Subsidiarity in the Constitution

SLAPSTICK ASYMMETRY OR A 'RIGHTS-BASED' APPROACH TO POWERS?

What is subsidiarity?

Subsidiarity is a general principle that says that governance should take place as close as possible to the citizens. It translates into the protection of lower levels of government against undue interference by national government. It also translates into a preference for placing functions and powers at lower levels of government where possible.

The South African Constitution was influenced by this principle, even though it does not mention it explicitly. The role of local government, for example, is secured in the Constitution. National and provincial governments may not interfere in local government without good reason. These notions are in line with the subsidiarity principle. There is one specific provision of the Constitution that may be understood in light of the subsidiarity principle, namely section 156(4). It provides as follows:

> The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –
>
> (a) that matter would most effectively be administered locally; and
> (b) the municipality has the capacity to administer it.

This article tries to explain section 156(4) against the background of the international knowledge of and experience with subsidiarity.

Why a principle on subsidiarity?

The principle was introduced in the 19th century, out of respect for the individual and for small groups and associations that played important roles in society, such as families, churches and guilds, but also for villages, towns and provinces. More recently, the principle has been motivated on the basis of more practical concerns such as efficiency in government spending. The argument is that lower levels of government are closer to the citizen and can therefore make more 'intelligent' decisions on what the citizens want. The overall objective of having governments adhere to the principle is to make the decision about 'who does what' less about politics and more about principles.

International manifestation of the principle

The principle is very prominent in the European Union (EU), where powers are exercised by the central EU bodies only if they cannot be exercised by the member states themselves. The EU institutions thus have to prove that 'centralisation' is necessary; otherwise the function remains with the member state. This is entrenched in EU treaties.

Internationally, the principle is also quite often recognised as important in the development of local government systems. The European Charter of Local Self-Government, applicable to most European countries, provides:

> Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.

Also, the Aberdeen Agenda on local government, adopted by the Commonwealth Local Government Forum, provides:

> Local democracy should ensure local government has appropriate powers in accordance with the principle of subsidiarity.

The experience with the subsidiarity principle internationally is a mixed bag. It can have great political and symbolic value and can thus influence discussions between national and lower levels of government on the division of functions. However, nowhere has it been legally enforced. Also, it has not succeeded in taking the politics out of the discussions on the division of powers. In fact, it sometimes sharpens and intensifies political disagreement across levels of government over who does what.

What about section 156(4)?

The Constitution expresses special concern for the role of local government, protects its status and encourages, in section 156(4), national and provincial governments to transfer functions to local government where possible. However, it is suggested that this must be viewed in the context of the quest for developmental municipalities rather than as a classic statement of the subsidiarity principle like that in the EU charter. The standard subsidiarity principle says that powers *must* go to or stay at local level unless they are better performed at a higher level. The Constitution, and particularly section 156(4), does not go that far; it allocates powers to local government and provides that more can be added if that is appropriate. The burden of argument is thus turned around.

Section 156(4) applies to all provincial powers but does not apply to all national powers. It excludes exclusive national powers that are not listed anywhere (such as defence and home affairs). The 'downward pressure' of the provision is thus applied only with respect to Schedule 4A functions.

Is it legally enforceable?

As stated above, the subsidiarity principle is not legally enforced in any of the international examples cited here, but is section 156(4) legally enforceable in South Africa? Can a municipality go to court and claim the right to exercise, for example, the housing function? It is a difficult question on which no court has yet pronounced. However, the suggestion here is that it is not legally enforceable.

Firstly, courts will, before hearing a dispute on the location of functions, insist that the parties try to solve their dispute otherwise. Secondly, if dispute resolution fails, the courts may still be very reluctant to be drawn into technical debates on whether a function should go to a municipality. These debates would deal with issues including the efficiencies generated by municipal performance of the function, intergovernmental fiscal consequences, economic imperatives such as spill-over effects, and assessments of the capacity of municipalities. South African courts are generally neither equipped nor eager to get embroiled in intricate governance issues for which there are other avenues. Their approach would be different only if there were a manifest violation of the Constitution.

A programmatic approach to functions and powers, managed through intergovernmental relations rather than by the courts, is more in line with the spirit of the Constitution. A 'rights-based' approach to section 156(4) of the Constitution could result in 'slapstick asymmetry': municipalities lodging claims for powers for a variety of reasons, and functions and powers 'tumbling up and down' between national, provincial and local government – the only referee being a judge with the unenviable task of mediating the endless intricacies of governance.

It is hardly conceivable that this scenario would contribute to the achievement of the goals of developmental local government.

key points

- Subsidiarity is a general principle that says governance should take place as close as possible to the citizens.
- The Constitution was influenced by this principle even though it does not mention it explicitly.
- The Constitution provides that national or provincial government "must" assign certain functions to a municipality if certain conditions are met.
- This not legally enforceable as courts are reluctant to be drawn into technical debates on where a function should go.
- A programmatic approach to functions and powers, managed through intergovernmental relations rather than by the courts, is more consistent with the Constitution.

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