

2/4/3/4/12a

Block 2/Phase 2

CONSTITUTIONAL ASSEMBLY

FRAMEWORK ON INTER- GOVERNMENTAL RELATIONS

REVISED VERSION

BY

PROF BC MAJOLA

TECHNICAL ADVISOR TO

**THEME COMMITTEE 3
RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

Embargoed until 14h00 8/5/95

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

RELATIONSHIPS BETWEEN LEVELS OF GOVERNMENTS

Framework on Inter-governmental Relations.

1. **Introduction:** The present Constitution gives some guidance to the Constitutional Assembly as far as the drafting of the new constitution is concerned. Most of this guidance comes from the Constitutional Principles contained in Schedule 4. For purposes of the discussion on intergovernmental relations, a few of those principles are set out below. When a constitution creates different levels of government and confers powers on them, it usually also contains provisions aimed at regulating intergovernmental relations. This is typical of many federal constitutions in the world. Our own interim Constitution makes provision for the regulation of the relationships between governments, as will be shown below. However, Constitutions are couched in terms that tend to be general but do not cover all possible areas of relationship. For that reason, mechanisms to cater for some of the matters that may not be covered in the constitution, become very useful for the smooth and efficient government of the country.

2. Inter-Governmental Mechanisms

In suggesting a framework for mechanisms which may be used to regulate inter-governmental relationships, it is necessary to look, among others, at the Constitutional Principles.

a) Constitutional Principle XVI provides that government shall be structured at national, provincial and local levels. *Also protects the levels*

Q. Since these three levels of government must work towards national unity and the achievement of the national objectives how can we ensure that there is smooth interaction among them?

b) Regarding the division of powers among the various levels of government and in particular between the national level and the provincial level, Constitutional Principle XIX and XXI (6) and (7) provides that certain powers shall be held concurrently by these two levels of government. See also Constitutional Principle XXII. *→ Nat Govt not encroach upon prov; not boundaries etc.*

Q. What mechanisms should be adopted to promote co-operation and to prevent and to deal with disputes arising from the exercise of concurrent powers by levels of government to which those powers are allocated?

According to Constitutional Principle XIX the powers and functions at the national and provincial and provincial levels of government shall include power to perform functions for other levels of government on an agency or delegation basis. *Who bears cost then*

*Concurrent Powers
+
Duplication
+
Agency.*

Q. What does this mean in real terms? When a level of government has delegated powers to another level or where the one level appoints the other as its agent, what mechanism should be employed to enhance productivity, efficiency and effectiveness and to minimise conflict?

c) Constitutional Principle XXVI guarantees a right to each level of government to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

Q. What mechanisms should be employed to ensure that, each year, every province gets an equitable share of revenue collected nationally?

The present Constitution provides, in Sections 198 - 206 the establishment of the Financial and Fiscal Commission for regulating the distribution of financial resources between levels of governments. Should this mechanism be retained and improved?

d) The national government is proscribed in Constitutional Principle XXII from exercising its powers in such a ways that it encroaches upon the geographical, functional or institutional integrity of the provinces.

Q. What should be understood by the phrase, "encroach upon the integrity of the provinces"? *what'd amount to encroachment*

Q. What mechanisms should be put in place either to prevent or reduce the possibility of the national government encroaching upon the integrity of the provinces and what should be done to reduce the risk of one province encroaching upon the geographical or institutional integrity of another or other provinces?

e) Constitutional Principle XVIII (5) requires that provision be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

f) Regarding local government, Constitutional Principle XXIV provides that the comprehensive powers, functions and other features of local government shall be set out in parliamentary legislation or in provincial legislation or in both.

*Div of Rev. between
Nat. & Prov
Prov & Local
Govt. ↓
Resources
Constitutionalise*

*Encroachment
There has to be a way
to prevent such
Anxiety of C. h/ Govt*

*Some mech. to
view to comply*

Q. What mechanisms should be employed to prevent either the provincial government or the national government from whittling away the autonomy of local governments? Note, however, that the Constitutional Principles do not expressly require autonomy for local governments nor proscribe it.

g) Constitutional Principle XXXIV envisages a possibility of the establishment of a territorial entity within the Republic or in any other recognised way and the entrenchment of its continuation together with its structures, powers and functions. *self-determination?*
what'd be rel. between this + other structures already existing + mechanisms

The Constitutional Principles referred to above create two possibilities. One is the possibility and the need for cooperation between different levels of government, for example, between national and provincial and between provincial and local governments. The other possibility is that of conflict arising, for example, out of the exercise concurrent powers by both levels of government to which such powers are given. Cooperation and conflict may also occur in relationships between and among provinces. The question remains how to promote cooperation and prevent, reduce or solve conflict. One way is to put in the constitution provisions which aim at achieving these objectives.

However, it is not possible for the constitution to contain sufficient or adequate provisions for bringing about and ensuring cooperation and for dealing with disputes. A constitution of a country is an instrument that is usually intended to last and serve for a long time. For that reason the tendency, in drafting constitutions, is not to make them too detailed to enable adaptations to developments that come with the passage of time. This reduces the need for constantly amending or changing the constitution. The above means that there will be matters which are dealt with in the constitution in broad outline and leaving the fleshing thereof to legislation, or judicial interpretation or to other mechanisms. There is, however, nothing preventing a country from drafting a detailed constitution.

One way of achieving the objectives of enhancing cooperation between or among levels of government and between and among provinces is to adopt mechanism for regulating intergovernmental relations.

3. Purpose of Inter-governmental Mechanisms

These include structures and procedures that promote co-ordination between levels of government and make their interdependence mutually beneficial and smooth in operation. Intergovernmental mechanisms are also employed for and serve the following purposes:

*Mediation

***Doing needs assessments**

***Joint planning of the national policy.**

These mechanisms do not replace the courts of the land as one of the mechanisms for settling disputes arising between levels of governments and among different provincial governments.

4. **Should Constitution Include Provisions Setting Out the Mechanisms?**

Neither Yes/No.

***Mechanisms can evolve as the constitution finds application and as problems arise and solutions to are sought. In such a case the mechanisms are therefore not contained in the Constitution. After evolving they may be incorporated into the constitution. The disadvantage of the evolutionary approach is that there are no solutions to problems when they arise and a lot of precious time can then be spent finding mechanisms to deal with the situation which has arisen. The advantage is that it allows for flexibility which allows adaptation as the Constitution grows and government develops.**

*** Mechanisms can be provided for in acts of parliament.**

*** Some mechanisms can be provided for in the Constitution or parliamentary legislation while room is provided for others to evolve. Chapter I and Chapter II of Part XI of the Constitution of India, which deals with relations between the union and states, provides mechanisms for intergovernmental relations. For example Article 254 (2), dealing with concurrent powers, provides that although an act of parliament shall prevail over an inconsistent law of a state, the law of the state shall prevail in that state if it has been reserved for the consideration of the President and has received his assent.**

- Should the intergovernmental mechanisms adopted be compulsory or voluntary? What should be the nature of the powers and decisions of these mechanisms? My opinion is that some may be and others not.

5. **Examples of Intergovernmental Mechanisms**

5.1 **At Executive Level**

***Premiers Conferences**

These are fora through which premiers of provinces discuss matters of common importance, exchange ideas, plan policy and negotiate and settle disputes. While the premiers conference resolves differences, it also harmonised the inter-dependence that exists, especially among neighbouring provinces.

Premiers conferences can also be used to discuss proposed legislation introduced either at national level or at provincial level and make an input as a block.

***Min/Mecs Conferences:** These are provided for in Section 220 (1) of Interim Constitution. Should they be retained?

These conferences are particularly useful regarding those matters over which power is exercised concurrently by both the national government and the provincial governments. Health, education, the public service and housing are some of those matters. As far as the South African Police Service is concerned, purpose of the minister/mec's conference is, according to S. 220 (1) of the Constitution, to ensure effective co-ordination of the Service and the effective cooperation among the various commissioners. A committee of provincial police commissioners is also to be established in terms of S 220 (2) of the Constitution.

***Mecs Conferences**

These are conferences of provincial MEC's of particular portfolios at which policies are discussed so that the policies of the one provincial government do not prejudice the other provinces. These will be particularly useful in areas such as education, health, transportation, tourism and lotteries and gambling. An example of a problem which these conferences may deal with is given. A long distance taxi association registered in Cape Town is issued a permit by the Western Cape Provincial Government to transport up to a maximum of 16 passengers per kombi on the N1 route between Cape Town and Pietersburg. The Free State provincial government imposes a taxation of R10 per head in respect of each passenger transported through the province by taxis which are not licensed by the Free State province. On the other hand, the Gauteng province allows taxis to carry a maximum of ten passengers per kombi while the Northern Transvaal Provincial Government does not permit taxis licensed outside the province to pick up passengers within the province.

5.2 Legislative Level

***Intergovernmental Legislative Committees** - May or may not be necessary depending on the degree of separation of powers at provincial level. The greater the separation of powers the greater the need. If the separation is weak, then this can be done at executive level, for example, it can take place in the form of premiers' consultative meetings with the senate.

5.3 Administrative Level

Q. Can one state ban the sale of lottery tickets of other states within its own borders?

The following are some of the mechanisms that can be employed at the administrative level.

***Directors-General Conferences:** These may be used effectively also in dealing with matters in the public service.

***South African Police Services - Policing,** the prevention and detection of crime and the need for maintenance of law and order transcend borders. This raises the need for cooperation, coordinate policies and joint planning among the security establishments of provinces. The present Constitution provides for the establishment of Boards of Commissioners. See Section 220 (2) of the interim Constitution.

6. The Senate

Depending on the way the senate is composed, it can also serve as a mechanism for regulating inter-governmental relationships. If the senate or second chamber in the national assembly is adequately representative of provincial governments, this may serve to enhance and harmonised cooperation and good working relationships between the national government and the provincial governments. The fact that the senate or second chamber will be a unit representing the interests of provinces, may also enhance greater cooperation among the various provinces.

End