

Rethinking the fiscal implications of different types of norms and standards

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ABSTRACT

South Africa is constituted as a unitary state with three distinctive, inter-dependent and inter-related spheres. The principles of co-operative governance bind all spheres of government in a close relationship to ensure that public services are delivered in an efficient and seamless manner. According to this division of powers and functions, national government sets policy and legislation while the responsibility for and accountability of implementation resides within the ambit of provincial and local government. Consequently, these sub-national spheres of government have significant discretion in implementing national policy and legislation.

To ensure that implementation is consistent with the intent of policies and legislation, the Constitution empowers national government to prescribe norms and standards in two circumstances. Firstly, national government may set norms and standards where a service must be dealt with uniformly across the country. For example, in terms of the Children's Act, 2005 all staff who conduct Early Childhood Development (ECD) programmes must be trained in ECD. Secondly, national government may promulgate legislation to prescribe essential or minimum standards in exclusively provincial or local government functions. For example, the staff to child ratio for ECD programmes for children between the ages one month and 18 months must be 1:6¹. In other words, norms and standards can be instituted to set minimum standards and create uniformity in the implementation of legislation and policy across the country.

Norms and standards have been extensively employed by national departments to influence the manner in which provinces and local government execute their responsibilities. Although there are a multitude of norms and standards that serve various purposes; much of the focus has been on access norms and standards which have been utilised to specify the minimum levels of services that South Africans can expect from government. Norms for free basic water and electricity were introduced to guarantee access to minimum levels of basic services for all citizens. Similarly, in education, teacher to learner ratios are set to maintain the quality of education by limiting class size. But these types of access norms and standards are costly to implement and setting them may undermine the autonomy of provincial and local governments to spend their budget as they deem fit. Therefore, when prescribing norms and standards, it is important to understand their cost implications and identify the appropriate sources of funding within the fiscal framework.

It is notable that access norms and standards are not the only types of norms and standards that national government has at its disposal. Other types of norms and standards such as efficiency norms and standards have been used to specify critical service delivery processes in sectors such as health and education. Irrespective of the types of norms and standards employed, they invariably have financial implications on provincial and/or local government.

This paper commences by reviewing the international experience of utilising the various types of norms and standards and the funding thereof. The paper will compare and contrast the experience of unitary states with the fiscal arrangements under federal regimes. The paper thereafter assesses the manner in which norms and standards are instituted across concurrent functions listed in Schedule 4 as well as exclusive competences listed in Schedule 5 of the Constitution. Specifically, the paper will explore the different types of norms and standards within concurrent functions such as health, basic education and social services as well as liquor licensing which is an exclusively provincial competence. The paper establishes the implications of different types of norms and standards on the intergovernmental fiscal framework and estimates the cost of implementation of selected norms and standards by way of case studies. The paper ends with recommendations on how to improve the use of norms and standards within the intergovernmental system.

Key words: norms, standards, unitary state, intergovernmental, fiscal

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¹ Consolidated Regulations Pertaining To The Children's Act, 2005

INTRODUCTION

Government systems are shaped by history and politics. In this regard, the South African system of government is no different. Although, the Constitution establishes government as a unitary state, it devolves critical functions to provincial and local government.² In effect, this 'hybrid' approach represents a compromise between having a powerful central government or a federal state with autonomous sub-national governments.

This compromise emerged during the negotiations over the Constitution, where a number of concerns were raised about concentrating power in national government, especially in the aftermath of an apartheid government that abused its powers. At the same time, it was important for provinces (which included former homelands) to maintain some level of decision making autonomy, while ensuring that they were obliged to pursue national interests and priorities³. In the end, the Constitution established an intergovernmental system comprising of three distinctive, inter-dependent and inter-related spheres of government⁴.

The Constitution divided powers and functions between national, provincial and local government in three ways. First, concurrent functions were introduced in Schedule 4 of the Constitution to bind two or more distinct spheres of government in a tight working relationship. These functional areas are listed in Part A of Schedule 4 of the Constitution. Yet, while the constitutional law maker's intent was to allow spheres the flexibility to define the scope of the function, this approach has left functional areas open to debate and interpretation. Over two decades of democracy, national government's role has come to focus largely on policy, legislation and regulation formulation while the implementation of these frameworks have been left to provinces and local government. Consequently, provincial governments have passed little legislation on concurrent functions, notwithstanding that they share legislative power over the concurrent functions with national government⁵.

Second, the Constitution assigned certain functions exclusively to a particular sphere of government. Exclusive competencies are listed in Schedule 5 of the Constitution. For instance, only a province can legislate on and administer the liquor licensing function. Exclusive functions are hallowed in the Constitution and national government may not intrude on the constitutional autonomy of sub-national government. The Constitutional Court affirms this principle when it ruled that the national government could not create a system of registration for liquor retailers as it infringed on the rights of provinces to administer the liquor licensing regime as they saw fit.⁶

Finally, all functions not falling within the ambit of Schedules 4 and 5 of the Constitution were left to national government, who could assign any of its functions to provincial or local government, provided that sufficient capacity existed for them to perform these functions.⁷

Even though, decentralisation empowers provinces and local government, the Constitution contains numerous checks and balances to ensure that all spheres pursue national interests. Norms and standards are but one of the mechanisms meant to ensure that national interests are not subverted by sub-national government. In line with the Constitution, norms and standards can be set for concurrent functions when a service must be dealt

² Constitutional Court (1996) *Certification of the Constitution of the Republic of South Africa*. Available online from: <http://www.saflii.org/za/cases/ZACC/1996/26.html>

³ Erasmus, R (2013) *Constitutional Opinion on Norms and Standards*. Prepared for DNA Economics.

⁴ Section 40(1) of the Constitution (No 108 of 1996)

⁵ Erasmus, R (2013) Op Cit

⁶ Constitutional Court (1999) *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill*. Available online from: <http://www.saflii.org/za/cases/ZACC/1999/15.html>

⁷ Sections 44, 97 and 99 of the Constitution (No 198 of 1996)

with uniformly across the country. National government may also enact legislation to specify essential or minimum standards in exclusively provincial or local government functions. Fundamentally, norms and standards are about maintaining minimum and consistent levels of service throughout the country.

In setting minimum norms and standards, government is guided by the Bill of Rights. These rights can be grouped in two categories: absolute rights and progressive rights. For instance, Section 29 (i)(a) of the Constitution grants all citizens and residents the right to basic education. By contrast, further education is a progressive right, which the state must achieve through reasonable measures⁸.

Absolute rights have far-reaching fiscal implications for government. In the case of basic education, government has to ensure that every child of school going-age has access to school infrastructure, teachers and learner support material. Under this narrow definition of Section 29(i)(a), the right to basic education is largely limited to access to infrastructure, resources and materials. The costs of meeting these basic infrastructure and resource requires for the approximately 12 million learners who rely on the public school system is significant.⁹ However, if as some commentators argue, the right to basic education set out in the Constitution encompasses the quality of the educational services offered by the state, the fiscal costs will be even larger.¹⁰

Progressive rights pose a different conundrum for government. These rights, in line with the Constitution, can be achieved within government's available resources. For instance, the provision of access to healthcare, which is progressive right and government is duty-bound to deliver health services to the population within its available budget while ensuring that the basic needs of citizens are met.

Over the past two decades, national government has used norms and standards to set minimum levels of services. In some instances, these norms and standards have focused on access issues. Norms for free basic water and electricity were introduced to guarantee access to minimum levels of basic services for all citizens. In other cases, they have been employed to set quality standards. The National Department of Health has issued the *National Core Standards* as a policy statement to describe the minimum levels of service quality that patients can expect from a health establishment. There have also been instances where norms and standards have been used to promote greater efficiency in the delivery of welfare services.

In whatever manner they are used, norms and standards demarcate the scope of the socioeconomic rights set out in the Constitution. The fiscal implications of the different types of norms and standards are not always immediately apparent or considered by those setting them. Indeed, one of the few pieces of work done on norms and standards was undertaken by the Fiscal and Financial Commission, which proposed a costed norms approach where basic services were funded based on the cost of delivering them in provinces.

This paper contributes to the knowledge base around norms and standards. It begins with a review of the constitutional provisions governing norms and standards to understand their purpose within the intergovernmental system. It then compares and contrasts the experience of federal and unitary states in setting norms and standards and highlights how their fiscal costs were dealt with. Against this background, the paper discusses the South African experience in setting norms and standards with an emphasis on the education and health sectors. The paper analyses the uses of norms and standards to develop a taxonomy of

⁸ Section 29(1)(b) of the Constitution (No 108 of 1996)

⁹ Spaul, N (2014) *An overview of the SA Education System*. Presentation to the Moneyweb Ibandla Conference. Available online from: <http://nicspaull.com/presentations/>

¹⁰ Simbo, C (2012) Defining the term basic education in the South African Constitution: An International Law Approach. *Law, Democracy and Development* pp 165. Available online from: <http://www.saflii.org/za/journals/LDD/2012/9.pdf>

the types of norms and standards and draws conclusions on the fiscal implications of these norms and standards.

LITERATURE REVIEW

Constitutional provisions

South Africa is constituted as a unitary state with three distinctive but interdependent and interrelated spheres of government. South Africa's constitutional arrangements are by no means unique - over time unitary states have decentralised functions to sub-national governments to ensure that the needs of communities are met.

And although powers and functions are divided across three spheres of government, the Constitution recognises that intergovernmental cooperation is essential to delivering public services.¹¹ Chapter three of the Constitution sets out the principles of cooperative governance and binds all spheres of government in a tight working relationship. In particular, all spheres of government are required to "respect the constitutional status, institutions, powers and functions of government in other spheres" and "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."¹² The Constitution also requires that all spheres provide for "effective, transparent, accountable and *coherent* government."¹³

Included in the Constitution are provisions that support the principles of cooperative government. Section 44(i) and (ii) grants Parliament of the Republic of South Africa legislative authority over any matter. This includes any matter within concurrent functional areas as defined in Schedule 4 to the Constitution.

Parliament may also intervene in functions over which provincial government has exclusive legislative authority under certain strict conditions. Accordingly, Section 44(2) states that Parliament may through legislative and other means intervene in a provincial matter when it is necessary to maintain national security, economic unity, or essential national standards, or to prevent unreasonable action by a province, which is prejudicial to the interests of another province or the country as a whole. This power is only meant to be exercised in exceptional circumstances.

As the Constitutional Court highlights during the certification of the Constitution, the power to intervene was not included in the Constitution to allow national government to take over provincial powers and responsibilities completely or permanently, but that this power would be exercised only for as long as necessary to ensure that services continued to be delivered. Indeed, the Constitution guards against the unmitigated utilisation of norms and standards in national legislation. Most notably, Section 125(3) of the Constitution compels national government to assist provinces and local government to build capacity required for the effective execution of their powers and performance of their functions in terms of the Constitution and national legislation.¹⁴

One of the mechanisms available to the national government to maintain a "coherent government" is by setting norms and standards.¹⁵ Specifically, in relation to concurrent functions, norms and standards can be used together with "policies and frameworks" to deal with matters that cannot be regulated effectively by individual provincial legislation or where there is a need to create uniformity across the country¹⁶. Section 100 (b) allows

¹¹ KPMG (2011) *Report on intergovernmental Institutions*. Prepared for the Council for the Australian Federation. Available online from: <http://www.caf.gov.au/documents/Report%20on%20intergovernmental%20institutions%20-%20November%202011.pdf>

¹² Section 41(1)(e) and (g) of the Constitution (No 108 of 1996)

¹³ Section 41(1) (c) of the Constitution (No 108 of 1996)

¹⁴ Erasmus, R (2013) Op Cit

¹⁵ Section 41(1)(a) and (c) of the Constitution (No 108 of 1996)

¹⁶ Section 146(2) of the Constitution (No 108 of 1996)

national government to intervene in a province to “maintain essential national standards or meet established minimum standards for the rendering of a services”. By implication, this provision allows national government to set “essential” or “minimum” standards for services delivered by provinces that assist in the realisation of the socioeconomic rights set out in the Constitution. In a similar manner, provinces can set norms and standards for local government. Where these norms and standards are not met, Section 139 allows provincial government to intervene in local government to maintain essential levels of service.

Taken together, these constitutional provisions point to the purpose and usage of norms and standards. The Constitution’s intent was that norms and standards should be employed to set minimum or essential standards for public services. Arguably, these public services are linked to the socioeconomic rights contained in the Bill of Rights.

The Constitution also declares that norms and standards can be used to create uniformity amongst provinces. One possible interpretation, which this paper supports, is that the constitutional provisions around uniformity, is meant to ensure that national government establishes an ‘essential level of services’ across concurrent functions that would be implemented across all provinces. This paper further argues that the essential level of services referred to in the Constitution relates to both minimum levels of access and quality.

Where provinces fail to deliver on their executive obligation, the Constitution allows national government to intervene. The basis for an intervention has to be rational and well supported through evidence in order not to fall foul of the principles of cooperative government which requires all spheres of government to respect each other’s constitutional status. It can be argued that norms and standards can be used as the basis for an intervention. This makes them a powerful instrument to regulate the workings of the intergovernmental system.

International experience

The use of norms and standards (or a variant thereof) is common to both unitary and federal systems of government. Approaches to setting norms and standards and the way in which they are funded and implemented differs across countries and offers some valuable insights for South Africa particularly in the education and health sectors.

Like South Africa, the United Kingdom is a unitary state. The United Kingdom’s education system comprises of five stages: early years, primary school, secondary school, further education and higher education. Education is a devolved function in the United Kingdom with local authorities responsible for the different types of schools within their jurisdiction.¹⁷ Primary and secondary school education is funded from national taxation through a system of grants allocated to local authorities.

Funding flows from central government, through the Department for Education to local authorities. The Dedicated Schools Grant is a formula-based grant that takes into account for the type of school, region, deprivation level and retention rates. Put differently, the grant is a fiscal equalisation mechanism designed to support poorer local authorities. The size of the grant is based on a historical allocation and adjusted annually.¹⁸ Local authorities develop their funding formulas to distribute funding between the various types of schools including academies, foundation, community and free schools. Two mechanisms are built into the grant to ensure that local authority and schools are not subject to large variations in funding. The Cash Floor guarantees that no local authority receives a cut of more than 2 per cent of its budget in cash terms and the Minimum Funding

¹⁷ United Kingdom Government (2012) *Education System in the United Kingdom*. Available online from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219167/v01-2012ukes.pdf

¹⁸ United Kingdom Government (2012) *School Funding Settlement 2012-2013 including Pupil Premium*. Available online from: <http://webarchive.nationalarchives.gov.uk/20131216163513/http://www.education.gov.uk/schools/adminandfinance/financi/management/schoolsrevenuefunding/settlement2013pupilpremium/a00200465/schools-funding-settlement-2012-13>

Guarantee ensures that no school sees more than 1.5 per cent per pupil reduction in budgets compared to the previous year. In addition, poorer schools receive additional funding through the pupil premium. The result of these funding arrangements is that expenditure per learner varies across and even within local authorities. This in itself is not a bad outcome, particularly if the grant framework allows for funding to go towards poorer schools and communities. However, over time, these funding arrangements have created large imbalances in the funding of education across local authorities.¹⁹

Because of these challenges, discussions are underway to reform school funding and replace the current funding arrangements with a national formula. The benefit of a national funding formula is that it would equalise funding per learner across the country and simplify the allocation of funding. In essence, the formula would yield a national norm - expenditure per learner – and is comparable across local authorities. This norm will serve as a minimum benchmark across the country. The extent to which a formula equalises funding depends on how it is calculated and the parameters it takes into account. The funding formula's effectiveness is also influenced by the reliability of the cost estimates around educational services. Currently, the Dedicated Schools Grant adopts a 'spend-plus' approach. The 'spend' element adjusts expenditure from a baseline year to take into account the type of school, enrolments, retention and migration of learners²⁰. The 'plus' element allocates funding made available for ministerial priorities to local authorities. This means that the link between school funding and the true cost of educational services is tenuous at best.

The United Kingdom's expenditure has two important lessons for South Africa. First, guaranteeing a unit of funding per learner is about primarily about equity in the funding system. However, the wide variation in school funding seen across the United Kingdom demonstrates the difficulty associated with devising funding mechanisms that promote equity. For instance, local authorities received a per learner allocation from central government and were tasked with distributing their allocations to schools, based on their need. However, research shows that in practice, local authorities chose to spread their funding allocation to all learners in their area.²¹ These local authorities did not target deprived schools and instead relied on specific grants from central government (e.g. pupil premium) to support poorer schools and their learners. Schools from wealthier communities received a basic allocation but also raised funding from other sources. Thus, the extent to which guaranteed funding has improved equity across schools and learners is questionable.

The second lesson demonstrates the importance of building a responsive funding mechanism that takes into account the levels of need, the demographic profile of the learners and the social and economic circumstances of the community. Collectively, these factors will influence the cost structures of school. For instance, the cost providing education in poorer local authorities is higher in the United Kingdom where additional teachers are needed for remedial learning or for second-language subjects. Poorer schools also supply the majority of learning materials and stationary, which would otherwise be unaffordable for learners from low income communities.

While the United Kingdom has grappled with funding norms, the United States has struggled with extending a core curriculum standards across all 52 states. This is not surprising for a federal government such as the United States, where each state is autonomous and fiercely guards its independence. However, the conflicting federal-state relationships renders the adoption and implementation of norms and standards exceedingly difficult.

¹⁹ Chowdry, H and Sibieta, L (2011) *School funding reform: an empirical analysis of options for a national funding formula*. Available online: <http://www.ifs.org.uk/bns/bn123.pdf>

²⁰ Department of Education (2013) *How is school funding apportioned throughout the country*. Available online form: <http://webarchive.nationalarchives.gov.uk/20130401151655/http://www.education.gov.uk/aboutdfe/foi/disclosuresaboutschoools/a0065048/how-school-funding-is-apportioned-throughout-the-country>

²¹ Chowdry, H and Sibieta, L (2011), Op Cit p10

A prime example is the challenges confronted in getting states to adopt a set of common and core academic standards for subjects such as English and Mathematics. In the United States, states are responsible for delivering education and establish district structures to manage and oversee the performance of schools. All three levels of government – federal, state, and local - contribute to education funding. States and local governments typically provide about 44 per cent each of all elementary and secondary education funding. The federal government contributes about 12 per cent of all direct expenditures.²²

Traditionally, each state government set its own academic standards. Over time, these academic standards have influenced the skills and competencies of school leavers across the country, in some cases deepening inequities between wealthier and poorer states. The richer states, with more resources invest more in education and set academic standards above their less well-off counterparts. The Common Core State Standards attempts to level the playing field and contains common curriculum standards for two core subjects: English and Mathematics.

By 2014, 43 of the 50 states had adopted the Common Core Standards and aligned with curriculum, assessments and learning materials to them²³. The 'hold-out' states argued the Common Core State Standards were tantamount to a federal takeover of education.²⁴ Opponents to Common Core State Standards also argue that federal influence over education is disproportionate to its fiscal contribution. To encourage the adoption of the budget, the federal government included a \$43.5 billion discretionary allocation for education in the 2009 American Recovery and Reinvestment Act (ARRA).

In 2010, the President Obama re-affirmed the federal government's commitment to standardising academic standards by making the ARRA funding contingent on the adoption of the Common Core State Standards, as part of the Race to the Top programme.²⁵ While there are certainly advantages to having common academic standards, states adopting these new standards do incur a number of additional costs. These costs include revising and updating their curriculum, developing new learner teacher support material as well as retraining teachers in the new curriculum. Since not all of these costs are funded through the federal grant, states incur additional expenditure financed from their own-source revenue.

Although, the dynamics of a federal system and the complex intergovernmental relationships in the United States are different from South Africa's, the experience of the United States demonstrates how national norms and standards can bind the fiscal resources of sub-national government. Unlike state government in the United States which can raise revenue through sales taxes, provinces in South Africa have limited revenue raising capacity. This means that additional costs for complying with norms and standards will have to come from the province's equitable share.

The use of norms and standards in the health sector is more complex. Health norms and standards range from access standards to quality and safety standards. Most countries have set some minimum form of access norms and standards in healthcare. A number of developing countries with severe fiscal constraints defined and adopted the concept of an Essential Health Package. Through it, they identify the minimum levels of health services that should be provided to all citizens based on their available resources, equity and social considerations. The Essential Health Package concentrates the use of fiscal resources on interventions that promote equity and efficiency. Accordingly the Essential Health Package is often seen as the guaranteed

²² Federal Education Budget (2011) *School Finance*. Available Online from: <http://febp.newamerica.net/background-analysis/school-finance>

²³ Common Core Standards Initiative (2014) *Standards in Your State*. Available online at: <http://www.corestandards.org/standards-in-your-state/>

²⁴ Non-adopters include Texas, Minnesota, Indiana, Virginia, Nebraska, Oklahoma and Alaska

²⁵ The Race to the Top programme provides competitive grant to states to encourage them to innovate and improve their overall performance

minimum level of health services funded by the fiscus, and in line with the Declaration of Alma Ata in 1978 on primary health care.²⁶ Countries such as Botswana and Uganda have adopted the Essential Health Package approach, although the international review reveals that the estimating the cost of delivering these health services has hamstrung by insufficient and unreliable data. The Essential Health Package apportions scarce resources according to demographic, economic, fiscal and social factors. When designed well, it accounts for the cost of the various possible health packages, and their effectiveness in reducing the overall burden of disease as well as their affordability of the different health packages.²⁷

While the Essential Package of Care is one way of allocating scarce resources, Universal Health Coverage is another. The aim of universal health coverage is to ensure that all citizens can access health services without suffering financial hardship. Universal Health Coverage pools funds from either general taxation or a combination of general taxation and employee contributions, with the mix of funding sources dependent on the circumstances of the a particular country. With a limited pool of resources, there are clear trade-offs between the coverage extended, the scope of health services provided and the financial protection afforded to citizens. Extending the coverage to the entire population may necessitate a reduction in the scope of services provided. Similarly, extending the scope of health services, while maintaining universal coverage, may require citizens to incur out-of-pocket expenditures.²⁸

Under a universal health coverage regime, governments use norms and standards in a number of ways. Policy norms for instance are used to determine who pays for universal health coverage, and will often exempt poor and vulnerable groups from payment obligations. However, the most widespread use of norms and standards under Universal Health Coverage is to ration the scope of health services provided and maintain minimal levels of quality. The Health Benefits Package describes the minimum levels of health services that can be claimed under universal health coverage and is defined through norms.²⁹ For instance, the benefit package may be restricted to only essential hospital-based services and limit elective procedures.

The determination of health services provided as part of the benefit package is influenced by a myriad of factors including the costs of specific health services, population demographics, the epidemiological profile and equity considerations. By identifying the package of services to be provided, governments can estimate the total cost of health provision. These estimates are then utilised as the basis for allocating funding to subnational government. Sub-national units of government such as health districts are guided by the norms in the defined benefit package when purchasing health services from providers.³⁰

The implementation of universal coverage in developed countries emphasizes that norms and standards should not just be based on the demographics and income distribution of the population but also the epidemiological profile. Government has over time built the systems to collecting information on the cost of health services and burden of disease. Without accurate information on cost of services and the needs of communities, norms and standards under a universal health coverage system is likely to lead to a misallocation of funding.

DISCUSSION

²⁶ World Health Organisation (2008) *Essential Health Packages: What are they for? What do they change?* Available online from: http://www.who.int/healthsystems/topics/delivery/technical_brief_ehp.pdf

²⁷ Ibid

²⁸ Evan, B (2012) *Universal Health Coverage: Concepts and Measurement*. Available online from: <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#>

²⁹ Carrin, G., Mathauer, I. and Evans, d. (2008) Universal Coverage of Health Services: Tailoring Its Implementation. *Bulletin of the world health organization*. 86(11)

³⁰ Ibid

The analysis in this paper focuses mainly on the use of norms and standards in the health and education sectors in South Africa, although norms and standards are used widely across government. One of the initial findings of this research process points to the proliferation of norms and standards within concurrent functions, mainly set by national government. Even in areas where provinces are entitled to set norms and standards for local government in terms of the Constitution, national government has issued broad sets of norms and standards. These practice blurs the lines between national government's powers and that of provinces in relation to the setting of norms and standards for local government.

One example of this is in the area of environmental health. Health services are included in Schedule 4 Part A as a concurrent function between national and provincial government. In contrast, municipal health services are listed in Schedule 4 Part B as a concurrent function between provincial and local government. The National Health Act (No 61 of 2003) defines municipal health services to include environmental health functions such as health surveillance of premises and waste management. Despite the powers conferred by the Constitution for provinces to set their own norms and standards, the National Department of Health in 2013 issued the National Norms and Standards Relating to Environmental Health, which now apply to all spheres of government.³¹

What are norms and standards?

The research process began with an attempt to establish a definition for the term norms and standards. Following an extensive analysis of the legislation, it was apparent that the concept of norms and standards remains largely undefined. Often the term 'norms' and 'standards' were used interchangeably. Our analysis revealed that the National Health Act (No 61 of 2003) is the only piece of legislation, which defines the concept of a "norm". It defines a norm as a "statistical normative rate of provision or measurable target outcome over a specified period of time". Interviews with key respondents during the course of the research also revealed that officials interpreted the definition and purpose of norms and standards differently.³² In some instances, officials interviewed were also unaware of the constitutional provisions that limited the powers of national government to setting "minimum" or "essential" norms and standards.

Nonetheless, the general consensus around the three key characteristics of norms and standards. First, norms and standards are measurable. For instance, norms and standards would not be "all citizens must have access to water" but instead that "all households receive 6 kilolitres of water per month." Second, norms and standards were an obligation set by national government for subnational governments. This obligation can be explicit in the form of legislation or implicit in policy³³. Whatever the case, the obligation is intended bind national and subnational government in a working relationship to achieve a certain policy outcome.

Last, norms and standards were about specifying levels of services and quality. They could also be used to articulate expectations around minimum levels of efficiency, which is closely linked to the quality and level of public services. In this way, norms and standards different from outputs produced by government which quantity production. Therefore, in the health sector, the norm would be that all district hospitals operate a 24-hour labour and delivery service for intermediate and high-risk pregnant women.³⁴ The output indicator would

³¹ National Department of Health (2013) *National Norms and Standards Relating to Environmental Health in Terms of the National Health Act, 2003*. Available online from: <http://www.pmg.org.za/files/130925normsstandardsforenvironmentalhealth.pdf>
<http://www.pmg.org.za/files/130925normsstandardsforenvironmentalhealth.pdf>

³² This research was done as part of a project conducted for the Department of Performance Monitoring and Evaluation

³³ Financial and Fiscal Commission, 2009. A Costed Norms Approach for the Division of Revenue. FFC

³⁴ Infrastructure Unit Support Systems Project. *IUSS Health Facility Guides: Maternal Care*. Available online from: http://www.iussonline.co.za/iuss/wp-content/uploads/2013/03/2014_06_17-IUSS-Maternity-care-facilities-proposal-V21.pdf

be the Early Neonatal Mortality Rate (ENMR) of the health establishment. Pulling all of this together, we are able to synthesize a general definition suitable for the South African context as:

Norms and standards measurable obligations set by national government for provincial and local government to deliver a specified level and/or quality of public services for the whole or specific groups of the population.

The lack of a generally accepted definition or understanding of norms and standards has led to the emergence of different types of norms and standards used for various purposes. Often the types of norms and standards set are in response to a particular problem and context faced by a national department.

What are the different types of norms and standards?

The review of legislation, policies and frameworks reveals that there are five types of norms and standards used in the health and education sectors.

In general, *access norms and standards* guide the level of service that a citizen or household could expect to receive as part of their constitutional rights. For instance, district hospitals are an integral part of curative service offerings in South Africa. In 2002, the National Department of Health issued A District Hospital Service Package for South Africa. This policy framework contained norms and standards for district hospitals. Access norms, for instance, were set as that “proportion of the population transferred from clinics to the hospital in less than an hour”. To achieve this norm, a district hospital would be required to maintain emergency medical services, ambulances and staff trained in accident and emergency procedures.³⁵ In rural provinces, the norm becomes increasingly costly as more emergency service resources are needed to meet this norm. It is possibly due to the high implementation costs associated with these norms and standards, that they did not gain much traction in the health sector.

Output norms and standards govern the scale and quantity of the service produced by government. In the health sector, output norms and standards. The National Department of Health developed the Primary Health Care Package for South Africa which set output norms for reproductive health. This included a target norm of “75 per cent of deliveries in the clinic was done by trained birth attendants”. The cost implications on these norms depend largely on the definition of a “trained birth attendant” and whether having a trained midwife instead of a doctor is an acceptable form of compliance.³⁶

Input norms and standards specify the quantity of resources used in the production of a public service. In its simplest form, learner-to-teacher norms have been set to regulate the size of a class, prevent overcrowding, and ensure that learners receive individualised attention. Again, input norms also have large fiscal implications. The National Education Policy Act (No 27 of 1996) obliges the Members of the Executive Council to determine the allocation and distribution of teachers to schools in line with a post provisioning framework set by the National Department of Basic Education. The Post Provisioning Norms framework determines the number of teaching position needed by schools after taking into account the maximum class size per grade, period load of educators, the size of the school, the number of grades, disabilities of learners and the social and economic circumstances of the school. The model is designed to allocate more teaching posts to schools offering early years and primary school education and those from historically disadvantaged communities. In the same way,

³⁵ National Department of Health (2002) *National Norms and Standards for District Hospitals*. Available online from: <http://www.kznhealth.gov.za/norms.pdf>

³⁶ National Department of Health (2003) *The Primary Health Care Package For South Africa: Norms and Standards for Health Clinics*. Available online from: http://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/documents/2003/primary_health_care_package_part_1_1to17.pdf

the Policy on the Organisation of Roles and Responsibilities of Education Districts limited the number of circuits in a district to a maximum of 10 in order to make sure that district can function optimally.³⁷

Quality norms and standards set the minimum level of service quality that should be expected by citizens. These types of norms and standards are used widely in social sectors to define the level of service quality expected from public institutions. The National Core Standards for Health Establishments, issued by the National Department of Health in 2011, defines infection control standards for health facilities, requiring that “the building and grounds are kept clean and hygienic to maximise safety and comfort”.

Finally, and less frequently utilised are *process norms and standards* that prescribe critical activities that needs to be completed within given timeframes and in a structured manner. The National Department of Basic Education has set extensive process standards for the collection of learner and academic data.³⁸

How are norms and standards developed and issued?

The analysis reveals that there are two approaches to setting norms and standards. Norms and standards can either be legislated, or alternatively negotiated and adopted through policy. Neither of these two approaches are mutually exclusive, and it is not uncommon to find both used in different concurrent functions, depending on what circumstances and challenges need to be addressed. Each of these approaches have their own strengths and weaknesses.

The legislated approach provides a legal basis for enforcement and permits norms and standards to be used as objective criteria for a constitutional intervention by national government. But, interestingly, thus far, the case for Section 100 constitutional interventions in the health and education sectors has mostly been made on basis of financial mismanagement, instead of the failure to comply with norms and standards. In any case, short of drastic measures such as a constitutional intervention, norms and standards are difficult to enforce in a unitary states, where the constitutional status of each sphere is protected. Legislated norms and standards commit the fiscal resources of provinces in the health and education sectors.

Under this approach, two or three spheres of government negotiate, agree, and adopt a set of norms and standards. The negotiated approach aligns well with the spirit and intent behind the system of cooperative governance. In general, the negotiated approach is more likely to result in ownership and less likely to result in malicious compliance. The risk that negotiated norms and standards are not implemented by provinces remain high.

How are norms and standards funded?

The Constitution mandates that the share of nationally raised revenue is divided between provinces equitably. The provincial equitable share is a general purpose grant given to provinces to fund their service delivery obligations. Provinces are given significant decision making autonomy to allocate their resources in line with their provincial needs, while ensuring that national priorities are attended to.

The analysis reveals that norms and standards are funded from either the equitable share or conditional grants or a combination of both. In some instances, where norms and standards impose capital expenditure, national government may opt to funding the whole or part of the capital expenditure through a conditional grant, leaving

³⁷ National Department of Education (2012) The Policy on the Organisation Roles and Responsibilities of Education Districts. *Government Gazette*. No 35107. Available online from: <http://www.pmg.org.za/files/doc/2012/120509education-organisationroles.pdf>

³⁸ National Department of Basic Education (2011) Data Quality Standard for Surveys. *Government Gazette*. No 34345.

the province responsible for the remainder of the capital and operational expenditure. In most cases, norms and standards are included as part of the conditions set out in the conditional grant.

At present, the provincial equitable share is divided according to a formula, built on historical expenditure trends and adjusted changes in population trends, service utilisation rates³⁹ and income distribution. Funding is based on a mechanical application of the formula and not linked to the cost of the service. For instance, even if the education component considers student enrolment in the province and weight the share in line with poverty levels,⁴⁰ it is likely that the cost of educational services differ significantly with provinces, depending on the extent of urbanisation. Urban areas with significantly more fee-paying schools depend less on the government subsidies.

To equalise the distribution of funding, the National Department of Basic Education has issued Norms and Standards for School Funding. These norms and standards are primarily about promoting greater equity in education. They oblige provinces to provide a minimum subsidy to poor schools falling quintiles 1 to 3. A province may opt to fund better resourced schools if sufficient resources remain after allocations have been made to poorer schools. Currently, quintile 1 schools receive R1 010 per learner, or about 6 times more than quintile 5 schools.⁴¹ In effect, the Norms and Standards for School Funding commit the province's equitable share to minimum levels of funding for basic education.

Other instances, the funding obligation imposed on provinces is less obvious. For instance, the Norms and Standards for Health Clinics contained various inputs, outputs and quality norms and standards. Complying with the input and output norms and standards would require considerable resources. In contrast, implementing with quality norms and standards would like to compliance costs, which although less costly, can divert resources away from service delivery.

Finally, conditional grant frameworks do not always explicitly specify norms and standards, especially in the health sector. The conditional grant framework dictates the indicators and outputs that need to be achieved. These targets are often set in terms of some policy directive. For example, the Comprehensive HIV and Aids Grant is administered by the National Department of Health to realise the objectives of the National Strategic Plan on HIV, STIs and TB 2012-2016. Interestingly, the allocation criteria is not based on minimum norms and standards, but rather on antenatal HIV prevalence, estimated share of Aids cases, population figures⁴². Accordingly, the framework specifies outputs such as number of patients on ART remaining in care instead of a norm such as all health establishments keep minimum levels of ART in stock.

What are norms and standards used for?

Since the adoption of the Constitution (No 103 of 1996), norms and standards have proliferated through legislation, regulation, policies and framework. The health and education sectors seemingly adopted these trends and used norms and standards extensively. Fundamentally, norms and standards have been used to regulate the workings of provincial government in order to achieve national priorities.

Our analysis of norms and standards reveal that they are set for two main reasons. The first reason for norms and standards to ensure that resources are allocated to national priorities. These priorities may relate to the need for better access to public services (e.g. norms governing the access to district hospitals) or a more

³⁹ This refers to student enrolments, hospital day patient equivalents, primary health care visits.

⁴⁰ National Treasury (2011) *Explanatory Memorandum to the Division of Revenue*. Available online from: <http://www.treasury.gov.za/documents/national%20budget/2012/review/Annexure%20W1.pdf>

⁴¹ National Treasury (2014) *National Norms and Standards for Schooling Funding*. Available online from: www.gov.za/documents/download.php?f=207685

⁴² 2014 Division of Revenue Bill

equitable distribution of resources (e.g. the norms and standards for schooling funding). Where the purpose of norms and standards is to redistribute resources, the analysis revealed little prior work done by national government on estimating the cost of implementation. In some cases, interviewees were aware that setting norms and standards would require more resources for monitoring within the national department, but almost no effort had been made in estimating the cost of implementation.

For instance, the National Department of Basic Education has set norms to limit the number of circuits in a district to 10. The extent to which this norm requires a reorganisation of the education district system and the cost associated with redrawing boundaries, moving staff and setting up new districts is unclear. Moreover, in Gauteng with its smaller geographical area, this cap may be counterproductive, if it compels the province to establish and resource small circuits, each with their own staff and offices. The cost associated with establishing and maintaining additional circuits may outweigh the benefits of more manageable geographic area for circuit officers. The example illustrates the importance of assessing the cost associated with implementing norms and standards prior to setting them.

Costing norms and standards is meant to provide national government with a clear understanding of the cost of service provision in different contexts. Over time, this reduces the information asymmetry and the likelihood of moral hazard where sub-national governments spend irresponsibly if there is an implicit guarantee that national government will bail them out. Especially where it is evident that national government has limited information to stage an early intervention.

The experience in Limpopo demonstrates these principles clearly. In mid-2011, the Limpopo Department of Education has overspent on its budget and could no longer pay its teachers. At the time 90 per cent of its expenditure went towards salary payments. The province had also ordered overpriced textbooks for learners because of shortcomings in its procurement processes. With almost of its budget spent, the province did not have sufficient resources for the provision remaining textbooks. Eventually the Limpopo Department of Education was placed under administration.

The Limpopo case demonstrates the consequences of national and provincial government knowing the drivers of education costs and benchmarking different cost items (such as textbooks and teacher salaries). If the cost of education provisions were estimated and benchmarked properly in the budgeting process, it would be apparent that the provincial Department of Education has been appointing teachers to the highest salary scales and that the unit price of textbooks charged by publishers were exorbitant. In part, if the funding was allocated on the basis of a unit cost per learner, the excessive expenditure may have been noticed and rectified sooner.

Two decades prior to the Limpopo textbook crisis, the Financial and Fiscal Commission forward the 'Costed Norms Approach' as an alternative way of distributing funding to provincial government. The approach was the first attempt to link funding for constitutionally mandated basic services to the cost of provision. In essence, the 'Costed Norms Approach' restructured the equitable share formula to determine divide funding in line constitutionally mandated norms and standards.⁴³ In applying the costed norms approach, the FFC estimated the resources needed to deliver a basic education, health and welfare services. For instance, the annual average cost of Primary Health Services at the time was R136 and the indirect or institutional costs amounted to R60. This meant that provinces should have received a guaranteed minimum of R196 per patient to fund primary health care.

The Financial and Fiscal Commission argued that failure to adequately fund norms and standards would undermine the delivery of constitutionally mandated basic services.⁴⁴ In the case of the Limpopo textbook

⁴³ Financial and Fiscal Commission, 2009. A Costed Norms Approach for the Division of Revenue. FFC

⁴⁴ Ibid

crisis, a formula-based allocation that ring-fenced the allocation of funding towards meeting the minimum textbook norms would have reduced the impact of over-expenditure on salaries on service delivery.

But at the time of the proposal on costed norms, one of the main concerns of the National Treasury was that inadequate information existed to implement this approach. Two decades on, the basis for the provincial equitable share remains formula based, although positive changes to the various education, health and poverty components have tried to improve its targeting and pro-poor orientation. With the equitable share growing incrementally over the changes, the link between the funding levels and the cost of the public services has weakened.

In the health sector, the introduction of occupation specific dispensation has increased the wage bill and higher medical inflation erodes the amount that can be delivered with current equitable share allocations. Unfunded mandates or as this paper argues is better termed as “basic service delivery deficits”. This arises when insufficient resources are dedicated to the meeting the demand and need for basic services. This disjunction reflects the gap between the cost of public services and the allocated level of funding increases. The extent of the gap can only be assessed if information on the cost of public services is available.

In repudiating the costed norms approach, government lost an opportunity to develop the data systems and the information needed on the costs and drivers of public sector costs. Nonetheless, as South Africa implements the National Health Insurance Scheme, government may have to reconsider using a variant of the costed norms approach. The National Health Insurance Scheme’s main purpose is to distribute pooled funds to where they are needed the most.

Establishing an effective allocation mechanism from national to provincial government is crucial to the success of the scheme. The first step towards a functional National Health Insurance scheme is establish a defined health benefits package for the country. The scope and breadth of this package of health services will be jointly determined by the costs of provisioning, population demographics and the epidemiological profile of provinces and their health districts. Simply put, the defined health benefits package would have to be affordable. Setting the package of health services above its affordability, will likely to place additional demands on the national fiscus, while a narrowly defined package of health services will undermine health outcomes.

The second reason for setting norms and standards is to regulate the quality and efficiency of service delivery. Traditionally, regulation has been associated with government setting rules for the private sector. However, over the past three decades, the concept of regulation within the public sector has gained wide currency.⁴⁵ Intergovernmental regulation in government involves one sphere of government (as the overseer) setting rules in place for another sphere (the implementing agency). Norms and standards are then seen as a regulatory mechanism design to check quality, promote efficiency or security probity in the utilisation of public resources.⁴⁶

Process and quality norms and standards are codified in either regulations or articulated as policy. Difficulties in setting these types of norms and standards arise in establishing the quality or level of efficiency expected from provincial government. For instance, waiting for one hour at a clinic may be justifiable in the case of a routine check but not in the case of an emergency. Quality standards can involve a certain level of subjectivity and determining the appropriate minimum level of acceptable quality is therefore problematic. Moreover, national government is often not well placed to establish the minimum benchmark because of information asymmetry. That is, national government knows less than provinces about the operations of health establishments.

⁴⁵ Baldwin, R., Cave, M., & Lodge, M. (2010). *The Oxford Handbook of Regulation*. New York: Oxford University Press.

⁴⁶ Ibid

In the health sector, quality standards have been widely adopted across the developed world and have increasingly found favour amongst developing countries. While these norms and standards may not have the considerable cost implications, they impose compliance costs on the entities they seek to regulate. Compliance costs can be grouped in two categories: implementation costs and administrative costs. Implementation costs include the additional labour, overheads, equipment and material costs that are incurred in complying with the standard. Administrative costs include the reporting and monitoring burden arising from the regulation. In addition, there are monitoring and enforcement costs incurred that by the 'overseers'⁴⁷.

For instance, the National Core Standards for Health Establishments sets information standards for health establishments. It requires that health establishments have a "health management information system in place to collect, store and provide data to meet managements' needs". As part of the criteria for compliance, the standard requires that staff have adequate IT hardware, skills and support to effectively use the systems and that computerised systems are functional where available. The standard in itself is important and aims to improve decision making and resource allocation within health establishment.

However, depending on how health establishments interpret the standard, some may understand compliance to mean setting up sophisticated software and database systems. The cost of compliance equates to the cost of the new system where sufficient resources are available to implement these computerised system. In contrast, where compliance with this standard shifts resources away from purchasing pressing health technology, the cost of compliance is measured by the opportunity costs associated with equipment forgone. These compliance costs become non-trivial if approximately 4 000 health establishments had to comply with approximately 80 quality standards. It can be argued that the benefit of delivery safe and quality health services is an equally important consideration and contributes towards the realisation of constitutional rights. Nonetheless, the compliance costs do take up scarce resources and encroach on the equitable share of provinces. For provinces with weak revenue raising powers, compliance costs reduce the resources available for deliver on their executive obligations.

RECOMMENDATIONS AND CONCLUSIONS

Much of this paper is about ways in which norms and standards can be used more judiciously to promote policy objectives. The paper argues the proliferation of norms and standards especially in concurrent functions demonstrates attempts by national government to 'regulate' provincial government. Indeed, the underlying purpose of the regulation may be an attempt to reduce the gap between national government's accountability for outcomes and provinces responsibility for implementation. In addressing this gap, norms and standards are used for two primary purposes. The first purpose is as a resource allocation mechanism; access, inputs and output norms are meant to be redistributive in nature.

Undoubtedly, national norms and standards, particularly in relation to constitutionally mandated basic services is warranted and needed to ensure uniformity and promote policy outcomes. This paper supports the costed norms approach in linking funding to the cost of public services. That said, the paper suggests that the time is right to revisit the formulation of the costed norms approach. In particular, for the education component, consideration should be given to the:

- inclusion of early childhood development years (Grade R) in the formula as a separate component,
- incorporation of a policy parameter for teacher training as separate from the remuneration per educator
- alignment of the formula with the quintile system adopted by the Department of Basic Education
- use of weighting to target funding to the poorest learners

⁴⁷ OECD (2014) OECD Regulatory Compliance Cost Assessment Guidance. OECD Publishing. <http://dx.doi.org/10.1787/9789264299667-en>

- creation of a guaranteed minimum level of funding per quintile to replace the current Norms and Standards for School Funding.

For the health component, the costed norms formula should be adjusted to take into account the proposals contained in the White Paper on National Health Insurance specifically relating to the defined package of care⁴⁸ and the burden of disease faced by each province.

The second purpose largely revolves around regulating the quality and efficiency of service delivery by provincial government. These types of norms and standards give rise to compliance costs either by increasing the administrative burden on provinces and/or raising the cost of implementation or service delivery. In using these types of norms and standards, national government can minimise compliance costs by setting only essential process and quality norms and standards to resolve particular problems.

Finally, going forward, it is an opportune time to introduce a fairer system of resource allocation between all three spheres of government. Part of this can be achieved by national government setting out guidelines around how norms and standards should be used and developing a framework for cost implications associated with different types of norms and standards. In the case of constitutionally mandated norms and standards, funding should ideally be informed by the cost of service provision. Where large gaps exist between funding levels and costs, harder policy decisions are needed around the scope of public services provided needs to be made.

In so far as quality and process norms are concerned, the potential for compliance costs to divert resources away from core service delivery activities within provinces remains a risk for provinces. But with better guidance to national departments on the types of compliance costs and their impact on provincial budgets, these risks can be mitigated.

This paper's aim is to contribute to the debate around norms and standards and their fiscal implications. It recommends that government develops a framework to govern the issuance and costing of norms and standards by national government. This framework should ideally be formulated in conjunction with provinces and local government so that all spheres share a common understanding of the purpose of norms and standards as well as the fiscal implications.

Norms and standards are a powerful mechanism for national government and can contribute to the achievement of policy outcomes. However, norms and standards should be used in a judicious manner, lest they become part of the very problems they were devised to resolve.

⁴⁸ This has yet to be released by government.