

“The Principles, Meaning and Application underpinning Cooperative Governance and Intergovernmental Relations in South Africa”.

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The purpose of this address is to introduce the concepts of intergovernmental relations and cooperative governance, to examine the essential underlying principles, and to place them in the constitutional and legislative context in South Africa. But first it would be helpful and informative to take a global view on multi-level government and then to focus on South Africa.

Let's kick off by looking briefly at what we understand by cooperative government and intergovernmental relations (let's call it IGR for short). Whether there is actually any difference between the two is subject to some debate. The conventional wisdom is that there is indeed a conceptual difference between co-operative government and IGR. Co-operative government is a fundamental philosophy of government (constitutional norm) that governs all aspects and activities of government and includes (and this is the really important part) the deconcentration of power to other spheres of government and encompasses the structures of government as well as the organisation and exercising of political power. It is specifically concerned with the institutional, political and financial arrangements for interaction among the different spheres of government.

Intergovernmental relations, on the other hand, is one of the means through which the values of co-operative government may be given both institutional and statutory expression and may include executive or legislative functions of government.

At this point, I have to make a confession: I have always been puzzled by why our form of government has been characterised as “Cooperative Government.” When we get down to brass tacks, the architecture of our form of government is more conventionally and conveniently characterized as decentralised government, and this is how most of the rest of the world would characterise it, but for some reason within the South African government circles, it seems that the term decentralisation is studiously avoided. Even our constitution does not use the word “decentralised” once, even though the architecture which it describes is precisely that of decentralised government. Perhaps there is some ideological reason behind this. In any event, in order to understand how government in South Africa works, and in particular, in order to understand the concepts of intergovernmental relations and cooperative governance, it is necessary to understand what decentralisation – and this is the globally accepted terminology - is all about. So whilst I do not intend to launch into full-blown lecture on decentralisation, I think that it is important to spend, with your permission of course, just a little time looking at some of the basic elements of decentralisation.

Since the 1970's, or perhaps even earlier, decentralisation has become one of the most predominant themes around the world in the field of governance. There has been an overwhelming move towards the decentralisation of government by the granting of new powers, functions and resources to local and regional governments, something which has brought sub-national governments to the forefront of politics. There are any number of definitions of decentralisation, but as good a definition as any is that it is the devolution of powers, functions, responsibilities and resources from the national government to subnational governments. It is generally considered that there are three types of decentralisation:

- Administrative decentralisation is the process whereby the authority to administer and execute powers and functions (and by implication, the responsibility to deliver services) is transferred from national to sub-national government, thereby resulting in deconcentration of powers;
- Fiscal decentralisation is the process whereby revenues of the central government, and also the power to raise revenues from local sources, are transferred from national to sub-national governments;
- Political decentralisation is the process whereby sub-national governments which are elected by local participants, are established within a constitutional framework and granted political power and authority to govern over particular geographical areas, usually in regard to specific functions. In short, it is the transfer (whether whole or partial) of political power and authority from central to sub-national governments, and therefore – ant this is of crucial importance for present purposes - involves the balancing of the exercise of power between various levels of government.

Countries may choose a decentralised model for many reasons. The list of objectives of decentralisation is potentially endless. Some of the objectives which are more commonly encountered include

- promoting democracy,
- promoting legitimacy,
- promoting public participation,
- promoting developmentalism,
- improving communications,
- defusing conflicts, and the most commonly cited reason,
- for bringing government closer to the people and promoting responsive and efficient service delivery

Just as there are many objectives of decentralisation, the challenges to decentralisation processes are also many and varied; some of the more common challenges – and here I must mention that these are from a global perspective and not necessarily from a purely South African perspective - include

- uninterested, inertia-bound and overwhelmed central governments which lack the focus, energy and resources to effectively implement decentralisation policies;
- elite capture, where local governments are captured by local elites who divert and distort public programmes to benefit themselves at the expense of poor citizens;
- lack of political will at all levels;
- the ever present problem of capacity constraints;
- financial constraints
- And finally, the challenge which is of particular interest for purposes of our present discussion, is the problem of intergovernmental tensions between the various levels of government over issues such as funding and powers. Which leads us neatly to our topic and the principal focus of this address.

As we alluded to earlier, decentralisation is, in essence, all about the shifting of powers and resources from one level of government to another. It is inevitable that this shifting of resources and powers will, in the absence of appropriate systems and mechanisms, lead, to a greater or lesser extent, to competition, confusion, confrontation and conflict. The potential for these “four Cs” to occur becomes even greater when the different levels of government, or institutions within these levels, are controlled by different political formations, such as different political parties or factions within parties.

Hence the need for a framework to promote a different set of “4 Cs”: clarity, consensus, cooperation, collaboration, and one that accommodates and manages interdependence, geographical and social diversity, competition for resources and influence, as well as ensuring ongoing social progress.

The term “intergovernmental relations” has been variously defined, but in essence it refers to the interdependent relationship amongst the various levels of government in a notionally decentralised system as well as the coordination of public policies between those levels. The concept incorporates various components of the governance, administrative and fiscal arrangements established between these various levels, including legislation and regulations, instruments (such as guidelines and mechanisms for monitoring and communication), structures (such as forums), processes (such as budgeting), other fiscal arrangements, capacity building and support (which is absolutely crucial), and dispute resolution procedures.

Intergovernmental relations are therefore a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral co-operation within and among the different tiers in a multi-level or decentralised system of government.

It may be said that a system of IGR has several objectives or strategic purposes; foremost amongst these are:

- The promotion and facilitation of cooperative decision-making.
- The coordination and alignment of priorities, budgets, policies and activities across interrelated functions and sectors
- Ensuring a smooth flow of information within government, and between government and communities, with a view to enhancing the implementation of policy and programmes.
- The prevention and resolution of conflicts and disputes.

Let's have a look now at the dimensions of IGR. There are several different dimensions to IGR that provide the basis for analysis of IGR institutions and processes. These include vertical, horizontal and sectoral dimensions, as well as the degree of formality with which IGR is carried out. Please understand that I am not talking here specifically of South Africa, but rather I am talking from a global perspective.

- Let's look first at the vertical dimension: IGR occurs most importantly in the 'vertical' relationship between the central government and sub-national governments within any given country. The number and nature of subnational governments vary from country to country. Some countries have two levels, many have three, some have four, such as Vietnam, and some such as China even have five. The powers, importance, relationships and permanence of these levels depends to a large extent on whether the country is characterised as federal or unitary. I won't get into an argument right now about whether South Africa is more federal or more unitary in character. But it is important to keep in mind that the essence of federalism is that the existence and powers of subnational governments are constitutionally guaranteed.
- Then we have the horizontal dimension: Horizontal IGR can take many forms. It may refer to relations between institutions within a government located in a particular sphere – for example, it might refer to relations between departments in the national government, and here one might find mechanisms such as the cluster system with which we in South Africa are familiar with. The term may also be used to describe relations between governments within a particular level. It might also arise when constituent units form alliances to take joint actions not requiring the national government, to discuss common issues or to lobby the national government on issues of joint importance.

- Then we have the sectoral dimension: This relates to the policy sector in question. So mechanisms may be created to facilitate relations between institutions established in different tiers or levels of government to perform functions in the same policy sector. So for example, in a particular three-level country the central government may have a department dealing with health; the regional governments will each have their own health departments and at local level, cities or towns may have their own health departments or at least a health function. A sectoral IGR mechanism may be established to coordinate health functions between the three levels.
- Finally, we have the formal/ informal dimension: IGR occur through both formal and informal means. Formal mechanisms can be constitutional, statutory or by way of non-statutory institutions, agreements and processes. Informal IGR do not have a constitutional basis but are often as important as formal mechanisms. So, for example, countries with older constitutions (USA, Canada, Australia) generally have very little to say in their constitutions about IGR and their constitutions establish few if any institutions to deal with relations between their constituent units and the national government. The rationale for this appears to be that it was simply assumed that the necessary instruments would be developed. By contrast, countries with more recent constitutions, such as Germany, South Africa, and Kenya have tended to establish structures and mechanisms to cater for the inevitability of IGR. Some countries have explicitly specified principles that should govern the conduct of IGR. For example, in Kenya, the Constitution speaks directly to Cooperation between national and county governments, and South Africa's constitution has a section 41 listing 'Principles of cooperative government and intergovernmental relations.'

So this conveniently brings us to the issue of cooperative or decentralised government and intergovernmental relations in the South African context, with particular reference to the constitutional and legislative framework which governs them. Remember, up until now we have been talking in general, global terms. So now we will look specifically at South Africa's model of decentralised government or cooperative government - call it what you will - and IGR.

You can make a discussion of the constitutional and legislative framework for IGR and cooperative government as long or as short as you like – it depends if you focus only on the specific constitutional provisions relating to CG and IGR, or if you go further field and include those aspects that are relevant but are not directly couched in IGR terms. In this discussion, we will be following to some extent the latter, broader approach but obviously, given the time available, we cannot cover every aspect.

The Constitution of South Africa provides the framework for the structures, mechanisms and functions of government in South Africa. In Chapter 3, it deals specifically with Cooperative Governance and Intergovernmental Relations. Section 40 (1) states that government is made up of the national, provincial and local spheres which are distinctive, interdependent and interrelated. The crucial element is the statement that government consists of three spheres –the multi-tier element is the crucial pillar of decentralised government. But moving on, I don't know how many different interpretations I have seen of "distinctive, interdependent and interrelated," but most of them are pretty vague and are often contradictory. Even the Constitutional court struggles to give meaning to these words, but nonetheless it provides the most reliable interpretation which is to be found in the Constitutional Court case of Premier of the Province of the Western Cape v President of the RSA , on which judge Chaskalson said:

"The principle of cooperative government is established in section 40 where all spheres of government are described as being distinctive, inter-dependent and inter-related. This is consistent with the way powers have been allocated between different spheres of government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is one sovereign, democratic state, and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government. "

Chapters 5, 6 and 7 of the Constitution focus on the structures, institutions, roles and responsibilities of each of the spheres of government. They deal with the executive authority and the legislative competence of each sphere. They also deal with intergovernmental support and the conditions under which the national government can intervene in provincial government, and the conditions under which the provincial government can intervene in local government.

The powers and functions of the various spheres of government are dealt with in sections 44, 104 and 156 respectively of the constitution. These sections are to be read with schedules 4 and 5 which set out the specific powers and functions allocated to the spheres.

Financial aspects, such as intergovernmental transfers and the powers of provincial and local governments to raise revenue, are also dealt with in the Constitution.

Thus we can see that the three types of decentralisation that we referred to earlier – administrative, fiscal and political – are all reflected in the Constitution of South Africa. As such, the system of government envisioned by the constitution bears, on the face of it at least, all of the hallmarks of a decentralised system.

The creation by the Constitution of this decentralised governance system, which comprised the three distinct but inter-related spheres of government, also gave rise to the need for a systematic system of IGR to give effect to the principles of cooperative government. Section 41 (1) of the Constitution of South Africa enumerates the principles governing co-operative government and intergovernmental relations among the various spheres of government in South Africa. I am not going to go through all of them, as I am sure that you have access to the Constitution and can read them, but they include:

- preserve the peace, national unity and the indivisibility of the Republic;
- secure the well-being of the people of the Republic;
- provide effective, transparent, accountable and coherent government for the Republic as a whole;
- be loyal to the Constitution, the Republic and its people;
- respect the constitutional status, institutions, powers and functions of government in the other spheres;
- Not assume any power or function except those conferred on them in terms of the Constitution;
- Exercising their authority and performing their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- Co-operating in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, coordinating their actions and legislation with one another, adhering to agreed procedures and avoiding legal proceedings against one another.

Section 41 (3) specifically provides that organs of state should make every effort to settle disputes and should engage in litigation only as a last resort.

Section 41 (2) of the Constitution stipulates that an Act of Parliament must establish the structures and institutions to promote and facilitate intergovernmental relations. Accordingly, the Intergovernmental Relations Framework Act was enacted in 2005.

The objectives of the Act include:

- Establishing a framework for the national, provincial and local governments to promote and facilitate intergovernmental relations;
- to provide for mechanisms and procedures that would facilitate the settlement of intergovernmental disputes; and

- to facilitate coordination in the implementation of policy and legislation in line with the principles of coherent government, effective provision of services, monitoring the implementation of policy and legislation, and realisation of national priorities.

Chapter 2 of the Act establishes a range formal intergovernmental structures:

- The President's Coordinating Council (PCC):
 - The PCC is a consultative forum , established in terms of section 6, through which the President raises matters of national interest with provincial governments and organised local government to seek their views on those matters
- National intergovernmental forums, which are also known as "Min MECs", are established under Section 9. This allows cabinet ministers to establish national intergovernmental forums in their areas of work to enhance intergovernmental relations. They are established to deal with sectoral issues involving national, provincial and local spheres. They consist of, amongst others, the national minister responsible for the functional area together with the corresponding MECs at provincial level, and in appropriate cases, representatives of local government.
- Provincial intergovernmental forums These forums, also known as the Premier's intergovernmental forum, seek to promote and facilitate intergovernmental relations between the province and local governments in the province.
- Moreover, premiers of two or more provinces can establish an interprovincial forum for the purpose of promoting and enhancing intergovernmental relations. Such a forum serves as a framework for consultation, information and best practice sharing, capacity building, and cooperation on shared provincial development challenges (Sections 22 & 23)
- Then we have District intergovernmental forums. This is a forum to enhance intergovernmental relations between the district municipality and the local municipalities in the district. It is a consultative forum for the district municipality and local municipalities in the district to consult each other on matters of mutual interest.
- Finally two or more municipalities can establish an inter-municipality forum to serve as a consultative framework for the municipalities to: Share information and best practices, capacity building, cooperate regarding common municipal challenges affecting them, and reviewing other issues of strategic importance influencing the interests of the participating municipalities (Sections 28 & 29)

The Act also contains provisions for the settling of intergovernmental disputes.

It is interesting to compare the structures established under this Act with the various dimensions of IGR which we discussed earlier. In these structures we find examples of the vertical dimension (PCC, Provincial Intergovernmental forums) the sectoral dimension (MinMECs), the horizontal dimension (interprovincial forums, inter-municipality forums, and the formal dimension, with all types of relationships between the various spheres being covered by statute.

We now need to look at some other Constitutional provisions.

An integral part of the intergovernmental system is the responsibility for support and oversight by senior governments over junior governments. It is perhaps a paradox of decentralisation that whilst senior governments divest themselves of responsibilities by handing them to junior governments, those same national governments now have to assume greater responsibilities in that they have to up their games when it comes to providing support to junior governments. This is crucial to the success of decentralisation processes and the failure on the part of national governments to provide such support is often the reason why decentralisation experiments fail.

- Section 100 of the constitution provides that when a province cannot fulfil an executive obligation, the national executive may intervene
- A similar provision exists for provincial intervention in municipalities. Section 139 of the Constitution provides that the provincial executive can intervene in a municipality when it fails to fulfil an executive obligation or when a municipality fails to approve a budget or any revenue raising measures necessary to give effect to the budget, or when there is a crisis in its financial affairs
- Section 154 poses a general obligation on national and provincial governments to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

It is also worth while mentioning that the constitution makes provision for dealing with conflicts between national and provincial legislation in sections 146 to 150, and between local government by-laws and national and provincial legislation in section 156.

Let's have a look at some other Legislation that relates to intergovernmental relations.

- Obviously, finance is crucial so let's spend a bit of time in this aspect. Here we are concerned with the Intergovernmental Fiscal Relations Act (1997).
 - It establishes two important forums structures:
 - The Budget Council consists of the Minister of Finance and the members of the executive council (MECs) responsible for finance in each of the provinces.

The national and provincial spheres consult on any fiscal, budgetary or financial matters affecting provinces as well as any legislation that has financial implications for provinces.

- The Local Government Budget Forum consists of the members of the Budget Council plus representatives of SALGA. It provides a forum for discussing financial matters relating to the local government fiscal framework.
 - It also provides a process for Revenue-sharing and allocation of money in terms of section 214 of Constitution; this process involves the consideration of the Financial and Fiscal Commission's submissions on the division of the equitable share between the three spheres of government and the allocation of funding to individual provincial and municipal governments
 - This process leads to the publication of the annual Division of Revenue Bill which allocates funding by a vertical process of division of revenue to the three spheres of government and then by a process of horizontal division of revenue allocates funding between individual provincial governments and individual local governments.
- Municipal Structures Act (1998) – This Act provides for the establishment of different types of municipalities and the division of powers and functions between local and district municipalities
- The Municipal Systems Act (2000) – This Act sets the powers and functions of local government and regulates the manner in which those functions are carried out.
- MFMA: This act regulates the management of local government finances. It is important from an IGR point of view in that it
 - provides for supervision over local government finances by the National Treasury
 - Permits the National Treasury to stop funds to a municipality in accordance with section 216 of the Constitution if a municipality commits a serious or persistent breach of any provisions under that section (i.e. provisions prescribed by law to ensure transparency and expenditure control
- PFMA: this act regulates the management of national and provincial finances, and amongst other things requires the NT to monitor the implementation of provincial budgets and assist government departments in building capacity for efficient, effective and transparent financial management. It also permits the NT to withhold funds in terms of Section 216 of the Constitution.

Time constraints mean that I have to bring this address to a close. Now as I mentioned earlier, this address cannot hope to cover every aspect of legislation that relates to IGR, nor can it deal with all of

the institutions that are relevant. For example, I have not touched on the role of the NCOP – but I believe that this will be dealt with thoroughly in a later address. Nor have I provided a critical analysis of the effectiveness of our IGR framework, or, for that matter, of the success of our decentralised system of government or cooperative government, call it what you will – this will, I believe, also be dealt with very adequately in later addresses in this workshop. But I do hope that I have provided a useful basis for understanding these and other issues which will be addressed in the course of this workshop.

Thank you for your time and attention.