Co-operative Governance in South Africa

Impetus for Fostering Effective Inter-Governmental Relationships

M Z Makoti and O K Odeku
Faculty of Management and Law
School of Law, Department of Public and Environmental Law
University of Limpopo, South Africa
kooacademics@gmail.com

ABSTRACT

Co-operative governance in a multi-sphere government is imperative in the sense that the responsibility of any government is to render essential basic services to the people, community and the society at large. The effective realisation of this responsibility requires that all the three spheres (national, provincial and local) of government together with various role players and stake holders must co-operate to accomplish and ensure good governance. Lack of co-operation amongst the three spheres of government will produce anarchy and poor service delivery, consequently resulting in dissatisfaction of people in the society, and disillusion resulting to disorder and vicious protests due to lack of service delivery. Oftentimes, lack of co-operation amongst the spheres of government occurs when one sphere of government tries to intervene or intrude into the affairs of another sphere. This is predominantly becoming rampant in South Africa as the provincial government often wants to usurp the powers of the local government through constitutionally mandated intervention. Obviously, the affected municipality resists any arbitrary or unjust intervention or intrusion hence this often triggers friction resulting in conflict and dispute. To avoid this conflict from occurring frequently, the Constitution provides in clear terms that each sphere is independent and autonomous, but they should co-operate with one another in order to render basic services to the people and society. In the event of arbitrary intervention which triggers a dispute, there are legislative mechanisms in place to resolve the intergovernmental disputes and as such, the dispute should be resolved amicably without resulting to litigation. Despite this, there are plethora of disputes in courts instituted by spheres of government against

one another predominantly between municipalities against provincial government. The uniqueness of this paper is that in addressing the problem of co-operation challenges amongst spheres of government, the study examines the approaches in Canada and United Kingdom in order to look at how they have been able to successfully resolve inter-governmental disputes without resulting to litigation. The current study draws lessons from these approaches to improve and strengthen South African's position.

Keywords: *Inter-governmental Disputes, Oversights, South Africa, Interventions, Canada and United Kingdom*

INTRODUCTION

Co-operative governance entails that all spheres of government (national, provincial and municipal) work together for the common good of the country, the citizens and the society at large. Sometimes, in the discharge of their constitutional mandates, spheres of government might intervene in the affairs of the other, hence crossing the red line. Interventions in the affairs of another sphere can be justified if done for legitimate reason or reasons as espoused in the *Constitution of the Republic of South Africa*, 1996 (Herein after referred to as "the Constitution"). Focus of this article is on intervention by provincial sphere into (local/municipal) government. This is because in section 154(1) the Constitution provides that national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. However, if the intervention is malicious, it would lead to a dispute which the Constitution itself abhors. Therefore, in the event of any dispute, there are appropriate legislative measures that have been put in place to resolve dispute amongst the spheres of government. The essence of ensuring that any dispute is promptly resolved is to ensure that spheres of government concentrate and focus on the constitutional mandate which enjoined the spheres of government to work together to ensure that they all perform and discharge basic responsibilities and functions consistently by putting people and their concerns first as the main priority of governance. This is said against the backdrop that in the hierarchy of governance, the municipal government is the lowest and at the same time the closest to the grass roots and communities. Therefore, both the provincial and national government have constitutional responsibility to always render assistance that will enable municipalities to focus on and continue to render sustainable basic services to the people through municipal infrastructure that have been put in place. They also have the responsibility to ensure that there is broad delivery of basic

municipal services of the right quality and standard to the people and at the same time promote good governance, transparency, accountability, building institutional resilience and administrative capability that would stand the test of time by providing top-notch administration that is always effective and efficient.

Therefore, the struggle and fight to ensure that the people receive best services from the government should preoccupy the three spheres of the government. This is the main reason why those who occupy political offices were elected and they have obligation to deliver as espoused in the Constitution and legislation. Anything contrary to this is unconstitutional and as such, amounts to violation of the Constitution which requires the rendering of basic services to the people.

It is pertinent to mention that these days, elected politicians are embroiled in vicious fights and personal attacks against one another not because they are fighting to ensure that they render and deliver basic services to the people as mandated by the Constitution, but mostly about who is in control of the municipality and other political offices in the municipality. Party lines and patronage are drawn against each other, usually to the prejudice of service delivery. Proximity to the public purse seems to be the driving factor. Hardly a day passes without a report that a certain elected politician is trying to ferment trouble, disrupt the sitting of council or trying to remove someone from a political position. As a result of this, many elected officials concentrate more on how to retain their political appointments at the expense of performing their responsibility of delivering basic services to the poor. It is all about self-preservation which put the needs of the people last. Thus, instead of spending time serving the people, officials often spend time in courts litigating on conflicts and disputes about the political leadership of the municipality. Approaching the courts to resolve intergovernmental disputes is inimical to the spirit of the Constitution which discourages parade of courts for purposes of settling disputes by elected politicians. While there is nothing wrong in approaching the courts to adjudicate disputes, what is worrisome and concerning is that most of the disputes being taken to courts do not have anything to do with fulfilling the responsibilities of the officials. Cooperation and pragmatism are necessary tools even in the face of disputes, thus fostering a properly functioning collaborative government.

THE EVOLUTION OF CO-OPERATIVE GOVERNANCE IN SOUTH AFRICA

The passing and the promulgation of the Interim Constitution Act No. 200 of 1993 introduced changes in terms of the formation of organs of government. For instance, the four

provinces that existed under the unified South Africa increased to nine namely: (Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Limpopo, Mpumalanga, Northern Cape, Northwest and the Western Cape) after the passing of the Interim Constitution. This was done, according to the preamble of the interim Constitution, due to the identified need to restructure the governance of South Africa. The main rationale appears to have been the idea that decentralisation of governance structures would bring government closer to the people and to address the problems of poverty; eradicate or reduce problems of gender inequality; resolve environmental challenges; advance of healthcare provision; address educational needs; and enhance access to technology (Burie 2011).

The need for co-operation grew even bigger under the Interim Constitution although it had no provision regulating or codifying co-operative governance (Woolman *et al*. 2006). There existed a legislative lacuna in that the Interim Constitution was silent on matters of co-operation between tiers of government. Collaboration was achieved mainly because the interim Constitution had provided for concurrent functions between the national and provincial spheres of government, which necessitated that role players should co-operate to avoid overlapping of roles "*Premier, Western Cape v President of the Republic of South Africa and Another* (CCT26/98) [1999] ZACC 2; 1999 (3) SA 657; 1999 (4) BCLR 383 (29 March 1999" at par 59). Concurrent functions are those roles and responsibilities that transcend across the spheres of government. Such functions may include the provision of water and sanitation, which all three spheres have a role to play in providing to the society.

The case that best illustrates concurrent functions is that of "*Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) (1 October 2013)" in which the national and provincial spheres of government were involved in litigation over whether the Premier was entitled to appoint a commission of inquiry to investigate the functioning of the police services. The Minister contended that policing is a matter of exclusive national competence while, on the other hand, the Premier argue that she could appoint a commission to investigate any matter that affected the province. The court found that: "however, in Part A of Schedule 4, the Constitution provides for concurrent national and provincial legislative competence over the policing function. The Schedule makes it clear that the provincial legislature has legislative competence over policing only to the extent conferred on it by Chapter 11. In turn, that chapter explains that a provincial executive is entrusted with the policing function as set out in the chapter or given to the provincial executive in national legislation or the national policing policy. Chapter 11 carves out the concurrent competence of a province in relation to policing. For now, the important provisions are section 206(3) and (5)."

It is pertinent to point out that the passing of the interim Constitution was as a result of negotiations and ultimately co-operation of the parties that participated in the Convention for a Democratic South Africa (CODESA). The discussions at CODESA focused on the nature or structure of the South African state as one of the fundamental issues after the liberation movements were unbanned during 1990 (Makoti and Odeku 2018:68–85). Over and above, at the CODESA, the leaders undertook to pursue a model of government that would benefit everyone. To this end, their collective agreement and co-operation ushered the current dispensation whereby it became, amongst other achievements of the Constitution, a fundamental principle that the organs of the state must co-operate, pursue peaceful relations and avoid litigating against one another (Makoti and Odeku 2018:98–112).

With the recorded history of the role that was played by the parliament during the days of oppression in South Africa, the CODESA negotiations culminated in the move away from parliamentary sovereignty to the adoption of the Constitution as the supreme law in the Republic (starting with the Interim Constitution Act No. 200 of 1993 and thereafter the Constitution). This was a conscious effort to move away from past injustices and the adoption of the rule of law, which is binding on all persons including institutions of the State. The principle of the rule of law denotes a fundamental value which imposes limitations on government institutions and regulates the exercise by government of public power or authority.

Structures of government were also rearranged to reflect the changes that came about with the Constitution. The most fundamental of these innovations of the Constitution is the introduction of multi-sphere system of governance in tripartite as the national, provincial and local government. All three spheres of government are clothed with administrative, executive and legislative powers.

For municipal government in particular, the Constitution endowed it with authorities, functions and obligations to, *inter alia*, make by-laws and to administer affairs within its area of competence. These powers and functions are in both Parts B of Schedules 4 and 5 of the Constitution. The exercise of powers and functions in local government are subjected to provincial and national government supervision. Section 139 permits provincial executives to intervene in the affairs of a municipality, amongst others, to assume the executive functions of a particular municipality when the municipality becomes dysfunctional and unable to perform its constitutional obligations and mandates of delivering basic services to the poor and the indigents and ensure the well-being of the people in the municipal area.

The Municipal Systems Act No. 32 of 2000 (MSA) was passed to empower both provincial and national government to supervise or perform certain activities in the institution

of local government. Section 106 of the MSA is a typical example of provincial government's authority to intervene in the territory of local government. Although this provision intends to provide a mechanism to obviate maladministration and corruption, if it is applied improperly, it may lead to conflict between provincial and local government (Reynecke 2012:22–36). Mathenjwa (2014:178–201) observed that investigations or interventions by some provincial governments amount to an intrusion into the affairs of municipalities, which is done under the excuse of monitoring and supervision of the affected municipalities. The Constitution and the rule of law stand against unjustified intrusion into the affairs of other spheres of government.

Therefore, it is imperative that sound inter-governmental relations are critical in South Africa which is constituted by the national government, the national departments and national state-owned entities–nine provinces each of which is constituted by provincial departments and provincial state-owned entities, and about 278 municipalities. The number of municipalities is made up of 8 municipalities of metropolitan status, 44 districts and 226 local municipalities (DCGTA 2016). In terms of the Constitution, each of these organs of state have a defined role in the delivery of service to their communities.

Remarkably, in Chapter 3 of the Constitution, the principles of co-operative governance are meticulously provided and articulated. This is done in recognising that there is an important role to be played by all spheres of government towards providing services to the people and the society at large. This means that all organs of the state will interact and transact with one another and, when they do so, they must respect the status of each other by not becoming overzealous which might lead to encroaching or usurping the function and responsibility of the other organ.

The current Constitution demands co-operation between spheres of government or organs of the state. Thus, the relationship among state organs is not one of choice but is governed by the constitutionally ordained principles of co-operation. In recognising this important constitutional imperative, the constitutional court held in the case of "*Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8" that "in a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government."

One of the important innovations of the Constitution in this regard is the demand that organs should avoid taking litigation action against one another. Organs of government are obligated to take positive steps to avoid conflict. The Constitution further demands

that organs of the state that may find themselves involved in a transnational conflict must take every step possible to resolve it by following an intergovernmental dispute resolution process which entails thorough assessment of the dispute in order to determine whether alternative dispute resolution will be appropriate in the circumstance. All possible measures must be taken and exhausted before an intergovernmental dispute may be presented for adjudication through the Court.

In South Africa, notwithstanding the clear language of the Constitution to avert conflict and to foster closer co-operative working relationship, government institutions still find themselves locked in disputes and most of these disputes end up being litigated in the courts of law. The implication of this is that no matter how well-defined the distinctions between the powers of governments at different levels, there will always be some overlap or inter-dependency between them. And if this is not properly managed based on the Constitution and legislation, the tendencies of conflicts and disputes would continue to rear their ugly heads and sometimes leading to vicious fight that would negatively impact the combatant spheres of government.

Parliament, on the other hand, is under a constitutional obligation to develop legislation in order to establish intergovernmental fora, structures and institutions which propagate for and help foster good intergovernmental relations between spheres of government. Such legislation exists in the form of Intergovernmental Relations Framework Act No. 13 of 2005 which seeks "to establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith" and Intergovernmental Fiscal Relations Act No. 97 of 1997 which aims at promoting "co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters" These pieces of legislation, attempt to harmonise relations among the various organs of the state.

The Constitution outlines only the broad principles of inter-governmental relations in South Africa. The details, nature or content are matters that need to be elucidated through parliamentary legislation. However, the lack of details may be indicative that the inter-governmental relations system in South Africa must be as elastic and accessible in the defined wide limits.

Both national and provincial governments have a mammoth part to play in building relations with the local sphere. Although the Constitution provides for concurrent national and provincial legislative competence, the constitutional court has recently held in the case of

"*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)" that the significance of section 155(7) of the Constitution, which provides that the national and provincial governments have legislative and executive oversight over local government, is that these higher spheres may not, by legislation, bestow upon themselves the functions of local government nor the authority to control municipal matters. This is because, the extent of these spheres' authority is confined to passing legislation for the regulation of the performance of local government affairs, not the direct administration thereof. To put the issue differently, both national and provincial governments are only entitled to promulgate laws to manage the local government affairs in Schedules 4B and Schedule 5B of the Constitution. They are not entitled to empower themselves to administer municipal affairs. The municipalities must administer and implement the laws passed by the higher spheres**.** Hence, both national and provincial government should not usurp powers and functions of local government, on the one side, and local government must perform assigned powers and functions in accordance with the regulations in terms of law.

JUSTIFYING COMPARATIVE ANALYSIS OF INTER-GOVERNMENTAL RELATIONS IN CANADA AND THE UNITED KINGDOM WITH SOUTH AFRICA

In this section a comparative analysis is made with two countries experiencing almost similar challenges of intergovernmental relations. This section considers how the United Kingdom and Canada deal with challenges associated with inter-governmental relations and disputes and compares it with South Africa. The selection of these jurisdictions is based on the historical similarities where the structures of both the Canadian and South African government were based on the British Westminster Parliamentary System of Government.

South Africa, together with Britain and Canada share several similarities other than being members of the Commonwealth of Nations. For instance, South Africa and Canada share commonality in that they are both former colonies of Britain. There are also strong relations between these two countries, evidenced by the 2003 singing of the Joint Declaration of Intent to foster bilateral relations. Relations between South Africa and Britain was established during 1910 when the Union of South Africa was founded on 31 May 1910.

Interestingly, both Canadian and South African systems of government were modelled around the Westminster System which was developed in the United Kingdom. This is a parliamentary system of government that was developed in England, which is now a constituent country within the United Kingdom. This term comes from the Palace of

Westminster, the seat of the British Parliament. Undoubtedly, there exist intergovernmental relations challenges in Britain and Canada as they are in South Africa and, as such this article inquire about how Canada and the United Kingdom resolve intergovernmental disputes whenever they occur and exist and what lessons South Africa can learn from the ways and manners, they resolve conflicts and disputes amongst the spheres of government. These two countries were therefore selected for comparative analysis for this article based on the peculiar relations and similarities with South Africa.

The United Kingdom

The government of the United Kingdom is divided into two tiers, the central government and local government and four administrations namely the governments of the United Kingdom Government (Britain), the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee. Grant (1985: 229–249) notes the presence of intergovernmental conflicts which, according to him increased during the period around 1979–80, and that such conflicts undermine and threaten the relationship between the central and local government (Grant 1985:229–249). Organs of the state are dependent on one another for the effective delivery of services to the society. The United Kingdom Select Committee on the Constitution agree that good inter-governmental practices and systems may help to reinforce and deliver constitutional stability.

The immediate observation is that the United Kingdom does not have a written Constitution like South Africa and Canada. However, despite the lack of a written Constitution, the United Kingdom has established prescribed structures sustaining inter-state relations and these are contained in the Memorandum of Understanding (MOU:2013) existing among the four administrations (Britain, Scotland, Wales and Northern Ireland). The MOU was founded in order to set out the fundamental principles that govern states' relations: communication, consultation, co-operation and confidentiality. The United Kingdom is constituted by the governments of England, Scotland, Wales and the Northern Ireland. Since the year 1999, some aspects of the principal government such as tax and welfare matters have been decentralised to the devolved governments of Scotland, Wales and Northern Ireland.

On the other hand, there is a question of relationship between tiers of government, the central and local government. According to Laughlin (2000:139–40), there is always tension and tautness which define state relations among the tiers of government. Litigation is one of the mechanisms used to resolve inter-state disputes. The other dispute resolution measures include the referral of intergovernmental disputes to the Joint Ministerial Committee and arbitration. In the case of "*Nottinghamshire C.C. v Secretary of the State*

for the Environment [1986] 2 WLR1" the local government used litigation to successfully challenge the legality of the central government's expenditure targets. Thus, although cooperation is an important mechanism for resolving intergovernmental disputes, litigation is not ousted to archive dispute resolution.

According to Trench (2014:1–20), the administration of inter-governmental relations and co-ordination is critical to systems of government, especially in federal and decentralised systems to function effectively. Conflict or disputes are inevitable due to the high political interplay within these systems (Trench 2014:1–20).

The United Kingdom's systems for inter-governmental relations were developed at the introduction of the devolution during 1999 and reviewed in 2013. These systems "are contained in what is called the 'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee." However, the mechanisms for resolution of disputes were only introduced in March 2010 when the protocol on dispute avoidance and resolution was adopted to, amongst others, establish the framework for dispute resolution. Recently, on 19 September 2014, the day following the referendum on Scottish independence, United Kingdom had agreed to devolve further powers to Scotland that was made in the run up to the referendum for independence. The Smith's Commission Report on the Smith Commission was established to carry out the task consequent upon which it made recommendations and propagated for a more effective and workable mechanism of dispute resolutions across administrations, the Scottish and United Kingdom governments. This commission provided the blueprint on how to ensure that intergovernmental disputes are resolved between United Kingdom and Scotland without Scotland necessarily threatening in the future to leave and secede for the kingdom and form and become an independent country.

One of the institutions established for dispute resolution in the United Kingdom is the Joint Ministerial Committee, which the Smith Commission recommended that should reform to provide for, amongst others, a more effective, efficient and workable mechanism to resolve inter-governmental disputes. According to the House of Lords, Intergovernmental Relations in the UK-11th Report of the Session (2014–2015), it is recognised in the United Kingdom that effective intergovernmental relations serve two important purposes; conflict resolution and collective decision-making where there are two or more organs of the state affected by a decision to be made.

In as much as the United Kingdom does not have a written constitution, it still considers matters of cooperative governance seriously. Among the innovations of the MOU is the

establishment of the Joint Ministerial Committee (the JMC) to deal with intergovernmental disputes. One of the principal agreements contained in the MOU is that the devolved governments work together, to the extent that it may be suitable, on matters of mutual interests. It is important that the four devolved administrations understand the importance of cooperation with one another to the extent that they recognise that there may be instances where they may have to represent one another when engaging in transactions for their mutual benefit.

The JMC, which is constituted of Ministers from the four administrations, is an important role player about intergovernmental relations. Born out of an agreement that all the administrations will participate in it, the JMC has the following terms of reference:

a. to deal with the matters have not been devolved but which may cause an interruption of the responsibilities of the devolved states and conversely.
b. to deal with matters over which there is an agreement between the government of the UK and those of the devolved administrations, to attend to devolved matters where it may be of benefit to deliberate over them within the various areas of the UK.
c. to maintain the activities adopted for co-operation between the administrations of the UK and the devolved states under review; and
d. to deal with any conflicts that may arise between the various administrations.

Disputes which cannot be resolved through bilateral relations or via the relevant bureaus of the regional Secretary of State are sent to the JMC secretariat in accordance with the wider values and provisions adopted for evasion of disputes and for dispute resolution as regulated in section A:3 of the MOU.

A criticism that may be levelled against the JMC is that it does not have any executive powers or functions, it being just a consultative as opposed to a body with executive functions. The result of this is that it can only achieve agreements rather than decisions. Further, its agreements may not have binding effect on any or some of the structures of the governments, which remain at liberty to regulate their own rules without ignoring the JMC discussions. However, it is expected that the administrations will lend support to agreements that have been reached by the JMC.

Given the challenges associated with dispute resolution, as recently as 2014, the Smith's Commission made recommendations and advocated for a more effective and workable mechanism for dispute resolutions across administrations, the Scottish and United Kingdom Governments. The Commission was appointed following the introduction of

the devolution of powers to the Scottish Parliament. Overall, it is plain to see that the governments of the United Kingdom take intergovernmental relations to be very important by putting in place interventions which would de-escalate rather than escalate disputes and conflicts when they arise.

One of the determinations of the Smith's Commission was the recommendation that the JMC should undergo reform in order to cater for, amongst others, a more effective, efficient and a workable mechanism to resolve intergovernmental disputes. As Trench (2003:1–31) notes, however, the whole structure of dispute avoidance and procedure is flawed. Yet, the co-operation between institutions of the state or tiers of government is important and has more advantages than disadvantages. The advantages are that the state parties involved in disputes can find own solutions and the avoidance of costly litigation, which is usually a protracted process.

Drawing lessons from the UK, South Africa can adopt a more robust approach to avoid dispute and make consultative processes under the Framework Act compulsory. Also, South Africa can benefit from using mediation processes to resolve or narrow disputes relating to provincial intervention into the affairs of local government.

The Federal Government of Canada

Canada has had its Constitution since 1867 with the enactment of the British North America Act ('BNA Act') of the same year. The BNA Act was later renamed and became known as the Constitution Act 1867 and it served to unite three former British colonies: Nova Scotia, New Brunswick and Canada. The union of these colonies became known as Canada. The change that resulted in the renaming of the BNA Act into the Constitution Act in 1982 introduced for the first time in Canadian history, the Charter of Human Rights and Liberties.

Co-operative governance in Canada has four main pillars: (a) the replacement of formal legislative processes with constant interaction, mainly by way of federal-provincial conferences between the federal and provincial governments; (b) consultation by the federal government with the provinces before committing to any rules impacting the provinces; (c) the establishment of policies on fiscal matters by all governments, and in inventing policies for economic stability and growth; (d) the establishment of more entrenched structures and methods of intergovernmental relations (Belange 2001).

In the same way section 40 of the South African Constitution established three main levels of government, which are the national level of government, the provincial level

of government and the municipal level of government. Both the national and provincial governments have legislative powers under the Constitution.

The federal government is empowered in terms of the Canadian Constitution to enact laws which have general application in the whole country, that is, it may enact laws which provide for peace, order and good governance over the entire area of the country and, furthermore, has the residual power to legislate for all matters which have not been assigned to provincial legislatures.

Canada also experiences inter-governmental disputes, particularly disputes over the segregation of powers. Such disputes were previously referred to the judicial Committee of the Privy Council for resolution, a process which many in the central government disliked for its tendency to weaken the powers of the federal government while, simultaneously, strengthening the powers of the provincial governments (Williams 1988).

Courts of law the Judicial Committee of the Privy Council (sitting in London) played a critical role in the resolution of intergovernmental disputes in Canada. This was the ultimate court of appeal in cases involving the bounds or division of powers, widely criticised for granting judgements in favour of strengthening provincial powers over those of the federal government as espoused in the case of "*AG of Ontario v A-G of Canada* [1947] AC 128, PC," where the court held that the Committee was the final arbiter of appeals for matters that involved the bounds or division of powers, and it was widely criticised for always granting judgements in favour of strengthening provincial powers over those of the federal government. Despite criticism, the Committee still played a meaningful role in expediting dispute resolution among state organs. Although litigation is one way resolving intergovernmental disputes, it is important to use the mechanism which is harmonious and, importantly, effective and cost-efficient for resolving disputes between state organs. The Committee plays a significant role in that regard.

Presently, one important mechanism for resolving intergovernmental disputes in Canada is through the adoption of inter-governmental agreements (Parker 2015:1–251). These are either formal or informal agreements that are used to regulate relations between federal and provincial governments. However, in South Africa, there are no formal guidelines on how intergovernmental agreements are to be formed. As it was noted by Cameron and Simean, (2002:49–71), intergovernmental relations in Canada are predominantly *ad hoc* and not seriously institutionalised. Despite the view of Cameron, there has been significant growth in the use and reliability of the collaborative efforts which are largely

engendered through intergovernmental agreements. Although intergovernmental relations may be *ad hoc*, Collins (2015) still believes that a country like Australia may learn from the institutionalised Canadian model of horizontal relationships between organs of state.

The significance of concluding these agreements is that state organs are enabled to reach agreements on matters of state policies and delivery of services, thereby avoiding conflict that might arise at some point in the future. This is the most preferred method of resolving intergovernmental disputes in avoidance of risk filled litigation (Trench 2003:1–30).

Like South Africa, the Canadian sports a three-tier system of government, the Federal government, the provincial government and local government. Initially Canada was separated into four provinces of Ontario, Quebec, Nova Scotia and New Brunswick. Presently, it has ten provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador) plus three territories, the Yukon, the Northwest Territories and Nunavut.

Both the federal and provincial governments have legislative powers under the Constitution Act. The federal government legislates on matters of common application across Canada and has the residual power to legislate for all matters which have not been assigned to provincial legislatures. It is empowered to pass laws which have general application in the whole country. That is, it may enact laws which provide for peace, order and good governance over the entire area of the country. Specific provincial matters are dealt with through provincial legislation.

Like South Africa and the United Kingdom, Canada is not immune to experiencing intergovernmental disputes, with the majority occurring between the federal and provincial governments. However, unlike the South African Constitution, the Constitution Act does not provide for intergovernmental fora as bodies established to consider and resolve disputes between organs of the state. Intergovernmental agreements serve as a critical and preferred mode of resolving intergovernmental disputes in avoidance of risk filled litigation (Trench 2003).

Most disputes are resolved through the help of the Canadian Intergovernmental Committee on Urban and Regional Research, which is based in Toronto, Ontario and was established in 1968 after a Federal-Provincial Conference was held on Housing and Urban Development. The purpose of the conference was for exchanging information between policymakers on urban, rural and regional matters between provincial governments across Canada and at all levels of government.

SYNTHESIS

The Constitution of South Africa has some resemblance of both the Canadian and British systems of governance. Harmony in resolving inter-governmental disputes is important for the states of South Africa, Canada and the United Kingdom. One important lesson that South Africa can learn from the Canada is the effective use of inter-governmental agreements as a means of resolving disputes and for the avoidance of litigation (Trench 2003:1–31). Agreements present state parties involved with an opportunity to reach negotiated settlements of disputes, which may in turn foster better relations among the involved organs of the state.

The recent constitutional case of "*Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8" highlighted how the lack of co-operation between the organs of the state can threaten delivery of critical services to society. The case exposed the failure of the South African Social Security Agency, the Department of Social Development and National Treasury to organise and support one another in ensuring that the state continued to pay social grants to qualifying members of the society. An inter-governmental agreement could have allayed fears that gripped the society for a considerable period of months when the payment of the grants was precarious.

There is also a lesson to be learnt from the model used in the United Kingdom, that is, the referral of disputes to the Joint Ministerial Committee. In South Africa there is the Cabinet, which is a platform for Ministers to discuss matters of mutual interest. The lack of cooperation between the organs of the state relating to the social security challenges could have been discussed in Cabinet and resolved there. Instead, the organs of the same state were not able to find harmony and to resolve the challenges that threatened recipients of social assistance hence the intervention by a Non-Governmental Organisation *Black Sash Trust who filed a suit against the Minister of Social Development and Others* in order to compel them to perform their duties as mandated by the Constitution and legislation.

In "*Ngaka Modiri Molema District Municipality v Chairperson, Northwest Provincial Executive Committee and Others* [2014] ZACC 31" the court had to deal with a dispute concerning the propriety of the invocation of section 139(1)(c) of the Constitution. The executive council of the Northwest Province had dissolved the council of Ngaka Modiri Molema municipality, a decision that the affected council challenged through urgent court application. The urgent application was dismissed in the High Court and council decided to appeal directly to the constitutional court.

The court in this matter recognised that a provincial government was empowered to intervene in local government affairs if a municipality is failing to fulfil its executive obligations imposed by the constitution and other laws. The court recognised that in these types of disputes, there is potential prejudice which is embodied in the continued disruption of delivery of basic services to the society. The court held that the people who would suffer harm were not the parties before it but those who are eagerly awaiting the delivery of services.

The constitutional court recognised two important things: first, pursuit of these disputes impedes service delivery imperative and, secondly, it puts a burden to the finances of the municipality, hence it declined to make an award for costs. In other words, the court was conscientious to the impact that a litigated intergovernmental dispute may have to the public purse.

Again, in "*Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] 4 All SA 67 (GP) (19 June 2014" the municipal council was dissolved by the executive council of Limpopo Province in line with section 139(1)(c) of the Constitution. Perturbed by the dissolution, the affected council instituted urgent court application to interdict the dissolution of council. The application was successful in the application and the court granted an order interdicting the executive council from dissolving the municipal council.

The court recognised that litigation of this nature leaves a significant hole in the public finances. As a result, the court refused to grant an order of costs for the victorious party on the basis that public purse was involved. They specifically remarked that public money should not be used to settle political disputes. In addition, the judge emphasised that public funds should be deployed to the proper course of building communities and supplying them with goods and services. This is indicative of the fact that intergovernmental disputes between provincial and local administrations affect not only the institutions involved and their functionaries but the public in general is also impacted.

Another case which exemplifies the regrettable conflict between organs of state is the case between "*City of Cape Town v South African National Roads Agency Limited and Others* 2015 (3) SA 386 SCA" in which the Supreme Court of Appeal had to decide the question of disclosure of information contained in court documents. The National Roads Agency had applied to keep in secrecy some information that it had disclosed concerning the appointment of service provider to manage the development of toll gate in the Western Cape Province. The court ruled in favour of the City of Cape Town and emphasised that accountability will be enhanced by the disclosure of the information and remarked that 'secrecy is the antithesis of accountability'.

The court also recognised that it is crucial for the administration of justice to provide members of the public with the reasons for decisions that affect them. In like manner, it is imperative for provincial governments to discuss the issues of non-compliances with affected municipalities, provide an opportunity to redress the challenges, prior to embarking on intervention in terms of section 139(1) of the Constitution. It is also best practice for reasons to be given to a municipality indicating why the intervention is warranted.

CONCLUSION

One of the defining features of co-operative governance is consultation. This is apt as shown by the good examples learnt from Britain and Canada. Good inter-governmental relations are important in multi-level governments such as are found in Canada, South Africa and the United Kingdom. Although, the approach on how to achieve good relations vary from country to country, the significance of maintaining inter-governmental relations that are based on mutual respect and co-operation cannot be overemphasised.

In the South African context section 40(1) of the Constitution envisages legislation that regulates co-operation between spheres of government. This is necessary because the aim of government, generally, is to render services to the citizenry. Such aim should not be derailed by state organs engaging in intergovernmental disputes which have adverse effects on the general society as espoused by the court in the case of "*Ngaka Modiri Molema District Municipality v Chairperson, Northwest Provincial Executive Committee and Others* (CCT 186/14) [2014] ZACC 31; 2015 (1) BCLR 72 (CC) (18 November 2014)." Canada has shown that even less formal mechanism for co-operation can work albeit with some difficulties and criticism.

Initiatives such as the JMC, in the United Kingdom, and the inter-governmental agreements, in both Canada and the United Kingdom, highlight the importance of avoidance of litigation to resolve inter-governmental disputes. On the same token, they highlight the significance of sound interstate relations. In South Africa, the Constitution commands organs of the state to take all reasonable measures possible to avoid conflict against one another. This notwithstanding, there seems to be persistent inter-governmental disputes and conflicts. By spheres of government meeting themselves through negotiated settlements would, undoubtedly reduce inter-governmental disputes in South Africa. The value in resolving inter-governmental disputes through co-operation is derived from the fact that issues can be settled quickly and cost effectively. A clarion call is made to all in government spheres to foster co-operation with one another. It is recommended to those

in government to put the interests of society first in order to ensure that services are delivered at acceptable levels to the society.

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