Constitutional Crisis: Case Studies in the Decentralised Public Administration of Education in South Africa (2011 – 2015)

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

Thokozani Jean Chilenga-Butao

Thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

Department of Political Studies, School of Social Sciences

University of the Witwatersrand

August 2019

Supervisors:

Professor Lawrence Hamilton – Department of Political Studies, University of the Witwatersrand

Dr. Federica Duca – Public Affairs Research Institute (PARI)

Declaration

I declare that this thesis, titled “Constitutional Crisis: Case Studies in the Decentralised Public Administration of Education in South Africa (2011 – 2015), is my original research. It has never been submitted by anyone for the award of any other Degree or Diploma in any college or University. Furthermore, to the best of my knowledge, it contains no material written by any other person except where due reference is made in the text of the thesis. It is submitted for the degree of Doctor of Philosophy in Political Studies at the University of the Witwatersrand, Johannesburg, South Africa.

Chilenga- Butao

30/10/2019

Thokozani Jean Chilenga-Butao

Date

Table of Contents

Tables and Diagrams

Dedication

"You hem me in, behind and before, and lay Your hand upon me…If I take the wings of the morning and dwell in the uttermost parts of the sea, even there Your hand shall lead me, and Your right hand shall hold me." -Psalm 139: 5 & 10

For Themba, our paths collided soon after I began this journey and I am ever thankful for your love and support – seen and unseen – for listening to ideas and frustrations, for reminding me that there is a good end in sight.

To my parents, Mphatso and Khumbo, for allowing me to be who I am, cheering me on, loving me and what this project means to me. Thank you for the many ways in which you have supported me and making sure that I get over the finish line.

Acknowledgements

This research was carried out and completed with the support of the the Public Affairs Research Institute and the Public Sector Education Training Authority's (PARI-PSETA) joint PhD fellowship programme.

This field work for this research was carried out and completed with the support of the PhD funding from the National Institute for Humanities and Social Sciences (NIHSS).

I am grateful for the support from these programmes, particularly because postgraduate funding is necessary, but can be scarce. Many young scholars and academics, particularly black African scholars and academics, need support and space to develop our ideas, conduct rigorous research and academically contribute to our African continent's progress. We are here. We are worthy. And we are not done.

In addition, I thank Professor Lawrence Hamilton, who supervised me at the University of the Witwatersrand. Professor Hamilton supported my research for a long time and allowed me to explore both the theoretical and practical aspects of my research. I sincerely appreciate this because I gained a number of skills and experiences through this exploration.

I also thank Dr. Alice Soares Guimaraes and Dr. Federica Duca, both of whom supervised me at PARI. Dr. Guimaraes and Dr. Duca played an instrumental part in my development as a PhD candidate through their guidance in the Postgraduate Dissertation Programme (PDP), their support for my work and the advice that they gave me throughout this process. I sincerely appreciate their supervision.

Abstract

South Africa's decentralised governance is in a constitutional crisis. This crisis is caused by the lack of an explicit naming and conceptualisation of decentralisation in the Constitution of the Republic of South Africa, 1996. Instead, the country relies on an implicit assumption that the state is a decentralised unitary state, which is reflected in the Constitution and ensuing legislation and regulations. The constitutional crisis is precipitated by the fact that mechanisms of decentralisation, known as constitutional interventions in Sections 100 & 139 of the Constitution, are also not fully regulated or clarified. As a result, attempts to resolve public administration crises in decentralised provincial administrations has failed. This is evident in the provincial education departments of Limpopo (LDE) and the Eastern Cape (ECDE). In the LDE, the implicit nature of South Africa's decentralisation produces a legislative gap in the implementation of S100 (1) (b). This legislative gap compounds the existing constitutional crisis because it lacks procedural clarity, confuses S100 as a mechanism and provides loopholes for exploitation of the process. These loopholes, in turn, distort and lengthen resolutions for public administration crises in provincial governance. In the ECDE, South Africa's constitutional crisis is compounded by the structural institutional crisis in that provincial education department. This department has experienced waves of colonial, apartheid and democratic decentralisation, which have produced layers of lack of capacity, internal factionalism and chronic mismanagement. In this context, the constitutional crisis becomes a red herring for structural institutional weaknesses in the province. In both case studies, the S100 (1) (b) did not develop or strengthen the problem-solving capabilities of these provincial education departments. This thesis examines South Africa's constitutional crisis in decentralisation using a multidisciplinary approach that relies on political theory, African and South African history, administrative and applied political studies perspectives to explore the constitutional crisis and provides practical recommendations to follow.

Keywords: Decentralisation, education, provinces, intervention, constitutional crisis.

Acronyms

AG	–	Auditor General of South Africa
ANC	–	African National Congress
COGTA	–	Department of Cooperative Governance and Traditional Affairs
DA	–	Democratic Alliance
DBE	–	National, Department of Basic Education
DG	–	Director General
DDG	–	Deputy Director General
DOJ&CD	–	Department of Justice and Constitutional Development
DPSA	–	National, Department of Public Administration
EE	–	Equal Education
ECDE	–	Provincial, Eastern Cape Department of Education
EFF	–	Economic Freedom Fighters
IFP	–	Inkatha Freedom Party
HOD	–	Head of Department
HR	–	Human Resources
IGFR	–	Intergovernmental Framework Relations Act, 2005
LDE	–	Provincial, Limpopo Department of Education
LRC	–	Legal Resources Centre
MEC	–	Member of Executive Council, Provincial Sphere
MSIB	–	Monitoring, Support and Interventions Bill
NA	–	National Assembly
NIF	–	National Intergovernmental Forum
NP	–	National Party
NCOP	–	National Council of Provinces
PED	–	Provincial Education Department
PFMA	–	Public Finance Management Act
PIF	–	Provincial Intergovernmental Forum
PCC	–	President’s Coordinating Council
SC	–	Supply Chain Management
SG	–	Superintendent General
S100 (1)(b)	–	Section 100 (1)(b) of the Constitution

1 Chapter One – Introduction

This thesis examines decentralisation as a mode of governance within South Africa's national and provincial spheres, and how it is tested during public administration crises, particularly during the implementation of a constitutional intervention known as Section 100 (1)(b) (S100) (1)(b)). In analysing the national government's intervention during the governance and public administration crises that occurred in the Department of Basic Education's (DBE) Limpopo (LDE) and Eastern Cape (ECDE) provinces between 2011 and 2015, the thesis notes the existence of a constitutional crisis. Analysis of this Constitutional crisis builds on some insights gained from the theory of democratic decentralisation. As such, this thesis is one that examines the nature of South Africa's decentralised governance, in specific relation to the governance of education in provincial departments of education, and whether this decentralisation strengthens the development and problem-solving capabilities of provincial departments and governments. According to decentralisation theory, as well as its more political-administrative variant of democratic decentralisation, this form of governance should strengthen the development of subnational governments, such as provincial departments and governments. However, this has not been the case in South Africa, even with the S100 (1) (b) intervention mechanism, which is designed for the purpose of resolving public administration crises.

1.1 Background

Education in South Africa has been, and remains, a site of historical, social and political tension. Its use as a tool for oppression and repression of the majority of the South African population dates back to the late 19th century during the formation of the union of South Africa and continued throughout the grand apartheid project. On the other hand, it was used as a strategic weapon to empower a minority. While education is perceived as the fundamental mechanism through which the aspirations of millions of South Africans can be realised, the education system in contemporary South Africa falters on this expectation. It is a site of disjunction where 'inputs' do not match the outcomes; where inequality, inaccessibility and lack of quality coincide; where the dignity of some of society's most vulnerable members are repeatedly trampled on; and where the final matric results each year are prioritised as if that final year of school is the only one that counts. One journalist, Redi Tlhabi, questioning the former president Jacob Zuma, summarised this appalling state of education as follows:

> "When are you going to fire the education minister? When you interfere with education, you are bequeathing to the nation a generation of South Africans who are dysfunctional, who cannot open the doors to their future…It's a black child who's being disadvantaged again. Verwoed is smiling in his grave" (Radio 702, 22 July 2012).

All the ills found in South Africa's education system, are entrenched in decentralisation, the mode of governance in which it operates. This mode of governance is both prone and party to these ills. Decentralisation entails the ceding of responsibilities and authority by the central government to recognised geographical territories for the purposes of governance through subnational administration. The replication of portfolios and objectives is usually common in decentralisation.

In the case of South Africa, it is a unitary state that has decentralised authority from the national level – or "sphere", as stated in the Constitution of the Republic of South Africa, 1996 – to the provincial and local spheres of government. This organisation of South African government is described as "Co-Operative Government" (Constitution, 1996, s40). Within co-operative government, each sphere is described as, "distinctive, interdependent and interrelated" (Constitution, 1996, s40). Therefore, each sphere of government must be recognised and respected, yet distinctive; should work together and maintain their association with each other for many purposes, including public administration. Unfortunately, the latter is precisely where the interdependence and interrelatedness of the spheres of government are tested. In particular, the interdependence and interrelatedness between the national and provincial spheres of government are tested in ways that are not always apparent. As such, this research will examine whether decentralisation, as an integral part of the organisation of public administration in South Africa, is conducive for the development and problem-solving capabilities of South Africa's public administration.

Like most functions of government in South Africa, basic education is decentralised. In the national sphere, there is the DBE, whose responsibility it is to formulate policy in education and oversee its implementation in provinces. Each of the nine provinces in South Africa has a provincial department of education (PED), whose responsibilities include implementing national policies in education; identifying the areas that affect the educational results of learners in that particular province; and, planning to address those problem areas; as well as ensuring that education is provided in districts and schools throughout the academic year. This decentralisation is replicated similarly throughout the nine provinces, with power being vested in national departments that authorise certain functionalities within the provinces. There are, however, variances in whether provinces can discharge responsibilities alongside the national government concurrently; or if national government maintains sole responsibility for some responsibilities, exclusively. Concurrent responsibilities are listed in Schedule 4[1] of the Constitution, while exclusive responsibilities are listed in Schedule 5[2] of the Constitution.

Decentralisation and basic education offer insight into the operations of national and provincial government that are often not found in other government functions. This is mainly because the historical context of education in South Africa urges national government and PEDs to correct and operate the education system optimally. The current context, however, presents a plethora of challenges – some of which are not, or should not even be related to education. Some of these challenges include political differences and outright fights between the national and provincial spheres and within provincial governments; systemic corruption; lack of administrative skills, tools and resources.

1.2 Understanding Decentralisation

Two definitions of decentralisation, stand out for me. The first - usually described as a "practical definition of the concept", suggests that decentralisation is "a process through which powers, functions, responsibilities and resources are transferred from central to local government and/or other decentralised entities" (United Nations 2009 in Koelble and Siddle 2013: 19). This process involves "striking a balance between the claims of the periphery and the demands of the centre", as well as "provides an arrangement through which critical issues (such as those of national unity and indivisibility, how to safeguard national interests and ensure coordinated and even development, equity in the distribution of resources and local autonomy) can be recognised." (ibid). The second definition describes decentralisation as, "any act in which a central government formally cedes

[1] Schedule 4 of the Constitution lists the "Functional Areas of Concurrent National and Provincial Legislative Competence", contained in the Appendix of this thesis.

[2] Schedule 5 of the Constitution lists the "Functional Areas of Exclusive Provincial Legislative Competence", contained in the Appendix of this thesis.

powers to actors and institutions at lower levels in a political-administrative and territorial hierarchy" (Ribot, 2002: v). This secession of power is "usually about strengthening both central and local governance in ways that support the objectives of national unification, democratisation, and greater efficiency and equity in the use of public resources and service delivery" (ibid).

Both these definitions of decentralisation are clear that there is a central or national government that disperses powers and functions to local, or subnational, governments. The purpose of this dispersal is practical utility, whereby the varying needs of subnational polities are best met by their closest subnational government. The latter is emphasised in the last part of Ribot's definition. Ribot also recognises decentralisation as one in which there is 'political administrative and territorial hierarchy'. This means that decentralisation involves the dispersal of political and administrative powers and functions; and that subnational governments have a predetermined and legally recognized standing with their national government. This is clearly the case in South Africa, where the Constitution transfers administration and service delivery to provinces and local governments. In addition to these definitions, decentralisation has three main aspects; administrative, fiscal and political.

Administrative decentralisation refers to "the process whereby the authority to administer and execute powers and functions (and, by implication, the responsibility to deliver services) is transferred from national to sub-national government, thereby resulting in a deconcentration of powers" (Koelble and Siddle 2013: 22). Administrative decentralisation is thus a legal arrangement in which the powers of both the national and subnational governments are outlined and subnational governments are empowered to act within national and subnational regulations. Fiscal decentralisation refers to, "the process whereby revenues of the central government, and also the power to raise revenues from local sources, are transferred from national to sub-national governments" (ibid). This form of decentralisation is important because it provides the legal scope within which subnational governments should supplement their nationally provided funds with their locally generated revenues, in order to provide for programmes and service delivery. Finally, political decentralisation is, "the process whereby subnational governments, elected by local participants, are established within a constitutional framework and granted political power and authority to govern over particular geographical areas. It entails the transfer (whether whole or partial) of political power and authority from central to sub-national governments, and therefore involves balancing the exercise of power between various levels of government." (Koelble and Siddle 2013: 22).

There are a number of reasons for decentralisation, namely:

- "political crises or pressures, due to ethnic or regional conflicts or other causes, which may prompt leaders to pre-empt future threats to disarm existing threats by widening political representation
- a response to the growing negative public views of existing political systems
- fiscal crises
- 'policy convergence', in which policy responses of a similar nature were adopted to similar problems in countries at a similar stage of economic or political development
- unification of the state
- revival of a long-existing spirit of local self-governance
- strengthening of power bases of established or new regimes

- institutional pressures, such as from donor organisations, often following external shocks which forced drastic changes in policy, which saw good public management and administration with an emphasis on accountability as an aspect of good governance
- local demands
- a genuine desire for political and economic transformation, such as the transition to democracy, enhancing participation and improving service delivery
- changes of political ideology (either within an already ruling party or as a result of a new party coming to power)
- other hidden agendas, such as shifting deficits downwards or devolving responsibility for spending to local governments" (Koelble and Siddle, 2013: 28 – 29).

There are nine main objectives of decentralisation, which are the promotion of democracy, legitimacy, public participation, developmentalism, responsiveness and efficiency, competition, the reduction of corruption, the improvement of communication and defusing conflicts (Koelble and Siddle, 2013: 43 – 61). These objectives seek to create a balance between democratic values and their practical manifestation through local governance. Some of the factors that influence the design of decentralisation are the process of democratic transition, country size, colonial legacy, economic development, the influence of international organisations, the party system and political elites (Koelble and Siddle, 2013: 43 – 44). Four of these relate directly to the decentralisation of education to the provinces. These factors are the process of democratic transition, colonial legacy, the party system and political elites.

Decentralisation is usually associated with a unitary state and contrasted with a federal state. A unitary state is a state that has one national or central government, with subnational governments that are constituted according to regions or geographical sizes of particular areas. Subnational governments can also be constituted according to the concentration of particular interests in an area, social groups and other political factors. Federal states, on the other hand, are states that have been formed as a result of separate or independent states or political entities choosing to form a larger union. Power is thus gained or increased through the joining of these different states into one union, with a federal government that oversees the formerly independent states now unified. In the case of federal state, power is not ceded from a federal government, power is given to the federal government through agreement and arrangement by formerly independent states.

1.3 Research Question

As interesting and intriguing as I find decentralisation, I could not find a research question that would allow functional and practical results about this mode of governance. Instead, I turned to the Limpopo case study that I was keen to investigate, having established a correlation between the public administration crisis there, and national government's role in remedying the crisis. I began working backwards by looking at the Limpopo Text book Crisis, the department's proximity to national government and the working relationship between the national and Limpopo provincial governments. I then realised that until we hear about the problems and public administration crises in a province, we rarely interrogate the working relationship between national and provincial governments. Bearing in mind the Limpopo case study, I sought to test the decentralised relationship between these two spheres. Therefore, my research question is:

Does decentralisation, through the Constitutional mandate of Section 100 (1) (b), strengthen the development and problem-solving capability of provincial governments?

Development refers to the progress and ability of provincial departments or governments to use their resources and regional information to provide education to the best of their ability in their respective provinces. Problem-solving capability refers to whether or not provincial departments can resolve administrative issues before they become endemic and require national intervention. Moreover, problem-solving capability is a process of learning how to deal with administrative problems as the provincial department receives help from the national government. Therefore, development and problem-solving capability are not overnight processes of national government interventions. Rather, they are incremental steps with tangible outcomes that move provincial departments towards better service delivery.

My research question has the directness required to examine case studies while attempting to make inferences about decentralisation. I also think that this is one of the main ways to test decentralisation – in the midst of a crisis over an abridged period of time. There are a number of assumptions included in this question. The first assumption is that if the working relationship between a national and provincial government is cordial and fruitful, then a public administration crisis would produce as cordial and fruitful outcome as possible during an intervention. Similarly, if the working relationship between the national and provincial governments in question is poorly managed and antagonistic, then the intervention will be filled with resistance, misunderstanding and bad outcomes. The second assumption involved in my research question is that S100 (1) (b) interventions are supposed to develop provincial governments or departments in terms of skills capabilities, controls and preventive action prior to a public administration crisis, and adopt or institutionalise problem-solving capabilities.

Given my combined interest in decentralisation and education as a public service, I will be examining the S100 (1) (b) interventions that took place in the LDE and the ECDE (2011 – 2015). This raises the following sub questions in relation to the case studies and decentralisation:

1. What are the historical contexts of both departments, and how do these historical contexts shape the current public administration crises in either department?
2. What were the causes of the S100 (1) (b) interventions in both the departments?
3. What were the similarities and differences in the processes during each of the interventions?
4. What were the reactions, in each of these departments, to the S100 (1) (b) interventions?
5. What were the outcomes of the S100 (1) (b) interventions in each of these departments?

The main argument that I will advance in my thesis is that there is a constitutional crisis around decentralisation as a mode of governance in South Africa and this subsequently causes a crisis around the implementation of S100 as a mechanism of decentralisation. This constitutional crisis arises from the fact that firstly, decentralisation is implicit in the Constitution of 1996, as opposed to being explicit. Secondly, the constitutional crisis is precipitated by the fact that, contrary to contemporary debates about decentralisation, this is not a new phenomenon. Rather, apartheid decentralisation and the similar colonial phenomenon form the fragmented foundations upon which current democratic decentralisation is built. And thirdly, despite the constitutional crisis, S100 of the Constitution is a product of foresight of the authors of the constitution. But S100 itself needs to be regulated using the pending legislation on this section of the Constitution. This will procedurally tighten the existing gaps in S100; and in turn, iron out some of the misunderstandings around decentralisation in South Africa.

As the following chapter will show, South Africa's decentralisation is not clearly spelled out in the Constitution or in regulations and legislation. The terms 'unitary', 'decentralised' or, 'decentralised unitary state' do not appear in any text pertaining to the structure and governance of the South African state. Rather the Constitution and other legal documents frame the state's structure around three spheres and frame the state's governance around intergovernmentalism. The Constitution is clear that the three spheres are national, provincial and local; and that the spheres are interdependent, interrelated and distinctive. Therefore, there is an avoidance to of creating a hierarchical structure wherein government has levels and there is an overarching centre from which power is decentralised. The latter terminology is avoided in the South African context, probably because the apartheid government was seen as hierarchical and centralised (White Paper on the Transformation of the Public Service, 1995), and a democratic government does not want to fall into the same typology. But that avoidance does not give a precise explanation for decentralised governance, which is simply described as 'intergovernmental', for which a set of 'cooperative governance' relationships are outlined in the Constitution, regulations and legislation. I argue that the implicit nature of South Africa's decentralisation causes a constitutional crisis because the lack of precise explanation of decentralisation leads to misunderstandings about the relationship between the national and provincial sphere. This leads to confusion about the amount of power that the national sphere has and leads to resistance by provinces when the national sphere exercises that power. This is particularly true in the LDE case study covered in my thesis.

In addition to the above, the constitutional crisis is precipitated by the fact that decentralisation is not a new phenomenon in South Africa, or in the African context. What emerges from this fact, as I will argue, is that the provincial sphere and its departments in particular, are contending between colonial, apartheid and democratic forms of decentralisation which took root at different times. This argument will show that firstly, decentralisation is neither ahistorical nor apolitical. Secondly, this argument will show that decentralisation in its current form is built on a fragmented foundation, which leads to a structural institutional crisis in some provinces. This structural institutional crisis is a result of apartheid decentralisation which had separate administrations for single functions. And following the amalgamation of these administrations during the consolidation of democratic decentralisation, there remained a number of structural issues such as lack of capacity, internal factionalism, chronic mismanagement and the difficulty of service provision in a large rural context, which democratic decentralisation has to contend with. This is particularly evident in the ECDE case study covered in my thesis.

The final part of my argument will show that despite this constitutional crisis, the writers of the Constitution foresaw that there will be issues around administrative decentralisation. To counter these issues, they inserted mechanisms of decentralisation into the Constitution, in the form of S100 and S139 interventions[3]. These mechanisms are, however, briefly explained, last resort measures that inadvertently add to the constitutional crisis because the power that is exerted through interventions is unrecognised, and therefore heavily resisted through legal action and administrative practice. The only way to stop this is by asserting the decentralised relationship between the national and provincial spheres through the enactment of the Monitoring, Support and Interventions Bill (MSI Bill). Unlike

[3] The Constitution uses the term 'intervene' hence my use of the term 'interventions'. This process is, however, also referred to as an 'administration'.

the Constitution, the MSI Bill provides details about the preventive measures prior to a S100 intervention, as well as the administrative and procedural steps to be taken during a S100 intervention. Therefore, the current constitutional crisis around South Africa's democratic decentralisation does not need to be prolonged or ignored.

1.4 Purpose of Research

The purpose of this research is to determine the effectiveness of South Africa's decentralised public administration; find the gaps in the public administration that lead to a strained relationship between the national and provincial offices; and, to discuss whether decentralisation is assisting in building a robust and responsive public administration. The research will be conducted through both a historical analysis and a comparative case study of the national DBE's provincial departments in Limpopo and the Eastern Cape. Both of these provincial departments have experienced public administration crises in the last five years.

Chapter 6 of the Constitution establishes the 9 provinces, their Provincial Legislatures (Constitution of the Republic of South Africa, 1996: 1311 – 1321), Provincial Executives (Constitution of the Republic of South Africa, 1996: 1321 – 1331), and allows them to have Provincial Constitutions (Constitution of the Republic of South Africa, 1996: 1331). Similarly, Chapter 7 of the Constitution established Local Government by stating that, "The local sphere of government consists of municipalities, which must be established for the whole territory of the Republic" (Constitution of the Republic of South Africa, 1996: 1331 (2)). The establishment of Local Government includes its objectives (Constitution of the Republic of South Africa, 1996: 1331 (2)), the categories of municipalities (Constitution of the Republic of South Africa, 1996: 1331 (3)), municipal "Powers and functions" (Constitution of the Republic of South Africa, 1996: 1331 (4)) and the "Composition and election" (Constitution of the Republic of South Africa, 1996: 1331 (4)) of these municipalities. Chapters 6 and 7 of the Constitution therefore create decentralised spheres of government in provinces as well as local government.

My interest in decentralisation as a topic is almost formal and technical because it is as a result of wanting to understand why key aspects of education create headline grabbing news, which actually constitute a public administration crisis. In other words, at every turn of the academic year in basic education, there is a stomach sinking intuition that education in South Africa is failing the Bill of Rights. The question that I have always struggled with is, who is administratively responsible for these crises and why do they seem to get worse? This is the same question I had about the Limpopo Text Book Crisis. The latter refers to an administrative breakdown in the Limpopo Department of Education (LDE), between 2011 and 2013. The LDE was said to be in such deep financial and administrative chaos at the time that it was unable to procure text books for learners, in a timeous and effective manner for the 2011 academic year. I conducted research into the crisis for my Honours research and found that there was a reluctance, on the part of national government, to step in and assist the LDE with this crisis (Chilenga, 2013). There was, at the time, a report that investigated the crisis, its causes and measures that were being taken to remedy the situation – the Metcalfe Report. Although this report and my research at the time were useful for understanding part of the education system then, I later realised that the Limpopo Text Book Crisis was symptomatic of a wider public administration crisis in the LDE.

That wider public administration crisis in the LDE was one of financial mismanagement and over expenditure to the extent that there was no funding left in the department to ensure the fulfilment of education service delivery such as procuring and delivering text books on time. Text books are just one of the few crucial programmes that are contained in the LDE; and thus, there has to be a wider problem for these programmes to collapse, as they did at the time. I discovered this during my research for this thesis – but my intuition about there being a wider problem was correct. One argument that I made in my earlier research is that a timeous response from national government was required in the form of a Section 100 (S100) Constitutional intervention. At the time, I assumed that such a decisive measure would ensure service delivery from the LDE. My assumption was partly correct, on the basis that the LDE was in far more trouble than I was able to find evidence for at the time. However, I did not realise then that S100 was part of a wider governance model of decentralisation in South Africa.

Besides a personal research interest in education as a public service, the overarching motivation for researching education is that education is the largest decentralised department in South Africa, in terms of the size of the department and government expenditure. Therefore, decentralisation can be observed and tested in this large and integral department. There are a number of ways that one can illustrate the size and importance of the DBE and its provincial departments. One of the ways is by examining trends in national estimated growth in expenditure for education, as compared to estimated growth for expenditure for other public goods and services, or national priorities. The National Treasury's Growth and Consolidated Growth data indicates revised and estimated budgets for spending each financial year. Since 2007/08, revised estimates for education expenditure have usually exceeded expenditure in other sectors such as health; social security and welfare; housing and other social services; police, prisons and courts; defence and intelligence; economic services; general administration; and, a contingency reserve. I have collated and tabulated this data below, where the highest revised estimates for each financial year are highlighted in orange.

A second way to measure the size and importance of education in South Africa is the size of the fiscal transfers from the national to the provincial sphere, known as the equitable share. According to UNICEF's 2017 data, provinces received an overall equitable share of 48% from the national fiscus for education (UNICEF, 2017). The net highest equitable share distributed was for health at 27% overall. However, the breakdown of this equitable share per province is quite astounding because some provinces, such as KZN, receive as much as 22.3% of their equitable share for education; while a province such as the North West receives only 2.3% of the equitable share. This is justified by the calculation of the equitable share per province. UNICEF's equitable share distribution table is illustrated below.

A third way to measure the size and importance of education as a decentralised department in South Africa, is to examine actual expenditure on basic education, compared to other government priorities. Below are two National Treasury infographics displaying the most recent budget expenditure breakdowns for 2017/18 and 2018/19. Education as a sector receives R320.5bn and R351.1bn in 2017/18 and 2018/19, respectively. Basic education, within the education sector, received R216bn in 2017/18 and R230.4bn in 2018/19. These are the highest expenditure figures for government priorities. A fourth and final way to measure the size of education in South Africa is by summarising how many learners, educators and schools it has across the country. According to the DBE, there are over 12 million learners in South Africa's public ordinary schools; over 400 000 educators besides office-based staff; and over 25 000 schools in 86 districts. Education is thus a mammoth task. Therefore, my choice of the DBE as a case study can be used to draw conclusions not only about S100 interventions and South Africa's decentralisation, but also about the decentralisation processes in the largest decentralised department in South Africa and the consequent relationships between the national and provincial spheres.

Table 1: Estimated and Consolidated Expenditure Growth, National Treasury (2007/8 – 2015/16)

	Revised Estimates (R Billion)								
Sector	2007/08	2008/09	2010	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Education	105.7	127.3	165.1	172.7	195.5	220.9	240.5	189.5[4]	213.7
Health	68.2	80.8	104.6	102.5	113.8	251.3	134.3	144.6	159.4
Social Security & Welfare/Social Protection	92.2	105.4	128.4	132.8	144.7	41.7	130.9	143.9	154.4
Housing and other Social Services/ Community Amenities	45.5	65.3	93.2	102.1	107.5	119	127.2		178.2[5]
Police, Prisons and Courts/Public Order and Safety	58.4	67.8	85.6	84	90.5				
Defence and Intelligence/Defence	28.6	30.8	33.8	34	38.4	142.5	154.5	163	171.5
Economic Services/Affairs	143.2	126.2	161	140.3	53	44.1	47.9		187.8
General Administration/General Public Services	34.9	48.1	123.4	51.3	52.1	53.8	62.6	64.7	97.5
Contingency Reserve	-	-	-	-	-	-	-	-	-
Recreation & Culture				6.4	9	-			
Environmental Protection[6]				4.7					
Science and Technology					9.9	15.1	17.5		
Economic Infrastructure					81.5	79.2	84.7		
Post-school Education and Training								64.6	64.2
Agriculture, Rural Development & Land Reform									25.2

Sources: National Treasury Consolidated Growth Expenditure, 2007/8 – 2015/16

[4] Becomes Basic Education

[5] Becomes Human Settlements and Municipal Infrastructure)

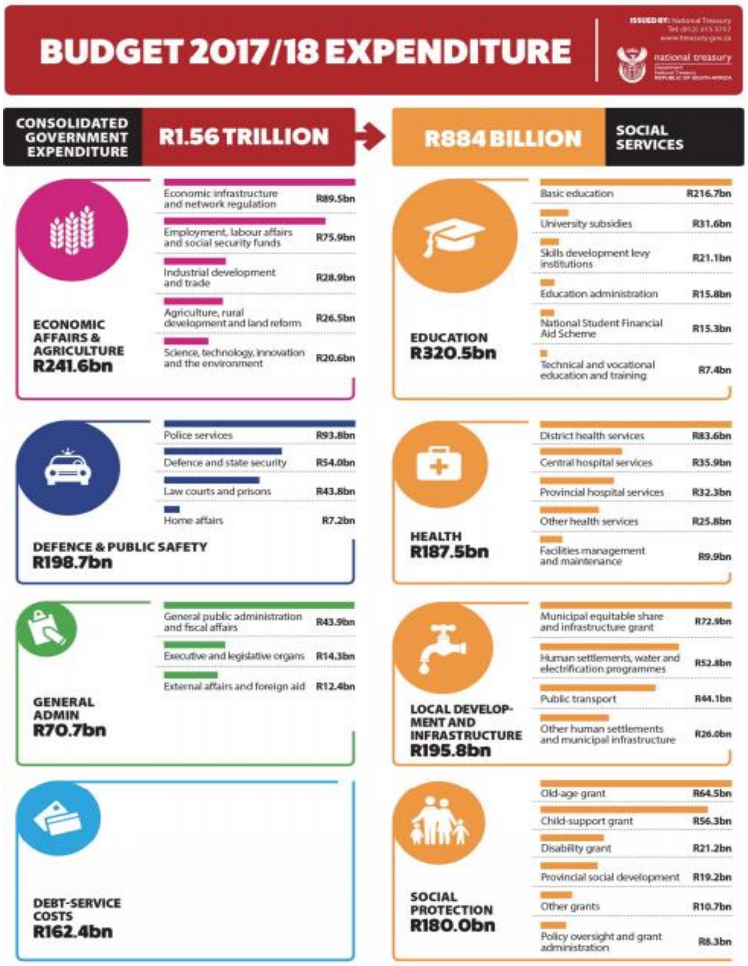
[6] Merged with Economic Affairs in 2012/13

Table 2: Equitable Share Distribution in Provinces, 2017

	Education (48%)	Health (27%)	Basic share (16%)	Poverty (3%)	Economic activity (1.0%)	Institutional (5%)	Weighted average
Eastern Cape	15.1%	13.5%	12.6%	16.3%	7.6%	11.1%	14.0%
Free State	5.3%	5.3%	5.1%	5.2%	5.0%	11.1%	5.6%
Gauteng	18.0%	21.8%	24.1%	17.3%	34.3%	11.1%	19.8%
KwaZulu-Natal	22.3%	21.7%	19.8%	22.2%	16.1%	11.1%	21.1%
Limpopo	13.0%	10.3%	10.4%	13.6%	7.1%	11.1%	11.7%
Mpumalanga	8.4%	7.3%	7.7%	9.1%	7.5%	11.1%	8.1%
Northern Cape	2.3%	2.1%	2.1%	2.2%	2.1%	11.1%	2.7%
North West	6.5%	6.7%	6.8%	8.0%	6.5%	11.1%	6.9%
Western Cape	9.1%	11.3%	11.3%	6.1%	13.6%	11.1%	10.1%
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

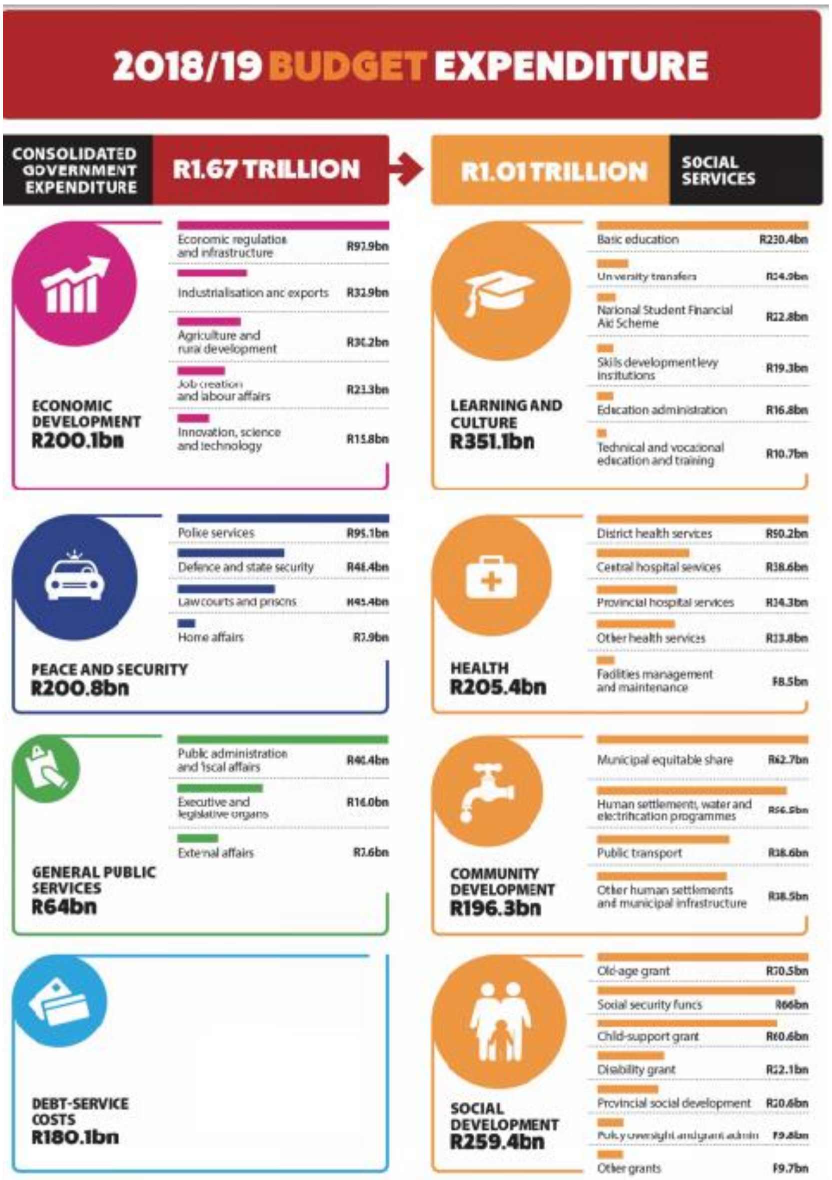
Source: UNICEF South Africa, 2017

Figure 1: Breakdown of Consolidated Government Expenditure, 2017/18



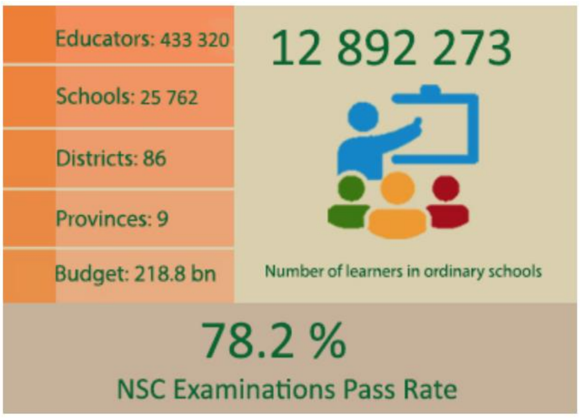
Source: National Treasury, 2017

Figure 2: Consolidated Government Expenditure, 2018/19



Source: National Treasury, 2018

Figure 3: DBE Statistics for Basic Education



Source: DBE, 2019

1.5 South Africa as a Decentralised Unitary State and Section 100 of the Constitution

South Africa is described as a decentralised unitary state (Humphries and Rapoo, eds., 1994: 9). Section 1 of the Constitution describes the republic as "one, sovereign, democratic state" (Constitution, 1996, s1). This indicates that unlike the apartheid concept of a minority national state with independent and Bantustan territories, the South African democratic state is inclusive of all territories within its borders. Chapter 3 of the Constitution, Cooperative Government, describes the Government of the Republic as follows:

> "In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated" (Constitution, 1996, s40 (1)).

There is no explicit mention that the government of the republic is decentralised. But the practical implication of s40 is that the national, provincial and local spheres will share responsibilities of governance. Moreover, each sphere, although distinctive in character, should be *inter*dependent and *inter*related. This means that no single sphere is completely independent or autonomous. Rather, spheres should work together at all times. In terms of sharing the responsibilities of governance, Schedule 4 and 5 of the Constitution stipulate areas of concurrent and exclusive responsibility, as outlined earlier. Given the interdependent and interrelated nature of South Africa's government, s41 (1) of the Constitution outlines how the spheres should work together, using the "Principles of cooperative government and intergovernmental relations" (Constitution, 1996, s41 (1)). Four of these principles are relevant for outlining the limits of decentralisation in South Africa:

> "41. (1) (e). Respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
>
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> (h) co-operate with one another in mutual trust and good faith by –
>
> 1. Fostering friendly relations;
> 2. Assisting and supporting one another;
> 3. Informing one another of, and consulting one another on, matters of common interest;
> 4. Co-ordinating their actions and legislation with one another;
> 5. Adhering to agreed policies and procedures; and
> 6. Avoiding legal proceedings against one another" (Constitution, 1996, s40 (1) (e) – (h)).

The limits of decentralised governance in South Africa are firstly, what the Constitution prescribes. Secondly, there cannot be encroachment on any of the spheres, in geographical, functional or institutional sense. And thirdly, the basis of cooperation between the spheres is good faith which is underpinned by the sub-principles listed.

South Africa's decentralisation is further undergirded by the role of the Parliament and the legislative authority that exists in the republic. S42 (1) of the Constitution establishes that Parliament comprises the National Assembly and the National Council of Provinces (NCOP; Constitution, 1996, s42 (1) (a) and (b)). With regards to the legislative authority in South Africa, the national sphere has legislative authority in Parliament; the provincial sphere has legislative authority in provincial legislatures; and, the local sphere has legislative authority in Municipal Councils (Constitution, 1996, s43 (a) – (c)). However, as will become apparent in my thesis, the unitary character of the South African state lies more in its goals and less in its technical set up; and that its decentralised governance is a careful tread between developmental interests and decentralised/federal compromise.

There are a number of Constitutional interventions that can be made within the republic when a sphere is not fulfilling its executive obligations. But before outlining these Constitutional interventions, it is important to conceptualise what an intervention is, and differentiate it from a Constitutional intervention. Generally, an intervention can be described as, "action taken to intentionally become involved in a difficult situation in order to improve it or prevent it from getting worse" (Cambridge Dictionary, 2018: online). This describes any remedial action that can be taken in any situation. Such a general intervention can be distinguished from the interventions that are outlined in the Constitution – which I have termed *constitutional interventions*. The latter are clearly spelled out in the democratic Constitution with particular prescripts and procedures that must be followed in order for this type of intervention to be considered legally constitutional.

The first type of intervention that is mentioned in the Constitution is under Chapter 4, which discussed Parliament and its national legislative authority. S44 (2) of the Constitution states that,

> "Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –
>
> 1. To maintain national security;
> 2. To maintain economic unity
> 3. To maintain essential national standards;
> 4. To establish minimum standards required for the rendering of services; or
> 5. To prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole" (Constitution, 1996, s44 (2) (a) – (e)).

This means that Parliament may pass legislation – as is its right according to s76 (1) – that deals with the functional areas of exclusive provincial legislative competence (Constitution, 1996, Schedule 5). In other words, Parliament can create laws that will affect the administration and governance in provinces. The conditions under which this intervening legislation can be passed are laid out in subsections (a) to (e). These conditions appear to be last resort measures or extreme circumstances, in which provinces have failed to fulfil their Schedule 5 obligations.

The second type of intervention that is stated in the Constitution is under Chapter 5, which discusses the President and National Executive. This section of the Constitution is called "National intervention in provincial administration", and it outlined as follows:

> "[Section] 100. National intervention in provincial administration – (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking appropriate steps to ensure fulfilment of that obligation, including –
>
> (a) Issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) Assuming responsibility for the relevant obligation in that province to the extent necessary to –

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

(ii) Maintain economic unity;

(iii) Maintain national security; or

(iv) Prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole" (Constitution, 1996, S100).

The details of this intervention will be examined later in this thesis. For now, it is important to note that this S100 of the Constitution contains two types of intervention. The first is S100 (1) (a), where the national executive issues a directive to the effect that a provincial executive need to take remedial action in a particular provincial area. The second type of intervention in this section is S100 (1) (b), where the national executive takes responsibility for the executive obligation that is dysfunctional. The conditions under which these interventions can be carried out are exactly the same as the first intervention stated in S44 (2).

Where the national executive does use a S100 (1) (b) intervention, the Constitution outlines the following procedure:

(2) If the national executive intervenes in a province in terms of subsection (1) (b) –

1. It must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
2. The intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approves the intervention;
3. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive" (Constitution, 1996, s100 (2)).

Furthermore,

"(3) National legislation may regulate the process established by this section." (Constitution, 1996, s100 (3)).

According to this procedure, the NCOP must be notified, approve, monitor and may make recommendations about the ensuing intervention. Also, as will be examined later in my thesis, the Constitution allows for national legislation to be created in order to regulate S100.

The third type of intervention contained in the Constitution is contained in Chapter 6, and it allows a province to intervene in local government. Section 13mai9 of the Constitution states that:

"(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

1. Issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

2. Assuming responsibility for the relevant obligation in that municipality to the extent necessary to –

1. Maintain essential national standards or meet established minimum standards for the rendering of a service;

2. Prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

3. Maintain economic unity; or

4. Dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step" (Constitution, 1996, s139 (1)(a) – (c)).

It is clear from this cascading legislation that the national executive is responsible for intervening in provinces in order to ensure the maintenance of particular standards. And if we read these standards carefully, they pertain to maintaining the nation, the economy and national security. Therefore, in a very positive and tangible sense, the notion of interventions in the Constitution is to maintain oversight and the ability to remedy problems in provinces and local governmentwh, even though the South African state is decentralised. The argument that Constitutional interventions are *mechanisms of decentralisation for the purpose of maintaining the unitary state* is substantiated in the forthcoming chapters.

1.6 Methodology

My thesis is a qualitative study that focuses on two case studies in the LDE and ECDE, and the S100 (1) (b) interventions that were invoked in these departments by the national executive and implemented through the DBE. I chose a qualitative approach because my thesis is concerned with the *initiation* and *process* of both S100 (1) (b) interventions and the effects thereof on the decentralised relationship between the national and provincial spheres of government. My thesis does contain quantitative data, although very little; but it is less concerned with the quantitative outcomes of both interventions. Through an analysis of how both interventions played out in these two departments, I seek to understand a very particular relationship in governance and public administration. Accordingly, Flick (2018), describes qualitative research as one that,

> "intends to understand, describe, and sometimes explain social phenomena 'from the inside' in a number of different ways":
>
> 1. "experiences of individuals or groups are analysed"
> 2. "interactions and communications are analysed in the making"
> 3. "documents…or similar traces of experiences or interactions are analysed" (Flick, 2018)

The two case studies enabled me to examine S100 (1) (b) interventions 'from the inside'. Specifically, I sought individual accounts of the intervention process from officials within the two departments and other individuals or groups familiar with, or involved in, interventions. I also sought primary source data such as government memoranda and meeting minutes, plans and other official documents. When I began my research, I thought that this documentation would give me official national government insight into interventions. But this data ended up revealing far more than that. I will now discuss my data collection process through the interviews and primary source documentation.

1.6.1 Data Collection

Flick describes the "aims of qualitative data collection" as, "to provide materials for an empirical analysis of a phenomenon that a study is about" and "how to do the collection" (Flick, 2018). This section will, thus, discuss the type of data that I sought, the reasons that I sought it, and what I actually gained from the data collection process.

1.6.1.1 Semi-Structured Interviews

I used semi-structured interviews whereby I had an interview schedule with the questions that I wanted to ask interviewees. Prior to the interview, I informed participants that I would ask questions for clarity or seek further explanations, if need be. Semi-structured interviews allowed me some degree of flexibility that I required. Since I do not work in government, it is possible that my participants would use some technical jargon that would have been difficult for me to follow if mentioned in an interview. Secondly, semi-structured interviews allowed me to ask follow-up questions and seek explanations for things that the participants said. This is generally an advantage of semi-structured interviews.

In order to assess the decentralised relationship between the national and provincial sphere, I had to conduct interviews in relevant departments in both these spheres. For my research, a relevant department is one that is familiar with decentralisation from a Constitutional perspective; and/or one that has been or is involved in S100 interventions. The latter was essentially a purposive selection process. And the national departments that I chose are:

1. Department of Cooperative Governance and Traditional Affairs (COGTA)
2. Department of Basic Education (DBE)
3. National Treasury

In COGTA, I was aware that the long-standing Deputy – Minister of this department was involved in the constitutional development of the South African Constitution, 1996. I was therefore, interested in his perspective on how the writers and developers of the Constitution thought decentralisation would be implemented practically; their reasons for including the S100 clause in the Constitution; and whether interventions of this specific nature were actually assisting provincial departments and strengthening the relationship between the national and provincial spheres. Upon contacting COGTA, the Deputy-Minister's officer referred me to a senior manager, who I interviewed, and agreed to a follow up interview if my questions were not satisfied. I gained a lot of knowledge from that interview at COGTA but required more depth from the Deputy-Minister about the specific questions that I sent to his office. Unfortunately, despite my repeated follow ups and a telephone call from the Deputy-Minister himself, the follow up interview with the Deputy-Minister was never given. However, the Deputy-Minister also referred me to the Deputy-Minister for the DBE, who I did interview. These referrals were a significant part of my research because they provided me access to officials and individuals who I would have waited a long time to interview. This is often referred to as 'snowballing' in qualitative research. I managed to interview two ex-government officials who assisted me greatly in my research, based on referrals and snowballing. These two individuals were:

1. Professor Mary Metcalfe: former MEC for Education in Gauteng, writer of the Metcalfe Report during the Limpopo Text book Crisis (2011 – 2013); as well as other roles related to education, such as Head of Wits School of Education, and DG in the Department of Higher Education and Training; and,

2. Geraldine Fraser-Moleketi: former minister of the Department of Public Service and Administration (DPSA).

The above interviews provided me with an overview of both the education and public administration landscapes in the early years of South Africa's democracy, and the interventions that took place at that time. For the interviews in the DBE, I sought an interview with the Minister of Basic Education, and applied for the permission to interview her, as per government protocols. Instead, I was referred to two officials in this national department. The interviews at National Treasury were obtained following a referral.

For my interviews in the PEDs of the LDE and the ECDE, I had to apply for permission to conduct these interviews, as per government protocol. This was often a long process with very little feedback and communication even after several attempts to get feedback. In the case study of the Eastern Cape, I actually travelled from Johannesburg to East London (which is near the ECDE) to follow up on my request for permission to conduct research. When I appeared at the department in person to follow up on my application, the process became smoother and easier upon my return to Johannesburg. Both my requests to conduct research in these departments was granted with certain conditions, which presented some limitations to my study – to be discussed below. I managed to conduct a total of 30 interviews between the national and the provincial spheres of government. However, these were only the interviews that were consented to or recorded. In some instances there were conversations or discussions that individuals or groups were willing to have, but they did not want these to be considered formal interviews, did not want them to be recorded or simply told me that they can give me background information but nothing further. Some individuals and groups literally told me where to find information, or handed it to me abruptly in person, but did not want to be part of an interview. This leads to part of my data collection exercise for my primary source documentation. And to protect the safety and integrity of these individuals and groups, I have not included their names, organisations, interests or anything that can identify them; except where this already appears in the public domain, or where they pointed me to the information they wanted me to have, or gave me, which reveals them. Where the latter is the case, I have focused on the content of the materials that they pointed me to or gave me, and not on the identity of the individuals or groups.

Given the diversity of my research participants and the information I sought, interview questions varied. Within the LDE and ECDE, I asked the following questions:

1. What knowledge do you have of the intervention that took place in the department, between 2011 and 2015?
2. What led to the initiation of the intervention?
3. How would you say the process was initiated and carried out by the national government, in the department?
4. How was the intervention received by the department?
5. How would you describe the intervention between the national and provincial departments of education?
6. Is there anything that you would like to add about the relationship between the national and provincial levels of government?

These questions were not always asked in this exact order, or with the same wording, but I tried as much as possible to follow the order and intent of the questions. In a national department, such as COGTA or the DBE, I asked questions such as;

1. How would you describe the relationship between the national Department of Education and its provincial offices?
2. What were the different factors that led to interventions in the Eastern Cape and Limpopo departments of education?
3. What were the similarities that led to interventions in the Eastern Cape and Limpopo departments of education?
4. How would you describe the differences and/or similarities of the implementation of the interventions in either province?

While interviewing people with a longer institutional knowledge of education or intergovernmentalism between the national and provincial departments, I tailored my questions around specific time periods and events as well as asking about their experiences with national interventions.

1.6.1.2 Primary Source Documentation

As mentioned earlier, I sought very specific primary source documentation, mostly government documentation, such as the following:

1. Memoranda pertaining to the S100 (1)(b) interventions;
2. Meeting minutes pertaining the how the interventions were initiated and proceeding;
3. Plans detailing the implementation of the interventions;
4. Any other official documents to the effect of the case studies that I was examining.

I applied for these documents using the Protection of Access to Information Act 2 of 2000 (PAIA). Accessing the primary sources outlined above through conventional channels proved to be futile. My initial application for these documents through the Office of the Presidency was rejected, I also applied through the LDE, and the application was sent to the Limpopo Provincial Treasury, which denied having the said documents. This was strange because an individual in Limpopo showed me the documents that I sought – as they pertained to the LDE intervention – and told me that the documents exist and that researchers could access them. In the end, I gained access to most of the documents I sought in the most unusual ways: a lot of the times, individuals and groups who do not want to be identified or who did not consent to being identified, either sent /handed me the information directly, or told me where to find it. I described this as ‘access gained’. In some cases, this data came in the form of court case documents.

A summary of my data collection process is provided below, and organised chronologically. The table details the dates of my data collection exercises, or access gained to primary source documentation. Some of the data collection that I embarked on is not listed in this table because that information pertains to discussions or conversations that potential interviewees did not want to be recorded or noted. Therefore, this summary table of my data collection is brief.

Figure 4: Summary of Thesis Data Collection Process

Date	Applications and Attempts at Data Collection	Type of Data Collected
13 April 2016	Request to interview with former MEC for Education in Gauteng	
28 April 2016	Application submitted to the DBE, LDE and ECDE to conduct research	
03 June 2016	Permission granted to conduct research in the LDE	
08 June 2017		Primary: Access to reports and legal documents pertaining to the S100 (1)(b) intervention in the LDE
01 August 2016	Visit to the ECDE, in Eastern Cape, to request permission to conduct research	
08 August 2016	Request to interview former HOD of LDE submitted	
16 August 2016	Ethics Clearance Certificate granted by the University of the Witwatersrand	
18 August 2016	Application submitted to the ECDE via email and a hard copy via Post Net, requesting permission to conduct research	
02 November 2016 – 19 November 2018	Repeated attempts to interview the Deputy Minister of COGTA	
14 November 2016	Request to interview officials at National Treasury submitted	
15 November 2016	Permission granted to interview National Treasury officials	
24 November 2016		Primary: Interview at COGTA
29 November 2016		Primary: Interview at National Treasury
20 January 2017	Follow up email requesting permission to conduct research in the DBE	
06 March 2017	Follow up email requesting interview with former MEC for Education in Gauteng	
09 March 2017	Request for access to Report on S100 intervention in the LDE submitted to the ministers of the DBE and National Treasury	
13 March 2017	Permission granted to conduct research in the ECDE	
20 March 2017	Request to access court documents pertaining to S100 (1)(b) intervention in the ECDE	
07 April 2017		Primary: Interview with former MEC for Education in Gauteng
29 May 2017		Primary: Access to government documents pertaining to the S100 (1)(b) intervention in the ECDE
09 June 2017		Primary: Interview with official from DBE
04 – 28 July 2017		Primary: Interviews conducted in the LDE
06 July 2017		Primary: Interview with official from DBE
14 July 2017	PAIA request submitted to LDE, for access to information on S100 and S18 interventions in the LDE	
20 July 2017	Request to interview Administrator of intervention in LDE	
04 October 2017		Primary: Interview with former HOD of DPSA
05 October 2017	Limpopo Provincial Treasury acknowledges PAIA request submitted for access to LDE S100 and S18 interventions	
06 October 2017	PAIA request for access to Cabinet memoranda pertaining to the LDE and ECDE intervention,	

	submitted to the Office of the Presidency as a hard copy, Pretoria	
08 – 20 October 2017		Primary: Interviews conducted in the ECDE
19 October 2017	PAIA request submitted to the LDE, rejected by the Limpopo Provincial Treasury	
07 November 2017	PAIA request submitted to the Office of the Presidency rejected	
16 January 2018		Primary: Interview with Deputy Minister of DBE
29 September 2018		Primary: Interview with former Administrator of the S100 (1)(b) intervention in the LDE
Number of Consented to and/or Recorded Interviews pertaining to the Histories of Education		2
Number of Consented to and/or Recorded Interviews Conducted in the National Sphere		5
Number of Consented to and/or Recorded Interviews Conducted in the Provincial Sphere		23
Total Number of Consented to and/or Recorded Interviews Conducted		*30*

1.7 Data Analysis – Thematic Analysis

The data I gathered was analysed thematically. Braun and Clarke describe thematic analysis as, "a method for identifying, analysing, and reporting patterns (themes) within data. It minimally organises and describes your data set in (rich) details" (Braun and Clarke, 2006: 79). As I was embarking on two case studies of government processes, I needed a method of analysis that would allow me to get to the 'rich details' of my data either quickly, or logically. For Boyatzis, analysing data thematically,

> "enables the researcher to encode qualitative information using explicit 'codes' which are usually presented as a list of themes; a complex model with themes, indicators, and qualifications that are causally related; or something in between these two forms" (Boyatzis, 1998: 4).

I chose this method of analysis because firstly, I needed a way to identify qualitative indicators about how the intervention processes in my two case studies played out. As has been explained, I was trying to understand S100 interventions and their broader correlation to the decentralised relationship between the national and provincial spheres. And seeing as there were no clues about the correlation between interventions and decentralisation, I needed to sift through the data that I had to find clues and indicators. Thematic analysis allowed me to do this. This process of finding themes, or codes, is discussed further below. Secondly, this technique was the most suited for the task at hand given that the data set was both varied and complex. The data was mostly in the forms of interviews, official government documents and court documents. Sometimes, none of the data spoke to each other. As such, thematic analysis allowed me to look for any themes that I could find in the data and use those themes to make inferences about decentralisation.

The process of thematic analysis was difficult in the beginning, not because of the method, but because of the fact that I had to grapple with all the data I had and organise it accordingly. In the LDE case study, this involved transcribing all my interviews and reading them repeatedly. In the ECDE case study, this involved going through complex data of different formats and finally settling on organising it chronologically, and then working with that timeline to establish the facts of the case study. This first step is known as "familiarising yourself with the data" (Braun and Clarke, 2006: 87). There are five other steps in thematic analysis, depicted below, as per Braun and Clarke.

Table 3: Braun and Clarke's (2006) Phases of thematic analysis

Phase	Description of the process
1. Familiarising yourself with the data	Transcribing the data (if necessary), reading and re-reading the data, noting down the initial ideas.
2. Generating initial codes	Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code.
3. Searching for themes	Collating codes with potential themes, gathering all data relevant to each potential theme.
4. Reviewing themes	Checking if the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic 'map' of the analysis.
5. Defining and naming themes	Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells, generating clear definitions and names for each theme.
6. Producing the report	The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back to the analysis to the research question and literature, producing a scholarly report of the analysis.

Source: Braun and Clarke (2006: 87).

Using this process of thematic analysis, I looked for themes in my data – mostly, things that were repeatedly mentioned by interviewees, facts and the contestation of certain facts that appeared in documents. I then looked for how often these themes were repeated or how important they were to my work. It was at that point that I was reviewing, naming and defining the themes. Boyatzis describes this analysis process in 4 steps:

1. "Sensing themes – that is, recognising the codable moment.
2. Doing it reliably – that is, recognising the codable moment and encoding it consistently
3. Developing codes
4. Interpreting the information and themes in the context of a theory of conceptual framework – that is, contributing to the development of knowledge" (Boyatzis, 1998: 11).

The themes that I identified and used for interpretation arose from the data that I had at the time. Braun and Clarke call this "inductive thematic analysis" because the themes "are strongly linked to the data" (Braun and Clarke, 2006: 83). This is in contrast to a "'theoretical' thematic analysis" which is as a result of the "researcher's theoretical or analytic interest in the area, and is thus more explicitly analyst-driven. This form of thematic analysis tends to provide [a] less…rich description of the data overall, and a more detailed analysis of some aspect of the data" (Braun and Clarke, 2006: 84). Similarly, Boytazis describes inductive thematic analysis as "data-drive" and contrasts this with other approaches of thematic analysis, depicted below (Boyatzis, 1998: 44). The shaded grey area in the depiction below summarises exactly the approach inductive, or data-driven, analysis approach that I used to analyse my data.

Table 4: Boyatzis's (1998) Stages and Steps in Using Thematic Analysis

Stage	Theory – Driven Approach	Prior – Research – Driven Approach	Data – Driven Approach
I	Deciding on sampling and design issues	Deciding on sampling and design issues	1. Deciding on sampling and design issues 2. Selecting subsamples
II	1. Generating a code from theory 2. Reviewing and rewriting the code for the applicability to the raw information 3. Determining the raw reliability	1. Generating a code from previous research 2. Reviewing and rewriting the code for applicability to the raw information 3. Determining the reliability	1. Reducing the raw information 2. Identifying themes within subsamples 3. Comparing themes across subsamples 4. Creating a code 5. Determining the reliability
III	1. Applying the code to the raw information 2. Determining the validity 3. Interpreting results	1. Applying the code to the raw information 2. Determining the validity 3. Interpreting results	1. Applying the code to the raw information 2. Determining the validity 3. Interpreting results

Source: Boyatzis (1998: 44)

1.8 Limitations, Ethical and Legal Requirements

1.8.1 Anonymisation

One of the ethical requirements that became part of my research was the anonymisation of interviewees of my research. This arose when one of the departments from my case study granted me permission to conduct research on condition that "institutions and respondents must not be identifiable in any way from the results of the investigation". It was not possible to anonymise institutions because it is public knowledge that both the LDE and ECDE were under S100 (1) (b) intervention during the time period under examination. However, I had to abide by the condition that my interviewees, "the respondents", are not identifiable and therefore, will be anonymised. As the rest of this Methodology section will show, this was extremely important in both case studies because of the nature of both the departments in the case studies. As such, I decided to anonymise all the names of the individuals of the interviewees in each of the departments.

Unfortunately, I was not able to choose the participants who I interviewed because I had no prior knowledge of their involvement in the interventions. And when I arrived in both the departments, I was told who I would be interviewing. The latter served as both a limitation and a way to anonymise my interviewees. It was a limitation in the sense that there were times when I interviewed participants who denied having any knowledge of the intervention and repeatedly ignored me, despite the research unit pleading with them to allow the interview, or them agreeing to the interview on a prior occasion and then not participating when I showed up to interview them. On the other hand, not knowing who I would be interviewing, allowed me to ask participants the same sets of questions without any bias through any prior knowledge of their involvement in the intervention.

I anonymised my interviewees in a way that reflects the members of staff that I was led to interview in both the LDE and ECDE. I recognised that those who I was led to interview comprised members of the Senior Management Service (SMS) in each of these department. Cameron describes the SMS as, "the top four levels of management within the public administration which are directors-general, deputy directors-general, chief directors and directors" (Cameron, 2009: 925). The SMS is one of the most recognised set of public administrators in departments, and it is not easy to identify where in the SMS an interviewee has a role. Thus, I anonymised both departments using this coding for my interviews:

1. LSMSI: Limpopo Senior Management Service Interview
2. ECSMSI: Eastern Cape Senior Management Service Interview

This anonymisation code appears in the rest of this thesis. Apart from this anonymisation of departmental officials, there was one other anonymisation that I did; anonymising one of the Administrators who oversaw the intervention in the LDE. I chose to anonymise this individual's because the allegations levelled against them are serious, I did not want to disclose their identity without having interviewed them. I however, was unable to interview them. So, in order to prevent legal or ethical reprisals, I have changed that Administrator's identity in my research.

1.8.2 Cancellations of Participation

Like in most research, participant withdrawal did occur. Some interviewees agreed to an interview but later reneged on the agreement. In some cases, it was clear that they agreed in the presence of a colleague from the research unit, but had no intentions of giving me information once we sat down for the interview. In other cases, interviewees interrogated me for conducting this study and evaded answering to any of my questions, or denied any knowledge of or involvement with the S100 (1)(b) interventions in their departments.

When doing studies such as mine, the possibility of being tracked cannot be ruled out. There is an instance when one potential interviewee agreed to an interview but their secretary later called me cancelling the interview. I was however referred to another potential participant – who they had already called and confirmed that I had arranged to interview separately. This gave me the impression that my movements were being tracked through both departments. I did not have issues with such tracking because my research was not clandestine or misrepresented. But the idea that participants were cancelling or abstaining from answering questions, and then tracking who I was interviewing presented a limitation for me in that I could not get as much information from certain interviewees even after agreeing to participate.

1.8.3 Fear and Safety

Prior to conducting field work in both departments, I was warned that there was a lot of fear within the departments. And this fear was of reprisal or victimisation because the S100 (1) (b) interventions exposed a lot of mismanagement and corruption. I was also warned that if I feared for my own life or found myself in an uncomfortable situation, I was not obliged to stay in that situation in order to collect data. I followed that advice, and thankfully, did not end up in any unsafe situation. I was however, aware that my interviewees may be fearful. Therefore, I had to respect the limits of what interviewees were willing to say on and off the record, which is an ethical consideration.

1.8.4 Unevenness of Evidence in Case Studies

A final limitation of my study is that the data I collected was uneven in that, while I intended to use semi structured interviews and primary sources (government memoranda; meeting minutes; government plans of implementation of the interventions; any other official documents; and, semi-structured interviews) in both LDE and ECDE, it emerged that semi-structured interviews were more applicable and fruitful in the former province whereas primary sources were readily accessible in the latter. This unevenness of data meant that I had to rely heavily on interviews in the LDE case study, and official documentation in the ECDE case. I believe that this unevenness is reflected in the data I collected and compared in my findings chapters. It is important to note that I realised this unevenness during data collection. I tried to avert this situation by applying for access to primary source documentation in the case of Limpopo and attempting to interview more people in the Eastern Cape case. Both these attempts were futile. I overcame this limitation while writing up; by using what was available and inferring from that to the extent that it assisted me in answering my research question and making wider inferences about decentralisation.

1.9 Other Reflections

Conducting field work is a generally exhausting and draining experience. But there were a number of things encountered during my research that just left me with a sense of numbness and almost grief at the state of public administration. These issues do not fall under any of the limitations, ethical or legal requirements listed above. But a colleague advised me to reflect on them nonetheless, because they provide a context and give life to the experiences of my interviewees. They also provide me with a space to express some of the less technical or formal aspects of completing my PhD. They are thus reflections, and I think it’s important that I note them here, so that the reader is aware of the conditions of some of the public administration, as much as they are concerned with my findings.

1.9.1.1 Contextual Narratives and Political Conspiracies

Both the Eastern Cape ad Limpopo have their own narratives about the history, context and realities in their provincial administrations, and how this subsequently impacts on their working relationship with national departments and administration. Such narratives and political conspiracies are important for public administration because they allude to different perceptions, both national and provincial, that are necessary for understanding some of the differentiations in decentralised administrations. Throughout this thesis and in sources about decentralisation, this form of government is seen as legalistic, democratic and efficient. And the outcomes thereof are considered to be negative, particularly because subnational governments are weak, corrupt and unskilled. However, the narratives and political conspiracies illustrated in this thesis reveal the opposite: national administration and politics often interfere in subnational administrations.

Another issue that narratives and political conspiracies reveal is the level of violence – structural and physical that takes place in the provincial administrations. This is more than just a political-administrative interface; it is the threat and fear of individuals that permeates the administrative system, interferes in the interventions and ultimately provides a clot in the nervous system of state administration. I came across some of these narratives and political conspiracies during my field work. These were often given to me off the record and stayed with me because long after this research is done, the violence against these interviewees remains. In the immediate context of my thesis, these narratives and political conspiracies reveal perceptions about how interventions really pan out and why their solutions fail to take root. The narratives however, lingered with me as I embarked on my field work, while I was in the field, and generally as I wrote the findings of each of my case studies. Apart from the caution that I had to exercise for my personal safety, I do still wonder how the work and lives of my participants are affected in public administration, and not just when researchers like myself use their experiences during field work. Below are some of the chilling stories that I was told during my field work:

1.9.1.2 The Following

One participant was explaining to me how powerful the unions are in one of the provinces; so powerful, that they rendered the department ungovernable because they instructed union members not to listen to the intervention administrator, as they disagreed with the administrator on the necessary course of action during the intervention. The administrator did not live in the province permanently and was living in temporary accommodation close to the relevant department. Upon leaving the department one day after work to go to their accommodation, the administrator noticed a union member, in a vehicle behind them, following the administrator to their accommodation. Scared, the administrator decided to drive onto a highway back to Johannesburg instead of driving back to their accommodation; and, the union member only stopped following them halfway to Johannesburg. That administrator never returned to the relevant province. The participant literally described the administrator's experience as being "frustrated out" of the province.

1.9.1.3 The Haunting

Another participant, after explaining their role in one of the interventions, discussed the risk and danger to their lives. After the intervention, the participant was out of the relevant province and got a call from someone they had worked with in the provincial treasury of that province. The caller asked the participant if they were still in the province; and, if they weren't, not to return because there was a "bounty" on their head. The source of the bounty was an individual whose education procurement contract was terminated when the participant ended the contract due to tender irregularity. The participant told the caller to pass on the following message: "Tell them to look me in the eye when they shoot me so that I know who to haunt when I die."

1.9.1.4 Off the Record

Yet another participant shares a lot of information about the intervention processes that had been carried out in their province. But they refused to go on the record at any point. Their reasoning was that, "This is the type of stuff that gets people killed around here."

1.10 Contribution of Thesis

The literature and understanding of decentralisation in South Africa has been approached from different historical, developmental and administrative angles. However, there has not been a consistent and thorough pulling together of this material to analyse South Africa's experience of decentralization. As such, one of the contributions of my research will be a consistent and thorough examination of theories of decentralisaiton, as well as South Africa's constitutional, academic and practical experiences of decentralization. This contribution is significant because it analyses a form of governance that has been debated and critiqued, yet remains elusive in government policy and pronouncements. It is therefore crucial to provide analysis founded on as many sources as possible to understand the drive, or lack thereof, behind South Africa's government machinery, as opposed to selective sources that are convenient for the ensuing research.

Decentralisation has multiple meanings and applications, and this has to be contextualized in the African and South African contexts in order to be meaningful. Furthermore, we are reaching a critical juncture politically, wherein liberation politics in South Africa is being asked to account for its governance as well as its implementation of norms that facilitate freedom. This governance has been couched in decentralization, whose participatory democracy element, has been punted in decentralised local government elections.

At this same juncture, opposition political parties have been taking their battles to the decentralised local level, winning large metropolitans in local elections and becoming 'kingmakers' in other municipalities, using the fight against corruption as a key governance issue. Furthermore, the ruling party has repeatedly proposed that provinces be reduced in number (Gallens, 2017: online). All of these political issues at this point are theoretically linked to decentralisation and South Africa's experience with the same. And yet, some of the history and practice has collected dust instead of debate. Therefore, the first contribution of my thesis will be the testing of the decentralized relationship between the national and provincial spheres of government through the use of a constitutional intervention. This is a multifaceted project comprising the Constitution, law and public policy, as well as field work. To date, there has been very little academic, or even public, analysis on what an intervention is or what its consequences are. Apart from Mogofe (2014) and Shaikh (2017), there are no in-depth studies about the processes of S100 interventions in South Africa, despite their use and severity as instruments of decentralisation.

Secondly, this study contributes to the decentralisation debate by proffering a thorough analysis of the past and present forms of decentralization in South Africa. The aim is to inform future discussions and modes of governance in South Africa and beyond.

Thirdly, this research provides important lenses through which decentralization and be analysed, namely; the general provincial perspective, and provincial department perspectives. This contribution is significant in many respects. One reason is that the provinces and their democratic formations, are allegedly a compromise; but, the details of this compromise and the effects on South Africa's public administration remain under researched. This is astounding considering how the provinces in their current formations form power battlegrounds for political parties, and nodes of service delivery for individuals and communities. Instead, discussions about service delivery focus on the local sphere of government, which is known as the coalface of service delivery. While it is true that local government is responsible for many essential services, or 'competencies' as they are Constitutionally called, it is also true that there are provincial competencies that are just as important – including education.

Another reason why a provincial perspective on decentralisation a significant contribution is, is that a provincial study will provide depth into the understanding of provincial administrative configurations. This is important as it will provide an analysis apart from the political-administrative interface analysis, which posits that the role of politics has an impact on the functions and effectiveness of administration. Although the political-administrative interface is integral for an understanding of governance, it is crucial to examine governance from organisational and institutional vantage points before understanding how politics imposes on that structure. The Public Affairs Research Institute does this well, and we need more of this work to be transferred into both academia and government. In doing so, we open up a space to discuss real governance and politics. Thus, I intend for my research to add to organisatonal and institutional research from a provincial perspective.

A final reason why a provincial perspective on decentralisation is a significant contribution is that there needs to be constant interdisciplinary research into systems, processes and outcomes of governance. There is need for constant engagement with what is and what ought to be. We cannot reimagine government and bureaucracy without some in-depth reflection on what currently exists. To this end, work by Ncholo (2000), Fraser-Moleketi (2006), Ngoma (2010), and Mogofe (2014) have been instrumental in providing the details of governance in South Africa's democratic institutions; and we need to continue to build on this.

There is a terrible rumour that at the end of apartheid, the former regime burned and destroyed documents related to apartheid bureaucracy and governance. There is speculation about whether those documents were destroyed to conceal acts of complicity, guilt; or, create chaos for the incoming administration. Democratic administration and governance in South Africa thus needs to introspect and learn from itself because former evidence is now, allegedly, just ash. My thesis aims to contribute to introspection on our current public administration. And such contributions cannot be delayed any further because if South Africa and Africa continue to fail at governance, the historical indictment will be worse than that of oppressive regimes, as the democratic expectation and imperative is now different to what came before.

1.11 Outline of Thesis

Chapter Two of my thesis is the Literature Review. This Literature Review will serve two purposes. First, provides a theoretical framework for the rest of my thesis using the work of Hans Kelsen and Arend Lijphart. The second purpose is to survey the literature on decentralisation as a technical concept, a form of organising the state and as an enduring part of the African state in both oppressive and democratic periods. Chapter Three will provide a pragmatic and historical examination of decentralisation in South Africa. This examination will rely on the theoretical framework provided in the Literature Review. This examination will also provide a fundamental premise for my research, which is that decentralisation was present in both the apartheid state and the current democratic state. But the way in which decentralisation has been instrumental in both these states has been varied and for different reasons. Therefore, decentralisation is a mode of governance that can be used in either autocratic or democratic states. This is because decentralisation denotes the desired proximity of power in a state; and power, in turn, can serve both autocratic and democratic ends. In addition to this theoretical examination of South Africa's constitutions before 1993, as well as the debates between decentralisation and consociational federalism during the transition to democracy. Through the constitutional examination, I intend to prove that the apartheid state was centralised in some respects and decentralised in others. This will not lead to comparisons between the apartheid and democratic states. Rather, it will show how weak the foundations for the democratic state were. The examination of the debates between decentralisation and consociational federalism will delineate the clear differences between these modes of governance, and their practical considerations for South Africa's democracy.

Chapter Four evaluates the legal-administrative framework of democratic decentralisation in South Africa. That is, the 1993 Interim Constitution, the 1996 Constitution, the Intergovernmental Relations Framework Act, and the Public Finance Management Act. The purpose of this evaluation will be firstly, to illustrate that South Africa's democratic decentralisation is based on intergovernmentalism between the three spheres of government. Secondly, this chapter will show that South Africa's democratic decentralisation is implicit in the intergovernmentalism that is presented in the Constitution and its ensuing legislation. This means that the structure and flow of power in South Africa's state is implied, rather than explicitly stated as being a decentralised unitary state. Furthermore, Chapter Four will also outline and discuss the constitutional and legal interventions that are present in the legal-administrative framework. I will argue that these interventions are an illustration of foresight on the part of the Constitution authors and thus, interventions are a mechanism that keeps South Africa's democratic decentralisation functioning. Moreover, interventions are designed to protect the integrity of the unitary state. Finally, in this chapter, I examine a piece of pending legislation that could change the nature and course of interventions, if it is ever tabled and passed in Parliament.

Chapters Five and Six of my thesis will cover the findings of my case studies in Limpopo and the Eastern Cape. As with most case study approaches, both of my case studies will be as in-depth as possible using the data that was available at the time. Moreover, the case studies will employ thematic analysis as discussed in my Methodology section above. The case studies will also be organised according to the following schema: pre-intervention, during the intervention, and the end of the intervention. This schema is based on how a team at National Treasury explained the process of interventions, which will be expounded on in Chapter Four.

Chapter Five of my thesis will provide the findings of my first case study into S100 (1) (b) interventions through the DBE. These findings relate to the case study of the LDE. This case study is one that will illustrate that S100 (1) (b) interventions can be politically tainted and as such, are perceived as unsparing tools of restorative measures for administration. The case study will also illustrate that S100 (1) (b) interventions are not entirely successful due to a number of factors pertaining to the legal and administrative processes of interventions. And finally, the case study will illustrate that the LDE was actually in a worse position after the S100 (1) (b) intervention, than before that intervention began.

Chapter Six will focus on the ECDE case study findings. The ECDE case study is one that was more complex to decipher because of the nature of the data collected. What this case study illustrates is that there was high level resistance of the S100 (1) (b) intervention in that department. This high-level resistance sought to completely discredit the intervention in the ECDE. Such high-level resistance was confusing given the number of perennial and immediate causes of the intervention. However, the ECDE was not unfamiliar with interventions, both constitutional S100 (1) (b) interventions and extra-legal interventions. This most recent S100 (1) (b) intervention was also unsuccessful.

2 Chapter Two – Literature Review

From the literature surveyed, three themes that are critical for this thesis and for the decentralisation discourse emerged. The first theme suggests that decentralisation is part of state formation. Within this theme there is a grand theoretical narrative by Hans Kelsen (1945), which provides an analysis on the role, probability and goals of decentralisation, and the ensuing correlation with a state's constitution. The more practical aspect of this theme considers South Africa's own experience with modern state formation through consociationalism, as advanced by Arend Lijphart (1985, 2008). Consociationalism provides a segway into federalism, which will be discussed and contrasted with decentralisation. The second theme focuses on Africa's modern experiences of decentralisation, which to date, have shown that decentralisation has been consistent in Africa's different types of state formation. Moreover, this decentralisation has been used for colonialism, apartheid and democratic ends. The third theme is about the criticisms and problems of decentralisation which show that decentralisation encounters historical, practical and structural issues.

2.1 Decentralisation as Part of State Formation

Kelsen's General Theory of Law and State (1945) shows how decentralisation is part of state formation and is outlined in a state's constitution. For Kelsen, the state and its law, as promulgated in its constitution, are synonymous. Kelsen's theory thus establishes the principle that decentralisation is part of state formation and law. Therefore, having been outlined in a state's constitution, a mode of governance such as decentralisation is then structured and practised in the state. More so, the theory illustrates that centralisation and decentralisation are possibilities for governance in both autocratic and democratic states. Consequently, there is nothing sacrosanct or hallow about either of these modes of governance, in theory. In practice, however, there are higher probabilities of autocracy-centralisation and democracy-decentralisation models. This is relevant for my thesis because it provides a wider scope of analysis for decentralisation in South Africa, apart from the modern theories of decentralisation which view this as a solely democratic trend. Furthermore, Kelsen's theory provides a theoretical framework which requires a clear constitution and ensuing legal order, where assumptions about governance are outlined. Finally, Kelsen's theory aligns with South African theories of decentralisation as a persistent trend from colonialism, through apartheid, to democracy.

There are four main parts of Kelsen's general theory that are important for my thesis namely, the state as a purely juristic entity; elements of the state; classification of constitutions; and, democracy and decentralisation as a form of organising the state (Kelsen, 1945: 181 – 318). For Kelsen, the state is best understood "from a purely juristic point of view. It is considered only as a legal phenomenon, a juristic person, or a corporation" (Kelsen, 1945: 181). The author sets up the purely juristic view of the state, by refuting the common understandings of the state as a sociological phenomenon or one that is an organism (ibid). He further argues that human actions are *oriented* towards the legal order or state; and that individual behaviour *adapts* to the state or legal order. As such, the law is the state because, "The power of the State is organised by the power of law" (Kelsen, 1945: 190).

The second most important part of Kelsen's theory focuses on elements of the state. There are three main elements of the state: "its territory, its people and its power" (Kelsen, 1945: 207). In terms of territorial fronts, a state cannot always be measured by a single physical geographical territory. States may also have colonies (Kelsen, 1945: 207 – 208), which is problematic – both in Kelsen's theory and in the conceptualisation of colonies as a form of decentralisation. I do not agree that colonies form part of a legal order. It is absurd and cruel to even entertain this thought. But for Kelsen, territory is described as "the space within which the acts of the State and especially the coercive acts are allowed to be carried out, the space within which the State and its organs, are authorised by international law to execute the national legal order." (Kelsen, 1945: 209 – 210).

Kelsen's description of territory as an element of the state takes place within the context of the international legal order. The international legal order confines national legal orders to a certain space and it determines the boundaries of this space" (Kelsen, 1945: 209). Demonstrably, there are two aspects to territory as an element of the state. The primary aspect is the geographical space in which a territory is located and contains a national legal order. The second aspect is the recognition of that territory by the international legal order. These two aspects of the territory are governed and determined by legal orders. But the importance given to an international legal order may be disturbing if states do not agree to the international legal order, or if that international legal order is not beneficial for individual states. Nevertheless, the thread of the international legal order runs throughout Kelsen's building of the state. The second element of the state is time. Kelsen acknowledges that time is not usually considered to be an element of the state. However, Kelsen makes the argument that if one considers territory to be an element of the state, they also have to consider how long the state has existed in a particular territory (Kelsen, 1945: 218).

The third element of the state is "the power of the state", which Kelsen defines as, "the validity and efficacy of the national legal order" (Kelsen, 1945: 255). By now, we understand that the law and constitution are being consistently aligned with Kelsen's formulation of the state. Kelsen proceeds to elaborate on how power in the state, and through the law, is formed. And the formation of power in the state is in legislation and execution (ibid). Kelsen's discussion about legislation and execution is couched in his analysis about the separation of powers. In constitutional and political theory, there is a separation of executive, judicial and legislative power. However, Kelsen argues that this trichotomy of the separation of powers is ultimately a dichotomy between the legislation and execution of powers, whereby the judicial and executive functions are close correlates and form one part of the power of the state; and, legislation forms another part of the state (Kelsen, 1945: 255 – 256).

This aligns with Kelsen's theory about the law and the state being consistent as law-creating mechanisms for general norms. It follows, that these laws and norms need to be executed accordingly in the state. But Kelsen has missed the purpose of the separation of powers which is, primarily, to ensure that the executive does not arbitrarily control courts and the judiciary and the legislature. The functions of the executive and judiciary work to implement law in different forums, but the ways in which this occurs should not be confounded. Legis latio and legis executio work together in a very specific way. That is, there is the creation of law on the one side of the dichotomy (legis latio, legislation) and application on the other side of the dichotomy (legis executio, execution) (Kelsen, 1945: 258 and 269)

Public administration, for Kelsen, falls into the executive function of the state because it is, "based upon administrative law, as the jurisdiction of the courts is based upon civil and criminal law" (Kelsen, 1945: 274). This means that public administration is a way of executing the law. And as alluded to earlier, it is the law that provides the nature and character of public administration. Without the law, there are things pertaining to the public that that cannot be done. But the law actually establishes *what* needs to be done and *how* these public services and duties should be carried out. If one does not conform to what needs to be done and how, as per the law, there are consequences that will follow – "administrative sanction" (Kelsen, 1945: 274).

Kelsen implies that administrative sanctions are different from civil and criminal sanctions. Moreover, unlike judges and the judiciary, administrative authorities are usually not independent because they fall in a hierarchy where they "are bound by commands from higher organs" (Kelsen, 1945: 275). Where there is no such hierarchy, administrative authorities are independent. In terms of their functions, both administrative authorities and courts have similar procedures (Kelsen, 1945: 275). This scenario substantiates Kelsen's argument that there is no separation of powers between the executive and the judiciary.

The notion of power as an element of the state is crucial for my thesis because power should have constitutional parameters. By positing that public administration is an executive function that executes the law, Kelsen places the primary responsibility for public goods and services in the central or national government, which then delegates such responsibility as it sees fit and in accordance with the constitution. Any deviation from the prescribed delegation or constitution either creates a constitutional problem or signals a problem with the constitution itself. Herein, lies the main argument of my thesis: the implementation of S100 in the LDE and ECDE signals a constitutional crisis.

The third part of Kelsen's theory that is important for my thesis is the classification of constitutions. This part of Kelsen's theory is particularly useful for my ensuing research because firstly, it assists in clarifying how South Africa's different constitutions, from 1910 – 1996, can be viewed as various constructions of the state, decentralisation and provinces historically. Secondly, and as a result of the first point, the application of this part of Kelsen's theory insists on a thorough examination of which configurations of the state and decentralisation have been introduced, amended and discarded. And in so doing, to be specific and clear about the supposed purpose of law and public administration and the actual interaction that takes place. It is this interaction that is key in my case studies and conclusions about decentralisation.

As has been outlined, the constitution, for Kelsen, is the basis for law, and the efficacy of the law is the power of the state, as well as the third element of the state. Therefore, it is essential that constitutions be classified based on the inference that constitutions can be different. Kelsen says that in political theory, "the classification of governments" is the key problem (Kelsen, 1945: 283). However, in the theory of law, the key problem is "the distinction between different archetypes of constitutions" (Kelsen, 1945: 283). Political theory points to "three forms of the State… [which are] monarchy, aristocracy and democracy" (Kelsen, 1945: 283). But according to the theory of law, constitutions can be classified into monarchy or republic (Kelsen, 1945: 283), where a republican constitution can either be an aristocracy or a democracy (Kelsen, 1945: 283). In Kelsen's words,

> "When the sovereign power of a community belongs to one individual, the government or the constitution is said to be monarchic. When the power belongs to several individuals, the constitution is called republican. A republic is an aristocracy or democracy, depending upon whether the sovereign power belongs to a minority or the majority of people." (Kelsen, 1945: 283).

Thus, the real distinction between constitutions is whether sovereign power belongs to an individual or is divided between individuals, to a lesser or greater extent. But Kelsen describes the division of sovereign power as a "superficial criterion of classification" because state power relies on the "validity and efficacy of the legal order" (Kelsen, 1945: 283). Furthermore, the classification of constitutions is, importantly, the "classification of governments" (Kelsen, 1945: 283). This means that the type of constitution, whether monarchy or republic, determines the type of government; and, ultimately, wherein law-creation will rest (Kelsen, 1945: 283).

Within the discussion about the classification of constitutions, Kelsen narrows down political theory's trichotomy between aristocracy, monarchy and democracy, to democracy and autocracy (Kelsen, 1945: 284). Kelsen argues that the "distinction" that we should seek when we look at forms of government, is the level of "idea of political freedom" (Kelsen, 1945: 284);

> "Politically free is he who is subject to a legal order in the creation of which he participates. An individual is free if what he "ought to" do according to the social order coincides with what he "wills to" do. Democracy means that the "will" which is represented in the legal order of the State is identical with the wills of the subjects. Its opposite is the bondage of autocracy" (Kelsen, 1945: 284).

Democracy and autocracy "represent ideal types" of constitutions and the forms of government that these create (Kelsen, 1945: 284).

The fourth and final part of Kelsen's theory, which strikes at the heart of my thesis is democracy and decentralisation as a form of organising the state in the constitution. Forms of organisation of the state refer to the legal structure of the state, which determines how the law will apply throughout the state. Kelsen argues that given the elements of the state, the executive and legislative, as well as the ideal types of the state being autocracy and democracy, centralisation and decentralisation are the "forms of State organisation" (Kelsen, 1945: 303). Centralisation and decentralisation pertain to, "territorial division" and, "must be understood as two types of legal orders", as the issues around both these types are issues about "the spheres of validity of legal norms and the organs creating and applying them" (ibid). Therefore, Kelsen has used the same method of legal reductionism to show that the state can be organised centrally, or can be decentralised. He does so by relying on legal orders to determine the organisation of the state. This analysis will become particularly important in the next section of this chapter, as we will examine the ways in which the different states of South Africa were centralised and are decentralised. We now turn to Kelsen's discussion about the static and dynamic concepts of centralisation and decentralisation (Kelsen, 1945: 204 – 316) and the federal state (Kelsen, 1945: 316 – 324).

The Static Concept of Centralisation and Decentralisation refers to geographical territories. Although Kelsen does not say so explicitly, the way in which he discusses this static concept in comparison to the dynamic concept implies that static relates to territory, whereas dynamic relates to the creation and execution of legal norms (Kelsen, 1945: 308). In the static concept, there exists a centralised and decentralised legal order (Kelsen, 1945: 304). The centralised legal order is described as an order in which, "all its norms have the same territorial sphere of validity" (Kelsen, 1945: 304). The decentralised legal order, on the other hand, describes "norms that have different territorial spheres of validity" (Kelsen, 1945: 304). Kelsen says that, "we speak of decentralisation only if the organisation is carried out according to the territorial principle" (Kelsen, 1945: 305). In addition to this, "These territorial spheres of validity of the local norms are often called provinces and decentralisation thus implies the existence of provinces" (Kelsen, 1945: 305 – 306).

Kelsen emphasises the differences between these legal orders by saying that there are some legal norms that are valid throughout a territory, which gives the state a "single order" (Kelsen, 1945: 304). And, there are other legal norms that are valid in "different parts" of that territory, also known as "decentral or local norms" (Kelsen, 1945: 304). As a result of local norms, decentralised territories "constitute a partial or local legal community" (Kelsen, 1945: 304). Thus, when we speak of a decentralised state, this means that "the national legal order contains not only central but also local norms" (Kelsen, 1945: 304). Together, the centralised and decentralised legal order constitute "the total legal community, 'the State'" (Kelsen, 1945: 304).

Having organised the state according to the territorial spheres of validity into central and decentral legal orders, Kelsen provides a justification for decentralisation. That is, different territorial spheres of validity "may regulate the same subject matter (trade for instance) differently for their respective regions" (Kelsen, 1945: 304). There are two important facts that should be highlighted at this point. The first is that this is not necessarily a positive support for apartheid systems such as the one experienced in South Africa or elsewhere. Neither is this a positive support for colonies, which Kelsen himself speaks of. We can infer this from Kelsen's earlier assertion that democracies are the most favourable form of government because of the value of freedom which is integral to their existence and substance. Therefore, an apartheid system, which is the antithesis of freedom – freedoms of all kinds – cannot really claim to be decentralised for reasons of freedom. This is important because the apartheid provinces and Bantustan project were disguised as segregation for the sake of fostering strong separate identities. Secondly, decentralisation during apartheid led to administrative disasters because the fragmented system has struggled to become coherent and cohesive. The latter will be examined in detail in the rest of this thesis.

A decentralised legal order is valid in different territories; yet, still adheres to the centralised legal order. Given this organisation of government, Kelsen argues that, "centralisation and decentralisation of a legal order may be quantitatively of varying degree. The degree of centralisation or decentralisation is determined by the relative proportion of the number and importance of central and local norms of the order" (Kelsen, 1945: 306). In other words, there are different boundaries to centralisation and decentralisation. The degrees of centralisation and decentralisation are total centralisation, partial centralisation, partial decentralisation and total decentralisation. Partial centralisation and partial decentralisation are the same forms of organising the state, where neither are total. Total centralisation takes place when, "all norms are valid for the whole territory"; and, total decentralisation is when, "all the norms are valid only for different parts of the territory, for territorial subdivisions" (Kelsen, 1945: 306).

There are two main criteria for the degree of centralisation and decentralisation. The first criteria is, "the number of stages in the hierarchy of the legal order to which centralisation and decentralisation extends" (Kelsen, 1945: 306). The second criteria is, "the number or importance of subject matters regulated by central or local norms" (Kelsen, 1945: 307). The first criteria is called the stages of constitution and the second criteria is called the stages of execution (Kelsen, 1945: 306 – 307). The stage of constitution refers to the fact that the constitution remains central for the whole territory of the state; while the stage of execution, refers to "legislation, administration and judication" within the state (Kelsen, 1945: 306).

The dynamic concept of centralisation and decentralisation relates to "the methods of creating and executing [legal] norms" (Kelsen, 1945: 308). More specifically, the dynamic concept means that "there is a plurality of norm-creating organs, regardless of the territorial spheres of validity of the norms created by these organs" (Kelsen, 1945: 309). Thus, while a constitution may continue to be the central legal order, there are different bodies and agencies that oversee and drive state responsibilities, as opposed to those responsibilities being territorially overseen and driven (Kelsen, 1945: 309).

Kelsen then creates a link between the forms of government (democracy and autocracy) and the forms of organisation (centralisation and decentralisation); and, thereby prioritises the forms of organisation over the forms of government. Kelsen also highlights how autocracy and democracy are likely to lean towards particular forms of organisation, and the reasons why:

> "Assuming the dynamic concept of centralisation and decentralisation, democracy can be described as a decentralised method of creating norms, since in a democracy the legal norms are created by the plurality of the individuals whose behaviour they regulate, and those law-creating organs are dispersed over the whole territory for which the legal order is valid"

By contrast,

> "In an autocracy, the legal order is created by a single individual different from and independent of the plurality of individuals subject to the order. Since the law-creating function is here concentrated in the person of the autocrat, autocracy can be characterised as a centralised method of creating norms" (Kelsen, 1945: 310).

In other words, dynamic centralisation/decentralisation relies on the number of people and government bodies that create legal norms over specified territories. Democracy is more likely to allow for decentralisation because it requires a plurality, or greater number of people to participate in law-making, and probably the maintenance thereof. Autocracy, on the other hand, is more likely to allow for centralisation because the presence of an autocrat reduces the number of those participating in law-making. Kelsen strictly describes a centralised autocracy as being headed by a single individual. However, where we recognise the static concept of centralisation/decentralisation, "no direct connection between these forms of organisation and the two forms of government" (Kelsen, 1945: 311). In static centralisation/decentralisation then, an autocracy or democracy can be centralised or decentralised because law-making is concentrated in the relevant organs, and not in an individual or a set of cabinet ministers. Where an autocracy is decentralised, "the autocrat will appoint for every province a governor who, as his representative, is competent to create the norms valid only for that territory" (Kelsen, 1945: 312).

The decentralised autocracy that Kelsen speaks of is akin to Mamdani's decentralised despotism (Mamdani, 1996) and the colonial system of prefectorialism and governorship. These links between decentralisation and autocracy are crucial because they illustrate how forms of state organisation are used at specific times to achieve particular ends. The latter observation is important because it breaks the binary thinking about central-autocratic and decentralised-democratic states. And in place of that binary thinking, we are forced to question the various complicated ways in which states are, and can be, organised.

Kelsen has demonstrated a number of key issues here, which recur in this Literature Review and reverberate throughout this thesis. Firstly, the dichotomy between autocratic-centralised states and democratic-decentralised states, is false. States choose between democracy and autocracy as much as they choose between centralisation and decentralisation. The practical proof of this is discussed later in this Literature Review. Secondly, South Africa's current constitution has spheres of validity of the national, provincial and local areas, as outlined in the Introduction. The use of the term 'sphere' in Kelsen's work and the Constitution may be coincidental; but the logic is the same: there has to be recognition of spheres in a constitution, and there are both central and subnational legal orders. This thesis is concerned with the central legal order that governs national departments and their provincial departments as implementers of policy; partly through concurrent responsibilities and partly through S100.

Kelsen alluded to the link between decentralisation and democracy in the discussion about dynamic centralisation/decentralisation, and the tendency of democracy to lean towards decentralisation. In the next section, Kelsen establishes the direct link between the two:

> "decentralisation allows a closer approach to the idea of democracy than centralisation. This idea is the principle of self-determination. Democracy demands the utmost conformity between the general will as expressed in the legal order and the will of the individuals subject to the order; this is why the legal order is created by the very individuals who are bound by it according to the principle of majority. Conformity of the order with the will of the majority is the aim of democratic organisation." (Kelsen, 1945: 312).

Self-determination is thus the link between decentralisation and democracy. Democratic decentralisation, based on self-determination, is essentially conformity of the legal order with the will of the majority, as per Kelsen's formulation. Furthermore, decentralisation can be either perfect or imperfect. Perfect decentralisation describes the scenario "when the creation of local norms is final and independent. It is final when there is no possibility that the local norm may be abolished and replaced by the central norm" (Kelsen, 1945: 313). That is, perfect decentralisation does not have room for the imposition of central norms once local, or decentralised norms, have been agreed to. Imperfect decentralisation, on the other hand, describes the scenario where "a central law contains the general principle to which legislation has only to give a more detailed application" (Kelsen, 1945: 313). This means that decentralised norms are aligned with central norms and thereby do allow for an imposition of central norms. Included in these descriptions of perfect and imperfect decentralisation is a discussion about federalism.

Finally, for Kelsen, "Only the degree of decentralisation distinguishes a unitary State divided into autonomous provinces from a federal State" (Kelsen, 1945: 316). As such, a federal state is highly decentralised in that, "Certain subject matters are… reserved for local legislation, that is, legislation of member states" (Kelsen, 1945: 313); whereas a unitary state allows its provinces some autonomy, which is imperfect decentralisation due to the imposition of central norms" (Kelsen, 1945: 313 – 316). Moreover, "On the scale of decentralisation, the federal State stands between the unitary State and an international union of States" (Kelsen, 1945: 316). Therefore, decentralisation and federalism are not diametrically opposed, they are both part of a continuum within which the integrity of a constitution and central norms have varying degrees of effectiveness and application. They are however, on different points of a continuum and are not casually interchangeable.

In addition to the unitary-decentralised-federal continuum, Kelsen provides an explanation for the characteristics of a federal state and a unitary decentralised state where, "The federal State is characterised by the fact that the component States possess a certain measure of *constitutional autonomy*", while, "the federal State is distinguished from a relatively decentralised unitary State, organised in autonomous provinces. If these are regarded merely as autonomous provinces and not as component States, it is not only because their competence, especially the competence of the provincial legislature, is *relatively restricted*, but also because these provinces have no constitutional autonomy, because their constitutions are prescribed for them by the constitution of the State as a whole and can be changed only by a change in this constitution" (emphasis added; Kelsen, 1945: 318). Decentralised provinces have relatively restricted legislative competence because their legal norms and whatever laws they create must be subject to the central legal order. This means that the independence of component states in federal states is much higher than that of decentralised provinces. That independence is as a result of constitutional autonomy in component states, which allows the states to create their own laws and legal norms. Unitary decentralised provinces have relatively restricted legislative competence because their legal norms and whatever laws they create must be subject to the central or national legal order.

Arend Lijphart's Consociational Theory provides a theory of state formation which considers the context of fragmented states in particular. Consociational theory was also considered and applied during the debates around the possibility of the first democratic province in South Africa at the time – the merger between KwaZulu and Natal. Furthermore, consociational theory indirectly proposes decentralisation as a tool to establish governance and administration in a politically fraught environment where even the drafting of a constitution cannot be considered until key representatives can meet and negotiate the way forward, out of a fragmented state. Consociational democracy will thus be discussed as a theory that was integral to the formation of provinces in South Africa.

Lijphart's theory of consociational democracy is described and applied in two key texts on the theory: "Power-Sharing in South Africa" (1985) and, "Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice" (2008). This displays the development of theory in the midst of pragmatic urgency and in hindsight of that urgency, the subsequent development of theory. Both these texts by Lijphart will be referred to for a full understanding of the theory and its application. Several scholars explored the consociational theorising prior to Lijphart's, work on consociationalism, which is now considered to be a key contribution to the theory. Consociational theory was initially covered by Apter (1961) in their case study on Uganda, whilst Althusius coined the term '*consociatio*' to describe the theory (Lijphart, 2008: 3 – 4). Following this, Lehmbruch (1967) contributed the concept of 'proportional democracy' to the theory, and Lewis (1965) focused their work on consociationalism in case studies in West Africa. Other significant contributions were made by Bauer and Renner in their discussion about austro Marxism (Lijphart, 2008: 3 – 4). Therefore, consociationalism has both theory and pragmatism at its core.

For Lijphart, the typologies of Western democracies attempt to draw distinctions between political and social structures, and political stability, which does not cover the overlaps between these distinctions (Lijpahrt, 2008: 25 – 28). Moreover, there are cases in which there is a correlation between weak political and social structures and high political stability. Lijphart calls these "deviant cases of fragmented but stable democracies", which translate into consociational democracies (Lijphart, 2008: 28). The key to these consociational democracies is the fact that "leaders of the rival subcultures [fragmented groups in the state] may engage in competitive behaviour and thus aggravate mutual tensions and political instability, but they may also make *deliberate efforts* to counteract the *immobilising and unstabilising effects of cultural fragmentation*" (emphasis added; Lijphart, 2008: 28). In other words, the behaviour of leaders of different and fragmented groups in a society, determines the stability of such a fragmented state. Where the leaders – or 'elites' as Lijphart calls them – cooperate to create a stable state in the midst of cultural fragmentation, they can ""achieve a degree of political stability quite out of proportion to its social homogeneity"" (Ake in Lijphart, 2008: 28). Consociational democracy is thus defined as "government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy" (Lijphart, 2008: 32).

A coalition or cartel of elites (Lijphart, 2008: 28 – 29), is the driving force behind consociational democracy, as they must first agree to come together to stabilise an otherwise precarious state, and then decide to stabilise the state. These arrangements are reached on the basis of certain principles. These principles are as follows:

> "(1) Executive power-sharing among the representatives of all significant groups; (2) A high degree of internal autonomy for groups that wish to have it; (3) Proportional representation and proportional allocation of civil service positions and public funds; (4) A minority veto on the most vital issues." (Lijphart, 1985: 6).

Executive power-sharing between the coalition of elites and internal autonomy are primary principles of consociational democracy, whereas proportional representation and a minority veto are secondary characteristics (Lijphart, 2008: 4). The first principle of executive power-sharing between the coalition of elites, is key to the consociational theory, as previously discussed. Lijphart provides a prescription for how the coalition of elites should behave and their role in realising a stable democracy. The coalition of the elites must be able to "accommodate the divergent interests and demands of the subcultures" (Lijphart, 2008: 32). Without this ability, the coalition cannot even come together. In addition to this, the coalition of elites should also have "the ability to transcend cleavages and to join in a common effort with the elites of rival subcultures" (Lijphart, 2008: 32). And this ability "depends on their commitment to the maintenance of the system and the improvement of its cohesion and stability" (Lijphart, 2008: 32). The necessity of this commitment indicates that the role of the coalition of elites is to persevere beyond their different cultures, in order to create an inclusive state. This role also involves the coalition of elites understanding the "perils of political fragmentation" (Lijphart, 2008: 32). As such, consociational democracy becomes an option when the stakes for political stability are high.

Lijphart argues that the stakes for political stability are high under three main conditions. The first condition is the possibility of "external threats", where there are "periods of international crisis" (Lijphart, 2008: 32). Lijphart bases this condition on nineteenth century Belgium's "Catholic – Liberal grand coalitions", the Lebanese National Pact (1943) and the Swiss Federal Council (1943) (Lijphart, 2008: 32). Lijphart claims that, "In all cases, the external threats impressed on the elites the need for internal unity and cooperation. External threats can also strengthen the ties among the subcultures at the mass level and the ties between leaders and followers within the subcultures" (Lijphart, 2008: 33). The second condition under which consociational democracy becomes necessary is when there is a "multiple balance of power among the subcultures" (Lijphart, 2008: 33). Under this condition, the coalition of elites learns the importance of cooperation. Having to share power in multiple directions such that consociational democracy is required, also prevents a two-horse race between two dominant political parties, or the prevalence of one dominant political party. The third condition is a "relatively low total load in the decision-making apparatus" (Lijphart, 2008: 34).

Internal autonomy and proportional representation (PR) as principles of consociational democracy, are interrelated. These two principles relate to identity and representation of that identity and within a fragmented state. Dealing with identity, Lijphart says that fragmented states need to make a choice between self-determination and pre-determination when applying consociationalism (Lijphart, 2008: 66). That is, the way in which different cultural groups self-identify or are identified will create the basis for the coalition of elites and subsequent significant decisions to stabilise the state. Self-determination refers to, "a method or process that gives various rights to groups *within* the existing state… and it allows these groups to manifest themselves instead of deciding in advance on the identity of the groups" (Lijphart, 2008: 66). Pre-determination, on the other hand, refers to, "an internal process… [wherein] the groups that are to share power are identified in advance" (Lijphart, 2008:66). In essence, self-determination and pre-determination are about how to identify different cultural groups in deeply divided or plural states. Within these states, groups are “divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate sub societies with their own political parties, interest groups, and media of communication” (Lijphart, 2008: 67). The question that arises for Lijphart now becomes how to share power in such societies and their states.

Lijphart recommends that PR is the best way to identify different cultural groups and achieve self-determination (Lijphart, 2008: 69). PR enables self-determination because it facilitates the representation of different groups proportionally, and thereby self-identify into preferred segments. In addition to self-identification and self-determination, PR is an “electoral system” which allows “the segments to manifest themselves in the form of political parties” (Lijphart, 2008: 69). As such, the use of PR “obviates the need for any prior sorting of divergent claims about the segmental composition of South Africa or any other plural society” (Lijphart, 2008: 69).

Consociational democracy can be compared to other forms of organising the state and similar concepts at the time. It is in these comparisons that Lijphart makes, that we can assess the use and impact of the unitary-federal continuum that Kelsen introduced, in a consociational democracy. Lijphart briefly discusses the unitary and federal states, overlapping this with decentralisation, as well as consensus democracy and majoritarianism. All these concepts fall within the context of the forms of organising the state, of which decentralisation is a part; and thus, it must be emphasised that consociationalism was a practical consideration for both state and provincial (re) creation in a fragmented South African apartheid state.

Lijphart comments that the term ‘consensus democracy’ was initially used to describe power-sharing and bring more clarity to consociationalism – a distant and tough concept for policy-makers at the time (Lijphart, 2008: 7). However, consensus and consociational democracies soon became distinguishable. In a consociational democracy, there are the four main primary and secondary principles, as well as “majoritarian characteristics”, which are, “unitary and centralised government, concentration of legislative power in a unicameral legislature, flexible constitutions that can be amended by simple majorities, systems in which legislatures have the final word on the constitutionality of their own legislation, and central banks that are dependent on the executive” (Lijphart, 2008: 7). Lijphart describes these characteristics as those from the “federal-unitary dimension” (Lijphart, 2008: 7). By contrast, consensus democracy contains “federal and decentralised government, government of legislative power between two equally strong but differently constituted houses, rigid constitutions that can be amended only by super majorities, systems in which laws are subject to a judicial review of their constitutionality by supreme or constitutional courts, and independent central banks” (Lijphart, 2008:7).

By this account, a consociational democracy is based on majoritarian and centrist principles, whereby a general agreement is reached and penetrates the structures of the state, and its law-creating mechanisms. This also adds substantially to Lijphart’s discussion about a coalition of elites because these elites will not agree on their differences, but have to find general agreement on issues of the state. A consensus democracy offers the option of difference to be part of the structures of the state, through decentralisation or federalism. At this point, confusion and alarm abounds for those familiar with the South African case, where the state is described as a unitary decentralised state because by Lijphart’s account, this contradiction is stark. But there are two main responses to this.

The first response is from the perspective that terms used to describe forms of organising the state have different meanings in different contexts. Lijphart presents this view in the South African context, stating that in political science, 'unitary' is synonymous with 'non-federal' (Lijphart, 1985: 24). But in South Africa, 'unitary' denotes "united, unified, undivided" (Lijphart, 1985: 24). This is clearly the case based on South Africa's history of the apartheid state, and even prior to the apartheid state, as will become clear in the next section of this chapter. The second response is from the perspective that states do not have to be strictly defined by a form of organising the state. Rather, the key issue is understanding how different unitary, decentralised and federal institutions work together. Basson presents this view in his discussion about whether the 1993 Interim Constitution was unitary or federal. In the South African case, it was "neither fully federal nor fully unitary in nature" (Basson, 1995: 196). There are two strong federal characteristics: the adjudicatory role of the Constitutional Court and a representative bicameral parliament comprising one house which represents provinces (Basson, 1995: 197). While the unitary characteristics, we can infer, are the interdependent aspect of the national, provincial and local spheres. This discussion will be picked up in the next chapter, when the 1993 Interim Constitution is examined.

2.2 Africa's Modern Experiences of Decentralisation

Having outlined very general and technical definitions of decentralisation according to modern conceptualizations, this Literature Review will now outline Africa's experiences of decentralisation under colonialism and apartheid, which the literature categorizes in different eras. This does not mean that there were no precolonial forms of decentralisation; but as far as the literature and the constitutional crisis argument that my thesis advances, are concerned, colonial and apartheid decentralization took place under the first period of decentralisation. Mamdani, (1996), properly described it as decentralised despotism due to the nature of state relationships between the colonial empire, the colonial state, citizens and subjects. The second period of decentralisation occurred under the political decolonisation period, wherein politically decolonised African governments experimented with decentralisation as a way to consolidate the African state. The third period is democratic decentralisation, whereby democratic governance reforms worked in conjunction with the functions of decentralisation. The literature that engages with Africa's experiences of colonial, decolonial and democratic decentralisation dispel the notion that technical forms of decentralisation are the only ones that have been experienced on this continent. Instead, decentralisation has been used as a political tool too.

2.3 Decentralised Despotism

Mamdani's seminal work, "Citizen and Subject" (1996), describes how colonial forces in Africa sought to distort state-citizen relationships in order to extract resources and quash repression as long and as effectively as possible. This has skewed state-citizen relationships well into the decolonial and democratic eras and created an urban-rural divide. Mamdani's argument is that "the regime of differentiation (institutional segregation)" between rural and urban communities, created in colonial Africa was intentional and sought to weaken resistance to colonial rule (Mamdani, 1996: 7, 294). This institutional segregation was implemented through decentralised despotism, which describes a set of trends or modes of domination; the effects of which linger today in the form of the urban-rural divide (Mamdani, 1996: 8, 294). His work thus analyses "*how power is organised* and how it tends to fragment resistance in contemporary Africa" (emphasis added; Mamdani, 1996: 3). This thesis agrees with Mamdani that decentralisation is not just a colonial institutional legacy, but also a way of organising the state, or as he calls it, organising power through state reform. Viewed in this way, decentralisation is not simply about public choice theory or developmentalism; it is consistently about political choice and expediency, both of which depend on who uses decentralisation and for which reasons.

Apart from theorising about the way in which power is organised, Mamdani makes insightful theoretical claims which this thesis resonates with. One of these claims is that "neither institutional segregation nor apartheid was a South African invention. If anything, both idealised a form of rule that the British Colonial Office dubbed "indirect rule" and the French "association"" (Mamdani, 1996: 7). Indirect rule as well as general forms of decentralisation have been forms of organising power on the continent for a very long time. Fascination with decentralisation as a recent trend and as an extension of only structural adjustment programmes (SAPs), when African states experienced political and economic crises, is somewhat inaccurate. There are differences between pre-colonial, colonial/apartheid, post-independence and democratic forms of decentralisation, but the thread of institutionalising governance that is close to local polities at various levels (local, regional, provincial), has remained intact and important.

Mamdani's work gives my thesis a simple enough analysis of how centralisation and decentralisation has been an enduring trend on the continent. It further draws our attention to the need to examine the institutional legacy of provincial government in order to understand whether some of the current trends in provincial governance are linked to deeper issues where organising the state is concerned. A question which Mamdani's work raises for my thesis is, what are the state reforms that have taken place at a regional or provincial level, to create the current decentralised mode of governance? And the most critical question, which is the essence of this research in a roundabout way, how is provincial power organised internally, and with the national state and relevant institutions, and later exposed through the breakdown of administration in provinces?

2.4 Decolonial to Democratic Decentralisation

Olowu and Wunsch categorise "Africa's History of Decentralisation" (Olowu and Wunsch, 2004: 31 – 40) into four phases. I group the first, second and third phases that they describe as decolonial decentralisation, and the fourth phase as democratic decentralisation. The latter is the authors' own terminology. What is important to gage from this literature is that decolonial decentralisation involved experiments on how to structure state-power and governance relations in the then politically decolonised states at the time. Decentralisation was fundamental to the process of decolonisation as a form of legitimacy, as well as for establishing policy implementation and resource allocation, as discussed earlier in this Literature Review. The democratic decentralisation phase illustrates how significant democracy became for decentralisation processes and entrenchment.

Within the decolonial decentralisation era, the first phase of decentralisation began soon after decolonisation and World War II, which they term the "golden age of local government in Africa" (Olowu and Wunsch, 2004: 32). Local government in the former British colonies was democratised to different degrees, found various sources of revenue to finance services at the local level, and aspired to efficiency, democratisation and localisation. Francophone countries were more centralised and hierarchical in their administration; and, traditional leaders were controlled by civil servants.

In the second phase of decentralisation, African leaders such as Nyerere of Tanzania, Kaunda of Zambia and Toure of Guinea did away with local governments as they tried to pursue rapid economic growth through socialist ideology (Olowu and Wunsch, 2004: 33). They viewed democratic local governments as "obstacles, to their ambitions of building powerful states" (ibid). Secondly, some of these leaders sought to consolidate the state through a single-party mechanism" (Olowu and Wunsch, 2004: 33). Consequently, local government was reformed to accommodate one-party and/or military states. This was still known as decentralisation but, “in reality local administrations were designed primarily for the maintenance of central control and law and order, and for the implementation of centrally determined development plans” (ibid).

The economic crisis in the 1970s and 1980s led to many African states pursuing decentralisation in order to secure finance from international finance institutions (IFIs), and as part of the implementation process of SAPs (Olowu and Wunsch, 2004: 35). IFIs viewed decentralisation as a cost cutting measure for central government. However, Olowu and Wunsch point out that, “Even before SAPs, many governments in Africa sought to hive off their responsibilities to other entities, purely as a response to declining resources” (Olowu and Wunsch, 2004: 35). The point here is that although SAPs greatly influenced the choice of decentralisation for many African states, this was not the only reason for this choice of government.

Ribot weighs in on the different periods of decentralisation and summarises them as follows: “Through the 1960s, 1970s and 1980s, decentralisation across the continent failed to produce autonomous representative local government units. They failed to devolve significant powers to local representative bodies. Surveys in the 1970s and 1980s showed that virtually no local government autonomy forms the central state” (Oyugi, 2000, in Ribot, 2002: 6). Moreover, ““By the end of the 1970s, it was clear that the state institutional apparatus for decentralised development had neither promoted participation, nor promoted any meaningful economic and social advancement”” (UNCDF 200:2, in Ribot, 2002: 6). Therefore, colonial decentralisation was repressive governance, while decentralisation implemented soon after the liberation of some African countries did not match its post-independence expectations.

Olowu and Wunsch describe the era of decentralisation from the 1990s onwards as that of democratic decentralisation. They imply that this is the period in which decentralisation reforms coincided with democratic changes on the continent, as well as more intense implementation of decentralisation. The authors note that Uganda, Nigeria, Ethiopia, South Africa, Benin and Botswana in particular experienced increases in public spending and staffing in the public sector (Olowu and Wunsch, 2004: 54). As with any reform measures, no matter their context, there were some challenges in implementation and most importantly, carry overs from the colonial era (Olowu and Wunsch, 2004: 55 – 61).

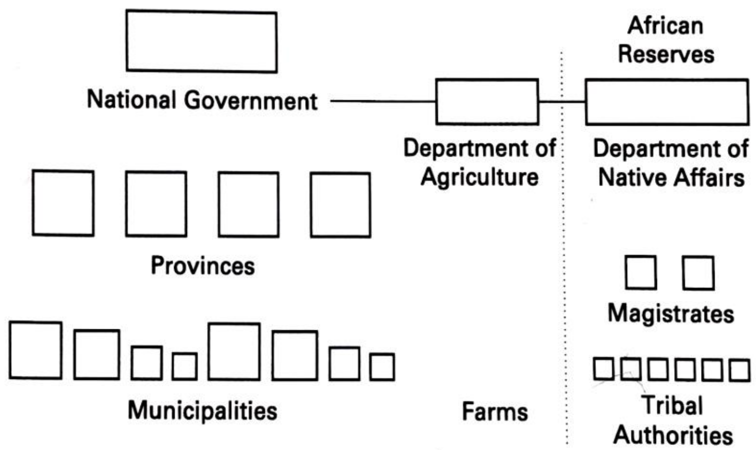
Democratic decentralisation describes the period in which democracy coincided with decentralisation. There are two events that solidified this period in decentralisation – “the fall of the Berlin Wall and the [1994] elections in South Africa”, which invigorated decentralisation “with a new, more democratic language” (Ribot, 2002: 6). As such, “Decentralisation is now being promoted in a context of pluralist discourse, emphasising greater representation of citizens as well as state reforms toward market-based development with structural adjustment programmes” (Ribot, 2002: 6). Decentralisation’s intentions thus shifted from the political to the democratic/development; where the political intentions were “national stability, garnering popular support, “petty politicking” and democracy and development are the current forms of decentralisation” (Ribot, 2002: 7). Three Phases of South Africa’s Decentralisation: from Apartheid to Democracy

An overwhelming aspect of this Literature Review thus far, is that decentralisation can be used or encountered in both colonial and democratic contexts. The same is true of South Africa, particularly in the context of apartheid and right until the present democracy. Martin Wittenberg (in Bardhan and Mookherjee, eds., 2006), explains how and why South Africa has had a consistent thread of decentralisation running through its major forms of government. Wittenberg presents three phases of decentralisation, namely:

1. The Consolidation of the South African State (1910 – 1948)
2. The Period of Grand Apartheid (1948 – 1982)
3. The Reform and Eventual Collapse of Apartheid (1982 – 1994) (Bardhan and Mookherjee, eds., 2006: 330 – 335).

In 1910, "the four British settler colonies" (Bardhan and Mookherjee, eds., 2006: 330) of the Cape, Natal, Transvaal and the Orange Free State established the union of South Africa. The union had a parliament representing the national government, and municipalities in local areas. But this only applied in white and mostly urban areas. Rural areas were a mix between "privately owned farms and a number of reserves where land was communally owned" (Bardhan and Mookherjee, eds., 2006: 330). Thus, the South African state was "created as a three-tier system, with elected bodies at all three tiers" (Bardhan and Mookherjee, eds., 2006: 330). And, the "overall nature of the state was unitary rather than federal, but the existence of well-organised regional interests ensured that there was always some element of decentralisation" (Bardhan and Mookherjee, eds., 2006: 330). Wittenberg provides a visual representation of this system, which is depicted below.

Figure 5: The "dualistic" Decentralised System in South Africa (1910-1948)

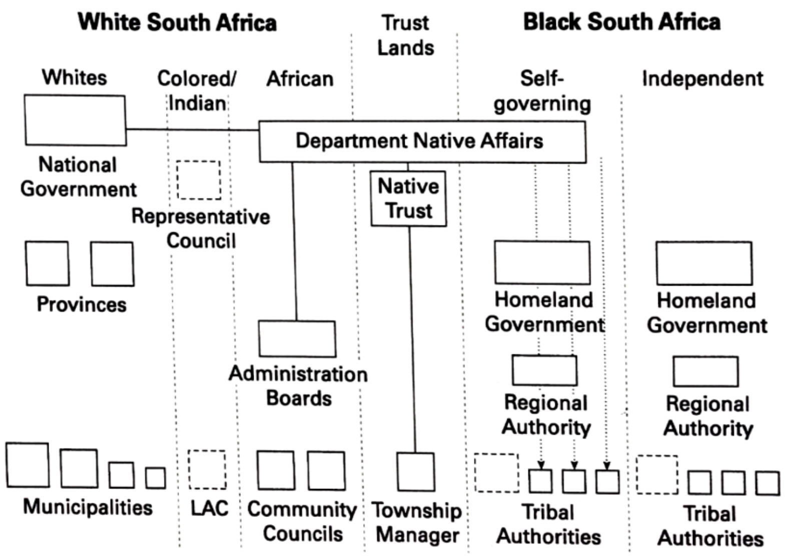


Source: Wittenberg in Bardhan and Mookherjee, eds., 2006: 331.

During Grand Apartheid (1948 – 1982), the government complicated the system even further, in order to serve its separatist ideology (Bardhan and Mookherjee, eds., 2006: 331). As such, the "nascent dualistic system of decentralisation that existed in 1948 was elaborated" with three systems, separating whites and black Africans; and two additional systems for coloured and Indian South Africans (Bardhan and Mookherjee, eds., 2006: 332). The first system comprised a "national government, provinces, and municipalities that applied to white South Africans" (Bardhan and Mookherjee, eds., 2006: 332). Wittenberg describes this first system during Grand Apartheid as, "progressively more centralised, as the national government assumed increasing control, particularly over the lives of black South Africans, through oppressive and repressive measures. It also did not trust even white-controlled local authorities to act with the same single-mindedness that characterised the centre." (Bardhan and Mookherjee, eds., 2006: 332).

The second system that was enforced during Grand Apartheid was "a centralised system of control over the lives of black South Africans outside the reserves (*or homelands or Bantustans*)" (emphasis contained in original text; Bardhan and Mookherjee, eds., 2006: 332). This refers to the actions of Grand Apartheid which sought to "integrate control over movement, access to the labour market, and access to accommodation" (Bardhan and Mookherjee, eds., 2006: 332). The third system of decentralisation which existed was that of "governance within the reserves", which can be seen as a "remarkable, if warped, attempt at decentralisation" (Bardhan and Mookherjee, eds., 2006: 332). Enter Mamdani, because this is precisely where the theory of decentralised despotism arises from. It arises from the fact that the Bantustans were indirectly ruled by the apartheid government, through traditional chiefs and laws. This complex system is depicted in another one of Wittenberg's illustrations, below.

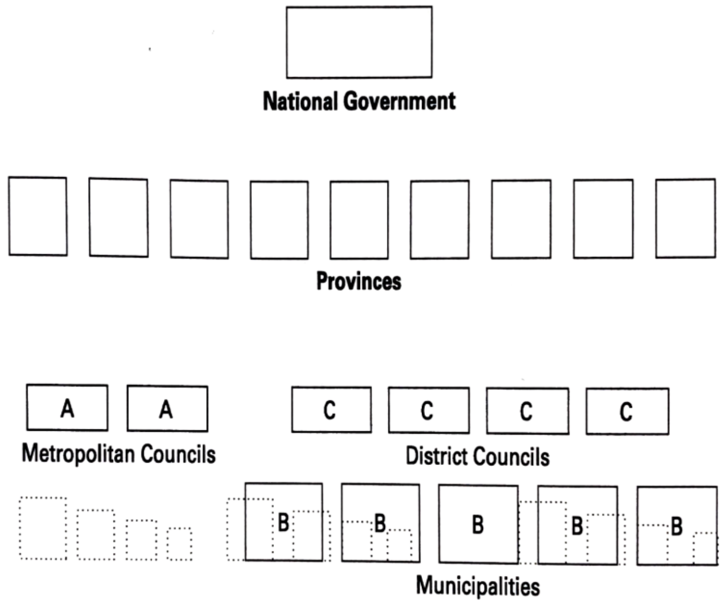
Figure 6: Grand Apartheid Decentralisation (1948-1982)



Source: Wittenberg in Bardhan and Mookherjee, eds., 2006: 333.

In the period of Reform and Eventual Collapse of Apartheid (1982 – 1994), the apartheid state attempted to "centralise control further (such as by abolishing the elected provincial tier) and create bridging structures that cross-cut the existing administrative systems" (Bardhan and Mookherjee, eds., 2006: 334). This was done to try and quell the growing resistance to the apartheid regime. The strategy used was to create "nine development regions with associated development agencies that were created to try and facilitate development across the borders of the homelands"; and locally, "regional services councils were created to provide financial support for developing the urban black townships" (Bardhan and Mookherjee, eds., 2006: 334).

Figure 7: Democratic Decentralisation in South Africa



Source: Wittenberg in Bardhan and Mookherjee, eds., 2006: 337.

South Africa's democratic decentralisation, as depicted in Wittenberg's illustration in Figure 4 above, had to amalgamate the existing structures and established a democratic system of a national government, with provinces and municipalities of different classifications. Wittenberg's analysis has clarified the ways in which the apartheid state was centralised and decentralised, which is important because it nuances the understanding of whether and how the state functioned. The transition and negotiations that led to this system will be examined fully in Chapter Three.

2.5 Criticisms and Problems of Decentralisation

Picard and Mogale (2015) argue that South Africa's decentralisation in the current democratic era is actually more centralised in nature and structure. They observe that the type of decentralisation implemented in Africa is usually administrative decentralisation, which is the application of "limited authority…delegated to officials who represent the state at the local level" (Picard and Mogale, 2015: 14). Authority is limited in that, the national government remains in control of financial and physical resources. Such retention of enabling resources by the national government renders decentralization ineffective. Of course, Africa is not a country and thus prima facie, this can appear to be a generalisation. In examining the nature of deconcentration, in South Africa the authors found the following forms: field administration, local administration and functional administration (Picard and Mogale, 2015: 14). Field administration entails transferring some decision-making authority to field staff, in functional administration, deconcentration occurs within specific sectors of service delivery such as health and education. For Picard and Mogale (2015: 14), local administration is more complicated because "subordinate levels of government become agents of the central authority" in an essentially prefectoral system that can either be integrated or unintegrated. Prefectoralism is governance by centrally appointed individuals or institutions (ibid).

Analysing the current relationship between the local state and national central control - "centre-periphery relations" (Picard and Mogale, 2015: 3) these scholars maintain that the local state was set up through the transition to democracy to ensure that power is shared between different spheres of government, thereby fostering democracy. However, there are “bureaucratic and control structures” (Picard and Mogale, 2015: 3) that have persisted beyond apartheid and into the current local state.

The local state is therefore the sphere of subnational government and the decentralised prefectoralism that permeates it as both a result of historical governance in Africa and South Africa and a consequence of current central and decentralised relations in government. As such, a fundamental aspect of the local state is the historical phenomenon of diarchy whereby colonial governors and self-governing provinces (Picard and Mogale, 2015: 18) operated within one geographical and national boundary. Picard and Mogale describe this as “two parallel forms of government operating separately but simultaneously” (Picard and Mogale, 2015: 4) – which they argue continues today in South Africa today because, “[although] South Africa functions entirely within the framework of its written constitution, it remains highly centralised, politically, fiscally and administratively” (Picard and Mogale, 2015: 163). Their reasoning and arguments will be examined in Chapter Three.

The second criticism of decentralisation is that it has mixed objectives which practically distort the actions of the main actors who implement decentralisation. In the African context, it was presumed to be a more effective way of organising governments partly as a backlash against centralisation, but its implementation was inconsistent because, “leaders were offered few clear and specific guides to help them choose particular forms of decentralisation” (Koelble and Siddle, 2013: 27). This led to decentralisation being implemented based on “mixed motives and objectives”, such as “‘statesmanlike considerations, seeking the genuine empowerment of groups at all levels, and of hard-nosed calculations of self-interest’” (Manor, 1999 in Koelble and Siddle, 2013: 27). Advances in communication allowed the concept of decentralisation to spread quickly despite there being little or no evidence to support its claims (ibid).

The third criticism and problem with decentralisation is that it is hindered by central or national political objectives and not democratic objectives. Devas and Delay (2006) observe that, “while there are many valid economic and administrative arguments in favour of decentralisation, the reality is that in many countries decentralisation has been driven not so much by these arguments or by local level democratic demand, as by the interests of local and national political elites, by certain political realities at the centre, and by external pressures” (Koelble and Siddle, 2013: 29).

Finally, decentralisation has been known to often lead to a recentralisation of power when it fails. Ideally, local governance should be strengthened by decentralisation; but the actual experience of decentralisation is that decentralised subnational governments, particularly local subnational governments, encounter many practical difficulties. These difficulties lead to subnational governments being re-centralised by their national governments. Such situations usually emanate from the unavailability of enabling resources within local governments.

Table 5: Idealised and Actual Experiences of Decentralisation

Idealised Process by which Local Governance Emerges from Decentralisation Reforms	Frequent Actual Experiences of Decentralisation Reforms
1. Elite chooses to devolve authority, resources and accountability to localities.	1. Elite announces reforms to devolve local authority, resources and accountability to localities.
2. Decentralisation reforms are defined and promulgated.	2. Some decentralisation reforms are defined and promulgated.
3. Redistribution of authority, resources, and accountability to localities emerge.	3. Redistribution of authority, resources, and accountability to localities is announced.
4. Decision-making institutions, broadened participation by the public, and greater accountability to localities emerge.	4. Several patterns emerge: • Incomplete statutory reform blocks effective control by local authority; • Resources are retained or recaptured by central actors via "conditional" grants, continued control of civil service posted to localities, ignoring local authority's decisions, etc.; • Resources of localities are consumed paying for salaries of officials they do not control, or for basic administrative overheads; • Local councils are ineffective because of low levels of education, poor organisation, infrequent meetings, internal division, and executive dominance; • Local institutions are designed to maintain central control; and/or, • Local elites dominate local governance from behind the scenes.
5. Improved performance and accountability of local governance institutions reinforce local support for reformed system.	5. Poor performance and non-accountability of local governance institutions discourages local support for them.
6. "Local governance" is a going concern.	6. Local governance remains weak and ineffective.
	7. Recentralisation occurs.

Source: Olowu and Wunsch, 2004: 6.

The relevance of recentralisation for this thesis is that, an even process of decentralisation is highly unlikely in the African context, including South Africa because subnational governments in this context have not had the time, capacity and skills required to exert an even democratic decentralisation process. Instead, as most of the literature above has shown, a lot of African subnational governments have laid their democratic decentralisation process on fragmented foundations of colonial, decolonial and apartheid decentralisation. Secondly, recentralisation is one of the most plausible explanations for Picard and Mogale's contention that the South African state remains centralised. Local governments are not in a strong position to manage their administrative and political processes on the one hand while provincial governments and departments have been placed under the guardianship of national government particularly through the S100 process. This is form of recentralisation, is the purview of this thesis.

3 Chapter Three – Practical Consolidation of Decentralisation in South Africa

3.1 Background

The purpose of this chapter is to show that South Africa's experience of decentralisation, through apartheid homelands and provinces and current democratic provinces, is not as neat as the apartheid-centralisation to democratic-decentralisation distinction that has been carved out. Instead, there have been variances in the state's experiences of decentralisation and federalism depending on the odds and stakes at the time. This is not, and never will be, an attempt to highlight decentralisation while eclipsing racial oppression. It is a way of showing that a particular theory about constitutions being the determining factor for the character of the state is valid, and that our understanding of decentralisation in South Africa is not simply a democratic phenomenon. This contributes to my argument about South Africa's constitutional crisis by showing that the wrangle over decentralisation and federalism is rooted in the formation of the democratic South African state. Moreover, according to Kelsen's theory (1945), the Constitution of 1996 established a democratic and decentralised unitary state. However, this is not explicitly written in the Constitution, which creates ambiguity about decentralisation in South Africa.

Kelsen's theory is important for this chapter in many ways. Firstly, Kelsen's juristic theory of the state (Kelsen, 1945: 181) shows something that often goes unchecked in sociological and political theories of the South African, and possibly African, state i.e. the fact that constitutions have served as the basis for law-creating mechanisms that have been used in both oppressive and democratic states. For example, South Africa had constitutions in 1909, 1961 and 1983, and currently has the democratic Constitution of 1996 and these constitutions have, depending on the times, been used in both oppressive and democratic ways. Secondly, the theory is useful for this chapter because it demonstrates how the state exists from conception to administration; or in other words, how the formation of the state consequently creates the modes of governance within the state. Kelsen's premising of the constitution and the law as a representation of society and politics and not as an abstract notion provides a realistic account of the conceptualisation of the state, its composition, its classification, and various ways on how it is organised. This is compatible with the primary objectives of this research: to show how the South African state came to be decentralised in the current democratic era and the manifestation of provinces; and how this affects public administration through the legal mechanism of interventions.

This chapter will also discuss the debates around decentralisation and federalism in South Africa prior to the 1996 Constitution to understand the constitution's influence on the nature and character of the state. These debates will be discussed using the historical evidence of the implementation of decentralisation and federalism during various periods. This will be done by analysing the Buthelezi Commission which is one of the first public enquiries into the possibilities of merging and apartheid homeland and apartheid province. An analysis of this commission provides an understanding on the intricacies in choosing between decentralisation and federalism. By examination of theory, constitutions and the Buthelezi Commission, this chapter will show that decentralisation has been entrenched in South Africa's governance. In addition to this, the theoretical examination will provide a workable framework for the rest of my thesis.

3.2 The History and Practical Debates about Decentralisation and Federalism in South Africa

Prior to South Africa's own experience of democratic decentralisation, there were Constitutions for a fragmented union (1909, 1961, and 1983) as well as strands of centralisation and decentralisation. This speaks directly to Kelsen's argument that the constitution determines the form of government (autocracy and democracy as ideal types) and the forms of organising the state (centralisation and decentralisation) (Kelsen, 1945: 304 – 306). As such, and as the public administration scholarship in South Africa postulates, centralisation and decentralisation are neither novel nor straightforward. Acknowledging the preceding, I will sift through the relevant history in order to identify the motivations, values and implementation stages of these ways of organising the state, an undertaking that will address my research questions.

This section will therefore examine the history of centralisation in the previous formations of the South African state to understand how the state functioned previously and how centralisation and decentralisation were conceived. Most of this examination will focus on the 'federal vs. unitary state' debate as it was presented between 1980 and 1993. Afterwards, using the Buthelezi Commission, this section will discuss debates about federalism in the apartheid state. The section will also discuss debates around decentralisation, federalism and regionalism during the transition to democracy. Lastly, the legal frameworks around South Africa's democratic decentralisation will be discussed.

3.3 History of Centralisation and Decentralisation in 'The Union' (1910 – 1983) as it pertained to Education

The Union of South Africa Act (1909) established the Union of South Africa on 31 May 1910. One of the aims of this act was

> "…to make provision for the union of the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony on terms and conditions to which they have agreed by resolution of their respective Parliaments and to define the executive, legislative, and judicial powers to be exercised in the government of the Union" (Union of South Africa Act, 1909, Preamble).

Thus, what came to be South Africa's first provinces were initially British colonies. Basson (1995) argues that through this unification "the possibility of a federal system for South Africa was mooted" (Basson, 1995: 196). The reason given by Basson is that the constitution of the union was modelled after the Westminster system, given the British origins of that constitution. In the Westminster system, and consequently in the union of South Africa,

> "The powers of the sovereign Parliament were unrestricted and undivided and Parliament could infringe at will on the subordinate constitutional powers of the four provincial councils which were empowered to make laws (called ordinances) with regards to matters within certain prescribed areas of legislative competence (and which applied in the province concerned)" (Basson, 1995: 196).

Basson thus characterises decentralisation in Kelsen's manner whereby there is a central constitution or law-creating organ which takes pre-eminence over all other structures. However, in the South African case decentralisation was an imperial power over its colonies to the exclusion of the native people. In the 1909 constitution, the executive was the king of England represented by a governor-general (Union of South Africa Act, 1909, Part III). Within the provinces, there were Administrators, Provincial Councils and Executive Committees which functioned for the administration of the four colonies. Administrators of the provinces are described as, “a chief executive officer appointed by the Governor-General in Council… and in whose name all executive acts relating to provincial affairs therein shall be done” (Union of South Africa Act, 1909, s68 (1)). Such a post was reserved for residents of the province and the tenure was five years (Union of South Africa Act, 1909, s68 (2) – (3)). There was also the possibility of appointing a deputy administrator (Union of South Africa Act, 1909, s68 (4)). Provincial Councils were established too, limited to twenty-five council members with three-year terms (Union of South Africa Act, 1909, s70 – 77). Of more interest here are the powers that were entrusted to Provincial Councils. These councils had the power to create ordinances in a number of areas. The areas included taxation, local governance, education, agriculture, health, local works, roads, fisheries and game preservations, and penal institutions (Union of South Africa Act, 1909, s85). These functions were decentralisation at work to organise the union. The ordinances pertain to administration that is best carried out by a government body close to the relevant constituency or province and this list has evidently become part of the current Constitution’s lists of executive and concurrent legislative competencies. A read of the list as presented in the then constitution shows that the basic configuration of provinces would later expand economically in terms of responsibility and politically; but the basic shape remained. This will be explained later.

Executive Committees were also functionaries of provinces. They consisted of the provincial Administrator and “members of the executive committee” who were elected (Union of South Africa Act, 1909, s78 (1)). The purpose of the executive committees was to “carry on the administration of provincial affairs” (Union of South Africa Act, 1909, s80). The scope of the executive committees was thus broad as it related to provinces.

The four colonial provinces remained in the 1961 Constitution. Instead of the recognition of the general British crown and a governor-general, there would be a State President, whose election, roles and benefits are detailed in this 1961 Constitution. In terms of the provinces, the role of the Administrator remained, except that now their appointment and accountability rested with the State President (Constitution of 1961, s 66). Provincial Councils also remained intact (Constitution of 1961, s68 – 75), as did their list of possible ordinances (Constitution of 1961, section 84). Importantly, and again signalling decentralisation, ordinances passed by Provincial Councils were valid in their relevant provinces “as long and as far only as it is repugnant to any Act of Parliament” (Constitution of 1961, s85). Again, parliament remained the central law-creating organ with provincial ordinances being subject to parliament, and thus being decentralised.

Basson notes that the central role of parliament continued well into South African history as “subsequent major constitutional changes in 1961 and 1963 maintained to the fullest the unitary system of government in South Africa with Parliament reigning supreme” (Basson, 1995: 196). Basson notes that the only break with the unitary character of the South African state was the independence of the TBVC states and the 1993 Interim Constitution which created the nine provinces. However, it is worrying that an exclusionary state be called unitary and devolve power when it excludes the majority within its boundaries.

Some strange things began to happen in the 1961 constitution which set the tone for apartheid or autocratic centralisation/decentralisation. Firstly, the revenue that was due to education from provincial revenue collection would not be paid into the established provincial revenue fund. Rather, the declaration and expenditure of this revenue was left to the discretion of the provincial Administrator. In the words of the 1961 constitution,

> “The administrator of a province may, subject to the laws relating to education, authorise every educational institution in the province which is specified in a list published by the State

> President by proclamation in the Gazette, to retain and apply such of its revenues and other moneys received by it, as the administrator may from time to time determine, for the purpose of meetings its expenditure, and such revenues and other moneys shall, notwithstanding the provisions of sub-section (1), *not be paid into the provincial revenue fund, but shall be accounted for and dealt with as the administrator may prescribe*" (emphasis added; Constitution of 1961, section 88 (3)).

This effectively meant that education in the four apartheid provinces had their finances decentralised to the provincial Administrator. The specific separation of education's finances was suspicious because education was subject to provincial ordinance, and subsequently administration, not an individual. But this may not have been as bad as the havoc that was being wreaked in Bantustans, because while education in the four apartheid provinces was being decentralised further, the education of the majority of South Africa was being centralised. Thus far, we have described Kelsen's concept of centralisation/decentralisation where a constitution determines the way in which the state is organised and the form of government that will follow. In this case, the apartheid state decentralised certain minority interests and centralised majority interests which aligned with its general segregationist policies.

The Bantu Education Act (1953) was a precursor for the centralisation of education for Africans and the decentralisation of the same in apartheid provinces in the 1961 constitution. The opening words of the Bantu Education Act stated that its purpose was

> "To provide for the transfer of the administration and control of the native education from the several provincial administrations to the Government of the Union, and for the matters incidental thereto" (Bantu Education Act, 1953).

A further indication of the centralisation of the education of Africans in the Bantu Education Act was the fact that the apartheid provinces no longer had decentralised control over this education. As the Bantu Education Act stated:

> "… there shall cease to be vested in the executive committee of a province any powers, authorities and functions, and the provincial council of a province shall cease to be competent to make ordinances, in relation to native education" (Bantu Education Act, 1953, section 2 (b)).

Thus, the 1961 constitution and the Bantu Education Act as a precursor can be used as evidence of the centralisation of a service that was going to be used for further oppression in the apartheid state. One can read this as a key move in the apartheid state. This was a collision course between the administration of the state and education, which continues to have adverse effects on administration in South Africa's decentralised democratic state.

As provincial councils were no longer responsible for the education of Africans, the Department of Native Affairs and its minister became responsible for "all the work necessary for or incidental to the general administration of native education" (Bantu Education Act, 1953, section 3 (1) – (2)). We know that the Department of Native Affairs was the focal point of apartheid policy over Africans, and thus the centralisation of education for Africans in this department revealed a wider state project of grand apartheid. Moreover, prior to Bantu Education the majority of education for Africans was provided by missionary schools. The work of the Eiselen Commission revealed the state's project to centralise the education of Africans (Chilenga, 2013).

The second strange occurrence in the 1961 constitution is that all "Bantu Affairs" were centralised under the state president. Section 111 of the 1961 constitution thus reads:

> "The control and administration of Bantu affairs …shall vest in the State President, who shall exercise all such special powers in relation to such reserves as may have been exercisable by the said Governor-General-in-Council" (Constitution of 1961, section 111).

Upon reviewing this, two theories come to the fore. The first theory is Kelsen's which tells us that autocracies tend to rely on centralisation as a form of organisation (Kelsen, 1945). This is precisely what we see in the above extract of the 1961 constitution where "Bantu affairs" were under the direct legal remit of the state president at the time. The 1961 constitution therefore did precisely what Kelsen's theory of law and state observed - allowing the state president, the autocrat, to determine the laws and conditions of the majority of South Africans.

The 1961 constitution, as well as the 1983 constitution which will be examined later, reveal that this centralisation originated in an autocratic and centralised constitution and this was on purpose – to limit rule and self-determination for all. It can also be inferred that hierarchical and rule bound systems in the apartheid 'public' service was a result of the controlling and repressive tactics of apartheid autocracies, as guided by their constitution.

The second theory that comes into play here is Mamdani's theory of decentralised despotism (1996) which was exercised in rural areas called "reserves" in the 1961 constitution, and direct rule in urban areas. Together, both these centralisation and decentralisation tendencies created a bifurcated state, wherein the state was organised to separate the rural and urban areas, and thereby govern according to the proximity of the colonial state to the native population (Mamdani, 1996). This was exactly the case in South Africa, as Mamdani tries to show. How do we disentangle these two tendencies in the same state? Does one have to take precedence over the other? One might say no because neither of them dominated the state completely. Beinart and Dubow (1995) noted the following about this form of organising the apartheid state:

> "The Afrikaner leader most closely identified with the development of the homelands was Hendrik Verwoed, Prime Minister from 1958 to 1966 and before that Minister of Native Affairs. Verwoed envisaged the creation of the Bantustans as a form of political decentralisation or internal decolonisation. *He calculated that this would defuse the rising tide of African nationalism and parallel the decolonisation policies pursued by Britain and France in Africa from the late 1950s*." (emphasis added; Beinart and Dubow, 1995: 16)

The two trends of centralisation and decentralisation were two means to different ends in the bifurcated state. The autocratic apartheid state used the 1961 constitution to centralise the legislation over Bantustans, while simultaneously decentralising administrative authority to apartheid provinces and trying to provide political decentralisation to Bantustans. That is, the apartheid government tried to maintain centralised legislation over the Bantustans, while allowing limited administrative powers to Bantustan leaders in order for them to govern their Bantustan territories. But theorists and pragmatists alike saw through both these tendencies. Turning to Beinart and Dubow again:

> "In theory, the new separate nations would be able to house the bulk of black people and provide the basis for national self-determination. Emphasis was placed on the virtues of 'separate development' rather than the racially exclusivist aspects of apartheid. This initiative involved a new system of local and regional government in which chiefs were elevated to positions of unprecedented authority. The Bantu Authorities Act of 1951 and the 1959 Promotion of Bantu Self-Government Act paved the way for nominal Bantustan independence, granted first to the Transkei in 1976." (Beinart and Dubow, 1995: 16)

These centralisation and decentralisation tendencies within the apartheid state align with Wittenberg's assessment of decentralisation during the Grand Apartheid phase as outlined in the literature review.

What can be seen, through a close reading of the 1909 – 1983 constitutions, is that the apartheid state chose to centralise and decentralise various functions at will. There was no steady logic to how this would affect public administration in both the medium and long term. Instead, the logic that was applied was autocratic and separatist, albeit with short sightedness of the sustainability of such a governance model and there is no doubt that the work that the democratic government has had to do through reform, transformation and amalgamation in the public administration is admirable, even if not perfect.

3.4 1983 constitution

In this section, I will rely heavily on secondary sources that discuss the 1983 constitution because, although I have read that constitution, its problematic nature is more lucidly explained by other sources. The 1983 constitution is one that displayed the immense pressure that the apartheid government was under to completely reverse separate development. Instead, the NP decided to rewrite its autocratic constitution of 1961 and tried to bring more racial groups towards the centre of government. According to Austin, the 1983 constitution was "introduced at a time of severe financial strain. Inflation at over 10 per cent, a falling price for bullion, excessive government expenditure and that most pitiful natural disasters, recurrent drought, have put the economy into great difficulty" (Austin, 1984: 185). The context that preceded the 1983 constitution also included the apartheid government's "total strategy" campaign (Worden, 2012: 133). Total strategy was a two-fold campaign whereby on the one hand the apartheid government tried to combat "revolutionaries from inside and outside the country" (Worden, 2012: 133). On the other hand, the total strategy "also aimed to restructure society in ways required by industry, thus combining the economic interests of business, the political interests of the Botha administration, and the security interests of the military and security forces" (Worden, 2012: 133). Yet, on the part of Africans, the lack of representation made them loathe these reform strategies (Worden, 2012). Under economic, social and political pressure, the apartheid government drafted a new "'tricameral' constitution" (Worden, 2012: 134) which passed a "referendum of white voters on 2 November: 'Yes' votes 65.95 per cent, 'No' votes 33.53 per cent, spoilt papers 0.2 per cent" (Austin, 1985: 189). The 1983 constitution,

> "…created separate parliamentary assemblies for white, coloured and Indian Members of Parliament. Each house controlled its 'own affairs', such as education, health and community administration, but all other matters were still monopolised by the White House of Assembly which retained the overall majority of seats, and the new office of State President, held by Botha, acquired wide-ranging powers…it was boycotted by the vast majority of coloured and Indian voters…The tricameral constitution made no provision for African participation. The principle remained the constitutional representation for Africans was confined to homelands" (Worden, 2012: 134).

Furthermore, the tricameral parliament was divided as follows:

> "House of Assembly – European – 178 members
>
> House of Representatives – Coloureds – 85 members
>
> House of Delegates – Indians – 45 members" (Austin, 1985: 188).

Jisheng (1987) argues that the 1983 constitution was the culmination of apartheid racist ideology in legal form. The three characteristics that Jisheng described as the most racist elements were the black masses deprivation of political rights, the treatment of Coloureds and Asians as second class citizens, and giving all political precedence to whites (Jisheng, 1987). Interestingly, the motivation behind the 1983 constitution for the NP was consociational federalism. Austin writes that, "The theory behind claims made for the constitution is, of course, the rather tired notion of consociational democracy – the evocation of a coalition through which the leaders of a plural society co-operate without merging their particular interests: a process of bargaining through elite accommodation" (Austin, 1985: 189). This is a very different interpretation of consociational federalism that the NP was trying to push through the 1983 constitution. In the first place, the tricameral parliament did not accommodate *all* races in the parliament, and this is one of the main prerequisites of consociational federalism because it later requires that those races be represented proportionally in parliament. In the second place, the majority of power still lay with white people in parliament and through the state president, which would not have allowed for a minority veto – another important part of consociational federalism.

The most relevant part of the 1983 constitution for this study is that the NP was centralising some of the powers that it had given coloured and Indian people through the tricameral parliament. This means that the NP, through its 'accommodation' of coloured and Indian people, was effectively controlling their decisions and powers which were already limited and repressed. It does not make sense to try to work out the nuances of centralisation and decentralisation in the apartheid state because there was no clear logic to it, except continuing violence and repression to maintain a separated society.

3.5 The Buthelezi Commission (1982)

As outlined earlier in this section, Natal was one of the four apartheid provinces established when the union was formed in 1909. The history of Natal as an apartheid province is intertwined with the history of KwaZulu and the two areas currently make up the democratic province of KwaZulu Natal. A very brief history of this area shows that in 1897, Zululand – the area that would later be called KwaZulu, was annexed to the then colony of Natal (Buthelezi Commission, 1982). In 1904, the land was allocated to the Native Reserves, and in 1909 it was moved to the Zululand Native Trust, only to be moved again into the South African Native Trust in 1936 (Ibid). This history does not mean that we should view the two areas as naturally separate a priori. Rather, in the context of the South African state as it has been formed and understood in the last two centuries, KwaZulu and Natal were conceived of as separate. Besides the issue of land and dispossession, the history of KwaZulu and Natal share a deeper economic and social history. In 1980, the future of KwaZulu and Natal – as a self-governing territory and apartheid province respectively – was debated and planned through the Buthelezi Commission. These debates and plans are highly relevant for my research because they embody one of the first debates about provincial formation between an apartheid province and a Bantustan; it was a discussion that involved the tangible implementation of consociational theory, and generally a foretaste of the economic, political and social planning of provincial decentralisation post the apartheid state.

In the words of the Commission itself, this was "the first real black initiative…non-racial and widely representative …a Black statement that there might be a peaceful alternative, and a Black expression of hope that a regional, moderate approach might be found which would be acceptable, at the very least, to the part of the country as a whole" (Buthelezi Commission, 1982: 31). It might not seem ground-breaking in today's context to consider integrating an apartheid province and a Bantustan, but back then this was a bold move in a state that contained separate 'states' on a false account of development. However, the Commission was clear that its plans and their potential implementation would be "within the overall framework of the Republic of the South Africa, of developing a regional constitutional arrangement which might provide an alternative to the programmes to which the White political parties had become committed" (Ibid: 31). So, although the Commission was a bold move, it was treading within the confines of apartheid law and constitutions, and not necessarily breaking with the status quo at the time.

However, a counterargument to this could be that the Commission was incremental in its approach. This is evident in the Commission's view of its potential impact: "If a widely supported political accommodation in one region [KwaZulu and Natal] can be achieved, there may be adaptations which could be appropriately considered for other regions" (Buthelezi Commission, 1982: 31). Political accommodation was deemed necessary for a stronger and better region going forward. This accommodation was also as a result of social and political pressure at the time. The social pressure was caused by the instability and threat of violence in an oppressive apartheid state. The political pressure was top down as, “there [had] been consistent argument at the provincial level for the introduction of a form of devolution which would allow a degree of effective joint decision-making in the region [of KwaZulu and Natal] (Buthelezi Commission, 1982: 30). Political pressure was also mounting because the apartheid project was failing even on its own terms of separatism. This was noted by the Commission, which observed that the apartheid policy of “deliberate decentralisation of industry to “border” areas was instituted and subsequently extended to include development efforts within the “homelands”, but, after a considerable period, has not produced the geographical separation of living that was envisaged” (Buthelezi Commission, 1982: 60).

In other words, separatism was unsustainable because resources and the movement of people, at the very least, was not viable on a practical level. Instead,

> “with the development of the self-governing territory of KwaZulu there has occurred an increased intermeshing of the “homeland” with the old “White” areas of Natal. In particular this has occurred because of the expansion of the major metropolitan areas such as Durban and Pietermartizburg where large numbers of urban KwaZulans, living in KwaZulu, are intermeshed into the metropolitan conurbations” (Buthelezi Commission, 1982: 60).

This added political pressure for the joint decision-making referred to earlier as more integration required more consideration for those being excluded on spurious grounds.

In light of the social and political pressure to merge KwaZulu and Natal, the Buthelezi Commission had corresponding terms of reference (TORs). The first TORs set out the general and important objectives of the Commission, which were to ensure, “peace, stability, prosperity and equity”, through the proper consideration of “possible or likely future developments, and with due cognisance of alternative constitutional forms and modes of political organisation and development” (Buthelezi Commission, 1982: 34). In addition to this, the first TOR included the Commission’s responsibility to assess “the rationality, desirability and viability of the present constitutional, social and economic situation of KwaZulu and Natal in the light of historical development, and the current and emerging political reality of South and Southern Africa” (Buthelezi Commission, 1982: 34). Essentially, the Commission sought a new way to organise KwaZulu and Natal to the benefit of all its residents, and in so doing, carve a different constitutional path and its subsequent political organisation. The hope here was that the new and successful organisation of KwaZulu and Natal at a provincial level would open a way for a different constitution and organisation at a national level.

Another set of TORs for the Commission was to, “consider the degree of economic, social and administrative interdependence or otherwise of KwaZulu and Natal” as well as to, enquire into and report on the patterns, problems and needs in regard to economic development in KwaZulu and Natal as they relate to the infrastructure, production, employment, technology, indices of overall prosperity and the quality of life of ordinary people in all areas, rural and urban” (Buthelezei Commission, 1982: 34 – 36). The final set of TORs dealt with the service delivery in KwaZulu and Natal. The political organisation of the province of KwaZulu and Natal would affect the specific services of social services, education and housing, as stated in the TORs (Buthelezi Commission, 1982: 36). We know that the apartheid province of Natal functioned administratively through the Administrator, Provincial Councils and Executive Committees. But according to the Commission, KwaZulu and Natal were structured and administered differently.

KwaZulu was run through the KwaZulu Legislative Assembly, which was convened under Act 21 of 1971 and was situated eUlundi. It was known as the KwaZulu Civil Service and some of its civil service members were assigned by the apartheid central government. The Commissioner General of KwaZulu was also appointed by the central apartheid government and was a "link with central government through the Department of Co-operation and Development" (Buthelezi Comission, 1982: 61). The tie between KwaZulu and the apartheid central government through the Commissioner General was essentially a form of devolution, similar to that of the colonial administrations which assigned a governor, or prefect in Francophone colonies, to oversee territories (Olowu and Wunsch, 2003). Below the KwaZulu Civil Service structure were 25 Regional Authorities, 202 Tribal Authorities, 7 Community Authorities and Urban Local Authorities (Buthelezi Commission, 1982). The main functions of Tribal and Community Authorities were the administration of finances, agriculture, social services and overseeing the judiciary. However, KwaZulu did not consider itself as self-governing because it was still governed by the apartheid central government according to the Schedule of 1971.

There was a fundamental difference in the forms of decentralisation in KwaZulu and Natal. KwaZulu had power devolved to it in an attempt to make it independent or self-governing; whereas Natal had power delegated to it. This difference is fundamental because devolution implies more independence over decision-making, while delegation is a mechanism for executing centrally planned policy. Given these differences between KwaZulu and Natal, there were five main options[7] considered for the merging of KwaZulu and Natal which test the notions of federalism, decentralisation and consociation. These considerations are thus crucial in the early debates about the formation of provinces and the ensuing forms of organising the state.

In the end, the option that was deemed to be the most viable one was federalism (Buthelezi Commission, 1982), and it is at this point, that the theories of decentralization, federalism and consociation begin to converge during one of the earliest discussions about the configuration of the new provinces and the South African state. Apart from federalism, the other option that was considered to be 'viable', though destructive in the long term and retained the status quo, was political

[7] The options, summarized by Schlemmer and Schlemmer were,

(a) "The status quo or the present position [Kwazulu as a Bantustan and Natal as a province];
(b) Independence for KwaZulu of the Ciskei type;
(c) Complete sovereign independence with substantial consolidation creating an economically viable state;
(d) Greater autonomy without independence and less emphasis on consolidation;
(e) Expanding and developing cooperation with the Natal Provincial Authority at the practical level, both formally and informally;
(f) "areas of co-operation" within the regional development context as currently proposed by the government;
(g) Joint sittings of the KwaZulu Legislative Assembly and the Natal Provincial Authority ot joint Cabinet-Executive meetings of the two bodies;
(h) An inter-group political accommodation in the region;
(i) Immediate demands from KwaZulu leadership for full power-sharing in the region, with a unitary system based on one man one vote;
(j) The rejection of any regional option and therefore the exclusive concentration of KwaZulu leadership on securing full franchise rights for all groups in the country as a whole" (Buthelezi Commission, 1982: 87).

separation (Buthelezi Commission, 1982). But this was precisely the element that most of the options above were feared to have in common with political separation, which was maintaining a status quo of so-called separate development with little economic and social development and cohesion. According to the Commission, most of these options "contain the dangers of encouraging conflict to a degree; some would create conflict equal to or almost equal to the present system of political separation (the status quo). The least problematic is the federal option" (Buthelezi Commission, 1982: 110). However, federalism, although not as severe as political separatism, is described by Schlemmer and Schlemmer as a bittersweet phenomenon. They describe is as follows:

> "Nevertheless, it [federalism] is at root a discriminatory system, albeit less so than other options. For this reason it cannot be conceived as sensible or appropriate without being accompanied by the process not yet fully discussed – consociation" (Buthelezi Commission, 1982: 110).

In other words, the only way in which federalism could avoid the element of political separatism, because it was likely to reinforce apartheid boundaries instead of breaking them, is through the process of involving an elite cartel of individuals from all concerned groups within KwaZulu and Natal, whose main purpose would be to encourage

> "(1) Executive power-sharing among the representatives of all significant groups; (2) A high degree of internal autonomy for groups that wish to have it; (3) Proportional representation and proportional allocation of civil service positions and public funds; (4) A minority veto on the most vital issues." (Lijphart, 1985: 6).

This means that federalism, in the South African context at least, was not going to be implemented unconditionally because of the potential danger of separatism that it contained. Instead, federalism would only be viable in this context if it had the conditional process of inclusion and real decision making for all groups in KwaZulu and Natal.

What would the consociational process involve? The consociational process would involve the principle of,

> "deliberate and conscious negotiation between legitimate leaders of different groups in a divided situation in order to establish a framework in which political accommodation can be achieved…The leaders have to be legitimate in the sense that once agreement has been reached, the leaders can then take effective steps to mobilise followers in support of the agreement and can control and discourage dissent from that agreement" (Buthelezi Commission, 1982: 110).

Thus, consociationalism would establish legitimacy within the groups represented and between the leaders of those groups. Moreover, the negotiations had to be well thought out since they were taking place under pressure. This aligns with the idea that KwaZulu and Natal would only merge under conditional federalism because there would be the need for calculated and conscientious steps towards how to apply federalism.

The fact that federalism was not going to be accepted unconditionally in KwaZulu and Natal also reveals the distinction between federalism and decentralisation in the South African context. As will become clearer in the next section, those who pushed for federalism did so because they wanted the separate nature of this principle, and not the unitary one, which decentralisation was estimated to be able to provide better. In the end, the Buthelezi Commission proposed that KwaZulu and Natal "be seen as a single political area for the purposes of future constitutional development", and that if the separation would continue, the consequences would be “grave in terms of dangers to stability, welfare and coherent planning and development” (Buthelezi Commission, 1982: 111).

3.6 Debates about Decentralisation, Federalism and Regionalism in South Africa (1991 – 1996)

Following the economic pressure, social instability and demands for political change in the 1980s, South Africa was forced to have more in depth and lengthy discussions about how to organise the state along federal or unitary lines. Many of these discussions took place during the negotiations that were transitioning South Africa into an inclusive democracy – the Congress for a Democratic South Africa (CODESA; 1991 – 1994) and the Multi Party Negotiation Process (MPNP; 1993). The culmination of these discussions was the outcome of the 1993 Interim Constitution and the 1996 Constitution of the Republic of South Africa. The available literature on these discussions suggests that the understandings of state organisation at the time revolved around regionalism which was used interchangeably with federalism and a unitary state. In this context, decentralisation was seen as a mechanism or instrument in either of these ways of organising the state, and not as the form of organisation, as theorised by Kelsen. This section is thus integral to the rest of this thesis because it is foundational for understanding South Africa’s conceptualisation and implementation of decentralisation in the current state.

Before delving into detail, it is necessary to clarify some terms which have been defined earlier in the research, but whose meanings and usage was slightly different during the debates that ensued. The first term is ‘unitary’ alluded to earlier during the examination of Lijphart’s work. Lijphart recognised that in traditional political theory, unitary refers to a non-federal state, while in South Africa it refers to an undivided state, even where this state includes federal characteristics (Lijphart, 1985). This South African definition has been historically induced given the experience of the divided apartheid state. Thus, as much as the political theory is important, we cannot discount political experience in order to align with theory.

The second term is ‘regionalism’ which was used to describe the possibility of federalism during the discussions around state organisation. This was relevant at the time when ‘regions’ were a merger between areas in South Africa and federalism was used to politically organise these areas. In some discussions, regionalism is used interchangeably with federalism, for example, Friedman notes that the NP only considered regionalism in 1990, a term later substituted for federalism in 1992 (Friedman and Humphries, 1993). The Inkatha Freedom Party (IFP) was committed to federalism (both as a term and as a constitutional arrangement) from the days of the KZN Indaba and the Buthelezi Commission right until the negotiations. (Ibid).

The third and final term requiring clarity is ‘decentralisation’. During the negotiations for democracy, decentralisation was not used heavily in the discourse. As described earlier, decentralisation was seen more as a mechanism than as a form of organising the state. Decentralisation and federalism were also used interchangeably as the two were seen as synonymous. However, I take Kelsen’s view (Kelsen, 1945: 316) decentralisation and federalism are on the continuum of state organisation, but they are *not the same form of organising the state*. Therefore, even the stubborn use of federalism to describe a state that even describes itself as a decentralised unitary state is theoretically expedient but practically hollow.

Turning now to the discussions that took place during the negotiations and transition, we will begin with the positions of the major political parties at the time as a way of framing the discussion – the ANC, the NP, and the IFP. The NP and the IFP were the federalists advocating for strong regionalism while the ANC esteemed unitarianism. The NP had been in power for thirty-five years when they enacted the 1983 constitution, which was a precursor for their federal preference during the negotiations. Irvine (1984) remarks of the 1983 constitution that,

> "While the provincial system had certain quasi federal features, there were no guarantees of autonomy; and over the years, the provinces' powers have eroded, not least because of race policies imposed by the central government" (Irvine, 1984: 492).

So, although the apartheid government had centralisation tendencies, its insistence on Bantustans, specifically the independent Transkei, Bophuthatswana, Venda and Ciskei states (TBVC) and the self-governing ones, created a federal system, according to Irvine. Earlier, I described this as a decentralisation tendency, whereas Irvine shows that the NP's 1983 constitution pushed the South African state into a more federal domain.

Moreover, if the NP was right wing and their apartheid ideology was creating a fractured federal state, some of their supporters were pushing for an even harder right-wing line as early as the 1980s. According to Irvine, complete partition was

> "being canvassed by dissident right-wing Afrikaner intellectuals is that of the strategic retreat into an Afrikaner homeland as an alternative to being a minority in a country run by others…it is a reminder of the strong feelings underlying the imperative to survival as an Afrikaner *volk*[8], and the deep historical desire for a state expressing the nationalist impulsion" (Irvine, 1984: 501).

This remark is also evidenced by the archive documents for the South African Bureau of Racial Affairs (SABRA), currently kept in the volk utopia of Orania, Northern Cape. The SABRA archive contains many documents from the 1980s detailing the establishment of a separate Afrikaner state. This could be reflective of the expectation of the coming political change that would no longer serve right-wing minority interests. By the time the negotiations took place, "the goal was racial federalism in the form of an Afrikaner *Volkstaat*" (Steytler and Mettler, 2001: 95). Thus, for the NP and their right-wing dissidents, the way in which the democratic state would have been organised is through federalism, only to protect their own volk interests.

A more technical description of the NP's position with regards to organising the state is provided by Frost, who describes the position as,

> "properly federal in that regional powers are entrenched and the centre is not granted concurrent powers in these fields or the power to override them. Insofar as the spirit of federalism is a decentralising one in that it allocates a few core functions at the centre (defence, foreign affairs, national security, and constitutional planning) and places all other powers in regional hands (finance, taxation, commerce, education, health, police, welfare, cultural affairs, mining, roads, nature conservation, water and local government). The NP has proposed that each party, which wins more than a certain percentage of votes in the regional elections should be given equal representation in a senate" (Humphries and Rapoo, eds., 1994: 5).

Again, this shows that in the NP's estimation of federalism, the central government would not be able to override certain fiscal, social and service delivery functions, and by inference, these functions are ones pertaining to the administration of group interests. It is interesting to note that the direct functions that the NP lists are some of the functions found in the remit of the Provincial Councils in the 1909, 1961 and 1983 Constitutions. Maybe the NP hoped to retain these functions in a democratic federal state.

---

[8] 'Volk' id n Afrikaner term that is directly translated as 'people'. When used in this context, it refers to Afrikaner people specifically, their nationhood, and the idea of Afrikaner nationalists, that Afrikaner people in particular need a space in which to practice their culture, language and beliefs. In this case, Afrikaner nationalists were advocating for a province of their own, called a 'volkstaat' or a 'state' for Afrikaners only.

The ANC was opposed to federalism on the grounds that the NP was aiming for a volkstaat. As such, the ANC adapted a Unitarian approach, which is the current form of organisation in the South African state. This state has come to be known as a "decentralised unitary state" (Humphries and Rapoo, eds., 1994: 9).Nowadays, it may be difficult to imagine an ANC that does not see beyond the liberation, the party or particular individuals. But the ANC of the transition to democracy, despite the criticism levelled at the negotiation that some say should have been a revolution, should be credited for having foresight about the risks of federalism after the existence of the apartheid state. The ANC's position at the time can be described as,

> "committed to a system in which there are strong regional governments whose powers are entrenched in the constitution. However, its policy with regard to the regions is not a federal one in that although certain regional powers are entrenched, the centre is still to have concurrent and overriding powers in all matters. *What makes its policy even less federal in character is the way in which the powers are allocated between the centre and the regions*. The regions are only granted *limited powers* of taxation and control over education, health, welfare, housing, transport, the environment, industrial development, and town and regional planning. With regard to the representation of the regions at the centre, the ANC has proposed that there be a senate elected from the regions, but has not proposed any special weighting of regional representation there." (emphasis added; Humphries and Rapoo, eds., 1994: 4).

Thus, where the NP was proposing full control over certain exclusive functions (a federal system), the ANC was proposing that these functions be carried out jointly, or concurrently, between central and regional governments. There were political, social and developmental motivations for this position. Politically, the ANC viewed federalism as a means to subjugate the majority – strong federal units would reinforce Bantustans while 'creating a separate white *Volkstaat*' (Steytler and Mettler, 2001: 94). Simeon and Murray concur positing that the ANC preferred a unitary state where ethnic and tribal differences are not essentialised in the Constitution (Simeon and Murray, 2001). This political battle between the forces that had been in power and the ANC was only one side of the political motivation against federalism.

The other side of the political motivation for the ANC was the fact that regionalism in the form of grand apartheid was used to deny citizenship to millions of South Africans. Friedman recalls that grand apartheid, manifesting as a type of regionalism, was "a vehicle for denying a common citizenship" (Friedman and Humphries, 1993: 10). As such, the form of organising the state required very careful consideration because the form and contours remain the same, but just under different leadership and goals. Kelsen posits the same, as examined earlier, that autocracies and democracies can be centralised or decentralised, but they each have a propensity towards one or the other based on their political values. As Friedman succinctly summarises this political motivation, "The idea, then, that the form of regional government is not simply one constitutional arrangement among many but a crucial determinant of access to the state and to economic resources – and to membership of a nation – is central to South African politics" (Friedman and Humphries, eds., 1993: 10).

The social and developmental motivations are intertwined. The unitary argument here was that the unitary state would encourage social cohesion more, while enabling a central state to seek inclusive economic development for all. Lawrence (1993, in Friedman and Humphries, eds., 1993) presents this view by arguing that a unitary state, unlike a federal state, fulfils two essential characteristics needed in a democratic South Africa. These two characteristics are nation-building and sustainable development. Nation-building refers to "fulfilling the formal requirements of equal rights to citizenship for all, as well as similarly guaranteeing equal rights of citizenship" (Friedman and Humphries, eds., 1993: 46). Thus nation-building requires equality through citizenship.

Lawrence also emphasises that nation-building in South Africa cannot be effectively achieved through federalism because where federalism was implemented early in countries such as the United States of America, it brought different and independently established states together (1993, in Friedman and

Humphries, eds., 1993). But in South Africa, the exercise was the opposite – "forcing limited autonomy on regional entities in the name of 'independence' so as to sanctify the preserve of white racial oligarchy" (Friedman and Humphries, eds., 1993: 48). Lawrence acknowledges that at precisely the juncture of a negotiated transition to democracy, South Africa could not expect to accept federalism apolitically (1993, in Friedman and Humphries, eds., 1993).

Lawrence adds another reason why federalism cannot be conducive for nation-building in the democratic South Africa - people in South Africa would "not be encouraged to discover a common identity" (1993, in Friedman and Humphries, eds., 1993: 48) if they remain in in regions of a federal state. This is a valid argument but it may not hold much value with those who currently believe that the rainbow nation – a manifestation of the nation-building project in South Africa – actually masks inequality and unfreedoms in South Africa today. In terms of the sustainable development characteristic, Lawrence argues that the government had to ensure the satisfaction of everyone's basic needs (Ibid). Thus, development strategies have to realise equitable and effective outcomes" (Friedman and Humphries, eds., 1993: 48). For Lawrence, a federal government cannot achieve this because federal states resist big government required to effect positive action for sustainable development (1993, in Friedman and Humphries, eds., 1993: 49). Instead, a federal government would probably create "regional ghettoes" through patronage networks at the regional level and neglect of federal regions that fall into the periphery of economic wealth (Ibid). Shubane agrees with Lawrence's argument saying that, "the history, evolution and origin of federalism in South Africa" problematise the federal principle of bringing different regions together (Friedman and Humphries, eds., 1993: 42). This is because separatism was forced in South Africa, whereas this was not always the case in early federations elsewhere, which could choose their government and its distance (Friedman and Humphries, eds., 1993: 42).

Prima facie, the IFP should have been the easiest and best political party to negotiate with because it represented the former Bantustan of KwaZulu. Furthermore, their leader at the time, Chief Mangosuthu Buthelezi, was at the helm of the Commission. Thus, their position should have been clear: a constitutionally and democratically driven province in a free and democratic South Africa. But the IFP threw a spanner in the works by walking out of the CODESA Working Group 2 negotiations, allegedly on the grounds that their vision for a province and democratic South Africa was not being considered. There are two main versions of this occurrence. The first is that the IFP and some other right-wing parties and groups were not satisfied with a unitary dispensation, and that a federal province was more preferable for the IFP. As Frost describes,

> "An even more extreme form of federal government is proposed by the Inkatha Freedom Party. Indeed, its proposal is not federal, but confederal in the sense that it suggests that sovereign should reside with each component state making up the confederation of South Africa. Only a few powers are to be allocated to the centre (defence, foreign affairs, and the monetary management function), while all other functions are to be placed with sovereign component state. At the centre the regions are to be represented in a senate" (Humphries and Rapoo, eds., 1994: 5).

This IFP preference was thus closer to the type of federalism that Kelsen identified i.e. a federal state that is sovereign in a greater international community and whose powers cannot be overridden by a central national government.

The second version about the IFP walkout is that the IFP found the negotiations problematic for a number of reasons. One reason given is that, "their demands included the finalisation of the constitution before the election date was set, and the establishment of a constitutional federal democracy" (Steytler and Mettler, 2001: 94). Another reason was that Chief Buthelezi was angry with not being seen as an equal partner by the ANC and The NP in the negotiations (Ibid). A final reason is that the "capacity of the negotiation process… [obscured] key issues" (Friedman and Humphries, eds., 1993: 10). Moreover, the IFP walkout "reflected other tensions, and that the parties could equally well have divided on any other issue" (Ibid: 9).

In the end, decentralisation in the unitary South African state was chosen over federalism. The ANC agreed to a "decentralised regional dispensation" (Koelble and Siddle, 2007: 70). But decentralisation was limited to local government because the ANC did not trust the provincial sphere and allowed the central government to maintain "overall policy-making and coordinating functions", according to Wittenberg (2006, in Koelble and Siddle, 2007: 70). Wittenberg goes on to suggest that decentralisation to the provinces "provide[d] a means of reining in the national bureaucracy and buying off Bantustan leaders (who had largely thrown in their lot with the ANC)" (Ibid: 71).

Basson (1995) notes that during the MPNP negotiations, there was a *Commission on the Demarcation of States/Provinces/Regions*. During the sittings of this commission, there was consensus about states, provinces and regions (Ibid). However, "in the end decided on the term 'provinces' to indicate the different regions where provincial government would come into operation in terms of Chapter 9 of the Interim Constitution" (Ibid: 191). Thus, the discourse changed from that of 'regions' to 'provinces'[9]. South Africa was beginning to formalise its democratic decentralisation process by creating provinces and their boundaries. The considerations that went into this process show that there were a number of issues to consider when creating these provinces as these provincial boundaries would affect the economic, social and political fabric of the provincial polities.

3.7 Analysis and Conclusion

In this chapter, I detailed Kelsen's (1945) General Theory of Law and State, as well as Lijphart's Consociational Democracy theory. Kelsen's theory provides a unique perspective on state formation because it posits that states are primarily legal orders that human behavior conforms to. This is in opposition to the 'sociological' and 'political' understandings of the state, which posit that the sum of individual wills creates a political community that is somewhat homogenous and afraid of external threats. Through his explanation of the classifications of constitutions, Kelsen also demonstrates that there are two main ideal types of constitutions (democratic and autocratic) that are broadly indicative of the type of government that is in power. It is important to note here that Kelsen is arguing that legal orders and constitutions *establish* how people will be treated in a state as well as how the state is organised.

[9] The commission was responsible for setting the boundaries of the provinces. The criteria used for demarcation were:

- "historical boundaries
- the former provincial boundaries and infrastructures;
- administrative considerations, including the availability or non-availability of infrastructure and nodal points of service;
- the need to rationalise existing structures;
- cost-effectiveness of governments, administration and the delivery of services;
- the need to minimise inconvenience;
- demographic considerations;
- economic viability;
- development potential; and
- cultural and language realities" (Basson, 1995: 192)

Moreover, Kelsen's argument that unitary, decentralised and federal states form a continuum of different ways of organising a state is compelling because it shows that forms of organising the state are relative. But despite the relativity and differences in degrees, there *are* differences between these types of organisation that should not be confused or conflated. On that note, Kelsen clearly differentiates between a federal state and a decentralised state. A federal state has component states, each with their own constitutional autonomy while the federal component states are "between the unitary states and an international union of states" (Kelsen, 1945: 316). In other words, the amount of autonomy that federal component states have allows them to be considered as completely independent if they so choose. Decentralised unitary states are one that have relatively restricted provinces; and that relative restriction appears in provincial legislatures. In addition to this, the decentralisation in unitary states is imperfect because provinces can only have legal norms that align with central legal norms, and nothing to the contrary. Given these differences between decentralisation and federalism, one must remain clear about what is being discussed and in which context.

Lijphart's consociational theory, on the other hand, provides a contextually driven understanding of how unitary states can be formed following deep political and social fragmentation. The conditions of consociational theory are practical because they consider the real situation that a state may be facing; whereby different political leaders cannot even sit down to agree on how to unify a state with a multiplicity of interests. And if consociational theory is considered to be possible in a real political situation, this will create a cartel or coalition of elites – as Lijphart describes it. Furthermore, as discussed in the literature review, consociationalism is actually a federal arrangement which was theoretically elaborated on by Althusius. If one considers the latter in conjunction with this chapter's examination on consociationalism, one can infer that firstly, consociationalism in South Africa would have been a form of federalism. Secondly, this consociationalism would have relied on internal autonomy of various social groupings in order to ensure their representation at a national level.

However, the Buthelezi Commission did consider this consociational federalism to be a possibility at the time. The Commission was optimistic and ambitious for believing that an apartheid government would allow the merging of a Bantustans and an apartheid province at the time. The Commission did not succeed in its attempt to merge KwaZulu and Natal. However, it succeeded in illustrating some of the complexities that would arise later during the democratic state formation project. It also succeeded in illustrating that the conditional merging of KwaZulu and Natal at the time would have led to a more federal dispensation that had the ability to entrench separatism. This was the case because a consociational federal merger between KwaZulu and Natal would have escaped the autocratic centralising claws of apartheid while consolidating its autonomy apart from the democratic unitary state that would follow, and when that unitary state debate ensued later, the IFP as a proponent of federalism and representative of KwaZulu opposed a decentralised unitary state.

The ANC preferred a decentralised unitary state as it believed that the fragmentation caused by apartheid would have been deepened under a federal arrangement. It is important to remember that in the South African case, the unitary state refers to the unification of all fragmented parts under one national government. This unification was also pragmatic in that it considered a dispensation where concurrent functions would be implemented jointly between the national and provincial governments; and, citizenship would not be denied to anyone. The unification of the democratic South African state would uniformly apply citizenship to all South Africans through access to services of the state in a democratically decentralised provincial system. These debates around federalism and decentralisation in democratic South Africa require clarify because they present a justification for the decentralised unitary state that we find ourselves in today, and without this justification, we make a theoretical and pedestrian mistake of conflating decentralisation and federalism.

Finally, the constitutional examination of this chapter displaces the 'apartheid as a centralised state' idea. This is because the apartheid state had both centralisation and decentralisation tendencies depending on the autocratic whim of the state president and the NP at the time. The latter is particularly evident in the 1961 and 1983 constitutions where power was mostly centralised in the state president, and then decentralised for different policies and to the detriment of the majority of South Africans generally. One such policy was the Bantu Education Act, and as outlined in the literature review, Wittenberg identifies that during the consolidation and grand phases of apartheid, the state centralised power as and when it pertained to white South Africans, while continuing to multiply avenues of decentralisation for the majority of South Africans – black, coloured and Indian South Africans. Similar to the nuances between decentralisation and federalism, we must remain vigilant about the nuances between centralisation and decentralisation within the apartheid state, for it is these nuances that determine the characteristics of a democratically decentralised state.

4 Chapter Four – The Legal – Administrative Framework for Decentralisation and Interventions in South Africa

4.1 Background

This chapter outlines the legal-administrative framework around South Africa's decentralisation and the intervention mechanism. The chapter will do so by firstly examining the 1993 Interim Constitution and how this bound the 1996 Constitution to decentralisation as well as partly federal characteristics. Secondly, this chapter will outline the implicit form of decentralisation present in the 1996 Constitution and the intergovernmentalism of corresponding legislation and the set-up of government. The reason why decentralisation is implicit in the 1996 Constitution is that there are chapters and terms that imply decentralisation as opposed to federalism. This should enable one to draw out the indicators of decentralisation as opposed to federalism. Furthermore, the tangible set up of government tells us that this set-up and legislation have created centripetal forces and decentralised implementers of government policy and service delivery. If we ignore this, we make a theoretical and practical slippage about the expectations, roles and functions of different parts of government.

Secondly, this chapter outlines Section 100 as a constitutional intervention. I will argue that Section 100 is a mechanism of decentralisation in South Africa because it weaves the functions of the central and provincial governments. Finally, this chapter presents a piece of pending legislation (Monitoring, Support and Interventions Bill (MSI Bill)) which is likely to change the course of interventions and the nature of decentralisation if it ever reaches Parliament.

This chapter illustrates two crucial points of the constitutional crisis argument outlined in the Introduction: That the 1996 South African constitution foresaw challenges in public administration that would require intervention of the central government; a fact which reveals awareness on the authors of the constitution that severe public administration crises would require central government restorative measures; and that South African decentralisation is largely implied in the constitution and its supporting legislation, a factor which has created confusion and constitutional crisis regarding procedures around decentralisation. The chapter will discuss these in detail and how it has necessitated the enactment of the MSI Bill.

4.2 The Interim Constitution, 1993 – Principles that Bind

The 1993 Interim Constitution contains Constitutional Principles (1993 Interim Constitution, Schedule 4) that would bind the final 1996 Constitution to some fundamental guidelines and mandates. A lot of these principles show the change in discourse from regions/regionalisation to provinces; provide guidelines for the shape and nature of the relationship between the spheres of government; and generally outline the decentralisation that was to follow in the democratic South African state. The 1993 Interim Constitution deals with the powers, boundaries and functions of the national and provincial spheres of government amongst other principles that would inform the 1996 Constitution. These Constitutional Principles required the final Constitution to be specific about the powers, boundaries and functions (Interim Constitution, 1993, Schedule 4, Principle XVIII: 163 - 170). There are four principles outlined in the 1993 Interim Constitution that speak to the need to decentralise the democratic South African state while maintaining its unitary integrity.

There is the *'Constituting principle'* (Principle IV) which is concerned with the structure of the state; the *'Majority principle'* (Principle XVIII) covering the power and majority required by provincial legislatures to amend the Constitution; the *'Decentralising principle'* (Principle XXI) explaining how

South Africa would be decentralised; and the *'Boundaries principle'* (Principle XXII) which stipulates that different government spheres cannot encroach on each other's powers.

The *Constituting principle* states that, "The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government" (Interim Constitution, 1993, Principle IV: 163). This principle constituted the structure of the democratic South African state and is one of the earliest to indicate that South Africa is decentralised. By positing that the Constitution is supreme in all areas of the republic, it means, there cannot be provincial statutes that prevail against the Constitution. Thus discussions around whether to have regions, now called provinces, were settled. De Villiers (2007) notes that this decision was reached in the midst of "an atmosphere of intense distrust" (De Villiers, 2007: 6), as also discussed in the previous chapter. In the end, however, "The overall consensus was that some form of elected provincial government had to be created. The parties agreed that the potential positives[10] of provinces outstripped the potential negatives, and that with proper leadership, resources and sound intergovernmental relations, the provinces would become a permanent feature of a democratic constitution" (De Villiers, 2007: 7).

Although De Villiers supports the notion that South Africa is a federal state, and interchanges decentralisation with federalism, their list about the advantages of decentralisation is important because it explains the necessity and importance of decentralised provincial governance on a practical level. The *Majority rule* principle stated that amendments to these powers, boundaries and functions of the provincial sphere as well as provincial institutions,

> "shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces…Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions" (Interim Constitution, 1993, Schedule 4, Principle XVIII: 164).

Therefore, unlike apartheid constitutions, the majority rule principle required that the newly formed democratic provinces be consulted about constitutional amendments and that the majority of those provinces agree to these amendments; which empowers provinces against the threat of a tyrannical national or centralist government. Thus the principle allowed decentralisation of important decision-

---

[10] Some of the positives that would accompany provincial government are described as,

(a) "The size of South Africa makes it impossible to be governed only by national and local governments
(b) The population composition of South Africa requires some form of regional organisation to allow informally for cultural, regional and language diversity
(c) Decentralisation to regional and local governments in developed and developing countries has been shown to build capacity and to lead to more effective government
(d) Political and civil society in South Africa was already organised on some form of provincial basis, for example, labour unions, political parties, sporting bodies, religious groupings, agricultural organisations, business bodies, etc.
(e) Provinces would be the best way to build national unity, while at the same time recognising diversity and the rights of minority political groupings
(f) Decentralisation would encourage experimentation and creativity at provincial levels
(g) Decentralisation would enhance the accessibility of government and decision-making
(h) Decentralisation would bring government closer to the people" (De Villiers, 2007: 5)

making powers to provinces. The principle required that the final Constitution be specific, by way of definition, about the powers, boundaries and functions of the national and provincial levels of government. (Interim Constitution, 1993, Principle XVIII).

Furthermore, amendments to these powers, boundaries and functions of the provincial sphere, as well as provincial institutions,

> "shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces…Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions" (Interim Constitution, 1993, Principle XVIII: 164).

In other words, the majority principle holds that provincial legislatures are to be representative of their respective constituencies and that provinces be consulted about constitutional amendments. This majority principle works hand in hand with the *Boundaries principle* which curtails potential abuse of power by the national government in encroaching on provincial jurisdictions (Interim Constitution, 1993, Principle XXII: 166).

Analysing the 1993 Interim Constitution, Basson argues for the need to scrutinise the power relationship between national and provincial legislatures to ascertain whether power is really divided or it remains with the central law maker (parliament) (Basson, 1995). According to Basson, giving excessive autonomous powers to provincial legislatures represents a federal type of governance, whereas allowing the national parliament to exercise authority over provincial legislatures reflects a unitary form of government (Basson, 1995). In other words, the division or centralisation of the legislative power of Parliament determines whether the state is unitary or federal. However, Basson recognises that the 1993 Interim Constitution straddled between the boundaries of a unitary and federal forms of governance. He states that;

> "Some federal characteristics can be identified: …the Constitutional Court has exclusive jurisdiction with regard to constitutional disputes between the central and the provincial levels of government…The Constitutional Court is also empowered to test parliamentary as well as provincial legislation against the fundamental rights entrenched in Chapter 3…The fact that the Constitutional Court is called upon to play such an important role in adjudicating upon constitutional disputes can be identified as a strong federal characteristic. Another federal characteristic is the principle of bicameralism, that is, the fact that there is a second House of Parliament[11], the Senate, which represents provincial interests." (Basson, 1995: 197)

So, although the aspiration of law-makers following apartheid was for a unitary state, there were federal characteristics evident in the 1993 Interim Constitution, and have continued until today. Those characteristics are the role of the Constitutional Court as the final dispute resolution body in a conflict between the national and provincial levels of government. It is the prerogative of the Constitutional Court, not Parliament, to test all national and provincial legislation. In other words, the "strong" (Basson, 1995: 197) federal characteristic is the role and ability of an impartial Constitutional Court to oversee a central Parliament and provinces.

The *Decentralising principle* of the 1993 Interim Constitution shows how the state would be decentralised. The words 'decentralisation' or 'decentralise' do not appear in this Interim Constitution or the 1996 Constitution, but the inference that power and authority would be divided politically,

[11] This second House of Parliament is now the National Council of Provinces (NCOP).

fiscally, administratively and institutionally between the levels of government implies decentralisation. In principle, this is supposed to override federal tendencies by the central government since it outlines state functions in both normal or crisis situations. Thus, Principle XXI states that, "The following criteria shall be applied in the allocation of powers to the national government and the provincial governments", implying that not all, or specific, powers will reside in particular parts of government (Interim Constitution, 1993, Schedule 4, Principle XXI: 165). The first criteria states that,

> "The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered to do so" (Interim Constitution, 1993, Schedule 4, Principle XXI, No. 1: 165)

This implies decentralisation as it speaks about effectiveness and quality of services which are the objectives of the earliest and most recent strands of decentralisation. There is also mention of accountability and responsibility of the relevant and empowered levels of government. The second criteria of Principle XXI says 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" (Interim Constitution, 1993, Schedule 4, Principle XXI, No. 2: 165).

The above shows that the central government is mandated to intervene in certain circumstances, a fact which reveals that the South Africa decentralisation model was never to allow complete autonomy of provinces without oversight and intervention. Thus interventions promote a unitary state and prevent extreme decentralisation moves towards federalism. Others however argue that interventions have been inserted because the ANC mistrusted, due to apartheid, decentralising power to such levels as they perceived it as potentially weakening and diluting majority rule while maintaining apartheid enclaves (Kiharto, 2004, in Koelble & Siddle, 2013). One might therefore say that interventions were inserted as a precautionary measure against the possible tyranny of provinces. This is ironic today because firstly, the provinces with the most resilient provincial leaderships are the ones that are left to their own devices. Secondly, political parties are often more or less powerful based on their provincial influence. Politically, provinces have become battlegrounds that affect administration.

The sixth, seventh and eighth criteria are clear that powers will either be exclusive or concurrent. These powers are,

(a) "for the purposes of provincial planning and development and the rendering of services; and
(b) in respect of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province." (Interim Constitution, 1993, Schedule 4, Principle XXI, No. 6: 166)

Concurrent powers would be designed to ensure equality and access to state resources as described by Friedman earlier. Hence the seventh criterion of Principle XXI says that, "Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a governmental service, the powers should be allocated concurrently to the national government and the provincial governments" (Interim Constitution, 1993, Schedule 4, Principle XXI, No. 7: 166). Mutual co-operation as a necessary pre-requisite for equality and access to the state is a direct reflection of the neglect of large parts of South Africa prior to the 1993 Constitution. As a result, Basson notes that in this Constitution the "Legislative Competencies of Provinces" (Interim Constitution, 1993, Schedule 6: 169 – 170) allowed provincial legislatures to make laws in some functional areas[12], thereby providing them with more access and control than under the Bantustan policies, and under a unitary state.

Yet, according to Basson, these provincial legislative competencies were not sufficient for the federalist camp at the negotiations – they walked out of the negotiations. As a way to bring these parties back to the negotiations, more competencies were added to the legislative competencies list. However, the legislative competencies that were added powers to the local government, not the provinces (Basson, 1995). Thus once again, the federalist fight was watered down because although more legislative competencies were added de jure, these competencies would not federalise the state de facto.

The *Decentralising principle* curtails possibilities of the national government encroaching on provinces, and when read in conjunction with Principle XXI, No. 2, it is clear the Interim Constitution aimed at protecting provinces from the national government except in extraordinary circumstances that could potentially jeopardise the integrity of the unitary state. However, the *Decentralisation principle* does provide that where there is a dispute regarding concurrent legislative powers between

---

(a) [12] " agriculture;

(b) casinos and related gambling issues;

(c) education at all levels (but excluding universities and technikons);

(d) environment;

(e) health services;

(f) housing;

(g) language policy and the use of official languages within the province;

(h) local government;

(i) nature conservation (excluding national parks, national botanical gardens and marine resources);

(j) police;

(k) provincial public media;

(l) public transport;

(m) regional planning and development;

(n) road traffic regulation;

(o) roads;

(p) tourism;

(q) trade and industrial promotion;

(r) traditional authorities;

(s) urban and rural development; and

(t) welfare services" (Interim Constitution, 1993, Schedule 6) these spheres of government, and the dispute cannot be resolved in a court, "precedence shall be given to the legislative power of the national government" (Interim Constitution, 1993, Schedule 4, Principle XXII: 166).Thus, the central government was still afforded some precedence.

Having examined the 1993 Interim Constitution, we can gage a few things about the ensuing unitary decentralised state in South Africa. Firstly, this Interim Constitution was designed to outline how decentralisation, not federalism, would unfold in the final Constitution and the state. This is evident in the powers, boundaries and functions of national and provincial governments shown in the Constitutional Principles. The careful wording of the Constitutional Principles shows that irrespective of the initial hesitation about the formation of provinces, a lot of thought was applied in the construction of provinces and the final Constitution. This 1993 Interim Constitution thus serves as a reference point for questions about the intentions of forming provinces during the transition. These intentions were meaningful equality and access to the state; exclusive and concurrent powers that would be placed where they would be most effective; and the continual upholding of the integrity of the unitary state.

A second thing that we can be taken from the Interim Constitution is that there was foresight about the possibility that there will be administrative and governance clashes in the division and allocation of powers. This is evident in the Constitutional Principles that discuss interventions and dispute resolution through courts and the precedence of national government. This reveals that there was no presumption that the mechanics of a new democratic government would always work, and this point must be emphasised because it is easy to assume that the transition in South Africa was rushed, unplanned or sold out. Moreover, the mention of an intervention in the Interim Constitution suggests that the foresight included the need for a careful approach towards restoring administration and governance in a province where this breakdown occurs. Therefore, the final Constitution would have an in-built mechanism to deal with such breakdowns.

4.3 The 1996 Constitution and Constitutionally Decentralising the Republic

One of the Founding Provisions of the 1996 Constitution is the Supremacy of the Constitution and the rule of law (Constitution, 1996, Sections 2 and 1 (c)). This reflects the constituting principle of the Constitutional Principles in the 1993 Interim Constitution. It is also a direct reflection of the aspiration for a unitary state with one supreme law, unlike the former constitutions (1910, 1961, and 1983) which governed the apartheid provinces and had different laws for Bantustans. Thus, from the outset, one can identify the way in which a unitary state contrasts with a historically fractured state with both centralisation and decentralisation tendencies; and possibly federal organisation too, if the federalist argument had prevailed in the negotiations. Chapter 3, "Co-Operative Government", says that the Government of the Republic is "constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated" (Constitution, 1996, Section 40 (1): 21).

Furthermore, Section 40 (2) says that each sphere of government "must observe and adhere to the principles" of Chapter 3 and co-operative government (Constitution, 1996, Section 40 (2): 21). These principles cover some general aspects of state sovereignty and democratic governance, and fall under the title "intergovernmental relations" (Constitution, 1996, Section 41). Some of the principles read as follows:

> "(1) all spheres of government and all organs of state within each sphere must –
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

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

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another" (Constitution, 1996, Section 41: 21)

There are a few observations about this chapter on co-operative government in the 1996 Constitution. The issue around central government's possible encroachment on provinces is echoed in the 1996 Constitution. Another observation is that where the 1993 Interim Constitution referred to "levels" of government, the 1996 Constitution refers to "spheres" of government. This could be because 'levels' imply a hierarchy, whereas 'spheres' imply and align with co-operative government.

At this point I will argue that the 1996 Constitution's chapter on co-operative government is the first implicit indication of decentralization in South Africa. In order for decentralisation to function, there has to be agreement and structure about how the centre/national government will disperse power to decentralised subnational governments, which is the essence of administrative decentralisation. Thus, the chapter provides the parameters for decentralisation in South Africa. If there were to be a more antagonistic and federal approach as envisioned by the NP, IFP and others during the negotiation, there wouldn't be an emphasis on co-operative government stated in the early stages of the Constitution. Co-operative government in the Constitution thus implies decentralisation because it is upon the national government to keep the integrity of the unitary state by responsibly maintaining a relationship with the provincial and local spheres for the material benefit of everyone.

Chapter 4 of the 1996 Constitution establishes Parliament and describes its composition as consisting of two houses: National Assembly (NA) and the National Council of Provinces (NCOP; 1996 Constitution, Section 42 (a) and (b)). The purpose of the NCOP is "to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative processes and by providing a national forum for public consideration of issues affecting the provinces" (Constitution, 1996, Section 42 (4): 23). In addition to the NCOP being part of the legislature, it has extensive powers which provide a federal aspect as discussed by Basson in the previous chapter. This contributes to the constitutional crisis by blurring the boundaries between the national government and subnational provincial governments which are subject to the Constitution and ensuing legislation and interventions.

According to Kelsen's (1945) analysis, the powers of provincial legislatures allow the provincial sphere to be law-creating organs, and although these legislatures have the power to change the legal nature of their provinces significantly, this power is subject to overall laws and values of the Constitution. Provincial legislatures are not completely novel in the South African context as

Bantustans had their own legislatures and executives. However, Bantustans were conceived as independent and self-governing states; whereas the provincial legislatures are not entirely self-governing, nor are they supposed to be. The latter will be demonstrated in the section on intergovernmentalism. There is something striking about the provincial legislatures however – they can pass provincial constitutions. Was this necessary if the 1996 Constitution is the supreme law of the land that will ultimately override all other laws and subnational constitutions?

Provinces also have executive authorities. Each province has a premier who embodies the executive authority, alongside an Executive Council (1996 Constitution, Section 125 (1) and (2)). Provincial Executive authority is carried out by:

a. “implementing provincial legislation in the province
b. implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
c. administering in the province, national legislation outside the functional areas listed in Schedule 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
d. developing and implementing provincial policy;
e. co-ordinating the functions of the provincial administration and its departments;
f. preparing and initiating provincial legislation; and
g. performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament” (Constitution, 1996, Section 125: 62 – 63).

Schedule 4 of the 1996 Constitution lists “Functional Areas of Concurrent National and Provincial Legislative Competence”, while Schedule 5 lists the “Functional Areas of Exclusive Provincial Legislative Competence”. These schedules and their distinction between concurrent and exclusive functional areas are not new to South African constitutions and the lists of concurrent and exclusive areas have not changed much in terms of the areas themselves and as shown throughout this chapter and the preceding one. What has changed is the length of the lists and the weight of responsibility attached to these competencies. The list of concurrent competencies is quite long and ranges from the state security, to development and essential services. The list of exclusive functions, on the other hand, is quite short and as Basson noted earlier, this list does not add significant power to provinces because exclusive functional areas do not have state priority

I argue that the weight of the concurrent list illustrates implicit decentralisation in the South African Constitution. There are a number of reasons for this. Firstly, there is joint responsibility between the national and provincial spheres of government for the listed competence. That joint responsibility will, at the most basic level, require consultation and policymaking. This implies decentralisation because there needs to be a working relationship between these spheres of government. This is not always the case in federal states. For instance, in the case of Nigeria, a federal republic, the quality and funding of education relies on the ability of states to collect local taxes and use the revenue to improve the quality of education (Guimarães and Chilenga, 2018). In South Africa, the funding and quality of education relies mainly on the funding and strategy of the national government.

Secondly, the competencies listed are ones that the state has to prioritise in order to sustain and protect itself. Police, trade, agriculture and disaster management are some of the competencies that play an important role in protecting and developing the state. Education, housing, health and welfare are essential and developmental services within the state. Given the history of the South African state, it would be very ambitious to leave these competencies with either the national or provincial governments alone. Furthermore, in order to ensure that there is access and equality in the state, there needs to be policy co-ordination between the national and provincial spheres of government. Thus, decentralisation is necessary for consistent and inclusive service provision.

Thirdly, concurrent competencies allude to government being organised in such a way that competencies will have national and provincial offices or departments for co-ordination purposes. This introduces us to the concept of centripetal forces and reintroduces us to Kelsen's concept of dynamic decentralisation. I first encountered the word 'centripetal' in a reading about Deutsch et al's (1957) discussion about the origins of federations (Kriek et al, 1992). Deutsch et al suggest that federations usually originate in one of two ways, through the centripetal linking of units, and through the centrifugal linking of units (Kriek et al, 1992). During the centripetal linking of units, "independent states move closer to create a federal state" (Kriek et al, 1992: 19) and during the centrifugal linking of units, "decentralised unitary units are converted into a federation. Usually, unilateral action is initiated by the central authority" (Kriek et al, 1992: 19). So, federations are born when independent states come together or when co-ordinating units are broken apart. This leads to a question whether there are centripetal forces in a decentralised unitary state. Put differently, are there departments in a unitary state that are the glue that bind and co-ordinate the decentralised aspects of the state?

The answer is yes. In South Africa there are centripetal forces that seek to maintain the integrity of the unitary state in different ways and areas. In a document on "Principles for Post Provisioning Norms and Standards for SMS [Senior Management Service] and Corporate (Support) Functions in the Public Service" (4 February 2011), the Department of Public Service and Administration (DPSA) classifies government departments for the purposes of sorting out its policies on employment in the public administration. The DPSA's classification of departments is as follows:

(a) "Policy and oversight departments at the centre of government, vertically and horizontally
(b) Delivery departments with exclusive national competence
(c) Delivery departments with concurrent competencies" (DPSA, 2011).

The policy and oversight departments "are relatively small and mainly responsible for policy, strategy, oversight and setting national norms and standards that govern functions and practices within their competence" (DPSA, 2011). These departments are the Presidency, the Department of Planning, Monitoring and Evaluation (DPME), provincial premiers' offices, the DPSA, National Treasury and the Office of the Public Service Commission (PSC) (DPSA, 2011). Delivery departments with exclusive national competence are "centrally established", and function for "operational service delivery purposes, they have developed institutional and organizational arrangements that enable them to deliver at a national scale through geographical service delivery points such as districts and/or regional areas" (DPSA, 2011). These departments include Correctional Services, Defence, Justice and Constitutional Affairs, Safety and Security, Home Affairs, Land Affairs, Labour, Water, Forestry and Fisheries; and, International Relations (DPSA, 2011). Delivery departments with concurrent competencies are "mainly responsible for policy development, executive oversight and monitoring and evaluation" in the national sphere (DPSA, 2011). In the provincial sphere, these departments are "responsible for operational service delivery of the functional competence" (DPSA, 2011). Some examples of these departments are Education; Health; Housing; Public Works; Transport; Agriculture; Environmental Affairs; and, Tourism (DPSA, 2011). Centripetal forces are thus indicative of the decentralised organisation of the South African state because their oversight, policymaking, institutional and organisational arrangements determine the objectives of the delivery departments with concurrent competencies. These concurrent competencies also remind us of Kelsen's concept of dynamic decentralisation. The latter means that functions in a state are delegated to departments and their ministers who determine the policy direction of their functions and rely on decentralised units to execute these functions.

4.4 South Africa's Intergovernmentalism

As described earlier, one of the ways in which South Africa's decentralisation is apparent is through legislation, guidelines and protocols that describe how the three spheres of government are expected to behave and co-operate with one another. The Intergovernmental Relations Framework Act (IGRF; 2005) is one such legislation. As discussed earlier, the 1996 Constitution discusses co-operative government, which demonstrates the implicit nature of decentralisation in South Africa. Similarly, the IGRF outlines the working relationship between the spheres of government and legislate these accordingly. Moreover, the IGRF is not just legislation that is not being applied. During an interview at the Department of Co-Operative Governance and Traditional Affairs (COGTA), a senior manager brought up the IGRF as a key piece of legislation that is used to approach the interactions between the different spheres (REF). Accordingly, the IGRF says its purpose is, "To establish a framework for the national government, provincial governments and local governments to promote and facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith" (IGRF, 2005: 2). Moreover, it seeks to do so "in the spirit of the Constitution" (IGRF, 2005: 2).

Intergovernmentalism is important for the sustenance of decentralisation because it will provide a framework for governance and administration in a larger, more coordinated and more economically, politically and socially responsible system than the apartheid one. As such, the Preamble to the IGRF expresses that South African intergovernmentalism requires coordination and structure for decentralisation, for developmentalism and for successful dispute resolution between the different spheres of government. The Preamble states that problems facing South Africa can be addressed

> …through a concerted effort by the government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country…
>
> …cooperation and the integration of actions in government depends on a stable and effective system of governance for regulating the conduct of relations and the settlement of disputes between the national government, provincial governments and local governments" (IGRF, 2005: 2).

If we read this Preamble together with the Reconstruction and Development Programme (RDP; 1994) and the National Development Plan (2013), it can be argued that the South African government has been consistent about an inclusive, developmental and growth-pursuant path for all. The IGRF's Preamble shows commitment to development through decentralisation with an intergovernmental framework. Koelble and Siddle (2012) agree, saying that "the notable exception of the developmental objective" is the clearest and tangible amongst the objectives for decentralisation, such as democracy, participation and representation (Koelble and Siddle, 2012: 71).

Koelble and Siddle (2012) also acknowledge the key aspect of intergovernmentalism in decentralisation. They identify twelve dimensions of decentralisation, based on the work of authors prominent in the field of decentralisation[13] and their own work. This list is comprehensive and describes intergovernmental relations:

> "the interdependent relationships that exist between the various levels of government in a decentralised system, as well as the coordination of public policies between those levels. The concept incorporates various components of the governance, administrative and fiscal arrangements established between those various levels, including legislation and regulations, instruments (such as guidelines and mechanisms for monitoring and communication), structures (such as forums), processes (such as budgeting) and dispute resolution procedures…the provision of oversight and support by central government and sub-national governments" (Koelble and Siddle, 2012: 58).

Intergovernmentalism is, therefore, crucial in a decentralised system because it provides the parameters within which the different levels of government should function. It also pre-empts what could go wrong in a system and provides ways to deal with it. Apart from intergovernmentalism, Koelble and Siddle describe either dimensions of decentralisation: constitutional security, democratic process, administrative authority, institutional capacity, public participation and information mechanisms, legislative authority and revenue-raising authority. These dimensions need to work hand in hand with intergovernmental relations to ensure that decentralisation is well-equipped to achieve its objectives.

Chapter 2 of the IGRF establishes Intergovernmental Structures. These are structures that keep the relationships between the spheres of government functions. There are five specific intergovernmental structures that are named in the IGRF:

(a) President's Co-Ordinating Council (PCC)
(b) National Intergovernmental forums (NIGF)
(c) Provincial Intergovernmental forums (PIGF)
(d) Municipal Intergovernmental forums (MIGF)
(e) General intergovernmental technical support structures (IGRF, 2005: 4).

The PCC comprises the President, the Deputy President, the Minister in the Presidency, the Cabinet Member responsible for finance, as well as the Cabinet Member responsible for the public service for which the council is being formed, Premiers of each of the nine provinces and a municipal councillor. In addition to these members of the council, "The President may invite any person not mentioned in subsection (1) to a meeting of the Council" (IGRF, 2005, Section 6 (3): 14). The President is the chairperson of the council. The PCC is a "consultative forum" for the purposes of bringing up issues of national interest before provincial and local governments and getting their perspective on a range of matters. Importantly, the PCC also discusses "performance in the provision of services in order to detect failures and to initiate preventive or corrective action when necessary" (IGRF, 2005, Section 7 (c): 14). Finally, it also has the function of considering reports of national interest from provincial and local governments.

The NIGF is established by a Cabinet member for the purposes of promoting and facilitating "intergovernmental relations in the functional area for which the Cabinet member is responsible" (IGRF, 2005, Section 9 (1): 16). It comprises the Cabinet member for the functional area for which

---

[13] Kearney (1999), Bardhan and Moorkherjee (2006), Falleti (2005), Shah and Thompson (2004), Crook and Manor (1998)

the forum has been established, who is also the chairperson of the NIGF; the Deputy President; MECs for the relevant functional areas in provinces, as well as a municipal councillor (IGRF, 2005, Section 10 (1) (a) – (d): 16). Similar to the PCC, the NIGF is a consultative forum designed to "raise matters of national interest within that functional areas with provincial governments and, if appropriate, organised local government and to hear their views on those matters" (IGRF, 2005, Section 11(a): 16). The NIGF also consults provincial government on issues and reports back to the PCC (IGRF, 2005, Section 11 (a) and, Section 12 (1) and (2): 16).

The PIGF is established by the Premier of a province "to promote and facilitate intergovernmental relations between the province and local governments in the province" (IGRF, 2005, Section 16: 18). This forum comprises the Premier (who serves as the chairperson), the MEC responsible for local governments and any other MECs chosen by the Premier, mayors in the local sphere, and administrator of a municipality under Section 139 of the Constitution and a municipal councillor (IGRF, 2005, Section 17 (1) (a) – (f): 18).

The last of the intergovernmental forums is the MIGF. This is constituted at the district level, "to promote and facilitate intergovernmental relations between the district municipality and the local municipalities in the district. This is constituted at the district level, "to promote and facilitate intergovernmental relations between the district municipality and the local municipalities in the district" (IGRF, 2005, Section 24: 22). MIGFs comprise the mayor of a district municipality, mayors or councillors of local municipalities, as well as the relevant administrator where a municipality is under a Constitutional Section 139 intervention (IGRF, 2005, Section 25). The role of the MIGFs is similar to that of PIGFs, except at a more localised and grassroots level of government.

The IGRF was cited by a senior manager at COGTA as an instrumental piece of legislation that guides the decentralised relationship between the three spheres of government (SM Interview, COGTA, 2016), which says that,

> "(2) An Act of Parliament must –
>
> establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and provide for appropriate mechanism and procedures to facilitate settlement of intergovernmental disputes" (Constitution, 1996, Section 41 (3): 22).

Therefore, the IGRF is a constitutionally mandated guideline to encourage functional intergovernmental relationships through the establishment of proper structures, institutions, mechanisms and procedures. In fact, the senior manager described the IGRF within the context of COGTA's mandate, which is "responsible for developing mechanisms, legislative framework [s], regulatory framework [s] around cooperative government; and intergovernmental relations" (SM Interview, COGTA, 2016). With regard to the IGRF being formalized in 2005, the senior manager recounts that, "we allowed for the system to evolve in terms of how this new phenomenon of the three spheres of government should be working" (SM Interview, COGTA, 2016). According to Kelsen's (1945) analysis, COGTA is thus a law-creating organ.

All structures mentioned in the IGRF are consultative forums. This is brilliant democratic language as it signals a platform for the various spheres of government to engage with each other. But we really must move beyond rhetoric and question the effectiveness of such forums. Still, one strength is that they are reflective of two dimensions of decentralisation – administrative authority and intergovernmental relations. The IGRF is reflective of these dimensions because it attempts to consolidate the working relationship between the spheres of government by providing informative structures for engagement. However, this is only *de jure*; and as the senior manager at COGTA noted, the IGRF is only a framework, thus implying that there is no obligation from government officials to follow it.

A glaring weakness of one of the IGRF structures is that the president can invite "any person" to sit in a PCC. It is not clear whether this person should be an official with expertise in a particular area or not. It is also possible, though, that "any person" could be invited to the sitting of a PCC as an observer, a researcher, an expert or in the capacity that is not harmful to the business of a PCC. Finally the IGRF denotes implicit decentralisation. Through the parts of the framework that speak about coordination and implementation of policy and service delivery. The latter illustrate that for most of the time, policy and legislation originate elsewhere – in the national sphere. An exception of this origination is the MIGF, where this forum can "draft national and provincial policy and legislation relating to matters affecting local government interests in districts" (IGRF, 2005, Section 26 (1): 22). This clause is limited as it only deals with policy and legislation in the local sphere.

4.5 Constitutional Interventions

This section, which constitutes the crux of this research, will begin to answer the research question directly by outlining what an intervention is and its potential impact on South Africa's decentralised provincial administrations. There are three major parts to this section. The first part will outline the different types of intervention in South Africa, their purposes and intended outcomes. The second part of this section will explore a pending and previously unseen piece of legislation that could change the nature of current interventions i.e. the Monitoring, Support and Intervention Bill (MSI Bill). The third part of this section will again argue that decentralisation is implicit in South Africa's unitary state because interventions signal an ongoing relationship between the national and subnational spheres. Moreover, interventions are a mechanism of decentralisation.

Before proceeding with this section, two concepts need to be clarified. The first concept is that of a constitutional intervention as opposed to a general administrative intervention. A constitutional intervention is provided in the 1996 Constitution. It is a constitutionally driven mandate to either supervise or monitor the fulfilment of an executive obligation in a province or provincial department or to administratively 'take over' the fulfilment of an executive obligation in a province or a provincial department, as per S100 (1) (a) and S100 (1) (b) respectively. On the other hand, a general administrative intervention usually focuses in a specific area within a public administration department to correct or manage an issue within policy and implementation. Thus a constitutional intervention is intergovernmental while a general administrative intervention is interdepartmental.

The second concept that needs to be clarified is 'public administration crises'. I describe this as the halting of the execution of public services or provision of public goods due to the irregular or irreconcilable practices within a department or sphere of government. Irregular practices can include outright corruption or similar fiscal activities that result in the significant loss of resources required for the public administration. Such irregular activities are also described and prohibited in legislation like the Prevention and Combatting of Corrupt Activities Act (2009) and the Public Finance Management Act (PFMA; 1999). Irreconcilable practices refer to behaviour, usually politically motivated, that does not align with the core business of a department or province.

There are four main types of interventions that exist in South Africa. Two of these interventions are constitutionally based, one is present in public administration, and the other is "extra-legal" (SM Interview, Department of Basic Education, 2017). This section will examine the origins, purposes and intended outcomes of all these interventions. The examination will be useful for understanding the legal and contextual status of this mechanism of decentralisation. Such an examination will also build on the foundation of decentralisation as the conceptual framework for this thesis. The four interventions that will be examined are:

(i) Constitutional Interventions – S100
(ii) Constitutional Interventions – S139
(iii) PFMA Interventions
(iv) Extra Legal Interventions

4.5.1 Section 100 Interventions

Constitutional interventions are an executive function. Chapter 5 of the constitution includes an outline of the two constitutional interventions. The first intervention is outlined in Section 100 and it is initiated by the executive at the national level and is carried out in the provincial sphere for the purpose of restoring the fulfilment or execution of an executive obligation (Constitution, 1996, S100 (1)). The Constitution states that the national executive may intervene in cases where a province is failing to fulfil executive obligations (Constitution, 1996, S100 (1)).

There are two ‘appropriate steps’ listed in Section 100(1). The first step, Section (100) (1) (a), involves giving a provincial government a directive stating how it has not fulfilled its obligation and how to remedy present failure. The second step, Section 100(1) (b), involves the national government taking over a provincial department or provincial government to ensure the restoration of the fulfilment of the relevant obligation. The entirety of S100 (1) (a) and (b) reads:

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

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

(g) assuming responsibility for the relevant obligation in the province to the extent necessary to –

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

(vi) maintain economic unity;

(vii) maintain national security; or

(viii) prevent that province from taking unreasonable action that is prejudicial to the interests of another province to the country as a whole” (Constitution, 1996, S100 (1) (a) and (b): 51).

Section 100 (2) prescribes the steps that need to be taken upon the initiation of an intervention by the national government. These include submitting a written notice to the NCOP within 14 days of instituting the intervention; the need to end the intervention if the Council disapproves it with 180 days of its institution; and the need for the Council (if the intervention is in progress) to review the intervention regularly and give recommendations to the national executive (Constitution, 1996, S100 (2))

However, there are a few questions that these procedures do not outline or answer. Some of these questions are:

1. Who, or which department, takes responsibility for the daily operational activities in an intervention? The president alone cannot do this;
2. How long is an intervention expected to last and how is it ended?
3. Which resources are going to be used for the fulfilment of an intervention?

A Constitution alone cannot answer these questions in full thus national legislation is given power to regulate the processes (Constitution, 1996, S100 (3)). There are guidelines, not legislation as yet, that address the application of Section 100. COGTA has these guidelines formulated when the department was still known as the Department of Provincial and Local Government (DPLG). The guidelines are very clear that interventions are not supposed to infringe on the nature and powers of provinces. Such a move would then signify a shift from the informal coaxing and negotiations to formalised and written directives.

It also signifies a shift of responsibility from individual departments to the national executive to see to the fulfilment by a province of its executive obligations;

And,

> "The successful implementation of a monitoring process may either prevent the use of the corrective measures or, if it is unavoidable, make only the least intrusive measures necessary,"

Furthermore,

> "Section 100 is not a tool to impose policies on a province or to ensure that a province performs its functions better. The aim of the process is to ensure that provinces live up to legislatively and constitutionally imposed executive obligations" (Intervening in Provinces & Municipalities, DPLG: 1 – 2).

Therefore, an intervention is a last resort following unsuccessful attempts by the national government to informally induce the fulfilment of an executive obligation by a provincial government or department. Moreover, a constitutional intervention has to balance the restoration of executive obligation with cooperative governance and inter-governmentality. On this point, the DPLG guidelines say that, "it is suggested that a restrained or conservative approach to intervention should be followed. If two avenues are open, the least intrusive avenue should be selected" (Intervention in Provinces & Municipalities, DPLG, n.d.: 4). In other words, an intervention should only be initiated where it is likely to foster co-operation, and not when it is likely to be seen as a hierarchical tool being wielded over subnational governments. Rather than the latter, the guidelines emphasise that the national executive use discretion to carefully consider whether an intervention will be necessary but not intrusive (Intervening in Provinces & Municipalities, DPLG, n.d.: 4). This discretion should consider the following:

> "*the nature and importance of the executive obligation that is not being fulfilled
>
> *the extent and duration of the non-fulfilment (whether transitory or persistent); and
>
> *the reason for the non-fulfilment (whether due to vis major, intention, etc.)" (Intervening in Provinces & Municipalities, DPLG, n.d.: 4)

With regards to who leads an intervention, its duration and resources, the guidelines abrogate the duties to an "administrator", who is an appointed provincial official or any other competent person

(Intervening in Provinces & Municipalities, DPLG, n.d.: 11). The word "competent" implies that administrators have experience in government or technical expertise in a relevant area of the intervention and the work has powers which however entail accountability (Ibid: 11).

In terms of the powers of administrators, the guidelines prescribe that,

> "administrators assume the powers and duties of the official whose place they have taken in order to fulfil the neglected obligation. The administrators step into the shoes (role) of the provincial officials who have failed to fulfil a particular obligation and assume his or her powers in respect of the neglected obligation" (Intervening in Provinces & Municipalities, DPLG, n.d.: 11).

An intervention is a last resort, and as such it is a moderately tough tool which involves relatively strict measures hence an administrator's role is basically a taking over of a provincial government or department. However, this could become technically and operationally problematic because it is not clear where officials who have been displaced fit in the meantime.

Additionally, administrators have limited accountability during interventions:

> "On assuming responsibility for the fulfilment of an executive obligation, the administrators are not accountable or subordinate to the province for their actions. The essence of an assumption of responsibility is that there is a usurpation of some or other aspect of the province's executive power and after detachment to a province, the administrators remain accountable to the national executive" (Intervening in Provinces & Municipalities, DPLG, n.d.: 11).

It can be argued that administrators are accountable to the national executive alone because interventions are an executive function and a national sphere responsibility.

The final notable guidelines concerning Section 100 is that officials in the province should fully co-operate with the administrators.

> "All officials must give effect to the directions and instructions of the administrators to the extent it is necessary to fulfil the neglected obligation and to ensure that it is performed in the future. As the administrators step into the shoes of provincial officials who were supposed to fulfil the obligation both the officials and all personnel falling under such officials must execute the directives and instructions of the administrators.
>
> As provincial officials must execute the directives and instructions, who, in turn, act on instructions from the relevant national department, there should be in principle no objection to the responsible minister appointing joint tasks teams consisting of both national and provincial employees" (Intervening in Provinces and Municipalities, Note: DPLG: 11).

This reflects co-operative governance contained in the Constitution and ensuing legislation. It creates the expectation that a provincial government understands the reasons behind the intervention and as such, fully co-operates with the authority of the administrator. It also emphasizes that the administrator is filling the shoes; of a provincial official and therefore, there should be no differentiation between the administrator and the provincial official's instructions. These guidelines also assume that under an intervention there is a chain of command which begins with the national department whose instructions are carried out by the administrator; whose instructions are to be followed by provincial officials. Lastly, the minister responsible for the intervention may create tasks teams that carry out work relevant to the intervention.

4.5.2 Section 139 Interventions

The second type of intervention listed in the Constitution falls under S139, and is known as a "provincial intervention in local government" (Constitution, 1996, S139). From the outset, it should be obvious that this is a provincial function. I emphasise this because a lot of public discourse contends that provinces are useless and are elite – creating, rent-seeking government structures. This may be the case de facto, but it is not case de jure. What is not working in practice is not necessarily a reflection of what should have been the case in theory and law.

S139 (1)(a) reads very similarly to S100 (1)(a), saying that where municipality has failed to fulfil its executive obligation "the relevant provincial executive may intervene" by issuing a directive and listing the necessary steps required to fulfil that obligation (Constitution, 1996, S139 (1) (a): 67). It is also similar in that a provincial executive may take over a municipality. The reasons for the take-over are exactly the same as in S100 (1) (b) – maintaining national and minimum standards, preventing unreasonable action that is prejudicial to another municipality, and maintaining economic unity (Constitution, 1996, S139 (1) (b) (i)-(iii): 67). The only condition that is missing is that of the maintenance of national security. The other exception and difference between Section 100 and Section 139 and their respective purposes and methods, is that S139 (1) (c) allows for the dissolution of a Municipal of a Provincial executive. Section 139 (1) (c) reads:

> "the relevant provincial executive may intervene by taking appropriate steps to ensure fulfilment of that obligation, including … (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step" (Constitution, 1996, S139 (1)(a): 67).

Effectively, the national government cannot encroach on a province's autonomy dissolving its executive, but a province can interfere in local autonomy by dissolving a municipal council. The rest of Section 139 outlines the appropriate steps that need to be followed in a municipal intervention. These steps align with the three forms of municipal interventions discussed in S139 (1) (a), (b), and (c).

The guidelines on a Section 139 intervention note that legislation was introduced in 2003(Municipal Finance Management Act), which gave more power to the national and provincial spheres in local government interventions (Intervening in Provinces & Municipalities, DPLG, n,d). . The purpose of the MFMA is, "To secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government; to establish treasury norms and standards for the local sphere of government; and to provide for matters connected therewith" (MFMA, 2003).

There are four types of interventions in Municipalities, based on S139 of the 1996 Constitution and the MFMA. These are summarized in the guidelines as follows:

(a) "Regular interventions in terms of S139 (1) of the Constitution, including:

- Issuing a directive;
- Assuming responsibility; and
- Dissolution of the municipal council.

(b) Intervention procedure in the case of serious financial problems in terms of MFMA, which may include:

- imposing a financial recovery plan;
- assuming responsibility; and
- dissolution of the municipal council,

(c) Intervention in response to municipality having budgetary problems, including

- the mandatory dissolution of the municipal council; and
- adoption of a temporary budget or revenue – raising measures.

(d) Intervention in response to a municipality experiencing a crisis in financial affairs, including

- imposing a financial recovery plan;
- dissolution of the municipal council; and
- assuming responsibility "(Intervening in Provinces and Municipalities, DPLG, n.d.: 14)

4.6 PFMA Interventions

The Public Finance Management Act (PFMA 1999) is a living and active part of South Africa's fiscus. Parliament and most importantly government departments refer to it as a crucial document in the country's finances. Thus, it is the fabric woven through South Africa's intergovernmentality. It refers to the resource that gets things done in government – public money. The purpose of the PFMA is:

> "To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith", (PFMA, 1999).

In other words, the PFMA deals with fiscal decentralisation in South Africa. It also establishes key figures, roles, processes and institutions. This legislation provides us with further evidence of South Africa's implicit decentralisation by acknowledging spheres of government, which confirms the intentions and spirit of the 1996 Constitution to have a unitary state but multi-layered government. The PFMA also establishes a centripetal force – the National Treasury, which has also become a focal point in South Africa's decentralised system through its history in the state's formation and the work of its democratic era bureaucrats who fortified the importance of National Treasury as an institution (Pearson, Pillay and Chipkin, 2016).

The PFMA establishes both National and Provincial treasuries (PFMA, 1999, Section 5 and Section17). The National Treasury's Functions and Powers reveal part of its nature as a centripetal force and its role in decentralised provinces. Some of these functions are:

(1)

(a) "promote the national governments fiscal policy framework and the co-ordination of micro-economic policy;

(b) co-ordinate inter-governmental financial and fiscal relations;

(c) facilitate the implementation of the annual Division of Revenue Act;

(d) monitor the implementation of provincial budgets.

(2) To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury –

(a) must prescribe uniform treasury norms and standards;

(b) must monitor and access the implementation of the Act, including any prescribed norms and standards, in provincial governments, in public entities and in constitutional institutions;

(c) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;

(d) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;

(e) must intervene by taking appropriate steps, which may include steps in terms of Section 100 of the Constitution or the withholding of fund in terms of S216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and

(f) may do anything further that is necessary to fulfil its responsibilities effectively" (PFMA, 1999, Section 16).

These functions and powers show that the National Treasury has a strong oversight and co-ordination role both nationally and provincially. This role is almost as strong as an intervention. If we couple this with the guidelines about intervening in provinces and municipalities, it becomes apparent that the PFMA and guidelines gives effect to the Constitution's mandate that legislation may regulate the process of S100 (Constitution, 1996, S100 (3)). This also shows that interventions are significantly covered in South African law as necessary and possible remedial action. However, the details of interventions at the provincial level are yet to be properly fleshed out. Similarly, some of the most prominent functions and powers of provincial treasuries are to:

(a) "Prepare the provincial budget;

(b) exercise control over the implementation of the provincial budget;

(c) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities; and

(d) ensure that its fiscal policies do not materially and unreasonably prejudice national economic policies" (PFMA, 1999, Section 18 (a)-(d)).

The PFMA also introduces a key role, that of an accounting officer, into South Africa's decentralisation legislative framework, fiscal decentralisation and ensuing interventions. An accounting officer must be present in all department and constitutional institutions: the head of department in a department is the accounting officer, and in a constitutional institution, the chief executive officer (CEO) is the accounting officer (PFMA, 1999, Section 36 (1) and (2)). The exception to the preceding, as covered in Section 36 (3), is when the accountant is appointed by a national or provincial treasury.

The most important part of this section is the part that cites "exceptional circumstances". What are the circumstances that could warrant a provincial or the national treasury appointing and accounting officer? The PFMA does not specify these circumstances but it is highly probable that interventions are some of those exceptional circumstances. Moreover, there may be times when it is necessary to find an acting accounting officer when the incumbent accounting officer is absent or otherwise unable to perform the functions of accounting officer" (PFMA, 1999, Section 37).

Accounting officers have a number of responsibilities that reflect fiscal decentralisation and form an integral part of the decentralised legal-administrative framework in South Africa. As mentioned earlier, the PFMA and MFMA are keys to decentralisation in South Africa because they are the financial fabric in a system that requires careful and decentralised use of resources. Resultantly, the role of the accounting officer becomes instrumental in the fiscal decentralisation of South Africa and thus the responsibilities of the accounting officer, as outlined in the PFMA, are numerous and detailed. These responsibilities are classified as general responsibilities, responsibilities over budgetary control, responsibilities over reporting, and responsibilities during the transferal of assets to Section 100 of the 1996 Constitution. Finally, S18 (g) imposes and suggests a tough fiscal sanction in such an intervention i.e. withholding funds for provincial departments under a provincial treasury intervention.

COGTA has a record of the number of S100 and S139 interventions to date. According to this record, prior to 2008, there were four S100 interventions in provinces. All of these interventions were short, lasting between one and two years, and all of them sought to deal with the problem of "Governance and Financial Administration" (COGTA, Accessed: 08 November 2016). From 2008 onwards, there were 13 S100 interventions, also mostly to do with "Governance and Financial Administration" (Ibid). In the local sphere, there have been a total of 102 interventions under S139 (1) (b) of the 1996 Constitution (Ibid).

Figure 8: Section 100 Interventions before 2008

Name of Department	Year of Intervention	End of intervention	Nature of Problem
1. Eastern Cape Provincial Government (as a whole in an MoU format)	1999	2001	Governance and Financial Administration
2. Kwazulu-Natal Provincial Government (as a whole in an MoU format)	1999	2001	Governance and Financial Administration
3. Mpumalanga Provincial Government (as a whole in an MoU format)	1999	2001	Governance and Financial Administration
4. Free state Provincial Government (as a whole in an MoU format)	1998	1999	Governance and Financial Administration
			TOTAL: 04

Source: COGTA, n.d.

Figure 9: Section 100 Interventions after 2008

Name of department	Year of Intervention	End of Intervention	Nature of Problem/s
Eastern Cape			**TOTAL: 02**
1. Department of Housing	2008	Uncertain but ended	Government and Financial Administration
2. Department of Basic Education	2010	Current	Governance and Financial Administration
Free State – S100 (1)(a) Interventions			**TOTAL: 02**
1. Provincial Treasury	December 2011	Uncertain but ended	Governance and Financial Administration
2. Police, Roads & Transport	December 2011	Uncertain but ended	Governance and Financial Administration
Limpopo – S100 (1)(b) Interventions			**TOTAL: 05**
1. Provincial Treasury	December 2011	31 March 2016 [Converted into a S100(1)(a) directive in February 2015]	Governance and Financial Administration
2. Department of Basic Education	December 2011	31 March 2016 [Converted into a S100(1)(a) directive in February 2015]	Governance and Financial Administration
3. Department of Health	December 2011	31 March 2016 [Converted into a S100(1)(a) directive in February 2015]	Governance and Financial Administration
4. Department of Roads & Transport	December 2011	31 March 2016 [Converted into a S100(1)(a) directive in February 2015]	Governance and Financial Administration
5. Department of Public Works	December 2011	31 March 2016 [Converted into a S100(1)(a) directive in February 2015]	Governance and Financial Administration
			OVERALL TOTAL: 13

Source: COGTA, n.d.

4.7 Extra-Legal Interventions

This is the fourth type of intervention in South Africa. While it is not mentioned in the legal-administrative framework, it exists. The extra-legal nature of the type of intervention is because it is not constitutionally or legally provided for. However, it involves the President sends a professional or technical team into a province or provincial department to remedy a breakdown in administration. I first heard about the extra-legal intervention following an interview with a senior manager at the DBE. This senior manager was discussing the fact that although the PEDs in the Eastern Cape and Limpopo were recently under Constitutional intervention, this was not the first time that this had happened. Moreover, a previous "extra-legal" intervention, to use the senior manager's words, was required in the Eastern Cape specifically because that department's administration was so devastatingly broken(SM Interview, DBE, June 2017). This senior manager said that the president at the time, former president Thabo Mbeki, initiated an intervention in the Eastern Cape and the intervention team was led by the former HOD of the DPSA, General Fraser-Moleketi.

The details of the extra-legal intervention will be discussed in the findings chapter on the Eastern Cape intervention. This extra-legal intervention forms part of a longer historical background in the Eastern Cape. For now, it is important to understand that interventions of this nature are based on the same characteristics of a Section 100 intervention. They are initiated by the executive; they are driven by the mandate to fulfil executive obligations; and they require human and other resources to be sent from the national centre to decentralised provinces.

4.8 The "MSI Bill"

There are two things absent from the existing legislation on interventions. Firstly, there are no guidelines on how to identify the non-fulfilment of an executive obligation; how the steps for an intervention should be carried out; who bears the cost of the intervention; how to measure the success of an intervention; and where there are any follow ups after the end of an intervention. The 1996 Constitution says that legislation and guidelines may be drafted to fill in Section 100 (Constitution, 1996, Section 100 (3)). To date, it appears that there has been no legislation to regulate Section 100 to this effect. In fact, when I asked a National Treasury official about how, or what process did they use to carry out interventions, their response was, "we used logic" (NT Interview, 09 March 2017). They went on to describe that this logic involved identifying the problem, sending a team to assist the provincial department, and waiting for improvement before ending the intervention.

Following an interview with a senior manager at COGTA in November 2016, I was given access to a pending piece of legislation drafted by COGTA (Intergovernmental Monitoring, Support and Interventions Bill – MSI Bill) which is supposed to regulate Section 100. It's not clear how long this Bill has been pending for but a separate interview with a retired official in the Eastern Cape revealed that the MSI Bill has been in the works for a number of years. If it is eventually debated and passed, the MSI Bill will provide a coherent and consistent regulatory process for interventions. For now, the MSI Bill represents a whole host of issues that may arise during, and prior to – interventions and thus should probably be anticipated in legislation. As such, it is important to examine and understand the MSI Bill.

A brief outline of the MSI Bill reveals that it deals primarily with the following:

1. Monitoring, support and national interventions in provinces.
2. Monitoring, support and provincial interventions in municipalities.

This section will deal with the first part of the MSI Bill because it pertains to the bulk of this thesis. The full draft of the MSI Bill is contained in the Appendix of this thesis, and the most relevant parts for my thesis are referred to and discussed in this section.

The introduction and Preamble to the MSI Bill outline the rationale and purpose of the bill. The introduction states that the purpose of the bill is,

> "To regulate the implementation of, and the processes provided for in, section 100 and section 139 of the Constitution; to provide for targeted support for provinces and municipalities in need of assistance; to provide for the monitoring of provinces and municipalities as to the fulfilment of their executive obligations; to provide alternative steps to intervention to induce compliance by provinces or municipalities with their executive obligations; to provide for the appointment of administrators by the intervening national executive or provincial executive; and to provide for matters connected therewith." (MSI Bill, 2016: 2).

This suggests that the national executive and national government need to make decisive moves around interventions. The preamble thus points to the fact that the national government seeks to provide more ways to ensure the functionality of subnational governments apart from constitutional interventions. It also implies that the current monitoring and oversight mechanisms over subnational governments are insufficient.

The MSI Bill seeks to fill an implementation gap between what S100 says in the Constitution and how interventions are practically implemented. The Bill also points to the fact that the national government cannot unnecessarily infringe on a province's right to fulfil its executive obligations (MSI Bill, 2016, section 5(1)) and this aligns with the Constitution's provision that the national, provincial and local aspects of government are spheres that are supposed to work in conjunction with each other, and not as levels, which implies a hierarchy.

There are four key aspects in the regulation of S100, through the MSI Bill:

1. Monitoring
2. Targeted Support
3. Interventions
4. Processes

Each of these aspects will be described and discussed in turn.

4.8.1 Monitoring

Chapter 2 of the MSI Bill deals with the "Monitoring and Support of Provinces" (MSI Bill, 2016: 17 – 21). It calls for early warning mechanisms that will alert both the national and provincial spheres of impending failure to fulfil executive obligations. Accordingly, the Primary Responsibility of provincial administrations in terms of monitoring is to be able to identify when the province is either having signs of impending crises or has actually succumbed to the crises (MSI Bill, 2016, Section 5(2): 17). In order for this monitoring to take place, provinces "must have an early warning monitoring and reporting system complying with requirements as may be prescribed, to alert itself and the national government of any possible or impending non-fulfilment of an executive obligation" (MSI Bill, 2016, Section 5 (2) and (3): 17).

Therefore, the Primary Responsibility confirms decentralisation and allows provinces to ultimately determine the running of their departments, though the provinces must alert the national government of potential or existing crises.

The national government also has a role in monitoring, which is more detailed than the self-monitoring role of the provinces. National monitoring involves the national executive establishing a monitoring system within the existing provincial monitoring arrangements (MSI Bill, 2016, Section 6: 18). Such a monitoring systems include having mechanisms and procedures at the national level to identify potential of failure to execute executive functions by the province, and to make sure that the central government is kept in the know of impending or existing crises that constitute failure to perform executive functions on the part of the province (MSI Bill, 2016, Section 6: 18).

This means that the centripetal forces within the state should be equipped, and now legislatively bound, to enforce some sort of monitoring in provincial departments. The monitoring part of the MSI Bill is a curious addition to existing legislation and organs of government because national government has at least two national departments in particular, that are responsible for monitoring and overseeing all national and subnational government departments. These two centripetal national departments are the DPSA and the Department of Planning, Monitoring and Evaluation (DPME hereafter). The DPSA's Mission, for instance, is to,

i. "Establish norms and standards to ensure that the state machinery functions optimally and that such norms and standards are adhered to.
ii. Implement interventions to maintain a compliant and functioning public service.
iii. Promote an ethical public service through programmes, systems, frameworks and structures that detect, prevent and combat corruption.
iv. Contribute towards improved public administration in Africa and internationally through dialogue and sharing of best practices" (DPSA, 2014: online).

And the DPME's Mission Statement reads,

> "Our mission is to facilitate, influence and support effective planning, monitoring and evaluation of government programmes aimed at improving service delivery" (DPME, n.d.: online).

In any case, despite the monitoring and oversight functions of national departments, the monitoring aspect of the MSI Bill explains a more precise and efficient form of monitoring provincial departments. And that form of monitoring, as quoted earlier, requires that the national executive create a "monitoring system" that identifies "the early warning signs" of an impending public administration crisis. In other words, the onus is on the president or the Office of the Presidency to have an early warning detection system about the condition of provincial departments. This onus is probably placed on the Presidency because the power to declare an intervention appears under the National Executive in the Constitution. Therefore, the monitoring function of the MSI Bill is scheduled to take place before the initiation of an intervention and is possibly ongoing; it is the responsibility of the national executive, and it supplements the responsibilities of the national executive as per the Constitution.

In addition to creating a provincial monitoring system by the national executive, the MSI Bill outlines what should take place when monitoring suggests that there is an impending public administration crisis or when steps taken are "ineffective" (MSI Bill, 2016, section 9: 20). In the first instance, where there is an impending public administration crisis, the MSI Bill recommends that the national government assess the impending or actual provincial failure by ascertaining the severity of the impending or on-going crisis and whether the province has put in place steps to remedy the crisis by way of informing the President and responsible Minister (MSI Bill, 2016, Section 9).

The above action requires active decentralisation whereby the relevant Cabinet member must, for a time, closely monitor the situation in a provincial department to prevent a public administration crisis.

In the second instance where steps taken are unlikely, or are not, effective, the MSI Bill states that the relevant Cabinet member,

> (a) determine whether the province has the skills, resources and capacity to take remedial steps to avert non-fulfilment of the obligation or to deal with the consequences should non-fulfilment occur or, if non-fulfilment has already occurred, to ensure a turnaround and sustained future fulfilment of the obligation (MSI Bill, 2016, Section 9: 20 – 21).

This section raises a critical aspect of applying remedial action in provinces and skills and resources are key in the remedial action. Where these skills, resources and capacity are absent in the province, the relevant Cabinet member must consider how to provide support and what support is needed. Furthermore, the relevant Cabinet member must decide whether an intervention is necessary and report to national structures.

4.8.2 Targeted Support

Targeted support is described as additional support to the one that provinces already receive from national government for the performance of provincial functions (MSI Bill, 2016, Section 7). The Bill states that provinces may request additional support via a "motivated written request to either the relevant national department or the national executive" (Ibid: 18 – 19). It is also stated that when either the national department or national executive receives the request, the relevant department ascertains the legitimacy of the request. If the request is legitimate, and after consultation with the province, the national executive prepares a report detailing areas (in the province in question) in need, why assistance is needed, the kind of assistance needed, and how that assistance will be given. There is also an assignment of roles and responsibilities and a constant need for monitoring the intervention and its outcomes (Ibid)

This section is supposed to work in conjunction with S125 (3) of the Constitution which, "imposes a duty on national government to assist provinces in developing the administrative capacity required for the effective exercise of their powers and the performance of their functions" (MSI Bill, 2016, Section 7: 18).Thus, targeted support, like the monitoring section of the MSI Bill, seeks to add substance to the intervention and executive authority aspects of the Constitution. But even more importantly, the MSI Bill states that provinces themselves should be able to identify their administrative shortcomings and *request* support from "the appropriate national department or otherwise the national executive" (Ibid: 18). This displays the interdependent nature of South Africa's decentralised governance. In other words, provinces and provincial departments can request support as much as the national government can recommend and initiate interventions in provincial departments. If implemented, targeted support lessens the scenarios in which S100 interventions are required by allowing provinces to be upfront about the administrative support that they need.

The type of national support that would be made available to provinces is:

(a) provision of professional, technical or administrative guidance and advice;

(b) the temporary secondment of key professional, technical or administrative personnel;

(c) assistance in managing, operating or maintaining—

i. administrative, personnel or financial systems; or

ii. infrastructure, equipment or other assets;

(d) access to technical equipment and facilities;

(e) the training of and transfer of skills to staff;

(f) assistance in guiding decision-making; and

(g) the sharing of information." (MSI Bill, 2016, section 7: 19).

Most of the support is administrative and technical which could be reflective of the Bill's authors' knowledge of problems that currently exist in provincial departments. The help is also reflective of the primary responsibilities of provincial departments.

4.8.3 Interventions

The next major part of the MSI Bill deals with interventions. This is extremely important because it advances the current S100 (1) (b) measures and other intervention measures that are present in the Constitution. The first step proposed in the MSI Bill is determining whether an intervention is necessary in a province or a provincial department. The Bill stipulates that the national executive should first determine if the crisis in a province is a result of the incompetence of that province. If that is the case, the executive has to satisfy itself that the area of failure is an executive obligation that justifies Section 100 intervention. The executive will also have to ascertain whether the crisis can best be resolved by means of Section 100 intervention or Section 11. If Section 100 is determined to be the appropriate measure, then it will be instituted following steps described earlier.

This effectively requires the national executive to conduct a thorough scoping exercise about whether a S100 (1) (b) intervention is applicable in a province because S100 (1) (b) interventions are last resort measures when a province is not fulfilling its executive obligation. This is evident in S10 (1) (a), (b) and (d), which are clear that there must be facts that point to a breakdown in the province's public administration as well as the extent or severity of that breakdown. Interestingly, S10 (1) (a) specifically requires that there be evidence to illustrate that the problems in a province emanate from a breakdown in public administration, not in other areas of the province. This implies that there could be other factors such as political or financial problems that cause problems in a province.

Section 10 (1) (e) refers to consideration about whether to choose S100 of the Constitution or S11 as a measure of intervention in a province. S11 of the MSI Bill states that other restorative measures can be used apart from intervention measures. Accordingly, S11 lists these measures with the caveat that these measures are not preconditions to S100 interventions. Rather, these pre-existing measures are alternatives to a S100 intervention. Thus, S11 of the MSI Bill reads:

"11. (1) If the conditions for a national intervention in a province in terms of section 100(1) are met, the national executive may, instead of intervening in terms of that section, take any other steps to induce compliance by the province with the obligation, including —

(a) utilising the forums, mechanisms and procedures established by the Intergovernmental Relations Framework Act, 2005 (Act No.13 of 2005);

(b) applying any legislation regulating provinces and the exercise of their powers, duties and functions, including the Public Finance Management Act; or

(c) providing targeted support to the province in terms of Part 2 of Chapter 2.

(2) Subsection (1) is not a prerequisite for a section 100 intervention and the national executive may, subject to subsection (3), summarily intervene if it so decides, provided that the conditions for a national intervention in terms of section 100(1) are met.

(3) If the obligation which the province failed to fulfil is a measure referred to in section 216(2) of the Constitution, compliance with the measure may be enforced by the National Treasury either by—

(a) taking steps in terms of that section; or

(b) initiating an intervention in the province in terms of section 100." (MSI Bill, 2016, Section 11: 22 – 23).

As briefly stated before, following the determination of whether a S100 intervention is necessary, the MSI Bill requires that the national executive determine further which action (s) should be taken to initiate the intervention. This section is straightforward and reads similarly to S100 in the Constitution:

"12**.** (1) If the conditions for a section 100 intervention in a province are met and the national executive decides to intervene in the province in terms of that section, the national executive must determine an appropriate intervention step or combination of intervention steps to ensure fulfilment of the obligation.

(2) The intervention steps the national executive may take in terms of a section 100 intervention include the following:

(a) the imposition of measures aimed at regulating decisions of a province relating to the executive obligation which the province failed to fulfil;

(b) the issuing of a directive as contemplated in section 100(1)*(a)*; or

(c) the assumption of responsibility for the executive obligation which the province failed to fulfil as contemplated in section 100(1) *(b)*.

(3) The national executive may not impose an intervention step referred to in subsection (2) (c) unless that intervention step is preceded by or combined with a directive in terms of subsection (2) (b)." (MSI Bill, 2016, Section 12: 23).

In making this decision, the next part of the MSI Bill (MSI Bill, 2016, Section 13) requires the national executive to consider a number of factors: nature of the obligation which the province faltered on; the extent of the faltering; the reason why such failure occurred; the consequences of the failure of the said obligation; the urgency needed in correcting the failure; and provincial capacity to control the failure. The executive will also have to consider whether the proposed intervention will remedy the crisis in the province.

Therefore, determining whether to undertake a S100 intervention in a province and the determination of what appropriate actions to take would become integral to the intervention process. If the MSI Bill was to be enacted, it would effectively regulate a part of the Constitution that to date has relied on other legislation or the logic of government officials and administrators.

4.8.4 Processes

There are a number of processes detailed in the MSI Bill. These processes, unlike the sections on interventions in the Constitution, seek to explain administrative and technical matters that are fundamental to S100 interventions. These processes are the appointment of an Administrator to lead the S100 intervention; the role of that Administrator; the responsibility of a province during a S100 intervention; obstruction of a S100 intervention; and the role of the Accounting Officer during an intervention.

4.8.4.1 Appointment and Role of an Administrator

As has been established throughout this chapter, the legal-administrative framework of decentralisation and interventions in South Africa provides the national executive with administrative power over a province or provincial government when a S100 intervention is initiated and implemented. However, it is impractical for the national executive to be directly involved in an intervention, thus the relevant Cabinet members and Ministers of a provincial department would lead such an intervention. The way in which they lead the intervention becomes a question, and is outlined in the MSI Bill. According to the MSI Bill, once there has been a determination that a S100 intervention is necessary, the national executive can appoint an individual as an Administrator to lead that intervention. The MSI Bill reads as follows in this regard:

"18. (1) If the national executive imposes a section 12(2) *(c)* intervention step, it may—

(a) appoint an official of a national department or national public entity, or a person in private practice, as administrator to fulfil the assumed obligation or specific aspects of the assumed obligation on behalf of the national executive; or

(b) appoint a national department or national public entity to fulfil the assumed obligation or specific aspects of the assumed obligation on behalf of the national executive (MSI Bill, 2016, Section 18: 26)

The Administrator is someone with, presumably, the expertise to act as a remedial representative using their previous experience in a national department or public entity, or in private practice. Once appointed, an Administrator is given functions and powers that will allow them to effectively oversee an intervention. Importantly, the appointment of the Administrator should "involve the Cabinet member responsible for the concurrent functional area in which the assumed obligation falls" (MSI Bill, 2016, S18 (2)). This means that the Cabinet member responsible for the concurrent function under intervention possibly needs to agree with the Administrator's appointment.

The role of the Administrator requires exercising his/her powers and functions strictly for the purpose of the restoring an executive obligation and fulfilling a S100 intervention:

(a) the national executive, or the administrator or national department or public entity charged with fulfilling the obligation, may exercise any of the powers, duties and functions assigned to an internal structure or functionary of the province, but only to the extent that the exercise of those powers, duties and functions are necessary for –

i. fulfilling the assumed obligation; and

ii. complying with section100(1)*(b)*(i) to (iv) (MSI Bill, 2016, Section 19: 27);

The exercise of these powers and duties is in such a way that it "...does not affect the province's right to administer the affairs of the province other than the obligation for which the national executive has assumed responsibility; and the province remains responsible for budgeting for and funding the fulfilment of the obligation" (MSI Bill, 2016, section 19: 27).

The MSI Bill addresses a number of issues here. Firstly, when an Administrator assumes responsibility over a provincial department, there may be certain incumbent roles in that department that then become displaced. S19 (1)(b), quoted above, addresses this issue and implies that if an incumbent's role is taken over by an Administrator, that incumbent "is suspended" until the intervention ends. Secondly, the provincial administration and leadership may feel incapacitated once a S100 intervention is implemented in a provincial department. S19 (1) (c) addresses this latter point by stating that the province retains the right to continue to administer other provincial affairs, apart from the one under intervention. Thirdly, provincial administration and leadership may think that they no longer control their own finance and budgeting. This issue is addressed in in that the provincial administration is still responsible for funding the executive obligation under intervention. Additionally, when an intervention ends, the provincial administration resumes its responsibility for the affected executive obligation:

> "20. If a section 12(2) *(c)* intervention step ends, the province resumes responsibility for the executive obligation." (MSI Bill, 2016, Section 20: 27).

This effectively allows decentralisation to resume after a process of recentralisation.

4.8.4.2 Responsibility of the Province

Some of the responsibilities of the provincial administration during an intervention was discussed above. The MSI Bill goes further in explaining the role of the province during a S100 intervention. The relevant section states as follows:

> "21. If the national executive intervenes in a province in terms of section 100, the
>
> Province –
>
> (a) must to the full extent of its capacity assist the national executive to achieve the objectives of the intervention and to bring the intervention to a successful conclusion as speedily as possible;
>
> (b) must take all reasonable steps to prevent its internal functionaries and members or officials of its internal structures from interfering with, hindering or obstructing implementation of the intervention; and
>
> (c) in the case of a section 12(2)(c) intervention step –
>
> i. may not withdraw any of its staff, funds or other resources allocated by it for the fulfilment of the relevant executive obligation; and
>
> ii. must provide such additional staff, funds and other resources, and render such other assistance, within its means and approved budget to facilitate fulfilment of the obligation in accordance with the reasonable requirements of the national executive or persons acting on its behalf." (MSI Bill, 2016, Section 21: 28).

Essentially, the province must cooperate with the national executive and ensure that "internal functionaries" and officials within the provincial department under intervention also cooperate with the national executive. Moreover, the province must dedicate existing and additional resources to the intervention. Section 22 (3) later states that an internal functionary "excludes the Premier or an MEC of the province" (MSI Bill, 2016, Section 22 (3): 29).

4.8.4.3 Obstruction of a S100 Intervention

Where someone within a provincial department hampers the implementation of a S100 intervention, that individual should be dismissed or suspended and another internal functionary fill the subsequent vacancy. Thus, the MSI Bill reads:

> "22. (1) If an internal functionary or a member or official of an internal structure of a province interferes with, hinders or obstructs implementation of a section 100 intervention, the national executive may direct the provincial executive—
>
> (a) to suspend that internal functionary, member or official from office;
>
> (b) to initiate or institute dismissal or disciplinary proceedings against that functionary, member or official in terms of any legislation subject to which that
>
> (c) functionary, member or official holds office; and
>
> (d) to designate another person to be responsible for exercising the powers, duties and functions of the suspended functionary, member or official.
>
> (2) Compliance with a directive in terms of subsection (1) is obligatory, and if the provincial executive fails to comply with a directive issued to it the national executive may take any steps available to it to ensure compliance with the directive, including by assuming responsibility for the obligation in terms of section 100(1)(b)." (MSI Bill, 2016, Section 22: 28 – 29).

This is probably one of the most contentious and important parts of the MSI Bill because it is clearly calling for accountability of staff in government departments, through suspension and dismissal if they are found to be preventing the implementation of a S100 intervention. The contentious part of this is being able to prove that a member of staff is obstructing an intervention and later suspending or dismissing them. These are processes that may take time to unfold during an intervention and may have repercussions long after the intervention has ended.

4.8.4.4 Role of an Accounting Officer

As discussed earlier, the PFMA provides for and describes the role of an accounting officer, who is usually the HOD of a department. According to the MSI Bill, the accounting officer:

> a) "continues during the intervention to be responsible in that capacity for complying with the Public Finance Management Act; and
>
> b) must manage the responsibilities of accounting officer or accounting authority in terms of that Act with due regard to the requirements needed for achieving the objectives of the intervention.
>
> (2) If another person is designated in terms of section 24(1)(a) or (b) to act as accounting officer of a provincial department or trading entity or as accounting authority of a provincial public entity during an intervention in a province, that other person must comply with subsection (1)." (MSI Bill, 2016, Section 23: 29).

The circumstances under which someone other than the incumbent can become accounting officer, as stipulated above, are unclear. But the MSI Bill suggests that the incumbent accounting officer may be replaced by someone from National Treasury.

“24. (1) If the national executive intervenes in a province in terms of section 100, the National Treasury may for purposes of the Public Finance Management Act designate a person determined by it during the intervention as –

(a) the accounting officer of a provincial department or trading entity; or

(b) the accounting authority of a provincial public entity in the province (MSI Bill, 2016, section 24: 31).

The Bill states that a person who may be designated to exercise duties and responsibilities of an accounting officer should be:

(a) an official of the affected provincial department, trading entity or public entity;

(b) an official of any other provincial department or provincial public entity;

(c) an official of any national department or national public entity; or

(d) an official or person appointed in terms of section 18 of this Act as administrator for purposes of the intervention.” (MSI Bill, 2016, section 24: 32).

Section 24 of the MSI Bill details several intricacies involved in designation an accounting officer which cannot be quote verbatim here. For the purposes of this discussion, it is suffice to know the role of that office and who qualifies to occupy it.

During a couple of interviews at the National Treasury, I sought an explanation of the Section 100 procedure, as it is neither established nor regulated in legislation or guidelines. The guidelines examined in the previous chapter are not technical and the MSI Bill has not been tabled before Parliament. As a result, there is no clear indication about the details of the procedure involved in a Section 100 intervention. For instance, how to identify a potential public administration crisis, how it is tabled before Cabinet, which departments participate in the intervention, which resources and skills are required for such an undertaking, and the measures of success for an intervention. All we have regarding this is the notion that an executive obligation should be restored according to legislation and that there are specific conditions for invoking Section 100. The details of procedure matter immensely in order to fill in the gaps.

The interviews at the National Treasury were with a team that was involved in both the Eastern Cape ad Limpopo interventions. In terms of the details of the procedures involved in the Section 100 interventions, one of the team members referred to the “post-intervention” period i.e. period when the intervention officially ends and when administrative and personnel changes would have taken place. Given the official’s periodisation, it makes sense to characterise the initiation, implementation and finalization of an intervention as pre-, during and post-intervention. This will allow me to sort and articulate the data as concisely as possible. It also establishes a procedure that can be used for analysis.

The *pre-intervention period* is partly described in the Constitution, which gives the conditions for the initiation of an intervention following a province’s failure to execute its executive obligations. This period is accompanied by legal, administrative and technical aspects. The legal aspect involves the executive i.e. the sitting president informing Cabinet of his/her decision upon the recommendations of one of the national ministers. This allows the Cabinet and the relevant national minister to approve the intervention and to formalise its initiation by informing the relevant province and department (Njobe Interview, 06 June 2017). The administrative and technical aspects of the pre-intervention period involve appointing an Administrator who becomes an accounting officer in the relevant department (NT Interview, 09 March 2017).

In addition to appointing an Administrator, the relevant departments should draft a diagnostic report about the issues identified in the relevant department (NT Interview, 09 March 2017). In drafting this diagnostic report, the relevant department also needs to be informed about the issues and conditions that warrant the intervention. Finally, the national departments involved in the intervention can create an ‘intervention team’ whose skills and technical expertise will assist the Administrator and the provincial department in restoring its executive obligations.

During the intervention, the Administrator and the intervention team institute a recovery programme for the provincial department under intervention. The recovery programme includes recommendations, system changes or corrections being implemented in the department. The National Treasury team interviewed described this as a period where two main processes take place. The first process is where the intervention team has to “restore controls” in the provincial department (NT Interview, 09 March 2017). The restoration of controls means that rules that are in place for running a provincial department must be put into place and adhered to. In the interview, the National Treasury team described this process as one where basic financial controls are reinstated in a provincial department (NT Interview, 09 March 2017). However, this only applies where financial mismanagement is identified as an issue for intervention. The second process requires the Administrator, through their role as accounting officer, to implement disciplinary measures against those alleged to have contributed to the failure that is being remedied. In some instances, the intervention team can write to the relevant minister advising them about who should undergo disciplinary action. The Administrator also needs to oversee the recovery programme’s implementation.

Finally, as the period draws to a close, the Administrator and the intervention team must draft an exit strategy with recommendations for the withdrawal of the Administrator and the intervention team and the reasons thereof (NT Interview, 09 March 2017). A complete withdrawal can be recommended whereby the Administrator and the intervention team leave the provincial department completely based on evidence that systemic changes have been fully implemented and instituted (NT Interview, 09 March 2017). On the other hand, a conditional withdrawal can be recommended where the provincial department is placed under the supervision of a provincial Treasury until evidence of systemic change is fully implemented and instituted (NT Interview, 09 March 2017). The *post-intervention period* refers to the time after an intervention has officially ended: the effects and success of newly instituted changes are evident and a “close out” report is presented to the President Parliament (NT Interview, 09 March 2017). According to the National Treasury team, an intervention has not officially ended until the close out report has been presented to Parliament.

However, the initiation and process of instituting a S100 intervention, according to the National Treasury team, may be technically specific to the department. Speaking to a director in the DBE, they outlined a general initiation and process of a S100 (1) (b) intervention is a Cabinet decision: “It is a Cabinet resolution first that has got to be taken” (Njobe Interview, 06 June 2017). This is however not listed in the S100 clause in the Constitution which, as discussed previously, only refers to the non-fulfilment of an executive obligation which the executive can then assume full responsibility for. This is an important aspect of interventions because if the executive and Cabinet are responsible for this decision, this should be clarified further in a framework or supporting legislation. Also, the relationship between the Executive, Cabinet and the relevant minister for the responsibility in question becomes integral to the implementation of a S100 (1) (b) intervention. This is because the ministers in a Cabinet are known as “executing authorities” (Njobe Interview, 06 June 2017) which means that “They’ve got the power to execute on behalf of Cabinet” (Njobe Interview, 06 June 2017). Therefore, once a Cabinet decision has been made to initiate S100 (1) (b) intervention, the minister for the executive responsibility that is being taken over by national government becomes the overseer of the intervention. In fact, the power of a minister as an executing authority is such that, "They've the power to execute on behalf of Cabinet. As an executive authority, the minister has the powers over and above the power of a Premier [of a province] because ministers are the executive of Cabinet and Premiers are not" (Njobe Interview, 06 June 2017). This is a significant perspective because it affirms the centralising power of a national government; Cabinet as a centripetal force; and Cabinet ministers as executors over provinces and their officials such as Premiers. As a result of the power of ministers as executing authorities, "the Cabinet will sort of entrust the responsible minister of that department" (Njobe Interview, 06 June 2017). Of course, the executing authority best placed and equipped to oversee a Cabinet initiated intervention is the very minister who oversees the policy for that department at the national level. Moreover, it confirms the view of the ANC, during the democratic transition, that the provinces cannot be independent to the federal extent that Provinces and Premiers are self-governing and self-sustaining.

Following the Cabinet's initiation and ministerial oversight of the intervention, the overseeing minister must "table the full decision of Cabinet to the National Council of Provinces, the NCOP, where the Premier resides in terms of authority" (Njobe Interview, 06 June 2017). This is consistent with S100 in the Constitution which says that when the national executive intervenes, "it must submit a written notice of intervention to the National Council of Provinces within 14 days after the intervention began" (Constitution, 1996, Section 100 (2)(a): 51). In other words, the executive through the relevant executing authority must notify the NCOP that it is reclaiming its national power over a provincial department. This, again, reflects the decentralised nature of governance because a central or national government is effectively going into a provincial legislature to rescind part of its power. This reveals decentralisation as opposed to federalism as provincial or state legislatures would probably not allow this in a federal system, except where there are issues of national security. As such, the federal characteristics contained in the Constitution are of no consequential relevance because they can be overridden. During the tabling of the decision to initiate a S100 (1) (b) intervention, the minister,

> "…must fully detail the scope. That is, the intention; the scope of the intervention; the period of intervention; how long is that desired to take place; and with a full plan of the intervention majors because it cannot be a blanket. There is a full plan that the minister is required to table: what are the areas of difficulty? … So, the minister will explain the scope of the intervention, or the duration, and specific areas and through the plan – what are the key areas that would have maybe been compromised" (Njobe Interview, 06 June 2017).

So, although the executing authority is tabling the national executive's intention to rescind some provincial power, that executing authority must provide a legitimate basis and scope for the intervention. In addition to this, "the NCOP becomes a reference group where the minister, from time to time, is required to [table] progress reports" (Njobe Interview, 06 June 2017). Again, this is consistent with the part of the Constitution that says "the Council [NCOP] must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the national executive" (Constitution, 1996, Section 100 (2) (c): 51). This means that both the minister, on behalf of the national executive, and the NCOP must review the intervention process as it has unfolded and remain accountable during the intervention. As the director in the DBE said, "This is intended to keep in check the power of the executing authority, so that it is not, sort of, abusive" (Njobe Interview, 06 June 2017). To summarise this process, the director says, "Cabinet is the custodian of the process, the minister is the executing authority…from time to time Cabinet will look into its decision because it will be receiving what we call reports through Cabinet memos. The minister will serve what we call Cabinet memos to Parliament, or to the legislature, to brief it from time to time" (Njobe Interview, 06 June 2017). Finally, in the process of initiating a S100 (1) (b) intervention, "the minister should appoint an Administrator, who in all probability assumes the role of an accounting authority" (Njobe Interview, 06 June 2017). As explained in the legislation earlier, the HOD is known as an accounting officer. However, as part of the oversight that the minister provides during an intervention, they take the powers of the accounting officer from the incumbent HOD and give those powers to the appointed administrator (Njobe Interview, 06 June 2017).

There are a few technicalities and issues to note about this part of the S100 (1) (b) initiation. Firstly, an Administrator's role is to go into the department where an intervention has been instituted and directly manage the processes of the intervention. However, this role is not outlined in the Constitution or the regulatory frameworks. Secondly, this implies that the HOD of the relevant department has their accounting powers taken away. What becomes of their position?

4.9 Analysis and Conclusion

The 1993 Interim Constitution provided four main principles that would become fundamental to South Africa's decentralisation. These four principles are the constituting, the decentralising, the boundaries and the majority principles. The decentralising and boundaries principles are reflected in the Co-Operative Government chapter of the 1996 Constitution. This chapter of the 1996 Constitution is important because it expands on the earlier statement in the 1996 Constitution which says that the republic comprises national, provincial and local spheres. The Cooperative Government chapter in the 1996 Constitution expands on what this relationship between the three spheres of government entails. For the most part, each sphere of government must respect the boundaries, powers and functions of the other. Furthermore, each sphere of government must cooperate with each other through friendly relations, support, flows of information between each sphere, alignment of legislation and avoiding legal action against each other. Therefore, the spheres of government are constituted into three spheres, and they are regulated by certain terms of cooperation. Importantly, the 1996 Constitution outlines cooperative government; the role of provinces and their provincial executive authorities; and the powers of provinces and provincial departments. This outline of the roles, powers and functionalities of the provincial sphere are a significant and democratic upgrade from the nature and character of apartheid provinces. More so, these parts of the 1996 Constitution signify decentralisation because they state that provinces are purposely mandated to implement national policy as well as formulate and implement provincial policy, which is indicative of administrative decentralisation. However, due to the fact that the term 'decentralised unitary state' does not appear in the 1996 Constitution, one has to look for the aspects of the Constitution and ensuing legislation that make this mode of governance explicit.

The IGRF and the PFMA are two pieces of legislation that illustrate the implicit nature of South Africa's decentralised governance. The IGRF in particular creates an intergovernmental system between the three spheres of government. In so doing, it also establishes a number of intergovernmental structures that facilitate the working relationship between the three spheres of government. These intergovernmental structures, mainly councils and forums, encourage direct and consistent communication and cooperation between the spheres of government. The IGRF thus regulates how power is dispersed from the centre of national government. The PFMA also addresses a critical aspect of South Africa's decentralisation i.e. fiscal decentralisation. Fiscal decentralisation was discussed in the Literature Review and is exemplified in the PFMA, which establishes Provincial Treasuries alongside the National Treasury. The IGRF and the PFMA together illustrate how South Africa's decentralisation should practically function i.e. on the basis of intergovernmentalism.

Within this intergovernmentalism there is a mechanism of decentralisation that is supposed to ensure that firstly, any public administration crisis that occurs is dealt with effectively by national government, and secondly, the integrity of the unitary state is preserved. This mechanism is an intervention initiated by either the national executive in the case of the S100 interventions, or provincial executive authorities in the case of S139 interventions, or National Treasury in the case of the PFMA interventions. There are also extra-legal interventions, which will be expounded in ensuing chapters. The main purpose of these interventions is to actively resolve public administration crises which result in a breakdown of public service delivery. This is evident in the sections of the Constitution and the PFMA that outline that an executive obligation must be under threat in order for an intervention to take place.

The conditions under which an intervention may take place are ones that indicate a severe set of circumstances that endanger both subnational and national governance. These conditions are unmet essential national standards or established minimum standards for a public service; the maintenance of economic unity or national security; and the prevention of unreasonable action that prejudices the interests of subnational and national governance. Under these conditions, one can infer that a second purpose of interventions in the South African context is to maintain the integrity of the unitary decentralised state. This is because the conditions that lead to an intervention are ones that address the possibility that the entire country may eventually suffer as a result of the public administration crisis in a subnational government.

Finally, this chapter presented the MSI Bill which has the potential to regulate the way in which interventions are carried out. The MSI Bill is one that establishes monitoring and support mechanisms, as well as intervention ones. The monitoring and support mechanisms are less intense than interventions and they provide both top down and bottom up approaches. Essentially, monitoring and support involves both a preliminary and voluntary mechanism through which subnational governments can request more direct supervision and oversight in a particular area of their administration. The rest of the MSI Bill deals with interventions.

The first and most important step in initiating a S100 intervention, according to the MSI Bill, is determining whether an intervention is even necessary. The determination criteria provided by the MSI Bill demonstrates that whereas this decision may have been abruptly or politically considered in the past, or lacking any substantive evidence prima facie, this determination of the necessity of an intervention will be scrutinised and held accountable if this Bill is enacted. Moreover, the determination criteria requires that the national executive, which is primarily responsible for initiating an intervention, must explicitly determine the necessary step (s) required to execute the intervention. This also adds substance to the decision to intervene because it requires the national executive to concretely outline and possibly justify and account for the foreseeable actions in an intervention. The processes that ensue following the determination of an intervention are quite technical but crucial to the implementation of a S100 intervention. These processes are appointing an Administrator; the continuing responsibility of a province; and the role of an Accounting Officer. These processes emphasise two aspects of South Africa's governance system. The first aspect is decentralisation, which is clear in the continuing role of provinces during an intervention. By stating that provincial leadership and structures do not relinquish full power, only the powers and functions over a failing executive obligation, the MSI Bill affirms that interventions are not recentralisation exercises. Rather, interventions are supposed to be limited and non-disruptive restorative measures. If the MSI Bill is affirming this as the case, it is effectively saying that S100 interventions can be carried out without harming the distinctive nature of the cooperative government principles.

The second aspect is the emphasis of intergovernmentalism. This is the appointment of an Accounting Officer and an Administrator. On the one hand, these processes presume and provide experts who are able to lead a S100 intervention. These experts would be appointed through national structures, thereby giving them authority to act as functionaries of the national sphere. However, on the other hand, it will disingenuous to ignore the ramifications of the confusion and possible resistance by incumbents in those positions.

5 Chapter Five – Findings in the Section 100 (1) (b) Intervention in the Limpopo Department of Education (LDE)

This chapter outlines the implicit nature of South Africa's decentralisation which produces a legislative gap in the implementation of S100 (1) (b). The legislative gap compounds the existing constitutional crisis by lacking procedural clarity which confuses S100 thereby providing loopholes of exploitation for Administrators. These loopholes distort and lengthen resolutions around public administration crises in provincial governance.

5.1 Background to the Limpopo Department of Education

Before the Limpopo province was named after the Limpopo River, it was known as the North/Northern Transvaal Province (map below).

Figure 10: Map of former Northern Transvaal, now Limpopo Province

Source: Verwey and Munzhedzi, 1994

Prior to that, it followed the same apartheid pattern of independent self-governing homelands[14]governing own general affairs. Lestoalo (1995) identifies this governance structure as follows:

1. "The [4] independent homelands, Transkei, Bophuthatswana, Venda and Ciskei, each with its own education system
2. The six self-governing territories, Lebowa, Gazankulu, Kwandebele, Qwawa, Kwazulu and Kwangwane
3. The three different own affairs education departments for Whites, Coloureds and Indians

[14] The independent homelands and self-governing territories are usually and collectively referred to as Bantustans; and this thesis will do the same unless the strict demarcation between these two classifications needs to be made to substantiate a point.

4. The two general affairs education departments for Education and Training and the National Education" (Letsoalo, 1995: 1).

According to Letsoalo, "the fragmentation of education through the creation of homelands and own affairs departments resulted in 18 departments of education under 15 cabinets, each with its own regulations" (Letsoalo, 1995: 1). And as with everything under the separatist and racist policy of apartheid, this led to administrative chaos in education and other public administration institutions. During the transition to democracy, there was a concerted effort to create provinces for the new democracy, as has been detailed in Chapter Two; as well as an effort to amalgamate the Bantustan, own affairs and general affairs departments under their relevant portfolios . For the public service of education, the draft White Paper on Education and Training made "provision for the establishment of completely new provincial education departments" under the first Minister of Education, Professor Sibusiso Bhengu (Letsoalo, 1995: 4). The final White Paper on Education and Training described this mandate as follows:

> "The new system of education will be a single national system which is largely organised and managed on the basis of nine provincial sub-systems. The Constitution has vested substantial powers in the provincial legislatures and governments to run educational affairs (other than universities and technikons) subject to a national policy framework. The essence of the relationship between the national and provincial governments is co-operative" (White Paper in Education and Training, 1995: 47).

Thus, it is clear that one national system and nine provincial departments would be established to cater for one democratic republic. This was a way of decentralising education, both as a principle of just governance, and in the interests of better public administration. This process was later described as a "rationalisation process" in the White Paper on Education and Training, whereby,

> "the ethnically-based education departments or services responsible for providing education under the previous Constitution are being dissolved under their functions and personnel rationalised into nine new non-racial provincial education departments. Once the provincial departments have been consolidated and their staff establishments rationalised in line with government's policies, the new structure of organisation will be considerably less complicated and should be more cost effective than the one it replaces" (White Paper on Education and Training, 1995: 51).

This rationalisation process had the good intention of creating a unified, efficient, democratic and more cost-efficient national education system in South Africa. The system would follow decentralisation as a mode of governance through the established provincial departments. The White Paper on Education and Training described the amalgamation process as, "assembling nine different jigsaw puzzles from the pieces of ethnic administration located in those provinces and connecting different personnel and other vital systems together so that single coherent provincial departments can function" (White Paper on Education and Training, 1995: 51).

The pieces that were to make up the jigsaw puzzle of the Northern Transvaal Education Department were:

1. "Lebowa Department of Education
2. Gazankulu Department of Education
3. Venda Department of Education

4. Department of Education and Training (DET)
5. Transvaal Education Department (TED)
6. House of Delegates (HOD)
7. House of Representatives (HOR)" (Letsoalo, 1995: 5).

Based on the above, the Northern Transvaal Education Department comprised at least one homeland, Venda; and two self-governing territories, Lebowa and Gazankulu. Heather Jacklin and Johann Graff (1994) conducted research in these Bantustans during the transition to democracy. Their work captures the history and potential pitfalls for the amalgamation. Jacklin and Graff's work provides a detailed account of Bantustan education departments, in a field where the institutional workings of Bantustan administration is not yet fully known. Furthermore, Jacklin and Graff's work provides economic and political realities at the time which would become historical legacies of the Northern Transvaal Education Department. Finally, their work details the foundations and structural basis of what is now the LDE. I will briefly discuss the Lebowa, Gazankulu and Venda Departments of Education, per Jacklin and Graff's work to provide a historical institutional analysis of what is now the LDE.

Jacklin describes the Lebowa Department of Education as institutionally and administratively weak since it worked under unfavourable apartheid economic conditions. The Lebowa Department of Education was "Operating in the poorest region in the country with minimal resources, capacity and legitimacy, the LDE emerged from these years with little more to show than its large numbers of students and an ostentatious head office within the lager of Lebowa's government buildings" (Jacklin, 1994: 1). In addition to its poverty and institutional weakness, Lebowa was "a particularly problematic child of apartheid – dependent and weak yet irresponsible and unruly" (Jacklin, 1994: 1). The latter was mainly due to the political context, mismanagement and corruption. The political context had "ongoing education boycotts" and "organised resistance" because Lebowa residents were frustrated with the maladministration in the Bantustan education (Jacklin, 1994: 2). Thus, the politics of Lebowa was inextricably linked to education as a public service; and this was exacerbated by an oppressive apartheid context where education represented economic freedom. The contentious political context stemmed from the alignment of Lebowa's Chief Minister Ramodike and the ANC during the transition to democracy (Jacklin, 1994). This ended up being a burdensome political choice because Ramodike did not build crucial political alliances with important organisations like SADTU thus the apartheid government "penalised Lebowa for its pro-ANC position and for their failure to control protest action within Lebowa" (Jacklin, 1994: 2).

In terms of the mismanagement and corruption in the Lebowa Department of Education, the Dekker Commission of 1988 (became De Meyer Commission of 1990) described these problems in the education department. According to Jacklin (1994), the 1990 Interim Report detailed misuse of funds for school textbooks between 1982 and 1990. There were irregularities in textbook buying processes; tenders were awarded to businesses affiliated to the Education Department and the responsible minister. More so, the 1992 De Meyer report states that school building contracts in townships between 1987 and 1989 were given to unsuitable companies with inadequate capacity and the process was poorly monitored which led to poor quality and uncompleted work (ibid).

Furthermore, Jacklin notes that mismanagement and corruption taking place in the Lebowa Department of Education, such as "sexual favours, created strong links between gender relations, power and corruption" (Jacklin, 1994: 4). Therefore, the Lebowa Department of Education was not fit for purpose because of mismanagement corruption and nepotism. But according to Jacklin, the solutions suggested by the De Meyer Report and the apartheid government were not helpful because they focused on a “completely technical analysis of the causes of corruption; the emphasis is on bureaucratic management capacity, procedures and controls and bad planning by politicians” (Jacklin, 1994: 5). Also, the apartheid government used the Report to justify unfettered administrative control of Lebowa prior to the restructuring of Bantustans (Jacklin, 1994). However, “these changes were not far-reaching enough, nor were they supported by adequate funding or steps towards greater political legitimacy” (Jacklin, 1994: 1).

The Gazankulu Department of Education also had corruption and mismanagement and the government deliberately ignored it and this increased spatial inequalities in the region (Jacklin, 1994). For example, the education department channeled more funding to better performing schools and neglected the poorly performing ones (Jacklin, 1994). Furthermore, except for QwaQwa, Gazankulu had more funding than all self-governing territories because it had more qualified teachers (Jacklin, 1994). It is ironic and possibly haunting that the Lebowa, Gazankulu and Venda departments of education had mismanagement, tender irregularities, were affected by political unrest and had poor performance as an output. If the names of the Bantustans were removed, this could be read as a current description of the LDE.

The recent history of the LDE as an institution finds meaning in the various types of leadership that the department has experienced since the democratic amalgamation of education departments in South Africa. One interview was integral to the understanding of the trajectory of the LDE with an immediate history in the democratic era, a longer history within the apartheid era and a more protracted history on the continent. According to the interviewee, the LDE has not always had the shortcomings that were discovered during the public administration crisis that led to the S100 intervention. Rather, the LDE was well run soon after its democratic inception until two subsequent leaders who oversaw its gradual decline. The participant described how one of the LDE earliest leaders was an outstanding, hands on, accountable and keen to see LDE increase its performance and integrity. The Head of Department (HOD) was Professor Nengwekhulu – he was hands on and practical in approach by physically visiting education sites. (LSMSI 11, 20 July 2011). He expected managers in the LDE to be proactive, even if their actions were not always correct, "“because that manager will be indicating to me [Prof. Nengwekhulu] that at least, that manager is doing something rather than sitting and not doing anything. Because if he takes a wrong decision, we are able to correct that manager and then we move forward.”" Nengwekhulu’s tenure in the LDE came to an end in 2005 when he was deployed to the Eastern Cape (LSMSI 11, 20 July 2011) and this was seen as a sinister plot to remove him, as reported by more than one interviewee.

The next HOD only stayed for a year but was not different from Nengwekhulu. Subsequent HODs were different from the two predecessors – they left all tasks to managers and their relationship with the head office and managers was bad, thus marking an end to hands-on leadership (LSMSI 11, 20 July 2011). Learner performance in the province suffered under the new leadership which was characterized by blame, vengeance and adversity (LSMSI 11, 20 July 2011). While differences characterise relationships in institutions, the differences described above marked a major shift within the LDE leadership and performance and in schools.

The third leadership came through the fifth HOD of the democratically led LDE. This HOD continued the downward trajectory that the LDE was on, with the added aspect of political influence to his leadership style. The political influence came with the HOD’s own political persuasions (LSMSI 11, 20 July 2011). The sixth HOD is described as the worst; he lacked managerial experience, was politically influenced by SADTU, evasive, and loathed accountability to the Limpopo Provincial

Legislature Education Portfolio Committee by being conveniently unavailable. Thus, the LDE continued on a downward spiral until the intervention of the S100 in 2011. (LSMSI 11, 20 July 2011).

5.2 Pre – Intervention – Political Conspiracy

According to the LDE's 2012/13 Annual Report, the nature and reasons of the S100 intervention were "to *stabilise and normalise the delivery of quality education in all its material facets; to address decisively the operational, management, administrative, as well as the systemic challenges facing the Department; and to ensure that measures implemented during the Section 100 (1) (b) intervention itself, guaranteed the sustainable provisioning of quality basic education after the intervention*". (Emphasis added; LDE Annual Report, 2012/13: 13). However, the details of the various aspects of these issues and why they required intervention, is not laid out clearly.

Another interesting reason given for the S100 intervention was the LDE's susceptibility to political, not administrative, intervention. This means that the S100 intervention that was initiated in Limpopo at the time through five different departments (Education, Health, Roads and Transport, Public Works and the Provincial Treasury) in the province was a political one disguised as legal and administrative intervention But this does not mean that there were no administrative problems in the departments that were placed under S100 intervention. Rather, the initiation of S100 was politically driven. These happenings in Limpopo portray how political power manifests itself through administrative and bureaucratic decisions. A critical reading into these occurrences also confirms that decentralization provides the occasion for the national government to exercise absolute control over subnational governments for political rather than administrative reasons.

To buttress the preceding discussion, between 2010 and 2012, the ANC was preparing for its upcoming elective conference in Mangaung in 2012. The Mangaung conference would determine the ANC's, and consequently South Africa's next president. As part of the strategic politicking that was going on in the ANC at the time, there was trepidation that the ANC's Limpopo provincial bloc would not support the election of Jacob Zuma at the conference. This support would not be forthcoming because the ANC campaigning within the provincial structures at the time would favour anyone but Zuma. The provincial campaigning team would use the money from provincial departments to fund ANC activities against the election of Zuma. Such activities included party regalia and cash to pay for support against Zuma through bribery. It was alleged that the Premier of the Limpopo province at the time, Cassel Mathale, would push the campaign agenda against Zuma. Alarmed by these dynamics, Zuma – also president of the republic at the time – was advised and took the decision to either stop funding the Limpopo province through the National Treasury; and/or place the province under a provincial wide S100 intervention. This meant that the province would not have the money needed to keep Zuma out of power. In addition to this, Mathale was removed as the Premier of Limpopo. Subsequent to this, the then president of the ANC Youth League (ANCYL), Julius Malema, was removed from his position along with the then deputy-president of ANCYL, Floyd Shivhambu. The official charge brought against the two by the ANC at the time, was "bringing the party into disrepute" (REF).

Speaking at an EFF media presser, Malema gives a similar account of what happened in the lead up to the Mangaung conference. Malema's version of events is as follows:

> "Zuma, after expelling us from the ANC, worked with Pravin Gordhan [former Minister of Finance in the National Treasury] to stop sending money to the Limpopo government, helped by the late Collins Chabane [Former South African Minister in the Presidency; from

> Limpopo]. They stopped sending money to the government of Limpopo and said Mathale collapsed the government of Limpopo [Cassel Mathale, former premier of Limpopo]. They withheld the money. Pravin – the same WhatsApp group of Cyril[15]. Why? Because Collins Chabane said to Zuma, the money which is going to remove you in 2012 conference [ANC elective conference?], is going to come from Limpopo. We have to dissolve that government. For factional reasons, stop sending money, collapse the government of Limpopo, make the people of Limpopo suffer; collapse the hospitals – because they were driven by factional interests. Masondo David, who is in the NEC [National Executive Committee] of the ANC today, still gives the same account today. The only mistake he makes is that he says he's the only one who said [inaudible]. I was with him when we said, "let's go to court". [But] Cassel was scared, they said, "No, ke dilo tsă lekgotla [Northern Sotho for: 'Those are factional issues, let's leave them to…'], they will self-correct"…They subjected me to concocted charges in Polokwane; humiliated my family, humiliated me, took my properties – with the hope that I will go and sell loose cigarettes in Zone 1 Masakane [Limpopo]. Little did they know that they were planting a seed. I'm sitting with them here today in Parliament. Zuma is gone. I'm coming for them now." (Malema, YoutTube, 2018)

The above confirms that the absolute power of the national government over subnational governments is largely political. The point that the S100 intervention was a manufactured administrative crisis for political gain was also brought up by the interviewees. They described the intervention as a product of factional battles within the ANC at the time. They speculated that the S100 intervention in Limpopo was imposed by an ANC faction in the government at the time which supported President Jacob Zuma. The full import of such factionalism on provincial governments was not well understood. One participant framed the political motives behind the S100 intervention as being consistent with the ruptures and instability within national government at the time:

> "Remember that it was a time when the politics of the province was volatile, like the politics of the country" (LSMSI 4, 04 July 2011).

This understanding of the tangible negative effects of the Zuma administration being felt in various areas of subnational government is important. Firstly, it denotes the specificities of one's presidency in general; and the turbulence of the Zuma era administration in particular. Secondly, apart from political conspiracy that is repeated as fact, it is also present and nuanced in academic studies which show how intertwined and complex that party-state relationship is (see Phadi, Pearson and Lessafre, 2018). Finally, the understanding adds to the literature on the difficulties of implementing decentralisation when practically the national centre is maintaining control over subnational governments.

5.3 Causes of the Intervention

In the S100 (1) (b) implementation in the LDE, it is apparent that there are two causes for the intervention action. The first is a proximal (immediate) one which provided an urgent need for an intervention in order to remedy a visible, current public administration crisis. The second cause can be described as underlying causes because these are problems that had persisted in the LDE for a traceable amount of time. Under these causes of the S100 (1) (b) intervention in the LDE, there are institutional practices or issues that are specific to the LDE's public administration crisis.

---

[15] "same WhatsApp group" is South African slang for friends, comrades, people who are even unrelated but are seen to behave in the same manner politically, socially, economically or otherwise.

5.3.1 Immediate Causes

5.3.1.1 Provincial – Wide Intervention

As mentioned earlier, the LDE was not the only provincial department in Limpopo that was put under a S100 (1) (b) intervention. There were four other departments that were placed under the national government's administration i.e. Provincial Treasury, Education, Transport and Roads, Health and Public Works.

According to the Chief Administrator of the provincial intervention, Mr. Tom, the reasons for intervention were:

(a) "To assist the province to upgrade its systems and capabilities to a new normality

(b) To ensure compliance with legislation and regulations framework of government

(c) To enhance the quality of service delivery" (Section 100 (1) (b) Intervention Team, National Treasury, 15 October 2013: 3).

The Chief Administrator also stated that the intervention had "three (3) inseparable measures", being:

1) "Recovery – stop the bleeding in a number of areas, by doing things differently,
2) Governance – enforce compliance, accountability with consequences
3) Sustainability – focus on 80/20 principle, whereby major problems can be addressed through building capabilities in 20 percent of the 5 critical areas" (Section 100 (1) (b) Intervention Team, National Treasury, 15 October 2013: 3).

The Limpopo provincial administration was really in dire financial straits prior to the intervention, with a provincial "unauthorised expenditure of R2.7 billion" (Section 100 (1) (b) Intervention Team, National Treasury, 15 October 2013: 5), a provincial overdraft of R1.7 billion, probable over expenditure of R594.6 million and a provincial cost of employment (COE) overspend of R661 million (Section 100 (1) (b) Intervention Team, National Treasury, 15 October 2013: 5). A summary of the LDE's finances from 2003 is contained in Table 6 below, which shows that the department had received negative audit outcomes for a number of years, from 2006 onwards.

The Chief Administrator presents three major causes for the intervention. These are:

(i) "Lack of leadership and laxity of controls

(ii) Poor systems, processes, skills, and capacity, resulting in:

   a. Poor budgeting and financial management skills;
   b. Poor safeguarding of movable and immovable assets; and
   c. Numerous management shortcomings in respect of supply chain management. Collusive behaviour within the public services which is exacerbated by the private sector (business) influence so as to get a particular procurement outcome.

(iii) Non reliability of the IT infrastructure and or enabling systems and software" (Section 100 (1)(b) Intervention Team, National Treasury, 15 October 2013: 4)

These causes of the intervention can be read as being listed in order of importance because leadership necessarily affects controls, systems, processes, skills and the implementation of IT plans for the LDE.

According to the same presentation, the LDE had reached the point where it "was not able to fund key strategic educational priorities, resulting in the failure to meet essential national standards" (Report of the Select Committee on Finance and termination of section 100 (1) (b), 11 November 2014: 5). This means that the LDE was not maintaining its basic core functions because it no longer had funding to do so. It is evident that the LDE was not maintaining essential standards for education – one of the justifications for invoking a S100 intervention in Section 100 (1) (b) (i) of the Constitution. This also shows that provinces and provincial departments are responsible for implementing essential and minimum standards for the provision of their relevant functions.

In addition to the inability to maintain essential standards for education, the report states that the LDE's "system of financial, supply chain, contracts, asset, records and cash flow management and controls was not effective and efficient" (Report of the Select Committee on Finance on termination of section 100 (1)(b), 11 November 2014: 5). These are some of the specific problems that led to the public administration crisis in the LDE. The financial severity of the crisis was such that, "the compensation of employees' budget was found to be bloated" (Report of the Select Committee on Finance on termination of section 100 (1) (b), 11 November 2014: 5). This could have been partly a result of the overpayment of employees in the LDE; the overstating of the numbers of the employees in the LDE; or the overstating of the number of employees in the LDE who were on the wage bill.

5.3.1.2 Occupational Specific Dispensation (OSD)

Another immediate cause for the S100 (1) (b) intervention in the LDE was an unfunded mandate. The policy mandate was known as the Occupational Specific Dispensation (OSD) - a remuneration package that is given to "identified categories of staff" within the government (DPSA, 2009: 5). The aim of this remuneration, in addition to existing salaries in the public service, is to "put in place a proper career-pathing model for all occupational categories. Such a career-pathing model is not an automatic salary increase but a forward-planning framework to systematically increase salaries after predetermined periods based on specific criteria such as performance, qualification, scope of work and experience" (Fouche, 2007: 54). From government's perspective, this should "enable government to recruit and retain professionals" (DPSA, 2009: 5). The objectives of the OSD are to provide:

- "Unique salary structures per occupation;
- Salaries of occupational categories will, where necessary, be aligned to the market;
- Centrally determined grading structures and broad job profiles;
- Adequate career pathing opportunities, which is a forward-looking plan to systematically increase salaries of public servants after the pre-determined periods based on specific criteria such as performance, qualification, scope of work, experience, etc.,
- Pay progression within the salary band and grade progression" (DPSA, 2009: 5).

Therefore, the OSD is an additional payment above salaries in certain occupations – partly to maintain a professional workforce in the public service and incentivize good performance. Occupations covered by the OSD include dental and physiotherapy assistants, podiatrists, nurses and teachers (DPSA, Circular 2of 2011; Fouche, 2007). In education, the OSD rate was negotiated between the then Ministry of Education, the Education Labour Relations Council (ELRC), and the South African

Democratic Teachers union (SADTU) (South African Government, 04 December 2007: online). There was, at one point, a breakdown in these negotiations, which led to a delay in the OSD being "implemented by the target date of 1 January 2008" (South African Government, 04 December 2007: online).

However, despite the noble intention of the OSD to professionalise the education sector, the implementation was irregular because the money required to fund OSD in the education sector was not readily available for provincial departments of education to disburse. According to some interviewees, the breakdown in negotiations between the Minister of Education, the ELRC and SADTU was one of the causes of the intervention because it contributed to LDE financial mismanagement. One participant states that when the OSD was introduced, the LDE was "probably the first, or one of the few who implemented it properly, as per policy" (LSMSI 13, 21 July 2017).

The implementation process is not as straightforward as the DBE issuing a policy and providing the necessary funding for the relevant policy. Instead, it is the provincial education departments that factor the new policy into their budgets and then request money to implement the policy from the national DBE (LSMSI 13, 21 July 2017). The funding required for the LDE was sent to the Limpopo Provincial Treasury. But instead of the money being sent interprovincially from the Provincial Treasury to the LDE, the money was diverted to a new financial mandate for the province which was the payment of traditional leaders. The Limpopo Provincial Treasury prioritised the payment of traditional leaders over educators, using money that was intended for the education OSD – allegedly. The participant explains that although this funding had been diverted, the OSD payment was already loaded onto the LDE's payroll system (PERSAL). PERSAL is automatically linked to the LDE's bank account. Resultantly, the initial OSD payment was added to educators' profiles on PERSAL, and paid automatically by the bank thereby incurring a debt because the LDE did not actually have this money in the bank, so the bank used an overdraft facility to pay for the amount (LSMSI 13, 21 July 2017).

This illustrates two things: firstly, that the adjusted budget for the LDE's OSD was approved and uploaded to PERSAL. Secondly, systems that are supposed to be efficient, such as linking PERSAL to a provincial department's bank account, proved to be detrimental in this case. Given this turn of events, was there any indication or accountability of the LDE's misdirected funding for the OSD? Yes. The same participant says team from the LDE visited the DBE in Pretoria in December 2011. During that meeting, where the participant was also present, the team alerted the DG of Basic Education that the funding for the OSD never reached the LDE, while the DG insisted that the funding did leave the national DBE (LSMSI 13, 21 July 2017).

The irony is that from the LDE and DBE's perspectives, the OSD was implemented, budgeted and paid for. The missing link in the system was the role of the Provincial Treasury and its misdirection of the appropriate funding. This illustrates that there is inefficiency and ineffectiveness in a decentralised system. And if this allegation is correct, it also brings the Limpopo Provincial Treasury into disrepute. There seems to have been an inconsistency on the Provincial Treasury's part which gravely impacted the LDE. This is unbecoming of a provincial treasury which carries a similar weight as the National Treasury, except in a subnational sphere. Another participant recalls how the OSD, as a cause of the S100 intervention, was also discussed publicly at the time by former Education MEC Masemola "said it several times to say, "No, no, no, no. The R1 billion was released from Pretoria, but that R1 billion never reached the province" (LSMSI 4, 04 July 2017). Therefore, the MEC of the province at the time indicated that the money meant for the OSD never reached the province. Importantly, this discrepancy was blamed on politicians in the province. Moreover, this explanation for the OSD being a cause of the financial woes of the LDE is corroborated in the LDE's Annual Reports, which clearly state that

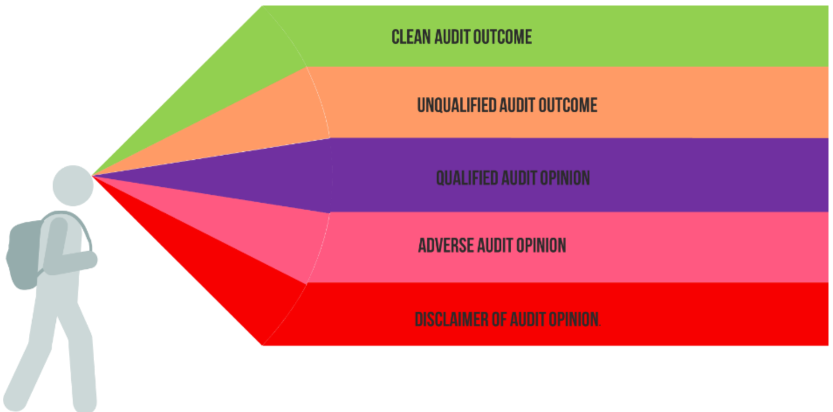
"The unauthorised expenditure was mainly in compensation of employees which was due to the carry through costs of the implementation of OSD for which there was no sufficient funding" (emphasis added; LDE Annual Report, 2010/2011: 68 – 69). Thus, at least in the two years prior the commencement of the intervention, the LDE acknowledged that the OSD over expenditure was financially plunging the department into a dark place. This over expenditure led to some planned activities in the LDE not taking place.

Table 6: Summary of LDE Performance (2002 - 2016)

Year/Data Overview	2003/04	2004/05	2006/07	2007/08	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
MEC & HOD	Mrs Joyce Mashamba & Prof. R.H. Nengwekhulu	Dr. P.A. Motsoaledi & Prof. R.H. Nengwekhulu	Dr. P.A. Motsoaledi & Rev. Z.C. Nevhutalu	Dr. P.A. Motsoaledi & Rev. Z.C. Nevhutalu	Mr. N.D. Masemola & Mr. L.B. Boshielo	Mr. N.D. Masemola & Mr. L.B. Boshielo	Mr. N.D. Masemola & Mr. M.J. Thamaga	Mme. D. Magadzi & Mr. M.J. Thamaga Administrator: Mr. M.C. Matthews		Hon. M.I. Ketjepe & Mr. K.M. Mashaba	Hon. M.I. Kgetjepe & Mme. N.B. Mutheiwana
No. of Learners	1 200 000	1 877 509	1 923 000	-	-	-	-			1 665 082	
Budget (ZAR)	8 732 036 000.00	9 689 857 000.00	11 398 658 000.00	11 948 413 000.00	17 300 000 000.00	19 552 834 000.00	21 068 160 000.00			20 963 654 000.00	25.264 705 000.00
Under/ Overspend (ZAR)	Under: 593 735 000.00	Under: 78 000 000.00	Under: 31 973	Under: 115 506 000.00	Over: 542 000 000.00	Over: 649 391 000.00	Over: 93 231 000.00			Under: 189 682.00	Over: 146 531.00
Districts	1.	6	5	5	5	5	2.			10	10
Circuits	3.	144	4.	5.	6.	7.	8.			134	134
Audit Outcome											

Notes: Omitted years of 2008/09, 2013/14, 2016/17 do not have Annual Reports available on the LDE's website. Some information unavailable in Annual Reports and is therefore incomplete information (-).

Key:



5.3.2 Underlying Causes – The Karodia Report

The Karodia Report reveals the underlying causes of the S100 (1) (b) intervention in the LDE. Dr. Anis Karodia was one of the three administrators appointed to lead the intervention in the LDE. Based on some of my interactions with NGOs and interviewees in the LDE, Karodia was a firm and effective administrator. However, some participants said Dr. Karodia was harsh. These mixed views correlate with the mixed view of participants on their reactions to the interventions: some welcomed the intervention, some did not. Following his secondment to the LDE in 2012, Karodia wrote a letter to then then HOD of the LDE and presented an update report to the NCOP. These documents proved valuable in the assessment of the leadership and institutional problems in the LDE at the time. As has been demonstrated in the preceding section, the causes outlined by the National Treasury and technical teams revolved around financial, administrative and technical problems. It is important to note and understand these problems and their details. Dr. Karodia's letter and report to the NCOP are extremely insightful. Both focus on the following areas of concern in the LDE's leadership and institution:

1. Senior management
2. Middle management
3. District offices and circuits
4. Cell phone and land line usage
5. Disciplinary cases
6. Former Model C schools
7. SADTU
8. BAS vs. PERSAL
9. Procurement thresholds
10. Security systems
11. Systems in general
12. Excessive training of senior levels of staff
13. Excessive travel
14. Bursaries
15. Lack of trace of invoices
16. Audit Committee and SCOPA Meetings
17. Reporting the Administrator to the National Department of Education and other political offices and the MEC
18. Monthly and quarterly reports
19. Annual performance plan
20. Visits to Model C schools
21. Structure of the department

22. Policies
23. Monitoring of leave
24. Infrastructure projects
25. Donor funding
26. Contracts
27. ICT
28. NSNP
29. Scholar transport
30. Norms and standards for School Funding
31. LTSM

Despite overlaps and mutual inclusivity, I group the above into five categories based on the nature of concern. These are leadership and management; accountability; financial management; internal operational issues; and service delivery. .

Both the letter to the HOD and the report to the NCOP revealed a grim picture about the LDE's senior management. The senior management was portrayed as unprofessional; lacking motivation and initiative and particularly hostile to the intervention. (Letter and Administrative Education Report, 12 March 2012). The report to the NCOP weighed in stating that "Public Administration and Management within the Department of Education has halted to a grind [ground to a halt] and is in the main dysfunctional with morass, decay and rot that has very deeply set in because of lack of supervision, oversight and leadership by senior managers" (Report to the NCOP, 26 March 2012: 15).

This state of the LDE can also be seen in some annual reports. For instance, as illustrated in Table 6, the Annual Report 2009/2010 stated that the accounting officer did not monitor management's compliance with laws and internally designed procedures (LDE, 2009/2010). In that same financial year, the LDE received a disclaimer for its audit opinion (LDE, 2009/2010: 59). According to the LDE's Annual Report 2010/2011, leadership in the department was described as having "not exercised oversight responsibility regarding financial reporting and compliance and related internal controls" (LDE, 2010/2011: 81). In that year, the LDE received a qualified audit opinion (LDE, 2010/2011: 76). Thus, the LDE leadership and management problems identified by Karodia and the AG were long-term, not temporary.

Dr Karodia also observed problems of nepotism in the entire management which he argued stifled professionalism and efficiency (Report to the NCOP, 26 arch 2012). This meant that the LDE was more inclined to pursuing interests of individuals in the management than that of learners in the province. The attitude of the LDE senior management worsened during the S100 intervention. Dr. Karodia's letter documents that the S100 (1) (b) intervention was slow and lacked management impetus and supervision of junior stuff was very unpleasing (Letter and Administrative Education Report, 12 March 2012). The resolution proposed by Dr Karodia was the replacement of management (Report to the NCOP, 26 March 2012)[16].

[16] These managers were:

Notwithstanding its shortcomings, SADTU is instrumental in keeping the DBE accountable. Accordingly, there are three main issues of accountability identified by Dr. Karodia in the letter and the report. Firstly, SADTU bemoaned the LDE's lack of cooperation with its agreements with SADTU a fact which highlighted the possibility that LDE was erring from its agreements with the union whose composition is mainly teachers(Letter and Administrative Education Report, 12 March 2012). Secondly, the union complained about lack of communication, a factor that pointed to management arrogance (Letter and Administrative Education Report, 12 March 2012). Thirdly, it seems that SADTU was relying on the intervention to address some of their demands and related concerns.

Accountability issues also surfaced regarding the LDE's failure to regularly report on its activities and progress. The LDE is supposed to do so through its Audit Committee, SCOPA Meetings in the Provincial Legislature, and monthly and quarterly reports. Dr. Karodia identified the absence of monthly and quarterly reports and as a result, he recommended that these reports be prepared to ensure detailed tracking of achievements and the identification of shortfalls in the system as this would ensure that appropriate remedial action is taken (Letter and Administrative Education Report, 12 March 2012). It is then clear that there was a high possibility of failure to fulfill objectives since there was no proper tracking of progress and accountability.

Regarding Audit and SCOPA meetings, it was identified that the LDE insufficiently prepared its responses to the provincial legislature. Audit and SCOPA meetings are important because they serve as a provincial mechanism through which representative provincial legislatures act as a check and balance over provincial departments and institutions. Such inter-provincial accountability is significant for this study because it shows that decentralised subnational governance is not only accountable to vertical structures, but to horizontal ones as well Apart from being accountable to National Treasury, the DBE and Parliament, the LDE is also accountable to both Limpopo's Provincial Treasury and Provincial Legislature.

Contrary to the narrative in previous chapters, I argue that the presence of subnational provincial legislatures is a progressive element in the South African governance system. These legislatures increase the autonomy and federal nature of provinces because regardless of their autonomy from the national legislature, they have similar functions of law making, deliberating, providing checks and balances on functions, and providing access and representation to a polity. Reporting to the inter-provincial structures like the Audit Committee and SCOPA needs careful consideration to ensure that the correct information is given and can be subjected to verification and scrutiny. In light of this, the lack of confidence in the LDE's preparation for these meetings is alarming. Moreover, the request that the CFO and HOD be more committed to these processes bring into question the usefulness of these two prior to the observations by Dr. Karodia.

---

1. The Head of the Department (HOD)
2. The Chief Financial Officer (CFO)
3. The Senior Manager Supply Chain Management (SCM)
4. Some Senior Managers in Charge of Finance and Budgets
5. Other Senior Managers (These are but a few examples)
6. Some District Managers and Circuit Managers (Report to the NCOP, 26 Marc 2012: 16).

A final issue connected to regular reporting is the "Reporting the Administrator to the national Department of Education and other political offices and the MEC" (Report to the NCOP, 26 March 2012: 31). According to the report, some staff in the LDE had reported Dr. Karodia to the DBE, political offices and the MEC. One of the reports was about the department's cell phones being turned off by the service provider due to non-payment by the LDE; and the other report was about the department's Project Management Unit (PMU) being closed (Report to the NCOP, 26 March 2012).

There are a number of issues identified in the letter report under LDE's financial (mis) management. These include simple issues like keeping invoices of the LDE's spending. The report observed the untraceability and convenient absence of invoices from service providers and reports from forensic auditors. A stern warning was given regarding this unscrupulous practice (Letter and Administrative Education Report, 12 March 2012). Besides the alleged convenient loss of invoices, the bursary bill of the LDE was deemed "too high", and in order to curb this, the system "must be reviewed" (Letter and Administrative Education Report, 12 March 2012: 11). Lack of financial internal controls and oversight by senior management was also identified in the LDE's annual report prior to Dr. Karodia's letter and report, meaning that the collapse of internal financial controls was neither sudden nor unpredictable. The collapse of the LDE long started before the S100 (1) (b) intervention, and this might dispel the narrative that the LDE was butchered on the altar of politics. Yet, the fact that the LDE's annual reports indicated collapse long before the intervention still gives legs to the political conspiracy – why did the DBE and the presidency conveniently noted the collapse at this time? . The annual reports also substantiate Dr. Karodia's observations about the lack of financial controls in the LDE. Dr. Karodia's report outlines at least fourteen items of concern under internal financial controls, four of which stand out: a lack of understanding of costs, commitments and obligations that are in keeping with laws; a financial collapse predicated on lack of clear delegation on who has access to certain financial tools and records which makes it difficult to trace accountability; improper recording of revenue and expenditure for accountability purposes; and lack of proper training of the Bid Adjudication Committee (BAC) to handle large tenders and procurement tasks (Report to the NCOP, 26 March 2012: 28). It is thus recommended that tenders above R1 million be handled by the national treasury electronically and that duties and responsibilities be clearly separated.

Thus, there were no clear budgeting protocols in the LDE that aligned to its objectives or conformed to the basic principles of budgeting and this stifled accountability. Lack of budgeting reflects poor planning. Dr Karodia emphasized, and correctly so, that the LDE lacked an understanding of; planning, adequate tracking and implementation of macroeconomic frameworks, project planning techniques, budgetary skills, qualified personnel, and information systems and financial management (Letter and Administrative Education Report, 12 March 2012).

The inabilities of the LDE show how planning and budgeting are intertwined. There are two main ways in which Dr. Karodia suggests that these inabilities be overcome. The first is the understanding of "allocative inefficiency" for the "distribution of public resources, in order to achieve the highest possible level of social welfare in education" (Letter and Administrative Education Report, 12 March 2012: 7). This means that the resources in the LDE can be used most productively to enhance education. The second way is better communication (Letter and Administrative Education Report, 12 March 2012).

Besides the forgoing areas of concern, there were some general operational issues in the LDE. These were around the (mis) use of resources; general payment, payroll and security systems; training; travel; the structure of the department; and policies. Resource wise, Dr. Karodia identified that cellphone and landline usage was too high in the department thus wasting the resources. This misuse occurred despite capped limits regulations regarding cellphone air time (Letter and Administrative Education Report, 12 March 2012). Furthermore, the LDE was paying “R1 million per month” for the department’s cellphone usage and the same amount for its landline usage” (Letter and Administrative Education Report, 12 March 2012: 3 – 4; Report to the NCOP, 26 March 2012: 20). As the Administrator, Dr. Karodia had to cut off the lines and reinstate them using the guidelines of the time that included ‘soft lock’ should limits be exceeded (Report to the NCOP, 26 March 2012). As cost recovery and regulation, the staff had to make up for the misuse through deductions of salaries (Report to the NCOP, 26 March 2012).

The payment and payroll systems are in LDE are BAS and PERSAL. As described earlier, BAS is for the capturing of payments for goods and services; whereas PERSAL is a payroll system. The issue that Dr. Karodia picked up around these two systems is that, “allowances of staff are also captured on BAS rather than PERSAL” (Letter and Administrative Education Report, 12 March 2012: 4). The danger of overlapping or loading staff allowances into PERSAL is that staff receive allowances that are not accounted for as personnel costs or they can receive fraudulent or duplicated payments that should otherwise not be paid. The letter interpreted this as lack of oversight and management misunderstanding of public service financial systems and their implications on tax (Letter and Administrative Education Report, 12 March 2012).

The security systems at the LDE were also problematic in two ways. Firstly, the poor security of the LDE premises posed a risk to the staff and premises. The report and letter highlighted how poor failure to monitor incoming and outgoing traffic on the premises posed a risk of monetary loss. (Letter and Administrative Education Report, 12 March 2012: 5; Report to the NCOP, 26 March 2012). Secondly, amount of security personnel financially unsustainable and unjustifiable and there was need to trim personnel and evaluate security systems and providers so that efficiency and monetary budget do not balloon (Letter and Administrative Education Report, 12 March 2012; Report to the NCOP, 26 March 2012). This appoints to financial leakages as far as security tenders were concerned. But it’s ironic that for all the security at the LDE, the premises were not properly secured. Thus, Dr Karodia recommended a re-writing of some LDE policies to contain costs by giving less priority on supply chain which was given convenient attention by the management(Report to the NCOP, 26 March 2012: 32).

The final concern raised by Dr. Karodia is service delivery. This had to do with the actual mandate of the LDE of education provision in Limpopo i.e. how learners receive and experience education. Service delivery is thus the culmination of the work done by the national DBE and the LDE. The points of service delivery are the National School Nutrition Programme (NSNP), Scholar Transport, Norms and Standard and Learner and Teacher Support Materials (LTSM). As Dr. Karodia points out, these programs are crucial because they constitute the heart of government’s provision of education to learners nationwide (Report to the NCOP, 26 March 2012). The quality of these programs demonstrates the LDE’s position with regards to the national education standards. National education standards differ between provinces but all provincial departments should provide equal, accessible and high-quality education for all learners in South Africa. According to Dr Karodia, the problems identified in these programs in the LDE predated Section 100 (1) (b) intervention (Report to the NCOP, 26 March 2012) and this dispels the narrative that the intervention undermined the LDE’s programs and efforts.

5.4 During Intervention: Unfolding of S100 (1) (b)

"haphazard, chaotic and disruptive" (LSMSI 11, 20 July 2017)

This quote describes how the intervention unfolded in the LDE. This section details how the intervention was chaotic owing to the politics around it i.e. the national government's unpreparedness and misinformation and resistance on the part of the LDE. Eight thematic categories came out of the interviews that I conducted:

- Information dissemination about the processes and procedures of S100 in the LDE
- S100 as takeover vs supervision
- Reaction to the intervention
- Legislative gap
- Differences between the administrators
- Relationship between the LDE and the DBE
- Success/outcome of the intervention
- Transition to a S18 intervention under the PFMA

Each of these themes reveals the constitutional crisis of decentralisation. There is a legislative gap in the S100 (1) (b) intervention as a mechanism which reflects lack of clarity around South Africa's decentralisation as a mode of governance. The themes, whilst different, they are mutually inclusive and as a result, I arrange them in a way that will cumulatively highlight the overarching theme i.e. legislative gap.

The second theme is the reaction of LDE staff to the intervention and will cover some of the broader and immediate reactions to the initiation of the S100 intervention, as well as the reaction to the initiation of S100 administrators and teams in the LDE. The third theme, S100 as takeover vs. supervision, deals with perceptions in the LDE about whether or not the S100 intervention mechanism is as severe as a takeover; or, if it is supervision from afar. The Constitution is clear about this. But this is not the perception within some quarters of the LDE. This poses a direct threat to decentralisation because individual and institutions act according to their perception of the system – as the discussion will elaborate. The fourth theme is the legislative gap, which refers to the fact that S100 interventions are based on a clause in the Constitution. There is very little supporting legislation or frameworks to guide S100 interventions. As a result, there was a lack of clarity around some of the processes in the LDE's intervention. The fifth theme, differenced between the administrators, focuses on the characters and impact of the nationally appointed administrators. The sixth theme deals with the relationship between the relationship between the LDE and the DBE prior, during and following the S100 intervention. The seventh theme will discuss the perceptions about whether the intervention was successful, as well as some supplementary evidence from official documents that discusses whether the intervention was successful. The eighth and final theme will address the plot twist in the LDE's S100 intervention. That is, the fact that the LDE was placed under a second interprovincial intervention, under S18 of the PFMA, following the Constitutional S100 intervention. These themes will now be analysed and navigated in turns.

5.4.1 Information Dissemination

This pertains to whether staff in the LDE were informed about *why*, *what* and *how* things would proceed under the intervention. There was an underlying assumption that the national government would inform provincial departments about the reasons for the intervention and how it would be carried out. Under normal circumstances, there should be unfettered flow of information between the two spheres of government especially when a legislative tool like the intervention is considered. The LDE staff needed information about their part in the intervention, the changes that will be taking place, the end goal, among other things. Lack of communication or miscommunication is unproductive in contexts marred with political discord

It came out in the interviews that prior to the commencement of the intervention, there were deliberations between the national and provincial government and this showed that LDE staff were somewhat knowledgeable about the intervention. An interviewee stated that around December of 2015, the Minister of the DBE visited the LDE before the implementation of the intervention (LSMSI 6, 17 July 2017). Other interviewees recalled visits by former finance minister Pravin Gordhan and other executive personnel prior the implementation of the intervention and this shows that the national and provincial governments were in communication regarding the intervention (LSMSI 13, 21 July 2017).

In addition to the above, one interviewee recalled meetings in the LDE, particularly with senior management, where they were informed about the intervention. The meetings contained warnings about stringent processes that would be followed during the intervention (LSMSI 6, 17 July 2017; LSMSI 9, 17 July 2017). Yet, despite these meetings, there was no Memorandum of Understanding (MoU) to testify to the occurrences of these meetings (LSMSI 12, 21 July 2017). MoUs are important because they serve as official and detailed summaries about action or agreements taken between parties. In this case, a MoU would have served as evidence of cooperation between the two spheres of government. Without the MoU, either party could claim ignorance to any cooperation taking place.

It is possible that the MOU exists and was signed, but was kept hidden by the national government. Another possibility is that LDE staff and researchers are not privy to such information. It is also possible that following the discussions with senior management, that management did not inform the rest of the LDE about S100 and may not have seen or had access to the MOU and the diagnostic report. The possibility was raised in Dr. Karodia's report to the NCOP:

> "*The current state of play within the department is not communicated to staff and all stakeholders* [by senior managers] *and senior staff are in denial that anything is wrong*" (emphasis added, Report to the NCOP, 26 March 2012: 16).

Thus, the MOU and diagnostic report not being circulated is not the only issue. The other issue is the lack of communication in the LDE itself. And between the MOU and the diagnostic report, it seems that the nature of the document was not the issue for some participants. What mattered most was whether there was official documentation about how national government foresaw the intervention proceeding (LSMSI, 17 July 2017). According to one interviewee, there was no MOU, and *no plan to create an MOU* between the national Departments of Treasury and Basic Education. Instead, the MOU was something that was thought of after the fact of the intervention being initiated and begun. This means that the intervention was in action within the department, and because there was no prior experience and no legislation or framework to guide the intervention, the teams that were sent from national departments were relying on their own professional or technical understanding of how the intervention should be carried out (LSMSI 4, 04 July 2017). Thus, the lack of information within the department was compounded by the lack of guidance – both of which speak to the sixth theme, which is the legislative gap.

5.4.2 Legislative Gap

S 100 is a mere clause in the constitution that is not nuanced regarding how the intervention should be carried out. It is not clear whether a MoU should be accessible to provincial staff or outlined in a protocol – such lack of clarity signifies a legislative gap. There are assumptions by technocrats i.e. National Treasury and DBE about how such a process should unfold. The fact that there is a clause in the Constitution without subsequent frameworks and legislation means that there is a legislative gap. This gap signifies missing information and leads to bad practice during interventions because, "without that guide we could best describe it [the S100 intervention] as being *haphazard, chaotic and disruptive*." (LSMSI 11, 20 July 2017).

The first aspect of the legislative gap is clearly the lack of legislation and frameworks around S100 (LSMSI 11, 20 July 2017). An interviewee stated:

> "There was no legal framework to guide both the master and the servant, both the national and the province. There was no legal framework. You see, usually things are not, in terms of the rule of law, things are not run directly from the Constitution. There has to be a legislative instrument that will implement that section of the Constitution…But with Section 100, there is no act, which means that national was actually making its own rules. It was not policed by the act…they were making their own rules, that was the problem." (LSMSI 4, 04 July 2017).

Consequently, there is confusion about who, between the incumbent HOD and the intervention Administrator, is supposed to make executive decisions during an intervention. This resulted in a real-time conflict between the HOD in the LDE and the Administrators of the intervention (LSMSI 11, 20 July 2017). A second result of the legislative gap is that the national DBE had to find existing legislation to justify the existence of an Administrator acting as an accounting officer in the LDE. The legislation that the DBE used was Section 36 of the PFMA (LSMSI 4, 04 July 2017), which was referred to earlier in this thesis.

This raises two major issues. First, one cannot sustainably use a loophole in one legislative act to cover a legislative gap in another area of the law. What should take place is that the legislative gap should be filled by clarifying how laws cover each other in such instances, and this should be codified in frameworks for all to see or contested in courts for judicial decision. Alternatively, a whole new law or policy can be written to address this legislative gap. And as I discovered, there is such pending legislation, which will be discussed later in this chapter. For now, the administrator's ability to take the accounting officer power is scantily covered by the PFMA. A question arises – what happens to the HOD who has now been made redundant? In the case of the LDE, the HOD was removed and a series of acting HODs replaced them (LSMSI 9, 17 July 2017).

The third result of the legislative gap is that the intervention administrators refused to be accountable to the LDE and the provincial legislature for their decisions during the intervention. Instead, according to an interviewee, the administrators felt they were accountable to the national government since they were appointed at that level. It was not practical for a provincial accounting officer to account for money coming directly from the national treasury (LSMSI 11, 20 July 2017). The administrators clearly stated that:

> "They were saying they are not accountable to the province, but to the national." (LSMSI 7, 17 July 2017).

And this created a gulf between the national government and the LDE.

5.4.3 S100 as Takeover vs. Supervision

S100 (1) (a) of the Constitution refers to the national government assisting provinces that are failing to fulfill their executive obligations. S100 (1) (b) refers to the national government taking over the functions of a province or provincial department to fulfill executive obligations. And as has been shown previously, staff at the national level understand that S100 (1) (b) means national government taking power from a province or provincial department until there is improvement and evidence that the province or provincial department can work on its own. However, this is not the perception that staff in the LDE were working with. Their understanding was that national government, through its administrators, would take over single functions or areas that were identified as in need for intervention, and not the whole department (LSMSI 9, 17 July 2017; LSMSI 7, 17 July 2017).

It did not make sense to have single functions under intervention and not others because the LDE as a whole was under such public administration crisis that services in education at school and district level were not being delivered. Moreover, if finance is the lifeblood of the LDE and there is no cash flow, no part of the department can actually function. And herein lies the reason why the legislative gap needs to be filled to ensure that there is a material and proper understanding of the different types of intervention and how they take place procedurally; and subsequently, the difference between supervision and takeover. In the specific case of the LDE, interviewees expressed that the intervention seemed to be "forced onto people" (LSMSI 8, 17 July 2017) in the LDE, which brought into question the motives of the whole intervention. And this led to a feeling in the department that the LDE staff and the intervention team "were working as if we were two departments. Them there and us there. They were not being too useful to us in that they were, we felt we were not being, every time they would talk about 'them' and 'us'; as if we the challenge and they were the solution." (LSMSI 9, 17 July 2017). This signals that there was a hostile and antagonistic working relationship between the administrators and national teams, and the LDE.

5.4.4 LDE Reaction to the Intervention

Two major reactions characterized the intervention; shock and resistance. Shock was as a result of the political motive of the intervention. Others who had experienced intervention in the past (2009 and 2010) were also shocked because the current intervention followed the preceding one too quickly especially considering that they thought the province was now able to perform administrative duties following the previous interventions (LSMSI 6, 17 July 2017). Resistance was also premised upon the politics surrounding the intervention hence sabotage was inevitable:

> "Whereas before they were actually resistance, let me put it plainly: they were not accepting Section 100 when it was announced. And in fact, they were determined to frustrate Section 100. So, now I think it's a change of management. Now the management that is there now, is very serious about anything that has to do with national; national Department of Education." (LSMSI 6, 17 July 2017).

Middle management also resisted because they believed that the causes of the intervention lay with senior management within the department (LSMSI 6, 17 July 2017). However, the levels of resistance which eventually led to sabotaging the work of Administrators reveal resistance to decentralisation in general. It is also ironic that a department that is so well versed in the Constitution and legislation undermined and resisted S100 (1) (b) as a mechanism of decentralisation contained in the same Constitution.

5.4.5 Differences between the Administrators

During the intervention there were three main administrators in the LDE sent to the department by national government. The first administrator did not stay for long because he was unhappy with the DBE directive that he excludes the LDE in his work (LSMSI 13, 21 July 2017). The first Administrator also "indicated that there is no scoping work being done to say that, these are the areas of interventions and then these are the findings." (LSMSI 12, 21 July 2017). Therefore he was dissatisfied with the early implementation of S100 (1) (b). The next two Administrators had the most impact in the intervention. One of those Administrators was Dr. Karodia and the other was Mr. Greenback (anonymized). I will look into each administrator's tenure in detail because they were a link between the two spheres of government and their work had a bearing on the success or failure of the intervention.

5.4.5.1 Dr. Karodia

Dr Karodia worked for six months as administrator and his report was lauded as key in improving the LDE if implemented. He was likened to Professor Nengwekhulu based on honesty and lack of fear for political figureheads like MECs (LSMSI 4, 04 July 2017). He however did not last for long as it is alleged that the national government was not happy with his closing in on corrupt figures in the LDE – dodgy procurement practices in the LDE that were linked to central government politicians were going to suffer under his administrative tenure (LSMSI 11, 20 July 2017). I also discovered that his uncovering of the text book crisis in the LDE led to his unceremonious removal. It was stated by an interviewee that he also had sour relations with LDE staff because he was strict and demanded thorough service delivery (LSMSI 11, 20 July 2017). He was an efficient public servant whose efficiency was loathed by many. Another interviewee said of Dr. Karodia's tenure, "A lot of things happened during this time here. The atmosphere was just not right." (LSMSI 8, 17 July 2017). The interviewee goes on to elaborate that:

> "He came with a preconceived idea and instead of him taking the same stance that [the first administrator] took, to say, 'I want to work with these people', he decided he's not going to work with us. And worse, what he then did was to ignore the top executive of the department. Then he goes and works with people who are, he said in his books, these are the people who are doing the work. Therefore, he's not going to talk to us, he's going to talk to these people…And the main thing was that he was convinced we were all crooks, we didn't know what we were there to do." (LSMSI 8, 17 July 2017).

This implies that under Dr. Karodia's administrative leadership there was a rift in the LDE between himself and some of the staff. This correlates with Dr Karodia's that I stated earlier – he liked the cooperation of some middle management staff but hated the haughtiness of some high ranking management such that he recommended that they vacate their positions. Thus, regardless of the veracity of allegations on Dr Karodia's character, it is clear administrative work of administrators appointed by the national government is not easily received in the provincial government sphere. An S100 intervention is already a loathed measure in an administration, and an addition of an 'abrasive' (in the eyes of the LDE) administrator exacerbates the situation. More so, the administrator is said to have been more in communication with the central government than he was with the LDE management (LSMSI 8, 17 July 2017). It is thus clear that a centrally appointed administrator is in dire straits; he has to forge a working relationship with those allegedly responsible for creating a crisis that he/she seeks to mend.

5.4.5.2 Mr. Greenback

Mr. Greenback succeeded Dr. Karodia and lasted for two years until the S100 intervention ended. This administrator is reported to have been corrupt since he was implicated in a dodgy NSNP tender in LDE. It is ironic that he deepened a crisis that he was supposed to remedy – the crisis of financial mismanagement.

One interviewee details irregularities under Mr. Greenback's administrative tenure. The interviewee stated that Mr. Greenback exploited the legislative gap and LDE to unduly benefit from procurement processes like the NSNP. During his tenure, the NSNP lasted for two years but was renewed for three years. Renewal of the tender for the time highlighted the administrator's corruption. The Supply Chain Management (SCM) decided to put the NSNP to tender, but the administrator disdained it. The bid was taken to the provincial treasury for signature, the administrator signed it but he did not advertise the tender citing a meeting where the NSNP would be further discussed (LSMSI 4, 04 July 2017). That meeting was attended by the Administrator, the then acting HOD of the LDE, a DDG, Chief Directors and other SCM staff. In that meeting,

> "The Administrator was *straight*, he simply said, "We cannot extend the contract of the service providers by one month because the politicians are saying, 'you are funding the EFF, you are funding the EFF', so we must terminate the contracts! So, we have to find a way, a way of how to proceed with feeding while we are thinking of advertising the big tender." (LSMSI 4, 04 July 2017).

In order to contain this political threat, vis-à-vis the political conspiracy, the decision taken in the meeting was that schools would be allowed to "appoint their own service providers" (LSMSI 4, 04 July 2017), until the big tender was finalized. Following this process, another meeting was called in which Mr. Greenback suggested that the NSNP tender be 'shared' by service providers from the national sphere, some of whom were also in the meeting. Mr. Greenback said,

> "I'm asking you as service providers to come together and share the districts. We come together and share the districts" (LSMSI 4, 04 July 2017),

Meaning that a selected group of NSNP providers would share the school districts of the LDE; providers who had not undergone the tender procurement process or would be favoured if that process were to go ahead. There was disagreement about this suggestion because the Administrator was effectively handpicking NSNP service providers and would reward the LDE's collaborators with promotion to the DBE (LSMSI 4, 04 July 2017). Mr. Greenback stated,

> "after we've shared the districts we will appoint you to head office" (LSMSI 4, 04 July 2017).

The disagreement resulted in staff writing a letter to the Chief Director of SCM stating that,

> "you're violating the Competition's Act, you're actually saying, helping the service providers, the suppliers, to collude amongst themselves on the issue of prices because there's no competition. Secondly, you are actually procuring without following supply chain procurement processes. Auditor is going to pick it up and the lawyers are going to breathe down our neck." (LSMSI 4, 04 July 2017).

It is clear that Mr. Greenback colluded with service providers and individuals about the NSNP tender and imposed service providers on the LDE. There were also allegations that he was colluding with national representatives in this graft. Thus, the administrator was further deepening a crisis that his appointment was supposed to correct. His collusion with national representatives and his disregard of the LDE management put a dent on the decentralization process because the LDE autonomy was rapped. Trust between the two spheres of government was negatively affected. There is therefore a need to address this legislative gap by clarifying legislation that allows monitoring of centrally appointed administrators, and if these laws exist, there should be emphasis on their use on wayward persons like Mr. Greenback.

Another interviewee noted that Mr. Greenback's went against the law by not listening to finance and SCM people on the matter (LSMSI 11, 20 July 2017). Moreover, Mr. Greenback tried to use the National Treasury regulations to justify their decisions; but there was disagreement here too because a deviation from National Treasury regulations must be legally justifiable (LSMSI 11, 20 July 2017). Even though the administrator knew the procurement laws, he broke them willingly.

Mr. Greenback tried to remove some members of staff from their position in the LDE and when he finally got the opportunity to, following the change in the MEC in the province, he did so and implemented his illegal procurement plans:

> "Immediately, within a week [of the MEC being changed], I was chased out of Supply Chain Management without even having a letter, and said, "Don't report here again, go to Budget."…So, I moved to Budget, and then immediately thereafter, there were NSNP tenders that were just dished out without following procurement processes. Remember, he relied on the provision in the Treasury regulation, which was meant for a good purpose, not for what he was doing, because I differed with him as far as that was concerned. That's why I was chased away together with my director, who was also acting, and that person had a legal background." (LSMSI 11, 20 July 2017)

Thus, politics defined the implementation of the intervention in Limpopo. There is need for legislative clarity on the boundaries and nature of power of a nationally appointed administrator.

5.4.6 Relationship between the LDE and DBE

One might expect that the relationship between the LDE and DBE would be fractured following the intervention. However, some in the LDE believed that, notwithstanding the final administrator's behavior, the LDE and the DBE have a cordial relationship. An interviewee stated that "the relationship with the national level, it's fine because we know that they are supposed to be supporting us on a number of issues." (LSMSI 9, 17 July 2017). There was an understanding that constitutionally, the DBE should exercise oversight and monitor the performance in the lower spheres of government however uncomfortable the nuances of that supervision might be. Thus, after the intervention, the LDE and DBE had a good working relationship. What happened prior to and during the intervention should not be used as a permanent yardstick of the relationship between the LDE and the DBE. The period prior to the intervention was peculiar. Prior to the intervention, MECs had created an autonomous space for themselves and this autonomy included undermining DBE authority. An interviewee stated that MECs distanced themselves from national, were those MECs who do not want to be accountable to the national, especially on the issues of finance and performance. Basically, the reasons why there would be distance from time to time, or closeness from time to time, is as a result of accountability; and accountability on financial management and performance; and corruption issues come in as well." (LSMSI 1, 03 July 2017). MECs are thus integral in the relationship between the national and provincial spheres of governance since their actions can weaken or strengthen the relationship.

5.4.7 Success of the Intervention

There were mixed reactions from the LDE staff regarding the success of the intervention. The perceptions of the staff that were there during the intervention is very important because they experienced the effects of the intervention. As per the S100 clause in the constitution, success is when whatever led to the public administration crisis has been sufficiently dealt with so that the department is functional again to be handed back its power by the national government. In light of this understanding of success, some perceived the intervention as a success because it led to the LDE being handed back its powers as a result of a strengthened relationship between the LDE, Provincial Treasury, National treasury and provincial government (LSMSI 6, 17 July 2017). According to one interviewee, the work of the LDE became more aligned with the goals of the provincial government (LSMSI 6, 17 July 2017).

However, most staff members were of a contrary view. First reason given was the absence of a 'close-out ' report – a final documented analysis (about whether and how the department in question improved under the S100 intervention) compiled by the executive authority that is tasked with overseeing and implementing the intervention, and is presented to the department under intervention and Parliament. I tried to access the report from the relevant authorities for almost a year without success. Apart from the report, others stated that there was no skill transfer. An interviewee stated that skill transfer guarantees the sustainability of the goals of the intervention (LSMSI 6, 17 July 2017).

Failure was also attributed to failure to contain corruption. An interviewee stated:

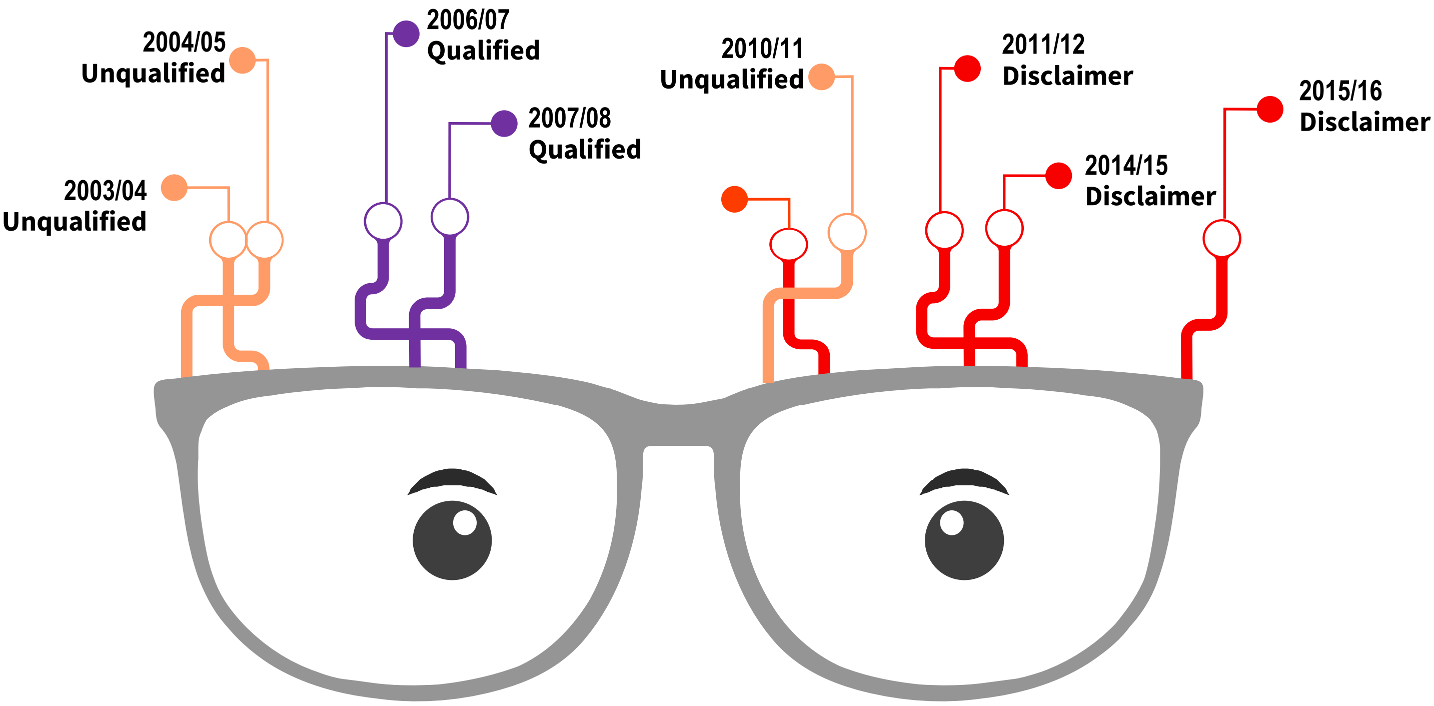
> "Nothing improved…Well, looting continues and the looters are not cleverer, because they have seen that there can be an intervention, you see? And my suspicion, which is not a wild one, is that the looters are now connected to the political masters up in Pretoria or Cape Town" (LSMSI 1, 03 July 2017).

This view was cemented by participants who stated that the LDE had bad audits during and after the intervention and they attributed this to lack of close monitoring of the LDE by the DBE because the latter had huge trust for the team it had sent. Thus, the question of whether the intervention was successful or not has different answers. But of those different answers, it is apparent that many I the LDE saw it as a failure because it failed to stem the fundamental issues that led to its invocation.

5.4.8 Transition to the PFMA S18 Intervention

Following the S100 intervention, the LDE was placed under PFMA S18 intervention (a provincial/inter-provincial intervention implemented by the provincial treasury). The PFMA S18 was in effect during my fieldwork in the LDE and had begun in 2015. Despite the Limpopo provincial treasury's denial of possession of the paperwork on the S18 intervention, it was very clear from the LDE staff that the S100 intervention had given way to the PFMA S18. According to an interviewee, an end to the S100 intervention was only possible upon the institution of S18 because the LDE 'was not yet out of the woods' to warrant a complete release from administration (LSMSI 6, 17 July 2017). Of all the departments in Limpopo that were under S100, the LDE was the only one that had not sufficiently improved to be handed back autonomous administrative powers (LSMSI 9, 17 July 2017). Another interviewee also stated that the Minister had allowed S18 intervention because, as evidenced by audit reports during the S100 intervention, S100 was a failure (LSMSI 8, 17 July 2017). As illustrated bellow, the LDE fared badly during the S100 intervention period.

Figure 11: 13 Year Audit Outcome Overview for LDE



In line with S18, there were people deployed into the LDE from the provincial treasury. From the interviews, it became clear that the S18 intervention was not well received. One interviewee stated:

> "That's another big problem that we have; and again, the people who came here with Section 18 are being appointed here. I don't know if we still have Section 18. [name redacted] came here as Section 18, [they're] now Head of Department. [name redacted] came here, Section 18, [they're] now acting director, Director of Supply Chain Management. This fellow, [name redacted], the CFO, came here as Section 18; [they're] now in charge of Finance…[name redacted] is officially the acting CFO, and [they're] acting precisely because [they] can't be absorbed into the post without advertisement because the post of CFO is at the level of DDG; whereas where [they] comes from it's at the level of Chief Director. So [they're] acting. Now can you call a person who's acting an interventionist, can you say [they're] intervening?" (LSMSI 4, 04 July 2017).

According to this interviewee, the most prominent positions in the LDE were being filled by staff from the Limpopo Provincial Treasury, and the issue with this is that their roles as Administrators who were supposed to be assisting the department were being overtaken by their personal ambition to become incumbents in these prominent positions. On the other hand, one of the members of the S18 team believed that their absorption in the LDE would create sustainable changes in the department, and bring stability to the department (LSMSI 10, 19 July 2017). Thus, there were different views on the issue of integrating the provincial team into the LDE. To the LDE staff, such integration was an encroachment, and to the S18 team from the provincial treasury, the integration was a move towards sustainability and stability in the department.

5.5 Preliminary Analysis of LDE Case Study Findings

The case study is rich in the understanding of how and why a provincial department collapses and the political explanations that follow. The collapse of the LDE was marked by national political dynamics and incompetency of the LDE staff. A clearer reading of the collapse of the provincial government and the five departments including the LDE is only possible through understanding that national and local factors were at play. The actions of the LDE staff and politicking in the ANC saw the collapse of the LDE; a collapse that justified the S100 intervention. Yet, despite the combination of these factors, politics seemed to have played a greater role in the justification of S100 intervention: the timing of the intervention was more suspicious and events that unfolded even during the intervention points more to political factors than anything else. The implementation of the S100 (1) (b) intervention itself was marked with irregularities. There was a legislative gap on how the intervention is described in the constitution and how it is practically implemented. There was a lack of formal documents and communication on the implementation of the intervention in the LDE which led to friction between the national and provincial spheres of government. Lack of clear pathways made the intervention open to manipulation and the ills that the intervention was supposed to mend were exacerbated, a phenomenon which led to the institution of the S18 intervention. The S18 intervention itself was no better – in addition to intervention fatigue, the absorption of the S18 members into the LDE was not taken lightly by the LDE staff. Yet, despite these occurrences in the LDE, the LDE staff's understanding of decentralization was not dislocated. The LDE staff was still of the idea that the DBE should maintain its oversight work notwithstanding irregularities in the practical implementation of those oversight duties. Thus, contrary to my initial assumption that an intervention throws into question the integrity of decentralization among those experiencing the intervention, the tenets of decentralization are still held in high regards among the LDE staff.

It also came out that the current decentralization has problems. Dr. Karodia questions the practicality of having one HOD in a vast province like Limpopo. This suggests a more decentralized system that ensures efficient management through smaller geographical catchments. In addition, unlike district managers, head officials have access to a budget and finance of the head office which allows speedy resolve and action. However, a more decentralised education system is also prone to more corruption and possibly more inequality as different education regions within a province are subject to the efficiency of their respective heads. The current form of decentralisation is also difficult to implement because national departments such as the DBE formulate policy and expect provincial departments to implement it no matter the cost. In the LDE's case, this led to over expenditure of LDE's finances which contributed to its financial collapse. But this is no how decentralisation should work because it relies on the *specific* needs of different areas being met efficiently and cost effectively. Therefore, a superimposed policy without the means to implement it – however noble the policy – is more similar to a centralised mode of governance. Where the South African state gets a concession for this national-formulation/provincial-implementation model, is at the point where it formed a unitary state in which access and equality had to be universal within the state. The main way to guarantee that universality is by creating uniform policies for at the national level, to be implemented sub nationally. This structure could change in future.

6 Chapter Six – Findings in the Section 100 (1) (b) Intervention in the Eastern Cape Department of Education (ECDE)

This chapter argues that the constitutional crisis around South Africa's decentralisation is compounded by structural institutional crisis in provincial departments. These departments have experienced waves of colonial, apartheid and democratic decentralisation which have produced layers of lack of capacity, internal factionalism and chronic mismanagement. In this context, the structural institutional weaknesses in provincial departments are exacerbated by the constitutional crisis.

6.1 Background to the Eastern Cape Department of Education

During my field work in the Eastern Cape, I spoke to a former HOD of the ECDE, who has also worked extensively in South Africa's education system, Mr. Godden. His work ranges from being a teacher in the department in 1984, to heading the ECDE in 1998. Godden was also involved in integral work during the transition to democracy, whereby researchers such as himself would find out the details of the education system at the time, as the result of an agreement between the Government of National Unity (GNU) and the World Bank. Godden and his fellow researchers travelled to 19 education departments at the time, in the homelands and the then provinces. He described the ECDE as a department in "structural crisis" (Godden Interview, 2016). He noted that the nature of the crisis changes over time, but remains unresolved. The underlying causes of the crisis are the costs associated with running the ECDE; migration patterns within the province and between provinces; and the weaknesses in management in the department. These causes are all interrelated. In terms of the costs of running the ECDE, Godden says that the general funding of education in South Africa does not consider the disparities in factors that are used to calculate the cost of education in the 9 provinces. Eastern Cape, KZN and Limpopo have 65% of South Africa's basic education learners, yet these provinces do not receive enough funding to cater for all these learners because of the geographical and structural backgrounds of these provinces. Godden's estimate is in line with the DBE's Education Statistics for 2014[17] which states that the highest numbers of learners are in KZN, Gauteng, Eastern Cape and Limpopo (Education Statistics in South Africa, 2016: 3). Three of these provinces, excluding Gauteng, are mostly rural and the cost of providing education in mostly rural provinces is high.

[17] These are the most recent statistics from the DBE that I could find..

Table 7: Number of learners, educators and schools in public ordinary schools, 2014

Province	Learners	Educators	Schools
Eastern Cape	1 889 307	61 260	5 554
Free State	656 408	23 631	1 306
Gauteng	1 944 486	60 782	2 070
KwaZulu-Natal	2 831 311	90 497	5 915
Limpopo	1 665 516	54 704	3 929
Mpumalanga	1 034 151	33 613	1 762
Northern Cape	284 908	8 880	551
North West	784 184	25 004	1 515
Western Cape	1 026 744	32 237	1 458
South Africa	12 117 015	390 608	24 060

Source: DBE, Education Statistics in South Africa, 2014.

This is because in rural provinces there are smaller and more geographically dispersed schools which are costlier to run. The DBE says: "The mainly rural provinces tend to have proportionally more schools with fewer learners than the more urbanised provinces, which tend to have proportionally fewer schools with more learners, an indication of higher population density" (Education Statistics in South Africa, 2016: 4). Schools in urban areas are comparatively less costly because many learners are concentrated in a small space. However, Godden noted that the national funding formula does not take this into account or the other large cost in education: teachers. Teachers cost 90% of the education budget in the provinces. Godden also states that the difference between top and bottom funding and performance in education is widening, and will continue to widen exponentially (Godden Interview, 2016). Provinces rely on national funding for education, and although they can raise their own revenue, this ability is structurally determined. This means that provinces raising their own revenue depend on the level of employment and economic activity to contribute to this ability raise revenue i.e. poorer provinces, such as the Eastern Cape with high unemployment will struggle to raise their own revenue to supplement their education funding.

Migration patterns between this province and others structurally contribute to the crisis in the Eastern Cape. According to Godden, learner's families in poor and rural areas in the Eastern Cape, KZN and Limpopo are migrating to the urban provinces of the Western Cape and Gauteng (Godden Interview, 2016). This migration pattern in the Eastern Cape affects the ECDE's costs in that when learners leave the Eastern Cape education system, the funding for those learners also leaves the province when the ECDE budget is calculated according to funding required for the number of learners in the system. In the meantime, the cost of educating the learners who do remain in the system increases because there are less learners who require the same amount of resources for their education. For example, a school in a rural area will require a set number of mathematics and language teachers despite the decreasing number of learners in the school. This problem is partly the cause of the DBE's rationalisation policy, which will be discussed later in this chapter. A final underlying cause of the structural crisis in the ECDE, according to Godden, is the weaknesses in the department's management (Godden Interview, 2016). There has been an exodus and retirement of competent and experienced managers in the department.

Overall, Godden thinks that the national system and decentralisation is not working (Godden Interview, 2016). The structural crises in ECDE are fluid and remain unresolved (Godden Interview, 2016). Godden provides evidence from his tenure as HOD when the structural crisis took a very financial shape that crippled the ECDE. During his tenure, it was discovered that the department had overspent its budget by R1.3 billion and the money that was allocated to the department at the time was actually less than the legal allocation that was allowed. The Eastern Cape Provincial Treasury tried to recover this amount from the ECDE at R700 million per annum by reducing the education budget. The effects of this at the time were that there was no electricity in schools and ECDE head office.

Ngoma (2007)[18] refers to the structural crisis in a way that highlights the historical, transitional, organisational and decentralisation aspects all at once. Her analysis shows that the ECDE is not just a department that has immediate issues that revolve around corruption and maladministration. Ngoma's historical analysis provides an explanation of a history that is well known, but as it relates to the ECDE in particular. The apartheid homeland system meant that the Eastern Cape as we know it was once divided "into four major boundaries, the Transkei, Ciskei, and South Africa's Border and Eastern Province" (Ngoma, 2007: 92). Very interestingly and importantly, Ngoma states that, "The first leaders of these homelands were Chief Kaiser Matanzima in the Transkei and Chief Lennox Sebe in the Ciskei. *They were direct appointments by the Pretoria nationalist government, which reinforced the separatist ideology of the apartheid state by creating mythical identities of separate Xhosa nations*" (emphasis added; Ngoma, 2007: 93).

This gives credence to the argument that an autocratic government will install pliant officials to carry out their mandates. This is not just a prefectoral or governor system, or decentralised despotism, as discussed earlier in this thesis. And although decentralised despotism was present in the apartheid state through rural traditional communities, these leaders in the Transkei and Ciskei were part of a more direct and central system that encouraged separatism. And at the risk of complicating the neatness that I have attempted to build around different forms of decentralisation, the leadership of Transkei and Ciskei straddled a line between the central nationalist system and its decentralised homeland system. The second interesting and important thing to notice about Ngoma's statement is that the mythical identities in the Transkei and Ciskei actually crystallised some of the roots of the structural crisis in the ECDE.

Drawing on Laclau and Mouffe (1985) who call these mythical identities "imaginary identities", Ngoma says that it is these imaginary Transkei and Ciskei identities that formed the basis of the struggles that took place during the amalgamation of the Eastern Cape province and the ECDE. Ngoma specifically refers to these imaginary identities as, "the point of contestation and difference in the old South Africa which would thus affect integration in the new dispensation. To change the country's "political landscape thus would require the eradication of these ingrained perceptions of difference at both ethnic and racial levels, as such perceptions have a potential to create antagonistic relations I the newly formed structures" (Ngoma, 2007: 95). Historically, the Transkei and Ciskei were quite different because the Transkei was ""largely rural with a traditional peasant population subject to powerful chiefs"", whereas the Ciskei "was made up of fragmented township spots within the major town of South Africa's Queenstown, King Williams Town and East London and their rural communities" (Ngoma, 2007: 93). During the transition to democracy, these geographical and political cleavages showed as the different officials and stakeholders from the Transkei and Ciskei battled to maintain their power and patronage networks (Ngoma, 2007). Some of these battles included a proposal from the Ciskei government to exclude the Transkei from the new province that was being proposed at the time; choosing the new capital of the province; and, merging the skills of the former homelands to create one effective province (Ngoma, 2007). Administratively, the Eastern

[18] I am grateful to Sarah Meny-Gibert for introducing me to this work.

Cape Province was set up to fail by the apartheid homeland system. As a result, "the province also inherits poor administration capacities that were inherent in the homelands…The homelands are known to have relied on patrimonial bureaucracy, which survived on 'clientelist' networks" (Ngoma, 2007: 104). Moreover, each administration during apartheid "had over time developed their own ways of doing things and had created their own practices in response to their supposedly unique environments and contexts" (Ngoma, 2007: 104).

Ngoma explicitly point out that the fragmented apartheid system was not only divisive, but also t allowed parallel administrations that were chaotic, disorganised and uneven to flourish. This was hardly a centralized enterprise in which a central authority was hands on or even cared to be. This was as much an administratively destructive mission, as it was a politically and socially destructive one. The effect of this on education was the presence of many education administrations conducting similar functions with varied amounts of resources and wide disparities in education performance. Eastern Cape had 19 education departments, and Ngoma states that that the immediate consequence of this was that, "[these] systems could not be developed uniformly and be of the same quality as this would defeat the ideology of apartheid policy. A consequence of this is that African education in particular became the worst-planned system, with poor communication and information systems" (Ngoma, 2007: 134). How this contributed to the structural crisis in the ECDE, is that when the transition to democracy took place alongside the amalgamation of different education departments to form the ECDE, there were "networks and dominant coalitions" that existed based on the former positions in different education departments, and that were now being strung together to form one education department (Ngoma, 2007: 178 – 184). This meant that officials in the ECDE had a "double responsibility" to carry out their duties *and* maintain their networks (Ngoma, 2007: 182 – 183). There were also various perceptions about which networks and dominant coalitions carried which skills, knowledge and expertise; and how these were transferred, or not, within the ECDE.

Crises in the new ECDE were varied. Administrators from the different parts of the Eastern Cape accused each other of corruption and those from Ciskei were seen as mentally inferior from those ones from Transkei (Ngoma, 2007). There was also little training and skill transfer. Friction among administrators meant little trust, constant power struggles, and high turnovers which put a dent on continuity of projects in the province (Ibid). In terms of the high turnover, Kota et al have summarized the number of MECs and SGs that have led the ECDE between 1994 and 2015 (Levy et al, eds. 2018: 128). Their table is duplicated below and shows that in 21 years, there have been 8 MECs, most in quick succession; and 15 SGs, a lot of whom were ousted due to disagreements and fighting. Based on my own current research in the ECDE, I have added some information, as well as a row to this table, indicating information that I found out during my field work. The information in italics is the information that I have added to Kota et al's existing table, to supplement our existing knowledge about leadership in the ECDE.

Table 8: Leadership Chronology in the ECDE

Period	**MEC**	**Superintendent General**
1994 – 1997	Nosimo Balindlela	(appointment date unknown) Dr Ronnie van Wyk (resigned 1997, left 1998)
1998 – 1999	Professor Shepherd Mayatula	Jonathan Godden (acting) (February/March 1998–Sept 2000) Mabandla Tsengiwe
1999/2000 – 2002	Stone Sizani	(Oct 2000–mid 2001) Modidima Mannya Phlip Qokweni (Acting) (Mid 2001–Feb 2003)
2002/2003	(November 2002) Nomsa Jajula	Reverend Lulamile Mbete (March–Dec 2003)
2004 – 2006	Mkhangeli Matomela	Bea Hackula (acting) (Jan–March 2004) (2005/2006 unclear)
2006 – 2007	Johnny Makgato (dates of appointment and resignation unclear)	
2007		Nomlamli Mahanjana
2008	Mahlubandile Qwase	Nomlamli Mahanjana (ousted after union protest)
2009	Mahlubandile Qwase (redeployed to OTP)	Ronnie Swartz (acting; ousted after union protest); Harry Nengwekhulu
2010	Mandla Makupula	(8 November 2010): Modidima Mannya
2011		Advocate Modidima Mannya (ousted in 2011 after union protest and cabinet-led intervention)
2012		Mathanzima Mweli (acting; secondment from DBE)
2013		(March) Mthunywa Ngonzo
2014/2015		(January 2014) Mthunywa Ngonzo (suspended after allegations of maladministration) (July 2015) Ray Tywakadi (acting; *also a secondment from the DBE*) (November 2015) Sizakele Netshilaphala (acting; *appointed on the understanding that she will be assisting with the ongoing intervention*)
2015 – Present	Mr Mvoko	*Mr. Themba Kojana*

The ECDE also faced a challenge of lack of supervision due to leadership instability. A constant change of leadership led to confusion regarding roles and responsibilities (Ngoma, 2007). This explains why work in the ECDE was slow post-apartheid. An ushering in of democracy also led to a void in centralised monitoring which led to the ECDE running in an almost autonomous way (Ngoma, 2007) yet it was in infancy.

Figure 12: Timeline of Events Leading to and During S100 (1) (b) Intervention in the ECDE (2011 – 2014)

START

1994 - 1997	First S100 (1)(b) Intervention in the ECDE
December 2002	Cabinet sends an Interim Management Team (IMT) to the Eastern Cape province to remedy the challenges in 4 departments: health, education, public works, and roads and transport, through an extra-legal intervention
11 August 2004	IMT ends extra-legal intervention in the Eastern Cape province
24 February 2011	Minister of Basic Education provides a Statement of Intent to remedy the challenges in the ECDE
03 March 2011	Media Statement by the Minister to explain the intention to institute S100 (1)(b) intervention in the ECDE
15 March 2011	DBE provides Notification in Terms of Section 100 (1)(b) of the Constitution in the NCOP
17 March 2011	DBE provides Notification in Terms of Section 100 (1)(b) of the Constitution to COGTA
11 April 2011	Department of Justice and Constitutional Development raises concerns about the legality of the S100 (1)(b) intervention.
31 May 2011	Memorandum of Understanding signed between the National Government and the Eastern Cape Provincial Government, agreeing to the terms of S100 (1)(b)
06 June 2011	Delegation from the Minister of Basic Education to the National Intervention Coordinator, Mr. Mweli
21 June 2011	5 x 5 MINMEC Task Team, comprising both national and provincial representatives, meets to discuss the S100 (1)(b) intervention process
15 July 2011	Update given on the Implementation of S100 (1)(b)
16 – 19 August 2011	Oversight visit to the ECDE by the Select Committee on Education and Recreation
17 August 2011	Letter from the Minister of Basic Education to the Eastern Cape MEC for Education, Mr. Makupula
17 August 2011	Letter from the Minister of Basic Education to the ECDE's senior managers
24 August 2011	Report of the Select Committee on Education and Recreation on the oversight visit to the Eastern Cape
20 September 2011	SG of the ECDE at the time, Advocate Mannya, provides an affidavit opposing a case brought against him for suspending members of the ECDE
30 September 2011	Implementation Plan of S100 (1)(b) issued

14 February 2012

Save Our Schools and Community and the Catholic Institute of Education files an urgent Notice of Motion against the President of the Republic of South Africa; the National Minister and DG of Basic Education; the MEC for Education in the Eastern Cape; and the SG of the ECDE for not implementing the S100 (1)(b) intervention speedily and effectively

8 March 2012

Advocate Mannya provides an answering affidavit against the motion brought by Save Our Schools and Community and the Catholic Institute of Education

9 March 2012

The president of the republic at the time, provides an answering affidavit against the motion brought by Save Our Schools and Community and the Catholic Institute of Education.

15 March 2012

The DG of the DBE at the time, provides a supplementary affidavit challenging the claims made in Advocate Mannya's affidavit.

19 March 2012

Heads of Argument and judgement in motion brought by Save Our Schools and Community and the Catholic Institute of Education.

20 March 2012

Court orders that the S100 (1)(b) intervention remains operative.

August - September 2016

Acting SG/HOD of the ECDE challenges SADTU over their position on the post provisioning process in the Eastern Cape. In that case, SADTU argues that the Acting SG/HOD cannot make decisions about post provisioning because they are not the HOD, because the S100 (1)(b) intervention, through which their leadership was instituted, ended.

8 September 2016

Judge Lowe rules, concerning the above case, that S100 (1)(b) lapsed after 3 years, as per the MOU and other official documents. However, the lapse of S100 (1)(b) did not invalidate the position or decisions of the Acting SG/HOD because they continued to act in their position until proper notice was given to the contrary.

END

6.2 Pre-Intervention – Systemic and Historic Challenges in the ECDE and Extra-Legal Interventions

As alluded to in the Introduction to this chapter, the ECDE has had a perpetual structural crisis from the time of the Bantustans to its democratic amalgamation in the 1990s. Thus, the case study of the ECDE has to consider historical facts. This section discusses part of the ECDE history where the national government intervened in the ECDE given the problems identified as early as 2002.

6.2.1 First Intervention (1997 – 1999)

Ngoma (2007) details the first intervention that took place in the ECDE between 1997 and 1999. Ngoma's thesis looks at the restructuring and reorganization of the ECDE bureaucracy. Her work in the ECDE looks at the whole administrative system, whereas mine focuses on decentralisation and tests this mode of governance through S100 of the Constitution. As such, there are likely to be conflicting views on S100 between our theses. Ngoma explains that the ECDE comprised 19 fragmented and autonomous departments of education under apartheid that were amalgamated into six regions with various functions and one head office in Bhisho. This process took place between 1994 and 1997 and resulted in a weak Bhisho head office incapable of overseeing these autonomous regional offices (Ngoma, 2007). The government invoked S100 (1) (b) to correct this inefficiency (Ngoma, 2007). Ngoma suggests that this was a S100 (1) (b) intervention because she describes it as a "takeover" of the ECDE (Ngoma, 2007: 155).

The immediate reason given for the intervention was that the ECDE had an over expenditure of R1 billion in 1997 (Ngoma, 2007). Ngoma states:

> "they did not follow financial regulations or meet basic accounting standards set in the Public Finance Management Act (PFMA) of 1999. As a result, by 1997, the department was sitting at R1 billion over expenditure. *Amongst other things, the basis of this expenditure was a result of autonomy given to regions in the absence of clear accountability measures and rules from the centre. In any event, the centre was as confused and lacked knowledge and expertise about finance*" (emphasis added; Ngoma, 2007: 151).

It is imperative to note that the S100 (1) (b) intervention referred to here aligns with Godden's analysis and probably took place during his tenure. Apart from this, there are a few issues that stand out here. The first issue is that the PFMA was enacted in 1999, whilst S100 of the Constitution was initiated in the ECDE two years prior in 1997. So, the above passage may be confusing, but it can be clarified by noting that the PFMA was premised on S216 of the Constitution (PMG Public Finance Management Act: briefing, 19 March 2001). S216 of the Constitution, subtitled Treasury Control, states that,

1) "ensure both transparency and expenditure control in each sphere of government, by introducing—

a) generally recognised accounting practice;

b) uniform expenditure classifications; and

c) uniform treasury norms and standards.

2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

3) A decision to stop the transfer of funds due to a province in terms of section 214(1) (b) may be taken only in the circumstances mentioned in subsection (2) and—

a) may not stop the transfer of funds for more than 120 days; and

b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76(1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—

a) the Auditor-General must report to Parliament; and

b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee." (Constitution, 1996, S216 (1) – (5)).

Therefore, it may have been the basis of S216 of the Constitution, which the PFMA later gave effect to, that S100 was initiated in the ECDE. The second issue is that the over expenditure was partly a result of autonomous and fragmented apartheid homelands running their finances in separate and non-uniform manner. This adds to my arguments that the apartheid state was not entirely centralised because even its bureaucracies and administrations were highly differentiated. Consequently, the democratic decentralisation project had to carry the cost and the administrative burden of these differentiations. The final issue identified here is that the national government was at the time in malaise over public finance.

Ngoma describes this first S100 intervention as a punitive measure in a punishment-oriented bureaucracy where, "the state recaptured the territory for financial management and planning…by withdrawing all departmental autonomy on financial expenditure" (Ngoma, 2007: 154). As part of the intervention, ECDE officials had their powers removed; the department moved into a disciplinary mode of operation; staff were demoralised and demotivated; the impact of the administration slowing down tremendously was that contractors were not paid and lost their livelihoods. In addition to this, the whole act of instituting S100 (1) (b) in the ECDE at the time was a form of decentralisation that was painful yet necessary (Ngoma, 2007)

Furthermore, this first intervention could be viewed as a form of recentralisation, as discussed in the Literature Review. However, I am reluctant to call this process recentralisation because by Ngoma's own account, the consolidation of the South African democratic state was incomplete and had a void that lacked leadership and understanding of the processes that were supposed to unfold. Hence my reasoning that even if the state was confused and incoherent in itself, it was not for lack of trying. This first intervention in the ECDE was clearly precipitated by the structural crisis of the department i.e. a fragmented foundation and as discussed earlier, these structural crises could not be handled quickly.

6.2.2 Second Intervention in the ECDE (2002 – 2004)

In 2002, the Department of Government Communication and Information System (GCIS) issued a statement regarding the Cabinet's decision to deploy an Interim Management Team (IMT) to the Eastern Cape to assist with governance and service delivery. To the awareness of the Premier, the IMT was focus on health, education, roads, public works and social development (GCIS, 5 December

2002). On 10 September 2003, the IMT released a report regarding its mandate in the province: "An Interim Management Team was appointed by President Thabo Mbeki late in 2002 to identify and diagnose chronic administrative and management problems in the Eastern Cape and identify ways to turn them around. The Interim Management Team dealt with four provincial Departments out of eleven. The team is accountable to the Premier of the Eastern Cape and through the Minister of Public Service and Administration, the President" (Report by the Interim Management Team to the Portfolio Committee: Public Services and Administration, 10 September 2003: 1).

In the report, the IMT noted that the Eastern Cape was marred with high levels of uneven development and poverty. It was noted that 64% of the population lived in poverty; 43% of the households earned less than R500 per month; and a majority of the households were dependent on social grants. It was stated that the Eastern Cape had service delivery challenges because of a history of neglect, prioritization of planning over implementation of programs, low job creation and governance processes that are not result oriented. The IMT identified what it called 'primary concerns' and these primarily focused on the management of the province. It was observed that managers were stuck to unproductive behaviours, lacked reactive and proactive responses to audit disclaimers, did not take responsibility for failure, were prone to high levels of corruption, were unprofessional, abdicated responsibility, and were prone to undue influence from unions. The powers of the Tender Board was also said to have been outweighing its accountability. These are among some of the many factors that justified the need for an intervention and they were very much similar to those ones in Limpopo that were discussed in the previous chapter.

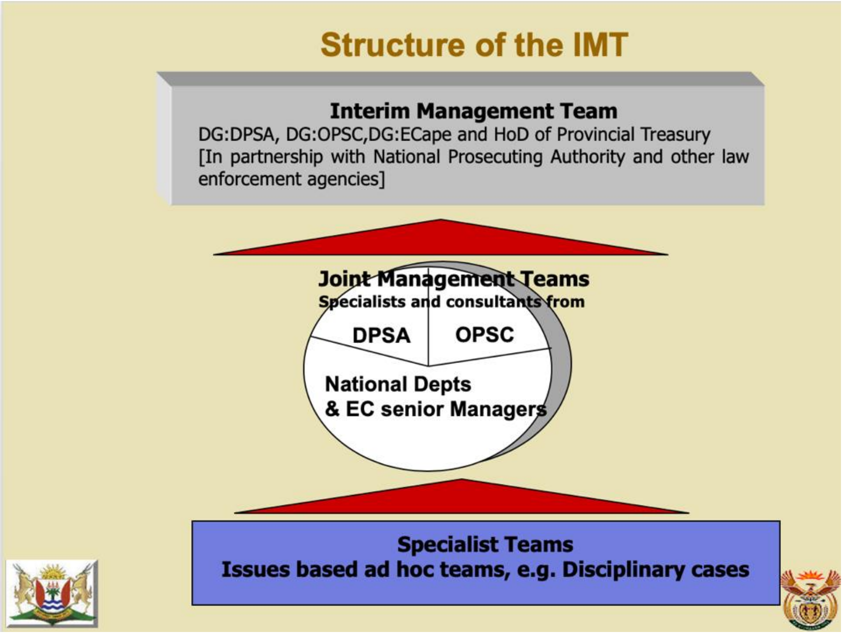
The interim and managerial goals of the IMT were to:

- To ensure that service delivery backlogs are addressed.
- To establish sound management and leadership in four target Departments: The Eastern Cape provincial Departments of Education, Health, Social Development and Roads and Public Works.

Their specific mandate was as follows:

- To establish turnaround plans for the four target Departments, including the elimination of service delivery backlogs.
- To address cross cutting issues such as disciplinary matters, procurement reform and human resource management.
- To establish appropriate management structures and "back office" or administrative support.
- To monitor the implementation of the turnaround plans and other interventions and also the use of conditional grants.
- To execute mandates related to specific challenges granted by the Provincial Executive and Cabinet." (Report by the Interim Management Team to the Portfolio Committee: Public Service and Administration, 10 September 2003: 1).

Figure 13: Structure of the Eastern Cape IMT (2002 - 2004)



Source: Report of the Interim Management Team Presentation, 10 September 2003: 2.

Therefore, the role of the IMT was to provide managerial support to ensure efficient service delivery in the Eastern Cape and the structure of the team was such that there would be national ministers and departments involved to oversee that support, with project and programme managers who would be plugged into specific programmes in each of the areas and departments identified. A diagram of the structure of the IMT which was contained in one of the IMT's presentations to the National Assembly is depicted below,

Based on this information, the nature and structure of this intervention constitutes a S100 intervention. However, as mentioned in Chapter Four of this these this was not termed a S100 intervention because S100 of the Constitution was not invoked. Rather, this is an extra-legal intervention. And due to this lack of the invocation of S100, this can be referred to as an extra-legal intervention. Importantly, the Report of the IMT suggests that there were previous "interventions" in these four departments prior to the IMT's deployment. These were not S100 interventions, but they were "interventions aimed at improving service delivery and capacity" (Report by the Interim Management Team to the Portfolio Committee: Public Service and Administration, 10 September 2003: 3). In other words, these were interventions initiated within these departments that were not as heavy handed as Constitutional interventions. According to the Report of the IMT, these interventions were carried out from December 2002. The number of interventions in each of the four departments from that time were:

> "Education: 28 different interventions
>
> Social Development: 20 different interventions
>
> Public Works: 13 different interventions
>
> Health: 32 different interventions." (Ibid, 10 September 2003: 8).

This is a large number of interventions in the departments and the Eastern Cape as a whole. It is not possible that in South Africa's short democratic decentralisation history at the time that there be many S100 interventions as shown above. It is rather safe to assume that these interventions were internal and generally technical whereby issues brought up in each of these departments were dealt with using internal measures – probably supported by the national government in some way – that should have been effective in limited areas of the departments, but not in the whole of the departments or the province. For instance, an intervention in any one of these departments could refer to poor record keeping both prior to and soon after the transition to democracy. One way of dealing with this could have been to train staff in each of these departments about how to straighten out and manage their records more effectively. The latter example could be one of many in these departments at the time given the nature of the issues in these newly amalgamated departments, and would thus be considered 'interventions', but not Constitutional interventions.

It is confusing that the IMT described their work as an "intervention" yet the records that I accessed from COGTA (which compile data on intergovernmental work including interventions) does not list this phase in the ECDE's history as a S100 intervention, let alone the specific S100 (1)(b) intervention. This is alarming because I assumed that all the interventions under the auspices of the Constitution would be listed as such in official government documentation. In the sources that I found through the PMG, this second intervention is described as an intervention carried out under the IMT. In order to answer this gap in the legal and administrative understanding of S100 interventions, I sought an interview with the former minister of DPSA, Geraldine Fraser-Moleketi and the president of the republic at the time, Thabo Mbeki. Since the S100 intervention initiation is an executive decision taken in Cabinet, I wanted insight from the former president about how this decision was made and what his thoughts were on interventions in general and their inclusion in the Constitution.

I managed to interview Fraser-Moleketi only, not President Mbeki. Fraser-Moleketi gave three pertinent reasons why the intervention by the IMT at the behest of the former president was not declared a full S100 intervention. These reasons were the willingness of the Eastern Cape provincial government to assist the national government with the intervention; the power of SADTU to hinder the intervention if it were declared a full S100 intervention; and, a multisectoral approach by national government with buy in from different departments, including the ECDE at the time.

Regarding the first reason, she stated that the Eastern Cape Province had a strong political leadership which was not resistant to the need for assistance in the department. The leadership was also likely to exercise the changes that an intervention would have brought (Fraser-Moleketi Interview, 04 October 2017). The Constitution stipulates that a fully blown S100 intervention is only necessary when the provincial department/government is unwilling to prevent the collapse of a department or when that leadership lacks ability to prevent such collapse. In the case of the Eastern Cape, the leadership was strong, able and willing to correct the errors that were in the province.

Fraser-Moleketi also opined that the reason there was no full S100 intervention in the Eastern Cape was the strength SADTU. She stated that the union's strength at the time made it oppose a full intervention. In her view, "SADTU, was so strong in the province, you had a push back from SADTU on the intervention" (Fraser-Moleketi Interview, 04 October 2017). Another reason given by Fraser-Moleketi for there being no S100 intervention was the presence of a multisectoral team in place that was going to work on the parts of the provinces' departments that required the most urgent action. This team included members from the DPSA, the PSC, National Treasury and the DBE itself. These team members were to audit the skills that were required in various Eastern Cape departments and ensure that these skills were transferred within these departments. This was possible because these various departments bought into the notion that the Eastern Cape was in desperate need of a public administration intervention. Fraser-Moleketi recalls this multisectoral approach and buy - in as "not a takeover from national. But we would put individuals that were from national, and we were also going to bring external consultants in. And, we would work at developing the capacity within the province" (Fraser-Moleketi Interview, 04 October 2017).

This suggests that any public administration intervention, especially S100, requires a multipronged approach, with as much national government willingness and work as possible. But this was described as an extra-legal intervention because it fell outside the formal declaration of a Constitutional S100 intervention as discussed earlier in this thesis. With this in mind, it is important to remember throughout the rest of this chapter that the Constitutional S100 (1) (b) intervention in the ECDE is not without background, context and continual effort by the national government to stabilise both the department and the Eastern Cape Province. Rather, the S100 (1)(b) intervention is the third attempt on the part of national government to institutionalise public administration reforms and resolve structural issues in the ECDE.

6.3 Causes of the S100 (1) (b) Intervention (2011 – 2014)

As discussed earlier, the ECDE has many historical and systematic challenges specific to the province. The DBE and national government acknowledge that they are working with a precarious and shaky foundation. In a Turnaround Strategy document of the ECDE (23 February 2011), the context of the ECE at the time is described as follows:

> "The Eastern Cape is the largest Provincial Education Department in terms of the number of schools to be administered, and the second largest, behind KwaZulu Natal, in number of educators and learners. The sheer size of this education system has ensured that, in spite of the significant progress that has been made over the years, *there are still major backlogs*, particularly with regards to school infrastructure. In 2007, 1 446 public schools (24.5%) did not have electricity, and 1 254 schools (21%) did not have water. In 2008, 1 239 public schools (21%) did not have electricity, and 1 121 public schools (19%) did not have water" (emphasis added; Turnaround Strategy, 23 February 2011: 3).

This reflects the enormity of the ECDE's responsibility, a responsibility which is difficult to bear for either a provincial or national government. The above also shows that despite interventions in the past, a significant backlog still remains. A Statement of Intent by the Minister of Basic Education (24 February 2011) further states that the Eastern Cape "houses a large proportion of poor people", but this is not the only reason why there were "problems that have plagued the province's record of service delivery in education" (Statement of Intent, 24 February 2011: 3). In other words, poverty and inequality in the Eastern Cape cannot alone account for the collapse of the ECDE. The Statement then describes the context prior to the intervention as one that involved "Various underlying problems" that collapsed the ECDE in early 2011 and also "manifested in serious shortcomings in service delivery" (Statement of Intent, 24 February 2011: 3). There are no details in the Statement about what the various underlying problems are; but based on the collation of previous sources, these underlying problems range from the size, the administrative capacity, the structures and systems of, and the political-administrative interface within the ECDE.

Some of the details of the underlying problems were mentioned by Advocate Mannya, the SG of the ECDE at the time, during a Select Committee visit to the Eastern Cape in 2011. The SG described the underlying problems

> "…as a result of various fundamental problems mainly associated with the amalgamation of the various administrations, which today constitute the department…the department wither received disclaimers or adverse audit opinions from the Auditor General" (Report of the Select Committee on Education and Recreation, 24 August 2011: 2).

This is insightful because similar to the examination of the LDE's audit opinions over a period of time, the finances in the ECDE were in a bad state and this led to its collapse (this will be discussed later). Finally, the SG noted that despite earlier interventions,

> "The lack of effective management appears to have reversed every single gain that was made" (Report of the Select Committee on Education and Recreation, 24 August 2011: 2).

This means that the ECDE was unable to sustain changes brought in by the previous interventions because management was unable to fully institute those changes.

The Statement of Intent also outlined that there were two previous attempts to remedy the various problems in the ECDE, which

> "*have not resulted in a sustainable remediation of the underlying challenges in the department and the schooling system*. It is therefore necessary to implement an intervention that accounts for, and mitigates, the reasons why the previous interventions have not been successful" (emphasis added; Statement of Intent, 24 February 2011: 3).

According to the Statement of Intent, these interventions occurred between 2003 and 2005. These interventions were described as extra-legal in the sense that they carried the weight of Cabinet's backing, but not the weight of S100 in the Constitution. In light of this, the Statement states,

> "The main purpose of the interventions required is to remediate the immediate problems in education delivery as well as to bring about sustainable turnaround of the department" (Statement of Intent, 24 February 2011: 4).

Again, the fact that the ECDE had not been in perpetual structural crisis from its inception until the 2011 intervention, was not lost in the Minister's understanding. Actually, both the national and Eastern Cape provincial governments agreed on this.

Before delving into the causes of the intervention, it is significant that I emphasise that the DBE had a plan called "Implementation Plan of Section 100 (1)(b) of the Constitution of South Africa in the Eastern Cape Department of Education" (Implementation Plan, 30 September 2011). It addresses the causes of the intervention and provides some of the evidence to justify action on these causes as well as the ways in which the intervention will be effectively carried out. The plan states that it originated in the Cabinet decision to invoke S100 (1) (b) over the ECDE, and that such an intervention should be "systemic and sustainable" (Implementation Plan, 30 September 2011: 1). On this note, the Implementation Plan identifies that despite previous interventions, "the Presidency decided to impose a partial section 100 national intervention on the Eastern Cape, and this led to the deployment of [a] national intervention team to the Eastern Cape to provide support as identified and needed by the province"; however, "the perennial problem in the ECED is that *the system relapses or collapses as soon as the national support is withdrawn, resulting in the apparent solved problems resurfacing into other shapes or forms*" (emphasis added; Implementation Plan, 30 September 2011: 1). In other words, the ECDE is unable or unwilling to institutionalise administrative reforms. On the one hand, this speaks directly to my research questions in the sense that it shows that provincial governments are not strengthened in their problem-solving capabilities following a national intervention. On the other hand, there is a wider problem around institutionalising the reforms so that they have long-term positive effects in the ECDE.

In light of the above, the Implementation plan had a two-pronged approach to implementing changes through the S100 (1) (b) intervention. This approach comprised an "implementation framework" and an "Action Plan" (Implementation Plan, 30 September 2011: 1). The Implementation Framework had six priority areas:

1. "Management of HR and capacity, as well as personnel and provisioning budget
2. Effective management and implementation of the NSNP
3. Procurement and delivery of LTSMs
4. Effective management and provisioning of scholar transport
5. School infrastructure development programme – priority mud and unsafe schools
6. Education systems and operations – planning, accountability, SCM, financial management (Implementation Plan, 30 September 2011: 1)

These priority areas are briefly described and then outlined in terms of each of their problem statements, objectives, indicators, short and medium-term targets and how the intervention team would act to remedy the issues under each priority. The Action Plan is more detailed and comprehensive. Firstly, the Action Plan details a Macro Plan that addresses specific projects in education which are Teaching and Learning, Planning and Infrastructure Development, Financial Management Services and Human Resources Management and Development (Implementation Plan, 30 September 2011: 23 – 27). Within each project there is an assessment of the internal and external capacity available to the department, the budgets needed for these projects and the timeframes in which the changes will be implemented. The second part of the Action Plan involves a set of Micro Plans and a strategy to improve Learner Attainment or outcomes (Implementation Plan, 30 September 2011: 31 – 50).

6.4 Perennial Causes of the Intervention

The Implementation Plan identifies 19 perennial causes of the S100 intervention in the ECDE:

1. Poor Learner Outcomes
2. Learner Attainment Improvement Strategy
3. Displaced Educators
4. Planning, Monitoring and Evaluation
5. Inflated Learner Numbers
6. Suspended Employees
7. Early Childhood Development (ECD)
8. Expenses Related to Litigation
9. Irregular Salary Increases
10. Small schools that are not educationally or economically viable
11. Categories of School Institutions
12. Budget Performance
13. Supply Chain Management (SCM)

14. Risk Management and Internal Audit
15. The Audit Profile of the Department
16. Strategic Leadership Vacuum
17. Organisational Culture
18. Organisational Structure
19. Communication and Stakeholder Relations (Implementation Plan, 30 September 2011: 1 – 14)

These causes confirm the depth of assistance that the ECDE required. The range of causes also confirms that the prior extra-legal interventions were not institutionalised as argued earlier. These causes identified by the Implementation plan can be categorised as the rationalisation of the Eastern Cape education system; improvement of education performance and outcomes; human resource management (HRM); financial management; and, oversight, data management and organisational dynamics.

Rationalisation of the Eastern Cape education system broadly to the merging and closure of schools in rural areas, that are deemed not viable. These schools are deemed unviable because they have an incredibly low number of learners, and thus it would be better and less costly to close them and move the learners to another school nearby. Some schools are in such close proximity to each other that it will be more efficient to merge the schools. Unviable schools are ones that were mostly in Bantustans and under resourced. They are also located in areas that are sometimes difficult for learners to access such as deep rural areas, and in the current period have fewer learners as their families move to urban centres in search of better public services. A government handbook with guidelines for rationalisation lists the following criteria for determining whether to merge or close schools:

i. Number of learners
ii. Curriculum considerations
iii. Accessibility of schools
iv. School infrastructure
v. Retention of learners
vi. Attracting and retaining educators
vii. The presence of public schools on private property (Directorate Rural Education, July 2009: 8 – 9).

The Implementation Plan described the situation around unviable schools as follows:

> "There are many schools in the Eastern Cape with few learner numbers and which make provisioning and resourcing for them very difficult and unaffordable. The latest data points to the fact that schools with learners that are less than 150 are categorised as follows:
>
> - Less than 50 learners – 347 schools
> - Less than 100 learners – 873 schools

- Less than 150 learners – 1, 509 schools" (Implementation Plan, 30 September 2011: 9).

The ECDE was also required to change its categories of schools, in order to align them with national policies responsible for "regulating schooling institutions" (Implementation Plan, 30 September 2011: 9). The Eastern Cape had Primary, Combined or Junior Secondary and Secondary/High schools whereas national policies only allow for Primary (Grade R – 7) and Secondary/High schools (Grade 8 – 12) (Implementation Plan, 30 September 2011: 9). Therefore, closing and/or merging unviable schools and re-categorising the ECDE's schools are part of rationalising the Eastern Cape's education system to make it more cost effective, efficient, accessible and equitable.

Improvement of education performance and outcomes as a perennial cause relates to the intention of the DBE, through the ECDE, to improve learners' achievements through various education programmes. The Implementation plan acknowledges that the Eastern Cape is one of the worst performing provinces in South Africa's education system as a whole. It states that the province "has been characterised by consistent poor learner outcomes as measured through matric pass rate, literacy and numeracy scores I systemic and whole school evaluations…The improvement made in this regard is not significant given the fact that Eastern Cape is still rated among the three poorest performing provinces" (Implementation Plan, 30 September 2011: 4). Moreover, the Learner Attainment Improvement Strategy (LAIS) programme, set up to make sure that learners' results improve, had "minimal or insignificant impact on improving the results to the extent that the province moves out of the category of three poorest performing provinces in the country" (Implementation Plan, 30 September 2011: 4 – 5). Most importantly, there is a lack of responsibility or accountability at various levels of the education system in the Eastern Cape.

The perennial cause of HRM refers to human resource problems that were adding to the public administration crisis in the department. The problems indicated a breakdown in the staffing procedures and the expected high levels of service from administrators in the ECDE. These human resource problems were displaced educators, suspended employees and irregular salary increases. With regards to displaced educators, the Implementation Plan states that in 2011, there were 211 displaced educators, which cost the department R28, 874, 721 (Implementation Plan, 30 September 2011: 6). This is an HRM issue because it demonstrates the ECDE struggles with ensuring that post provisioning is planned and executed timeously; and that the post basket accurately reflects not only the placement of teachers, but also tracks their movements through the Eastern Cape's education system. The displacement of educators is reflective of difficulties around the rationalisation process in the ECDE. According to a news article in 2016, a SADTU member pinpointed the schools' rationalisation process as one that did not make plans for the educators whose schools were merged or closed during the process. The union's member described the predicament as follows:

> "Many of our members are regarded as displaced educators even though their schools were closed by the department….We can say for a fact that not all the principals are guaranteed their jobs after the closure of these schools" (Manama, 3 October 2016, IOL Online).

This shows that the ECDE's planning and implementation of the rationalisation of schools does not account for the professional futures of educators whose schools are closed. This reflects lack of coordination and follow -through for major plans. Therefore, even where there are plans that aim to better the quality of education for the learners, the execution of those plans is in constant disarray and the financial costs accrue to the ECDE while the professions of teachers are compromised and uncertain. This is either a result of lack of buy in to the idea of rationalisation or a genuine lack of oversight. If this is not addressed, all policies in the ECDE face potential failure.

The second HRM matter that was identified regards suspended employees:

> "The latest report indicates that thirty (30) employees who were office-based and at different salary levels are on suspension. Eight (8) of these employees are Senior Management Service (SMS) members. Some of these employees have been on suspension for over a year. A few of these cases have been concluded. The cost of the salary related benefits for these employees who have been on suspension is R7.3 million. At the time of compiling the information the figure of suspended officials had significantly increased, but this information could not be included because it had not been verified" (Implementation Plan, 30 September 2011: 8).

The number of employees who are on suspension is high and it is alarming that almost a third of those on suspension are part of the SMS. The SMS is a strategic and crucial aspect of South Africa's public administration. It is corps of "a senior cadre of public servants" which comprises director general and his/her deputies, chief directors and directors in the public administration whose purpose is the improvement of public service via recruiting and retaining good managers (Cameron, 2009: 925).

The fourth perennial cause of the S100 (1) (b) intervention in the ECDE is the state of the financial mismanagement in the department. Like the LDE, the financial management of the ECDE has been poor for a long time which is evident in the nature of the problems that the IMT were sent to remedy during the extra-legal interventions. The Implementation Plan identified four financial areas: budget performance, SCM, risk management and internal audit, and the general audit profile of the ECDE. Financial management is the lifeblood of the institution because it ensures provision of quality education. Unfortunately, a lot of subnational governments struggle to manage their finances and administration and as a result, national governments finds justification to take over (Olowu and Wunsch, 2003). The budget performance of the ECDE was compromised by compensation of employees, which the Implementation Plan describes as having gone out of hand. Also, "Year on year the department has huge figures of accruals, which is a cardinal sign of **poor cash-flow management**" (emphasis contained in original text; Implementation Plan, 30 September 2011: 9).

The Implementation Plan also pointed to the state of SCM, particularly the process and turnaround time that it takes to fulfill the ECDE's supply requirements. The process and turnaround time for procurement in the ECDE was so slow that some bids took time to be processed which led to a making of decisions based on stale data which resulted in a lot of litigation from service providers, a scenario that perpetuated the financial burden in the ECDE (Implementation Plan, 30 September 2011).

Oversight, data management, and organisational dynamics are the final set of perennial problems that are identified in the Implementation Plan. These are identified through issues in leadership, orgnisational culture and structure, and communications and stakeholder relations. This cause of the S100 (1) (b) intervention in the ECDE is one of the top priorities of the department along with financial management. If the leadership and organisation of the ECDE are in disarray, not much in the department can function.

6.5 Immediate Causes of the Intervention

1. The immediate causes of the S100 (1) (b) intervention on the ECDE can be summarised as follows:Over-expenditure in budgeting and expenditure
2. Procurement and Management of LTSM
3. Collapse of Key Programmes

These causes are, of course, linked to the perennial causes of the S100 (1) (b) intervention. However, they are described as immediate causes because it is these issues that signal a warning to the national government, about deeper problems in the ECDE.

6.5.1 Over-expenditure in budgeting and expenditure

The Deputy Minister of Basic Education outlined this immediate cause as follows, in a Statement to the NCOP:

> "Over-expenditure of the budget for compensation of employees, because the province could not comply with policies and norms and standards relating to Educator Post Provisioning. This problem has placed an enormous strain on the overall budget for education in the province and has impacted on the province's overall budget and spending trends." (Statement to the NCOP, 17 March 2011: 1).

Thus, overspending revolved around bypassing of regulations "Educator Post Provisioning". Post provisioning is described a process whereby legislation governing education (Employment of Educators Act 76 of 1998) determines that number of educators allocated per school in accordance with the teacher to learner ration (Sephton, 2017). The process takes into consideration number of: learners in each school, learners with disabilities, grades each school caters for and the subjects offered by each school. Therefore, a bypass of these provisions and processes in the ECDE resulted in financial mismanagement through over-expenditure. In a province the size of the Eastern Cape and with the demographics that it has, this data probably needs to be collected and managed well, before it is inserted into the computerised model. Further administration that is required is the allocation of these posts by the HOD. The oversight aspect involves the MEC declaring and allocating posts. The SG of the ECDE at the time describes what the issue around post-provisioning was prior to the intervention:

> "the Department of Education was required in terms of the 2010 financial turnaround plan to terminate the services of temporary educators on the 31st December 2010. The termination was part of addressing identified inefficiencies and aimed at addressing the cost pressure on the personnel component of the budget which was overspending. It is required in terms of the South African Schools Act, that the MEC declares posts for institutions every year. Once the MEC had made such declarations, the Head of Department was required to distribute such posts to schools. The distribution of posts entailed the allocation of posts to the various schools considering various factors. The Department appointed temporary teachers from January 2010 after the declaration if posts for 2010 post establishment. The Department declared 69 390 posts for the 2010 academic year but could not secure a budget to fund all these posts." (Report of the Select Committee on Education and Recreation, 24 August 2011: 2).

So, there was a plan in place to ensure that the ECDE improves its post provisioning by decreasing the number of temporary teachers. This should have decreased the compensation of employee's budget. Some of the inefficiencies that are mentioned could have been temporary instead of employment of teachers, which could have been more costly than permanent employment; ghost employees in the system; lack of verifiable data on teachers and schools. However, what hampered this plan, according to the SG at the time, was that temporary teachers were appointed following the declaration of posts for 2010 and these appointments exceeded the declaration and the budget. This maintained the "cost pressure" on the OSD issue in the LDE - there was a gap between the ECDE's budget and expenditure for that year. The over-expenditure on post-provisioning in 2010 is explained further in the Implementation Plan. The Plan states that learners in the province had decreased with only a few schools experiencing marginal increase (Implementation Plan, 30 September 2011). It thus follows that the spending in the province should have matched this statistic since most learners had migrated from the province due to poor quality education. This efficiency is through a better understanding of specific local needs and a lack of this efficiency causes local residents to leave their current locality in search of better service provision in others. Decentralisation theory holds that services provided locally should efficient. .

Despite the fact that the number of learners was decreasing, there were an additional 8 671 teachers required for the 2011 academic year and the cost was in excess of R2 billion (Implementation Plan, 30 September 2011). Posts to he filled were less than the post basket. This inevitably caused problems like labor issues around employment termination and allocation of teachers to already under resourced schools. The over expenditure crippled the ECDE because there was no clarity and practicality regarding how the province's finances would be stabilized.

Another inefficiency that contributed to over-expenditure on the compensation of employees was the fact that some teachers were on prolonged sick leave. The Implementation Plan noted that the number of teachers on prolonged sick leave was high and costly for the ECDE, as it cost the ECDE "over **R2 million**. The cost of substitute teachers would lead to double the figure indicated above." (Emphasis contained in original text; Implementation Plan, 30 September 2011: 6). Prolonged sick leave is something that should be monitored by the HR of the ECDE and HR should ensure that the finances of the department are truly aligned to the needs of those who qualify for pay even on prolonged sick leave.

6.5.2 Procurement and Management of LTSM

The second immediate cause of the intervention is the fact that text books and stationery were not delivered to schools. The Deputy Minister of Education outlined this issue as a "Failure to provide text books and stationery to Section 20 schools due to poor management of the procurement process (the provincial department supplies text books and stationery to Section 20 schools as opposed to Section 21 schools that procure their own)" (Statement to the NCOP, 17 March 2011: 1).

A number of things need to be understood. The procurement and management of LTSM is problematic, as evidenced by the LDE text book crisis discussed earlier. Generally, procurement process in South Africa have become a fertile bed for corruption. The SG of the ECDE at the time, described how the provision of LTSM was delayed:

> "in the 2011 academic year, the stationery for section 20 schools was delivered late, owing to the failure of the Department to finalise the stationery tender on time. This resulted in the stationery tender having to be cancelled and culminated in a litigation which further delayed the process. Stationery had at that stage been delivered to all schools" (Report of the Select Committee on Education and Recreation, 24 August 2011: 3).

There could be a number of reasons why there was a delay in finalising the tender, but given the trend that such delays are usually for bad reasons, this could not be positive for the ECDE's reputation. Procurement in the ECDE is generally poor and delays sees section 20 schools (those that rely on the department for procurement since they do not have approval to procure independently) facing further marginalisation. These schools must be informed of their paper budget so as to prepare them to understand the actual costs of running the school" (DOE, 1998: 28 in Nyambi, 2005: 23).

A Section 21 school has more capability and expertise and its responsibility to procure in sanctioned by Section 21 of the SASA 84 OF 1996. In these schools, there is a significant and consistent decentralization to the allocation of resources (Nyambi, 2005: 29, citing Caldwell and Spinks, 1992: 54). Thus, Section 21 schools are more empowered and equipped to handle the procurement and management of their LTSM. These schools can do decisions timeously as compared to Section 20 schools which are dependent on the provincial department of education. Therefore, Section 21 schools are more decentralized than their counterparts. More decentralization for Section 20 schools is only possible, as stated by the HOD of ECDE then, when they develop critical skills – only then can they enjoy Section 21 privileges.

6.5.3 Collapse of Key Programmes

The third immediate cause of the S100 (1) (b) intervention was the collapse of key programmes in the ECDE, which then manifested in schools. There was a suspension of scholar transport as a result of overspending; termination of the NSNP due to financial mismanagement, 'noncompliance with policy' and 'poor chain supply management'; and ineffective implementation of school infrastructure development which saw funding returning to the National Treasury despite the province having despicable infrastructure (Statement to the NCOP, 17 March 2011: 2). were the NSNP, scholar transport and infrastructure development. I have characterised these programmes as key ones because they allow learners to learn in an environment that provides them with physical access, safety, nutrition and a generally decent learning space. The latter may be obvious in other education systems in different countries; but in South Africa, these key programmes are also reflective of the social justice objectives of a newly democratic state.

At the centre of the collapse was financial mismanagement. In the case of the scholar transport programme, there was a large number of learners who required transportation to get to school, and possibly, not enough budget to cover all the learners for the whole academic year. As the SG at the time reported,

> "as at December 2010, an estimated 110 000 learners were said to be transported. By August 2010, the budget for this programme was already exhausted" (Report of the Select Committee on Education and Recreation, 24 August 2011: 3).

This suggests that despite the decreasing numbers of learners in the Eastern Cape, the demand for transport for learners is still high. Despite the exhaustion of the budget, "learners continued to be transported resulting in high levels of accruals" (Report of the Select Committee on Education and Recreation, 24 August 2011: 3). The ECDE continued to transport learners because it anticipated to identify funds to run the programme until year end (ibid)). Unfortunately, no funds were found which led to the suspension of the programme. However, the programme continues for learners who live on farms.

The SG at the time also noted that the scholar transport programme "became vulnerable to abuse, fraud and corruption" (Report of the Select Committee on Education and Recreation, 24 August 2011: 3). In order to clean up the programme, there had to be a verification of learners who required scholar transport so the programme was moved to the Department of Transport. The situation transpired as follows:

> "A new system was introduced for the application of learners to be transported. This had resulted in the verified number of learners being 53 000. The Executive Council had by that time taken a decision to transfer the programme to the Department of Transport…The Department of Transport would be responsible for the physical transportation of learners and coordinate all matters relating to the physical transportation, including but not limited to verify safety issues, contracting and managing suppliers. It was reported that the Education

> Department would remain responsible for determining requirements and coordinating all activities relating to managing the participation of schools in the programme" (Report of the Select Committee on Education and Recreation, 24 August 2011: 3).

The scholar transport programme's failure within the ECDE and the issues encountered, according to the former SG, shows how the department was suffering from longstanding systemic problems. One of these issues is data verification and management. Earlier, the former SG noted that 110 000 learners needed to be transported to school, but later noted that the verified number of learners needing transport was almost half the initial figure at 53 000. The fact that a data collection provides a figure of demand for 110 000 learners, and the verification proved demand for 53 000, shows that there is a huge problem with how, when and why the learner data is collected by the ECDE. This is a systemic problem because it demonstrates that there could be a lack of proper or sufficient means to collect and manage such data or the inflated data reflects corruption on the part of those who inflate the data and this is not a good thing on an already collapsing department.

In my view, corruption is more plausible cause for over inflating data because I spoke to a former administrator in the ECDE, who was faced with a similar situation. According to this administrator, the situation in the ECDE was that the budget and expenditure was too high. The Administrator thus insisted that all NSNP funding for schools and learners be provided by verifying the ID numbers for learners in the school. This method allows for funding of the NSNP in schools using an actual and realistic account of how many learners are actually in the ECDE schooling system. In the first year that the administrator implemented this, they identified about 80 000 learners that did not exist, but were being counted for funding. These 80 000 ghost learners were referred to as "Class D". This Administrator was accused of "tightening the taps too much" and was later accused of causing the electoral loss of one of the political parties during the local government elections in 2016. According to these accusers, the funding that was stopped would have assisted that political party with its election campaigning in that year. What a bizarre, normalised and systemic set of occurrences.

> Another programme that collapsed was the NSNP. According to the former SG, prior to the S100 intervention, the NSNP was last run by the ECDE in 2008, where the tender contracts awarded to fulfill the requirements of the NSNP was extended for two years from that date (Report of the Select Committee on Education and Recreation, 24 August 2011: 3). The funding for the NSNP was a conditional grant which needed a business plan in order for the grant to be considered and awarded (ibid). Following this, in January 2010, the NSNP was run in a way that was inefficient due to the way in which this programme was implemented. The former SG of the ECDE records that, "the model of implementation was the goods and services approach in terms whereof supplies were appointed. This posed a number of challenges including *widespread fraud and corruption, poor quality of food, non-adherence to feeding menu and standards in certain instances no feeding took place*" (emphasis added; Report of the Select Committee on Education and Recreation, 24 August 2011: 3). Therefore, the procurement process in 2010 that followed the tender process was not able to meet the requirements for the NSNP. Since procurement was susceptible to abuse, it was decided, and approved by the national department, that funds be transferred directly into schools for them to manage the programme on their own. However, due to delays, the programme commenced in March 2011(Report of the Select Committee on Education and Recreation, 24 August 2011).

As was stated in the LDE by an interviewee, the NSNP was only fully and properly implemented when it was decentralised to the school level. Thus, decentralisation is a panacea to some management issues.

6.5.4 The Implementation Protocol

Further to the causes of the intervention in the ECDE and the proposal that there be an Implementation Protocol, the Department of Justice and Constitutional Development (DOJ & CD) was “asked to advise on the constitutionality” of this Implementation Protocol (DOJ & CD, 11 April 2011: 1). They did so in a letter that was addressed to the DBE’s Director: Legal Services. This letter will be discussed in this section because it flagged a number of legal and procedural problems that would arise if the Draft Implementation Protocol was not revised. It also raises problems of decentralisation inherent in South Africa’s mode of governance that would be affected if the Draft Implementation Protocol was not revised. The letter from the DOJ & CD is significant for a number of reasons. Firstly, the DOJ & CD has the expertise needed to make an analysis of such interventions. It is therefore crucial to understand the DOJ & CD’s perspective on this topic in general and the S100 intervention in the ECDE in particular. This letter is also significant because it illustrates part of an official engagement between two national departments – the DBE and the DOJ & CD. It is rare to come across such an engagement at a national level. Secondly, the letter identifies two main issues pertaining to the then impending S100 intervention in the ECDE i.e. limits of the intervention and legal conflation and provincial autonomy. I discuss these two below

6.5.5 Limits of the Intervention

The letter begins by going over the principle of Co-Operative Government, the IGRF Act of 2005 and parts of the Constitution (DOJ & CD, 11 April 2011: 1 – 5). The purpose of outlining this legislation is to lay a foundation for the possible reasons for a S100 intervention and the roles and limits of national and subnational governments in their decentralised relationship. The DOJ & CD identifies two problems related to the Implementation Protocol. First, the preamble and focus of the protocol which are considered inconsistent which would potentially interfere with other spheres on the ECDE which were functional (DOJ & CD, 11 April 2011). The problem with this is that the S100 intervention in the ECDE would be too wide in scope thereby infringing on the Eastern Cape’s autonomy and not allowing the ECDE to continue with their executive obligations that were still functional. The inconsistency between the Preamble and the focus of the protocol lay in the fact that the former was preoccupied with operations and service delivery[19], whereas the focus of the Protocol was said to be, “*an improved quality of basic education* is provided in the province, and that the ECED [ECDE] is properly organised, administered, managed and resourced to sustain an enhanced level of performance, both at the operational and systemic levels” (DOJ & CD, 11 April 2011: 11). Having read the Preamble and focus of the Draft Implementation Protocol as they appear in this letter, I think that the “focus” sounds like an aim, and the Preamble sounds like precise objectives of the aim. In this case, the programme areas addressed in the Preamble would ultimately meet the overall aim of improving the quality of basic education. However, the DOJ & CD had an opposite view, which held that:

> “The focus appears to be much wider than the “extent necessary” to address the five problem areas mentioned in the Preamble. Unintended consequences may arise in that the national

[19] These operations and service delivery areas were budgeting and expenditure; lack of delivery of LTSM to schools; collapsed scholar transport and school nutrition programmes; and lack of implementation of the school infrastructure programme. These areas are similar to the causes of the intervention.

> executive may in concentrating on the focus areas intervene in areas where the provincial government is actually fulfilling its executive obligations. A section 100 intervention is not designed to emasculate a province." (DOJ & CD, 11 April 2011: 11).

The DOJ & CD relies on the term "extent necessary" that is contained in the S100 clause in the Constitution. This may seem reasonable because it is not productive to intervene if functioning areas, and this was echoed by an interviewee in LDE who believed there was no need for the Administrator to halt functioning programmes just because other areas were not. I however argue that the S100 (1) (b) is a *whole* takeover in a *department* because each programme area is connected to the finances of the department and if the finances of the department are in trouble, that will affect all the programme areas. Thus, the DOJ & DC arguments are wrong because there is a difference between a *provincial department* and a *provincial executive*. If that executive has challenges, those challenges may be separate from the variations of performance in different provincial departments.

Where the challenges in the provincial executive affect the provincial departments that should be addressed accordingly, and unlike the prior extra-legal interventions, it is clear that this was a departmental intervention. Unfortunately, the DOJ & CD was of the view that in this instance, "A section 100 intervention may not interfere with the autonomy of the provinces" (DOJ & CD, 11 April 2011: 11). Theoretically and according to the Constitution itself, departments and provinces are not so autonomous that public administration crises cannot be addressed. This speaks to the heart of South Africa's decentralisation: it is not necessarily 'interference' if issues of equality and access need to be resolved, and there is a whole historical basis for this. Moreover, in the certification of the Constitution it is duly noted that;

"NT 100 [S100] created an exception to the general principle that the implementation of provincial legislation in a province is an exclusive provincial executive power…NT 100 serves the limited purpose of enabling the national government to take appropriate executive action in circumstances where this is required *because a provincial government is unable to or unwilling to do so itself…This cannot be said to constitute an encroachment upon their legitimate autonomy*" (emphasis added; DOJ & CD, 11 April 2011: 6 – 7)Therefore, the Constitutional Court understood what I have argued when it certified the Constitution that S100 is not an interference or encroachment. The reason given was that a breakdown in a province's implementation of provincial legislation would be due to an inability or unwillingness to do so, both of which warrant action by the national executive. The national executive devolves power because it bears ultimate service provision of services; it does derive it from provinces. Therefore, the DOJ & DC's explanations do not make a strong case if read in light of what the Constitution says.

6.5.6 Legal Conflation and Provincial Autonomy

In their letter, the DOJ & CD identify that the Draft Implementation Protocol established a PSC which was supposed to meet and function during the S100 (1) (b) intervention. The PSC would be, "charged by the Minister of Basic Education, and consisting of the Premier, the MEC for Education as well as the MEC for Finance…in the Eastern Cape (National Treasury)" (DOJ & CD, 11 April 2011: 11). The DOJ & CD was "of the view that this committee undermines the structure of the Constitution" because the PSC was conflating intergovernmental function with the purpose of the S100 (1) (b) intervention (DOJ & CD, 11 April 2011: 12 – 13). According to the DOJ & CD, this conflation would occur because the Draft Implementation Protocol was established in terms of S35 of the IGRF which outlines intergovernmental relations between the spheres of government and not S100 (1)(b) (DOJ & CD, 11 April 2011). As such, this would have led to the impression that, "the section 100 intervention is being disguised as an exercise in intergovernmental relations designed purely to assist the province to exercise its executive obligation in respect of education when, in fact, the Cabinet decided on a section 100 intervention" (DOJ & CD, 11 April 2011: 13). Essentially, the DOJ & CD was raising the issue that the S100 (1) (b) intervention must technically be recognised as such in all formal documentation, such as the Draft Implementation Protocol, and the basis of this intervention should always be cited as the Constitution, otherwise a different basis would create a loophole in the understanding and implementation of S100 (1) (b) intervention. This presents a problem for South Africa's decentralisation because the whole structure of this mode of governance is built on intergovernmentalism and cooperative governance, which gives the impression of constant equality and symbiosis as opposed to hierarchical order. But the DOJ & CD was trying to solve this problem by stating that different actions within such a structure should be premised on correct and corresponding legislation.

In addition to the legal conflation between intergovernmental legislation and S100 (1) (b) of the Constitution, the DOJ & CD contended that the establishment of the PSC was actually an action that would undermine the autonomy of the Eastern Cape. This would happen because, "It is, in our view, most unusual for a political committee to be established consisting of a Minister in the national sphere and chaired by that Minister, the Premier and the MEC for Education of that province. This undermines the position of the Premier in a way which may not pass constitutional muster" (DOJ & CD, 11 April 2011: 13).

This illustrates that something was amiss with establishing the PSC because it would have comprised both national and provincial leadership in a direct working relationship, rather than a more decentralised and reasonably distanced working relationship. Moreover, the DOJ & CD lists the powers and functions of a Premier as per the Constitution, thereby illustrating that these powers should be exercised independent of any direct influence from the national sphere.

It is not clear why the PSC needed to be established in the first place and even the name, *Political* Steering Committee, indicates that this committee may have had less to do with the S100 (1)(b) intervention and more to do with the political issues in the province at the time. Furthermore, the DOJ & CD notes that although the Minister oversees the intervention, "it is the national executive which assumes responsibility for the intervention and not the Minister" (DOJ & CD, 11 April 2011: 16). As such, the Minister has to be led by the national executive in their action, and not lead the provincial executive through a political steering committee.

6.6 The Memorandum of Understanding (MOU)

Unlike the intervention in the LDE, the S100 (1) (b) intervention in the ECDE had an MOU[20]. The MOU was between the national government and the Eastern Cape Provincial Government; where the former is represented by the Minister of Basic Education who is "duly authorised by the National Executive", and the latter is represented by the Eastern Cape's MEC for Education, who is also "duly authorised by the Eastern Cape Provincial Executive Committee (EXCO)" (MOU, May 2011: 1). The Preamble of the MOU states that the "Province of the Eastern Cape has not fulfilled its executive obligations in the delivery of school education" in terms of the Constitution and other relevant education legislation (MOU, May 2011: 2). It also specifically mentions the collapse of the NSNP. The type of intervention that is stated as decided on by Cabinet is Section 100 whereby the national government takes over the province to revamp collapsed NSNP and access to education (MOU, May 2011). The EXCO, according to the MOU, assists the implementation of Cabinet decisions on the

[20] This document is clearly labelled "SECRET" and is now publicly available through court documents in which the ECDE was involved in litigation. As such, the document is now part of public records and I am grateful to the parties who provided me with access to this document.

intervention to resurrect collapsed critical programmes in the province (MOU, May 2011). It is therefore clear from the Preamble that national government, through the DBE Minister, takes responsibility for the ECDE and while the EXCO is expected to assist with implementing the Minister's directives.

The fact that the MOU refers to the EXCO of the province and not the leadership of the ECDE is interesting. It shows that S100 is an executive decision and action at the national and provincial levels. This could also be illustrative of the Constitutional principles of interdependence on the one hand, and distinction on the other hand. These are the principles of cooperative government which are stated in the Preamble. Importantly, the MOU states that the S100 (1) (b) intervention will be "(3) years, or as determined by Cabinet" (MOU, May 2011: 3). Another section of the MOU discusses "Mandates", which outlines the various obligations of the relevant parties during the S100 intervention (MOU, May 2011: 3). The primary mandate to intervene was from a Cabinet decision taken on 2 March 2011. The secondary mandate was obtained from the EXCO of the Eastern Cape. The next mandate came from the NCOP, which has the constitutional responsibility of approving the intervention. It is stated that, "The NCOP formally considered and unanimously adopted the intervention in the Eastern Cape in terms of the S100 (1) (b) of the Constitution, subject to due process" (MOU, May 2011: 3). Thus, according to the MOU, all legal and procedural protocols had been followed to initiate S100 (1) (b) in the ECDE. The next set of mandates deal with how administrative power in the ECDE would be reoriented, and for which purposes, under the intervention. One of the administrative mandates in this regard, states that the Minister of the DBE takes power from the province's authority in order to restore the functions of basic education in the province:

> "As a legal consequence of the section 100 (1) (b) intervention, the Minister is mandated to take over all the statutory obligations and functions conferred on the Provincial Authorities in terms of the Constitution, education legislation and other relevant laws that authorize such Provincial Authority to deliver school education and basic nutrition in schools, insofar as these relate to the content of Article 3 of the Memorandum of Understanding" (MOU, May 2011: 3).

This is the understanding that national government must have had at the time: that the Minister is responsible for pursuing the intervention by taking power from the provincial authorities. Such an understanding is not far-fetched because it indicated that national government is mandated to remedy problems where relevant provincial authorities were unable or unwilling to do so. In the event that provincial authorities are unable to fulfill a function such as carrying out basic education programmes, it makes sense that a higher, larger, national oversight department take over that function. However, this could be seen as a hierarchical solution that disempowers provincial authorities. A counterargument to that perception is that the public administration crisis in the ECDE was overseen by provincial authorities who cannot simply undo or take corrective measures themselves now that they have been caught.

The next set of administrative mandates are very important because they address a very technical detail about *how* S100 (1) (b) interventions are and ought to be carried out. These administrative mandates state that there will be a withdrawal of delegations[21] in the ECDE by the Minister who will re-delegate functions to suit the S100 (1) (b) requirements. The mandate reads:

[21] Section 238 of the Constitution describes "Agency and delegations" as: "An executive obligation of state in any sphere of government may –

> "Subject to the provisions of Article 3, the Minister shall withdraw and reallocate all administrative delegations under the Public Finance Management Act of 1999 as amended, the Public Service Act, 1994 as amended, education laws, and any other legislation applicable to the provision and administration of school education in the Eastern Cape" (MOU, May 2011: 4).

This means that the Minister under S100 (1) (b) would take all administrative delegations in the ECDE and place them in the more effective and capable hands. These hands could be the intervention team or reliable staff in the ECDE – the MOU does not specify. This is a very technical aspect of the intervention because it means that officials in the ECDE would have their delegations withdrawn, leaving them powerless. Where are these officials supposed to go and what are they supposed to do in such an instance? The obvious answer is that some of these officials may have been suspended if there were allegations of misconduct against them. The less obvious answer is that officials in the ECDE whose delegations were withdrawn would be powerless and their reaction to and cooperation with the intervention would be unpredictable or resistant. But, as if to counter such a scenario, one of the other administrative mandates requires that all staff, including the SG, fully cooperate with the S100 (1) (b) intervention. The mandate says that,

> "The roles and responsibilities of the Superintendent General and the staff of the Eastern Cape Education Department will include support and assistance within the mandate of the Minister to implement the actions, decisions and steps under this intervention to take over the executive obligations as contained in the applicable legislation" (MOU, May 2011: 4).

In other words, the SG and staff of the ECDE were expected to support and assist the Minister in their fulfillment of S100 (1) (b). The MEC was expected to do the same. This is evident in the final administrative mandate which refers to the position of the MEC during the S100 (1) (b) intervention. According to the MOU:

> "The roles and responsibilities of the MEC will include support and assistance within the mandate of the Minister to implement the actions, decisions and steps under this intervention to take over the executive obligations as contained in the applicable legislation" (MOU, May 2011: 4).

Based on these latter mandates, there was a general expectation that the relevant provincial structures and departments comply with and assist the national government in their execution of the S100 (1) (b) intervention. In terms of decentralisation, this displays that the national government needed the provincial structures and departments to cooperate and not just accept the actions being taken in the ECDE. Recall that in the LDE, there was a struggle to even accept the intervention because there was lack of information around the process, including an MOU, as the one being discussed here. The S100 (1) (b) intervention in the LDE also lacked a clear delineation of roles and responsibilities as well as procedures, factors which caused confusion. And on this point, we can also recall Dr. Karodia's concerns about the intervention procedures. Therefore, this MOU's mandates not only list the expectations that national government had of provincial structures and departments; it also admits that it requires provincial cooperation of the intervention.

(a) Delegate any power or function that that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) Exercise any power or perform any function for any other executive organ of state on an agency or delegation basis."

The issue around delegation is expanded on by the MOU which describes the methods of the intervention. As part of the Methodology, the Minister will identify "a specific person" who will "manage those delegated functions within the available resources, directives and timeframes set by the Minister for the performance of those functions or sub-functions" (MOU, May 2011: 7). This is probably referring to the appointment of an administrator to oversee S100 (1) (b) in the ECDE, in a similar way to the LDE. Moreover, such an appointment would "occur after consultation with the MEC" (MOU, May 2011). Following the reallocation of delegations, that person will be responsible for ensuring that the relevant "functions are performed as provided for in the Operational Plans" (MOU, May 2011: 7). Thus, there would be a plan that established how the S100 (1) (b) intervention would proceed and which delegations would be used in that procedure. Finally, with regards to the delegations as part of the Methodology, the MOU states that:

> "Any function contained in the specific Operational Plans must be performed to maintain the essential national standards or meet the established minimum norms and standards for the rendering of the service and function. This function must be performed within the shortest possible timeframe" (MOU, May 2011: 7).

This means that the procedures to be followed must be for the purposes of the intervention. Also, the phrasing of this clause on functions and delegations reads similarly to the purpose of S100 in the Constitution. On the sixth of June, the Minister delegated Mr. Mweli to become the National Intervention Coordinator in the ECDE. This was signed under a Section 'D', titled 'Executive Authority Delegations' on a document titled "Delegations Template in terms of the South African Schools Act, 1996 as Amended: Eastern Cape Education Department" (Delegations Template, 06 June 2011). Importantly, and although brief, the Minister states that there was consultation with the MEC for Education, Mr. Makupula, on this decision. The document also states that Mr. Mweli "will be assisted by the functionaries as set out in Appendix A and B" (Delegations Template, 06 June 2011). I do not have access to this Appendix, but based on the foregoing analysis, these functionaries probably include provincial officials.

The next part of the MOU describes the "Areas of the Intervention"[22] (MOU, May 2011: 5), which are the same as the immediate causes of the intervention discussed earlier. The MOU then goes on to

---

[22] Verbatim, these Areas of Intervention are:

(a) The personnel and provisioning budget, especially in the post provisioning norms and compensation of educators, arising from the continuous failure of the Eastern Cape Education Department over a number of years to effectively comply with policies as well as norms and standards related to educator post provisioning. This failure has placed an enormous strain on the overall budget for education in the Eastern Cape, which has probably also impacted on the province's overall budget and spending trends;

(b) The procurement and distribution of text books and stationery to schools, especially non 21 schools in the province;

(c) The effective management and provisioning of subsidised scholar transport programmes across the province to reduce hardship for learners and absenteeism from school;

(d) The effective management and implementation of the national school nutrition programme (NSNP) to comply with the national policies regarding school feeding schemes and the right of children to basic nutrition in terms of section 26 (1)(c) of the Constitution;

(e) The school infrastructure development programme to address the failure to eradicate the high number of mud and unsafe school structures, and the consequent return of funding earmarked for school infrastructure to the National Treasury;

outline the Purpose, Scope and Methodology of the intervention of the S100 (1) (b) intervention. The Purpose of the MOU is twofold. Firstly, the MOU sought to "deal with the consequences of the section 100 (1) (b) intervention to clarify" the mandates and areas of intervention (MOU, May 2011: 6). In line with this, the Purpose of the MOU was to provide the basis upon which the relevant national and provincial structures "shall implement a coordinated and effective strategy to ensure that the section 100 (1) (b) intervention is executed *within a stipulated timeframe*, to ensure achievement of the objects and outcomes as envisaged by Cabinet" (emphasis added; MOU, May 2011: 6). The issue of the timeframe will become integral in the latter part of this chapter. For now, it is important to note that the MOU framed part of its purpose as dealing with the consequences of the intervention to clarify mandates. This suggests that national government and the DBE were preempting, or at least aware, that there would be tensions and reactions around the withdrawals and reallocations of delegations. Secondly, the Purpose of the MOU was to fulfil the rights of children to education in certain material aspects.

The Scope of the intervention was said to be "geared towards achieving the outcomes envisaged by Cabinet", which indicates that there was a clear vision for what this intervention would do (MOU, May 2011: 6). Moreover, the Scope sought to deal with both the immediate and perennial causes of the breakdown in basic education in the Eastern Cape. The Scope reads as follows:

> "The scope of the intervention is geared towards achieving the outcomes envisaged by Cabinet, namely,
>
> (a) Normality and stability in the delivery of improved quality education in all the material facets;
>
> (b) Addressing decisively the operational, management, administrative and systemic challenges facing the Eastern Cape Education Department in the provisioning of quality education; and
>
> (c) Ensuring that measures implemented during this intervention, guarantee the sustainable provisioning of quality school education and basic nutrition in schools after the intervention" (MOU, May 2011: 6)

The first goal is straightforward and aligns with the general understanding that the ECDE was in perpetual structural crisis. The second goal conveys that the S100 (1) (b) intervention in the ECDE was to "decisively" deal with the perennial problems in the department. This is quite wide for an intervention because it involves all aspects that run the ECDE. However, this goal follows a couple of past extra-legal interventions and thus, the tone of the intervention should not have been a surprise. The final goal also deals with a longstanding issue in the ECDE – the inability to institutionalise past intervention measures and changes. A key aspect of this part of the Scope is that as discussed earlier, the Methodology of the intervention included and Operational Plan. This Operational Plan is described as a document that,

> "must identify the financial and human resources needed to perform identified functions. The financial resources must be identified from the financial streams listed in Article 2 and is such

(f) The systems and operations relating to planning and accountability, budgeting and financial management, supply chain management and human resource capacity to ensure effectiveness and sustainability;

(g) All other auxiliary services necessary for the provisioning and delivery of quality education" (MOU, May 2011: 5).

> funds are not immediately available, the functions must be scheduled to be performed when such funds are available or on approval of an arrangement with the National Treasury" (MOU, May 2011: 7).

This speaks to an important issue in S100 interventions: who finances them and how much is needed to carry out the intervention? The MOU also allows the Minister or the MEC to find other monies to fund the intervention through donations. In addition to donations, the ECDE could apply for Conditional Grants from the DBE to assist with specific functions laid out in the intervention's Operational Plan or more funding can be sourced from the 2011 adjusted, or 2012 budget (MOU, May 2011). Resources could also be made available from the budgets of the National Treasury and the DPSA, if available (Ibid).

However, the letter from the DOJ & CD to the DBE suggests that at some point, the DBE expected that the ECDE should have funded the intervention. The DOJ & CD was of the view that this was not practical because the ECDE could not be expected to fund an intervention when the department had financially collapsed. In the words of the DOJ & CD's letter:

> "We [DOJ & CD] indicated on a prior occasion that the financial aspects should be properly discussed with the National Treasury *as this is an intervention by the national executive*. The National Treasury must also engage the provincial treasury. This is vitally important as funds will be needed for the project and funds already allocated may have to be transferred between the two departments. *We have some difficulty with the proposition that the Superintendent-General must provide funds for the logistical support of the project teams when that person has had difficulty in funding the identified problem areas*." (Emphasis added; DOJ & CD, 11 April 2011: 18).

The DOJ & CD focuses on the person of the SG who is the head and accounting officer of the ECDE and is expected to source the funds for projects within the department. The logic of the DOJ & CD was that since the ECDE was in financial trouble, it could not fund its own intervention.

6.7 During the Intervention: Delegitimising S100 (1) (b)

Within the first year of the S100 (1) (b) intervention in the ECDE, there were a number of events that took place which threw the intervention into disarray. According to the primary source documents, the two main things that happened were first, there was intimidation of staff in the ECDE as part of a top-level resistance to the intervention, and secondly, at a more technical and administrative level, there was a terrible disagreement about the withdrawal and reallocation of delegations by the Minister of the DBE. Before drilling into the issues, it is important to flesh out some parts of the timeline and some characters who were central in the ECDE intervention. I will do the latter later because my understanding of the intervention relied on a batch of legal documents, which can be disjointed as they relate to a number of problems surrounding education, with the intervention being imposed or colliding with these problems. In the absence of a wide range of interviews to triangulate the various types of data collected, I relied on a brief summary of events provided by a research participant, which allowed me to piece together the timeline of events and the contentions during the intervention.

The participant explained that inefficiency and mismanagement continue in the ECDE despite the intervention, that the chaos within the department makes it easier to loot from the finances of the department, and that decentralisation is not working. The participant viewed the S100 (1) (b) intervention as a disaster because it was used as a political football between opponents. Furthermore, opponents to the intervention did not mind a "lame duck intervention" because they preferred a working relationship between the national and provincial spheres of government, rather than a takeover of the department by the national government. And it is also possible that they preferred a lame duck intervention so that the chaos that allows the looting in the ECDE could continue. The S100 (1) (b) intervention was unpopular and lined the pockets of consultants who were contracted to assist with the intervention.

Within this narrative, some characters and their roles in the intervention emerged. The first character to emerge was the SG of the ECDE at the time of the intervention. The SG is a direct representative of the tension between the national and provincial spheres of government as will become clear in the rest of this chapter. This SG was a complex character, but they made a significant contribution to the intervention action by saying that it was a watered-down process and lacked the effectiveness that it required to resolve the problems in the ECDE. This SG even fought with the DBE Minister about the ineffectiveness of the intervention and eventually lost their job. The second set of characters to emerge are the Administrators sent to the ECDE by the Minister to lead the intervention. These Administrators were not all sent to the ECDE at the same time. So, in order to protect their different identities, I will not reveal their tenures in chronological order. The number of Administrators sent and the issues surrounding their tenures and dismissals give an indication about how difficult and contentious the ECDE intervention was.

One of the Administrators was simply described as "ineffective". Another Administrator was not liked or regarded by the MEC for Education in the province. This Administrator had the potential to become the SG of the ECDE after the intervention but the MEC's disdain for them prevented this appointment. When this Administrator's competition for the position was appointed as SG, they also tried to appoint the overlooked Administrator as CFO for the ECDE – given their competence in financial matters. However, the newly appointed SG was warned by the education trade unions not to appoint this former Administrator because that would be an act of "political suicide". Another Administrator was eyeing the job of the SG following their role as administrator, but they did not get the job and was left disgruntled. Another Administrator was sent to the ECDE as a strong preference of the Minister of the DBE. Their role and presence in the ECDE were described as being *the* intervention. But upon tracking down and talking to the said Administrator, they categorically denied being part of the intervention in any shape, form or fashion; and, they did not know why the officials in the ECDE had that impression. And yet another Administrator's role was delegitimized when the S100 (1) (b) intervention was challenged in court.

6.7.1 Intimidation of Staff in the ECDE

On 17 August 2011, the DBE Minister sent an "Urgent Memorandum" (Urgent Memo hereafter) to Senior Managers in the ECDE and a letter to the Eastern Cape's MEC for Education. The tone of the letters differs significantly, but the main issue stood out in both letters: intimidation of staff in the ECDE as part of a resistance to the intervention by top-level officials of the ECDE. In the Urgent Memo, the Minister begins by commending the managers for their commitment to the intervention, as well as their participation and also references "several meetings" that took place between national and provincial educational structures (Urgent Memorandum, 17 August 2011: 1).

This indicates that there was an understanding of the need for an intervention and cooperation with this measure on the part of the senior management. Compared to the S100 (1) (b) intervention in the LDE, the ECDE's senior management agreed with the intervention. The Minister then goes on to raise a matter that was brought up during a meeting in the province on 12 August 2011. It seems that the meeting was one of many that took place regularly during the intervention. The Urgent Memo stated that the senior managers

> "alleged that, on a daily basis, [they] are faced with monumental challenges in the department, including high levels of intimidation and victimization, unprecedented abuse of power and authority, disrespect and humiliation – sometimes in full view of the public and junior officials of the department" (Urgent Memorandum, 17 August 2011: 1).

As part of resolving the mistreatment of senior managers, the Minister promised to write to the MEC for Education in the province, Cabinet and the 5x5 MinMec Task Team to raise the issue. In the Letter to the MEC for Education on the same day, the Minister details this issue and specifically mentions that the senior managers of the ECDE were being intimidated by the SG of the department at the time (Letter to the MEC, 17 August 2011: 1). Interestingly, the Minister notes that the MEC was in the first half of the meeting in which the intervention was discussed; and, that it was a "pity" that the MEC "had to leave before the second session" when the issue of intimidation was raised (Letter to the MEC, 17 August 2011: 1). According to the Minister, the nature of the issue of intimidation was rooted in the following:

> "the section 100 (1) (b) intervention being questioned or ridiculed by the Superintendent-General…my authority, as the Minister mandated by Cabinet to drive the implementation of the section 100 (1) (b) intervention in the Eastern Cape Education Department, being questioned and undermined; senior managers being vilified, slandered, victimized and intimidated by the Superintendent-General of the Eastern Cape Education Department" (Letter to the MEC, 17 August 2011: 1 – 2).

Therefore, the SG of the ECDE at the time was accused of subverting the course of the S100 (1) (b) intervention and the role of the Minister as the representative of the national government, and as a result, the SG was intimidating senior managers in the department, as a way of resisting the process altogether and that the MEC was involved in resisting the process in other ways. The ways in which this resistance was taking place were listed by the Minister in the letter. The letter is pregnant with accusations, but for purposes of time, I will give a summary of the accusations by the minister against the SG. The Minister stated that the SG Modidima Mannya disregarded the intervention in management meetings (Letter to the MEC, 17 August 2011). He is to have been maintaining that him as the SG was in charge and anything instituted by the minister had no value – he blatantly disregarded the intervention stating that all work in the province had to be done within the ambits of his decisions. The SG also refused to accept the delegation from the national government and the Minister interpreted this as a disregard of his authority. The Minister argued that the SG framed charges against all senior management whom he felt were not advancing his cause; these charges led to some members of the management being investigated by the Hawks (South African directorate for priority crimes). In some cases, it is stated that he harassed, disrespected and victimized central government delegation. Worst case scenarios saw the suspension of these delegates without due processes being followed. The letter reads;

> The unprecedented levels of intimidation, threats, harassment, disrespect, and victimisation, which are subsequently followed by wholesale suspensions, in some cases without due processes being considered. Consequently, an atmosphere to execute good public service in a labour environment that is sound and peaceful, has been damaged, contrary to my advice in the first letter I wrote to you on 22 March 2011. *While I accept that in law and administrative practice, the Superintendent-General can sign letters suspending middle managers, staff lower than middle managers, and educators, I wonder who signed the letters suspending the SMS managers.* (Letter to the MEC, 17 August 201: 1)

Thus, the Minister, while acknowledging the SG powers, he castigated his extra-judicial actions that served to advance his parochial goals while derailing the intervention. The SG is reported to have been disrupting all programmes under the intervention through dismantling committees and tampering with Bids in the province. The minister postulates that:

> There were dubious reasons for dismantling and reconstituting the Bid Committees from those established by the predecessors of the incumbent Superintendent-General, namely *Professor Harry Nengwekhulu and Mr. Ronnie Swartz. There may be a need to establish the basis on which those Bid Committees were dismantled and new ones established"* (emphasis contained in original text; Letter to the MEC, 17 August 2011: 2 – 4)

In short, the SG, at least according to the letter, is portrayed as running a parallel project during the intervention.

The list is incredibly long and damning. Within this list, there is a blatant denial that there is even a S100 (1) (b) intervention. Such behavior is subversive, especially from the SG of the ECDE because it shows that the top leadership of the department despite their declarations to the contrary during the initiation of the S100 (1) (b) intervention earlier in 2011. It is also subversive because there were formal processes that were begun and drafted following the consultations and meetings with both the provincial and ECDE leadership. Therefore, the accusations of actions against the intervention were concerning. Another factor in the list that shows the subversive nature of the SG's actions is the statement that, "he [the SG] has been confirmed by the Eastern Cape Provincial Executive as the accounting officer of the ECED; and that anyone who does not internalize this reality will face his wrath" (Letter to the MEC, 17 August 2011: 2). This means that despite the delegations for HOD/accounting officer being given to the National Intervention Coordinator by the Minister, the SG and provincial executive "confirmed" that the SG remained an "accounting officer" after the fact of the delegations being reallocated.

In terms of decentralisation, the Minister's list indicates that the provincial structures of the Eastern Cape as well as the ECDE were not only resisting the intervention in subtle ways through formal processes; the resistance by the SG and the MEC was actually an assertion of semi-autonomy as a province. This was done in a number of ways according to the Minister's list, and all for the purpose of enforcing the ECDE's and Eastern Cape's authority more than that of the national government. Some of the ways in which this authority was reasserted was administratively and technically. This was evident in a number of ways according to the Minister's list. For example, the SG hindering the work of the National Intervention Coordinator by telling staff and managers not to cooperate with the Coordinator, and issuing directives to "execute unreasonable, impractical and unlawful instructions" (Letter to the MEC, 17 August 2011: 2 – 3). Such actions and the level of resistance could also be indicative of a misunderstanding of South Africa's decentralization. The Constitution is clear that the spheres of government are to be cooperative, interdependent and interrelated. Thus, such resistance to the intervention was not aligned to these values. Finally, the intimidation of senior managers and staff in general reveals a bad working environment that is toxic and damaging. It displays the lengths that the SG was willing to go to reassert his position as the accounting officer of the ECDE. In the letter to the MEC, the Minister questioned the actions of the SG:

> (a) What makes the incumbent Superintendent-General behave and/or act in the manner as alleged above?
>
> (b) Which public servant can slander the decisions of the National Executive in the manner reported above?
>
> (c) What gives the Superintendent-General the impression that he can undermine my powers and authority as the Minister, specifically mandated by Cabinet to implement the section 100 (1) (b) intervention in the Eastern Cape Education Department?

(d) What makes the Superintendent-General to believe that he is above the legal regime defined through the Constitution and applicable legislations? (Letter to the MEC, 17 August 2011: 4).

The foregoing shows that the working relationship between the national and provincial departments of education had collapsed. It does not look like there was a direct confrontation between representatives of the two spheres, based on these documents alone. Neither does there seem to be a point at which the Minister, MEC and SG disagreed. But the tone and content of these letters indicates that there was a breakdown along the path of the intervention. And although the Minister was careful to frame the issues as allegations, the very effort of having to do so illustrates that this decentralised relationship was strained.

6.7.2 Withdrawal and Reallocation of Delegations

The forgoing section revealed there was a serious problem around the withdrawal and reallocations of delegations by the Minister of the DBE. The problem with these delegations is that they were withdrawn from incumbent officials in the ECDE and given to the National Intervention Coordinator. The result is that firstly, the incumbent officials in the ECDE, particularly the SG, were unhappy with the withdrawal of their delegations. Secondly, there was confusion about who was allowed to run the department through operations, finances and other departmental administration. Thirdly, the issue was contested as part of legal cases. One such case was heard in the Bhisho High Court of South Africa in the Eastern Cape. The case was between 30 applicants and the SG, the MEC for Education in the Eastern Cape, the Premier of the province, the Minister of Basic Education, the National Intervention Coordinator and three additional respondents. According to an answering affidavit provided by the SG of the ECDE at the time, the applicants were employees in the ECDE at one point, and the SG took disciplinary action against them by charging and suspending them. As a result of these charges, the applicants were challenging whether the SG even had the authority to discipline the applicants because they were not the SG of the ECDE at the time (Bhisho High Court, case no: 378/2011: 5). Rather, there was no SG of the ECDE, due to the S100 (1) (b) intervention being in place resulting in questions about who had which powers in the department. The applicants argued that the National Intervention Coordinator, not the SG, has the sole power to authorise and institute disciplinary proceedings in the Department" (Bhisho High Court, case no: 378/2011: 7). But the SG contends that this challenged his authority and would be terrible for maintaining discipline in the ECDE and would put an end to the disciplinary processes and destabilise processes underway to stabilise the department (Bhisho High Court, case no: 378/2011: 6).

The issue about who has the authority to initiate disciplinary action in the ECDE becomes a major stumbling block for the S100 (1)(b) intervention because it questions the legitimacy of the incumbent officials in the department during an intervention as well as the precarious position of the National Intervention Coordinator in the same situation. Moreover, it questions the legitimacy of the Minister's powers, particularly as a representative of the national government. On the other hand, this legal action against the incumbent SG could have been a frivolous attempt by the applicants to get the disciplinary charges against them dropped or; this legal action could have been a serious indictment of the general behavior of the incumbent SG and their relationship with colleagues in the ECDE. Whatever the reason, the case indicates the tension between national and provincial officials during an intervention. The case also reveals what the incumbent SG thought about the withdrawal of their delegations.

To further complicate the issue, the SG argued that the Minister only delegated certain powers to the National Intervention Coordinator, and not all powers. The implication of this is that the SG retained some powers and although it's not clear which powers these are, it is apparent that one of the powers that the SG thought they retained is disciplinary power. This is confusing because the Minister clearly stated in the MOU that all powers of the HOD and accounting officer were to be vested in the National Intervention Coordinator. But for the purpose of establishing tensions about the S100 (1) (b) intervention, we will follow the SG's logic on this one. The SG begins the issue of delegations by stating that:

> "On 1 June 2011, the Minister delegated certain powers and duties vested in her as representative of the National Executive during the Section 100 (1)(b) intervention to Mr. Mweli, the MEC and myself" (Bhisho High Court, case no: 378/2011: 64).

The SG is saying here that instead of delegations being withdrawn and reallocated, powers and duties were delegated to the National Intervention Coordinator, the MEC and the SG. This was done by using a document called a delegation template, wherein each of these individuals were delegated a "specific statutory power and/or obligation" (Bhisho High Court, case no: 378/2011: 64). Apparently, the SG was not in possession of the MEC's delegation template. But in his interpretation of the National Intervention Coordinator's delegation template, "the Minister sought to delegate certain powers and obligations of the accounting officer under the PSA, the SSA and the EEA" (Bhisho High Court, case no: 378/2011: 65). This is consistent with the delegation reallocation discussed earlier. However, the SG interpreted the delegation as follows: "To me, the Minister delegated certain powers and obligations of the accounting officer under the SASA" (Bhisho High Court, case no: 378/2011: 65).

Firstly, this is clearly the SG's interpretation, which does not have to be confused with the actual intent and spirit of the delegations, and according to earlier discussions, the intention was to completely reallocate the SG's powers to the National Intervention Coordinator. Secondly, according to the PFMA, part of being an HOD or SG involves being an accounting officer. The two are intertwined because there are very few functions and operations that can be executed without proper financial and accounting oversight. Hence, the SG or HOD must have both functional and operational, and financial and accounting powers. And the SG, in their affidavit, has not acknowledged this technical or administrative aspect.

The next part of the SG's logic is the most crucial for this study and reveals a recurring problem with S100 (1) (b) interventions, both in the LDE and the ECDE. The SG says,

> "I pause to mention that the function of an accounting officer of a government department established under statute is to establish a single *locus* of responsibility for financial expenditures within the Department. That being so, it's crucial that there be no ambiguity or bifurcation of accounting officer responsibilities. Unfortunately, that is exactly what has happened as a result of the conflation and confusion of roles occasioned by the delegations" (Bhisho High Court, case no: 378/2011: 65 – 66).

The SG is correct in saying that the accounting officer is the central point of responsibility in the departments of public administration, and this is clear in the PFMA. The issue that arises in the case of a S100 (1) (b) intervention is that the incumbent HOD, in this case the SG, becomes displaced when their powers are withdrawn and the Administrator or National Intervention Coordinator takes over these powers – technically. But administratively and politically, it creates tension and confusion *within* the affected department. In the case of the ECDE, there was technical ambiguity, and administrative and political tensions. The technical ambiguity was created because according to the SG's affidavit, the documents assigning delegations to the SG and the National Intervention

Coordinator were identical (Bhisho High Court, case no: 378/2011: 66 – 69). As a result of this ambiguity, the National Intervention Coordinator,

> “sought to exercise the powers of the HOD and the accounting officer. *Inter alia*, he has convened meetings with senior management, issues instructions to staff members and continued to develop operational plans that department from the Department’s existing turn-around strategy…Mr. Mweli’s unauthorised conduct unfortunately gave rise to duplications of functions, consequential wasteful expenditure and general administrative uncertainty. The instant case is an example of the fruit from the seeds of uncertainty planted by Mr. Mweli” (Bhisho High Court, case no: 378/2011: 83 – 84).

The disturbing part of this accusation by the SG is that the National Intervention Coordinator had the right to behave in the manner of both HOD and accounting officer The SG was defending their position in order to uphold disciplinary action that they took against staff of the ECDE, actions that may have actually been legitimate. But the subsequent attack on the National Intervention Coordinator’s equally legitimate actions was misplaced. Nevertheless, a misstep in the process of S100 (1) (b) interventions whereby delegations that are necessary for both the daily functioning of the department and the extraordinary occurrence of a constitutional intervention need to be clarified. This was unfortunate in the case of the LDE, but it was more devastating in the case of the ECDE because this S100 (1) (b) was supposed to be a final resolution to the immediate and perennial problems in the department and the challenge to the National Intervention Coordinator within a year of the intervention would have questioned the legitimacy of the whole S100 (1) (b) exercise.

These legal documents show that within the first year of the S100 (1) (b) intervention in the ECDE there was agreement between the national and provincial structures. However, there were disputes that arose from the delegations between the incumbent SG and the incoming National Intervention Coordinator. These disputes cover a very legal and technical aspect of the S100 (1) (b) intervention. But the question of whether actual work was done during these disputes cannot be easily answered. This is an issue that I came across in the field whereby it was not clear whether the national government managed to get the intervention going. I grappled with an answer to this. On the one hand, the intervention was initiated as a S100 (1) (b) intervention and then “watered down” to a S100 (1) (a) intervention. In the latter case, a S100 (1) (a) intervention is one that involves monitoring and supervision from the national sphere, as opposed to a full takeover of the relevant department. When I asked an interviewee about why the intervention was watered down, their response was as follows:

> “What happened politically, there was a fight back from the provincial politicians, the provincial government; because the implication of a Section 100 intervention, whether it’s the full one or the joint one, one with joint responsibility, is it’s a vote of no confidence in the provincial governance. Because they’re supposed to have actually fulfilled their constitutional mandate. So, in the end, they brought the president on board and the president [at the time, former president Zuma] took a political decision, that it will be diluted to a sort of an intervention where both national and provincial government – that’s Section 100 (1)(a) – they have joint responsibility.” (ECSMSI 2, 13 October 2017).

There are a number of issues that come out of this response. Firstly, despite the interdependent and distinct nature of South Africa’s decentralized governance, it is inconceivable that a provincial government can resist executive action. Secondly, the movement of political power at this point became fluid and detrimental to the success of the intervention. One direction of this political power was from the provincial executive upwards towards the executive at the time. This is because, according to this interviewee, the provincial executive managed to convince the president at the time that the S100 (1) (b) intervention should be watered down. In doing so, the provincial executive would have circumvented the Minister of Basic Education's role in the whole intervention process. It is rumoured that the former president was persuaded by the provincial executive and watered down the intervention on condition that they would always have a political constituency in the Eastern Cape. Thirdly, the provincial executive perceived a Constitutional intervention as an indictment on the leadership of that executive. And really, such an intervention could be perceived that way. But considering the state of the ECDE at that point, and previous attempts to fix the perennial problems in the department, there was no reason and no time to take this intervention politically.

With all these issues in mind, it became apparent during my field work that there were some people who thought that there was never an intervention in the ECDE. However, this was corrected by one interviewee who physically left one province in South Africa, to work in the ECDE as part of the intervention team appointed by the national government. The interviewee recalls that "we had a very sound intervention strategy; we had very specific intervention objectives, those objectives were informed by the fact that the department [ECDE] had overspent on its budget in the previous financial year, if I'm not mistaken, by R130 million" (ITMI1 Interview, 13 October 2017). However, officials in the ECDE received the intervention as 'tokenistic' and gave the intervention team a "perpetual run-around" (ITMI1 Interview, 13 October 2017). For instance,

> "A turn-around plan was drafted, and when we attempted to implement what we were confronted with was essentially a go slow. What we anticipated should take a week, took a month. What we anticipated should take a month, took a term. What we anticipated should take six months, took a year. So, ardent lip-service was paid to the turn-around plan; the implementation of the turn-around plan was scuppered. And it was done very subtly, but very pervasively" (ITMI1 Interview, 13 October 2017).

When the interviewee finally got some information about the resistance to the intervention in the ECDE, they were told that, "before we came to the province, the MEC called a meeting and said, "We will welcome them, and, on the surface, we will appear to comply. But as far as I'm concerned, it's business as usual"" (ITMI1 Interview, 13 October 2017). The interviewee also emphasised that contrary to rumours and public reports, there was definitely an intervention that took place which they were part of and it ended in June 2013 (ITMI1 Interview, 13 October 2017). Therefore the narrative that there was no intervention in the ECDE is partly an obfuscation on the part of those who resisted the S100 (1) (b) intervention in the ECDE (ITMI1 Interview, 13 October 2017).

6.7.3 Reassertion of Provincial Structures

In an earlier examination, it was clear that the SG, and possibly the MEC, were not happy about the S100 (1) (b) intervention and the presence of the National Intervention Coordinator. Accordingly, the SG opposed the idea that the Minister handed all delegations, including that of accounting officer, to the National Intervention Coordinator. In the SG's answering affidavit, the SG revealed more details about how the Provincial Executive Council, the MEC and the SG subverted the process of the S100 (1) (b) intervention at the time. In essence, this subversion was a way of reasserting provincial structures as a sphere of government and not as a department under intervention. It is strange that the provincial structures and officials took the intervention into their own hands instead of approaching national structures when there were issues to do with the intervention. The main way that provincial structures in the Eastern Cape tried to reassert themselves above the intervention in the ECDE was by instituting provincial officials to retain their powers and delegations, and in so doing, not comply with the intervention. As a result, the Provincial Executive Council took some actions that would block out the ability of the S100 (1) (b) intervention to function, even though the National Intervention Coordinator. According to the SG's answering affidavit:

> "Also, the Provincial Executive Council (the "EXCO") met on 28 June 2011 to consider, *inter alia*, a report by the MEC regarding the implementation of the intervention. The MEC reported that, because of the manner in which the intervention had been implemented, the administration had "ground to a halt". Officials had taken the view that the department had "no authority to make decisions"" (Bhisho High Court, case no: 378/2011: 24).

And,

> "The EXCO resolved that, until such time as the Province's concerns regarding the MOU were resolved in consultation with the task team, the "*administrative delegations* [would] *remain vested in the Province and its appointed officials*"" (Bhisho High Court, case no: 378/2011: 24).

There are very two important aspects to this, one of which was discussed earlier. One is the impression that the ECDE was not under intervention or was not being effectively steered by the DBE in the intervention. Second, these NGOs are closest to the ECDE because they are based in the Eastern Cape. Thus, their view of what is happening on the ground, especially given the set up decentralisation, is one that cannot be ignored. If the changes that are sought are not being seen or recognised by those most affected or close to them, then the decentralisation model has failed on two fronts. On the one front, it has failed because the provincial education system has collapsed. On the other front, decentralisation has failed because even a mechanism of decentralisation in the form of Constitutional interventions is not seen to be working. What followed this urgent application were answering affidavits. Again, as with many documents related to the Eastern Cape study, these affidavits are useful because they reveal pertinent information about the S100 (1) (b) intervention specifically and decentralisation generally.

Effectively, the provincial leadership was displacing the national government's authority to intervene in the ECDE and was reasserting its own authority over the education department. As discussed in the Literature Review, it is possible for a central or national government to take authority back from subnational governments that fail to function for whatever reason. In light of S100 (1) (b) and all that it entails, one can argue that it has recentralising tendencies, albeit temporary. However, what has not yet been accounted for in the literature is a blatant reassertion of decentralised authority by a subnational government or department. Unlike in the LDE, there was no administrative in the ECDE while the national government maintained an administrative representative through the Administrator/National Intervention Coordinator. Instead, the department and the Eastern Cape provincial government actively invalidated the S100 (1) (b) intervention and questioned the legitimacy of national government's intervention actions as well as revolted against the intervention and reasserted their authority. This was a monumental and troubling action in terms of providing education as a public service because it placed the political feelings of the ECDE and provincial leadership ahead of the education needs of learners. In terms of decentralisation, such action is akin to asserting federal autonomy.

Advocate Mannya's version of events is vehemently denied by the DG of the DBE at the time, Mr. Bobby Soobrayan, who provided a supplementary affidavit on behalf of the Minister and himself as the DG of the department (Soobrayan Supplementary Affidavit, 15 March 2012). In that affidavit, Mr. Soobrayan states that both Advocate Mannya and the MEC for Education in the Eastern Cape, the Premier of the province as well as other SMS members of the ECDE were present at a number of consultations about the MOU (Soobrayan Supplementary Affidavit, 15 March 2012: 3 – 4).

Therefore, by implication, any issues around the MOU should have been raised by Mannya at those consultations. In addition to the MOU consultations, Soobrayan states that, “The Implementation Framework was a product of meetings between senior officials from the DBE and the ECED, which were co-chaired by Advocate Mannya and myself. At these meetings, the strategic situational diagnostic analyses were carried out” (Soobrayan Supplementary Affidavit, 15 March 2012: 4). Having been part of the intervention initiation processes and the formal acceptance of the process by the NCOP, Mr. Soobrayan describes Advocate Mannya as one who “refuses to accept the authority of the National Executive to intervene in the ECED or the very real and ongoing reasons necessitating such an intervention” (Soobrayan Supplementary Affidavit, 15 March 2012: 5).

Mr. Soobrayan then refers to a meeting that took place in Cape Town where a “5 x 5 MINMEC Task Team” established to assist with the intervention and the meeting took place on 21 June 2011 (Task Team Meeting, 21 June 2011). The Task team comprised 5 representatives from the national executive, 5 from the Eastern Cape Provincial Executive Council (PEC), and technical support from the DBE. The members of the Task Team were:

Figure 14: "5x5 MINMEC Task Team"

	National Executive	Eastern Cape PEC
1	Minister of DOJ & CD: Mr. Jeff Radebe (Chair of Committee)	MEC for Finance and Planning: Mr. Phumullo Masaulle (Task team Leader)
2	Minister and Deputy Ministers of Finance: Mr. Pravin Gordhan and Mr. Nhlanhla Nene	MEC for Education: Mr. Mandla Makupula
3	Minister and Deputy Ministers of the DBE: Ms. Angie Motshekga and Mr. Enver Surty	MEC for Sports, Recreation, Arts and Culture: Mr. Xolisa Tom
4	Minister of Higher Education and Training: Dr. Blade Nzimande	MEC for Local Government and Traditional Affairs: Mr. Mlibo Qoboshiyane
5	Acting Minister of the DPSA: Ms. Mildred Oliphant	MEC for Economic Affairs and Tourism: Mr. Mcebisi Jonas

Source: Task Team Meeting, 21 June 2011: 1

Based on the structure of this Task Team, it is clear the team was multisectoral, both at national and provincial levels. It was clearly structured in this way to ensure that the skills required to manage both the intervention and the administrative controls and tools needed within the ECDE.

The document that came out of that meeting, which is referred to in Mr. Soobrayan’s supplementary affidavit, brings up a number of issues pertaining to the S100 (1) (b) intervention. These issues were the misinterpretation on the purpose and usefulness of this intervention; the power of the intervention resting with the national government and not with the provincial structures; and how to maintain the intervention in the midst of push back from the provincial structures. On the issue of misinterpretation of the purpose and usefulness of the intervention, the meeting document states that:

> “it was apparent that there were divergent interpretations on the implementation of section 100 (1)(b) intervention, and that there were reservations raised by the province with regard to the need for this intervention but the national team responded by clarifying that realities and deficiencies of education in the province were extremely serious and demand an urgent and decisive intervention.

> The meeting reiterated the fact that the section 100 (1) (b) intervention was the correct instrument to use and would continue" (Task Team Meeting, 21 June 2011: 2).

This explains that even at a high-level meeting such as this one, there was acknowledgement and concerns that there were different interpretations about how S100 (1) (b) should be implemented. Moreover, there was also an objection from the province about whether this intervention was necessary. The national representatives emphasised the importance and went ahead with the intervention. This demonstrates that the national and provincial sphere did not have a sudden clash over the necessity of a S100 (1) (b) intervention as may be supposed based on Mannya's court documents. Rather, there were prior engagements between bot spheres about this executive decision. There is also an inference that the provincial representatives did not see this intervention as necessary, which suggests that they did not see problems in the ECDE as sufficient enough to warrant such drastic Constitutional action. It is also highly likely that these provincial representatives were not behind the S100 (1) (b) action. This brings up what Fraser-Moleketi referred to as buy in from the provincial structures, discussed earlier. The lack of buy in from provincial representatives continued throughout the intervention as evidenced by the letters and court documents that allege intimidation and subversion of the intervention process.

On the issue of the power of the intervention resting with the national government and not with the provincial structures, the meeting document states that:

> "The meeting emphasised the important of ensuring that the intervention should be based on full authority being vested in the National Executive over those areas of focus, the scope and duration of the intervention to the extent necessary. In this regard, it was agreed that the delegations in respect of financial management, planning and human resource management vest with the Minister of Basic Education. The delegations for other operational functions relating to the core business of the Eastern Cape Education Department which are to ensure effective teaching and learning, would remain with the incumbent Head of the Eastern Cape Education Department" (Task Team Meeting, 21 June 2011: 2).

This part of the document emphasises that the national government bears primary responsibility for the intervention which means that no matter what the opposition to the S100 (1) (b) intervention by the provincial representatives was, the National Executive had to manage the intervention. Another important function that this part of the document performs is that it clearly distinguishes the delegations between the National Executive and the SG of the ECDE. This is important to flag because throughout the documents discussed in this case study, as well as the LDE case study, the problem of the withdrawal and reallocation of delegations persists. Therefore, this part of the document clearly delineates the different delegations as they pertain to the S100 (1) (b) intervention. Furthermore, this point was discussed in the presence of provincial representatives who should not have later denied the knowledge of the withdrawal and reallocation of these delegations.

On the issue of how to maintain the intervention in the midst of push back from provincial structures, the meeting agreed states that a decisive solution be found to correct the situation where the implementation powers of the National Executive are challenged. This statement says a lot about the fact that there were ongoing battles of authority between the national and provincial executive governments and their departments. Even where national and provincial representatives met, there was strong disagreement about the need for the intervention, its procedure and where authority to practice was vested.

In the end, the meeting resolved that:

"In addition to the above matters, the meeting reached agreement on the following:

(a) That the implementation of the intervention in the Eastern Cape Education Department in terms of section 100 (1)(b), should continue unhindered and would be informed by a spirit of cooperative governance;

(b) That the Minister of Basic Education, in terms of her powers and responsibilities to implement the section 100 (1)(b) intervention, is empowered to delegate [to] whoever she deems appropriate to undertake any function or set of functions pursuant to the implementation of the intervention;

(c) That on Thursday, 24 June 2011, the MEC for Finance and Planning will provide specific details on matters that may enhance and strengthen the effective…[words missing from document due to poor photocopy]

(d) That by 24 June 2011…[words missing due to poor photocopy] process to appoint someone, other than the incumbent Head of the Eastern Cape Education Department, as the accounting officer of that department in terms of section 36 (3) of the Public Finance Management Act, 1999 (Act No. 01 of 1999);

(e) That the Department of Basic Education and the Eastern Cape Education Department will ensure that the principles of professionalism, integrity, mutual respect, honesty, hard work, commitment and dedication to the Public Service Regulations and rules, are observed in the implementation of the intervention;

(f) That the five Ministers and the five MECs Task Team will continuously interact with each other, to ensure that the intervention is implemented successfully; and

(g) That the communication henceforth, will be done cooperatively, to ensure that a uniform message is communicated to the public." (Task Team Meeting, 21 June 2011: 3).

So, there was an agreement that the S100 (1) (b) intervention would continue. It is unclear whether this was a mutual agreement between the national and provincial structures. However, one can infer that this agreement irretrievably broke down by the middle of the intervention and in conjunction with this agreement, there was an attempt to reiterate that the Minister was allowed to "delegate [to] whoever he deems appropriate to undertake any function or set of functions pursuant to the implementation of the intervention" (Task Team Meeting, 21 June 2011: 3). This unfortunately fell on deaf ears. The only promising agreement that came out of the meeting was the intergovernmentalism and cooperation between the national and provincial structures.

Recalling that these documents and affidavits were part of a court case in the Bhisho High Court, I will now turn to the outcome of the case. The application brought by the Save our Schools and Community and Catholic Institute NGOs was "dismissed with costs" (Bhisho High Court, case no: 378/2011: First Respondent's Heads of Argument), on the grounds that:

> "In bringing this application the Applicants are undoing the process embarked upon by both National and Provincial government and are attempting to undermine their efforts. This the Applicants are not entitled to do. Indeed, the orders which continue to be sought seem to be aimed at embarrassment of the Government rather than to ensure the deployment of resources to deal with the problem" (Bhisho High Court, case no: 378/2011: First Respondent's Heads of Argument).

The impression that this judgement gives is that the NGOs that brought this application were purposefully 'undermining' the work of the national and provincial governments. This is an unbecoming attitude against a section of society that often raises urgent issues in society. Moreover, the idea that the NGOs sought to 'embarrass' a whole national government is worrying and a travesty. Such a dismissal is even more worrying given the amount of evidence used to show that the intervention was breaking down. As a researcher, I cannot undermine a court dismissal or decision because I am not a legal practitioner, nor do I seek to disrespect courts. But the chaos that was the S100 (1) (b) intervention in the ECDE at the time was not aided by this application's dismissal.

6.8 Preliminary Analysis of ECDE Case Study Findings

The S100 (1) (b) intervention examined in this case study was the third national attempt to resolve the perennial and immediate causes of the intervention. The perennial causes of the intervention illustrate that the historical context and the guidance, or lack thereof, during the transition to democracy necessarily impact the condition of the ECDE today. The perennial problem of a lack of institutionalised interventions and reforms, as per the DBE's analysis, is one that is difficult to handle. In terms of decentralisation, however, the three interventions examined in this chapter, from the extra-legal to the Constitutional interventions, demonstrate that the national executive and departments are well aware of the deep-seated issues in the ECDE. Moreover, national government has attempted to restore controls and stabilise the ECDE. In addition to this, the immediate causes of the intervention display common problems in provincial public administration departments. These common problems may not require intensive care in other contexts but in the context of the ECDE and the Eastern Cape as a whole, these common problems form a plethora of issues in the department.

Formally, technically, and legally, there are a number of documents and procedures that set the S100 (1) (b) intervention in motion in the ECDE. These documents are the MOU and the Implementation Plan, while the procedures included giving notice to the NCOP, appointing a National Intervention Coordinator, and withdrawing and reallocating delegations. In this regard, there was a lot of movement around the initiation of the S100 (1) (b) intervention; and these documents and procedures would be vital as evidence later in the intervention. Where the process of the intervention is concerned, the most overwhelming finding is that the intervention was resisted at very high levels and on a legal level. The chief instigators of this resistance were the MEC for Education and the SG of the ECDE at the time and the main reason for this resistance was that the intervention would be an indictment on the provincial leadership of the Eastern Cape. During the fieldwork, I could not understand why a provincial leadership would take a S100 (1) (b) intervention so politically. In hindsight, and against the historical context and previous interventions, this perception resistance of the provincial leadership is now understandable. However, in terms of decentralisation, such high-level and legal resistance is tantamount to resisting a Constitution that is clear about the expectations of education and the remedial measure of interventions when necessary.

Another overwhelming finding in this ECDE case study is that officials of the ECDE and part of the provincial leadership tried to delegitimise the whole S100 (1) (b) intervention in the department. This was done on a number of occasions and in different ways. On the first occasion, the SG of the ECDE allegedly threatened and intimidated staff in the ECDE. The reports of threats and intimidation of staff gives insight into the type of environment that existed in the department at the time. Such an environment is toxic and the extent to which it is part of the institution of the ECDE can be inferred from the letters from the Minister of DBE. Such a toxic environment is not healthy for a positive public administration department. In addition to these threats and intimidation, the SG pronounced that the national government did not have authority in the ECDE and that the MEC alone had that authority. This is subversive, as well as dismissive of the role of the DBE during an intervention and the role of decentralisation generally. On the second occasion, the provincial leadership actually questioned the necessity of an intervention in the ECDE during a 5x5 MINMEC Task Team Meeting held between the national and provincial spheres. This demonstrated that even in the midst of an intergovernmental and cooperative forum, the provincial leadership was bold in their assertion that they were not behind the intervention. Also, as Mr Soobrayan's supplementary affidavit attested that the provincial leadership was aware of all the measures that were being taken for the intervention and the reasons thereof.

The third occasion which was the culmination of the ECDE leadership's resistance to the intervention was the assertion that the Minister of the DBE had only withdrawn and reallocated some delegations in the case between Zibi and Others vs. the SG of the ECDE and Others. The logic that the SG followed in this case was flawed and the SG tried to argue, again, that their authority was essentially above the decisions of the national government. These occasions are representative of the levels of resistance to the intervention, and it is worrying to think that staff in the ECDE could have been subjected to more and worse. The intervention was ended when a judge declared that the intervention lapsed and ended after three years. As such, the intervention was not entirely successful because according to the case between the Acting HOD vs. SADTU, the acting HOD at the time was appointed under the auspices of continuing the work of the intervention.

In terms of decentralisation, the ECDE case study presents a complex scenario in which the attempts at recentralisation through the intervention are just not robust enough to counter the resistance in the ECDE. Theoretically, the provincial leadership, through the MEC of Education at the time, were treating the ECDE and the province as if it was a federal state and not a decentralised province. The consequences of such an action are evident in this case study; namely, that there will be a constant, and almost illogical, reassertion of autonomy, resulting in disruptions that do not assist intervention measures. Unfortunately, in the case of the Eastern Cape it seems that the more the national sphere advances with intervention and restorative measures, the more the provinces and its departments retreat and become overly defensive.

7 Chapter Seven – Conclusion and Recommendations

7.1 Conclusion of Findings

South Africa's democratic decentralisation is underpinned by four principles in the 1993 Interim Constitution. These principles are the constituting, majority, decentralising and boundaries principles. Each of these principles adds an integral component of either governance or administration to the country's decentralised mode of governance. These principles appear in the 1996 Constitution. The constituting principle appears in the Founding Provisions of the 1996 Constitution which states that the Constitution is supreme, and which later manifests under the powers and constitutions of provinces, where these provincial powers and constitutions are subject to the national Constitution. The decentralising and boundaries principles appear in the intergovernmental, concurrent and exclusive functions of the 1996 Constitution. The majority principle is evident in the fact that the majority of the NCOP must agree with constitutional amendments. This shows that decentralisation and its ensuing and supporting codes are contained in the South African Constitution. That is, although the Constitution reflects decentralisation as a structure for the South African state and a mode of governance, there is no explicit expression that the South African state is a decentralised unitary state. The latter can be dismissed as insignificant or unnecessary because the Constitution is a living document that is open to interpretation until a matter is determined by the Constitutional Court.

However, the lack of clear terminology around a decentralised unitary state causes a constitutional crisis for the implementation of the functions and mechanisms of decentralisation. In addition to decentralisation being implicit in the 1996 Constitution, South Africa's decentralisation is operated on the basis of intergovernmentalism. Intergovernmentalism is supposed to acknowledge all spheres of government instead of privileging national government which creates a hierarchy that subnational governments must conform to. But even in the midst of an intergovernmental system of operation, there are centripetal government departments that sit at the apex of policy and oversight departments. There are delivery departments that have both concurrent and exclusive responsibilities such as the DBE and its provincial departments. Again, this emphasises the fact that South Africa's mode of governance is decentralised. Therefore, South Africa's decentralisation is also part of the intergovernmentalism in the Constitution because it relies on a specific type of interaction between the spheres of government. Apart from intergovernmentalism, the 1996 Constitution contains interventions as a mechanism of decentralisation. Interventions are mechanisms of decentralisation because they are supposed to be remedial and corrective measures from either the national or provincial sphere towards the provincial or local sphere, respectively.

Both the LDE and the ECDE are education departments that were built on racially and administratively fragmented foundations. In the case of the LDE, there were 7 Bantustan and own affairs departments that were amalgamated to create the current department. In the case of the ECDE, there were at least 2 Bantustan departments and 2 apartheid provincial departments that were amalgamated into the current one. This shows that apartheid was not just a racist separatist policy; but that in addition to that policy, it was producing separate administrations, each with variances in purpose and performance, which proved disastrous as these departments were underfunded, yet also had maladministration and corruption; and they had their own patterns of administration and management which were uneven and inconsistent for a unitary state. This was not the decentralised despotism that Mamdani identified in rural South Africa at large; but it was an autocratic and apartheid decentralisation, whereby state power was dispersed to the extent that it would not 'burden' the apartheid state. When the state sought to centralise some administrative powers through legislation, such as the Bantu Education Act, it did so in order to control its oppressive tendencies.

The above speaks to the need to firstly identify the ways in which states centralise and decentralise power, when and for which ends, and secondly, the need to differentiate between decentralisation and federalism clearly. Firstly, states centralise and decentralise power depending on their goals. As Kelsen pointed out, autocrats are more likely to centralise power while democracies are more likely to decentralise power. However, Kelsen added that there are no hard and fast rules about these likelihoods. Rather, the constitutions of states reveal the nature of power, where it resides and is dispersed, and to what end. The latter is exactly true of South Africa as the apartheid constitutions of 1910 and 1961 showed; the state president held all power and decentralised it to provincial councils, Bantustans and own affairs to carry out a separatist project. When there was a need to directly control a policy or service, this was centralised. Wittenberg also shows how the South African state through its consolidation and grand apartheid phases generally decentralised and multiplied administrations to satisfy its racist whims. Enter the democratic state, and it had to embark on the project of democratic decentralisation. This process involved creating one national government at the centre on one hand; and consistently decentralising provincial and local spheres on the other hand. As such, one must realise the nuances and complications of decentralisation in the colonial, apartheid and democratic formations of the African state.

Secondly, it is of great importance that we differentiate between decentralisation and federalism. *Decentralisation has a particular centre whereas federalism is multi-centric; decentralisation seeks to create certain efficiencies and increase participatory freedoms while federalism protects and guarantees pre-existing freedoms; decentralisation can recall some of its powers through recentralisation but federalism canno, and decentralised provinces are independent insofar as they do not jeopardise the integrity of the unitary state, while federal states can secede from a federal union on the basis that their independence is not being protected*. Of course, this is a brief theoretical summary and decentralisation can have federal principles. Moreover, there are variations of federalism. One of these variations is consociationalism, for which South Africa was a case study in the 1980s. The Buthelezi Commission considered consociationalism as a way to merge the then Bantustan of KwaZulu with the Natal apartheid province. This consideration was on the basis that the two areas could share economic growth whilst maintaining separate cultural and educational activities. As the transition to democracy began in the 1990s, these proposals became more federal and were pushed by political parties that sought to maintain their own powers against a democratic government. These federalist proponents did not succeed entirely as a decentralised unitary state was formed. But the supporters of a more unified state also did not gain an outright victory as provinces were formed partly to allow semi-autonomy to suit the federalists. Thus South Africa, much like the rest of the African continent, has gone from varying degrees of decentralised despotism, to autocratic or apartheid decentralisation, to democratic decentralisation.

The causes of the S100 (1) (b) interventions in the LDE and the ECDE were similar in some respects and different in others. Both the LDE and the ECDE had underlying and perennial causes of poor leadership and management, financial mismanagement and lack of proper controls over the finances and operations of the two departments. However, in the LDE, these underlying causes were as a result of a decline in the leadership and controls within the department which was previously a relatively functional department until the 2009/2010 financial year. In the ECDE, the perennial causes of the intervention were as a result of persistent administrative, financial and operational issues in the department. These issues were despite the extra-legal intervention that took place in the ECDE almost a decade earlier. The fact that there were immediate, underlying and perennial causes in both the LDE and the ECDE reveal that South Africa’s provincial education departments are in a perpetual state of public administration crisis. This crisis, at its foundation, is a consequence of apartheid’s flawed and fragmented design. The latter was evident in the history of the LDE and more present in the amalgamation of the ECDE.

Above this foundation, both departments had remedial measures taken to improve them in the immediate post-apartheid period (1994 – 2003). In the case of the LDE, the remedial measure was strong hands-on leadership that strove to create a reputable and well-performing provincial educational department. With the ECDE, there was an extra-legal intervention that sought to stabilise the functions and systems within that department. But it is in the same period that both departments also experienced their post-apartheid and democratic public administration issues. In the LDE, the changes in leadership seriously undermined the work in the department as Limpopo's provincial and departmental structures created an imbalance in the political-administrative interface which was weighted more towards political goals than administrative ones. The ECDE did not experience such a rupture, but it did not necessarily benefit from the extra-legal intervention that took place there.

In the LDE, the immediate cause of the intervention was the collapse of the Limpopo provincial government and administration in at least 5 of the province's departments. In addition to this, the finances of the LDE were plunged into the red because the OSD policy was implemented without adequate funding for its implementation. The backdrop to these immediate causes a political conspiracy that continues to plague South Africa's politics today. These immediate causes reveal two key things about South Africa's decentralisation. Firstly, South Africa's decentralisation is institutionally and systemically weak because although the Constitution, legislation and regulation allow decentralisation de jure, these institutions and systems are really struggling administratively and fiscally de facto. Secondly, the political and factional battles that take place within political parties and nationally, permeate and destroy governance and administration at the subnational level. This is important to understand because it exacerbates the constitutional crisis that exists as a result of an implicit and unclarified decentralisation.

However, I also cannot make the mistake of assuming that all the issues around decentralisation will be rectified once the constitutional crisis is resolved. As the political conspiracy in the LDE case study shows, the political-administrative interface is currently weighted more towards political decisions which have the potential to destabilise any decentralised province or institution. The underlying causes of the S100 (1) (b) intervention in the LDE add to the point above, where decentralisation in South Africa is institutionally and systemically weak because the nature of these problems indicate the administrative and fiscal issues within the LDE.

The LDE case study on the implementation of S100 (1) (b) reflects a constitutional crisis caused by the legislative gap between that section of the Constitution, existing regulatory frameworks and the MSI Bill. This is evidenced by the fact that although the initial response to the intervention was factional both in the province and within the LDE, the stronger resistance was towards the lack of formal documentation that would initiate, formalise and procedurally guide the intervention as well as formal guidance about how legal delegations in the department would change, be removed and later resume. This is a constitutional crisis and an ironic one because the very section of the Constitution that is supposed to remedy public administration crises is not clear enough with the IGFR and the PFMA, and is desperate for the enactment of the MSI Bill. What this tells us about decentralisation in South Africa is that it is still a work in progress in terms of being institutionalised and accepted as such in provincial departments; and the mechanisms of decentralisation themselves such as interventions, need to be concretised in order to institutionalise decentralisation practices in the way that they are envisioned and communicated in the Constitution. Decentralisation has been a mainstay of African and South African politics and administration in both oppressive and democratic eras. But the democratic decentralisation that South Africa has now, has been designed by our constitution writers, albeit with input and observation from international organisations and similarly decentralised countries as examples. Therefore, it is South Africa's legislation, institutions and cooperative government that has to set the parametres of this decentralisaiton through mechanisms such as interventions in general, and S100 in particular.

The above will be possible primarily through the enactment of the MSI Bill. As outlined in the chapter on the legal-administrative framework of South Africa's decentralisation, the MSI Bill is a pending piece of legislation that deals specifically with monitoring, support and interventions between the spheres of government. The MSI Bill can be perceived of as a very technocratic and punitive measure for resolving public administrative crises. However, the MSI Bill insists on monitoring and support measures that are both top down and bottom up *before* allowing an intervention, and where an intervention is necessary, it must be a last resort and procedurally compliant. Consequently, the MSI Bill clarifies intervention mechanisms procedurally, prevents the unnecessary or arbitrary use of these mechanisms and actually prefers more pre-emptive measures of monitoring and support. If the MSI Bill is enacted, it is hoped that monitoring and support would strengthen South Africa's model of intergovernmentalism because monitoring and support underpins intergovernmentalism.

The MSI Bill would have been instrumental in ensuring that formal procedures of MOUs, implementation plans, clarity around delegations and a general understanding of how the relationship between the national and provincial spheres would unfold during such a crucial time. Effectively, the MSI Bill would have dealt with one of the most prominent findings in the LDE case study i.e. closing the legislative gap. Hypothetically, if the MSI Bill was enacted and enforced prior to a case such as the LDE, there would have been monitoring and support measures prior to invoking S100 (1) (b). Thus, the constitutional crisis caused by lack of precise and consistent regulation of S100, and as described by S100 of the Constitution, would be averted by the use of the MSI bill. This provides a concrete step towards closing the legislative gap and regulating the decentralised relationship between the national and provincial spheres. However, the MSI Bill is a technical and administrative tool and it does not account for the second and third major findings in the LDE case study. That second major finding is the allegation of political interference of the provincial administration in Limpopo, particularly the LDE, while the third major finding is the allegation that one of the Administrators sent to the LDE exacerbated financial mismanagement in the LDE.

The political interference in the province, as evidenced by the political conspiracy, is a major charge against the national government and its executive. Firstly, it signifies that S100 is used as a punitive tool in decentralisaiton. This goes against the grain of democratic decentralisation theory which holds that subnational governments become recentralised when they lack resources or lack of ability to manage resources. However, what recentralisation does not discuss is whether recentralisation can be influenced by political and factional battles. Given the LDE case study, it is evident that political and factional battles as well as political conspiracies play an overwhelming part in the perception of the reason for intervention; in the acceptance or resistance of the intervention; and decentralisation between the national and provincial spheres. Perception and acceptance or resistances have been thoroughly illustrated in the LDE case study chapter. With regards to the effect of political battles and conspiracy on decentralisation, there is clearly an antagonistic relationship that emerges if the intervention is rooted in political battles and conspiracy.

Dr. Karodia's letter and report are significant and valuable for this research for a number of reasons. Firstly, in the absence of national government memoranda and similar source documents, the letter and report serve as official documentation that deals with the causes of the S100 (1) (b) intervention in the LDE. Furthermore, these details are given by someone who has been appointed by national government and is thus supposed to provide an overview of the issues in the LDE based on their experience and expertise. As such, the perspective provided in the letter and report are as close to a high level assessment or diagnostic report as I was able to obtain.

Secondly, Dr. Karodia's letter and report indicate the depth of the issues and causes of the intervention as well as the types and nature of the issues. That is, each issue is named; its nature and type is described, be it administrative, financial, operations, school level, etc.; and, the extent is also described. Therefore, unlike the annual reports of the LDE, interviews or source materials such as the committee summaries, the Karodia letter and report outline a lot of underlying and precipitating matters which are not otherwise or elsewhere discussed. Thus, the Karodia letter and report are franker and more transparent than other source documents. In response to this, it is arguable that other source documents, by their very nature and purpose, are usually more succinct and summary oriented than an administrative letter and report. Given this fact, the Karodia letter and report provides a useful and more engaging source of information about the S100 (1) (b) intervention in Limpopo.

In the third instance, the Karodia letter and report indicate what the relationship between the national government, the DBE, and the LDE is like when there is a national representative – the administrator – is placed in the province as a subnational sphere. This is an important observation for this research because it speaks directly to questions about the relationship between the national and provincial levels of government. The S100 (1) (b) intervention is a very unique situation for both the national government and the LDE as a provincial department. This is why I asserted in my research, very early on, that the intervention as a mechanism of decentralisation tests the relationship between the national and provincial levels of government. The administration and intervention team become the locus of expectations ad reactions, both from the national government and the relevant provincial department. On the other hand, the Karodia letter and report also provide an administrator's perspective on the intervention issues at hand.

There were some key similarities and differences between the intervention processes that unfolded in the LDE and ECDE. The key similarity is that there was no clear indication about how the intervention process was supposed to unfold. In the case of the LDE, interviewees were adamant that there was no formal documentation about the initiation and strategy of the intervention. In the ECDE, the formal documentation was clear, but there were divergent views about how the process should unfold, or whether the process should unfold at all. The LDE case study thus displayed the legislative gap between the Constitution, the IGFR and the PFMA. Apart from the COGTA guidelines, which are not readily accessible to the public, there is no cohesive and consistent legislation that has the ability to use existing legislation to create a regulated process for S100 interventions.

There were a number of differences between the processes of the interventions in the LDE and ECDE. One of the differences is that once the intervention was in place in the LDE, it appears that some staff were willing to comply with the intervention measure; whereas in the ECDE, the intervention began smoothly and formally until there was a plan to challenge it out of existence. Both of these situations made the interventions precarious because the intervention measures relied on the attitude and decisions of the provincial education departments and not on the role of a S100 intervention. In the case of the LDE, the intervention still struggled to create tangible changes when it was received, and in the case of the ECDE, there was so much confusion and legal resistance, that there was doubt about whether an intervention even took place in the department. These differences still display nuances around the constitutional crisis pertaining to South Africa's decentralisation.

The nuance in the case of the LDE is that the intervention was finally accepted even in the midst of the legislative gap that is present in Constitutional interventions. This provides an opportunity for the public administration crisis to be resolved and allows the department to develop its capacity and problem-solving. This is unlike the case of the ECDE, where the nuance was that the provincial structures took the decision to subvert the S100 intervention, and did so by administratively and legally challenging the integral aspects of the process such as delegations. This disallowed the opportunity for the ECDE to finally resolve perennial problems in the department through an increase in capacity and problem-solving abilities.

Another difference between the processes in the LDE and ECDE case studies is that the allegations of financial mismanagement and irregular procurement practices by one intervention Administrator in the LDE; while the ECDE's intervention processes were slow and only minimally effective. In the case of the LDE, this reflected the constitutional crisis around decentralisation because the ambiguous role of the Administrator as head of the intervention, acting HOD and accounting officer concentrated too much authority in the Administrator. In the ECDE, the intervention processes were put on a go slow until the whole S100 process was overturned by a court. This is embarrassing, costly and time consuming for the ECDE and DBE which further weakens the credibility of the S100 process. In the Eastern Cape in particular, interventions have a long history of being unsuccessful because its practices have not been institutionalised.

The outcomes of both S100 interventions in the LDE and ECDE were unsuccessful. In the case of the LDE, the department's audit opinions remained adverse during the intervention and led to a more specific S18 intervention to be advanced by the Limpopo Provincial Treasury. In the case of the ECDE, the intervention had little impact and was also legally challenged. This is an incredibly discouraging state of affairs for provincial education departments and the DBE. It is also discouraging for South Africa's decentralisation because the unsuccessful outcomes indicate that the constitutional crisis impacts crucial sites of policy implementation, service provision and the realisation of human rights. Therefore, the constitutional crisis is not just a legal or administrative issue that can wait to be resolved as years go by. Rather, the constitutional crisis affects the very ability of national and provincial departments to effectively and properly execute their duties.

One of the positive outcomes of the intervention in the LDE is that despite the unsuccessful S100 intervention, there was another attempt to remedy the public administration crisis through the PFMA S18 intervention. This shows both initiative and opportunism on the part of the DBE because this more concentrated action also requires clarity and a practical outline for implementation. On the other hand, the absorption of S18 staff into the LDE creates more room for political conspiracies to take root and also undermines the capacity and problem-solving skills of the incumbent staff. A notable outcome in the intervention in the ECDE is that it took a court decision to determine the existence and legitimacy of a S100 (1) (b) intervention. Such litigation is constructive and necessary when urgent pressure needs to be applied to provincial departments. However, this litigation needs to go further and impact the way the department functions and the way in which interventions are received and implemented.

7.2 Recommendations

Given the conclusion above, this thesis presents the following recommendations to resolve South Africa's constitutional crisis and all its attendant issues:

1. The MSI Bill must be tabled before the National Assembly for deliberation and consideration for enactment. This Bill is not a panacea for the constitutional crisis around decentralisation and its intervention mechanisms but it is hoped that the deliberation and consideration of this Bill will highlight that S100 interventions are last resort measures and should be preceded by monitoring and support as stipulated in the Bill. By encouraging both a top-down and bottom-up approach to monitoring and support, the Bill should strengthen the decentralised relationship between the national and provincial spheres by clearly outlining the parametres and procedures around maintaining a functional decentralised relationship during public administration crises. Moreover, given the evidence from the LDE and ECDE case studies, and the recent intervention in the North West province, the constitutional crisis around decentralisation will continue to worsen unless and until there is conceptual and procedural clarity around this mode of governance.

2. There needs to be a more decisive break between the political-administrative interface. As indicated in the LDE case study, the relationship between the national and provincial spheres is influenced or held together by the MECs of different portfolios in the province, the Premier of the province and all their political background within the province. This shapes the way in which the province and departments react to policy implementation generally, and extraordinary measures specifically. Theoretically, the autonomy that provincial Premiers and MECs try to carve out for themselves reflects a more federal understanding of their role rather than a decentralised understanding of the South African state's formation and goals. Therefore, to overcome the constitutional crisis and thereby reduce the weight of the political weight in the political-administrative interface, decentralisation needs to be clarified and the autonomy of provincial Premiers and MECs has to be shifted more towards the administrative side of the interface.

3. The third recommendation is that South Africa's decentralisation needs to be consolidated through a clarification strategy on the part of government departments such as the DPSA, DPME, COGTA, COJ & CD and the Office of the Presidency. These are centripetal departments that are supposed to be monitoring and overseeing all departments in all spheres of government. Therefore, the responsibility to explain, advocate for and oversee decentralisation processes and mechanisms lies with them. The executive cannot keep making decisions about interventions when S100 remains vague, ambiguous and contested. The executive cannot also continue to make these decisions in an environment where decentralisaiton is understood more like federalism.

4. The fourth and final recommendation is that South Africa's provinces must improve their administrations and governance and should not be eradicated wholesale. They fulfill two vital functions in the country's decentralised unitary state: representation and deliberation through the National Council of Provinces, and fulfilling concurrent functions. Therefore, the problems found in this thesis will not be mitigated by blaming provincial administrations and eradicating them because they have multiple functions.

8 Appendix

8.1 Schedule 4 of the Constitution of the Republic of South Africa: Functional Areas of National and Provincial Legislative Competence, "concurrent responsibilities"

1. Administration of indigenous forests
2. Agriculture
3. Airports other than international and national airports
4. Animal control and diseases
5. Casinos, racing, gambling and wagering, excluding lotteries and sports pools
6. Consumer protection
7. Cultural matters
8. Disaster management
9. Education at all levels, excluding tertiary education
10. Environment
11. Health services
12. Housing
13. Indigenous law and customary law, subject to Chapter 12 of the Constitution
14. Industrial promotion
15. Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
16. Media services directly controlled or provided by the provincial government, subject to section 192
17. Nature conservation, excluding national parks, national botanical gardens and marine resources
18. Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
19. Pollution control
20. Population development
21. Property transfer fees
22. Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
23. Public transport
24. Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
25. Regional planning and development

26. Road traffic regulation
27. Soil conservation
28. Tourism
29. Trade
30. Traditional leadership, subject to Chapter 12 of the Constitution
31. Urban and rural development
32. Vehicle licensing
33. Welfare services.
34. Part B (“local government matters”)
35. Air pollution
36. Building regulations
37. Child care facilities
38. Electricity and gas reticulation
39. Firefighting services
40. Local tourism
41. Municipal airports
42. Municipal planning
43. Municipal health services
44. Municipal public transport
45. Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution and any other law
46. Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
47. Storm water management systems in built-up areas
48. Trading regulations
49. Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

8.2 Schedule 5 of the Constitution of the Republic of South Africa: Functional Areas of Exclusive Provincial Legislative Competence

1. Abattoirs
2. Ambulance services
3. Archives other than national archives
4. Libraries other than national libraries
5. Liquor licences
6. Museums and other national museums
7. Provincial planning
8. Provincial cultural matters
9. Provincial recreation and amenities
10. Provincial sport
11. Provincial roads and traffic
12. Veterinary services, excluding regulation of the profession
13. Part B ("local government matters"
14. Beaches and amusement facilities
15. Billboards and the display of advertisements in public places
16. Cemeteries, funeral parlours and crematoria
17. Cleansing
18. Control of public nuisances
19. Control of undertakings that sell liquor to the public
20. Facilities for the accommodation, care and burial of animals
21. Fencing and fences
22. Licensing of dogs
23. Licensing and control of undertakings that sell food to the public
24. Local amenities
25. Local sport facilities
26. Markets
27. Municipal abattoirs
28. Municipal parks and recreation
29. Municipal roads
30. Noise pollution
31. Pounds
32. Public places
33. Refuse removal, refuse dumps and solid waste disposal
34. Street trading
35. Street lighting
36. Traffic and parking

9 Bibliography

Articles, Books, Journals, Media and Websites

Austin, D. 1985. *The Trinitarians: The 1983 South African Constitution*. Government and Opposition, Vol 20, No. 2 (SPRING 1985), pp. 185-195. Accessed: 15/01/2019.

Bardhan, P. and D. Mookherjee. Editors. 2006. Decentralisation and Local Governance in Developing Countries: A Comparative Perspective. Cambridge: The MIT Press.

Basson, D.A. 1995. South Africa's interim constitution: text and notes. Kenwyn: Juta.

Beinart, W. and S. Dubow. Editors. 1995. Segregation and apartheid in twentieth-century South Africa. Routledge.

Braun, V. and V. Clarke. 2006. *Using thematic analysis in psychology*. Qualitative Research in Psychology, 3: 2, 77 – 101. Accessed: 08/01/2018

Boyatzis, R.E. 1998. Transforming Qualitative Information. Thematic Analysis and Code Development. London: Sage Publications.

Buthelezi Commission. 1982. The Requirements for Stability and Development in KwaZulu and Natal. Durban: H&H.

Chilenga, T.J. 2013. Public Services in South Africa. A Historical, Contextual and Theoretical View, using the Limpopo Textbook Crisis (2011 – 2013) as a Case Study. Honours Research Paper. University of Johannesburg.

Chilenga, T.J. 3 May 2018. Cyril Ramaphosa's New Dawn is Slowly Breaking in Mahikeng. https://www.businesslive.co.za/bd/opinion/2018-05-03-cyril-ramaphosas-new-dawn-is-slowly-breaking-in-mahikeng/.

De Villiers, B. October 2007. The Future of Provinces in South Africa – The Debate Continues. KAS Johannesburg, Policy Paper No. 2.

The Editors of Encyclopaedia Britannica. 2019. "*Confederation*". Encyclopedia Britannica, Inc. https://www.britannica.com/topic/confederation-politics

Friedman, S. and R. Humphries. 1993. Editors. Federalism and its Foes. Johannesburg: Centre for Policy Studies.

Flick, U. Editor. 2018. The SAGE Handbook of Qualitative Data Collection. Los Angeles: Sage Reference.

Fouche, N.A. *What does the Occupation-Specific Dispensation (OSD) in the public service mean for nursing?* South African Journal of Critical Care (SAJCC), November 2007, Vol. 23, No. 2. Accessed: 18/07/2018.

Gallens, M. 10 July 2017. *ANC pushes ahead with plan to reduce number of provinces*. Mail & Guardian. https://mg.co.za/article/2017-07-10-anc-pushes-ahead-with-plan-to-reduce-number-of-provinces. Accessed: 23/07/2019.

Graff, J. 1994. Teachers without Classrooms: Education in Venda. http://wiredspace.wits.ac.za/handle/10539/25647. Accessed: 10/01/2019.

Guimarães, A.S. and T.J. Chilenga. November 2018. *Local Government and the Provision of Public Goods: decentralisation and fiscal autonomy in Nigeria*. African Tax Research Network, ATRN working paper 1.

Humphries, R. and T. Rapoo. Editors. 1994. Governing the provinces: proceedings of two conferences convened for the Centre for Policy Studies on forming new governments and administrations in South Africa's regions. Johannesburg: Centre for Policy Studies.

Irvine, D.M. 1984. South Africa: Federal Potentialities in Current Developments. International Political Science Review, Vol. 5, No., 4, pp. 491-506.

Jacklin, H. 1994. Inherit the Wind: A report on Education in Lebowa. http://wiredspace.wits.ac.za/handle/10539/25643. Accessed: 10/01/2019.

Jacklin, H. 1994. Schooling in Gazankulu. http://wiredspace.wits.ac.za/handle/10539/25649. Accessed: 10/01/2019.

Jisheng, X. 1987. *Evolution of South Africa's Racist Constitutions and the 1983 Constitution*. A Journal of Opinion, Vol. 16, No. 1 (1987), pp. 18-23.

Kelsen, H. 1945. General Theory of State and Law. Cambridge: Harvard University Press.

Letsoalo, M.M. 1995. The Incorporation of the Seven Northern Transvaal Education Management Structures into a Provincial Unit. Thesis. University of the Witwatersrand.

Levy, B., R. Cameron, U. Hoadley and V. Naidoo. Editors. 2018. The Politics and Governance of Basic Education. A Tale of Two South African Provinces. Oxford University Press.

Lijphart, A. 1985. Power-Sharing in South Africa. University of California Berkeley.

Lijphart, A. 2008. Thinking about Democracy. Power-sharing and majority rule in theory and practice. London: Routledge, Taylor and Francis Group.

Mamdani, M. 1996. Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism. Princeton University Press.

Malema, J. 2018. "*EFF Julius Malema Press Briefing after Zuma Resignation*." YouTube. https://www.youtube.com/watch?v=1B1cbBKrZ4U. Accessed: 16/02/2018.

MacPherson, C.B. Editor. 1968. Leviathan. Penguin Books.

Mogofe, M.E. July 2014. Section 100 Constitutional Intervention in Limpopo Provincial Treasury. Faculty of Commerce, Law and Management, University of the Witwatersrand.

Monama, T. 3 October 2016. *Opinion: How the rationalisation of schools works*. IOL. https://www.iol.co.za/dailynews/opinion/how-rationalisation-of-schools-works-2075528. Accessed: 26/11/2018.

Ngoma, W.Y. 2007. Complexities of Organisational Change: The Case of the Eastern Cape Department of Education (ECDE). Graduate School of Public and Development Management, Faculty of Commerce, Law and Management, University of the Witwatersrand.

Nyambi, M.M. 2005. The Contribution of School Governing Bodies in Section Twenty-One Rural Schools. University of Pretoria. https://repository.up.ac.za/bitstream/handle/2263/27747/00dissertation.pdf?sequence=1. Accessed: 15/11/2018.

Olowu, D. and J.S. Wunsch. 2003. Local Governance in Africa: The Challenges of Democratic Decentralisation. London: Lynne Reiner Publishers.

Oxford Dictionaries. 2018. *Interim Management*. https://en.oxforddictionaries.com/definition/interim_management. Accessed: 12/11/2018.

Phadi, M., J. Pearson and T. Lessafre 2018. The Seeds of Perpetual Instability: The Case of Mogalakwena Local Municipality in South Africa. Journal of Southern African Studies, 44:4, 593-611.

Pearson, J., S. Pillay and I. Chipkin. 2016. State-Building in South Africa after Apartheid: The History of the National Treasury. Working Paper, Public Affairs Research Institute. https://pari.org.za/state-building-south-africa-apartheid-history-national-treasury/.

Picard, L. and T. Mogale. 2015. The limits of democratic governance in South Africa. Claremont: UCT Press.

Radio 702. 22 July 2012. "*Redi Tlhabi Interviews President Jacob Zuma*." YouTube. https://www.youtube.com/watch?v=DKx2EGBjPY&list=FL6tRsmBgR9PWaQgT0k9raVA&index=28&t=5708s. Accessed: 26/11/2018.

Ribot, J.C. 2002. African Decentralisation: local Actors, Powers and Accountability. Democracy, Governance and Human Rights – Paper No. 8. United Nations Research Institute for Social Development.

Shaik, S. February 2017. *Efficacy of Oversight by the Legislature in Limpopo Province*. Masters Thesis. University of the Witwatersrand.

Siddle, A. and T.A. Koelble. 2012. The failure of South Africa's decentralisation in South Africa's local government: Complexity and unanticipated consequences. Claremont: UCT Press.

Simeon, R. and C. Murray. 2001. *Multi-level Government in South Africa: An Interim Assessment*. Ethnic Politics and the Making and Unmaking of Constitutions in Africa, Volume 43, number 3, 536 – 571.

South African History Online. 2017. The Union of South Africa Act, 2 December 1909. http://www.sahistory.org.za/archive/union-of-south-africa-act-1909. Accessed: 12/11/2017.

Steytler, N. and J. Mettler. 2001. *Federal Arrangements as a Peacemaking Device During South Africa's Transition to Democracy*. Publius: The Journal of Federalism, Volume 31, Issue 4, 93 – 106.

South African History Online. 2017. The Union of South Africa Act, 2 December 1909. https://www.sahistory.org.za/archive/union-south-africa-act-1909. Accessed: 09/01/2019.

UNICEF South Africa. 2017. *Distributing the equitable shares by provinces, 2017*. Education Budget Brief. https://www.unicef.org/esaro/UNICEF_South_Africa_--_2017_--_Education_Budget_Brief.pdf. Accessed: 05/02/2019.

Vaismoradi, M. 2013. *Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study*. Nursing and Health Sciences, 15, 398 – 405. Accessed: 08/01/2019.

Veriava, F., A. Thom and T.F. Hodgson. 2017. *Chapter 14: Post Provisioning* by S. Sephton. Basic Education Rights Handbook: Education Rights in South Africa. SECTION 27: Braamfontein, Johannesburg. www.section27.org.za/wp-content/uploads/2017/02/Chapter-14.pdf Accessed: 14/11/2018.

Verwey, C.T. and E.M. Munzhedzi. June 1994. *Education in the Northern Transvaal: Data, indicators and scenarios*. Provincial, Education and Information Series, No. 7. Northern Transvaal. Centre for Policy Information, Development Bank of Southern Africa (DBSA).

Worden, N. 2012. The Making of Modern South Africa: Conquest, Apartheid, Democracy. Hoboken, N.J.: Wiley-Blackwell.

World Statesmen. 2019. South Africa Act No. 32 of 1961 ('Constitution of 1961'). www.worldstatesmen.org/south_africa_const1961.pdf. Accessed: 09/01/2019.

Court Documents

Head of Department of Education, Eastern Cape Provincial Government vs. South African Democratic Teachers Union and Others 2016 (3760) SA (ECB). Notice of Motion. Accessed: 13/06/2017.

Head of Department of Education, Eastern Cape Provincial Government vs. South African Democratic Teachers Union and Others 2016 (3760) SA (ECB). Founding Affidavit. Accessed: 13/06/2017.

Head of Department of Education, Eastern Cape Provincial Government vs. South African Democratic Teachers Union and Others 2016 (3760) SA (ECB). Answering Affidavit. Accessed: 13/06/2017.

Head of Department of Education, Eastern Cape Provincial Government vs. South African Democratic Teachers Union and Others 2016 (3760) SA (ECB). Replying Affidavit. Accessed: 13/06/2017.

Head of Department of Education, Eastern Cape Provincial Government vs. South African Democratic Teachers Union and Others 2016 (3760) SA (ECB). Judgment. Accessed: 08/01/2019.

Save Our Schools and Community and Another vs. President of the Republic of South Africa 2012 (50) SA (ECB). Notice of Motion. Accessed: 29/05/2017.

Save Our Schools and Community and Another vs. President of the Republic of South Africa 2012 (50) SA (ECB). First Respondents' Answering Affidavit. Accessed: 29/05/2017.

Save Our Schools and Community and Another vs. President of the Republic of South Africa 2012 (50) SA (ECB). Fourth and Fifth Respondents' Answering Affidavit. Accessed: 29/05/2017.

Save Our Schools and Community and Another vs. President of the Republic of South Africa 2012 (50) SA (ECB). Notice of Filing: First Respondents' Heads of Argument. Accessed: 29/05/2017.

Save Our Schools and Community and Another vs. President of the Republic of South Africa 2012 (50) SA (ECB). Supplementary Affidavit. Accessed: 29/05/2017.

Zibi and Others vs. The Superintendent General of the Department of Education in the Eastern Cape Province and Others 2011 (378) SA (ECB). First and Second Respondents' Main Answering Affidavit. Accessed: 29/05/2017.

Government Documents

Auditor General of South Africa (AGSA). 2018. Auditor Terminology. https://www.agsa.co.za/AuditInformation/AuditTerminology.aspx. Accessed: 13/08/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2006/07. http://ecdoe.co.za/files/resources/resource_303.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2009/10. http://ecdoe.co.za/files/resources/resource_305.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2010/11. http://ecdoe.co.za/files/resources/resource_301.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2013/14. http://ecdoe.co.za/files/resources/resource_253.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2014/15. http://ecdoe.co.za/files/resources/resource_300.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2016/17. http://ecdoe.co.za/files/resources/resource_448.pdf. Accessed: 07/11/2018.

Eastern Cape Department of Education (ECDE). Annual Report 2017/18. http://ecdoe.co.za/files/resources/resource_515.pdf. Accessed: 07/11/2018.

Government of South Africa: Department of Basic Education. March 2016. Education Statistics in South Africa, 2014. https://www.education.gov.za/Portals/0/Documents/Publications/Education%20Statistics%202014.pdf?ver=2016-05-13-144159-067. Accessed: 19/12/2018.

Government of South Africa: Department of Basic Education and, Province of the Eastern Cape: Education. 30 September 2003. Implementation Plan of Section 100 (1)(b) of the Constitution of South Africa in Eastern Cape Department of Education. Accessed: 29/05/2017.

Government of South Africa: Department of Basic Education. 15 March 2011. Notification of an Intervention in Terms of Section 100 (1)(b) of the Constitution to the NCOP. Accessed: 29/05/2017.

Government of South Africa: Department of Basic Education. 17 March 2011. Notice of Intervention in Terms of Section 100 of the Constitution to the Department of Cooperative Governance and Traditional Affairs. Accessed: 29/05/2017.

Government of South Africa: Department of Basic Education. 17 August 2011. Letter to the MEC for Education, Mr. Makupula concerning the Implementation of the Intervention in the Eastern Cape Education Department [in] terms of section 100 (1)(b) of the Constitution of the Republic of South Africa, 1996. Accessed: 29/05/2017.

Government of South Africa: Department of Basic Education. 17 August 2011. Urgent Memorandum concerning the Implementation of the Intervention in terms of section 100 (1)(b) of the Republic of South Africa, 1996 in the Eastern Cape Education Department. Accessed: 29/05/2017.

Government of South Africa: Department of Cooperative Governance and Traditional Affairs. No date. Executive Summary of Interventions in Terms of Section 100 of the Constitution. Accessed: 08/12/2016.

Government of South Africa: Department of Cooperative Governance and Traditional Affairs. No date. Executive Summary of Interventions in Terms of Section 139 of the Constitution. Accessed: 08/12/2016.

Government of South Africa: Department of Cooperative Governance and Traditional Affairs. 2016. Intergovernmental Monitoring, Support and Interventions Bill, 2016. Accessed: 25/11/2016.

Government of South Africa: Department of Education. 15 March 1995. White Paper on Education and Training. https://www.gov.za/sites/default/files/gcis_document/201409/16312gen1960.pdf. Accessed: 13/01/2019.

Government of South Africa: Department of Justice and Constitutional Development. 1996. Interim Constitution of the Republic of South Africa, 1993. http://www.justice.gov.za/legislation/acts/1993-200.pdf.

Government of South Africa: Department of Justice and Constitutional Development. 1996. Constitution of the Republic of South Africa, 1996. www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

Government of South Africa: Department of Provincial and Local Government. No date. Intervening in Provinces and Municipalities. Guidelines for the Application of Section 100 & 139 of the Constitution. Accessed: 25/11/2016.

Government of South Africa: National Treasury. Public Finance Management Act No. 1 of 1999. http://www.treasury.gov.za/legislation/pfma/PFMA%201999%20as%20amended%20March%202017.pdf.

Government of South Africa. July 2009. Directorate, Rural Education. Guidelines for Rationalisation of Small or Non-Viable Schools. https://www.gov.za/sites/default/files/education_WEB%20guidelines.pdf. Accessed: 19/11/2018.

Government of South Africa: Department of Justice and Constitutional Development. 11 April 2011. Letter concerning Draft Implementation Protocol (version 3A) on Section 100 (1)(b) Intervention to be Implemented in the Eastern Cape Department of Education. Accessed: 29/05/2017.

Government of South Africa: Government Communication and Information System. 5 December 2002. Statement on Cabinet meeting of 4 December 2002. https:///www.gcis.gov.za/print/1020. Accessed: 14/06/2018.

Government of South Africa: Government Communication and Information System. 15 March 1995. White Paper on Education and Training. https://www.gov.za/sites/default/files/gcis_document/201409/16312gen1960.pdf. Accessed: 12/01/2019.

Government of South Africa: Government Communication and Information System. 17 March 2011. Statement to the National Council of Provinces on the Eastern Cape Education Department Intervention by Mr. ME Surty, MP, Deputy Minister of Basic Education. https://www.gov.za/statement-national-council-provinces-eastern-cape-education-department-intervention-mr-me-surty-mp. Accessed: 08/11/2018.

Government of South Africa: Department of Planning, Monitoring and Evaluation (DPME). Mission Statement. https://www.dpme.gov.za/about/Pages/default.aspx. Accessed: 23/01/2019.

Government of South Africa: Department of Public Service and Administration (DPSA). *Occupations Covered by the Occupation Specific Dispensation (OSD) for Therapeutic, Diagnostic, and other Related Allied Health Professionals, as Contained in PHSDSBC Resolution 2 of 2010*. Annexure A to DPSA Circular 2 of 2011. Accessed: 18/07/2018.

Government of South Africa: Department of Public Service and Administration (DPSA). 2009. Salaries and Benefits in the Public Service. www.dpsa.gov.za/dpsa2g/documents/rp/2009/salaries.pdf. Accessed: 18/07/2018.

Government of South Africa: Department of Public Service and Administration (DPSA). Principles for Post Provisioning Norms and Standards for SMS and Corporate (Support) Functions in the Public Service. 4 February 2011

Government of South Africa: Department of Public Service and Administration (DPSA). 11 March 2014. About the dpsa. www.dpsa.gov.za/about.php. Accessed: 23/01/2018.

Government of South Africa. 24 February 2011. Statement of Intent on the Redemption of the Present Challenges in Basic Education in the Eastern Cape Province. Ms. Angie Motshekga, MP. Minister of Basic Education. Accessed: 29 May 2017.

Government of South Africa: National Government. 31 May 2011. Memorandum of Understanding between the National Government and the Eastern Cape Provincial Government. Accessed: 29 May 2017.

Government of South Africa: National Treasury. 2008. *Consolidated Expenditure Growth 2008*. National Budget 2008. http://www.treasury.gov.za/documents/national%20budget/2008/review/chap1.pdf. Accessed: 05/02/2019

Government of South Africa: National Treasury. 2009. *Consolidated Growth 2009*. National Budget 2009. http://www.treasury.gov.za/documents/national%20budget/2009/review/chap1.pdf. Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2010. *Consolidated Growth 2010*. National Budget 2010. http://www.treasury.gov.za/documents/national%20budget/2010/review/chapter1.pdf; Accessed: 05/02/2019

Government of South Africa: National Treasury 2011. *Consolidated Growth 2011*. National Budget 2011. http://www.treasury.gov.za/documents/national%20budget/2011/review/chapter%201.pdf; Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2012. *Consolidated government expenditure by function, 2011/12 – 2014/15*. National Budget 2012. http://www.treasury.gov.za/documents/national%20budget/2012/review/chapter8.pdf. Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2013. *Consolidated Growth 2013*. National Budget 2013. http://www.treasury.gov.za/documents/national%20budget/2013/review/chapter%201.pdf; Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2014. *Consolidated government expenditure by function*. National Budget 2014. http://www.treasury.gov.za/documents/national%20budget/2014/review/chapter%201.pdf. Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2015. *Consolidated government expenditure by function*. National Budget 2015. http://www.treasury.gov.za/documents/national%20budget/2015/review/chapter%201.pdf; Accessed: 05/02/2019

Government of South Africa: National Treasury. 2016. *Consolidated government expenditure by function*. National Budget 2016. http://www.treasury.gov.za/documents/national%20budget/2016/review/chapter%201.pdf. Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2017. *2017/18 Budget Expenditure*. National Budget 2017. http://www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf; Accessed: 05/02/2019.

Government of South Africa: National Treasury. 2018. *2018/19 Budget Expenditure*. National Budget 2018. http://www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf; Accessed: 05/02/2019.

Government of South Africa. 4 December 2007. Education on Occupation Specific Dispensation (OSD) for educators. https://www.gov.za/education-occupation-specific-dispensation-osd-educators. Accessed: 18/07/2018.

Government of South Africa. 2018. Republic of South Africa Constitution Act 110 of 1983. https://www.gov.za/documents/constitution/republic-south-africa-constitution-act-110-1983. Accessed: 09/01/2019.

Limpopo Department of Education (LDE). Annual Report, 2004/05. http://www.edu.limpopo.gov.za/index.php?option=com_phocadownload&view=category&id=30:2004-2005. Accessed: 14/11/2018.

Limpopo Department of Education (LDE). Annual Report, 2005/06. http://www.edu.limpopo.gov.za/index.php?option=com_phocadownload&view=category&id=29:2005-2006. Accessed: 14/11/2018.

Limpopo Department of Education (LDE). Annual Report, 2006/07. http://www.edu.limpopo.gov.za/?option=com_phocadownload&view=category&id=22:2006. Accessed: 14/11/2018.

Limpopo Department of Education (LDE). Annual Report, 2007/08. http://www.edu.limpopo.gov.za/?option=com_phocadownload&view=category&id=23:2007. Accessed: 14/11/2018.

Limpopo Department of Education (LDE). Annual Report, 2008/09. http://www.edu.limpopo.gov.za/index.php?option=com_phocadownload&view=section&id=22. Accessed: 14/11/2018.

Parliamentary Monitoring Group. 19 March 2001. Public Finance Management Act: briefing. https://pmg.org.za/committee-meeting/414/. Accessed: 27/12/2018.

Parliamentary Monitoring Group. 10 September 2003. Interim Management Team Report: Eastern Cape: Consideration. NCOP Cooperative Governance and Traditional Affairs. https://pmg.org.za/committee-meeting/2855/. Accessed: 12/11/2018.

Attachment: Report on the Work of the Interim Management Team, Eastern Cape. Presented in the NCOP. 11 September 2003. Power Point Presentation.

Parliamentary Monitoring Group. 10 September 2003. Report by the Interim Management Team to the Portfolio Committee: Public Service and Administration. http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030915summary.htm Accessed: 11/12/2018.

Parliamentary Monitoring Group. 30 January 2004. Reflection on the Work of the Interim Management Team in the Eastern Cape. http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/040811reflection.ppt Accessed: 14/06/2018.

Parliamentary Monitoring Group. 10 August 2004. Interim Management Team Progress Report on Eastern Cape: briefing. https://pmg.org.za/commitee-meeting/3796/ Accessed: 11/12/2018.

Attachment: Reflection on the Work of the Interim Management Team: Eastern Cape. 11 August 2004. Power Point Presentation.

Parliamentary Monitoring Group. 17 April 2018. Department of Basic Education 2018/19 Budget & Annual Performance Plan. https://pmg.org.za/committee-meeting/26122/. Accessed: 19/12/2018.

Province of the Eastern Cape: Education. 23 February 2011. Eastern Cape Department of Education Turnaround Strategy. Accessed: 29/05/2017.

Province of the Eastern Cape: MEC: Finance. 30 March 2015. Appointment in terms of Section 36 (3) of the PFMA and assignment of financial management delegations: Ms. N. Netshilaphala as Accounting Officer for Vote 6: Department of Education. Accessed: 13/06/2017.

Province of the Eastern Cape: Office of the Premier. 15 July 2011. Update on the Implementation of Section 100 (1)(b) Intervention in the Department of Education. Accessed: 29/05/2017.

Province of the Eastern Cape: Office of the Premier. 04 November 2015. Appointment as acting Head of Department for the Eastern Cape Department of Education. Accessed: 13/06/2017.

Province of the Eastern Cape: Office of the Premier. 12 May 2016. Extension of appointment to act as Head: Education. Accessed: 13/06/2017.

Statistics South Africa. 26 February 2016. Education Report focusing on the Eastern Cape. http://www.statssa.gov.za/?p=6213. Accessed: 16/11/2018.

Interviews

Historical

1. Former MEC: Education, Gauteng. Professor M. Metcalfe. 07 April 2017.
2. Former Minister of Public Service and Administration (DPSA). G. Fraser-Moleketi. 04 October 2017.

National Sphere

1. Department of Cooperative Governance and Traditional Affairs (COGTA). T. Khasi. Senior Manager. 24 November 2016.
2. Department of Basic Education (DBE). P.O. Njobe. Director: Office of the Director-General. 06 June 2017.
3. Department of Basic Education (DBE). Dr. Gustafsson. 06 July 2017.
4. Department of Basic Education (DBE). Deputy Minister. E. Surty. 27 February 2018.
5. Department of National Treasury. Intervention Team. 29/11/2016 and 09/03/2017.

Provincial Sphere

Eastern Cape Department of Basic Education (ECDE)

1. Eastern Cape Senior Management Service Interview 1 (ECSMSI 1). 13 October 2017.
2. Eastern Cape Senior Management Service Interview 2 (ECSMSI 2). 13 October 2017.
3. Eastern Cape Senior Management Service Interview 3 (ECSMSI 3). 17 October 2017.
4. Eastern Cape Senior Management Service Interview 4 (ECSMSI 4). 18 October 2017.
5. Intervention Team Member Interview (ITMI1). 13 October 2017.

6. Mr. Godden (Godden Interview). 02 August 2016.

Limpopo Department of Education (LDE)

1. Limpopo Senior Management Service Interview 1 (LSMSI 1). 03 July 2017.
2. Limpopo Senior Management Service Interview 2 (LSMSI 2). 03 July 2017.
3. Limpopo Senior Management Service Interview 3 (LSMSI 3). 04 July 2017.
4. Limpopo Senior Management Service Interview 4 (LSMSI 4). 04 July 2017.
5. Limpopo Senior Management Service Interview 5 (LSMSI 5). 13 July 2017.
6. Limpopo Senior Management Service Interview 6 (LSMSI 6). 17 July 2017.
7. Limpopo Senior Management Service Interview 7 (LSMSI 7). 17 July 2017.
8. Limpopo Senior Management Service Interview 8 (LSMSI 8). 17 July 2017.
9. Limpopo Senior Management Service Interview 9 (LSMSI 9). 17 July 2017.
10. Limpopo Senior Management Service Interview 10 (LSMSI 10). 19 July 2017.
11. Limpopo Senior Management Service Interview 11 (LSMSI 11). 20 July 2017.
12. Limpopo Senior Management Service Interview 12 (LSMSI 12). 21 July 2017.
13. Limpopo Senior Management Service Interview 13 (LSMSI 13). 21 July 2017.
14. Limpopo Senior Management Service Interview 14 (LSMSI 14). 22 July 2017.
15. Limpopo Senior Management Service Interview 15 (LSMSI 15). 27 July 2017.
16. Limpopo Senior Management Service Interview 16 (LSMSI 16). 27 July 2017.
17. Professor Karodia (Karodia Interview). 29 September 2018.