

Intergovernmental disputes between the provincial and local governments in South Africa: Impediments to good governance and socio-economic development

By

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ABSTRACT

This mini-dissertation looks into the relationship between the different spheres or organs of the state, which is elaborately provided for in Chapter 3 of the Constitution. In particular, this mini-dissertation scrutinizes the propriety of the relationship between provincial and local government, using case law to analyze and examine conflicts within the organs of government. The critical question that is posed is whether the mechanisms provided for in the Constitution and legislation are working appropriately to foster cooperation between the spheres of government or whether they are inadequate to address these challenges. An argument that this mini-dissertation raises is that, in spite of the laws that have been put in place to resolve conflict within the state organs, the mechanisms provided for are inadequate and need to be strengthened if there is going to be proper and better cooperation between the spheres of government. The gap is more glaring in cases involving intervention by provincial governments into the functional terrain of local government. It has been observed that there is lack of willpower from the different role players to ensure the improvement of intergovernmental relations and cooperation as espoused by the Constitution. A comparative analysis was done, hence the mini-dissertation utilises the jurisprudence of the United Kingdom and Canada and draws useful lessons for South Africa. This paper therefore concludes that there is a need for legislative reform that will compel organs of government to avoid costly litigation against one another. It is recommended, also, that there should be effective inter-sphere communication so as to make plain the expectations of one sphere over another.

DECLARATION BY STUDENT

I, **Adv Mokgerwa Zacharia Makoti** declare that this mini-dissertation submitted to the University of Limpopo for the degree of Masters of Laws in Development and Management Law has not been previously submitted by me for a degree at this University or any other University, that it is my work. I further declare that I have acknowledged all the sources and material used in the design and construction of this mini-dissertation.

Makoti M Z (Adv)

Date

DEDICATION

Firstly, I dedicate this to achievement to the Almighty God who sustains me and grants me the ability to keep going. He is indeed the beginning and the end I could not have found the time to pull this work through had it not been for His abundant love and grace. My parents are no longer around to see and share this achievement with me, but the confidence that they had in me and their kind words of encouragement always made me realise that there is no achievement without hard work. I therefore dedicate this achievement posthumously to my late parents, in particular my mother Mogofane Frengeline Makoti, because they always believed in me and pushed me to achieve in my academic life. Secondly, I dedicate this achievement to my family who, whilst not seeing the reason for anyone to pursue a second Masters qualification, still offered me their support and prayers for me to succeed in this academic journey. Their love gave me the much needed impetus to keep going when it got tougher through this academic journey.

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Chapter 1

An overview of inter-governmental disputes between provincial and local spheres of government in South Africa

1.1 INTRODUCTION

The promulgation of the Constitution¹ in 1996 has ushered in a new democratic dispensation in South Africa. The principles of co-operative government were codified and firmly formed part of the South African law. The Constitution segregated government into three levels of government, being the national, provincial and local governments which are distinct and independent, but which are simultaneously codependent and interconnected.²

Some duties and responsibilities of the three tiers of government may intertwine, however, each has clearly defined role. It is therefore imaginable that government authority may be distributed in a manner that accords each sphere a Constitutionally defined role without it being subjected to the authority of another, probably higher, sphere.³ That is the reason why the Constitution created the different spheres as distinctive and independent before they are interdependent. They are autonomous because the Constitution allows them to exercise their roles and functions independently within their segregated areas of competence and without interference from other spheres.⁴

Section 41(1)(c) provides that these spheres of government are obliged to provide government that is effective, transparent, accountable and coherent. The same Constitution cautions the spheres of government to perform only functions conferred upon each one of them and not perform functions assigned to the other spheres.⁵

¹ Constitution of the Republic of South Africa, 1996.

² Section 40(1).

³ Rautenbach and Malherbe, 1996.

⁴ Section 41(1)(g).

⁵ Section 41(1)(e)-(g).

Spheres of government share common Constitutional duty to provide basic services to communities living within their areas of jurisdiction.⁶ When striving to provide basic services, section 40(1) requires the three spheres of government to do so in collaborative manner.⁷ This implies that the governments in all the spheres are requirement to co-operate with one another for an improved delivery of basic services.⁸

The same Constitution which has established the principles of co-operative government, has introduced mechanisms in terms of sections 139(1) and 154(1) for supervision by provincial government over local government. Section 139(1) empowers provincial government to intervene into the affairs of a local government that is failing to executive its executive function or duty imposed by the Constitution and other legislation. Section 154(1) on the other hand, obligates both national and provincial governments to supervise, monitor, support and strengthen local government so that it can manage its own affairs.⁹

Section 152(1)(b) of the Constitution states as one of the objects of the local government, the provision of sustainable services to the communities that they are established to serve. Government has conceded, however, that there have been obstinate challenges in some areas of local government to deliver basic services in an efficient and effective manner.¹⁰ Local government can achieve this with the support of the higher governments as espoused in section 154(1) of the Constitution.

Section 41(1)(h) of the Constitution requires organs of the state to co-operate with one another and avoid inter-governmental conflict. This is so because, according to Akintan and Christmas,¹¹ inter-governmental conflict has debilitating effect on governance. Knoetze also noted that conflict within or between the different spheres

⁶ *Ibid*, section 41(1)(b).

⁷ *Ibid*.

⁸ Section 41(1)(h).

⁹ Department of Local Government and Co-operative Government, '*State of Local Government in South Africa*' (2009) p17.

¹⁰ Department of Local Government and Co-operative Governance: A Twenty Year Review 1994 – 2014, p39 at 4.5.

¹¹ O. Akintan and A. Christmas, '*Intergovernmental Dispute Resolution in Focus: The Cape Storm*' (2016).

can stifle the noble intentions of the Constitution towards service delivery.¹² This was also the conclusion reached by Sokhela, that is, that conflict undermines government's ability to render socio-economic goods and services.¹³

Deputy President Cyril Ramaphosa recently remarked that the spate of inter-governmental disputes has become a cause for worry or concern.¹⁴ He stated this during the National Economic Development and Labour Council ('NEDLAC') Annual Summit held in September 2016, recognizing the devastating effect of inter-governmental disputes.¹⁵

According to Mathenjwa,¹⁶ a level of inter-governmental supervision is necessary but may result in an intrusion by one government into the affairs of another. He reasons, however, that the principle of co-operative governance places restraint on the exercise of supervisory powers by provincial sphere of government over local government in order to preserve the Constitutional autonomy of the affected municipal government from being eroded.

Thus, although the Constitution permits supervisory roles by national and provincial governments over local government, these higher tiers of government are obliged in terms of section 41(1)(g) to respect the institution of local government and avoid encroaching on its geographical, functional and institutional integrity.¹⁷ Thus, it would be offensive to the tenets of the Constitution if national or provincial governments acted in a manner that impinges on the autonomy of local government, or of one another. It is in that spirit that section 41 of the Constitution sets out the principles of cooperation in accordance with which all the spheres of government are obliged to respect one another and avoid encroaching on each other's integrity.¹⁸

¹² E. Knoetze, Legislative Regulation of the Developmental Functions of Traditional Leadership – In Conflict or Cohesion with Municipal Councils?

¹³ P. M. Sokhela, Intergovernmental Relations in the Local Sphere of Government in South Africa with Specific Reference to Tshwane Metropolitan Municipality, 2006 p64.

¹⁴ Ramaphosa's speech delivered at the 21st NEDLAC annual summit, 09 September 2016.

¹⁵ Sunday Times, 11 September 2016.

¹⁶ M Mathenjwa, 'Contemporary trends in provincial government supervision of local government in South Africa' (2014).

¹⁷ Rautenbach and Malherbe, 2008 p89.

¹⁸ Rautenbach and Malherbe, 2008 p89.

This mini-dissertation investigates the effect of inter-governmental disputes, the distinctive roles and functions of provincial and local governments, areas of co-operation between them and also seeks to determine the causes of inter-governmental disputes between these two spheres of government and how they can be addressed amicably without resort to spending huge sums of money on litigation in courts. In particular, it focuses on conflict between provincial and local spheres of government within the scope of the application of section 139(1) of the Constitution, which empowers provincial government to intervene into the affairs of municipalities.

In conclusion, it recommends how inter-governmental disputes can be eradicated or reduced. Among other considerations, this mini-dissertation examines how the provisions of the Intergovernmental Relations Framework Act, 2005 ('IRFA'), can be used to reduce conflict between these two spheres of government. It is pertinent to point out that the ambit of operation of the provisions of IRFA do not apply to conflict that may arise as a result of interventions in terms of section 139(1) of the Constitution. In other words the dispute resolution mechanisms found in IRFA are not applicable to disputes concerning interventions by a provincial administration into affairs of a municipality.

1.2 RESEARCH PROBLEM

One of the important initiatives introduced by the Constitution is the principle of cooperative governance. Cooperative governance is a broad concept that requires government institutions and entities to work together or cooperate with one another towards a common goal and to deliver quality socio-economic goods and services to the people.

It is expected, constitutionally speaking, that these spheres of government will function harmoniously without any rift or conflict. However, the reality on the ground is that there have been instances of conflicts among them and this is affecting or hindering fulfilment of their Constitutional mandates to provide good governance and deliver Constitutional services to the people, hence impacting on the provisions of socio-economic rights, amenities and services that should be provided by the local government to the people.

Government has, through legislative measures such as the Framework Act, set up various structures such as the President's coordinating council and the Premier's intergovernmental forum¹⁹ which are aimed at assisting the organs of state to avoid conflict with one another or, where conflicts already exist, providing mechanisms of resolving such conflicts without resort to litigation. Notwithstanding these legislative frameworks, the use of the available dispute resolution mechanisms is not compulsory. The effect of this is that the legislative measures that are in place may be implemented for the purpose of resolving intergovernmental disputes whenever they are imminent or arise.²⁰

Unfortunately, disputes falling within the ambit of section 139 of the Constitution are excluded from the inter-governmental dispute resolution mechanisms in terms of section 39(b) of the IRFA. Thus, this mini-dissertation also investigates whether the dispute resolution measures introduced by the IRFA can be extended to cover disputes that may arise in instances of intervention by a province into the affairs of a municipality. If not, what other measures can be introduced to ensure quick and cost effective measures of resolving dispute falling within the ambit of section 139 of the Constitution.

1.2.1 Sources of intergovernmental disputes

The letter of the Constitution is succinct in that it envisions harmonious intergovernmental relationship among the various organs of state. Despite this noble intent, some of the sources of intergovernmental disputes or conflict can be located within the Constitution. Take for example, section 41(1)(h) enjoins all the different levels of government and their institutions to foster or promote cooperative governance and avoid conflict with one another.²¹ Fundamentally, the Constitution imposes a duty on organs of government to take positively action or steps to, amongst other things, cooperate and support each other for the good of the society and, most importantly, avoid litigation against one another. This was the view expressed by the Constitutional

¹⁹ S 16 of the Framework Act.

²⁰ S 18 of the Framework Act.

²¹ S 41(1)(h)(iv).

Court in *MEC for Health, KwaZulu-Natal v Premier, Kwazulu-Natal: In re Minister of Health and Others v Treatment Action Campaign and Others*.²²

Nonetheless, the invocation of an intervention by provincial organs of state into the affairs of a municipality, in terms of the provisions of section 139 of the Constitution, is a fertile ground for intergovernmental disputes. This section empowers provincial organs of state to intervene in the affairs of local government where it is reasonable apprehended that a municipality is failing to perform its executive obligations in terms of legislation.²³ Provincial government may assume the executive function that a particular municipality is failing to perform and, in more serious instances, may even dissolve a municipal council if it is of the view that the municipal council has become dysfunctional.²⁴ This type of intervention is warranted if it is used genuinely based on a failure by a municipality to discharge its executive obligations. That may not always be the case as the court in the case of *Member of the Kwa-Zulu Natal Executive Council for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others*²⁵ considered a decision taken by the MEC to intervene into the affairs of the Amajuba municipality as a political squabble. In this case the MEC intervened on the basis that the municipal council had refused to elect two ANC councilors into its executive committee. The court set aside the decision of the MEC to intervene into the affairs of the municipality. According to Mathenjwa²⁶ there is sufficient evidence to conclude that interventions into affairs of municipalities are often marred by party political considerations instead of genuine reasons based on a municipality's failure to discharge its executive obligations.

There have been instances where conflict arose between provincial and local government organs, resulting from the invocation of the provisions of section 139(1) of the Constitution. There have been instances where the application of the provisions of section 139(1) have been challenged in the courts. In the case of *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Council*

²² (CCT15/02) [2002] ZACC 14; 2002 (10) BCLR 1028 (5 July 2002).

²³ S 139(1)(a) and (b).

²⁴ S 139(1)(c).

²⁵ [2011] 1 All SA 401 (SCA) at para 1.

²⁶ M Mathenjwa, 'Contemporary trends in provincial government supervision of local government in South Africa' (2014).

*and Others*²⁷ the decision of the North West Executive Council to dissolve the municipal council was challenged in the High Court and in the Constitutional Court. In this case the court dismissed the application on the basis of lack of urgency. The same court challenge was taken against the decision of the Executive Council of the Eastern Cape to dissolve the municipal council in *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others*.²⁸ In this case the court found in favour of the municipality and set aside the decisions to dissolve the municipal council because it impinged on the rights of the municipality to self-govern.

Another legislation that is likely to ignite conflict is the Municipal Systems Act ('MSA').²⁹ Section 106 of this legislation empowers a member of the executive council responsible for local government to conduct an investigation into a municipality where there are allegations of maladministration or corruption. While section 106 is intended to provide a member of the executive council with oversight functions over municipality, it is a common occurrence that a decision predicated on the provisions of this legislation is usually seen as undue intervention or interference hence result in an intergovernmental dispute.³⁰ This is likely to happen if the decision to act in terms of the section has not been properly explained by the Executive Council to the affected municipal council.

1.2.2 Shortcomings of intergovernmental structures formed to resolve intergovernmental disputes

The text of the Constitution is prescriptive³¹ in its demand to government institutions to work together towards service delivery. Nonetheless, conflicts and litigation have taken place aplenty between provincial governments and municipalities. Most of these

²⁷ (CCT 186/14) [2014] ZACC 31; 2015 (1) BCLR 72 (CC) (18 November 2014).

²⁸ [2009] ZAECBHC 14 (5 August 2009).

²⁹ Local Government: Municipal Systems Act No. 32 of 2000.

³⁰ *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014) at paragraphs 35 and 37.

³¹ *Ibid.*

have taken place in instances where provincial governments invoked the provisions of section 139(1) to intervene into the affairs of municipalities.³²

Even the ruling African National Congress ('ANC') has acknowledged or become aware of the challenges of lack of cooperation between spheres of government.³³ It is also aware that these challenges need to be resolved by way of rigorous efforts taken by the institutions of government in all the spheres, in particular within provincial and local government. This mini-dissertation³⁴ posits that successful cooperation between government spheres is dependent on, *inter alia*, settlement of disputes between the spheres of government.

Intergovernmental Relations Framework Act³⁵ ('IRFA') established structures and mechanisms such as mediation and consultative fora for resolving disputes. Some of the structures such as the national intergovernmental forum and the interprovincial forums are meant to discuss matters of common interest between state organs.³⁶

The procedures laid down in the IRFA are not all compulsory. This may lead to a situation where organs of government are not always required to engage in meaningful discussions to resolve their disputes prior to cases reaching the courtrooms. This may have a deleterious impact on the functioning and good governance. For instance, section 32 of the IRFA provides that intergovernmental structures are meant for consultation and discussion. Subsection (2) is even more explicit in stating that these structures do not enjoy executive decision-making powers, although they may adopt resolutions and make recommendations on any matter under discussion. Resolutions taken by these structures should be made to be binding.³⁷ In this way the

³² M Mathenjwa, '*Contemporary trends in provincial government supervision of local government in South Africa*' (2014).

³³ ANC: Provincial and Local Government Review Discussion Paper (2-4 December 2010).

³⁴ *Ibid.*

³⁵ Act No. 13 of 2005.

³⁶ Sections 9(1) and 22(1) of the Framework Act use the word 'may' when dealing with the formation of these forums.

³⁷ *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa and Another* [2017] 1 All SA 239 (GP); 2017 (2) SA 597 (GP) (26 October 2016).

recommendation would be accorded the same status as remedial actions recommended by the South Africa Public Protector.³⁸

1.2.3 Background to the problem

Before 1994 the Republic of South Africa endured an era of apartheid that caused significant divide within the South African citizenry.³⁹ During the year 1948 the ruling Nationalist Party, led by then President Hendrik Verwoerd, promulgated and institutionalized laws to perpetuate segregation of different racial groups in South Africa. Ironically, the then supreme parliament⁴⁰ was an institutions that was used to pass and perpetuate past apartheid laws. Due to the sovereignty of Parliament co-operative governance was non-existent.⁴¹

With the recorded history of the role that was played by the Parliament during the days of oppression in South Africa, the Convention for a Democratic South Africa (CODESA)⁴² negotiations culminated in the move away from parliamentary sovereignty and the adoption of the Constitution as the supreme law in the Republic.⁴³ 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. Government was established in tripartite as the national, provincial and local government. The most fundamental of these innovations of the Constitution is the introduction of multi-sphere system of governance.

³⁸ Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

³⁹ The Origins of Apartheid: <http://www.apartheidmuseum.org/sites/default/files/files/downloads/Learners%20book%20Chapter1.pdf> (12 May 2016).

⁴⁰ C Hoexter *Administrative Law in South Africa* 2nd Ed. (2015) p13 (JUTA).

⁴¹ Currie and de Waal the Bill of Rights Handbook 5th Ed (2005) p3 (JUTA).

⁴² Convention for Democratic South Africa.

⁴³ Starting with the Interim Constitution Act No. 200 of 1993 and the current constitution.

All the three spheres of government is clothed with administrative, executive and legislative powers.

For local 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 located 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 executive to intervene in the affairs of a municipality, amongst others, to assume the executive functions of a particular municipality.

Other legislation such as the Municipal Systems Act⁴⁴ was passed which further empowered provincial and national government to supervise or perform certain activities in the institution of local government. Section 106 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.⁴⁵ Mathenjwa concludes 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.⁴⁶

Notwithstanding the clear language of the Constitution to avert conflict and to foster closer cooperative working relationship, government institutions still find themselves locked in disputes. Most of the disputes end up being litigated.

1.3 PROBLEM STATEMENT

South Africa has achieved huge political successes when it became a Constitutional and democratic State in 1994. This paved way for the adoption of legislative and other

⁴⁴ Act No. 32 of 2000.

⁴⁵ A. J. Reynecke, Testing the boundaries of municipal supervision: an analysis of section 106 of the Municipal Systems Act and provincial legislation - p22.

⁴⁶ M Mathenjwa, 'Contemporary trends in provincial government supervision of local government in South Africa' (2014).

measures to invalidate apartheid and its mischiefs. Some of those ills were entrenched in government institutions which led to the restructuring of some State institutions. Legislation was aimed at correcting the past and putting up government structures that address the needs of the society.

Regrettably, the noble mandate of the Constitution is yet to be realised, partly due to the conflict across spheres of government. Resolution of disputes, whenever they emerge, is not sufficiently resolute.

The challenge is that sections 100 and 139 of the Constitution seem to be the sources of conflicts rather than mechanisms for resolution of problems. It will be noted that the Intergovernmental Framework Act⁴⁷ specifically excludes these conflicts from the dispute resolution mechanisms under the Act. Essentially, all disputes falling within the two provisions are left to be adjudicated by the Court instead of following dispute resolution measures that are less combative.

This mini-dissertation examines the reasons for the Framework Act's exclusion of disputes under section 100 and 139 of the Constitution. In the case of other disputes between organs of the state not falling within the ambit of sections 100 and 139 of the Constitution, section 45 of the Framework Act requires that intergovernmental processes such as mediation and consultation must be conducted before litigation may be embarked on. This enjoins state organs to apply dispute resolution mechanisms and to avoid litigating against one another irrespective of the nature and the source of the dispute.

1.4 LITERATURE REVIEW

The incessant disputes amongst government institutions is a cause for concern on various levels. It should be noted that litigation is a costly exercise⁴⁸ and it significantly drains the public fiscus of its limited financial resources. Conflict defocusses state institutions away from their Constitutional and legislative mandates. Litigation of disputes in the courtroom renders nugatory the internal systems and structures that

⁴⁷ See, Chapter 4 – section 39(1)(b) Act No. 13 of 2005.

⁴⁸ *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156; 2002 (2) SA 715 at par 45.

have been established to aid government institutions to avert disputes and resolve conflict.⁴⁹

1.4.1 Constitution of the Republic of South Africa

Sections 152 and 153 of the Constitution imposes a duty on local government to provide basic municipal services to communities.⁵⁰ The court held in the case of *Joseph and Others v City of Johannesburg and Others*⁵¹ that these sections of the Constitution obligates every municipality to provide basic municipal services to their inhabitants. If a municipality is not doing what the Constitution provides, the provincial executive may step in, in terms of section 139(1)(b) or (c) and take over the execution of the duties that a municipality is failing to perform.⁵²

Similarly, a provincial executive is empowered by the Constitution⁵³ to, where there is reasonable apprehensions that a particular municipality is failing, is unable to or does not to achieve an executive duty that is imposed by the Constitution or another legislation, intercede by adopting such apposite measures as may be necessary to guarantee the fulfilment of that responsibility.

In more serious conflict situation, section 139(1)(c) of the Constitution empowers the provincial executive to remove a municipal council from office and to substitute it with an administrator. In this case, the executive may appoint an administrator to hold office while the processes of electing a newly municipal council are being finalised. This is what happened in the case of *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* where the provincial government dissolved the council of the municipality in terms of the provisions of section 139(1)(c) of the Constitution. It was alleged by the provincial government that the municipality was failing to perform its executive functions. The court found that the provincial government did not have good grounds to justify the dissolution of council and set aside the decision as *ultra*

⁴⁹ *Ibid*, at par 33.

⁵⁰ See also, sections 4(2)(f) and 73 of the Local Government: Municipal Systems Act.

⁵¹ 2009] ZACC 30; 2010 (4) SA 55; 2010 (3) BCLR 212 (CC).

⁵² Section 139(1)(a).

⁵³ Section 239(1).

vires and irrational.

The irony is that the same Constitution, in Chapter 3, imposes a duty on spheres of government and other state organs to cooperate with one another.⁵⁴ It prohibits the spheres of government from encroaching into the defined area of competence of another.⁵⁵ This is intended to preserve the Constitutional autonomy⁵⁶ of the different spheres of government.

Section 139 as a whole seeks to encourage accountability by local government while, simultaneously, promoting or encouraging good governance.⁵⁷ In the case of *Ngaka Modiri Molema* an intervention under section 139(1)(c) the court said that the intervention was not an interference with the affairs of the municipality but that it was a necessary measure for the provincial administration to ensure service delivery duties are met by the municipality.⁵⁸

Interventions under section 139 of the Constitution become problematic and therefore result in conflict if they are not properly carried out or used for ulterior purposes and malicious motives. This usually happens where intervention is made without compliance with proper procedures such as prior consultation.⁵⁹ Courts have inherent powers to intercede where legality and the rule of law are compromised as a result of any intervention into the affairs of a municipality.⁶⁰

In many instances, litigation is usually the result of non-adherence to prescribed procedures. A decision to intervene in the affairs of another sphere of government must meet the standard of legality. This was affirmed in the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*⁶¹ where the Constitutional Court held that the principle of legality demanded that the exercise of public power should not be arbitrary

⁵⁴ Section 40(2).

⁵⁵ Section 41(1)(g).

⁵⁶ Section 40(1).

⁵⁷ Section 41(1)(c).

⁵⁸ *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive, supra.*

⁵⁹ See, *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECHC 14 (5 August 2009).

⁶⁰ *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115.

⁶¹ 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

or irrational. Thus, a decision to intervene in the affairs of another sphere should meet the rationality test.

When implementing a decision in terms of section 139 of the Constitution to intervene in the affairs of a municipality the respective provincial government must act within the confines of the law.⁶² This was also expressed in the case of *Masetlha v President of the Republic of South Africa*⁶³ Ngcobo J held that the rule of law requires legality, that is, that public power must be exercised in compliance with the law and within the boundaries set by the law.

1.4.2 Municipal Systems Act, 2000

The Municipal Systems Act allows the provincial executive, through a provincial member of the executive who is in charge of the affairs of that local administration, to conduct investigations in a municipality if he or she is of the belief that there is that malfeasance, fraud, corruption or any other grave dereliction that has taken place or is continuing in a council or in the province.⁶⁴

This type of intervention is permitted primarily when such misdeed is affecting the attainment of delivering Constitutional mandates to the people. But the intervention must be done when it is necessary not hurriedly to score political points which might lead to dispute. The fact that such encroachment may take place is another circumstance that may lead to a dispute that may result in litigation. As Mathenjwa⁶⁵ noted, it would contravene the Constitution if an intervention is conducted in a manner that impinges on the autonomy⁶⁶ of the affected municipality.

This Act and the Constitution require a provincial government to consult with the affected municipality and to provide it with an opportunity to fix the identified non-compliance.⁶⁷ With proper consultation between the spheres of government, in my

⁶² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998).

⁶³ 2008 1 BCLR 1 (CC).

⁶⁴ Section 106 of the Systems Act.

⁶⁵ Mathenjwa, *supra*.

⁶⁶ Section 41(1)(e), constitution.

⁶⁷ *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

respective view, conflict will be averted. The court in the case of *Mnquma* set aside the intervention on the grounds of failure by the provincial government to engage the municipality prior to taking the decision to intervene in terms of section 139(1)(c) of the Constitution.

1.4. 2 Municipal Finance Management Act, 2003

Chapter 13 of the Municipal Finance Management Act (MFMA)⁶⁸ regulates intervention by a provincial administration over the municipal affairs. It envisages however, that such intervention shall be made with the intention to pull the affected municipality out of financial quagmire. Section 136 of this legislation empowers a member of the executive council to, where he or she has become aware of a serious financial mismanagement, inquire into the gravity of the maladministration and decide whether to intervene along the dictates of section 139 of the Constitution. The intervention in the case of *Mogalakwena Local Municipality* was also invoked in terms of section 136 of the MFMA, which empowers the MEC to intervene when there are serious financial problems within a particular municipality.

Often, the interventions invoked in accordance with section 139(1) of the Constitution lead to conflict between the affected provincial administration and the municipality concerned.⁶⁹ According to Mhlantla J, in the case of *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another*,⁷⁰ it is not a bad thing to disagree. How disagreement is handled is what is important.⁷¹ In this Constitutional epoch avoidance of litigation by one state organ against another is important. In this case the Constitutional court noted that:

“... Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point

⁶⁸ Act No. 56 of 2003.

⁶⁹ (CCT 209/15) [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) (20 May 2016) at para 4.

⁷⁰ MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

⁷¹ *Ibid.*

... The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships ...”

Conflicts between organs of state are regrettable to the extent that they negatively affect the values of the Constitution which are to progressively render basic services to the society. In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court criticised the National Assembly and government’s conduct which led to litigation that could have been avoided by complying with the remedial actions of the Public Protector.⁷² Tuchten J expressed a regretful view in *Mogalakwena Local Municipality*, commenting on how state coffers are plundered through costly litigation. The court held that:

“...In my view, public money should not be used to resolve such a political dispute and should not, in a local government context, be diverted from its proper purpose of building communities and supplying them with resources. The courts have wide powers to regulate the remuneration of their officers. Tasima (Pty) Ltd v Department of Transport and Others 2013 4 SA 134 GNP para 73. It would be open to a court to order, as it did in Tasima, that no public money might be used to remunerate the lawyers for any party who is found to have acted in the fashion which I have described...”

The MFMA, however, has an internal mechanism that aims to resolve disputes with other state organs. Section 44 thereof provides that when a dispute arises concerning a financial issue, the state organs involved must attempt to resolve the dispute expeditiously and try to do so without going to court. As expressed by Mhlantla J in *Rivonia Primary School* case,⁷³ conflict is inevitable and where parties fail to find a resolution through intergovernmental relations framework, litigation may not always be possible to avoid. In the case of *National Gambling Board v Premier KwaZulu-Natal*

⁷² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁷³ *Member of Executive Council for Education in Gauteng Province and others v Rivonia Primary School and others* 2013 (6) SA BCLR 1365 (CC).

the court also recognised that conflict is bound to happen, but that organs of state are bound to take reasonable measures to avoid it or to find non-litigation measures to resolve any disagreement. On proper reading of section 41(3) of the Constitution, it envisages that there will be conflict amongst organs of state hence it enjoins them to take reasonable effort to settle them.

1.4.3 Intergovernmental Relations Framework Act 13 of 2005

Parliament passed this legislation in compliance with section 41(2) of the Constitution and with the intent to give full effect to the Constitutional dictate for state organs to foster good intergovernmental relations. In the case of *National Gambling Board v Premier of KwaZulu-Natal & Others*⁷⁴ the court held that:

*"[I]t could be argued that the failure of Parliament to comply with its obligations in terms of [FC s 41(2)] has rendered the important provisions of [FC ss 41(3) and 41(4)] inoperative. For reasons that follow, it is not necessary to decide that now. However, even the possibility that such an argument could be raised emphasizes the urgent need for the envisaged legislation. Co-operative government is foundational to our Constitutional endeavour. The fact that the Act envisaged in section 41(2) has not been passed requires the attention of the Minister for Justice and Constitutional Development."*⁷⁵

The Constitution specifically called for national legislation to be passed to regulate intergovernmental relations. The long title of the IRFA makes it plain that the aim of the legislation is to bolster intergovernmental relations and to provide a platform for resolution of intergovernmental disputes.

This Act establishes structures such as the national, provincial and municipal intergovernmental fora to adjudicate intergovernmental disputes and to attempt to resolve them. The problems with such fora are: firstly, they are not obligatory to be formed⁷⁶ and, secondly, some of their decisions lack the force of law as they are

⁷⁴ 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

⁷⁵ *Ibid*, at par 32.

⁷⁶ See, section 9 of IRFA.

merely consultative fora.⁷⁷ This is so because this legislation create some bodies, such as the President's Co-ordinating Council, as just consultative entities.⁷⁸

In *Member of Executive Council for Education in Gauteng Province and others v Rivonia Primary School and others*,⁷⁹ for example, court was faced with intergovernmental dispute between the controlling body of the primary school and the department of education over the implementation of the admission policy of learners. The court showed its disquiet with the conduct of the parties, both of whom were organs of state. Mhlantla AJ passed scathing remarks that the parties could and should have gone an extra mile to avoid litigation.⁸⁰ The learned judge emphasised the Constitutional value of cooperative governance by stating that the parties were required to work together in partnership to find workable solutions to persistent and complex difficulties.

The people who are involved in implementing and enforcing the Framework Act should take a more robust stance and make the formation of all the intergovernmental structure obligatory. This will encourage state bodies to have meaningful discussions that may avert litigation.⁸¹

There is need to reiterate that litigation is a costly exercise. That was pointed out by the court in the *Rivonia Primary School* case where, once again, the court declined to award costs to the victorious party in order to save public funds.⁸² Some of the money spent in litigation costs could be used towards provision of Constitutional goods and services to the people. The limited financial means of the state was recognised by the Constitutional court in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*⁸³ where the court held that:

"I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by

⁷⁷ For example, section 18 of IRFA.

⁷⁸ Section 6 of IRFA.

⁷⁹ MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

⁸⁰ Ibid at par 78.

⁸¹ As noted by Mhlantla in the Rivonia case, supra.

⁸² Footnote 65 above.

⁸³ 2000(11) BCLR 1169 (CC).

the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.”

This means that the state must therefore take care of the finances and not waste them through litigation. The levels of poverty in South Africa are high and could better use its financial resources to eradicate it. The Human Rights Commission found that the rights of many citizens to access food are being violated.⁸⁴ The report notes that:

“The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.”

There is need to use money to provide socio-economic services to the people instead of losing millions through state organs fighting against one another in courts of law.

1.4.4 Case law dealing with interventions under section 139 of the Constitution

The concept of cooperative governance was first discussed by the court in the first certification judgement.⁸⁵ This section of the mini-dissertation therefore seeks to review some of the important cases on intergovernmental disputes. The object of

⁸⁴ The Right to Food: 5th Economic and Social Rights Report Series 2003/2004 Financial Year: Human Rights Commission (21 June 2004).

⁸⁵ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

doing so is to analyse and assess the impact of the disputes on delivery of services and, furthermore, on the financial and human resources of the institutions affected.

In *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others*⁸⁶ 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 North-West 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 type 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.⁸⁷

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*⁸⁸ 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

⁸⁶ *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31.

⁸⁷ *Ibid* at para 9.

⁸⁸ [2014] 4 All SA 67 (GP) (19 June 2014).

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 leave 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.⁸⁹ 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*⁹⁰ 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'.⁹¹

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.⁹² 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

⁸⁹ Ibid at par 80.

⁹⁰ 2015 (3) SA 386 SCA.

⁹¹ Ibid at par 45.

⁹² Ibid.

practice for reasons to be given to a municipality indicating why the intervention is warranted.⁹³

1.4.5 Comparative analysis on how other countries handle intergovernmental relationship between organs of state – United Kingdom and Canada

This part of the study shall focus on the government structures both in the United Kingdom and Canada. The purpose will be to determine whether the two countries have established governance structures that are similar to the ones in South Africa.

Both Canadian and South African systems of government were modelled around the Westminster System⁹⁴ which developed in the United Kingdom. It is the thought, therefore, that there may exist similar intergovernmental relations challenges in these three nations.

The intention of this section of the mini-dissertation is to inquire on how other countries, such as Canada and the United Kingdom, resolve intergovernmental disputes whenever they exist. It will also be useful to draw lessons where there are good ones to learn.

1.4.6 Intergovernmental relations in the United Kingdom

According to A. Trench⁹⁵ the administration of intergovernmental 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.⁹⁶

⁹³ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1458 (CC) (“First Certification Judgment”).

⁹⁴ The Westminster Parliamentary System of Government: https://en.wikipedia.org/wiki/Westminster_system (15 June 2016).

⁹⁵ Alan Trench, Intergovernmental Relations and Better Devolution (December 2014) page 6.

⁹⁶ Ibid.

The United Kingdom's systems for intergovernmental relations were developed at the introduction of the devolution during 1999 and reviewed in 2013.⁹⁷ However, the mechanisms for resolution of disputes was 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 in 2014, the Smith's Commission⁹⁸ made recommendations and propagated for a more effective and workable mechanism for dispute resolutions across administrations, in particular the Scottish and United Kingdom Governments. The Commission was appointed following the introduction of the devolution of powers to the Scottish Parliament.

One of the institutions established for dispute resolution in the United Kingdom is the Joint Ministerial Committee, which the Smith Commission recommended that should under reform to provide for, amongst others, a more effective, efficient and workable mechanism to resolve intergovernmental disputes.⁹⁹ It is recognised in the United Kingdom that sound intergovernmental relations serve two important purposes of conflict resolution and for collective decision-making where there are two or more organs of the state affected by a decision to be made.¹⁰⁰

According to Csehi,¹⁰¹ collaboration among organs of government has significant advantages. There are disadvantages also on flip side of the debate, however, the advantages outweigh the disadvantages. We can draw lessons from this that the value of resolving intergovernmental disputes through cooperation is that issues can be settled quickly and cost effectively.

⁹⁷ These are contained in the 'Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee'.

⁹⁸ The Smith Commission, Report on the Smith Commission for further devolution of powers to the Scottish Parliament.

⁹⁹ Ibid, p15.

¹⁰⁰ House of Lords, Inter-governmental Relations in the UK – 11th Report of the Session 2014-2015.

¹⁰¹ Robert I. Csehi, The Changing Nature of Intergovernmental Relations in Labor Market Development – Cases for Collaborative Federalism in Canada and the EU.

1.4.7 Intergovernmental relations in Canada

Canada has had a 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. 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.

Cooperative governance in Canada has four main structures: (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.¹⁰²

In the same way section 40 of the South African Constitution established three main levels of government, which are the federal level of government, the provincial level of government¹⁰³ and the municipal level of government. Both the federal 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.¹⁰⁴

¹⁰² Claude Belanger, Cooperative Federalism – 19 February 2001.

¹⁰³ See, section 6 of the Constitution Act. Initially Canada was divided into four provinces of Ontario, Quebec, Nova Scotia and New Brunswick. Canada now consists of ten provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador and three territories, the Yukon, the Northwest Territories and Nunavut.

¹⁰⁴ Sections 91 and 92 of the Constitution Act of 1867.

Canada also experiences intergovernmental disputes, particularly disputes over the segregation of powers in its three levels of administration. Such disputes were previously referred to the Judicial Committee of the Privy Council for resolution, a process which weakened the powers of the federal government while, simultaneously, strengthening the powers of provincial governments.¹⁰⁵

Courts of law, in particular, 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.¹⁰⁶

One important mechanism for resolving intergovernmental disputes in Canada is through the adoption of intergovernmental agreements.¹⁰⁷ These either formal or informal agreements that are used to regulate relations between federal and provincial governments. Unlike in South Africa, there are no formal guidelines on how intergovernmental agreements are to be formed.

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 considered to be the most preferred method of resolving intergovernmental disputes in avoidance of risk filled litigation.¹⁰⁸

¹⁰⁵ D.E. Williams, *Constitution, Government, and Society in Canada: Selected essay* by Alan C. Cairns (Toronto: McClelland & Stewart, 1988).

¹⁰⁶ See for example, *A-G of Ontario v A-G of Canada* [1947] AC 128, PC.

¹⁰⁷ Jeffrey Parker, *Comparative Federalism and Intergovernmental Agreements: Analyzing Australia, Canada, Germany, South Africa, Switzerland and the United States* - <https://books.google.co.za/books?isbn=1317656474> accessed on 02 February 2017.

¹⁰⁸ Alan Trench, *Intergovernmental Relations in Canada: Lessons for the UK?* p22 (October 2003).

1.5 PURPOSE OF THE STUDY

1.5.1 Aims

The aim of this study is, firstly, to investigate and determine the root cause of conflicts between provincial and local governments. Secondly, to investigate the impact of such conflicts in the society and; finally, to determine whether there are sufficient resources for resolving intergovernmental disputes in less combative manner or without resorting to litigation.

1.5.2 Objectives

The main objective of this study is to investigate the prevalence and the root cause of intergovernmental disputes between provincial and local government. The court are frequently called upon to adjudicate these disputes. Other objectives linked to the main objective are to:

- investigate and determine whether the alternative mechanisms of dispute resolution can be successfully implemented to reduce the number of intergovernmental disputes rather than going to court;
- interrogate the impact of intergovernmental dispute on the realisation and delivery of socio-economic rights to the citizens; and
- propose recommendations on how intergovernmental disputes can be avoided or reduced. Cognisance should always be had that the mere existence of government institutions is to provide services.

1.6 RESEARCH METHODOLOGY

A desktop approach was used by relying on existing legal literature such as text books, legislation and policies, articles, journals and case law. There will be no collection and use of raw data and questionnaires in this mini-dissertation.

1.7 SIGNIFICANCE OF PROPOSED RESEARCH

A successful study in this regard will provide government institutions, in particular, with insights on how to avoid engaging in disputes and to better gear towards cooperation in the interest of service delivery. It will be of benefit to organs of the state who are enjoined by the supreme law to support and cooperate with one another.

Additionally, it is envisaged that this research will assist the policy makers and legislators to pass laws which will strengthen the legislative regime and which will make it compulsory for organs of state to employ alternative dispute resolution mechanisms and avoid costly litigation against one another.

1.8 ARRANGEMENT OF CHAPTERS

The five chapters of this dissertation are arranged as follows:

- Chapter 1 – Introduction
- Chapter 2 – A critical analysis of legislation governing intergovernmental relations
- Chapter 3 – Intervention in terms of section 139(1) of the Constitution: lessons learnt from case law
- Chapter 4 – Evolution of the concept of co-operative governance: a comparative analysis
- Chapter 5 – Conclusion

Chapter 2

A critical analysis of legislation governing intergovernmental relations

2.1 General

The Constitution¹⁰⁹ regulates the relationship among the different tiers or organs of government, amongst others, the avoidance of disputes while fostering cooperation with one another.¹¹⁰ The organs of the state are required to not to assume power or function except those that are conferred¹¹¹ and not to encroach on the functional area of others.¹¹²

To further regulate inter-state relations, the Constitution envisages parliamentary legislation which must establish bodies and institutions to promote and facilitate intergovernmental relations. Where disputes have developed, the legislation should provide for mechanisms and procedure to resolve or settle the dispute.¹¹³ Furthermore, organs of the state which are involved in intergovernmental disputes are enjoined to employ reasonable measures to settle the dispute. Unless they exhaust all the alternative measures available, organs of the state are not supposed to engage in litigation against others.¹¹⁴

Courts, on the other hand, are given discretionary powers to direct state parties to seek dispute resolutions by means other than litigation.¹¹⁵ Cooperation and consultation with one another are, *inter alia*, some of the important principles espoused by the Constitution. Although the various spheres of government enjoy a level of autonomy,¹¹⁶ they are still required to adhere to the principles of cooperation¹¹⁷

¹⁰⁹ Chapter 3.

¹¹⁰ Section 40 and 41 of the Constitution.

¹¹¹ Section 41(1)(e).

¹¹² Section 41(1)(h).

¹¹³ Section 41(2)(b).

¹¹⁴ Section 41(3).

¹¹⁵ Section 41(4).

¹¹⁶ Section 40(1).

¹¹⁷ Section 40(2).

provided for in chapter 3 of the Constitution.

Despite these Constitutional dictates, South Africa has recently experienced unprecedented levels of acrimony between various organs of the state.¹¹⁸ The National Treasury engaged in much publicized conflict with ESKOM, a national state owned entity, over the submission by ESKOM of certain reports concerning the procurement of goods (coal).¹¹⁹

2.1 Inter-governmental Relations Framework Act, 2005

The Intergovernmental Relations Framework Act ('the Framework Act')¹²⁰ was passed in 2005 to give effect to the Constitutional mandate imposed on national government or parliament to enact law for the promotion and facilitation of sound intergovernmental relations.¹²¹ Section 2 provides that the Act applies to all the tiers of government,¹²² but it has no application over parliament and legislatures, the courts and judicial officers, Constitutional institutions¹²³ and other independent institutions.

According to its long title, the Framework Act is aimed to establish a framework for the different organs of the state or spheres of government to stimulate and expedite sound or cordial relations. In addition, the Framework Act seeks to introduce for measures and processes for facilitation of settlement of intergovernmental disputes, whenever they may arise.

From the Constitution's point of view, sound relationship between organs of state is important for smooth administration.¹²⁴ It is therefore necessary that institutions or organs of the state must cooperate and take collaborative efforts to provide services

¹¹⁸ See, the Daily Maverick, Treasury v Eskom: A government at war with itself - <http://www.dailymaverick.co.za/article/2016-08-29-treasury-vs-eskom-a-government-at-war-with-itself/#.V9HtMeQkrmQ> accessed on 08 September 2016.

¹¹⁹ Ibid.

¹²⁰ Act No. 13 of 2005.

¹²¹ Section 41(2).

¹²² Subsection (1).

¹²³ Chapter 9 of the Constitution.

¹²⁴ C. Murray, Republic of South Africa – International Association of Centers for Federal Studies (Forum of Federations).

to communities, and to take reasonable and genuine efforts to resolve intergovernmental disputes before litigation is embarked upon. The court in *National Gambling Board v Premier of KwaZulu-Natal & Others*¹²⁵ noted with concern the failure at the time of parliament to pass the legislation as envisaged. The court observed that parliament's non-compliance with its constitutionally imposed duty to pass legislation to regulate intergovernmental relations¹²⁶ had a negative effect over important provisions of sections 41(3) and 41(4) and that that state of affair rendered them largely inoperative. It was clear for the court that, even in the absence of an Act of Parliament then cooperative government was still foundational to our Constitutional endeavour.¹²⁷

The requirement for organs of government to employ reasonable measures to avoid litigation against one another was considered by the court¹²⁸ to be critical even in the absence of legislation contemplated in section 41(2).¹²⁹ The court emphasised the need for state organs involved in intergovernmental dispute to seek alternative ways and compromises with the aim of averting acrimonious litigation against one another.

Once passed and promulgated, the Framework Act established structures such as the national, provincial and municipal intergovernmental forums which are mandated to adjudicate intergovernmental disputes and to attempt to resolve them. A court adjudicating an intergovernmental dispute may, if not satisfied that parties took rational and pragmatic measures and that they have exhausted such measure in attempting to resolve the disputes, direct the parties to follow alternative processes to resolve the dispute.¹³⁰

¹²⁵ 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) at para 32.

¹²⁶ Section 41(2).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ In paragraph 36 the court held that: 'The parties have made no meaningful effort to comply with their constitutional obligation of cooperative government. The dispute primarily raises questions of interpretation. Such disputes can be resolved amicably however. Moreover, organs of state's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of state to re-evaluate its position fundamentally. In the present context, it requires of each of the organs of state to re-evaluate the need or otherwise for a single CEMS, to consider alternative possibilities and compromises and to do so with regard to the expert advice the other organs of state have obtained.'

¹³⁰ Section 41(4) of the Constitution.

The problems associated with the present intergovernmental relations legislative scheme was highlighted in the case of *Member of Executive Council for Education in Gauteng Province and others v Rivonia Primary School and others*¹³¹ where the court was faced with intergovernmental dispute between the body elected to govern or control the school and the department of education over the implementation of the admission policy of learners. According to the court the parties should the have given more attention to their Constitutional value to cooperate and to work together in partnership in order to find workable solutions to persistent and complex difficulties. In a sign of displeasure, the court declined to award costs in order to preserve public funds.¹³²

Chapter 3 of the Framework Act provides for the adoption of implementation protocols to synchronise state activities in whatever manner that may be suitable or in a way that may be necessary under the circumstances.¹³³ The aim is to use the protocols to avert or manage conflict. The implementation protocols may be concluded at the initiative of any organ of the state, which shall do so only after it has consulted any organ(s) of the state that is likely to be affected by the protocols.¹³⁴ At this level it is clear that the Framework Act has complied with its Constitutional obligation by instilling values¹³⁵ of cooperation between tiers of government.

The Framework Act takes a different turn in Chapter 4 which deals with settlement of intergovernmental disputes. Its starts by excluding from its operation any dispute that another piece of national act may impose a specified procedure or mechanism for resolution.¹³⁶ In addition, it excludes disputes that may arise under sections 100 and 139 of the Constitution.¹³⁷ The Act does not provide reasons for excluding specifically

¹³¹ MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

¹³² *Ibid.*

¹³³ Section 35 of the Framework Act.

¹³⁴ *Ibid.*, (5).

¹³⁵ Section 41 of the Constitution.

¹³⁶ Section 39(a) of the Framework Act.

¹³⁷ *Ibid.*, (b).

intergovernmental disputes under sections 100 and 139 of the Constitution. It is difficult to fathom the rationale for the exclusions.

Nonetheless, it may be sound to infer that the exclusion is occasioned by the facts that there are special procedures for interventions both sections 100 and 139 of the Constitution. While it may be so, Steytler and de Visser argue that IRFA falls short of its expectations.¹³⁸ Their criticisms include the fact that IRFA applies only within the executive arm of government.¹³⁹

As for the reason why section 100 and 139 interventions are excluded, it could perhaps be connected to what the Court has stated in the Ngaka Modiri Molema case where it was held that:

“It needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councillors, but in the continued disruption of basic essential services to the people and communities the Municipality is supposed to serve. The people who may suffer the real harm are not party to these proceedings. It is because of the alleged failure in its executive obligation to them that the Municipality was dissolved.”

This still does not deliver a conclusive solution to the issue. It is fair to assume, however, that the exclusion has to do with the fact that both sections have inbuilt procedures to be followed before a decision to intervene is taken and implemented.¹⁴⁰ At the outset it is clear that the Constitution necessitates that the relevant Minister responsible for local government should be engaged and be informed in writing of the intervention at least 14 days after the decisions has been made to intervene.¹⁴¹ Furthermore, the provincial executive must inform, also in writing, the provincial legislature and the NCOP of the decision to intervene.¹⁴²

¹³⁸ Steytler and de Visser (2007) 16-4.

¹³⁹ *Ibid*, 16-5.

¹⁴⁰ Intervention must be preceded by written instructions.

¹⁴¹ Section 139(2)(a)(i).

¹⁴² *Ibid*, (1)(ii).

Paragraph (b) specifically indicates that the intervention comes to a halt if it is disapproved by the Minister within 28 days of it being started or if, at the conclusion of that period, there is still no approval from the Minister.¹⁴³ Also, the interference must be ceased if the NCOP rejects it within a period 180 days from the date it started.¹⁴⁴ There is a further requirement that the NCOP should conduct regular reviews of the intercession and submit, while doing so, any commendations as may be necessary to the provincial executive.

Perhaps it is due to these intrinsic mechanisms that the Framework Act has specifically excluded intergovernmental disputes arising out of the implementation of both sections 100 and 139 of the Constitution.

By excluding interventions under sections 100 and 139, in my view, the Framework Act has missed a good chance to give full effect to the provisions of the Constitution, which does not classify or exclude any type of intergovernmental relation or dispute. It means, therefore, that parties to a dispute arising out of an intervention under these provisions are at liberty to take each other to court without having to try and resolve the dispute amicably.

As for the rest, section 40 of the Framework Act enjoins the parties that are affected by or involved in a dispute to take every reasonable step possible to settle the dispute without embarking on litigation.¹⁴⁵ In fact, section 45 of the Framework Act is more directive in providing that:

“(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

¹⁴³ *Ibid*, (b)(i).

¹⁴⁴ *Ibid*, (b)(ii).

¹⁴⁵ Section 40(1)(b) of the Framework Act.

(2) All negotiations in terms of section 41, discussions in terms of section 42 and reports in terms of section 43 are privileged and may not be used in any judicial proceedings as evidence by or against any of the parties to an intergovernmental dispute.”

The judgement in *Mogalakwena* case noted that the type of litigation under section 139 of the Constitution puts a heavy burden on the public purse, which is funded through taxes collected from the society. Based on such observation, Tuchten J declined to make an award for costs against any of the parties in the litigation.

Government is not in the business of litigation, which is undeniably a costly exercise. Thus, every measure possible should be considered to avert inter-state conflict or to resolve it without resort to litigation. This includes, arguably, disputes under sections 100 and 139 of the Constitution. There is no reason that such disputes should be treated differently as they drain the public finances whenever such litigation is embarked upon.

2.1 Municipal Systems Act, 2000

The Framework Act is not the only legislation that permits provincial intervention into the affairs of local government.

An intervention may also be embarked upon in terms of the provisions of the Municipal Systems Act¹⁴⁶ which also allows the provincial executive, through an MEC for local government, to conduct investigations in a municipality if he or she is of the opinion that there is that there is malfeasance or maladministration, fraud, corruption or any other serious mismanagement that has taken place or is continuing in a particular municipality.¹⁴⁷

A process under this Act is permitted primarily when there is a transgression that is affecting the attainment of an obligatory legislative provision. Nonetheless, the fact

¹⁴⁶ Act No. 32 of 2000.

¹⁴⁷ Section 106 of the Systems Act.

that such encroachment may take place is another circumstance that may lead to a dispute that may result in litigation.

On the proper consideration of sections 40 and 41 of the Framework Act, a dispute arising out of the provisions of the Systems Act is not excluded from its operation. On this the guiding principle are to be found in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁴⁸ where it was held that:

“... Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.”

2.2 Municipal Finance Management Act, 2003

Chapter 13 of the Municipal Finance Management Act (MFMA)¹⁴⁹ instigates for provincial authority to intercede and, if necessary, assume the affairs of a local authority that is failing in one way or the other.

The MFMA envisages however, that such intervention shall be made with the intention to pull the affected municipality out of financial quagmire. Section 136 of this legislation empowers a Member of the Executive Council (*‘MEC’*) to, where he or she has become aware of a serious financial mismanagement, assess the seriousness of the maladministration and objectively decide if there is need to invoke section 139(1) provisions and intervene and, if so, what would be the most suitable manner of intervention. Importantly, this section requires the MEC to consult with the Mayor of the affected municipality prior to intervening. This is a means of encouraging the two

¹⁴⁸ 2012 (4) SA 593 (SCA) at 18.

¹⁴⁹ Act No. 56 of 2003.

functionaries to find solution to the problem through consultation, cooperation and through support for the failing municipality.

The MFMA, however, has an internal mechanism that aims to resolve disputes with other State organs. Section 44 thereof provides that when a dispute arises concerning a financial issue, the State organs involved must attempt to resolve the dispute expeditiously and try to do so without going to court. This may not always be possible to achieve.

2.3 Conclusion

Beginning with chapter 3 of the Constitution, the South African law requires that state organs should support one another, foster sound working relationships and respect each other's autonomy.¹⁵⁰ Section 45 of the Framework Act demands of state organs to hold meaningful negotiations in order to settle inter-governmental disputes. Litigation is only allowed between organs of the state if the dispute that has been formally declared¹⁵¹ could not be resolved through meaningful negotiations. This restriction against litigation does not apply to disputes that may arise from interventions in terms of section 100, national intervention over provincial affairs and section 139, provincial intervention into municipal affairs. State organs involved in disputes emanating from such interventions remain predisposed to costly litigation.

The irony is that conflict between provincial and local spheres of government usually results from an intervention permitted in terms of section 139(1) of the same Constitution that promotes interstate cooperation. One cannot criticise the fact that the Constitution allows for provincial intervention into the affairs of local government because that is permitted for an important purpose of ensure that delivery of services to the citizens is achieved. The Constitution allows intervention only in situations where the affected local government institution is failing to perform its executive obligations

¹⁵⁰ Section 41(1)(f)-(h).

¹⁵¹ Section 41 of the Framework Act.

in terms of the Constitution or other legislation. In other words, the intervention is a mechanism to ensure compliance by local government with the statutory obligations.

Apart from the provisions of the Constitution, section 106 of the Municipal Systems Act also empowers a Member of the Executive Council for local government to intervene when there are allegations of malfeasance and maladministration within a particular municipality. Similarly, Chapter 13 of the MFMA also permits provincial governments to assume financial functions of a local authority if it becomes clear that the local authority involved is failing to perform its obligations to provide much needed basic services to the society. While it may be necessary for the MEC to intervene, prior consultation with the Mayor is required¹⁵² so as to limit the risk of litigation.

The judgement in the case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*¹⁵³ which was adjudicated by the Constitutional court highlighted how in some instances provincial, and even national government, tend to encroach into the executive terrain of local government.¹⁵⁴ This is constitutionally impermissible.¹⁵⁵

Except for matter falling under the provisions of section 100 and 139, the provisions of the Framework Act are applicable. The exclusion of these sections leaves a gaping hole that could be plugged by the extension of its application. In the alternative, the provisions under these provisions should be amended to define a peremptory procedure to be followed by provincial executives whenever they intend to intervene in the affairs of a municipality. This will have the effect of reducing costs as the internal mechanism might be cheaper than full litigation.

¹⁵² Section 136(1)(a) of the MFMA.

¹⁵³ 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010).

¹⁵⁴ Schedules 4 Part B and 5 Part B of the Constitution.

¹⁵⁵ Section 41(1)(h).

Chapter 3

Intervention in terms of section 139(1) of the Constitution: lessons learnt from case law

3.1 General

Chapter 3 of the Constitution has in the advent of this democratic era established three spheres of government, amongst them the local sphere which is autonomous sphere just like the national and provincial spheres.¹⁵⁶ Local government is vested with both executive and legislative authority, which authority is exercised through municipal councils.¹⁵⁷

Municipalities enjoy powers which are constitutionally defined to self-govern or to govern own internal affairs.¹⁵⁸ Self-governance within municipalities must be exercised without any interference from both the provincial and national spheres of government.¹⁵⁹ Such powers to self-govern may be frustrated in the event of interference from either the provincial or national spheres.

The powers of municipalities to self-govern are not absolute and they are to be exercised subject to the duties to render sustainable services to communities within their geographical areas.¹⁶⁰ As the court held in *Joseph and Others v City of Johannesburg Metropolitan Municipality and Others*¹⁶¹ the collective effect of sections 152 and 153 of the Constitution, read with section 73 of the Systems Act, is that an

¹⁵⁶ C. Murray and R. Simeon, Promises Unmet – Multi-level Government in South Africa p233.

¹⁵⁷ Section 3(1) of the Municipal System Act, 2000 ('Systems Act') provides that: 'Municipalities must exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution.

¹⁵⁸ Section 4 of the Systems Act reads: 4. (1) The council of a municipality has the right to-

- (a) govern on its own initiative the local government affairs of the local community;
- (b) exercise the municipality's executive and legislative authority, and to do so without improper interference; and
- (c) finance the affairs of the municipality by—
 - (i) charging fees for services; and
 - (j) imposing surcharges on fees, rates on property and, to the extent authorised by national legislation other taxes, levies and duties.

¹⁵⁹ Section 41 of the Constitution.

¹⁶⁰ Section 156(1)(b) of the Constitution.

¹⁶¹ 2010 (4) SA 55 (CC).

obligation is imposed on every municipality to provide basic services to its inhabitants.¹⁶²

Within the constitutional context, section 73(1)(c) of the Systems Act imposes an obligation on municipalities to effectuate these constitutional dictates and to prioritise the elementary desires of local communities.¹⁶³ According to the Systems Act the rendering of services must be equitable and sustainable and must also be done in a manner that is economic, efficient and effective¹⁶⁴ given the limited resources allocated.

In order to ensure that municipal services are successfully implemented, the Constitution imposes at least two duties on provincial governments. On the one hand, it obliges the provinces to support municipalities¹⁶⁵ while, on the other hand, it empowers a province to intervene¹⁶⁶ and take over the executive functions of a municipality that is failing to perform such executive obligations that are imposed in terms of the Constitution and other legislation. Additionally, the relevant MEC of a province is further given the authority to monitor a municipality and to assist it with planning and the adoption of integrated development plan.¹⁶⁷

Whatever a province elects to do, it must always be conscious of its other Constitution obligations not to interfere with or to impede a municipality's performance of its functions.¹⁶⁸ The Constitution, on the other hand, requires of the three spheres of government to respect each other's autonomy and to refrain from encroaching into the arena of another sphere's area of competences.¹⁶⁹ In fact the Constitution requires more from these government in that it enjoins them to cooperate with one another and

¹⁶² See, *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* 2015 (1) BCLR 72 (CC).

¹⁶³ See, *Mkontoana v Nelson Mandela Bay Metropolitan Municipality*; *Bisset v Buffalo City Local Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng* 2005 (1) SA 530 (CC).

¹⁶⁴ Section 73(1)(b) of the Systems Act.

¹⁶⁵ Section 156(1) of the Constitution.

¹⁶⁶ Section 139(1)(a) to (c) of the Constitution.

¹⁶⁷ Section 31(a) of the Systems Act.

¹⁶⁸ Section 154(1) and (2) of the Constitution. In terms of these provisions national and provincial governments are under a duty to support and strengthen municipality's capacity to manage own affairs. To achieve this the national and provincial government may use such measures such a legislation etc.

¹⁶⁹ Section 41 of the Constitution.

to support each other.

However, in the case of local sphere of government, the same Constitution, which promotes cooperation by spheres of government, grants provincial government with powers to exercise a level of supervision over municipalities.¹⁷⁰ This power is located under the provisions of section 139 of the Constitution and it can be exercised in a number of ways. Amongst others, a provincial government may issue directives¹⁷¹ to a municipality requiring it to perform certain functions which the municipality may be failing to perform. National government is also empowered to intervene in local government affair by the Constitution.

The executive autonomy of municipality is undermined whenever there is intervention from another sphere of government. For instance, the case of *Mogalakwena Local Municipality*,¹⁷² *infra*, is one of the cases that exposed the challenges associated with intervention by one sphere of government into the executive or administrative terrain of another. This paper will explore the Constitutional scheme regulating the manner in which spheres of government should cooperate with and support one another.

It is important at this stage to mention that central government is constitutionally instructed to perform a meaningful leadership role for the unity and progression of the entire Republic.¹⁷³ Thus, in line with the precepts of co-operative governance, all the tiers of government have both administrative and legislative authorities in their respective jurisdictions, but they are required to cooperate governance principles in ensuring that they co-ordinate their efforts and work together for the good of the country. Both national and provincial spheres of government share monitoring and support mandates over local government.

¹⁷⁰ Ibid.

¹⁷¹ Section 139(1) of the Constitution.

¹⁷² *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014).

¹⁷³ See, section 3(2) of the Systems Act, which reads: 'The national and provincial spheres of government must, within the constitutional system of co-operative government envisaged in section 41 of [he Constitution, exercise 40 their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.'

The support to municipalities is even more needed in the light the Auditor General's report for the financial years 2010/11 where just 72 municipalities, from a total number of municipalities in the country and the municipal entities that received unqualified audits reports.¹⁷⁴ On the other side, the number of municipalities that received disclaimers (and adverse opinion) in the same period of 2010/2011 financial year was 43. Against this backdrop, this paper turns to consider the implications of section 139 on the autonomy of local government.

3.2 Interventions under section 139 of the Constitution

The national Department of Cooperative Governance ('the Department'), which is the custodian of local government affairs, is the repository of information on interventions that have been conducted under the auspices of section 139 of the Constitution. Such information will share light on whether these types of interventions achieve the reasons for embarking on them. It is expected that, like any other system, there might be shortcomings with these interventions.

Amongst other things, the Department has published the guidelines to be followed when there is an intercession from a provincial administration into the affairs of a municipality is contemplated. The procedure required for a section 139(1)(b) intervention is provided for in paragraph 3.2.1 of the guidelines¹⁷⁵ which require that a provincial government should issue a notice in writing to the municipality concerned of its (provincial government's) intention to invoke the provisions of the Constitution to intervene due to the failure to execute the identified executive obligations.

In terms of the guide, the intervention must be conducted in compliance with the procedural requirements whereby a written notice will be issued to an identified municipality and stating:¹⁷⁶

¹⁷⁴ Audit Report 2010/2011 local government financial year.

¹⁷⁵ Intervention in Provinces and Municipalities.

¹⁷⁶ *Ibid.*

- (a) the executive obligation which the affected municipality is allegedly unable to execute. This envisages a valid substantive reason for intervening and taking over the duties of a municipality;
- (b) once the failure is identified, the provincial government has to issue a directive to the municipality to demand that the identified executive obligation is executed;
- (c) in addition, the provincial government should invite the council of the affected municipality to submit written representations on the efforts it will take to ensure that there is compliance with the Constitution and other legislation to perform the executive obligation that would have been identified; and
- (d) allowing the municipality reasonable time period for submitting the sought representations and to perform the identified executive obligations. This, one presumes, has to take place with the full provincial government's support¹⁷⁷ to the municipality.

In accordance with the clear terms of section 139(1) of the Constitution, a provincial executive is empowered to, *inter alia*, taking any suitable measures to ensure accomplishment of the executive obligations of local government. The intervention by a province may include several steps such as the issuing of instructions to the affected municipality,¹⁷⁸ or by performing the executive function,¹⁷⁹ or by dissolving¹⁸⁰ a municipal council.

The Department of Cooperative Governance and Traditional Affairs reasons that the entitlement for an executive in a province to intercede in local government is a crucial component of the established framework for developing local government.¹⁸¹ An

¹⁷⁷ Section 154 of the Constitution.

¹⁷⁸ Section 139(1)(a) of the Constitution.

¹⁷⁹ *Ibid*, (b).

¹⁸⁰ *Ibid*, (c).

¹⁸¹ Intervention into Provinces and Municipalities: Guidelines of the application of sections 100 and 139 of the Constitution.

intervention like this is seen as a necessary corrective measure to be taken whenever a municipality fails or refuses to perform its executive obligations¹⁸² and to govern, thus jeopardising the service delivery mandate. It too is a feature of intergovernmental relations¹⁸³ and, as a result, it has to be implemented within the broad essence of co-operative government.

According to the Department's briefing to the National Council of Provinces in 2013, there were approximately seventy (70) municipalities receiving support through the collaborative efforts of national and provincial governments.¹⁸⁴ This is a large number as it means that a commensurate number of municipalities are failing to perform their executive obligations along the dictates of the Constitution and legislation. From the information held by the Department these interventions have highlighted serious shortcomings in the application of section 139(1) interventions.¹⁸⁵ The main challenges concern the misinterpretation of the laws regulating the interventions and the glaring inconsistency in the implementation of the interventions.

A big question is whether all the interventions are all appropriately thought. What is clear though is that any intervention, once implemented, tends to compromise the autonomy of the affected municipalities,¹⁸⁶ and which the Constitution intends to protect.¹⁸⁷ The jury is still out on the question whether these interventions are completely a reflection of municipalities failing to function as mandated by law,¹⁸⁸ or whether provincial governments are themselves failing to monitor and support municipalities when administrative frailties emerge.

Caution should be taken that the interventions should not spiral into becoming

¹⁸² Section 139(1).

¹⁸³ In terms of Intergovernmental Framework Relations Act, "**intergovernmental relations**" means *relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs.*

¹⁸⁴ Support to municipalities under section 139 of the Constitution: Department of Cooperative Governance and National Treasury 2013 – <https://pmg.org.za/committee-meeting/16342/>, accessed on 06 September 2016.

¹⁸⁵ CoGTA Joint workshop with Legislatures (2010) 11-12.

¹⁸⁶ Mogalakwena Local Municipality case.

¹⁸⁷ Section 41 of the Constitution.

¹⁸⁸ It should be noted that if provincial governments properly support municipalities, in terms of section 154 of the Constitution, there is every likelihood that incidents of municipalities failing to perform their executive functions may be limited.

provisional take-overs.¹⁸⁹ If these are not properly managed there exists the danger of the purportedly curative interventions resulting in mini take-overs where the provincial government becomes the *de facto* municipal administrators.

The danger here is that the intervention power in line with section 139(1) may be abused by provincial governments. To minimise the negative impact that these interventions may have on affected municipalities, there is a network of legislation, such as, the Police Services Act, 1995¹⁹⁰ that may help to determine how intervention may be undertaken.

It is therefore clear from the constitutional scheme that section 139 is the sole original power of intervention into the affairs of a municipality by provincial executive councils, whether as advocated in section 139 of the Constitution itself, or in terms of the relevant provisions contained in the MFMA, although it could be argued that section 155(6)(a) and (7) provide ancillary powers of intervention.

Although local sphere of government is said to be independent, its autonomy is quite clearly limited by section 139 of the Constitution. The rationale behind this limitation is understood to be for the purpose of ensuring that municipalities act upon their defined Constitutional and legislative mandates. The ultimate aim is to ensure that municipalities perform their functions to effectively and efficiently render basic services to communities located in their areas of jurisdiction.

Constitutionally, intervention in a municipality is allowed only in circumstances where such a municipality is failing to perform the executive obligations imposed upon it by the Constitution or in terms of legislation. This jurisdictional condition must be met before intervention can be sustained.

The provisions of section 139(1) are clearly intended to cure the sometime defective

¹⁸⁹ *Ibid.*

¹⁹⁰ Section 64N(2),(3) and (4) of the Police Services Act of 1995 states that if the MEC for Safety and Security identifies a failure in a Municipal Police Service, he or she can request the municipality to comply within a specific time frame. If the municipality does not comply, the MEC can appoint a provincial administrator of the Municipal Police Service and take such other steps as necessary.

functioning of municipalities. As to whether the aims of the Constitution are realised will be a matter to be explored in this work. Nonetheless, intervention in terms of section 139(1) constitutes a means employed by the Constitution to ensure that there is full compliance by municipalities with their executive functions as mandated by the Constitution and other legislation. Such mandates are imposed by law in the interests of service delivery.¹⁹¹

3.3 Constitutional approach to interventions under section 139

Although there is an obvious distinction from the Constitution relating to cases of intervention, it can be observed that there is emerging jurisprudence which somehow ensures consistency in the methodology of dealing with section 139 interventions. An example in this regard can be made from the case of *Premier of the Western Cape v Overberg District Municipality*¹⁹² where the Supreme Court of Appeal had to adjudicate a dispute dealing with an intervention on the basis of section 139(4).¹⁹³ The Court found that the provincial government was not justified in deciding to intervene and dissolving the municipal council due to its failure to approve its annual budget whether the province was justified in dissolving the municipal council which has failed to adopt an annual budget by the prescribed timeframes.

The Constitutional Court has held in the case of *Johannesburg Municipality v Gauteng Development Tribunal and Others*¹⁹⁴ that section 139 of the Constitution is the only legal means of intervention allowed by the Constitution into the executive and administrative space of local government. This leads to a conclusion that Chapter 13 of the MFMA is a regulatory machinery which is empowered by the scope of section 139 of the Constitution.

¹⁹¹ Section 4(2) of the Systems Act provides that: The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community.

¹⁹² 2011 (4) SA 441 (SCA).

¹⁹³ Section 139(4) empowers provincial government to intervene where a municipality cannot or is failing to approve budget or revenue. Such intervention includes, where appropriate, dissolving a council of the recalcitrant municipality.

¹⁹⁴ *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at paras 44 and 64 – 66.

There is ample evidence that the autonomy of municipalities is to be protected notwithstanding the type of intervention being invoked.¹⁹⁵ Further to this, the courts have entrenched a culture of respect for municipal autonomy. Therefore, the Constitutional Court eloquently stated the most appropriate approach to be adhered to regarding provincial interventions. In the case of *In Re: Certification of the Constitution of the Republic of South Africa*: the Court recognised, on the one side, the autonomy of local government sphere and, on the other, the need for provincial government monitoring of performance by the local government. Where performance is inadequate or deficient the Constitution empowers the higher government to intervene in a manner deemed appropriate.¹⁹⁶

Based on the above, when an intervention is invoked cognizance should be taken on how it will impact on the affected municipality's right to self-govern and to be allowed space to lead service delivery unhindered. Each case must be dealt with on its own merits and a one size fits all approach to intervention is inappropriate.

When taking a decision whether to intervene or not to do so, a provincial government is required to act within the broad spectrum and essence of the principles of co-operative governance.¹⁹⁷ The decision must be directed by the standards that section 139, being a grave encroachment into local government's recognised or formal integrity,¹⁹⁸ is a matter to be considered as a last option. Intervention should therefore be considered when other measures, including the steps taken to support and strengthen municipalities have been unsuccessful.

Nonetheless, the Court emphatically reasoned that despite the provision seemingly making it obligatory for provincial executives to dissolve council in circumstances under 139(1)(c), it should not proceed without circumspection. Firstly, the Court discussed at length the process of appropriate steps to be followed during the intervention process. Furthermore, the Court instructed that what is deemed

¹⁹⁵ Sections 40 and 41 of the Constitution are the first provisions to provide such protection.

¹⁹⁶ Certification Judgment (*In Re: Certification of the Constitution of the Republic of South Africa 1996 – 1996 (4) SA 744 (CC)*) in paragraphs 370 to 374.

¹⁹⁷ Section 40 and 41 of the Constitution.

¹⁹⁸ See, footnote 22 above at p24.

appropriate must be considered on the specific conditions or circumstances of each particular case. Moreover, the Court held that all actions must be based on the principles of legality. This is where the right of a municipality to be heard and to be afforded an opportunity to correct or improve becomes important.

3.4 Mogalakwena Local Municipality: a case study

This is one of the cases which has exposed the challenges associated with the implementation of section 139 of the Constitution. There is no doubt that the Constitutional provision was enacted with good intentions of ensuring that municipalities perform their executive obligations in order to ultimately take services to their communities.

The case was instituted as an urgent application in the Gauteng Division of the High Court.¹⁹⁹ The applicants were the councilors of the Mogalakwena Local Municipality (*'Municipality'*) who challenged the Executive Council of the Limpopo (*'EXCO'*) government over its intervention into the Municipality's affairs.

On 17 March 2014 EXCO, having concluded that the Municipality was failing to execute its executive, Constitutional and legislative functions, sought to intervene into the Municipality's affairs. The intervention was decided and executed ostensibly in line with section 139(1)(b) of the Constitution of the Republic of South Africa, 1996 (*'the Constitution'*).

Section 139(1)(b) empowers a provincial government to, where a municipality is failing (cannot or does not) to adhere to the dictate of the Constitution to perform an executive obligation as required by the Constitution or another piece of legislation, intercede by undertaking such apposite measures as may be necessary to guarantee the fulfilment of that duty or function. The measure may include the assumption of the executive responsibility by relevant provincial executive council as may become essential and

¹⁹⁹ CASE NO: 35248/14.

to:

- issue directive a local council to perform an identified Constitutional or executive task. The directive must give full description of the nature and extent of the non-compliance and, furthermore, indicate the remedial steps needed to comply with the defined obligations;
- assume the performance of the executive obligation that has identified in order to-
 - (i) uphold the critical standards set by the national government or to achieve the adopted lowest standards for service delivery;
 - (ii) preclude the council from taking any action or decision that may be irrational and which may cause prejudice to the welfares of another municipality or to the entire province; or
 - (iii) uphold economic unity.
- authorize, by paragraph (c), an executive council of a province to disband a municipal council. When council is disbanded the relevant provincial executive appoints an administrator to oversee the business of the municipality pending the declaration of newly council. This drastic step is to be considered in exceptional cases where the prevailing circumstances may warrant such encroachment.
- In the Mogalakwena case the provincial EXCO elected to assume the responsibility for the duties and responsibilities that the Municipality was deemed to be failing to fulfil. It appointed an administrator to take over and perform the executive functions that the Municipality was allegedly not performing.

The procedure referred to above was considered and determined by the Constitutional Court in the Second Certification²⁰⁰ judgement. In paragraph 119 of the judgment the Constitutional Court held that it was imperative that first a directive must be issued before the duties of another sphere are assumed. It must be noted, however, that the intervention dealt with in the quoted paragraph related to national intervention²⁰¹ into the area of provincial government. The same principles remain the same even in interventions under section 139 (1).²⁰²

A similar procedure was in any event confirmed by the other Court when dealing with intervention by Provincial Government into the Affairs of a Municipality. The question of compliance with procedure was dealt with in the case of *Mnquma Local Municipality*²⁰³ where the Court held that failure²⁰⁴ by a municipality to fulfil its executive obligation is the jurisdictional factor that entitles a province to intercede in the affairs of such municipality.²⁰⁵

The Court noted that the sub-section²⁰⁶ may be sub-divided threefold: first, there must be failure to accomplish an executive responsibility;²⁰⁷ second, an optional authority to intercede; and third, the adopting apposite measures to remedy the dire situation, which may include making directives to the council involved,²⁰⁸ the adoption of duty to perform the relevant responsibility, or the disbanding of council. When the intervention embarks on a process of disbandment of the council, there is an additional

²⁰⁰ Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC); also, 1996 (10) BCLR 1253 (CC).

²⁰¹ Section 100 of the constitution.

²⁰² Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996; 1997 (2) SA 97 at [119].

²⁰³ *Mnquma Local Municipality v Premier of the Eastern Cape* [2012] JOL 28311 (ECB) at [17]. See also, *City of Cape Town v Premier, Western Cape* 2008 6 SA 345 (c).

²⁰⁴ This also became one of the findings in the Constitutional Case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 where the Court found the State President to have breached his executive obligations in terms of the Constitution.

²⁰⁵ *Ibid.*

²⁰⁶ Section 139(1) of the Constitution.

²⁰⁷ *Ibid.*

²⁰⁸ Guideline on interventions: The provincial executive must first issue a directive before it can assume responsibility. Only after the issuing of a directive did not have the desired effect, may assumption of responsibility be opted for. The substantive and procedural requirements relevant to the issuing of a directive will be discussed below.

consideration of whether there are compelling grounds as envisioned in subsection (1)(c).

A decision or intervention that is implemented in any manner that does not comply with the requirements stands to be set aside for want of legality.²⁰⁹ Legality was the central question that was dealt with in the case of *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*²¹⁰ where the Constitutional Court held that legality required that the wielding of and the usage of public authority should be non-arbitrary or rational. In *Mogalakwena* the Court found the Limpopo's provincial EXCO's intervention to be arbitrary. It had not followed the procedures laid down in the Second certification judgement and *Mnquma*.

To reach its findings the Court in this case relied on the interpretation that was accepted by the Court in the case of *Mnquma*. Although the facts of *Mnquma* differed somewhat from those of the present case, the *ratio decidendi* is the same and the Court still found the decision valuable.

Furthermore, the Court reached its conclusion by placing emphasis on what it termed the policy of the Constitution to separate powers of the three spheres of government.²¹¹ The Court held that section 139(1), in its amended form, implied that the Court should give weight to the principles of separation of powers²¹² of the three spheres of government. Further, the Court recognised the intrusiveness of the power to intervene. The Court also recognized that the power to dissolve a municipal council, as the Limpopo government had done, must be used in extreme situations.

In addition, the Court considered the provisions of section 136 of the Municipal Finances Management Act, 2003, ("the MFMA"),²¹³ to support its conclusion that the

²⁰⁹ *Mogalakwena* case, *Supra*.

²¹⁰ 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

²¹¹ Chapter 3, section 40(1) and (2) of the Constitution.

²¹² *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others*, *Supra*.

²¹³ Local Government: Municipal Finance Management Act No. 56 of 2003.

relevant MEC for local government should have first consulted the municipality prior to the implementation of the decision to intervene. The MFMA provides that an MEC who becomes mindful of a serious financial problem in a municipality must consult the mayor, consider and assess the situation and the municipality's reaction to the situation and decide whether there is justification for an intervention as advocated in section 139 of the Constitution.

Therefore the Court found it appropriate to grant the interdictory relief that was sought against the intervention as there was no indication that there was prior consultation that is required by 136 of the MFMA.²¹⁴ It could hardly be stated that there was cooperation²¹⁵ as contemplated in the Constitution in a situation where there was no prior consultation before intervention measures were invoked.

In another important case of *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Council and Others*²¹⁶ the Constitutional Court faced a similar case for interim interdict against the provincial government's intervention in terms of section 139(1)(c), where there was dissolution of a municipal council. An application for interim interdict had been dismissed by the North West Division of the High Court and the municipality asked for leave to appeal directly to the Constitutional Court. The High Court had reached its decision to dismiss the application for interdict on the basis that the municipality, as distinct from the individual councilors, suffered no harm. That was despite the fact the council of the municipality was dissolved²¹⁷ by the decision of the North West EXCO.

The Constitutional Court dismissed the application for leave to appeal even though a case had been argued that the councilors will suffer harm because of their loss of earning in salaries. In reaching the decision the Court found that:

²¹⁴ Read with section 139(1)(c) of the Constitution.

²¹⁵ Section 41 of the Constitution.

²¹⁶ 2015 (1) BCLR 72 (CC) (18 November 2014). The case was decided after the interim interdict in Mogalakwena case had been granted.

²¹⁷ Dissolution in terms of section 139(1)(c) being in accordance of Mogalakwena judgement the most intrusive as compared to the one under s139(1)(b).

- First, it was not the councilors nor the municipality which stood to suffer irreparable harm. The public stood to suffer harm where service delivery was deficient, the Court reasoned; and
- Second, it was not in the interest of justice for the Constitutional Court to grant direct access to determine review application.

The Constitutional Court confirmed that the High Court (North West) acted correctly by following the decision in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*²¹⁸ and dismissing the application for interim relief. There was sufficient evidence for the Court to find that the intervention was meant to benefit the provision of services to communities within the district municipality.

A probing question is whether or not, non-compliance by a municipality to perform its executive duties is not in itself an indictment on provincial government, or even national failure to support the affected municipality.²¹⁹ The next section of this mini-dissertation deals with support to municipalities, which the higher government are required to provide in order for them to be able to perform their Constitutional functions.

3.5 Support of municipalities

Provincial governments are under a Constitutional obligation to render support to municipalities.²²⁰ Section 155(7) of the Constitution obligates provincial governments to adopt legislative and other non-legislative steps to support municipalities and to ensure that there is effective and efficient performance by municipalities of their legislated functions.²²¹

While it is the Constitution which seemingly creates a window of opportunity for

²¹⁸ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 at paras 45-47.

²¹⁹ See, for example, section 155(7) of the Constitution.

²²⁰ Section 154(1) of the Constitution.

²²¹ See also, section 4(1)(a) of the Systems Act.

intervention into the affairs of local government, it is the very same instrument which requires that both central and regional governments are not permitted to compromise or impede local government in the exercise of powers and functions conferred upon it by law.²²² According to James Madison the objects of government are to regulate human behavior towards one another.²²³ It is thus fitting that the Constitution also regulates conduct or behavior from one organ of state towards another.

With the objective of government in mind, the Constitution is conscious of the potential of an abuse of provincial government power of intervention.²²⁴ As a result, it has introduced measures to safeguard the autonomy of local government from the possible abuse of provincial government power. In this regard the Constitution empowers, in every intervention case, the relevant Minister responsible for local government to have the authority to proscribe²²⁵ the decision of province to interfere in the activities of local government.

In addition to the Minister's right to veto a decision to intervene,²²⁶ the National Council of Province ('NCOP') has arguably the same right to reject the intervention into the affairs of local government.²²⁷ Both the Minister and the NCOP have independent powers to terminate those interventions in instances where they find that the intervention was conducted in an improper manner and for inadequate reasons.

²²² See, section 151 of the Constitution which provides that:

"Status of municipalities

151(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

²²³ Fourth President of the United States of America and considered the "Father of the Constitution".

²²⁴ Section 139(1)(b).

²²⁵ Section 139(2)(b) and (3)(b).

²²⁶ The Constitution does not require the Minister to either approve the entire intervention or disapprove it altogether. The Minister can approve certain aspects of the implementation and disapprove others, provided that the Minister cannot add any measures or tasks, but only subtract. Therefore, the Minister can set terms to the approval. The provincial executive can then proceed with the intervention, subject to these terms.

²²⁷ *Ibid.*

3.6 Conclusion

Organs of state are required in terms of the supreme law of the country to respect and support one another. Section 154 of the Constitution particularly requires both national and provincial spheres of government to take positive steps to support local government. Read together with section 151(4) of the Constitution, it is clear that the autonomy of local government must be respected by both the national and provincial spheres.

The fact that there are interventions still implemented in accordance with section 139(1) of the Constitution points to an indictment across government spheres that there is general lack of cooperation with one another. A question that needs to be answered is whether, in the dispensation of section 41 of the Constitution, there should be an obligation to follow intergovernmental ways of resolving disputes under section 139(1) or whether there exist sufficient reasons for excluding such disputes from the application of the Intergovernmental Relations Framework Act, 2005.

It is undeniable, however, as it was observed in the Mogalakwena and other case law, above, that disputes under the provisions of section 139(1) of the Constitution usually lead to protracted litigation at huge cost to the public purse. Moreover, when such disputes rage on, service delivery suffers. These must be avoided and the better way of doing so is to introduce legislative reform to govern such disputes through expedited consultative procedures and outside of the courtroom.

According to Kanyane the litigation conundrum can be quelled by effective cooperation whereby, for instance, organs of state respond collectively to service delivery challenges.²²⁸ That way the need for provincial government to intervene in the affairs of local government would be reduced.

²²⁸ M. Kanyane, Interplay of intergovernmental relations conundrum – SoN 2016.indb.

Chapter 4

Evolution of the concept of co-operative governance: a comparative analysis

4.1 Introduction

This comparative analysis is made in order to better comprehend the notion of intergovernmental relations from a South African perspective. The two countries selected for a comparative study are Canada and the United Kingdom. They are selected for two primary reasons: firstly, because, like South Africa, these are part of the fifty two (52) Commonwealth member states.²²⁹ The second reason is that the both Canada and South Africa share a common history of having based the formation of their early governments on the British Westminster system.²³⁰ The Westminster system puts prominence on effective government and concerted authority.²³¹

The secondary reason for choosing both Canada and the United Kingdom for a comparative study is due to the similarities in their structures of government and, to some extent, the structure of intergovernmental relations.

4.2 South African context

Sound intergovernmental relations²³² are critical in South Africa which is constituted by the national government constituted by national departments and national state owned entities, nine (9) provinces²³³ each of which is constituted by provincial departments and provincial state owned entities, and about 278 municipalities.²³⁴ The

²²⁹ The Commonwealth - <http://thecommonwealth.org/member-countries>.

²³⁰ The Westminster Parliamentary System of Government: https://en.wikipedia.org/wiki/Westminster_system (15 June 2016).

²³¹ C. Murray, Republic of South Africa – International Association of Centers for Federal Studies (Forum of Federations).

²³² House of Lords' Select Committee on the Constitution, 11th Report of Session 2014-2015, Intergovernmental Relations in the United Kingdom: Inter-governmental relations are needed in any nation with a multi-level system of government, such as devolved or federal states. 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.

²³³ Chapter 6 of the Constitution.

²³⁴ Chapter 7 of the Constitution.

number of municipalities is made up of 8 municipalities of metropolitan status, 44 districts and 226 local municipalities.²³⁵ In terms of the Constitution, each of these organs of state have a defined role in service delivery to their communities.²³⁶

Apart from the changed numbers,²³⁷ the segregation of the state into the national, provincial and local governments is not an innovation of the current Constitution. Under the old Constitution,²³⁸ for instance, South Africa was segregated into four provinces, each with its administration and legislative bodies in the form of provincial councils.

Chapter 3 of the Constitution²³⁹ codified the principle of cooperative governance, recognizing that there is an important role to be played by all spheres²⁴⁰ of government towards providing services to the society²⁴¹ at large. This means that all the organs of the state will transact with one another and, when they do so, they must respect the status of each other.²⁴²

4.3 The source of intergovernmental relations in South Africa before 1994

Before 1994, South Africa was constituted by the national government, the four provinces of Cape of Good Hope, Free State, Natal and the Transvaal.²⁴³ Add to that list the homeland states.²⁴⁴ The provinces were headed by chief executive appointed by the State President and the chief executive played the role of administrator of the

²³⁵ Department of Co-operative Governance and Traditional Affairs, www.gov.za/about-government/government-system/local-governmentwww.gov.za/about-government/government-system/local-government, accessed on 07 September 2016.

²³⁶ Section 41.

²³⁷ Before 1994 South Africa had four (4) provinces but now has nine (9).

²³⁸ Act No. 32 of 1961.

²³⁹ Sections 40 and 41.

²⁴⁰ Section 41(1)(e).

²⁴¹ Section 41(1)(b).

²⁴² Section 41(1)(e).

²⁴³ Governance was carried in terms of the South African Constitution Act No. 32 of 1961, which came into operation on 31 May 1961. The Act was later repealed and replaced by the Republic of South Africa Constitution Act, 1983, which came into operation on 3 September 1984. These pieces of legislation provided for national and provincial governments.

²⁴⁴ Transkei, Bophuthatswana, Venda and Ciskei.

provinces.²⁴⁵

The provincial council, which is an equivalent of the present day's provincial legislature, was empowered by the Constitution to pass laws in the form of provincial ordinances.²⁴⁶ In addition, provincial councils could recommend the passing of any laws to the then sovereign Parliament.

The previous Constitutions in South Africa did not, in the manner done in terms of the current Chapter 3, regulate or codify the principle of cooperative governance. Nonetheless, there were relations between the national government and the provincial administration. In the first instance, the provincial administrators were appointed by the President.²⁴⁷

Even before the 1961 Constitution,²⁴⁸ there were elements of cooperative governance between the four Colonies²⁴⁹ that existed in the Republic of South Africa. The British who occupied the interior of Southern Africa from 1836 had to find ways of working with the Boers, which were commonly known as the Voortrekkers.²⁵⁰ The first of the colonial states to be formed was the Republic of Natalia, followed during early 1950s by the (Voortrekkers) Boer Republics of the Orange Free State and South African Republic (Transvaal).²⁵¹

The four colonies became provinces after the unification of South Africa by the first Constitution of the Republic of South Africa, 1909 and which became operational in 1910. The manner in which the four colonies had shared infrastructure, even before unification, was a sign of cooperative governance.

²⁴⁵ Section 66 of Act 32 of 1961 (now repealed).

²⁴⁶ Section 84 and 85, *ibid*.

²⁴⁷ Section 66 of the old constitution.

²⁴⁸ The period under the Union of South Africa, 1910.

²⁴⁹ Crown Colony (the Cape), Natal, Orange Free State and the Transvaal.

²⁵⁰ South African History Online - <http://www.sahistory.org.za/article/great-trek-1835-1846> accessed on 02 February 2017.

²⁵¹ The four South African colonies shared a common, especially railway, infrastructure.

4.4 Intergovernmental relation under the South African Interim Constitution

The passing and the promulgation of the Interim Constitution²⁵² introduced changes in terms of the formation of organs of government. While under the unified South Africa there were four provinces that number increased to nine²⁵³ after the passing of the Interim Constitution.²⁵⁴ This was done, according to the preamble of the interim Constitution, due to the identified need to restructure governance of South Africa.²⁵⁵ The main rationale appears to have been the idea that to spread governance among the three spheres could help to render basic services,²⁵⁶ including to:

- (i) address the problems of poverty;
- (ii) eradicate or reduce problems of gender inequality;
- (iii) resolve environmental challenges;
- (iv) advance of healthcare provision;²⁵⁷
- (v) address educational needs; and
- (vi) enhance access to technology.

The need for cooperation grew even bigger under the Interim Constitution although it had no provision regulating or codifying cooperative governance.²⁵⁸ Despite this, there

²⁵² Act No. 200 of 1993. Currently the provinces are the Eastern Cape, Free State, Gauteng, Kwa-Zulu Natal, Limpopo, Mpumalanga, Northern Cape, North West and the Western Cape.

²⁵³ Chapter 6 of the Constitution.

²⁵⁴ Section 124(1) of the Interim Constitution.

²⁵⁵ N. Olivier, *Intergovernmental Relations in South Africa: Conflict Resolution within the Executive and Legislative Branches of Government* – www.forumfed.org.

²⁵⁶ *The Machinery of Government: Structures and Functions of Government* – Department of Public Service and Administration, May 2003.

²⁵⁷ C. Murray, *Republic of South Africa* – International Association of Centers for Federal Studies.

²⁵⁸ Woolman *et al*, *Co-operative Governance* p14-1.

existed a legislative lacuna in that the Interim Constitution was silent on matters of cooperation between tiers of government.

Although the interim Constitution did not have provisions regulating cooperative governance, it was observed by the Court in the case of *Ex Parte Speaker of the National Assembly: In Re Constitutionality of Certain Provisions of the National Education Bill of 1995*, did not prevent organs of state from developing or fostering any ad hoc mechanisms in order to regulate relations between them.²⁵⁹ These were achieved because the interim Constitution had provided for concurrent functions between the national and provincial spheres of government, which necessitated that role players should cooperate to avoid overlapping of roles.²⁶⁰ Concurrent functions are those roles and functions that transcend across the spheres of government.²⁶¹ This necessitated cooperation amongst the spheres of government. Such functions may include the provision of water and sanitation, which are functions in respect of which all the three spheres have a role to play.

The case that better illustrates concurrent functions is that of *Minister of Police and Others v Premier of the Western Cape and Others*²⁶² in which the national and provincial spheres of government litigated over the entitlement of the Premier to appoint a commission of inquiry to investigate the functioning of 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:

“[31] 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

²⁵⁹ *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provision of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC).

²⁶⁰ See, footnote 18.

²⁶¹ *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.

²⁶² [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) (1 October 2013).

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 should be recalled that the passing of the interim Constitution was a result of negotiations and ultimately cooperation of the parties that participated in the Convention for a Democratic South Africa (CODESA).²⁶³ The discussions focused on the nature or structure of the South African state as one of the fundamental issues after the liberation movements were unbanned during 1990.²⁶⁴

According to Murray and Simeon²⁶⁵ the leaders of the discussions had to undertake some heated debates in the pursuit for a model of government that would benefit everyone. Their cooperation ushered the current dispensation whereby it became, amongst other achievement of the Constitution, a fundamental principle that the organs of the state must cooperate, pursue peaceful relations and avoid litigating against one another.²⁶⁶

4.5 Cooperative governance under the 1996 Constitution of the Republic of South Africa

The current Constitution demands cooperation between spheres of government or organs of the state.²⁶⁷ Thus the relationship among state organs is governed by the principle of cooperation.²⁶⁸ In recognising this important Constitutional imperative the Constitutional court held in the case of *Black Sash Trust v Minister of Social Development and Others*²⁶⁹ that:

²⁶³ Convention for Democratic South Africa.

²⁶⁴ *Ibid.*

²⁶⁵ Multilevel Governance in South Africa: An Interim Report – unpublished paper.

²⁶⁶ Section 41(1)(h) and (3).

²⁶⁷ Chapter 3 of the Constitution.

²⁶⁸ Sections 40 and 41.

²⁶⁹ [2017] ZACC 8.

“[10] 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 on one another.²⁷⁰ Organs of government are required to take positive steps to avoid conflict. The Constitution further demands that an organ 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 mechanism. All possible measures must be taken and exhausted before an intergovernmental dispute may be presented for adjudication through the Court.²⁷¹

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.²⁷² Such legislation exists in the form of the Intergovernmental Fiscal Relations Act²⁷³ and the Intergovernmental Relations Framework Act.²⁷⁴ Both these pieces of legislation, which shall be considered more intensely below, attempt to harmonise relations among the various organs of the state.

The Constitution outlines only the broad principles of intergovernmental relations in South Africa. The details, nature or content are matters that need to be elucidated through Parliamentary legislation.²⁷⁵ However, the lack of detail may be indicative that intergovernmental relations system in South Africa must be as elastic and accessible in the defined wide limits. The Constitutional court also held the case of *Rivonia Primary School*²⁷⁶ that schools admission policies should be applied in a flexible

²⁷⁰ Section 41(1)(h).

²⁷¹ Section 41(3).

²⁷² Section 41(2).

²⁷³ Act No. 97 of 1997.

²⁷⁴ Act No. 13 of 2005.

²⁷⁵ Section 41(2).

²⁷⁶ 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

manner, recognising that there are roles to be played for both the governing bodies of schools and the education authorities in provinces.

Higher and central governments have a mammoth part to play in building relations with the local sphere.²⁷⁷ 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*²⁷⁸ that the significance of section 155(7) of the Constitution,²⁷⁹ 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.²⁸⁰ 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.²⁸¹

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.²⁸² The municipalities must administer and implement the laws passed by the higher spheres.²⁸³ By so doing, that is, both national and provincial government not usurping powers and functions of local government, on the one side, and local government performing assigned powers and functions regulated in terms of law, both national and provincial legislation, the Constitutional imperative for cooperation between spheres of government would be fulfilled.

²⁷⁷ White Paper on Local Government: 1998

²⁷⁸ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)

²⁷⁹ "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

²⁸⁰ *Gauteng Development Tribunal* at para 43.

²⁸¹ *Gauteng Development Tribunal* at para 59.

²⁸² *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

²⁸³ *De Vos* at 297.

However, Simeon and Murray have raised an argument to the effect that the multi-tier governance has brought with it problematic organisation in South Africa.²⁸⁴ They contend that provinces and municipalities, with emphasis on local government, have not yet mastered the craft of establishing and consolidating the processes of intergovernmental relations for the purpose of enhancing relations with other spheres of government. They align with the views expressed by Tapscott who has argued that the codification of intergovernmental relations will not automatically yield positive outcomes in cases of tensions between spheres of government.²⁸⁵ Despite aligning with the views expressed above, Baatjies recognises that through current legislation a great step has been taken towards effective implementation of intergovernmental relations processes.²⁸⁶

4.6 Comparative analysis of intergovernmental relations in Canada and the United Kingdom

In this section a comparative analysis is made with two countries experiencing almost similar challenges of intergovernmental relations. This exercise considers how the United Kingdom and Canada deal with challenges associated with intergovernmental relations and disputes. 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 Westminster²⁸⁷ system.

²⁸⁴ Simeon and Murray (2001) p65.

²⁸⁵ Tapscott (2000) 127.

²⁸⁶ R.C Baatjies, *The evolution and prospects of our intergovernmental approach: A local government perspective* (2012b).

²⁸⁷ The Westminster Parliamentary System of Government: https://en.wikipedia.org/wiki/Westminster_system (15 June 2016).

4.6.1 United Kingdom

It has already been expressed in the opening paragraphs to this chapter that Britain was chosen for comparison on account of identified similarities between its government structure and that of South Africa.

Malcolm Grant notes the presence of intergovernmental conflicts which, according to him increased during the period around 1979-80,²⁸⁸ and that such conflicts undermine and threaten the relationship between the central and local government.²⁸⁹ 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.²⁹⁰

The United Kingdom is constituted by the governments of England, Scotland, Wales and the Northern Ireland.²⁹¹ Since the year 1999, some aspects of the principal government such as tax and welfare²⁹² matters have been decentralised to the devolved governments of Scotland, Wales and Northern Ireland. .

On the other hand there is question of relationship between tiers of government, the central and local government. The government of the United Kingdom is divided into two tiers, the central government and local government.²⁹³ According to Martin Laughlin²⁹⁴ 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

²⁸⁸ Central-Local Relations: The Balance of Power – The Changing Constitution 2nd Ed p247.

²⁸⁹ *Ibid.*

²⁹⁰ House of Lords: Select Committee on the Constitution – 11th Report of the Session 2014-15.

²⁹¹ "The Countries of the UK". statistics.gov.uk, accessed on 08 September 2016.

²⁹² Welfare Act 2014.

²⁹³ See footnote 42 above.

²⁹⁴ Restructuring of Central-Local Government Relations 4th Ed p137 (2000).

case of *Nottinghamshire C.C. v Secretary of the State for the Environment*²⁹⁵ 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 as a means to archive dispute resolution.

The United Kingdom does not have a written Constitution like South Africa and Canada. 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)²⁹⁶ existing among the four administrations.²⁹⁷ The MOU was founded in order to set out the fundamental principles that govern states' relations:²⁹⁸ communication, consultation, co-operation²⁹⁹ and confidentiality.

It is clear that the United Kingdom, in as much as it does not have a written Constitution, still takes matters of cooperative governance seriously. Among the innovations of the MOU is the establishment of the Joint Ministerial Committee ('the JMC')³⁰⁰ to deal with intergovernmental disputes. One of the principal agreements contained in the MOU is that the devolved governments want to work together, to the extent that it may be suitable, on matters of mutual interests.³⁰¹ It is important that the four devolved administrations understand the importance of cooperation with one another to the extent that even recognise that there may be instances where they may have to represent one another when engaging in transactions for their mutual benefit.³⁰²

²⁹⁵ *Nottinghamshire C.C. v Secretary of the State for the Environment* [1986] 2 WLR 1.

²⁹⁶ Memorandum of Understanding and Supplementary Agreements, 2013 - Between the devolved governments of the United Kingdom Government (Britain), the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee the original MOU was written in 1999 and has since been updated or amended several time.

²⁹⁷ The administrations of Britain, Scotland, Wales and Northern Ireland.

²⁹⁸ Part I of the MOU.

²⁹⁹ *Ibid*, 8.

³⁰⁰ Part II of the MOU.

³⁰¹ Section 8 Part I of the MOU.

³⁰² *Ibid*.

The JMC, which is constituted of Ministers from the four administrations, is an important role player with regard to intergovernmental relations. Born out of an agreement that all the administrations will participate in it,³⁰³ the JMC has the following terms of reference:³⁰⁴

- (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) over the 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, such matters could be sent to the JMC secretariat in accordance³⁰⁵ with the wider values and provisions adopted for evasion of disputes and for dispute resolution as regulated in section A:3 of the MOU. One of the main aims of the MOU, and the establishment of the JMC, is to avoid intergovernmental disputes.

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.³⁰⁶ 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

³⁰³ Clause 23 Part I of the MOU.

³⁰⁴ Clause 24 Part I of the MOU.

³⁰⁵ Clause 26 Part I of the MOU.

³⁰⁶ Section 1A.10 Part II of the MOU.

partaking governments, which remain at liberty to regulate their own rules without ignoring the JMC discussions.³⁰⁷ That despite, 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 Commission³⁰⁸ made recommendations and advocated for a more effective and workable mechanism for dispute resolutions across administrations, in particular 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 important.

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, an efficient and a workable mechanism to resolve intergovernmental disputes.³⁰⁹ As Trench notes, however, the whole structure of dispute avoidance and procedure is flawed.³¹⁰ That despite, cooperation between institutions of the state or tiers of government, as the case may be, is important and has more advantages than disadvantages.³¹¹ The advantages are that the state parties involved in disputes are able to find own solutions and also the avoidance of costly litigation, which is usually a protracted process.

South Africa can adopt a more robust approach to dispute avoidance 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 intervention³¹² into the affairs of local government.

³⁰⁷ *Ibid.*

³⁰⁸ The Smith Commission, Report on the Smith Commission for further devolution of powers to the Scottish Parliament.

³⁰⁹ *Ibid.*, p15.

³¹⁰ Fn 38, above, p14.

³¹¹ Robert I. Csehi, The Changing Nature of Intergovernmental Relations in Labor Market Development – Cases for Collaborative Federalism in Canada and the EU.

³¹² Section 139(1) of the constitution.

4.6.2 Canada

Like South Africa, the Canadian sports a three-tier system of government, the central government, the provincial government and local government. Initially Canada was separated into four provinces of Ontario, Quebec, Nova Scotia and New Brunswick.³¹³ It now has ten provinces³¹⁴ plus three territories, the Yukon, the Northwest Territories and Nunavut.³¹⁵

Both the federal³¹⁶ and provincial governments³¹⁷ have legislative powers under the Constitution Act.³¹⁸ The federal government legislates on matters of common application across Canada and also has the residual power to legislate for all matters which have not been assigned to provincial legislatures.³¹⁹ 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.³²⁰

Like South Africa and the United Kingdom, Canada is not immune to experience 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 a critical and preferred mode of resolving intergovernmental disputes in avoidance of risk filled litigation.³²¹

³¹³ Section 3, II UNION: the Constitution Act.

³¹⁴ Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador.

³¹⁵ Section 69, *Ibid.*

³¹⁶ Section 17 of the Constitution Act.

³¹⁷ Section 22 of the Constitution Act.

³¹⁸ Sections 64 and 65 Part V of the Constitution Act.

³¹⁹ Sections 91 and 92 of the Constitution Act of 1867.

³²⁰ Section 22 of the Constitution Act.

³²¹ Alan Trench, Intergovernmental Relations in Canada: Lessons for the UK? p22 (October 2003).

Agreements are a shift from the previous route of referring disputes to the Judicial Committee of the Privy Council for resolution, a process which was criticised for weakening the powers of the federal government and strengthening the powers of provincial governments.³²² The Judicial Committee of the Privy Council (sitting in London) occupied a critical part in the resolution of intergovernmental disputes in Canada.

This 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.³²³ 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.

4.6.3 Comparison and analysis of inter-governmental relations (dispute resolution) in South Africa, Canada and the United Kingdom

South Africa and Canada developed their systems of governance by following the British Westminster system. It is not surprising that their laws and governance practices still have similarities. 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 Canadians is the effective use of intergovernmental agreements as a means of resolving disputes and for the avoidance of litigation.³²⁴ 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.

³²² D.E. Williams, *Constitution, Government, and Society in Canada: Selected essays* by Alan C. Cairns (Toronto: McClelland & Stewart, 1988).

³²³ See for example, *A-G of Ontario v A-G of Canada* [1947] AC 128, PC.

³²⁴ Alan Trench, *Intergovernmental Relations in Canada: Lessons for the UK?* p22 (October 2003).

The recent Constitutional case of *Black Sash Trust v Minister of Social Development and Others*³²⁵ highlighted how lack of cooperation 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's failure 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.

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 Cabinet, which is a platform for Ministers to discuss matter 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.

4.7 Conclusion

Good intergovernmental relations are important in multi-level governments, such as are found in Canada, South Africa and the United Kingdom. The approach on how to achieve good relations vary from country to country, however, the significance of maintaining intergovernmental relations that are based on mutual respect and cooperation cannot be overemphasised.³²⁶

In South Africa, for instance, the Constitution³²⁷ envisages legislation that regulates cooperation between spheres of government. This is necessary because the object of government, generally, is to render services to the citizenry.³²⁸ Such objectives should

³²⁵ [2017] ZACC 8.

³²⁶ Alan Trench, Intergovernmental Relations in Canada: Lessons for the UK? p22 (October 2003).

³²⁷ Section 40(1).

³²⁸ Woodrow Wilson: The Objects of Government- <http://history-world.org/govob.htm> (02 August 2016)
- This, then, is the sum of the whole matter: the end of government is the facilitation of the objects of society. The rule of governmental action is necessary cooperation. The method of political development is conservative adaptation, shaping old habits into new ones, modifying old means to accomplish new ends.

not be derailed by state organs engaging in intergovernmental disputes which have adverse effects on the general society.³²⁹

Initiatives such the JMC, in the United Kingdom, and the intergovernmental agreements, in both Canada and the United Kingdom, highlight the importance of avoidance of litigation to resolve intergovernmental 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.³³⁰ The creation of inter-governmental structures such as the Presidential Co-ordinating Council, the Premier's inter-governmental forum and others, is a step in the right direction.

³²⁹ Ngaka Modiri Molema case: 2015 (1) BCLR 72 (CC) (18 November 2014).

³³⁰ M. Dlanjwa, *The role of South African Local Government Association in the premier's intergovernmental relations forum: a case study of the Western Cape Premier's Intergovernmental Forum* (2013).

Chapter 5

5.1 Conclusion

Delivery of basic services is an important value of the Constitution. Organs of the state are under an obligation to ensure that services are taken to communities living within their areas of jurisdiction.³³¹ For local government, sections 155 and 156 of the Constitution makes it clear that they are obliged to provide citizens with basic services. Even the courts have recognised this as an important value of our Constitutional democracy.³³²

However, sometimes municipalities encounter challenges where they are unable to perform their executive functions in terms of the Constitution or other legislation.³³³ When some situations arise, the Constitution provides in its section 139(1)(b) and (c) that provincial government may intervene and perform whatever function that the municipality will be failing to perform.

The intervention is not always welcomed by those that are affected. For instance, in *Mogalakwena* case, along with a number of others, provincial government intervention led to conflict between the affected municipality and the respective provincial government.³³⁴

The Constitution imposes a duty on national and provincial governments to support local government.³³⁵ This is, in my view, one of the means of ensuring that circumstances do not arise where local government fails to perform its Constitutional obligations. The question is, though, why there are still municipalities that fail to perform their duties and functions of service delivery. My conclusion is that municipalities will fail if there is no adequate cooperation with both national and

³³¹ C. Thornhill, *Intergovernmental Relations: The Case of Co-operative Local Government* (School of Public Management and Administration, University of Pretoria) p677.

³³² National Gambling Board case, *supra*.

³³³ M. Kanyane p96.

³³⁴ For example, Ngaka Modiri Molema District Municipality case, *supra*.

³³⁵ Section 157.

provincial governments. Kanyane cautions in this respect that interventions that are not properly managed may lead to unintended yet adverse consequences.³³⁶

With proper cooperation between spheres of government, service delivery problems should be anticipated and the respective governments should be able to work together to obviate them. That, in my view, is the importance of the inter-governmental structures established in terms of sections 6,³³⁷ 9³³⁸ and 16³³⁹ of IRFA.

The fact that there are still interventions in terms of section 139(1)(b) and (c) of the Constitution points to an indictment across government spheres that there is general lack of cooperation with one another. A question that needs to be answered is whether, in the dispensation of section 41 of the Constitution, there should be an obligation to follow intergovernmental ways of resolving disputes under section 139(1) or whether there exists sufficient reasons for excluding such disputes from the application of the Intergovernmental Relations Framework Act, 2005.

It is undeniable, however, as it was observed in the Mogalakwena and other case law, above, that disputes under the provisions of section 139(1) of the Constitution usually lead to protracted litigation at huge cost to the public purse. Moreover, when such disputes rage on, service delivery suffers. These must be avoided and the better way of doing so is to introduce legislative reform to govern such disputes through expedited consultative procedures and outside of the courtroom.

Courts have tried to shed light on how the provisions of section 139 of the Constitution should be invoked. For example, the court has pronounced that there must be prior consultation before there is intervention into the affairs of another sphere of government.³⁴⁰ The Constitutional Court judgment in the case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*³⁴¹ highlighted how in some instances provincial, and even national government, tend to

³³⁶ Kanyane p103.

³³⁷ President's coordinating council.

³³⁸ National intergovernmental forums.

³³⁹ Provincial intergovernmental forums.

³⁴⁰ First Certification Judgement.

³⁴¹ 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010).

encroach into the executive terrain of local government.³⁴² This is apparent lack of cooperation is constitutionally impermissible, and central and provincial governments should tread carefully and not interfere with the running of local government institutions.³⁴³

The one limitation is the exclusion of application of the provisions of Framework Act in matters falling under the provisions of section 100 and 139 of the Constitution. Interventions invoked in terms of these section have the propensity to lead to conflict, which, in *Mogalakwena* case and others, led to costly litigation. State organs can benefit, in my submission, from an extension of application of Framework Act into these kinds of interventions.

5.2 Recommendations

The provision of basic services can benefit when organs of the state cooperate, that is, work together and support one another in order to ensure that they achieve their respective Constitution mandates.³⁴⁴ On the other hand, conflict among the organs of state can stifle the delivery of services to citizens. Section 41(1)(h) demands that the organs of the state must take reasonable measures to avoid conflict and, where there is conflict, resolve it without resorting to litigation.

Legislative measures in terms of the Framework Act are not adequate to force state organs to pursue conflict resolution measures which will help them avoid costly litigation. This mini-dissertation therefore recommends steps and measures that may help organs of the state to avoid conflict against one another or to resolve conflicts expeditiously and without litigation.

5.2.2 Legislative reform

³⁴² Schedules 4 Part B and 5 Part B of the Constitution.

³⁴³ Section 41(1)(h).

³⁴⁴ T. Edwards, *Cooperative governance in South Africa with specific reference to challenges of intergovernmental relations* (2008).

Most of the intergovernmental structures established in terms of the IRFA are only consultative bodies. For instance, the Presidential Coordinating Council is merely an advisory body and cannot take binding decisions. The role of a facilitator appointed in terms of section 43 of the Framework Act, also, is also limited in scope to facilitation of engagement between the organs of state involved in conflict. He or she will submit a report to the MEC for local government.

The dispute resolution measures in terms of legislation have to be stronger than just facilitation of engagement. It is therefore recommended that the facilitator must be conferred with powers to make binding decisions. This is important because the facilitation processes are funded through state coffers. It would, in my view, amount to fruitless expenditure if facilitator is not empowered to take binding decisions. In the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others*³⁴⁵ the Constitutional court held that:

“... It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector’s powers or decisions were meant to be inconsequential. The Constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our Constitutional democracy lacked even the remotest possibility to do so. ...”

Thus, the functions of the facilitator cannot be left to be inconsequential because his or her main purpose to give effect to the Constitutional imperative of helping organs of the state to avoid litigating against one another. Accordingly, legislative amendment to give facilitators more powers to settle inter-governmental disputes.

5.2.2 Mediation

³⁴⁵ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) at par 49.

Mediation has been part of our law for some time. It is one of the most important steps for resolving employment disputes.³⁴⁶ Mediators usually consult with parties involved in disputes individually with the purpose of influencing them to move towards settlement resolution of their conflict. A mediator's role is similar to the role of a facilitator, except that the mediator does not only facilitate engagement but uses his or her persuasive skills to lead parties to resolve inter-governmental disputes. This role may be played by an attorney or advocate as an independent mediator. This will also require legislative amendment.

5.2.3 Arbitration

Arbitration is similar but a quicker and cheaper option than court litigation.³⁴⁷ In this regard an independent arbitrator may be appointed to adjudicate, in a quasi-judicial forum, an inter-governmental dispute and issue a binding award. Instead of adjudicating disputes in court, organs of the state should be compelled to have such disputes adjudicated through arbitration in order to attain speedy and less costly resolution.³⁴⁸

5.2.4 Cabinet

In the United Kingdom they refer inter-governmental disputes to a Committee of Ministers, the JMC, which deliberates the issues in dispute and attempt to resolve them. There is no reason why Cabinet cannot be used to debate matters of intergovernmental disputes and take resolutions on them. The challenges that threatened SASSA's ability to continue providing social grants to qualifying people could have been discussed in Cabinet and resolved. Instead, the Ministries of Social Development and Treasury failed to cooperate with one another in order to serve the vulnerable people of South Africa. There must be meaningful discussion of disputes in Cabinet so as to avoid conflict between organs of the state.

³⁴⁶ J. Alder, The use of mediation to resolve environmental disputes in South Africa and Switzerland (2005) p4 (UWC).

³⁴⁷ J. H. Carter, International Arbitration Review 7th Ed. (2016) (Law Business Research Ltd).

³⁴⁸ Arbitration Act No. 42 of 1965.

5.2.5 Disputes arising from sections 100 and 139 of the Constitution

Disputes arising from interventions in terms of sections 100 and 139 of the Constitution are excluded from the operation of section 45 of the Framework Act. In other words, state organs involved in inter-governmental dispute emanating from these sections are not required to follow dispute resolution processes provided for in the Framework Act, to engage in meaningful engagement to resolve their dispute prior to embarking in litigation. Although such interventions are subject to review by the Minister for local government and the National Council of Provinces, most result in very costly litigation.³⁴⁹ It is recommended that the Framework Act be amended to subject state organs involved in disputes arising from intervention in terms of sections 100 and 139 of the Constitution to compulsory mediation. Mediation can be arranged and conducted within a period of a week and it can provide quick resolution of inter-governmental disputes.

5.2.6 Consultation

In cases of intervention, it is recommended that the higher government organs intending to take over the affairs of a lower sphere must be obligated to conduct meaningful consultation with the affected lower sphere. Through consultation the lower sphere can be informed of its failures and be offered the type of support that is envisaged in section 154(1) of the Constitution. Unless a situation is absolutely untenable, there is every possibility that a lower sphere being provided with support may turn its fortunes around and start managing its affairs properly.

5.2.7 Strengthening of consultative forums

Decisions on interventions are not taken overnight. They follow a meticulous process of assessment and evaluation of compliance with executive obligations by an organ of the state affected by an intervention. This means that there is enough time for the organ of state intending to intervene into the affairs of another to conduct consultation with the affected organ of state and other state organs prior to an intervention being initiated. Attendance or membership of such forums may include members of

³⁴⁹ Mogalakwena case, supra.

Parliament's Portfolio Committee or the National Council of Provinces whom, it is assumed, will bring independent contributions into the discussions.

These measures require amendment to legislation, in particular, the Framework Act in order to ensure that its strict provisions prohibiting litigation without prior engagement can be extended to disputes arising from interventions in terms of sections 100 and 139 of the Constitution.

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