Constitutional Framework: Powers and Functions

Premier’s Coordinating Forum
19 November 2009
Beaufort-West

Jaap de Visser
Associate Professor, Community Law Centre (UWC)
jdevisser@uwc.ac.za
Objective

- Most important constitutional rules on
  - division of powers between national / provincial / local
  - monitoring
  - intervention
Background: Cooperative Government

- Chapter 3 Constitution: “distinctive, interdependent and interrelated”
“Distinctive” → autonomy
- Each sphere of govt. has its own constitutionally protected powers

“Interrelated” → supervision
- Higher sphere supervises lower sphere - inequality

“Interdependent” → cooperation
- Organs of state must work together
- Relationship of equality, e.g.
  intergovernmental planning, dispute resolution, IGR forums, implementation protocols etc.
“Distinctive” → autonomy
- Each sphere of govt. has **constitutionally protected** powers

“Interrelated” → supervision
- Higher sphere supervises lower sphere - **inequality**

“Interdependent” → cooperation
- Organs of state must work together
- Relationship of **equality**, e.g. intergovernmental planning, dispute resolution, IGR forums, implementation protocols etc.
Distinctiveness

- Each sphere has constitutionally protected powers
- National government
  - Schedule 4 (e.g. education, housing, nature conservation, health, fire-fighting etc.)
  - ‘Residual’ (not mentioned in any list, e.g. home affairs, defense etc.)
- Provincial government
  - Schedule 4
  - Schedule 5 (e.g. liquor licences, museums, libraries etc.)
Local government

- Schedules 4B and 5B
- S 229 Constitution (property rates, fees)
Result: overlap between national/provincial and local

1. How far can prov. go in regulating LG matters (e.g. municipal planning, municipal public transport, fire fighting etc.)
   - framework legislation (minimum standards, monitoring schemes etc.)

2. What are the cut-off points between provincial-local?
Example

**Provincial** authority:
- Schedule 4A: “urban and rural development”
- Schedule 4A: “regional planning”.
- Schedule 5A: “provincial planning”

**Municipal** authority
- Schedule 4B: “municipal planning” = LG

1. What is the difference between these competencies? What are the cut-off points?
2. How far can the province go in regulating “municipal planning”
How to solve this?

1. Define in law, e.g.
   - National Health Act defines “municipal health”
   - Land Transport Act defines “municipal public transport”
   - NB! Provincial law?

2. Define in guidelines, e.g. from CoGTA, MDB)

3. Negotiate → IGR
   - Agreements, implementation protocols (ito IGRFA)

4. Go to court
   - E.g. JHB court case on DFA Tribunal: “municipal planning”
SCA: City of JHB vs Gauteng Development Tribunal

- Development Facilitation Act $\rightarrow$ provincial Tribunal makes land use planning decisions (irrespective of municipality’s role in Town Planning Ordinance)

- Q: does this violate JHB’s authority over “municipal planning”?

- Arguments:
  - Province: no, “municipal planning” = strategic planning (IDP), not land use regulation and control
  - JHB: yes, “municipal planning” includes land use regulation
Supreme Court of Appeal: DFA does violate Constitution because municipality has constitutional authority over land use planning function as per the Ordinance.

Province can regulate (framework) but may not take away the right to administer.
Consequences for Wcape (no DFA)

- Re-assess provincial land use planning powers: do they encroach on LG’s land use planning powers?
In Sum:

- Province can regulate (not administer) Schedule 4B and 5B matters, such as "municipal planning", "public nuisances", "billboards", "child care facilities" etc.
  - only to regulate minimum standards, not to take over the function
  - With regard to Schedule 4B: province shares with national government
Supervision

- Relationship of inequality - limit to autonomy
- Monitoring
- Support
- Intervention
Monitoring

- Early debate: who monitors, national or provincial?
  - Both have constitutional duty and authority to monitor
  - But provincial govt. (not national govt.) has hands-on monitoring powers (e.g. Systems Act)

- Extensive framework for monitoring LG
  - Financial monitoring (MFMA)
  - Sector-based monitoring (housing, water, transport etc.)
  - General monitoring (Systems Act)

- Debate: proliferation / effectiveness of monitoring LG / overregulation
Monitoring powers - variations in intrusiveness:

- **Self-reporting**
  - Annual reports, IYM, budget reporting etc.

- **Reporting on demand**
  - E.g. MEC may require info (s 105 Systems Act)

- **Specific enquiry**
  - Commission of Enquiry ito s 106 Systems Act
Commissions of enquiry

- Suspected fraud or mismanagement
- **MEC must** follow s 106 and Western Cape Commissions Act when investigating municipality
- Province can investigate matters that could, if proven true, be reason for a s 139 intervention
  - *(e.g. not: criminal investigation in order to assist police or speaker)*
Province must notify NCOP, CoGTA, NT whenever s 106 is instituted

CoGTA may “request” MEC to investigate

After such a request, MEC must report on outcome to NCOP/NT

‘Request’ = instruction
Intervention

- Most intrusive form of supervision, last resort
- Legal framework into s 139
  - Directive (provincial instruction)
  - Court action
  - Assumption of responsibility (province takes over a function, council stays)
  - Dissolve council → elections
  - Financial interventions (Province imposes budget or recovery plan etc.)
Only province can use s 139

- except financial interventions which may be done by NT if Province fails

Procedures complex, intimidating

- E.g. Mnquma judgment Eastern Cape

S 139 not used as targeted, early intervention but only after total collapse
Thank you

jdevisser@uwc.ac.za