footnote 13.

[83]. 1992, 17-23.

[84]. 1992, 17-5.

which is rooted in liquor legislation in Canada.

The p.o.g.g. power has to have a national dimension. Lord Watson in the *Local Prohibition* case[85] was the first to emphasise a national dimension by stating that:

> "Their Lordships do not doubt that some matters in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such a sense as to bring it within the jurisdiction of the Parliament of Canada."[86]

The fact that legislation could acquire a national dimension and, therefore, come within the p.o.g.g. power is the core of the national concern branch of p.o.g.g.[87] The Privy Council had in the case of *Russel v The Queen*[88] made the assumption that whenever Parliament regarded a problem as being one which was of general concern to the Dominion and, therefore, needed legislation which was to be uniformly applied throughout the country, parliament acquired the power to deal with

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[85]. *A.-G. Ont. v. A.-G. Can. (Local prohibition)* [1896] A.C. 348.

[86]. 1992, 17-8.

[87]. 1992, 17-8.

[88]. 1882, 7 App. Cas. 829.

it under the p.o.g.g. provisions.

By 1911, the Privy Council shifted its position on the national dimension of p.og.g. and decided that only an emergency would justify the exercise of the p.o.g.g. power. This emergency view of p.o.g.g and its inconsistency with the national concern or dimension view of that power was confronted in *A.-G. Ont. v. Canada Temperance Federation.* [89] The Privy Council pointed out that the *Russel*[90] decision had stood for sixty years and therefore had to be regarded as being firmly embedded in Canadian constitutional law. It also ruled, significantly, that the *Russel* case had not been decided on the basis of an emergency and that the power of p.o.g.g. was not confined to such situations.

According to Hogg, the *Canada Temperance* case repudiated a long line of cases which held that only an emergency could justify the exercise of the p.o.g.g. power.[91] The Privy Council through Viscount Simon formulated a new test as follows:

> " In their Lordships opinion, the true test must be found in the subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter

[89]. (1946) A.C. 193.

[90]. 1992, 17-8 footnote 28.

[91]. 1992, 17-10.

affecting the peace order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so too, may be the drink or drug traffic, or the carrying of arms. In Russel v The Queen, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects the provinces."

The Canadian courts have attempted to limit the bounds of interference by the federal parliament through the p.o.g.g. powers by introducing a number of unique elements. In the *Anti-Inflation Reference(1976)*[92], it was stated that for a matter to qualify for p.o.g.g. intervention, it had to have a degree of unity which makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain the bounds of form. In *R v Crown Zellerbach*[93], Le Dain J, described distinctiveness as follows:

"For a matter to qualify as a matter of national concern.... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

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[92]. *Re Anti-Inflation Act* [1976] 2 S.C.R. 373.

[93]. [1988] 1 S.C.R. 432.

under the Constitution."

The use of the p.o.g.g. powers has attracted considerable attention and comment form constitutional experts in Canada. Once exercised, it usually intrudes upon provincial powers. Therefore, the courts have attempted to define the limits upon its use. The concept of "newness" has been introduced and the courts have, on occasion, justified the use of the p.o.g.g. power on the basis that it was exercised to deal with entirely new problems.

According to Hogg[94], Le Dain's comments[95] emphasises that the requirement of distinctness is an essential safeguard, allaying the justifiable concern that the national concern branch of p.o.g.g. would tend to absorb the entire catalogue of provincial powers if subject matters as broad as inflation and pollution were within federal authority.

Hogg is severely critical of the element of newness introduced by the Canadian courts to justify or to condone the use of the p.o.g.g powers by the federal Parliament. According to him, "it is irrelevant and unhelpful in this context. As Lysyk has said, the newness, or lack of newness, of the matter ought to be an entirely neutral factor in the process of determining the content of the federal residuary power."[96]

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[94]. 1992, 17-15.

[95]. Supra footnote 92.

[96]. 1992, 17-17 and 18.

Hogg's views in this regard cannot, with respect, be correct. His views were based on the reasoning of the Supreme Court in *Queen v Hauser*[97] which found that the federal Narcotic Control Act was a valid exercise of the p.o.g.g. power. According to Hogg that result (the finding) was surprising as it was based on the concept of newness, to deal with "a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in a class of matters of a merely local or private nature". Hogg complains that in that judgement no indication is given as to why narcotics have attained the requisite degree of national concern as drug abuse is a very ancient phenomenon!

Hogg fails to appreciate that drug trafficking has become a major source of international concern, let alone national concern in many countries. Syndicates organised world-wide have targeted the youths of many countries, both first and third world to expand their trade in drugs. Police cooperation to curb the growth of this industry has assumed greater dimensions internationally. The Supreme Court, therefore, appears to have been correct in its reasoning that the newness of the drug menace necessitated federal intervention, despite the fact that drug abuse was an "ancient phenomenon". The Canadian courts appear to have accepted that in order to strengthen the police's ability to fight that crime that the federal parliament needed to pass a special law which was effective and which provided for very heavy sentences for drug trafficking.

Another obvious reason for invoking the p.o.g.g. power is to deal with war and

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[97]. [1979] 1 S.C.R. 984.

national emergencies.[98] In a long line of cases the Privy Council has ruled that the p.o.g.g. power was only available in cases arising out of some extraordinary peril to the national life of Canada, such as the cases arising out of war. In *Toronto Electric Commissioners v Snider*[99] intemperance was classified as an emergency: an evil "so great and so general that at least for the period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called upon to intervene to protect the nation from disaster." Hogg has, however, pointed out that this "national binge" theory was roundly condemned in *The King v Eastern Terminal Elev. Co*[100] by Anglin CJ whose views were often in conflict with those of the Privy Council.[101]

The important point to note is that the courts of Canada have clearly sanctioned the broad use of the p.o.g.g power, although the lines of constitutional authority which were created by the Privy Council will serve as a brake on the unbridled exercise of that discretion by requiring certain clearly defined criteria to exist first.

In Canada two other grounds for applying the p.o.g.g power exist, viz., "apprehended insurrection" and inflation. It is not necessary for this dissertation to deal with these aspects at all, except to say that they have been regarded as matters with national dimensions which justify the federal Parliament intervening.

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[98]. National War Measures Act.

[99]. [1925] A.C. 396.

[100]. [1925] S.C.R. 434, 438.

[101]. 1992, 17 -20 footnote 101.

The federal parliaments' use of emergency powers is of a temporary nature. Preventative legislation of necessity has to be permanent, as for example in temperance matters or in drug trafficking. The intervention can, therefore, be of both a temporary or permanent nature.

This point is also made by Louis Davis[102]. According to him, in Canada, in order to determine whether legislation made in terms of the peace, order and good government provisions was indeed enacted to combat an emergency, it is necessary to examine the legislation itself. In doing so, it is not only permissible, but also necessary to give consideration to the material which parliament had before it at the time when the statute was enacted for the purposes of disclosing the circumstances which prompted its enactment.

Davis also mentions that parliament is required, when it exercises its extraordinary power in any situation in which a dispute may arise as to the existence of an emergency and as to constitutional foundation for its action, to give an indication in the title, the preamble, or the text of the instrument, which cannot possibly leave any doubt that, given the nature of the crisis, parliament in fact purports to act on the basis of that power.[103] Of particular significance is the fact that :

> " Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between

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[102]. 1985, 96 para 21.24.

[103]. 1985, 96 para 21.25.

the Parliaments of Dominion and the Parliaments of the provinces comes into play, but very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation."[104]

In the case of *Russel v. The Queen*[105] the validity of the Canadian Temperance Act was considered. The Act attempted to regulate matters which fell within the exclusive jurisdiction of the provinces and was, therefore, challenged. The court held:

"The declared object of Parliament in passing the Act is that there should be uniform legislation in all provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it.... The objects and scope of the legislation are still general, viz., to

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[104]. 1985, 96 para 21.26.

[105]. (1882) 7 A.C. 829 (P.C.).

promote temperance by means of a uniform law throughout the Dominion."[106]

Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable. Parliament alone can deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only.[107]

It should, however, be noted that the court came to the decision that the Act did not fall within the classes of subject reserved for the provinces, but dealt with legislation which is ..."clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion".[108] This reasoning has been severely criticised by many commentators. Its relevance for the present discussion is that it confirms that the central government may well want to legislate to deal with various matters which cannot effectively be regulated by the provinces, except through legislation which applies uniformly throughout the country. This is important because provincial legislation only applies to the province which has enacted it.

In *Hodge v. The Queen*[109] the court held that, in relation to section 92 of The British North America Act, 1867, which conferred exclusive powers on the provinces, "within

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[106]. Macklem 1994, 59.

[107]. Macklem 1994, 60.

[108]. Macklem 1994, 60.

[109]. (1883), 9 A.C.117(P.C.), (1882), 7 O.A.R. 246, (1881), 46 U.C.Q.B.141(ont.H.C.).

these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect"[110] Even in cases where the dominion parliament has intervened in the national interest to pass laws which apply uniformly throughout the country, that action does clearly not deprive the provinces of the right to legislate on the same subject. Clearly conflicts between the two laws would have to be resolved.

In South Africa, an intervention in terms of Section 44(2), does not negate the right of the provinces to legislate on the same subject. In this respect then the position appears to be the same as in Canada, as Parliament's legislation will prevail over the legislation of the provinces. The test in Canada appears to be that the matter of the legislation must exceed local or provincial concerns and must be of importance to the whole country. If this test is satisfied, then the law will fall within the p.o.g.g. power in its national concern branch.

[110]. Macklem 1994, 63.

4.3 FEDERAL REPUBLIC OF GERMANY.

In the Federal Republic of Germany, concurrent federal power may be exercised only upon a showing of special need.

Article 72(2) of the Basic Law, authorises the Federation to legislate in respect of concurrent powers to the extent that a need for regulation by federal legislation exists because:

(1) a matter cannot be effectively regulated by the legislation of individual Lander, or

(2) the regulation of a matter by a Land law might prejudice the interests of other Lander or the people as a whole, or

(3) the maintenance of legal or economic unity, especially by the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.[111]

The German provisions have been used by the Federal Government to legislate on a number of matters. In Germany, the Federation has the right to legislate for the maintenance of economic unity.[112] This is , however, a concurrent power which can only be exercised when a need for regulation by federal legislation exists. The German basic law appears to be the only other foreign law which allows the central government to intervene to maintain economic unity. It would appear that the provisions of section 44(2)(b) may well have been based on those provisions.

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[111]. Currie 1994, 43.

[112]. Article 42 of the Basic Law.

The German courts have upheld a number of federal laws relating to economic matters, such as the retirement of chimney sweeps in 1952 on the basis of uniformity in terms of article 72(2)3.[113]

The question of *need* has proved ineffective in limiting the federation's power to legislate in terms of article 72(2), especially as the court has doubted that the question of need is justiciable. According to Currie, the courts have held that:

> "The question whether there is a need for federal regulation is a question for the faithful exercise of legislative discretion that is by its very nature non justiciable and therefore not subject to review by the Constitutional Court."[114]

A similar view has been expressed by the Malaysian and Canadian courts in relation to national security matters.

It should be noted that economic matters have been given very wide meanings. In Germany, a gun inspection law was held to be valid because it fell within the realm of economic regulation because it served to promote the weapons industry and protected the public.[115] Most of the decisions in which federation laws have been upheld in Germany have been based on the need for uniformity. This requirement of uniformity has also found its way into our constitution.

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[113]. Currie 1994, 44. The reasoning in this matter was evidently less than satisfactory as the court arrived at its decision on the basis that the Lander had asked the Federation to act.

[114]. 1994, 44.

[115]. 1994, 48.

4.4 RELEVANCE OF REFERENCE TO INDIA, CANADA AND GERMANY

While the Indian Constitution specifically empowers the Indian Parliament to make laws which would otherwise be reserved for the provinces, the Canadian courts have created the space for the federal government to intervene in provincial matters uniformly across the country in an emergency or in times of war. The development of this power of the Canadian Parliament to legislate in respect of provincial matters is interesting and has been justified on the basis of anxieties about national concerns and emergencies. This has even extended to liquor matters, as has already been explained.

The reference to situations in which the Canadian and Indian Parliaments may intervene in what are legitimate and exclusive provincial or state legislative competences, illustrate that interventions similar to that prescribed by section 44(2) of the Constitution are not entirely unique, but also permissible. Countries need to make provision for unusual circumstances in the national interest. Under such conditions, (national) parliaments then need to intervene decisively. The same position prevails in Germany. More important is that the power to intervene has been confined to:

(a) the need to apply certain laws, especially in relation to fundamental rights (as in India), uniformly throughout the country.

(b) issues of national concern.

(c) emergencies or war (as in Canada and India); and

(d) economic issues.

5. INTERPRETING THE POWER TO INTERVENE

Section 44(2) will be examined in the light of the decision of the *Liquor Bill* case. To appreciate the judgement, the content of the Bill will be outlined.

5.1(a). THE LIQUOR BILL - ITS REFERRAL TO THE CONSTITUTIONAL COURT.

The Liquor Bill was referred to the Constitutional Court by the President of the Republic of South Africa in terms of section 79(4) of the Constitution.[116] The Constitutional Court is, however, obliged to make a decision regarding a Bill's constitutionality only in relation to the President's reservations.[117]

In referring the Bill to the Court the President stated that schedule 5 of the Constitution lists the functional areas of exclusive provincial legislative competence, which include "Liquor licences". The implication of a functional area in Schedule 5 is that Parliament may only intervene in terms of section 44(2) by passing legislation in accordance with section 76(1) with regard to a functional area listed in Schedule 5 when it is necessary for any of the reasons mentioned in section 44(2). The President mentioned that he was unable to decide whether the legislation was indeed necessary.

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[116]. Section 79(1): "The President must either assent to and sign a Bill passed in terms of this Chapter [4]or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

Section 79(4): "If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either-
(a) assent to and sign the Bill; or
(b) refer it to the Constitutional Court for a decision on its constitutionality."

[117]. *The Liquor Bill* case para 14.

5.1(b). OUTLINE OF THE LIQUOR BILL.

The Liquor Bill is designed, amongst other things, to maintain *economic unity* and *essential national standards* in the liquor trade and industry, regulate the manufacture, distribution and sale of liquor on a uniform basis, facilitate the entry and empowerment of new entrants into the liquor trade and address the economic and social costs of excessive alcohol consumption. The Bill seeks to achieve its objects through the creation of a national and uniform administrative and regulatory framework within which the liquor industry can conduct its business.

These provisions are similar to "liquor matters" in the Indian Constitution.[118] They appear to be reserved exclusively for the provinces in terms of Schedule 5 of the Constitution. They relate, as does the Indian Constitution, to the manufacture, distribution and sale of liquor. However, the Indian Constitution mentions, not the distribution, but the purchase and sale of liquor. Inherent in this is, of course, the distribution of liquor. The reference to the Indian Constitution is relevant because, in that country, the national government has, in the national interest, intervened in provincial liquor matters. The maintenance of economic unity and essential national standards are grounds for intervening in terms of section 44(2)(b) and (c).
The Bill is designed to apply uniformly throughout the country.

Liquor has played a very important role in South Africa's history. It may be necessary to acknowledge that the effects of that role linger today. Liquor has caused serious destabilisation of communities through the tot system, easy access to liquor by poor

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[118]. List 11 of the Seventh Schedule.

and impoverished sections of the community and the official encouragement of alcohol consumption by the apartheid authorities. Its impact on crime universally is well known. In 1995, for example, 22379 of drunken driving cases were reported in South Africa. According to Adv Frank Khan SC, the Director of Public Prosecutions for the Western Cape, alcohol plays a major role in the commission of most crimes.[119] The total number of serious crimes reported in 1995 was 1 993 474. If his allegations are correct, then liquor would have played a major role in the commission of the offences. If that is indeed so, then South Africa faces a national crisis, necessitating central government intervention, quite apart from any other intervention which it may feel that it has to make in terms of section 44(2).

Subsection 2 (c) of the Bill introduces a whole new element totally unrelated to the provisions of section 44(2), by promoting a spirit of co-operation and shared responsibility within all spheres of government, amongst other things. This was probably done in the interests of cooperative government and to encourage the different spheres of government to work together to achieve the objects of the Bill and to address the negative socio-economic effects of excessive alcohol abuse and consumption.[120] There is also a commitment to involve all interested parties in the promotion and achievements of the objects of the Bill, such as non-governmental organisations and

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[119]. Affidavit made in case of *Lawrence, Negal and Solberg v The State* 1997 (2) SACR 540 (CC).

[120]. In *Premier, Western Cape v President of the Republic of South Africa and another* 1999 (3) SA 657 (CC), para 55, the Court stated that: "Co-operation is of particular importance in the field of concurrent law- making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provisions is made therefor in the budgets of the different governments."

the industry itself, although this is not specified.

The objects of the Bill appear not to have been made hypocritically or simply to appease the provinces whose powers are encroached upon by the Bill. The Bill creates or establishes various bodies, both provincial and national, in which both the national government and the provincial governments have a major say. Section 4 establishes a National Advisory Committee whose members have to be appointed by the Minister of Trade and Industry, i.e. the minister responsible for liquor matters in the national government. These appointments can only be made after consultation with all other relevant national ministers and the Members of the Provincial Councils responsible for liquor matters, in terms of section 5(2).

The powers and functions of this committee are to advise both the national and the provincial governments on liquor matters, especially the manufacture, distribution and sale of liquor, consumption of alcohol amongst the youth and the effects of excessive alcohol consumption and has to resolve disputes between national and provincial liquor authorities.[121]

The Bill also establishes a National Liquor Authority which has to consider applications for the manufacture and wholesale distribution of liquor and for Provincial Liquor Authorities which have to consider applications for the retail sale of liquor for consumption both on and off the premises at which it is to be sold and the sale of liquor

[121]. See section 8.

at special events.[122]

The members of the Provincial Liquor Authorities have to be appointed by the relevant Member of the Executive Council, without having to consult in any way with the national minister. The Member may determine the composition, personnel and administration of the authority. Each provincial authority has the same powers and duties which are specified in section 16 of the Bill, but confined to the retail sale of liquor for consumption on or off the premises where the liquor is sold or at special events.

The Bill also establishes a National Liquor Appeal Tribunal appointed by the national minister and a Panel of Appeal for each province whose members have to be appointed by the Members of the Executive Councils. These bodies consider appeals against the decisions made by the National and Provincial Liquor Authorities respectively. Uniform and standard procedures are laid down for the appointment of the members of both national and provincial appeal structures.[123]

The Bill distinguishes very clearly between functions which have to be performed by the national minister and the provincial MECs and also distinguishes between functions which have to be executed at a national level and a provincial level. The Bill, therefore, gives a very important role in liquor matters to the provinces. It should be noted that the right of the provinces to legislate on liquor matters has not been taken away completely. Each province is, therefore, free to legislate on any aspect of liquor matters not dealt

[122]. See sections 9 and 13 and 14 and 16.

[123]. See section 17

with by the Bill itself and may even legislate on the same matter, although the national legislation will prevail in the event of a conflict.[124]

The Bill stipulates criteria to be used when considering applications for registration, the qualifications for appointment to the various bodies to be established under the Act , appeal procedures, effects of registration and disqualification, the creation of a national record of registrations, terms and conditions relating to the sale of liquor and various restrictions on the employment of certain persons, amongst other things. The provisions of the Bill will apply uniformly throughout the country.

Of special significance is the fact that when considering an application for registration in terms of clauses 29(a) and (b), the national authority which considers the application must :

(1) determine whether all the requirements of the Act have been met;

(2) consider the merits of the application;

(3) determine the terms and conditions applicable to the registration that conform to the prescribed criteria, norms and standards pertaining, amongst others to-

(i) limiting vertical integration, the creation of a controlling interest or excessive concentration of ownership and control amongst participants in the liquor industry;

(ii) encouraging divesture and diversity of ownership of manufacturing

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[124]. See sections 14, 15 and 16.

and wholesale distribution enterprises participating in the liquor industry;

(iii) enhancing the involvement of historically disadvantaged social groups in the liquor industry; and

(iv) facilitating the entry of new participants in the liquor industry.

Section 2(b)(I) of the Objects of the Act is to create an environment in which the entry of new participants into the liquor industry is facilitated. Section 29(a) and (b) appear to be designed to address this aspect.

At present there appears to be a huge concentration of ownership of the liquor industries in the hands of a few companies. This not only inhibits free competition, but also makes it difficult for historically disadvantaged people to enter the industry.

An application for registration to sell liquor for consumption on or off the premises where the liquor is sold, or for sale at special events in terms of section 29 (c),(d), (e) and (f) has to be considered by the provincial body established in terms of the act in accordance with section 32. Amongst other things each educational institution or (and) place of worship in the area in which the applicant intends to sell liquor has to be notified in writing of the application. The applicant is also obliged to advertise the fact that certain premises are earmarked for liquor sales by advertising that fact on a pole embedded firmly in the ground at the premises at which the applicant intends to sell liquor. The reasons for compelling the applicant to do so and to advertise the application is the afford the community an opportunity to make its feelings on the matter

known to the registration authorities.

The National Liquor Advisory Committee has extensive powers in terms of the Bill and has to advise the Minister or MEC on any matter referred to it or relating to the manufacture , distribution or sale of liquor, consumption of liquor by youths and the impact which excessive alcohol consumption has on public health and family and social life. It would appear that both the National Liquor Authority and the provincial liquor authorities established in terms of the Bill will be bound by the advice given or recommendations made by the National Liquor Advisory Committee. It should, however, be noted that no mention is made of this fact in the Bill itself. At the very least the liquor authorities will have to give some consideration to the advice given or recommendations made. If it did not, the provisions of the Bill relating to the advisory committee would be meaningless. It should also be noted that the provincial councils can legislate on the matter as well. If the advice given or recommendations made are not adhered to, then the provincial legislatures and Parliament, for that matter, can legislate to give effect to the decisions of the advisory body.

There are numerous provisions in the Bill which are not only designed to achieve its objects but are also designed to ensure a strong provincial voice in liquor matters. According to the Constitutional Court, the purpose of legislation may be relevant to show that a provincial legislature had the necessary competence to pass the law in question.[125] This would apply to Parliament as well.

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[125]. *In Ex Parte Speaker of the Kwazulu-Natal provincial Legislature: In Re Kwazulu-Natal Amakhosi and Iziphakanyisiwa Amendment Bill of 1995,* 1996 (4) SA 653 (CC), para 19.

The Liquor Bill purports to be an intervention in terms of section 44(2). The Bill, aims to maintain economic unity and essential national standards in the liquor trade and industry; to regulate the manufacture, distribution and sale of liquor on a uniform basis and to address the economic and social costs of excessive alcohol consumption, amongst other things.[126] Important features of the Bill are that the administrative and regulatory framework will apply uniformly throughout the country and that those in the liquor industry will, through the environment created be able to attain and maintain adequate standards of service delivery. These are just some of the features which, in concluding this dissertation, require some examination.

An intervention in terms of section 44(2) may be on any of the five grounds listed in the section. The Bill appears to have been passed on the grounds mentioned in section 44(2)(b) and (c). In addition, section 44(2)(d) appears also to have been taken into consideration.[127]

[126]. According to the short title. These are re-stated in the Objectives of the Bill clause in more detail.

[127]. The creation of an environment in which those involved in the liquor industry will be able to attain and maintain adequate standards of service delivery in the Objects of the Bill.

5.1.(c). THE MATTER OF THE LIQUOR BILL.

For a law to be valid, Parliament or a provincial legislature must have the constitutional competence to legislate in the area concerned.[128] In deciding the constitutionality of an intervention in terms of section 44(2), a number of questions need to be asked:[129]

(1) What is the matter with which the challenged legislation deals with?

(2) Does the matter of the challenged legislation fall within the competence of the originating legislature?

The constitutional enquiry may, however, extend to an examination of other factors as well, in order to determine the two questions posed. In Canada, for example, it has been held that the problem to be solved, by national intervention, is often political, social or economic.[130]

Quoting Lord Porter of the Privy Council, Magnet said that:

> "the problem to be solved will often not be so much legal as political, social or economic, yet it must be solved by a court of law, for where there is a dispute, as here, not only between Commonwealth and citizen but between Commonwealth and intervening states on the one hand and citizens and the

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[128]. Klaaren 1998, 5-5 para 5.2

[129]. Klaaren 1998, 5-5, says that the legal analysis required can be reduced to a five part test. This was written long before the decision of the Constitutional Court in the *Liquor Bill* case. However, that Court applied similar "tests" when it considered the Liquor Bill. The Court held, for example, that it was necessary to characterise the Bill to ascertain what the matter of the Bill is and under what competence it falls.

[130]. Magnet 1983, 154. Magnet was responding to Mr Mundell who in an article in the Canadian Bar Review wrote that when a law has to be tested to see, in relation to a matter, what it deals with, the intention of the legislature needs to be examined.

> States on the other hand, it is only a court of law which can decide the issue. It is vain to invoke the voice of Parliament. The Privy Council itself has, in effect, said that it has to probe deeper.[131]

These factors appear not to have been taken into consideration by South African commentators and must necessarily be considered, particularly as the present government has committed itself to redressing the enormous imbalances of the past. In relation to the Liquor Bill these questions are relevant and were taken into account.[132]

Essentially the "matter examination" is designed to determine the pith and substance of legislation to ascertain whether it falls within a particular class of subjects reserved for the provinces or the national parliament. Once the probe extends "deeper", then the intention of the legislature also needs to be considered as well as the social, political or economic objectives which the legislation intends to achieve. The Liquor Bill has precisely such objectives.

What this means in relation to the Liquor Bill is that the court had to consider a number of additional factors in order to determine its constitutionality. A court considering the matter may, in respect of the social aspect, ask what impact the bill will have on people living together in more or less organised communities,[133] how it impacts on the management of a country's income and expenditure and to what extent it affects the

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[131]. 1983, 154.

[132]. In the *Liquor Bill* case, the Court held that the racial inequality, amongst other things, warranted national intervention in terms of section 44(2). Para 76.

[133]. Shorter Oxford Dictionary meaning of "social".

policies of the government.

In the case of a section 44(2) intervention, the matter question also entails an examination of the objectives which such intervention needs to achieve. A court, nevertheless, has to consider whether the matter of the Bill is in fact a subject or class of subject falling within the competences reserved exclusively for the provinces in terms of schedule 5. In the *Liquor Bill* case, the Court held that[134]:

> "The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing any matter excluding only the provincial competences. The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap with the provinces' concurrent and exclusive powers. Examples of concurrent powers which could overlap with Schedule 5 competences include "trade" and "liquor licences."...It is in the light of this vision of the allocation of provincial and national legislative powers that the inclusion of the functional area of "liquor licences" in Schedule 5A must in my view be given meaning. That backdrop includes the express concurrency of national and provincial legislative power in respect of the functional area of "trade" and "industrial promotion" created by Schedule 4.[135]

The Constitutional Court has also held that whenever a legislature's authority is limited, some rule must be adopted to address the possibility that a [single] law may touch upon subject matter

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[134]. Para 47.

[135]. Para 53.

[both] within and outside legislative competence[136] and that it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in what field of competence its substance falls; and this having been done, what it incidentally accomplishes[137]. Once that has been settled, the other factors need to be considered. This point is made by Klaaren [138] and has been confirmed by the Constitutional Court.

The Court held that:

> "it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in which field of competence its substance fall and what it incidentally accomplishes. This entails that a court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation."[139]

Although the Canadian "pith and substance" test is designed to determine the main substance of a Bill or what the actual matter of a Bill is, the Constitutional Court has ruled that, in the South African context, a Bill may have more than one characterisation. In the Liquor Bill case, the Court specifically stated that it was unnecessary for the purposes of the judgement to consider the utility or applicability of the Canadian "pith and substance" cases to the development of an indigenous South African jurisprudence regarding national and provincial legislative competences. In the Court's view, the separation of functional areas in

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[136]. *Liquor Bill* case. Para 61.

[137]. *Liquor Bill* case para 62.

[138]. 1996, p 5-5.

[139]. *Liquor Bill* case para 62.

Schedules 4 and 5 could never be absolute and that a rule has to be adopted to address the possibility that a single law may touch upon both functional areas.

In coming to this conclusion, the Court has attempted to define the "pith and substance" rule in a way which will benefit South African jurisprudence. Different parts of the legislation may thus need to be assessed differently.[140] The Court pointed out that it had already rejected the notion that the purpose of legislation was irrelevant to the constitutional inquiry.[141]

Initially the Department of Trade and Industry wanted to introduce the Bill in terms of Schedule 4. That would have been done in accordance with its concurrent powers in respect of "Trade" in Part A of that Schedule. It would appear that in doing so, that Department was of the view that it was regulating an aspect of "trade".

In the *Liquor Bill* case, the Constitutional Court held that:

> "Whatever the proper characterisation of the Bill... it can hardly be disputed that if it does not seek to trench on the provinces' exclusive legislative competence in respect of "liquor licences", thereby requiring justification under section 44(2), a large number of its provisions must be characterised as falling within Schedule 4, more particularly the concurrent national and provincial legislative competences in regard to "trade" and "industrial promotion".[142]

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[140]. *Liquor Bill* case para 62.

[141]. Para 63.

[142]. *Liquor Bill* case para 28.

However, the Department of Trade and Industry failed to consider the means to be used to achieve regulation of the liquor industry. Even if the matter fell within a Schedule 4 competence, if regulation of the subject required that the Department intrude upon a Schedule 5 power, then it would have to follow the section 44(2) route.

In Australia and Canada particularly, definitions such as "trade" cause serious interpretational problems because they have not been adequately defined. Therefore the "pith and substance" rule or the "matter examination" was introduced.[143] The Constitutional Court has held that although it is not necessary to consider the utility of this rule for the development of South African law, a formula has to be found to deal with cases which may fall within both functional areas.[144] In every federal -type system, certain powers are reserved exclusively for either of the two levels of government, either provincial or national. These powers are defined cryptically. This has resulted in serious problems occurring when one of the levels believes that it has the right to introduce a Bill on the basis of its own interpretation of its power.

[143]. See Hogg 1992, 15-7: "The first step in judicial review is to identify the "matter" of the challenged law. What is the "matter" of the law? Laskin says it is "a distillation of the constitutional value represented by the challenged legislation"; Abel says it is "and abstract of the statute's content"; Lederman says it is "the true meaning of the challenged law"; Mundell says it is the answer to the question "what in fact does the law do, and why?" Beetz J says it is "a name" for "the content or subject matter" of the law; other judges have sometimes said it is the "leading feature" or "true nature and character"of the law, but usually they have described it as the "pith and substance" of the law. The general idea of these and similar formulations is that it is necessary to identify the dominant or most important characteristic of the challenged law. As emphasised earlier the sole purpose of identifying the "matter" of a law is to determine whether the law is constitutional or not. In identifying the "matter" of the law, the Courts therefore tend to use concepts that will assist in determining to which head of power the "matter" should be allocated."

[144]. *Liquor Bill* para 61.

When differences of opinion arise as to the validity or constitutionality of such a Bill, then the courts have had to adopt this rule. This has been the practice in almost all of the Commonwealth countries, most notably Canada, Australia, New Zealand, India and even in Malaysia. Reference to it has also been made in Germany, a non Commonwealth country. It seems highly likely that this approach will be adopted by the Constitutional Court in future.

Hogg has pointed out that the "matter" examination is often difficult as many statutes have features which fall within the provincial head of power and other which fall within the federal head of power.[145] This was precisely the difficulty which confronted the department.[146]

One of the objections to the Bill was that the system of registration in respect of the manufacture, distribution and sale of liquor amounts to a sophisticated licencing system for liquor and is therefore inconsistent with Schedule 5 which reserves "liquor licences" exclusively for the provinces and the "control of undertakings that sell liquor to the public" exclusively for local government and the provinces. The Constitutional Court accepted that those who had been dealing with the Bill realised that the Bill established a system of liquor licences, but [they] were not confident that there was justification

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[145]. Hogg 1992, 15-8.

[146]. In the *Liquor Bill* case, the court mentioned that "it will on occasion be necessary to determine the main substance of legislation, and hence to ascertain in what field of competence its substance falls and this having been done, what it incidentally accomplishes... it seems apparent that the substance of a particular piece of legislation may not be capable of a single characterisation only, and that a single statute may have more than one substantial character." para 62.

under the override provisions for the section 44(2) intervention.[147]

Section 28 of the Bill prohibits any person from manufacturing, distributing or selling liquor without being registered. Various categories of registration are provided for in terms of section 29.[148] Anyone wishing to participate in any of the activities mentioned must register. The Bill prohibits certain people from applying for registration. Such persons include those who were convicted of serious offences murder, rape, robbery, culpable homicide involving an assault, assault with intent to do grievous bodily harm, any offence arising from the trade in or the possession of drugs, any offence involving sexual abuse of a child or any offence involving dishonesty, or any attempt to commit any of these offences.[149] Various other disqualifications apply as well.[150]

A national authority will consider applications for manufacturing and wholesale registrations while the relevant provincial authority will consider the retail application for

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[147]. *Liquor Bill* case para 22.

[148]. These are:

(a) The manufacture of liquor that either exceeds or does not exceed the prescribed volume.

(b) The wholesale distribution of liquor.

(c) The retail sale for consumption of liquor off the premises where the liquor is being sold.

(d) The retail sale and consumption of liquor both on and off the premises on which the liquor is being sold; and

(e) The retail sale and consumption of liquor at a special event.

[149]. Section 30(b).

[150]. Sections 30 (c) - (h). These include unrehabilitated insolvents, persons of unsound mind, un registered close corporations or companies, a trust in which the majority of trustees are not shareholders, partners, co-trustees or co-beneficiaries of any disqualified person and persons who owe a debt to the State.

registration. A liquor licence is designed to permit the holder of such a licence to do various things connected with liquor which are prescribed in that licences, such as , for example, selling or manufacturing liquor. It appears to be obvious that the objection to the Bill on the basis that the system of registration which the Bill will introduce is in fact a sophisticated licensing mechanism.

Had the provisions of "Liquor licences" and "The control of undertakings that sell liquor to the public" not been described so specifically in Schedule 5, then the Department's view that the Liquor Bill was a trade related matter in respect of which it has concurrent jurisdiction with the provinces would probably have been upheld and no further enquiry would have been necessary. This has been the approach which has been adopted in Australia and in Canada. According to Howard[151] the linking of the notion of trade and commerce with the movement of goods, and, where appropriate, of persons, has not meant that commercial transactions are not within the concept unless they deal in tangible commodities.[152]

This view is inconsistent with the view expressed in that country for some years that the transportation of goods is not in itself trade and commerce, although incidental thereto, but the means whereby trade and commerce are carried on. In the *Liquor Bill* case, our

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[151]. 1995, 285.

[152]. *In W. & A. Mc Arthur Ltd. V Queensland* (1920) 28 CLR 530, the court held that "Trade and commerce ... has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is of course, a truism. But that they go far beyond is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of "trade and commerce". According to Howard, this takes the act of transportation of goods as the heart of trade and commerce and adds to it a penumbra of associated commercial activities.

Court has held that once the character of a Bill has been determined, it is still necessary to examine the means used to achieve its objects. On this approach, trade is abstract in character.[153] This view was rejected by the Privy Council and also in a number of subsequent cases.[154] This would suggest that if our courts followed the same approach the Liquor Bill would withstand a constitutional challenge on the grounds of it being a trade related matter in accordance with Schedule 4. Such an approach would also mean that the national government may be able to legislate on any matter it considers to be within trade.

The drafters of the Constitution clearly intended to limit that right significantly by reserving certain powers exclusively for the provinces. This situation did not prevail under the interim constitution and the Parliament is only permitted to intervene in schedule 5 matters by using the provisions of section 44(2). In Germany, the federal government may, in terms of section 72(2) legislate in respect of its concurrent powers only under very specific circumstances. According to David Currie the court in that country has in forty years reviewed a profusion of federal laws enacted on the basis of concurrent powers without once finding a violation of article 72(2).[155] According to him, the "need requirement" has proved as ineffective in limiting federal authority in Germany

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[153]. Howard 1995, 285.

[154]. *The Bank Nationalisation Case* (1948) 76 CLR 1 (HC); 1949 79 CLR 497 (PC). The majority held the view that "banking" was within the conception of trade and commerce and the the Privy Council agreed. In another case *Second New South Wales Airlines P/L v. New South Wales* (No.2) (1965) 113 CLR 54, the court ruled that safety regulations and licencing requirements in terms of Commonwealth regulations were valid in terms of the trade and commerce provisions.

[155].1994, 45.

as the enumeration of congressional powers has been in the United States. In Germany therefore it is apparent that the court has attempted to side with the federal government on matters of national importance.

In Canada, too, it has been held that interprovincial and export marketing of certain grains by the board and the regulation of interprovincial and export trade in such grains is legislation in relation to the regulation of trade and commerce.[156] The control, the court held, has become a matter of national concern. The court also confirmed that the entire act has to be scrutinised to determine its true nature and character and the intention of the Legislature.

In the *Liquor Bill* case, the Court examined the whole Bill in relation to both Schedules 4 and 5. Once it had done so, it was able to conclude that the Bill did indeed regulate an aspect of trade, but the means to do so was located within Schedule 5. Early in that judgement, the Court had ruled that although Schedule 4 and 5 functional competences should be interpreted as being distinct from each other, the division could never have been contemplated as being absolute.[157] The Court specifically held that:

> "Nothing in Schedule 4 suggests that the term ("trade") should be restricted in any way, and the Western Cape government did not contend that Parliament's concurrent competence in regard to "trade" should be limited to cross-border or inter-provincial trade. It follows that in its ordinary signification, the concurrent

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[156]. *Queen v. Klassen* (1960) 20 D.L.R. (2d) 406, 29 W.W.R. 369 (Man. C.A.), discussed in Macklem and others 1994, 313.

[157]. *Liquor Bill* case, para 50.

national legislative power with regard to "trade" includes the power not only to legislate intra-provincially in respect of the liquor trade, but to do so at all three levels of manufacturing, distribution and sale."[158]

This statement is highly significant as it suggests that the concurrent powers can be given very wide meanings which would enable the national government to encroach more easily than initially thought on Schedule 5 competences. My view in this regard is strengthened by the Court's ruling that:

"...the exclusive provincial competence to legislate in respect of "liquor licences" must also be given meaningful content, and, as suggested earlier, the constitutional scheme requires that this be done by defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4." [159]

The Court held that the field of "liquor licences" is narrower that the "liquor trade"[160] and that legislation which relates to the production of liquor products, including quality control, marketing and import and export of such products would fall within the concurrent competence of trade or industrial promotion rather than the exclusive competence of liquor licences.[161] It should be noted that the Court rejected a

[158]. *Liquor Bill* case para 54.

[159]. Para 55.

[160]. Para 57.

[161]. Para 57.

submission that the tem liquor licences applied only to the retail sale of liquor.[162]

[162]. *Liquor Bill* case para 59.

5.2. SECTION 76 LEGISLATIVE PROCEDURE

Section 76(4) is of particular significance as it specifically states that legislation envisaged in section 44(2) must be dealt with in terms of the procedure stipulated in section 76(1). However, if during an examination of the constitutionality of a section 44(2) Bill, it emerges that the Bill does not in fact deal with a Schedule 5 matter, but is still constitutional, the fact that the wrong parliamentary procedure was used to pass the Bill will not affect its validity. The Constitutional Court said that:

> "it would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the section 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make the passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult."[163]

The provisions of section 76(3), which stipulate when the section 76(1) and (3) procedures have to be used, will also have to be taken into account, in this event. The Court did not decide what the position would be in cases where a provincial delegation is required to vote through its head or individually by each member casting a vote. The NCOP protects the interests of the provinces. It would, therefore, seem that if the provincial delegations are required to vote through their respective leaders, a failure to follow that procedure will render a Bill invalid. The Court stated that the procedure used may in defined circumstances be determinative as to whether the NCOP has passed a Bill. The Court also stated that the provisions of section 76(3) suggest that a Bill which

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[163]. *Liquor Bill* case para 26.

substantially falls within Schedule 4 must be dealt with under section 76[164]. This suggestion by the Court may make the future splitting of Bills, which contain elements of both Schedules 4 and 5 functional areas, by Parliament unnecessary.

Because the Liquor Bill sought to maintain economic unity and essential national standards Section 44(2) applied. The means to achieve its objectives are to be found in Schedule 5 which lists areas of exclusive provincial competence. Therefore, the Bill was passed in accordance with section 76(1). In the light of the findings of the Constitutional Court, that procedure was clearly correct.

[164]. *Liquor Bill* case para 27.

5.3 INTRODUCTION TO THE GROUNDS FOR INTERVENTION.

An intervention in terms of section 44(2) must be necessary to maintain national security, economic unity and essential national standards, to establish minimum standards required for the rendering of services or to prevent unreasonable action taken by a province which is prejudicial to the country as a whole or to the interests of another province.

Section 44(2) contemplates a situation in which Parliament may be called upon or compelled to take steps or to do certain things in the national interest. The various factors mentioned in section 44(2) do not all have to be present at the same time. Any one of the grounds for intervention mentioned therein will justify Parliament taking appropriate steps. The same point is made by De Ville in relation to the interim constitution.[165]

These concepts need to be examined in order to ascertain whether the Liquor Bill amounts to a valid intervention and the circumstances under which parliament may utilise section 44(2) to intervene in provincial matters.

The criteria for intervention in terms of section 44(2) are limited.[166] Apart from having

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[165]. 1995, 152. He was commenting on the question of paramountcy in cases of conflict between national and provincial legislation on the same matter. The grounds on which parliamentary legislation prevails over provincial legislation were listed in section 126 of the 1993 constitution. The inclusion of the word "or" according to him means that the paragraphs containing the different grounds for paramountcy should be read disjunctively and not conjunctively.

[166]. In the *Liquor Bill* case para 49 the Constitutional Court held that it had already found that "Parliament's power of intervention in the field of these exclusive powers was defined and

to give consideration to the approval or rejection of the legislation by the National Council of Provinces,[167] the Court would still have to consider whether the "encroaching" Act complies with the grounds listed in section 44(2). De Ville, too, mentions that, in interpreting the provisions of the Constitution, in respect of both provincial and parliamentary powers, the usual rules of constitutional interpretation apply.[168] When considering the constitutionality of legislation passed in terms of section 44(2), those rules will be used. The purpose of the legislation, the background to it and all other relevant factors must also be taken into account.

The Liquor Bill must necessarily be examined in the context of section 44(2), particularly sections 44(2)(b)(c) and (d). Whilst the Bill does not provide for the prevention of unreasonable action taken by a province which is prejudicial to the interest of another province or the country as a whole, it is apparent that the provisions of the Bill could be utilised for the purposes set out in section 44(2) (e) as well.

An essential feature of any section 44(2) intervention is that with the exception of

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limited by section 44(2). Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament." The Court also held that if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of section 44(2), the occasion for intervention by Parliament is likely to limited. The point was made by the Court in the *Certification Judgement*.

[167]. This factor was not considered by the Constitutional Court in the *Liquor Bill* case.

[168]. 1995, 144.These rules include grammatical, systematical, teleological, historical and comparative interpretation. These allow the meaning of words to be determined through dictionaries, definition clauses, and the constitution itself. The meanings of words must also be determined within the context of their use. Intra- and extra-textual contextual aids should also play a role and the viewing of provisions of the constitution in their historical context and the jurisprudence of other countries may also be used as tolls of interpretation.

section 44(2)(e) perhaps, any legislation passed must apply uniformly throughout the country. It must therefore apply equally to each province.

Internationally, the uniformity of legislation has been a persuasive factor in upholding legislation. Thus, in relation to economic unity, the German courts have upheld a law, in respect of chimney sweeps, which applies uniformly throughout the country, on the basis of economic unity. It should be noted, though, that, as has already been pointed out, the German courts have not found a violation of Article 72(2) of the German Basic Law in forty years.[169] That article deals with the exercise of concurrent power by the Federal Parliament.

De Ville also holds the view that economic unity is protected if the economic circumstances throughout the country are uniform.[170] Significantly, the Liquor Bill is designed to apply uniformly throughout the country. Although the provinces are given the power in terms of section 14 and 15 to determine the name of the provincial liquor authorities and to determine the number of persons who will serve on those boards, they have to function in accordance with a framework which is provided for in the Bill and which has to observed by all the authorities. In respect of manufacturing and wholesaling, all persons engaging in those activities must be registered by the national authority.

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[169]. Currie, 1994, 43.

[170]. 1995, 154. In this article he relies on Von Munch.

5.3(a). THE CONCEPT "NECESSARY".

The necessity question will be considered together with the role of the National Council of Provinces and the constitutional duty to consult as indicators of necessity.

Section 44(2) permits an intervention on one or more of the grounds mentioned in the section only when it is "necessary". This category of override is also mentioned in section 146(2)(c)which stipulates that national legislation, in respect of a functional area listed in Schedule 4, that applies uniformly with regard to the country as whole and which is necessary for the purposes mentioned in section 146(2)(c) (I)-(vi) prevails over provincial legislation. The element of necessity, therefore, needs to be examined.

The Constitution in section 44(2) permits Parliament to intervene by passing legislation with regard to a functional area listed in Schedule 5 when it is necessary for the reasons mentioned in sections 44(2)(a)-(e). In other words, although the provinces may decide not to cooperate with the government, an intervention for the reasons mentioned in section 44(2) is valid, although consultations which precede the legislation will be useful. The person alleging that the legislation in terms of section 44(2) is necessary bears the onus of proving that fact. Consultation with all the role-players may help in this regard.

The concept of necessity has not been defined often. In South Africa it would appear that the term has been used on very many occasions, also without being defined.

Klaaren has pointed out that it is open to a broad range of interpretations.[171] De Ville has also examined the concept of necessity and has also considered the same definition.[172] Although he is unable to come to a firm conclusion he states that the word necessary has to be interpreted in the context of the section, which in this case would be the provisions of section 44(2).[173] The construction will, he believes be dependent on how "one sees the division of power between the provinces and parliament. An approach which gives as much scope as possible to the provinces to regulate their own affairs, would require the word necessary be given a strict construction whereas a more *unitary* approach would require the opposite." His views are, with respect, not very helpful, as he has considered the question in the context of the federal versus unitary debate about the South African constitution.

The word *necessary* may also mean essential.[174] That meaning is perhaps best suited to a proper test of the validity of an intervention in terms of section 44(2). A court having to examine the matter would therefore have to ask whether the intervention was

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[171]. 1998, 5-15. He cites the Black's Law Dictionary 5 ed (1979) meaning at 928 which is drawn from *Kay County Excise Board v Atchison, T & SFR Co 91 P2d 1087. 1088 (Okl),* : 'the word must be considered in the connection which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater benefit or convenience, and its force and meaning must be determined with relation to the particular object sought.

[172]. 1995, 153.

[173]. 1995, 153.

[174]. The Shorter Oxford English Dictionary (3rd ed), 1315.

essential or indispensable for any of the reasons mentioned in that section. In other words, would, for example, the maintenance of national security be jeopardised if the intervention had not taken place. If other means are available to achieve the same objective, then the intervention must fail, because the intervention would not be essential or indispensable for that purpose. The Constitutional Court has given some indication as to how it would deal with the question of *necessity.*

The Liquor Bill, for example, acknowledges that the social and economic effects of excessive alcohol consumption can be harmful, despite the economic benefits of the industry as a whole to the country. The Court in evaluating the constitutionality of that Bill has to consider its purpose. In *S v Lawrence*[175], Chaskalson P pointed out that the Supreme Court of India has held that liquor is a harmful substance and that laws which regulate and control the sale and production of liquor do not infringe the right to carry on any profession, occupation, trade or business, in terms of section 19(1)(g) of the Indian Constitution.[176] This is so because the laws made are designed to protect the public against the harmful effects of liquor. This is relevant to the present discussion on the Liquor Bill, because liquor matters are reserved for the provinces in terms of the Indian constitution, yet the Indian Parliament deemed it necessary to intervene to protect the public against liquor's harmful effects and constitutional challenges on a number of grounds were rejected. If Parliament decided to intervene in liquor licencing, in terms of section 44(2) to protect the public, the comments in *Lawrence* would be applicable.

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[175]. 1997(2) SACR 540 (CC).

[176]. Ibid para 50.

In Canada the courts have condoned central intervention in respect of liquor matters in the national interest. I submit that given the high incidence of alcohol consumption, the large numbers of crimes which are alcohol related and the "dop system" amongst other things make the Bill necessary. Its uniformity across the nation, the standards which it aims to achieve and the social, economic and political issues which it addresses seek to make it a valid intervention by Parliament in terms of section 44(2). However, the Constitutional Court did not consider the whole of the Bill to be constitutional. This aspect is dealt with in the discussion on the Liquor Bill case itself.

5.3(b). THE ROLE OF THE NATIONAL COUNCIL OF PROVINCES.

It is submitted that the legislative process may well provide indicators of the necessity of the legislation.

The rejection or otherwise of a Bill by the National Council of Provinces will indicate to the Court that the provinces whose interests are represented by the National Council of Provinces are in favour of the Bill. Provincial representatives in that body are required to obtain a mandate on matters affecting their provinces from the provinces which they represent. Therefore, the approval of the Bill by the National Council of Provinces will indicate clearly the views of the majority of the provinces. The fact that mandates supporting a Bill may have been obtained after consultations between the national and provincial governments through inter-governmental discussions would also strengthen the case of those favouring the Bill. This is precisely the point which the Constitutional Court ruled that it did not have to decide upon in the Liquor Bill.

In terms of section 146(4), the adoption or rejection of the legislation by the National Council of Provinces has to be considered by the Court, when considering whether legislation is necessary for any of the purposes set out in section 146(2). Section 146 relates only to disputes in respect of schedule 4 legislation. It would, therefore, appear that the inclusion of the word"necessary" was designed to prevent the national parliament from riding rough-shod over the wishes of the provinces.[177] National-provincial conflicts should not be over-judicialised as that will lead to judicial limitations

[177]. This point is also made by Klaaren 1998, 5-15 where he states that "it would seem that the final constitution has put several protections in place in order to ensure that this override is not interpreted in such a manner as to destroy provincial autonomy."

on central government power.[178] This probably explains why a court is enjoined to consider the vote of the National Council of Provinces on certain issues.[179]

The Constitution also imposes an obligation on all spheres of government to co-operate with each other to resolve disputes and to give effect to the provisions of the Constitution.[180] The Constitutional Court has held that "the fact that such legislation has been approved by the NCOP will not create any presumption in favour of the national legislation. All that the court is enjoined to do is to have "due regard to the approval or rejection of the legislation" by the NCOP. The obligation to pay "due regard" means simply that the court has a duty to give the to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances."[181] Interestingly, the Court mentioned that it would probably have been entitled to do so, even without an express provision to that effect.

I submit that the same principle should apply to section 44(2) interventions. Interestingly, in the *Liquor Bill* case, the Constitutional Court did not consider the view of the National Council of Provinces at all. This may have been due to the fact that it was not raised in argument by the various parties, although the Court did hold that:

> "The attitude of the National Assembly (or, where appropriate, Parliament) to the Bill's constitutionality is therefore also a material factor in this Court's

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[178]. Klaaren 1998, 5-8.

[179]. Section 146(4).

[180]. Chapter 3 - Co-operative Government, particularly section 41 (1)

[181]. *In Re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997(1) BCLR (CC) para 155.

determination, and it is for this reason that this Court's rules permit all political parties represented in Parliament as of right to make written submissions relevant to the determination of the Bill's constitutionality."[182]

The duty to consider the decision of the NCOP also, in my view, compels the different spheres of government to cooperate, especially as the party claiming an override will have to convince the court that the factors necessitating such an override were present. Discussions between the different spheres will demonstrate an intention to resolve a national issue through cooperation.[183]

Section 44(2) interventions do not require the approval of the National Council of Provinces. The task of a court, which has to determine the constitutionality of a Bill passed in terms of that section, is, nevertheless, simplified by the approval of that body, but a number of other "tests" still have to be passed. The approval or otherwise by the National Council of Provinces was not taken into account by the Constitutional Court in the Liquor Bill, presumably because the Court held that the constitutionality of the Bill's various sections, which it was not asked to comment on could still be challenged constitutionally.[184] It did, however, rule that the attitude of the National Assembly (or, where appropriate Parliament) to the Bill's constitutionality is therefore also a factor

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[182]. *Liquor Bill* case para 19.

[183].In India, Germany and Australia legislation may be passed either at the request of the states or in consultation with them on matters affecting the states. In India the central government has specific powers in terms of section 249 of the Constitution to intervene which are similar to section 44(2) powers.

[184]. In the *Liquor Bill* case, the Court held at para 20 that supervening constitutional challenges after it (the Bill) has been enacted are not excluded.

which the court needs to consider.[185] It did not, however, take that factor into account. This, too, may have been due to the Court's acknowledging that further constitutional challenges were possible. It is most unfortunate that the Court did not deal with the attitudes of the National Assembly and the National Council of Provinces to the Liquor Bill. Had it done so, it would have laid the foundation for the resolution of future disputes on the constitutionality of Bills passed in terms of section 44(2).

Many constitutional lawyers have commented on the provisions of section 44(2). Klaaren expresses the view that in any examination of the validity of an intervention in terms of section 44(2), regard will have to be had to the approval of the measure by the NCOP.[186] In other words, if the National Assembly proceeds with a Bill which has been rejected by the NCOP, any court which has to determine the constitutionality of the Bill would have to take that fact into consideration as well.

Rautenbach and Malherbe[187] point out that the National Council of Provinces can, however, impose a two-thirds majority on the National Assembly in respect of section 44 (2) legislation passed by Parliament. This factor would of necessity have to be taken into consideration by the Constitutional Court when deciding upon such legislation. The Constitution, in any event stipulates that in certain types of disputes, the Constitutional Court has to consider the rejection or otherwise of a Bill by the National Council of

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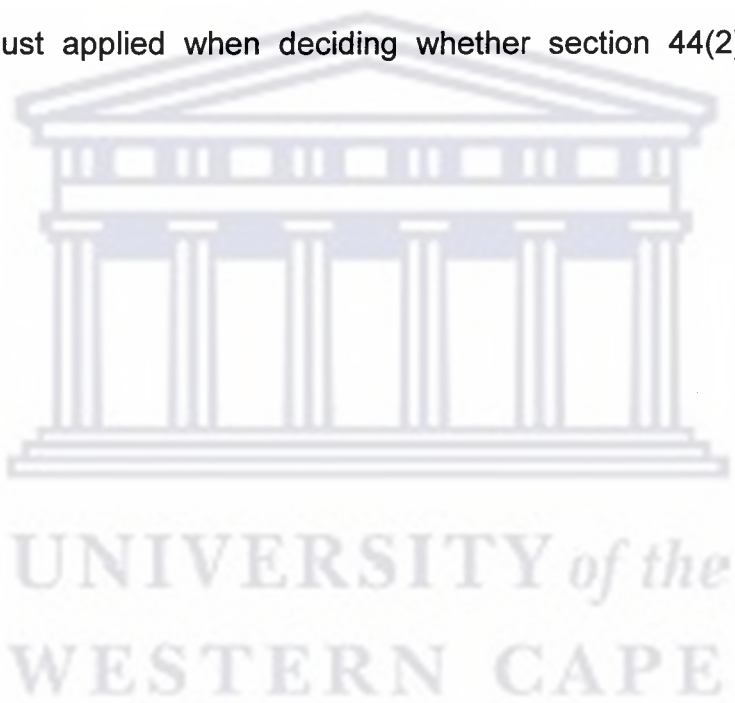
[185]. Ibid para 19

[186]. Chakalson 1998, 5-6.

[187]. 1996, 257.

Provinces.[188]

Confining section 146(4) only to schedule 4 matters may well have been an oversight on the part of the drafters of the Constitution. Section 44(2) encroaches on exclusive schedule 5 provincial powers. Once legislation is enacted in terms of section 44(2) then the national government exercises concurrent legislative powers with the provinces in respect of the subject matter of the legislative intervention. The principles contained in section 146(4) must applied when deciding whether section 44(2) legislation is necessary.



[188]. Section 146(4).

5.3(c).CONSULTATION OUTSIDE PARLIAMENT- THE CONSULTATIVE PROGRAMME OF THE DEPARTMENT OF TRADE AND INDUSTRY.

Cooperation and consultation have been recognised as essential elements of cooperative government, as prescribed by the Constitution, in the exercise of concurrent competences. The spheres of government are specifically obliged to inform one another of and consulting one another on matters of common interest[189] and to co-ordinate their actions and legislation with one another.[190]

These provisions are important in respect of the Liquor Bill, as the national government consulted very widely with all relevant role players, including the provinces, prior to proceeding with the Bill. Section 44(2) is an intervention authorised by the Constitution. It is submitted that it needs to be preceded by consultation and cooperation, if the intervention is to succeed. A section 44(2) intervention is a drastic step which has to be taken with extreme caution. If the provinces are not consulted and do not cooperate, the intervention will be fraught with difficulty. The consultative programme embarked upon by the Department of Trade and Industry (DTI) is of relevance.

In December 1994, at a workshop held between the Department of Trade and Industry and representatives of all the provinces in Pretoria, consensus was reached regarding the transfer of the functions under the Liquor Act , No. 27 of 1989, to the provinces. The Minister of Trade and Industry suggested that each province reviews its needs in respect of that Act. Since then liquor matters have been discussed at every Minmec

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[189]. Section 41(1) (h) (iii).

[190]. Section 41(1)(h)(iv).

meeting.

In 1995, the Minister mentioned that he wanted to retain the legislative competence in respect of liquor matters, while the provinces indicated that the question of uniform criteria needs to be discussed. The Liquor Forum, an alliance consisting of a number of liquor organisations stated that the "National" Liquor Act ...

(I) deals with a subject matter that cannot be regulated uniformly and thus effectively and satisfactorily by Provincial executive action, because the Act,

(ii) deals with a matter that, to be performed effectively, requires to be regulated and co-ordinated by uniform norms and standards that should apply generally throughout the Republic."[191]

This was the first time that the question of "norms" and "standards" was raised.

The question of universal minimum standards in relation to persons under 18 years of age, the sale of liquor within a specified distance of schools, health aspects and the prohibition on the consumption of liquor in public was raised by the Law Review Project on 22 October 1996.[192] This project also suggested as alternatives stricter legislative restrictions on the sale of liquor and registration of liquor sellers by the local authorities.

In 1996, the view was expressed that the administration of liquor matters should be left to the provinces. The legislative power had to remain with the national government

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[191]. Undated submission made to DTI on 28 August 1995, page 2.

[192]. Discussion document: Control over the sale of liquor. Policy choices, page 10

which should not be able to introduce legislation or amendments thereto without consultation. The rationale behind this thinking appears to have been that the provinces had to "preserve society and its values".[193]

In 1997, the DTI suggested that the sale and distribution of liquor be decriminalised and that new legislation be introduced so that minimum standards can be introduced for the benefit of consumers; standards in the hospitality industry can be raised through training; a national liquor advisory committees can be created to advise on matters relating to standards in the industry, distribution , control and the social economic effects of the consumption of liquor and the establishment of provincial bodies to advise the MECs on various matters. The criteria for registration would apply uniformly throughout the country.

At the Minmec meeting held in March 1997, problems relating to the application of the "old" Liquor Act, its application in the Western Cape and the differences in the application thereof were discussed. The issue was discussed extensively again at the Minmec meeting on the 8 August 1997.

Various meetings of the portfolio committee on trade and industry were attended by members of the liquor industry who made suggestions in respect of amendments to the Act. Many of those were accepted by the committee. The National Council of Provinces, during, its deliberations and public hearings also made amendments to the bill which were accepted by the National Assembly. The process followed suggests that a great

[193]. Minutes of Minmec meeting 31 May 1996, page 2.

deal of cooperation and interaction took place between the different government structures at provincial and national level and with the public.

In the *Liquor Bill* case, the Court only referred to both the consultative process and the submissions made by the numerous interest groups which participated in the discussions and the parliamentary processes,[194] without drawing any conclusions. This was unfortunate. The approach taken by the Court to the lengthy consultative process differs to its approach to cooperative government as expressed in the case of *Premier of the province of the Western Cape v President of the RSA and others.*[195] In that case, the government of the Western Cape sought to set aside certain provisions of the Public Service Laws Amendment Act[196] on the basis that they were inconsistent with various provisions of the Constitution, including section 41.[197] The Court held that:

> "The provisions of Chapter 3 of the Constitution are designed to ensure that in the fields of common endeavour the different spheres of government cooperate with each other to secure the implementation of legislation in which they all have a common interest. The cooperation called for, requires that every reasonable effort be made to settle disputes before a court is approached to do so."[198]

It also held that:

> "Cooperation is of particular importance in the field of concurrent law-making

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[194]. *Liquor Bill* case, para 30.

[195]. 1999(4) BCLR (CC) at para 90.

[196]. Act 86 of 1998.

[197]. Principles of Co-operative Government and Inter Governmental Relations.

[198]. Para 54.

> and the implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments."[199]

The offending legislation had been passed in consultation with all the role players and the Western Cape government was able to make its views known and of making representations concerning the draft legislation.[200] The legislation even incorporated some of the suggestions made by that government. The Court held that the Western Cape government had not been deprived of any power vested in it under the Constitution. In deciding the matter it appears to have been persuaded by the fact that consultation and cooperation, as envisaged by section 41, had taken place. There were, of course, other factors as well, particularly the fact that the political direction and executive responsibility for the province remain in the hands of the Premier and the Executive Council.

Had the Court applied these same principles to the Liquor Bill, then the very extensive consultation process which preceded the Bill should have been taken into account and all the provisions of the Liquor Bill should have been found to be constitutional.

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[199]. Para 55.

[200]. Para 90.

6. NATIONAL SECURITY.

Whilst national security is not necessarily confined to war, insurrection, civil disobedience, to try to obtain an appropriate meaning regard has to be had to the Constitution.

Section 2 of the Constitution provides that the Constitution is the supreme law of the land and that any law or conduct inconsistent with it is invalid. According to Devenish[201] this applies to all situations and circumstances, in times of peace and even in times of war. According to him, there are no implicit reserve powers beyond those that are furnished by the Constitution. Therefore, the Bill of Rights has to provide for the controlled and orderly exercise of emergency power. The jurisprudential justification for the suspension of fundamental rights and liberties during times of national turmoil and emergency is necessity or self-defence. A state of emergency may be declared only in terms of an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and the declaration is necessary to restore peace and order.[202] During such times, certain fundamental rights may be suspended, but the Constitution which continues to operate is not. Emergency powers flow from the Constitution itself and not from any ancient power or law.

According to Devenish, the fundamental purpose in the declaration of the state of

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[201]. 1998a, 144.

[202]. Section 37(1)(a)and (b) of the Constitution.

emergency is the protection of the Constitution and the democratic body politic[203]. It should be noted that an emergency can only be declared when there is an actual threat to the life of a nation.[204] The threat to the country whether by war or any other calamity must be such that the ordinary law of the land cannot deal with the matter effectively to restore peace and order. According to Devenish a vital issue to consider is whether the threat must exist throughout the country, although a serious emergency located in one part of the country may be so severe that it impacts on other parts as well. [205] Significantly the emergency need not have materialised, but must be actual or imminent. The threat of the danger, be it war or a natural catastrophe must be authentic.

A section 44(2) intervention need not, however, meet the section 37 standard, as no crisis is needed for the intervention. The test, therefore, is much lower. Parliament may take steps when it is necessary to do so. If any of the provinces have taken steps or failed to do so and the life of the nation is threatened, then quite clearly an intervention in terms of section 44(2) (a) will be justified and valid. De Ville [206] points out that the origin of the phrases the protection of the environment and the maintenance of national security is not clear but these powers, especially the latter power, are tasks which are

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[203]. 1998a, 145.

[204]. *Lawless vs Ireland* 1 EHRR 15, Series A, Vol 3, judgement of 7 December 1976. In this case the European Court held that the natural and customary meaning of the words "public emergency threatening the life of a nation" are sufficiently clear. They refer to an exceptional situation or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. Quoted in Devenish 1998a,146.

[205]. 1998a, 147.

[206]. 1995, 155.

typically reserved for the national government everywhere in the world.

In Malaysia, those responsible for national security are the sole judges of what action is necessary in the interests of national security. However the power of the courts to determine whether the decision was in fact based on grounds of national security is not precluded.[207] The government has to prove that security considerations existed. The court in that country specifically ruled that although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations[208]. This point was made by Lord Fraser as well.[209] The same situation is likely to prevail in South Africa as well.[210] In determining whether an intervention is necessary to maintain national security,[211] the court is hardly likely to be able to dispute the executive's view of what national security measures are necessary. However, any legislation passed will have to be based on such considerations. The scope of review may well have to be limited to "illegality, irrationality or procedural impropriety". This was the view expressed in Chang by the court which refused to consider whether the security measures were necessary.[212]

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[207]. *Chang Sun Tse v The Minister of Home Affairs & Ors and other appeals* [1989] 1 FLJ 69(Court of Appeal, Singapore) quoted in Lee 1991, 507.

[208]. Lee et al, 1991, 514.

[209]. *CCSU v Minister for the Civil Service* [1985] AC 374 also known as the GCHQ case.

[210]. In the *Liquor Bill* case, it was clear that the Minister who alleged that the intervention was necessary, carried the onus of proving that fact.

[211]. In terms of section 44(2)(a).

[212]. Supra footnote 191.

The European Convention on Human Rights contains many references to national security. However, elaborate enumeration of exceptions is to be found only in Protocol No.4. [213] The restrictions must be in accordance with the law, and they must be necessary in a democratic society in order to safeguard certain essential interests of the State and society, namely, national security, public safety, prevention of crime and other like subjects.[214]

The most useful reference, for the purpose of this discussion on section 44(2) is in article 8 which permits restrictions on privacy and family life on both national security and economic well-being grounds.

From the above, it is apparent that national security can assume many dimensions. Those dimensions can necessitate states of emergency or the restrictions on fundamental rights. National security relates to the objective factors which may jeopardise the safety and security of the citizens of a country, or the country itself or the government of the day. Each case will have to be reviewed on its merits and the courts will ultimately be the arbiters as to what exactly the national security is.

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[213]. The Universal Declaration of Human Rights. A Common Standard. By: Martinus Nijhof Publishers. Page 269. They were referring to the restrictions on the right to freedom of movement.

[214]. See articles 6, 8 and 10 which deal with the rights to a fair trial, privacy and freedom of expression respectively.

7. ECONOMIC UNITY

An intervention to maintain economic unity will also be valid, according to de Ville,[215] if the economic circumstances throughout the country are to be uniform. To achieve this, an intervention, in terms of section 44(2)(b), will have to apply uniformly throughout the country and any national legislation passed will have to have this as its objective. According to him the word "protection", is according to German texts, to be interpreted to include not only the protection of something which already exists, but also the creation of something new. He contends that the word "maintenance" will have a similar effect and will apply to that which already exists and the creation of new things as well.

The Constitutional Court has held that "economic unity" as envisaged in section 44(2) must be understood in the context of our Constitution, which calls for a system of co-operative government, in which provinces are involved largely in the delivery of services and have concurrent legislative authority in everyday matters such as health, housing and primary and secondary education. They are entitled to an equitable share of the national revenue, but may not levy any of the primary taxes, and may not impose any tax which may "materially and unreasonably" prejudice national economic policies, economic activities across provincial boundaries or the mobility of goods, services, capital or labour.[216]

It specifically said that:

> "our constitutional structure does not contemplate that the provinces compete

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[215]. 1995, 154.

[216]. *Liquor Bill* case para 75.

with each other. It is one in which there is to be a single economy and in which all levels of government must cooperate with one another. In the context of trade, economic unity must mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intra-provincial trade."[217]

The Court stated that economic unity demands that the trade at a national level be regulated by a single system.[218] In coming to this conclusion, the Court appears to have relied upon the provisions of section 146(2)(a) of the Constitution which mentions that national legislation prevails, if it deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually. In respect of the manufacturing and wholesale distribution of liquor, the court concluded that these aspects of the liquor trade need to be regulated at a national level as they require uniformity.

The Court did not attempt to define what the concept actually means, but based its interpretation of the concept on what has already been provided for. In other words, it considered the question of economic unity in the context of the Constitution as a whole. The Constitutional Court has, in accordance with what appears to be the international practice, given the concept of economic unity a very wide definition. In future, the national government will be able to include most trade-related matters under this definition.

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[217]. *Liquor Bill* case para 75.

[218]. Para 75

The Constitutional Court has held that the Liquor Bill's provisions in so far at it relates to economic unity with regard to the manufacture of and wholesale trade in liquor is constitutional.[219] It failed to uphold the Bill's provisions in respect of retail sales, micro manufacturing and the production of sorghum beer. The Court, in effect, reaffirmed that the person who alleges that a section 44(2) intervention is necessary bears the onus to prove that fact when it said:

> "While the Minister's evidence in my view shows that the national interest necessitated legislating a unified and comprehensive national system of registration for the manufacture and distribution of liquor , it failed to do so in respect of its retail sale. There he averred only that "consistency of approach" is "important". This may be true. But importance does not amount to necessity, and the desirability from the national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence, and no other sufficient ground for such intrusion has been advanced."[220]

In considering the constitutionality of the Bill, the Court dealt with an affidavit by the Minister of Trade and Industry in which he asserted that the objectives which the Bill seeks to attain include erasing the history of the use of liquor as an instrument of control over most of the population as part of the policy of Apartheid and to make the liquor industry more accessible to historically disadvantaged groups.[221] Against a background

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[219]. *Liquor Bill* case para 75.

[220]. *Liquor Bill* case para 80.

[221]. Para 31.

of a history of overt racism in the control of the manufacturing, distribution and the sale of liquor the Minister contended that the provisions of the Liquor Bill constituted a permissible exercise of legislative power by Parliament.[222] The Minister also disputed the characterisation of the Bill as liquor licensing system. He stated that the Bill is directed at trade, economic and competition issues and health and social welfare matters.

Of equal importance is the fact that the Bill aims to address the socio-economic aspects of liquor consumption, especially amongst youths. Whenever an applicant applies for a retail liquor licence, that person has to satisfy the liquor board concerned that the application was widely publicised and has to furnish that board with any comments which the applicant may have received from educational and religious organisations.

The failure of the Court, therefore, to find the provisions of the Bill relating to the retail sale of liquor constitutional is indeed surprising, especially as the court studied the objectives of the Bill very carefully. The judgement does, though, underscore that the person alleging that an intervention in terms of section 44(2) is valid bears that onus.

In respect of the manufacture and wholesale distribution of liquor, the Constitutional Court held that the national government proved that its interest in maintaining economic unity authorises it to intervene in respect of liquor licences under section 44(2).[223] In arriving at that decision, the Court examined the concept of trade, the way in which

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[222]. Para 32.

[223]. Para 75.

liquor is manufactured and distributed and concluded that these two areas probably fell outside the exclusive functional area of "Liquor licences". It did not, however, have to come to that conclusion because the intervention in terms of the override was justified. The Court did say that if manufacture and distribution were to be regulated by the provinces, then manufacturers and distributors would have to obtain licences from each province for the purposes of trading nationally and possibly internationally.[224] The exclusive liquor licence function, therefore, probably did not relate to such activities.[225] Earlier the Court had stated that the means which the national government has chosen to achieve its ends, namely a registration system are within its powers[226]. The element of necessity still needs to exist.

The Court's reasoning in respect of the retail sale of liquor and the manufacture of sorghum beer and micro-manufacturing seems almost illogical. It ruled that the Bill in respect of these activities is unconstitutional. It is also unfortunate that it failed to consider the question of retail liquor licences in the context of the Bill as a whole. The result is that once the Bill is finally approved by Parliament, it is likely that the Court will again have to examine the matter. In the *Makwanyane* case,[227] the Court stated that our courts have held that it is permissible in interpreting a statute to have regard to the context in respect of its matter, its purpose and its background.

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[224]. Para 73.

[225]. Para 74.

[226]. Para 70.

[227].1995(3) SA 391 (CC).

In justifying its decision in respect of manufacturing and distribution the Court took the very factors mentioned in *Makwanyane* into account. It appeared to have relied heavily on the Minister of Trade and Industry's affidavit which detailed why it was necessary to regulate the industry at a national level. The Court held that:

> "while the Minister's evidence shows that the national interest necessitated a unified and comprehensive national system of registration for the manufacture and distribution of liquor, it failed to do so in respect of its retail sale ... no other grounds for such an intrusion were advanced."[228]

The court had analysed the objectives of the Bill very carefully and had also considered the racial aspects of the matter, it was aware that one of the main purposes of the Bill was to manage and reduce the socio-economic and other costs of excessive alcohol consumption, by amongst other things, creating an environment in which community considerations in respect of retail premises are taken into account.[229] The consumption of alcohol by youths and the disruptive effects of alcohol consumption on family life are all matters which need to be regulated nationally, in view of its impact on the national budget and society. In failing to find the Bill constitutional in respect of retail sales, the Court appears to have ignored the principles of interpretation laid down in *S v Makwanyane.*[230] It appears also not to have considered foreign law as it is entitled to do in terms of Section 173 of the Constitution.[231] Had it followed the Canadian approach

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[228]. Para 80.

[229]. Objects of the Bill section 2

[230]. 1995 (3) SA 391 (CC).

[231]. In terms of this section, the courts have the power to develop the common law.

and the background to the Bill, it would have been mindful of the "evil" which the Bill seeks to address.

A further surprising feature of the Court's decision is that it linked the question of retail sales squarely to the national system for manufacturing and wholesale distribution of liquor. The Court had earlier in its judgement indicated that it is necessary to characterise a Bill to determine the subject matter which it purports to deal with. Once it had done so in respect of the Liquor Bill, it concluded that it was a trade related matter falling within Schedule 4. However, it still had to examine whether the means which the national government sought to use to achieve its objects fell within its power or was justified by the section 44(2) override. It then concluded that the system of registration was a form of liquor licensing within schedule 5. However the necessity of the intervention warranted the use of that power in terms of section 44(2).

With regard to retail licences it held that:

> "If section 44(3) applies to national legislative intrusions into the exclusive provincial competences, I am inclined to the view that the phrase "reasonably necessary for, or incidental to" should be interpreted as meaning "reasonably necessary for and incidental to"."[232]

The national government had, on that construction, not shown that the retail structures which are to be created by the Bill are reasonably necessary for or incidental to the

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[232]. *Liquor Bill* case *para 81.*

system to be created for the manufacturing and distribution of liquor.[233] In coming to that conclusion, it has suggested that there must be a relationship between the regulation of the retail liquor trade and the regulation of the manufacture and distribution of liquor. That cannot, with respect, be correct.

From the Bill itself, it is clear that the regulation of the retail trade in liquor is designed amongst other things to address the "evil" associated with excessive alcohol consumption and to take community views into consideration when approving retail licences. The regulation of the manufacturing and distribution side of the industry is designed to prohibit cross-holdings between the three tiers involved in the industry and the establishment of uniform conditions, in a single system, for the registration of those involved in the manufacture and distribution of liquor. The various types of registration have different objectives and to link them the way the Court has done, must in my view, be wrong. The retail sale of liquor is, after all, a product of the manufacture and wholesale distribution of liquor.

The Court also appears to have contradicted itself. It has said that the concurrent power to regulate trade intra provincially in respect of liquor extends to the three levels of manufacturing, distribution and sale.[234] Once it concedes that Parliament has that power, then it follows that Parliament should also be able to choose the vehicle through which it wants to achieve its objectives. Rejecting the Minister of Trade and Industry's approach of "consistency" was unfortunate, as a consistent approach to the social evils

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[233]. *Liquor Bill* case *para 82.*

[234]. Para 54.

of alcohol consumption appears to be necessary. The regulation of the retail trade in liquor may also be necessary to maintain economic unity.

8. MAINTENANCE OF ESSENTIAL NATIONAL STANDARDS.

An intervention in terms of section 44(2)(c) may have as its objective the maintenance of essential national standards. Four elements are involved. These are that such legislation must establish standards, which are essential and have to apply nationally. The legislation must also provide mechanisms to maintain those standards.

The question of national standards was discussed by the Constitutional Court, in the context of concurrent competences[235]. The court had to decide whether an Act of Parliament can require a provincial head of education to be required to cause a plan to be prepared as to how national standards could be best implemented in the province. The court held that if national standards have been formulated and lawfully made applicable to the provinces in accordance with the constitution, those must also be complied with.[236] This measure appears to have been designed to maintain those standards as well.

The constitutionality of the National Education Policy Bill's clauses, which contemplate a situation in which a provincial head of education may be called upon to secure the formulation of a plan to bring education standards in the province in line with the constitution or with national standards, was disputed. The court held that the effect of the relevant clauses is to give the provinces themselves an opportunity of addressing the alleged shortfall in standards itself and of suggesting the remedial action which

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[235]. *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995.* 1996 (3) SA 389 (CC) 532 para 34.

[236]. Para 35.

should be taken. Of importance is the fact that the court held that this could be done even if national standards have only been formulated, but have not been made the subject of legislation. The alternative would be for the government to act unilaterally and to take decisions without allowing the provinces this opportunity.

Although this case did not refer to section 44(2)(c) at all, the Court's ruling is of fundamental importance to any enquiry designed to test the validity of an intervention in terms of this section. While this issue did not arise in the *Liquor Bill* case, it would seem that the Liquor Bill itself could be viewed as an intervention designed to maintain essential national standards as well.

Two issues arise: the first is that any national standards must be in line with the Constitution and secondly where they have been lawfully made applicable to the provinces, they must be complied with. For standards to be national, they must apply uniformly throughout the country. It would seem that this uniformity should not be interpreted so strictly that it leads to inequitable or absurd results. Rather the uniformity should take prevailing conditions in different provinces or different areas into account. The requirement of uniformity means, therefore, that inequalities in the distribution of resources and facilities, wealth and all other relevant factors must be considered. For example, a central government grant to the provinces for textbooks would probably permit a distinction to be made between well-resourced and under or poorly resourced schools. This would permit more books to be given to the latter schools, even though this is not stated in the grant itself. The Act, in terms of which such grants are to be made, would itself have to establish the standards.

Once the standards have been validly enacted or made applicable to the provinces, they must be complied with. In other words the provinces have to abide by and implement those standards.

A section 44(2)(c) enquiry will, therefore, have to determine firstly whether the national standards sought to be maintained are in line with the Constitution. Such an enquiry may well have to consider whether there is the capacity or the will in the provinces to maintain such standards and whether the provinces are obliged to maintain them, in other words, whether a constitutional duty is imposed upon the provinces to give effect to those standards. Then it will have to be established if the duty imposed upon the provinces has been validly made. I submit that once it has been established that a constitutional duty exists in terms of which the provinces are obliged to give effect to or to implement the national standards and that the provinces have failed to do so or do not have the capacity or the will to do so, that the intervention would be valid. Of course, an intervention may also be designed simply to establish the standards, which the provinces will have to adhere to. The Constitutional Court has ruled that such an intervention necessitates national and provincial cooperation.[237]

[237]. *National Education Policy Bill* case, 532. Para 34.

9. ESTABLISHMENT OF MINIMUM STANDARDS REQUIRED FOR THE RENDERING OF SERVICES.

According to De Ville, the establishment of minimum standards required for the rendering of services means that an Act of Parliament must be necessary to set minimum standards across the nation for the delivery of public services and to determine these necessary standards from the context.[238]

Although section 44(2)(d) does not make mention of public services, it would appear that is probably what the legislature had in mind. Quoting from Blacks Law Dictionary, De Ville mentions that public services are applied to the objects and enterprises of certain kinds of corporations, which specifically serve the needs of the general public or conduce to the comfort and convenience of an entire community, such as railroad, gas, water, and electric light companies; and companies furnishing public transportation.[239] He suggests that a provincial approach would require the word *necessary* to be given a strict construction. This would permit a section 44(2) intervention only if the provinces are not able to fix such standards.

In Canada, it has been held that the government has the power, in performance of its function of service to the public, to organise a suitable distribution of duties between public officers.[240] According to Hogg, public servants in Canada are subject to

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[238]. 1995, 153

[239]. 1995, 154.

[240]. *Langlois et al v Minister of Justice of Quebec et al* [1984] 1 S.C.R. 472.

restrictions on their partisan political activities.[241] This is because the civil service is a professional career service which is supposed to serve the government, irrespective of the party in power, with equal diligence. The maintenance of political activity is necessary, according to him, for the effective functioning of the service with the political administration and in its dealing with the public. One challenge to the rule was unsuccessful.[242] In another case, [243] the Supreme Court of Canada held that the Act was a justifiable limitation of freedom of expression . The objective of maintaining a neutral public service justified such limits, but in that case, the Act was over-inclusive and did not pursue the objective of a neutral public service by the least drastic means.

In Australia the Commonwealth has the power to make laws with respect to matters relating to any department of the public service, the control of which is transferred to the Executive.[244] In that country the Commonwealth may make laws which affect the salaries, conditions of service generally and indemnities of public servants. These prevail over state laws which also affect Commonwealth public servants, working in the different states.

In South Africa, the public service must be structured in terms of national legislation and must loyally execute the policies of the government of the day.[245] The terms and

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[241]. 1994, 40-32.

[242]. *Opseu v Ontario*(1986) [1987] 2 S.C.R. 2.

[243]. *Osborne v Canada (*1991) [1991] 2 S.C.R. 69.

[244]. Section 52(2) of the Constitution of Australia.

[245]. Section 197(1) of the Constitution.

conditions of employment of the public service must also be regulated by national legislation.[246] Provincial governments are obliged to recruit, appoint, transfer, promote and dismiss members within a framework of uniform norms and standards applying to the public service.[247]

The use of the word minimum lowers the standard which has to be applied to the rendering of services. The word *minimum* implies that only the very basic standards which are sufficient to render the services need to be utilised. This appears to be sound as services have to be rendered in accordance with budgetary constraints and the capacity of the provinces and local government to render the services.

On the other hand, the use of the word *minimum* limits the power of Parliamentary intervention. Parliament can only prescribe basic standard for the services. If the provinces have the capacity and the will to render services, in a way which serves the interests of the public then an intervention is unlikely to be permitted.

The Liquor Bill could also have been construed as an intervention designed to establish minimum standards for the rendering of services. The procedures which the Bill establishes, the creation of various bodies, the criteria to be followed in considering applications for registration all suggest, amongst other things, that the Bill paved the way for minimum standards to apply throughout the country.

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[246]. Section 197(2).

[247]. Section 197(4).

10. THE PREVENTION OF UNREASONABLE ACTION TAKEN BY A PROVINCE WHICH IS PREJUDICIAL TO THE INTERESTS OF ANOTHER PROVINCE OR THE COUNTRY AS A WHOLE.

Section 44(2)(e) empowers Parliament to intervene in matters where the actions of one province impacts on the interests of another province or the country as a whole. Legislation passed in terms of this section is unlikely to apply throughout the country.

The language of section 44(2)(e) is very similar to section 146(3)(a). Although it is difficult to see to what extent a province could take unreasonable action, an example would probably be the suggestion made by the Western Cape government after the 1994 elections that a form of influx control should be introduced to prevent large numbers of people from other provinces seeking employment and residence in the Western Cape. Such a move, if it were constitutionally possible, would not only impact on other provinces, but on the interests of the country as a whole.

According to De Ville[248] the provisions of a similar section in the interim constitution are so vague that the scope of the powers of the provinces will depend to a large extent on how the courts interpret the grounds upon which acts of parliament will prevail. De Ville also cites a German example of how a state law could prejudice the interests of other states or the country as a whole. He mentions the example given by Maunz that a state which by legislation increases agricultural production to such an extent that the markets of other states are also flooded by the product, then that will be prejudicial to the interests of the country as a whole or to other states.[249]

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[248]. 1995, 155.

[249]. 1995, 155.

According to Klaaren,[250] the provision is clearly aimed at renegade or out of place provincial legislation that could not be dealt with by means of the other overrides. He believes that the provision reflects the thinking that South Africa should be a unified nation in relation to economic, health and security concerns.[251]

The Liquor Bill, once passed, with or without the provisions relating to retail sales, will also have the effect of preventing a province from taking steps which cause prejudice to another province or the country as a whole. This, however, is not an issue which will be dealt with herein.

[250]. Klaaren, 1996, 5-15.

[251]. 1996, 5-15.

11. CONCLUSION.

What is apparent from the above is that many countries in the world have provisions which enable the central government to take steps to legislate in the national interest. This is particularly so in relation to the economy. Countries such as India and South Africa have provisions in their Constitutions which enable the national Parliament to intervene by taking steps to pass legislation in respect of certain powers which are reserved entirely or exclusively for the provinces. In such cases, the legislative intervention prevails over the provincial or state legislation. It should be noted that such an intervention is justiciable and that the courts ultimately have the power to decide whether the intervention was valid or not. In India the intervention may be of a limited duration only. In Canada, although there is no similar power, the central government has used the peace order and good government provisions in its constitution to pass legislation in respect of exclusive provincial powers, during times of emergencies. The courts in that country have ruled that such measures may remain in place even after the emergency has passed.

Section 44(2) of the South African constitution, appears to resemble the German constitution very closely. In that country, section 72(2) of the Basic Law enables the federal government to intervene when it is necessary to prevent a state from taking steps which are prejudicial to another state or to maintain legal or economic unity. Of particular significance is the fact that internationally courts have ruled that the centre may legislate where it is necessary for the economic, social or political good of the country. In other words, an examination of a law passed by a level of government which does not enjoy those powers has to extend much deeper than a simple consideration

of the pith and substance of the legislation. This appears to be authority, in so far as our courts may consider foreign law , that the social economic and political effects of legislation may also be taken into account when deciding upon the constitutionality of an Act of Parliament, passed in terms of section 44(2).

In the context of our negotiated settlement, the need to develop in a way which promotes the interest of all South Africans, job creation and crime amongst other things are all matters which the central government must of necessity give attention to. This is so even if certain powers are reserved exclusively for the provinces in terms of schedule 5. Certainty needs to prevail. Therefore the decision by the Constitutional Court lays a solid foundation upon which section 44(2) intervention may take place. Parliament is likely to intervene in provincial matters more readily in the future in the national interest. The Liquor Bill is likely to be followed by various agricultural bills soon. The importance of the Liquor Bill decision is that it provides an adequate basis for determining how section 44(2) interventions need to be dealt with in the future.

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