THE PROS AND CONS OF INTERGOVERNMENTAL SUPERVISION UNDER THE 1996 CONSTITUTION OF SOUTH AFRICA

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1 Introduction

In South Africa power is exercised simultaneously by all spheres of government.[1] Consequently provision is made for the constitutional principles of cooperative government to coordinate government functions and intergovernmental supervision.

Given the interdependence, distinctiveness and interrelatedness of spheres of government,[2] intergovernmental supervision is essential to preserve the unity of the Republic, but could also be prejudicial to the autonomy of the spheres. Although this article explores both views of intergovernmental supervisory powers, it is not an exhaustive discussion. Intergovernmental dispute resolution, established under the Intergovernmental Relations Framework Act (IGRFA)[3] and the mechanism established by the Constitution to review intergovernmental supervisory powers are also assessed. The article concludes with proposals for improvement.

2 Intergovernmental supervision

Intergovernmental supervision is conducted with the understanding that the Constitution affords equality and autonomy to each sphere of government.[4] It includes monitoring of, intervention in and support of one sphere of government by

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1 Schedules 4 and 5 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) distribute government powers to all spheres of government.

2 Section 40 (1) of the Constitution provides that the national, provincial and local sphere of government are distinctive, interdependent and interrelated. Steytler and De Visser in *Local Government Law* (2007) ch 16:3 define distinctiveness as the autonomy that the spheres have in respect of their powers and functions, interrelatedness as the relationship between the three spheres of government, and interdependence as their dependence on one another.

3 Intergovernmental Relations Framework Act 13 of 2005.

4 Bekink *Local Government Law* (2005) 64; Meyer *Local Government Law* (1997) 6; Steytler and De Visser *Local Government Law* (2007) ch 16:13.

another.[5] Although the Constitution allocates powers to all the spheres, the national government has the responsibility to establish a framework within which they exercise such powers and supervises this process.[6] Therefore the national executive has the authority to intervene in a provincial executive when a province cannot or does not fulfil its executive obligation in terms of the Constitution or legislation.[7] The purpose is to help the provincial executive to fulfil its obligations by taking any appropriate steps, including issuing directives describing the extent to which a province has failed to fulfil its obligations and the steps that ought to be taken to meet the obligation,[8] as well as assuming responsibility for the relevant obligations of the provincial executive.[9]

National government also has the authority to ensure that municipalities effectively exercise their powers as listed in Schedules 4 and 5 of the Constitution.[10] Therefore the national executive is also required to intervene if the provincial government fails to exercise its powers of intervention in a municipality adequately.[11] Thus, national government supervises both provincial and local governments.

In turn provincial government monitors and supports local government through legislative and other provincial measures.[12] Just like the national government, provincial government is required to oversee the effective performance by municipalities in respect of matters listed in Schedules 4 and 5 of the Constitution[13] and may intervene if a municipality fails to fulfil an executive obligation in terms of the Constitution or legislation,[14] for instance, if it fails to approve a budget or revenue-raising measures necessary to give effect to the budget,[15] or if the municipality fails to provide basic services as a result of crisis in its financial affairs.[16]

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[5] Mathenjwa "Contemporary trends in provincial government supervision of local government in South Africa" 18 (2014) *LDD* 181 in discussing the scope of provincial government supervision of local government points out that it is broader under the 1996 Constitution.

[6] In re *Certification of the Constitution of the Republic of South Africa, 1996* 10 BCLR 1253 (CC) 239 it was held that the allocation of supervisory powers to the national government is necessary for South Africa to act as a single entity.

[7] s 100 (1) of the Constitution.

[8] s 100 (1) (a) of the Constitution.

[9] s 100 (1) (b) of the Constitution.

[10] s 155 (7) of the Constitution.

[11] s 139 (7) of the Constitution.

[12] s 155 (6) (a) of the Constitution.

[13] s 155 (7) of the Constitution.

[14] s 139 (1) of the Constitution.

[15] s 139 (4) of the Constitution.

[16] s 139 (5) of the Constitution.

Murray points out that the Constitution tasks government with social and economic development and therefore intergovernmental supervision is required to curb foot-dragging by spheres of government that are not committed to these goals.[17] However, the history of intergovernmental supervision in 20 years of democratic government shows both advantages and disadvantages.

3 Pros of intergovernmental supervision

The Constitution provides principles of cooperative government to minimise disputes among the various spheres of government in the Republic.[18] These constitutional principles direct all spheres of government to preserve the national unity and indivisibility of the Republic, secure the wellbeing of its people and provide effective, transparent, accountable and coherent government for the Republic as a whole.[19] Accordingly, intergovernmental supervision is essential to ensure that all spheres of government achieve this goal.

3.1 Indivisibility of the Republic of South Africa

The Republic of South Africa is one sovereign state.[20] All spheres of government and organs of state are required to preserve the national unity and indivisibility of the Republic.[21] The Oxford South African Concise Dictionary defines "indivisibility" as meaning "unable to be divided or separated".[22] According to Bartelsman indivisibility distinguishes sovereign authority from other forms of political power. Thus, indivisibility of sovereignty is a necessary condition of the unity of the state.[23] Furthermore the notion of indivisibility requires regional structures to account for the unity of the state and fosters the continuity of such a unity in time and space and its ability to withstand political change.[24]

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[17] Murray "Municipal integrity and effective government: the Butterworths intervention" 1999 *SAPL* 333.

[18] s 41 of the Constitution.

[19] s 41 (1) (a)-(c) of the Constitution. See further Mathenjwa "The constitutional obligations imposed on a provincial government on instances where a municipality cannot provide basic services as a result of a crisis in its financial affairs" (1) 2015 *TSAR* 61 on the principles of cooperative government.

[20] s 1 of the Constitution.

[21] s 41 (1) (a) of the Constitution.

[22] Oxford South African Concise Dictionary (2010) 594.

[23] Bartelsman "The indivisibility of sovereignty" (2011) 2 *Journal for the Study of Knowledge, Politica and the Arts* 85.

[24] Bartelsman 87.

Therefore the various spheres of government and organs of state have a duty to provide coherent government, maintaining national security, economic unity, and minimum standards for the rendering of services and to ensure that they do not take any action that could prejudice another sphere.[25] In a practical sense the question of the indivisibility of the Republic of South Africa was emphasised indirectly by *Certification of the KwaZulu-Natal Constitution 1996.*[26] Here the provincial legislature of KwaZulu-Natal drafted a provincial constitution that regulated the status of the province as self-governing within the Republic. When this constitution was referred to the Constitutional Court for certification, the court rejected it, because it was beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic.[27] This judgment reinforces the indivisibility of the Republic by clarifying that in South Africa only the Constitution of the Republic regulates the status of the spheres of government. In *Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill*,[28] the court differentiated the sovereignty of South Africa from that of the United States of America (USA). It held that "unlike in the USA, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution".[29] In the USA powers vest in state governments and the federal government exercises only those powers allocated to it by the constitution of the federal Republic of the USA.[30] Consequently, intergovernmental supervision is necessary to prevent disintegration in government structures.

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[25] This view is reinforced by the power of the national parliament in terms of section 44 (2) of the Constitution to intervene and legislate in the competence area of the provincial legislature if necessary to maintain national security, economic unity, essential national standards, to establish minimum standards required for the rendering of services or to prevent unreasonable action taken by a province which is prejudicial to interests of another province or the country as a whole; furthermore section 139 (1) (b) permits provincial government to intervene in a municipality to the extent necessary to maintain essential national standards or meet established minimum standards for rendering a service or to prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or the province as a whole, or to maintain economic unity.

[26] *Certification of the KwaZulu-Natal Constitution 1996* 1996 (11) BCLR 1419.

[27] See the *Certification of the KwaZulu-Natal Constitution* 15.

[28] *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Bill of 1996* 1996 (3) SA 289 (CC).

[29] *Ex Parte Speaker of the National Assembly* 23.

[30] *Ex Parte Speaker of the National Assembly* 23.

3.2 Good governance

The spheres of government and organs of state are required to provide effective, transparent, accountable and coherent government for the Republic as a whole.[31] The Constitution envisages that the different spheres of government will provide good governance for the people. Mbao and Komboni correctly point out that there is no universally accepted definition of "governance" but the term is mainly used to refer to the way that a country is governed and how a nation's affairs are conducted.[32] Hatchard, Ndulo and Slinn further point out that good governance implies "conscious management of regime structures with a view to enhancing the legitimacy of the public realm".[33] The values and principles of good governance include efficiency, accountability and transparency.[34]

Intergovernmental supervision is essential to ensure that all spheres of government exercise their powers to accomplish good governance. This is evident in the case of *MEC for Cooperative Governance and Traditional Affairs KwaZulu-Natal v Imbabazane Municipality*.[35] Here the respondent was employed as a municipal manager in terms of the Municipal Structures Act, which stipulates that the employment contract for a municipal manager should be for a fixed term of employment up to a maximum of five years, but not exceeding a period ending one year after the election of the next council of the municipality.[36] The employment contract of the respondent by operation of law expired on 18 May 2012, one year from the date when the local government elections were held in 2011.[37] Despite expiry of the contract the respondent continued to occupy the position. The MEC succeeded in obtaining a court order declaring the contract of employment of the respondent null and void after 18 May 2012.[38]

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31 s 41 (1) (c) of the Constitution.

32 Mbao and Komboni "Promotion of good governance and combating corruption and maladministration: the case of Botswana" (2008) 12 *LDD* 50.

33 Hatchard, Ndulo and Slinn *Comparative Good Governance in the Common Wealth* (2004) 2.

34 s 195 (1) of the Constitution.

35 *MEC for Cooperative Governance and Traditional Affairs v Imbabazane Municipality* case no 5238/12 (KZPHC) (unreported) .

36 s 54 A of Local Government: Municipal Structures Act 118 of 1998.

37 *Imbabazane Municipality* case 20.

38 *Imbabazane Municipality* case 52.

In the case of *Dakolo v Mokhatla,*[39] the executive mayor of the Southern District Municipality used his cell phone allowance far beyond the limitation prescribed. This abuse was picked up by the Auditor-General who voiced his dissatisfaction. Instead of settling the debt the mayor came to an agreement with the council to write off the funds.[40] The Auditor-General, being unsatisfied with the agreement, summoned the mayor to appear before the North West Provincial Accounts Standing Committee. Although this case deals with the privileges of a municipal council, it is relevant to show the importance of intergovernmental supervision. In this case the mayor was made to account for the abuse of government resources before the provincial government. Consequently, intergovernmental supervision was used to curb corruption in the local sphere of government.

The issue of poor governance arose in *Member of the Executive Council of the Eastern Cape Responsible for Local Government and Traditional Affairs v Inkwanca Local Municipality*.[41] Community dissatisfaction with service delivery and irregularities at the municipality prompted the MEC to institute a forensic investigation, which revealed irregularities to be addressed.[42] Despite several requests from the MEC that the municipality act upon the issues raised in the forensic report, the council failed to do so. The MEC then obtained a court order instructing the council to convene and consider the issues.[43] Accordingly intergovernmental supervision helped arrest a lack of service delivery in local government.

3.3 Wellbeing of the people of the Republic

All spheres of government and organs of state should secure the wellbeing of the people of the Republic.[44] The phrase “wellbeing” is not defined in the Constitution. The Oxford Concise English Dictionary defines “wellbeing” as the state of being comfortable, healthy or happy.[45] This could also be ascertained from reading the

[39] *Dikoko v Mokhatla* 2006 (6) SA 235 (C C).
[40] *Dikoko* case 5.
[41] *Member of Executive Council of the Eastern Cape Responsible for Local Government and Traditional Affairs v Inkwanca Local Municipality* case no1246/14 (ECGHC) (unreported) 82 .
[42] *Inkwanca Local Municipality* case 20.
[43] *Inkwanca Municipality* case 64.
[44] s 41 (1) (b) of the Constitution.
[45] Oxford Concise English dictionary (2001) 1625.

Constitution holistically. The preamble shows that "wellbeing" implies for instance the attainment of social justice and improvement of the quality of life for everyone.[46] The Constitution is explicit in guaranteeing the wellbeing of the people: the inherent dignity of all and the right to have their dignity respected, an environment that is not harmful to their health or wellbeing, access to adequate housing, health care services, including reproductive health care, sufficient food and water, social security, and the right to basic nutrition, shelter, basic health care and other social services.[47]

The responsibility of realising the wellbeing of the people is entrusted concurrently to all spheres of government. Hence the spheres must supervise one another to ensure that none drags its feet. This view is supported by the *Grootboom* judgment where, in explaining the right of access to housing, it was held that each sphere of government accept responsibility for the provision of housing.[48] The judgment reflects the need for the spheres to supervise one another.

Without intergovernmental supervision there is a danger of disintegration and fragmentation. However, the actual exercise of the supervisory powers could also have a negative effect.

4 The cons of intergovernmental supervision

Apart from the advantages of intergovernmental supervision, there are also factors that negate its good effects. Factionalism in the government sector, political considerations in intergovernmental supervision, consequences of the electoral system of government and concurrent distribution of powers to all the spheres of government weigh heavily against the achievement of effective intergovernmental supervision.

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[46] The preamble to the Constitution provides that the people of South Africa recognise the injustice of the past and draft the Constitution as the supreme law of the Republic, to heal divisions and establish a society based on democratic values, social justice and fundamental human rights; improve the quality of life of all citizens and free the potential of each person. The view is reinforced in the judgment of *Government of South Africa v Grootboom* 2001 (1) SA 46 where it was held that the preamble of the Constitution shows that the people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone.

[47] s 10, 24, 26(1), 27 (1) and 28 (1) (c) of the Constitution.

[48] *Grootboom* case 40.

4.1 Factionalism in government sector

Factionalism among the members of a political party is manifested in all spheres of government,[49] and has a negative impact on intergovernmental supervision. The issue of factionalism arose in *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo.*[50] The case arose from disunity in the municipal council due to factionalism among ANC councillors. One faction of councillors was allied with the former mayor and the other with the municipal manager. The municipal manager instituted a forensic investigation that indicated that the former mayor and other councillors were corrupt.[51] The municipal council made a resolution to appeal to the MEC for local government to remove the former mayor as a councillor. Subsequently the speaker of the municipality wrote to the MEC informing him of the council resolution and requested that the former mayor be removed as a councillor because he was implicated in the forensic report. The MEC responded by advising that the implicated councillor should be afforded the opportunity to state his side of the story regarding the alleged irregularities. The speaker then received notice from the MEC advising the municipality that the Provincial Executive Council of Limpopo had taken a decision to intervene in the Mogalakwena Local Municipality by assuming responsibility for a relevant obligation of the municipality. This action was based on the municipality's alleged failure to fulfil its executive obligation in terms of the Constitution or legislation as reflected in the disunity that had prevailed among the councillors.[52] The municipality sought an interim order interdicting the province from implementing the intervention pending an application for review of the provincial government decision. The court found the supervisory powers were used by the province against those whose political opponents were in power in the municipality.[53]

In granting the interim order the court held that the provincial government's failure to consult the affected councillors when taking the decision to intervene in the

[49] *Ilanga Newspaper* (15-17 June 2015) "Divisions in the African National Congress".
[50] *Mogalakwena Local Municipality v Provincial Executive Council of Limpopo* case no 35248/14 (GPHC) (unreported) 400.
[51] *Mogalakwena Local Municipality* case 9.
[52] *Mogalakwena Local Municipality* case 1.
[53] *Mogalakwena Local Municipality* case 24.

municipality was at odds with the constitutional principle of cooperative government, which required all the spheres of government to cooperate with each other.[54]

4.2 The consequences of party politics

Political considerations impact on intergovernmental supervision when supervising spheres have interests in inter-political party disputes in other spheres of government. This is evident in the supervision of municipalities by provincial governments of a different political persuasion. In the case of *Democratic Alliance Western Cape v Minister of Local Government Western Cape,*[55] the Western Cape minister for local government, led by the ANC, instituted an investigation into the affairs of Langeberg Municipality, led by the DA. The investigation was based on a DA decision to institute a disciplinary committee to investigate a councillor of the municipality – a DA member who at the time "crossed the floor" to the ANC in terms of the amended Schedule 6B of the Constitution. In setting aside the investigation the court found that it had been instituted improperly to look into the internal conduct of an opposition political party at local level.[56] Thus intergovernmental supervision powers were used for political purposes on purely internal party matters.

In *City of Cape Town v Premier of the Western Cape,*[57] the local government minister and the Western Cape premier (whose provincial government was led by the ANC) decided to appoint a commission of inquiry to investigate the affairs of the City of Cape Town, based on allegations of irregularities during an investigation into the conduct of one of its councillors. The court found there was no merit in the provincial government's investigation into the affairs of the city,[58] and that the premier was influenced by political considerations when instituting the investigation so as to embarrass a political opponent, the mayor of Cape Town.[59]

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[54] *Mogalakwena Local Municipality* case 34.
[55] *Democratic Alliance Western Cape v Minister for Local Government Western Cape* 2005 (3) SA 576 (C).
[56] *Democratic Alliance* case 46.
[57] *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C).
[58] *City of Cape Town* case 161.
[59] *City of Cape Town* case 162. Note that the Western Cape provincial government was led by the ANC while the City of Cape Town was led by the DA in 2008.

Inkatha Freedom Party v Abaqulusi Municipality involved the appointment of a municipal manager.[60] The municipality was led by an ANC dominated coalition government when its executive committee recommended the candidate be employed in the position. The mayor, an ANC member, tabled an item recommending employment of the candidate. In addition, the mayor circulated an item stating that she had checked the candidate's references and discovered that he was unsuitable for employment, since he had falsified his CV by indicating that he was employed as lecturer in local government studies by the University of Natal. She further reported that the reference check brought to light that the candidate's former employer, Amajuba District Municipality, indicated that his performance as a municipal manager was poor and that he was on the verge of being charged for misconduct when he resigned. The deputy mayor, a member of the National Freedom Party (NFP), conducted his own reference check, finding that the municipal manager was indeed suitable for employment.[61] At the next seating of the council the contradicting reports were discussed and the council, by majority vote, resolved to employ the municipal manager. The mayor then submitted the resolution of the council to employ the candidate to the MEC,[62] who, relying on the mayor's report, advised that the candidate should not be employed. The Inkatha Freedom Party (first applicant) and the candidate (second applicant) resorted to court for a mandamus ordering the municipal council, executive committee and the MEC to implement the resolution of the municipal council in terms of which the second applicant was appointed municipal manager of the municipality. The mayor and the MEC opposed the application on the basis that the second applicant was not suitable for the position. However, the court found that the negative reference check regarding the second applicant was devoid of truth[63] and that the council resolution employing the second

[60] *Inkatha Freedom Party v Abaqulusi Municipality* case no 4539/13 (KZPHC) (unreported).

[61] *Inkatha Freedom Party* case 9.

[62] Note that the MEC is required to oversee whether the employment of a municipal manager complies with the law. Accordingly section 54 A (7) (a)-(b) of the Municipal Structures Act provides that the municipality must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed, and the MEC must within 14 days of receipt of the information on the employment of the municipal manager, submit a copy to the Minister; section 54A (8) provides that if the person is appointed as municipal manager in contravention of this section, the MEC must within 14 days of receiving the information, take steps to enforce compliance by the municipality with the law, which may include an application to a court for declaratory order on the validity of the appointment, or any other legal action against the municipality.

[63] *Inkatha Freedom Party* case 16.

applicant was valid and binding.[64] The respondents were ordered to implement the council resolution employing the defendant as a municipal manager.[65] The MEC approached the High Court and obtained an interdict against the municipal council to prevent it from implementing the court order pending an appeal she intended to launch against the judgment.[66] The MEC's leave to appeal against the judgment was refused, as was her appeal to the Constitutional Court.[67]

The case reveals how political considerations can negate the aim of intergovernmental supervision. The MEC's determination to use tax money to take the case to the highest court on a matter that was already resolved by council after considering both reports on the suitability of the candidate for the position reflects that the supervision of the municipality was clouded by political interests on the part of the MEC. This observation equally applies to the case of *Democratic Alliance Western Cape* and *City of Cape Town* where political consideration was found to have clouded the supervisory power of the provincial government.

4.3 The consequences of electoral systems of government

In South Africa election to the National Assembly, provincial legislatures and municipal councils generally results in proportional representation.[68] In respect of election to local government, provision is also made for ward representation in addition to proportional representation.[69] Accordingly, local government elections result in a mixed system. This electoral system combines single-member constituencies based on simple plurality votes.[70] The principle of proportional representation entails the division of seats and constituency according to the number of votes cast for party lists.[71] Norris indicates that although the system of proportional

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[64] *Inkatha Freedom Party* case 25.
[65] Inkatha Freedom Party case 26.
[66] See case of *MEC for KwaZulu-Natal of the Department of Co-operative Governance and Traditional Affairs v Inkatha Freedom Party* case no 10304/13 (KZPHC) (unreported) 62.
[67] See *Member of Executive Council for Cooperative Governance, Traditional Affairs, KwaZulu-Natal v Inkatha Freedom Party* case no 118/14 (CC) (unreported) .
[68] Section 46 (1) (d) of the Constitution provides that election of National Assembly is in terms of electoral system, which generally results in proportional representation; section105 (1) (d) provides that election to provincial legislature is in terms of an electoral system that generally results in proportional representation and section 157 (3) provides that the election of a municipal council must be in terms of electoral systems that generally result in proportional representation.
[69] s 157 (4) (a) of the Constitution.
[70] See Norris 5.
[71] Norris "Choosing electoral systems: proportional, majoritarian and mixed systems" 18 (3) 1997 *International Political Science Review* 5.

representation has advantages in accommodating minority parties in government, it produces indecisive outcomes and a lack of clear cut accountability and transparency in decision making.[72] Given the nature of a proportional electoral system, the influence of political party caucuses on intergovernmental supervision could be huge, especially when the dominating political party in the sphere of government supervising another sphere is the same party that dominates in the National Council of Provinces (NCOP) and parliament. This view is supported by a case study showing that in all but one instance of provincial government intervention in local government, both the NCOP and cabinet member responsible for local government approved the interventions, even in instances where such interventions should not have been approved.[73] Accordingly, the blind loyalty to a political party necessitated by this type of electoral system may lead to indecision by members of the reviewing functionaries, since, should they dissent from the caucus of the political party, they could be relieved of their posts with the legislatures at the discretion of the parties.[74]

4.4 Consequences of concurrent distribution of powers

Although the constitutional principle of cooperative government aims at harmonising cooperation and harnessing the functioning of government among the spheres, case law indicates that the exercise of concurrent government powers may evoke unhealthy competition among the spheres, negating this aim. Such competition is

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[72] See Norris 5.

[73] In the *MEC of KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Amajuba District Municipality* 2011(1) SA 401 (SCA) the cabinet member responsible for local government was a member of the same political party as the party leading provincial government, which disapproved the decision of the provincial government to intervene by dissolving the Amajuba District Municipal Council, which was governed by coalition of political opponents. Further instances of interventions in local government are evident in *Mnquma Local Municipality v Premier of the Eastern Cape* 2011 (4) SA 44 (SCA); *MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council* 2007 (3) SA 436 (N); *Ngaka Modiri Molema District Municipality v Chairperson North West Executive Committee* case no 186/14 (CC) (unreported) 31 . Apart from the *Ngaka Modiri Molema* case the NCOP and cabinet member could have reviewed and disapproved the interventions, which were carried contrary to the principle of legality. On the legality of intervention in Utrecht Municipal Council case, Mathenjwa (n5 above) 187 points out that that intervention might be illegal.

[74] See www.icol.co,za/news/politics/anc-members-face-internal-inquiry (29-06-15), which reinforces the expectation of blind loyalty to the decision of the causes from members of legislature under a proportional system of representation. The media reported on an MP of the ANC who objected to the adoption of the Protection of State Information Bill by abstaining from voting, irked the wrath of the party, and the party threatened to take disciplinary action against members who did not vote for the Bill.

apparent in the *National Gambling Board v Premier of KwaZulu-Natal*.[75] The case involves competition between the KwaZulu-Natal premier and the minister of trade and industry over who should have the authority to control the central electronic monitoring system linking the gambling machines. The minister and the National Gambling Board contended that there should be a single central electronic monitoring system to which all gambling machines in the country should be linked and controlled by the National Gambling Board. On the other hand the premier contended that the provinces are entitled to their own electronic monitoring systems. This confusion arose from the provisions of section 44 (1) (a) (ii) read with section 104 (1) (b) (i) read with Schedule 4 of the Constitution, which bestows on the national and provincial legislatures concurrent legislative competence to pass gambling laws.[76] The board launched a court application for an order declaring that there may be only one central electronic monitoring system in the Republic. The Constitutional Court dismissed the matter because the parties had failed to comply with the principles of cooperative governance to try and solve intergovernmental dispute before litigating.[77]

In *City of Johannesburg Metropolitan v Gauteng Development Tribunal*,[78] the issue arose from competing legislation bestowing powers on both municipalities and the Provincial Development Tribunal to approve planning applications. The Town Planning and Townships Ordinance authorised the City of Johannesburg to consider applications for the rezoning of land and establishment of new townships within the area,[79] whereas the Development Facilitation Act authorised the tribunal to consider applications for the rezoning of land and the establishment of new townships within the same area of jurisdiction. In approving a number of applications for land developments within the jurisdiction of the City of Johannesburg the tribunal failed to take into account the city's development planning instruments and undermined the

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[75] *National Gambling Board v Premier of KwaZulu-Natal* 2002 (2) SA 715.

[76] *National Gambling Board* case 4; Schedule 4 Part A of the Constitution bestow on the national and provincial government, concurrent powers over trade; section 104 (1) (b) (i) afford provincial government the power to pass legislation for its province with regard to any matter within a functional area listed in Schedule 4 and section 44 (1) (a) (ii) confers on parliament the power to pass legislation with regard to any matter including a matter within a functional area listed in Schedule 4.

[77] *National Gambling Board* case 36.

[78] *City of Johannesburg Metropolitan v Gauteng Development Tribunal* 2010 (6) SA 182.

[79] Town-Planning and Townships Ordinance 15 of 1986.

city's development planning and its planning committee.[80] The city launched a court application to obtain a declaratory order clarifying the powers of the tribunal under the Act. The court held that the Constitution confers "planning" on all spheres of government but municipal planning is allocated to the local sphere of government.[81] The court found that the provisions of the Development Facilitation Tribunal Act, which allows the Development Tribunal to exercise powers over municipal planning, were inconsistent with the Constitution.[82]

In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council: Minister of Local Government Environmental Affairs and Development Planning, Western Cape v City of Cape Town*,[83] the issue arose from the decision of the minister for local government in the Western Cape to decide on appeals regarding decisions by the City of Cape Town on planning-related matters and even replace the city's decision with its own. Section 44 of the Land Use Planning Ordinance (LUPO) allows the provincial government to hear appeals regarding planning decisions by the city. Acting in terms of this provision, the minister upheld the appeal against the decision of the city to refuse applications for rezoning and on another matter. The minister not only approved an appeal on rezoning, but also imposed his own conditions on the application.[84] The city approached the court for an order declaring section 44 of LUPO unconstitutional. The court held that the power under which section 155(7) of the Constitution is bestowed on the national and provincial government, meant creating norms and guidelines for the exercise of power or the performance of a function, and not the usurpation of the power or performance of the functions as such. The court found that the constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions.[85]

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[80] *Gauteng Development Tribunal* case 9.
[81] *Gauteng Development Tribunal* case 53.
[82] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010(6) SA 182 (CC) 70.
[83] *Minister of Local Government, Environmental Affairs and development Planning, Western Cape v the Habitat Council: Minister of Local Government, Environmental Affairs and development Planning, Western Cape v City of Cape Town* case no 117/13 (CC) (unreported).
[84] *Habitat Council* case 5.
[85] *Habitat Council* case 22.

In *Minister of Police v Premier of the Western Cape*[86] the premier of the Western Cape, acting on community complaints about the ineffectiveness of the South African Police Services in the province, appointed a commission of inquiry to investigate such complaints. The commission was afforded the power to subpoena police officials to appear before it to account for the functioning of the police service. The premier exercised this power in terms of the provisions of the constitution, which entitle provinces to oversee the functioning of and appoint a commission of enquiry to investigate complaints against the police service.[87] The national minister brought a court application for a restraining order to prevent the commission from issuing subpoenas to members of the police service, and direct it to suspend its activities pending a decision on review to set aside the premier's decision to appoint the commission.[88] The applicant based his application on the fact that policing was the functional arm of the national government.[89] The court held that although policing is a national competence, the power afforded to the province to appoint the commission to inquire into police efficiency, impliedly includes the power to subpoena members of the police service to attend its hearings, testify before it and produce documents.[90]

The *Minister of Police* case demonstrates that the national government could not monitor the provincial government in exercising its powers in monitoring the effectiveness of policing in the province if the national government competes for the exercise of such powers with the provincial government.

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[86] *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC).

[87] Section 206 (3) of the constitution provides that each province is entitled to monitor police conduct; to oversee the effectiveness of the police service, including receiving reports on the police service; to promote good relations between the police and the community and to assess the effectiveness of visible policing with respect to crime and policing in the province. Section 206 (5) empowers provincial government to investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and community.

[88] *Minister of Police* case 10.

[89] *Minister of Police* case 28. Note that section 199 (1) of the Constitution provides for a single police service made up of all the security services in the Republic. Accordingly provinces do not have their distinct police services. Furthermore, in terms of section 206 (1) the national minister is responsible for policing. However, in terms of section 206 (3) provinces are entitled to oversee the effectiveness of policing in their own areas. Schedule 4 part A of the Constitution allocates concurrent policing powers to the national and provincial governments to monitor the police service. Accordingly the effectiveness of the police service is a concurrent functional area of the national and provincial governments.

[90] *Minister of Police* case 57.

It is evident from case law that the conferring of concurrent powers without demarcating specific functional areas causes unhealthy competition among the various spheres of government and compromises the integrity of intergovernmental supervision. This occurs when the supervising sphere exercises instead of monitors the power that should be exercised by the other sphere. Thus the competition is likely to create tension, which might sour intergovernmental relations. This view is supported by a case study on the abuse of supervisory powers by provincial governments for crude and partisan reasons.[91] The following section explores a mechanism to resolve intergovernmental disputes.

5 Intergovernmental dispute resolution mechanism

This discussion of case law indicates that intergovernmental disputes are inevitable in intergovernmental supervision. In anticipation of potential disputes the Constitution envisages national legislation to[92]

> "(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> (b) provide for appropriate mechanisms and procedures to facilitate the intergovernmental disputes".

The IGRFA was passed to promote and facilitate intergovernmental relations and to provide for mechanisms and procedures to facilitate the settlement of these disputes.[93] Intergovernmental relations are defined as a "relationship that arises between different governments or between organs of state from different governments in the conduct of their affairs".[94] The Act provides for the establishment of intergovernmental structures to promote and facilitate these relations.[95]

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[91] See par 4.2 above.
[92] s 41 (2) of the Constitution.
[93] See n 3 above.
[94] s 1 (1) (g) of the IGRFA.
[95] Section 6 of IGRFA establishes the president's coordinating council, which is a consultative forum for the president on matters of interest for provinces and local governments; section 9 makes provision for the establishment of a forum for a cabinet member to consult with MECs in the functional area for which the cabinet member is responsible and section 16 establishes the premier's intergovernmental forum where the premier consults with the mayors of municipalities to discuss matters of mutual interest.

Intergovernmental disputes are defined as[96]

> "A dispute between different governments or between organs of state from different governments concerning a matter arising from -
>
> (i) a statutory power or function assigned to any of the parties; or
> (ii) an agreement between the parties regarding the implementation of a statutory power or function; and which is justiciable in a court of law".

The Act requires all organs of state to make reasonable efforts to avoid intergovernmental disputes.[97]

However, not all intergovernmental disputes are resolved by mechanisms established under the IGRFA. Interventions by the national government in provincial government in terms of section 100 and by provincial government in local government in terms of section 139 of the Constitution are not included in the meaning of intergovernmental disputes.[98] Accordingly, if a dispute arises between spheres of government over interventions among these spheres the dispute settlement mechanism provided for in the Act does not apply.

Given the failure of IGRFA to provide for dispute resolution mechanisms to resolve intergovernmental intervention disputes, the Act might not adequately provide for an intergovernmental dispute resolution mechanism. This view is reinforced by Malherbe who criticises the Act for preserving national dominance over provincial and local government.[99] Given the weakness of the Act in failing to provide for intergovernmental intervention dispute resolution mechanisms, the mechanism for review of intergovernmental intervention powers is explained.

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[96] s 1 (1) (c) of the Act.

[97] Section 41 of the IGRFA allows the spheres of government and organs of state involved in intergovernmental disputes to declare them intergovernmental disputes. However section 41 (2) requires the organ of state to declare the intergovernmental dispute only if such organ of state had made reasonable effort to resolve the dispute. Section 42 requires the parties to convene a meeting between themselves to resolve the dispute once a formal dispute is declared.

[98] Section 39 (1)(b) of IGRFA provides that chapter 4 on settlement of intergovernmental disputes does not apply to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.

[99] Malherbe "Does the Intergovernmental Relations Framework Act, 2005, confirm or suppress national dominance?" 2006 *TSAR* 810-818.

6 Review of intergovernmental interventions

When provincial government intervenes in a municipality in terms of section 139 of the Constitution it must submit a written notice of the intervention to the cabinet member responsible for local government affairs and to the provincial legislature and NCOP.[100] These functionaries have the power to review, set aside or confirm the intervention.[101] This provision is congruent with the oversight responsibilities of the national government over the exercise of powers by provincial government. It should be noted that the constitution is silent on review mechanisms when the national executive intervenes in provincial government. As in the case of provincial government interventions in local government, national government interventions in provincial government should be reported to the NCOP and parliament. This view is congruent with the national executive's duty to account to parliament.[102]

The weakness in the supervisory role of the NCOP is that members of the council who participate in the decision of the provincial executive council to intervene in a municipality's matters are the same members who sit on the NCOP and review its own decision of intervening in a municipal council.[103]

Another weakness in the oversight of intergovernmental supervision is that the Constitution requires the intervening party to report intervention to other spheres of government. The Constitution is silent on whether the sphere of government that is a victim of an intervention can also report the intervention to the relevant functionaries for review. Accordingly, intergovernmental interventions may only be reviewed at the instance of the intervening sphere.

The disadvantages of intergovernmental supervision show that the autonomy afforded to each of the spheres, and the good aim of intergovernmental supervision, are not decisive in achieving the goals of governance in the Republic, but that the actual practice of intergovernmental supervision power makes all the difference.

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100 s 139 (2) (a) of the Constitution.

101 s 139 (2) (b) of the Constitution.

102 Section 92 (2) of the Constitution provides that members of Cabinet are accountable collectively and individually to parliament for exercising their powers and performing their functions.

103 Section 60 (2) of the Constitution provides that NCOP is composed of ten delegates from each province, which include the premier of each province or his or her nominee. Also see section 125 (1), which provides that the executive authority of the province is vested in the premier of that province. Accordingly provinces are reviewing their own powers when their delegates sit on the NCOP.

Rautenbach and Malherbe warn against over-reliance on words such as “spheres” in explaining the autonomy of government structures, and that it is not always the reference to “level” or “tiers” of government that reflects a hierarchical government structure, but the extent to which government authority is distributed.[104] Thus the enshrinement of the principles of cooperative government in the Constitution is not decisive of good governance in the Republic, but it is the proper exercise of government powers and intergovernmental supervisory powers that will achieve such goals.

7 Conclusion

The discussion in this article shows that intergovernmental supervision is the most important mechanism for achieving the aim of governance in the Republic. However, the exercise of intergovernmental powers reflects patterns of hierarchical government structure in terms of which upper levels of government control the lower levels. This impedes the constitutional autonomy of the spheres of government, the practice of factionalism, political consideration, and the nature of the electoral system. Undemarcated concurrent distribution to and exercise of simultaneous powers by the spheres contribute hugely to national, and relatively to provincial, dominance in intergovernmental supervision. Although there are mechanisms in place for resolving intergovernmental disputes, they are weakened by the failure of IGRFA to include actions of intergovernmental interventions in such mechanisms. The reliability of the mechanisms to oversee and review intergovernmental interventions is compromised further by membership of the NCOP, where members who review the supervisory powers of provincial government are the same members who participate in decisions to intervene in local government in their capacity as members of the provincial executive.

Based on these findings, it is recommended that the demarcation of functional areas for the different spheres should be established through national legislation. Such legislation would define and demarcate a specific responsibility for each of the spheres in concurrent functional areas. In this way the uncertainty that prevails with regard to areas of responsibility in the concurrent functional areas among the

[104] Rautenbach and Malherbe *Constitutional Law* (2009) 93-94.

spheres would be obviated. If the recommendations are implemented, the reliability of intergovernmental supervision could be restored.