

2/4/3/2/3/20

**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

SUBMISSIONS
RECEIVED AS AT 02 JUNE 1995

COMMISSION ON PROVINCIAL GOVERNMENT

VOLUME 15

DISCUSSION DOCUMENT

SUMMARY OF RECOMMENDATIONS: INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA

Bertus de Villiers¹

South African circumstances - as is the case internationally - require a high level of co-operative intergovernmental relations. This means in essence that there should be a range of networks between the provinces themselves and with the national government. It does not mean that there will be no competition between the various levels of government, but rather that where required partnerships will be established.

The following recommendations are made for creating a framework for intergovernmental relations in South Africa:

1 Recognition of intergovernmental relations

In organizing intergovernmental relations a balance must be struck between a constitutional/statutory framework and the allowing of sufficient room for spontaneous and ad hoc developments. Intergovernmental relations cannot be confined to the narrow definitions of the constitution or other statutes; on the other hand, a young democracy such as South Africa cannot adopt a laissez faire approach to the relationship between levels of government.

It must be emphasized that no single institution, whether created by the constitution or in a spontaneous manner, should be seen as the sole facilitator in intergovernmental relations. The whole body politic - legislative, executive and judicial organs; civil servants; political parties; specialist agencies and pressure groups in civil society - should combine forces to provide a dynamic network to link the levels of government in as many ways as circumstances may require.

The new constitution should be a catalyst for an intergovernmental partnership by initiating and introducing a framework for intergovernmental relations, but without attempting to dominate all other initiatives.

It is recommended that:

- (i) the new constitution should contain an overall objective which requires that all levels of government shall strive towards co-operation, consultation and co-ordination in the exercise of their responsibilities with the aim of serving the people of South Africa in an optimal manner. Such a provision could be used as an introduction to the allocation of powers to national, provincial and local governments*
- (ii) the importance of sound intergovernmental relations and a partnership*

based on mutual respect and sharing should therefore receive constitutional recognition and be mandatory on all tiers of government. This will have a legal, political and moral impact on the whole governmental fabric. It will also ensure that the constitutional and legal basis of intergovernmental agreements is explicit, which in turn will allow the judiciary to develop a jurisprudence that could serve as a framework for intergovernmental relations;

- (iii) the Constitutional Court should in its interpretation of the constitution and its efforts to balance national and provincial interests, use the objective referred to above (i) to develop the contours within which all levels of government must exercise their powers and functions.

2 Establishing a National Commission on Intergovernmental Relations

It has been emphasized that no single institution could or should be made responsible for the conduct of intergovernmental relations in South Africa. That does not mean that no provision whatsoever should be made for a national institution to co-ordinate and study matters pertaining to intergovernmental relations. On the contrary; international experience shows how crucial is the role that could be fulfilled by a national institution specializing in such matters. It could have a wide range of activities; e.g. monitoring intergovernmental relations, undertaking research locally and internationally, collecting data relevant to policy formulation at all levels of government, and making recommendations for the improvement of intergovernmental relations in general.

Providing for an institution that involves itself mainly in intergovernmental matters must not be seen on the one hand, as "centralization" and the "domination" of intergovernmental relations by the central government or, on the other hand as a "weakening" of central government is because of its obligation to consult with provinces and local authorities. If the composition, functions and activities of the proposed institution are generally acceptable, it could give significant support to all levels of government.

The following recommendations are made:

- (i) the constitution should provide for the establishment of a National Commission on Intergovernmental Relations. The detail of its composition and functions could be set out in the constitution or in subsequent legislation
- (ii) the commission should be so composed that it has a scientific, expert and technical basis for its functioning, and is acceptable and credible to national, provincial and local government. It should be seen as a technical, advisory and consultative body that serves levels of government and not as a political institution serving segmental interests;
- (iii) A National Commission on Intergovernmental Relations should not be so rigid and legalistic that it prevents other social and political forces and other specialized institutions from influencing intergovernmental relations. It should be a catalyst rather than a "gate keeper" in the intergovernmental process;

(iv) the powers and functions of the commission could inter alia be:

- To monitor the operation of national-provincial-local relations and make recommendations for their improvement;
- to undertake research in South Africa and abroad, and to compile and maintain data on all matters that may be of relevant to the formulation of policy on intergovernmental relations;
- to propose options for consideration to solve conflicts that may arise between levels of governments - whether vertical (i.e. between national and a provincial government) or horizontal (ie between two provincial governments);
- to provide all levels of government with the opportunity to make submissions on general or specific issues concerning intergovernmental relations;
- to liaise with other institutions, organizations and forums involved in the process of intergovernmental relations, - such as specialized committees of parliament and the provincial legislatures, particular ministerial committees, the office of the President, the Financial and Fiscal Commission, and non-governmental specialist organizations;
- to assist, when requested, provincial and local governments with the establishment of intergovernmental partnerships within or between provinces;
- to undertake other activities to promote and co-operation, consultation and co-ordination between tiers of government.

3 Provincial advisory commissions on intergovernmental relations

International experience, particularly in developing countries, indicates that local authorities often suffer under the authority of provincial governments. It is interesting that in numerous cases where provincial governments have agitated for more autonomy, they have at the same time usurped the powers and functions of the local authorities in their areas of jurisdiction. Measures to facilitate national-provincial relations must therefore be extended to foster sound provincial-local ties.

It is recommended that the new constitution should contain the following provisions for intergovernmental relations:

- (i) provinces should have the right to establish provincially based commissions on intergovernmental relations with, in the sphere of the province, the same responsibilities and functions that as National Commission on Intergovernmental Relations;
- (ii) the main purpose of the provincial commissions should be to monitor and facilitate relations between the province and local authority, and between provinces themselves; to make inputs to the National Commission on Intergovernmental Relations, and to provide the provincial

legislative assemblies with options for the improvement of intergovernmental ties;

(iii) the offices of the provincial Premiers should, as with the office of the national President, pay particular attention to the conduct of intergovernmental relations within the province, between the provinces and with the national government.

4 Financial and Fiscal Commission

The success of all levels in the execution of their responsibilities depends to largely extent on the financial and other resources at their disposal. International experience shows that legislative powers without the necessary financial resources to implement programmes, leads to frustration and the erosion of the credibility of the provincial and/or local governments.

It goes without saying that it is impossible to devise a system in which each province and local government will be able to generate enough income for its own activities. Inequalities between provincial and local governments are a fact of life in all states. In all multitiered systems provision is accordingly made for financial and other transfers, both vertical and horizontal, between the respective levels.

It is important that subnational authorities must be afforded some guarantee as to the frequency and size of allocations by the national government. Hence the constitutional and legal guarantees in for Germany, Belgium and Nigeria, for instance that certain fixed percentages of national taxes will be paid over to the subnational authorities to supplement their own-generated income. This allows them to undertake medium and long-term planning and to initiate projects based on anticipated income, instead of being forced into short term, year-to-year planning.

It is recommended that consideration be given to the establishment of a Financial and Fiscal Commission with the following aims:

- (i) to investigate options and propose possible solutions for the development of norms and criteria for the allocation of unconditional and conditional grants-in-aid to provinces and local authorities;
- (ii) to investigate ways to promote the fiscal performance of the various levels of government and increase their ability to initiate programmes to meet the expectations of their inhabitants;
- (iii) to report to parliament and the respective provincial legislatures on the fiscal performance of the provinces;
- (iv) to propose ways in which the income of provinces and local governments could be expanded by means of a fixed formula
- (v) to make recommendations on ways to improve the allocation of legislative and taxation powers of all levels, in order to avoid confusion and overlapping and the minimize intergovernmental transfers;
- (vi) to liaise with all levels of government and specialist agencies in order to facilitate and encourage intergovernmental co-operation.

5 Role of senate in intergovernmental relations

One of the greatest deficiencies of the interim constitution is that it understates, even ignore, the role the senate could play in intergovernmental relations. The senate is an ideal forum to provide linkage between national and provincial governments. It is intended not only to reflect and represent provincial interests; it is also under the obligation to provide feed-back to the provinces on matters of national interest. The senate thus has a dual role - representing the provinces in the national parliament and representing the national interest *vis-a-vis* the provinces.

It is recommended that the following be considered in order to utilize the potential of the senate as a linkage between the national and provincial governments:

- (i) *the senate should be so composed as to enable it to reflect more accurately than it can under the interim constitution, the opinions of the provincial legislatures and governments are. There are various options to consider, although some form of indirect election by the provincial legislatures may prove the most practical;*
- (ii) *provision should be made for feed-back and consultation between the senate and the provincial legislatures. This could be done in various ways - such as joint meetings of legislative committees; for provincial inputs into the national legislative process: collaboration between the national and provincial commissions on intergovernmental relations, and the setting up of specialist committees dealing with intergovernmental affairs;*
- (iii) *the senate should consider the establishment of a permanent Committee on Intergovernmental Relations: to monitor all matters pertaining to intergovernmental ties; to serve as a point of contact between the provinces and the senate, working together with the House of Assembly; to liaise with the National Commission on Intergovernmental Relations, and to take other steps to facilitate intergovernmental relations.*

6 Specialized joint committees between parliament and provinces

Parliament, with its two houses, various committees and legislative programme, is arguably the main player in the field of intergovernmental relations. Their success or failure depends largely on the ability of parliament to unite national, provincial and local interests within a co-operative framework in which a culture of partnership and respect is cultivated. Although all the functions of parliament may have a direct or indirect impact on provincial and local governments, certain of its committees are more relevant to intergovernmental ties, such as those dealing with foreign relations and treaties, fiscal and financial matters, social and economic restructuring and other areas of concurrent powers.

It is recommended that parliament should, in addition to its normal role as main institution in the field of intergovernmental relations, also provide specifically for specialized committees such as:

- (i) *A Foreign Affairs and Treaty Committee with the following aims:*
 - * *to co-ordinate national and provincial foreign policy*

initiatives, especially with regard to Southern Africa;

- * *to afford the provinces the opportunity to comment, evaluate and propose amendments to treaties and to consider other foreign policy initiatives of the national government, in as far as they may have a direct impact on provincial powers and functions; and*
- * *to enable the provincial governments to inform and consult the national institutions on specific actions that are being considered at provincial level, and that may have a bearing on national foreign relations.*

(ii) an Intergovernmental Relations Committee with the following aims:

- * *to monitor and provide general coordination of intergovernmental ties, especially between the national and provincial governments;*
- * *to liaise with the National Commission on Intergovernmental Relations on matters of mutual concern;*
- * *to evaluate continuously the allocation of powers and functions to the tiers of government so as to improve the rendering of services;*
- * *to initiate policy measures and draft legislation in consultation with the provinces, in order to facilitate the functioning of intergovernmental relations;*
- * *to identify, prevent and/or mediate in disputes that may arise between levels of government;*
- * *to provide a forum for specialist agencies to make submissions on matters pertaining to intergovernmental ties.*

(iii) a Financial and Fiscal Committee with the following aims:

- * *to monitor financial and fiscal relations between levels of government and to propose for their improvement;*
- * *to make recommendations to parliament on the allocation of grants-in-aid to the provinces;*
- * *to investigate ways to improve taxation and to promote an equitable distribution of resources and efficiency in the administration of the revenue system;*
- * *to consider applications for loans and other financial assistance by the provinces and local authorities.*

(iv) a number of specialist committees, responsible for concurrent matters on which both the national and provincial governments are competent to legislate, should be established. This will ensure that concurrent matters are addressed in a partnership spirit. The specific committees could be finalized only when clarity is reached on the allocation of powers and functions but typical concurrent areas are housing, welfare, education, conservation, agriculture and tourism. In such matters

provision could be made for direct consultation between the parliamentary committee and the respective provinces.

7 Presidential leadership in intergovernmental relations

International experience shows that head of the government has a key part to play in building sound and friendly co-operation among the various components of the state. Provision is accordingly made in several ways to involve him in intergovernmental relations. Examples are a special section in the office of the President to monitor these ties; frequent meetings between the President and provincial governments, and the establishment of a specialist agency to advise him.

The following recommendations are made on the role the President could play in intergovernmental relations:

- (i) the President should provide personal guidance to encourage sound intergovernmental relations, by public statements, policy initiatives and meetings with representatives of all levels of government*
- (ii) a special department responsible for the monitoring of intergovernmental relations could be established in the office of the President. Provision could also be made for a close relationship between the office of the President and the National Commission on Intergovernmental Relations;*
- (iii) the President should meet as regularly as possible with the premier's of the provinces to discuss matters of common concern*
- (iv) consideration could be given to the calling of a meeting of members of the cabinet, parliament, premiers, provincial legislatures, representatives of local government and other interest groups to lay the foundation for an overall strategy for intergovernmental relations.*

8 Executive interaction

It is essential to devise ways to build close co-operation between the executives at national and provincial level with the aim where possible of harmonizing and co-ordinating activities, legislation and policy measures. It is especially in the field of concurrent matters, where both national and provincial governments can legislate, that collaboration and co-ordination are required. Similarly provision could be made for provincial-local and provincial-provincial co-operation.

The following recommendations are made for executive interaction between national and provincial governments:

- (i) The national President and premiers of the provinces should meet as regularly as possible to discuss matters pertaining to intergovernmental relations at large;*
- (ii) Ministers at national and provincial level, especially those responsibilities involving the national and provincial governments - such as education, housing, conservation, tourism, health and agriculture - should meet regularly at ministers' conferences to co-ordinate activities and devise policy measures applicable to both*

levels of government;

- (iii) *Premiers of the provinces could consider the establishment of a permanent premiers' conference with its own staff. Such a conference and infrastructure could provide the provinces with the opportunity to exchange ideas, develop common positions, make recommendations, develop databases for policy formulation and to undertake any other action that might facilitate closer co-operation in addressing mutual problems;*
- (iv) *provincial ministers could form joint ministerial committees to meet at regular intervals. Such meetings could become the "working stations" where policy is developed, legislation is conceived and common positions are established.*

9 Administrative co-ordination

The extent to which intergovernmental relations succeed or fail in practice, depends largely on the way in which administrative and bureaucratic co-operation and consultation between government departments occurs. Although excessive "bureaucratization" of intergovernmental relations could blur the transparency of government activities, it is necessary that a working relationship is developed between national and provincial departments on matters of common concern. Collaboration between civil servants at provincial and national level could pave the way for the joint planning and management of activities and the sharing of expertise, which in turn could lead to a harmonization of legislation.

The influence of today's civil servants within a new system of provincial government should not be underestimated. Those involved could form a core of officials and provide the essential management skills required by the provinces and local governments.

The following recommendations on administrative co-ordination between levels of government are made: -----

- (i) *permanent interdepartmental forums between national and provincial departments should be established to co-ordinate activities, devise policy options, and provide each level with the opportunity to comment on legislative measures of the other. It is especially in areas of concurrent and framework powers, where both the national and provincial governments can legislate, that joint forums of this kind are needed;*
- (ii) *provinces should consider establishing among their own departments various modes of co-operation. This will enable civil servants to exchange information, undertake joint planning, share expertise and co-ordinate in general on all matters of provincial concern;*
- (iii) *a culture of collaboration and partnership between civil servants at national and provincial level could be developed, encouraged and enhanced by a national public service commission that would, be responsible inter alia for certain training programmes for civil servants. This would help to ensure that they serve the national interest and are equipped to do duty in national as well and provincial departments.*

10 Constitutional Court

The judiciary, and in particular the constitutional or supreme courts in the our case studies has generally played a decisive part in the development of intergovernmental relations. It has the responsibility to interpret the constitution, to provide a contour within which the exercise of powers must occur, and to devise rules and binding on all levels of government should adhere. One of the primary responsibilities of the Constitutional Court will be to rule on the powers and functions of the national and provincial governments, to harmonize laws as far as possible, to adjudicate irreconcilable conflicts and to set limits to what the various levels of government may and may not do. Because of this it will be able to direct, influence and even force the levels to work together. The Constitutional Court of South Africa could, as is the case in the USA, Germany, India and elsewhere others become an indispensable institution for giving new content to the constitution and clarity to inter-tier relations.

The following recommendations are made on the role of the Constitutional Court in matters pertaining to intergovernmental relations:

- (i) *The Constitutional Court should, in its interpretation of the constitution, encourage a culture of co-operation and consultation between government levels. As the German Constitutional Court has used Bundestreue foster (and enforce) joint action, so could the South African Constitutional Court could develop a philosophy based on an indigenous concept such as Ubuntu to encourage a partnership approach between governmental institutions;*
- (ii) *the implementation of numerous provisions of the bill of rights could form the basis of intergovernmental collaboration to ensure that universal standards are adhered to by all the provinces and local authorities. Fundamental rights bearing on freedom of movement, economic activity, labour relations, and the environment are some that will encourage various forms of co-operation, joint planning and common action.*

11 Specialized institutions

The success of intergovernmental relations generally lies in a balance between constitutional, statutory, specialized and informal forums and institutions. The constitution need not therefore cover all aspects of intergovernmental relations, but only provide a general framework that will encourage, facilitate and monitor co-operation.

Ample room should be allowed for specialized institutions to cultivate common action in certain crucial areas of government such as health, education, welfare, housing, and fiscal and economic affairs. Their inputs could provide the basis for legislation and government action at provincial and national levels.

The following recommendations are be made on the role of specialized institutions in intergovernmental relations:

- (i) *In order to promote effective rendering of services, transparency of government activities and accountability to the electorate, ample room must be provided for specialized institutions to become involved in matters relevant to intergovernmental relations, such as housing, education, conservation, agriculture and welfare;*

to the constitution and clarity to inter-tier relations.

The following recommendations are made on the role of the Constitutional Court in matters pertaining to intergovernmental relations:

- (i) **The Constitutional Court should, in its interpretation of the constitution, encourage a culture of co-operation and consultation between government levels. As the German Constitutional Court has used Bundestreue foster (and enforce) joint action, so could the South African Constitutional Court develop a philosophy based on an indigenous concept such as Ubuntu to encourage a partnership approach between governmental institutions;**
- (ii) **the implementation of numerous provisions of the bill of rights could form the basis of intergovernmental collaboration to ensure that universal standards are adhered to by all the provinces and local authorities. Fundamental rights bearing on freedom of movement, economic activity, labour relations, and the environment are some that will encourage various forms of co-operation, joint planning and common action.**

11 Specialized institutions

The success of intergovernmental relations generally lies in a balance between constitutional, statutory, specialized and informal forums and institutions. The constitution need not therefore cover all aspects of intergovernmental relations, but only provide a general framework that will encourage, facilitate and monitor co-operation.

Ample room should be allowed for specialized institutions to cultivate common action in certain crucial areas of government such as health, education, welfare, housing, and fiscal and economic affairs. Their inputs could provide the basis for legislation and government action at provincial and national levels.

The following recommendations are made on the role of specialized institutions in intergovernmental relations:

- (i) **In order to promote effective rendering of services, transparency of government activities and accountability to the electorate, ample room must be provided for specialized institutions to become involved in matters relevant to intergovernmental relations, such as housing, education, conservation, agriculture and welfare;**
- (ii) **special institutions should be established by government in co-operation with the private sector to assemble data that may bear on the formulation of policy, the allocation of funds and the consideration of policy options. International experience shows that comparative provincial data on matters such as population size, age and growth; urbanization, illiteracy, poverty levels, ethnic living patterns, economic growth and other economic indicators, educational facilities, natural and other resources, industrial development, and a host of other information is critically important for intergovernmental institutions to develop effective policies. Such institutions could also be involved in policy option generation, information management, evaluation and planning.**

1. These draft recommendations form part of the findings of a research report which has been written for the Commission on Provincial Government by Bertus de Villiers. The report analyzes the experiences of the USA, Germany, India, Nigeria and Belgium with intergovernmental relations. The final report will be available from 1 July 1995. Comments on these draft proposals will be welcomed by Bertus de Villiers, the Commission and/or the relevant committees of the Constitutional Assembly.