

Co-operative Government in the Systems Bill

Section 3 of the Local Government: Municipal Systems Bill (B27-2000) provides that -

(1) *Municipalities must within the constitutional system of co-operative government envisaged in section 41 of the Constitution-*

(a) *seek to integrate the exercise of their legislative and executive authority with the policies, programmes, legislation and institutional arrangements of the national and provincial spheres of government;*

(...)

(2) *Subsection (1) (a) applies only to the extent that that subsection does not compromise or impede a municipality's ability or right to exercise its powers or to perform its duties.*

It was submitted by the Community Law Centre at the public hearings, hosted by the Portfolio Committee on Provincial and Local Government (National Assembly) and the Select Committee on Local Government and Administration (NCOP) on 9, 10 and 12 May, that these provisions are in conflict with the principles of co-operative government of Chapter 3 of the Constitution.

The duty to seek integration

(Section 3(1))

Chapter 3 is not 'one way traffic'

The first objection made to the formulation of co-operative governance in the Systems Bill relates to the lack of appreciation for the reciprocity of the duties, imposed by the principles of co-operative government in the

Constitution. This duty in the Systems Bill on local authorities to co-ordinate their actions and legislation with other spheres is but one side of the coin. Just as much as local government must co-operate with national and provincial governments, national and provincial governments must also co-operate with local governments. *Section 3(1) in its present form presents co-operative governance as a duty on local government to take national and provincial interests into account.* However, national and provincial governments must also take the interests of local government into account. Section 41 (1) of the Constitution speaks of the duty on all spheres to co-operate in *mutual trust and good faith with one another.*

Chapter 3's application varies with degree of equality

The second objection relates to the rigid formulation (municipalities must 'integrate with' provincial and national policies). Both the nature and the content of co-operative government depend on *the type of relation* to which it is applied. Confusion over the nature of the relation between spheres and a subsequent incorrect application of co-operative government has the potential to create or aggravate disputes. A distinction should be made between relations of hierarchy and those of equality. The principles of co-operative government apply both within and between the spheres of government. The Constitution defines

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clear lines of subordination between the three spheres of government. Examples of subordination are the powers of intervention in terms of section 100 and section 139. Another example is the overriding legislative power of national government in terms of section 44(2). A degree of subordination is also created by the scheme of legislative powers, laid out in the Constitution. The degree of (in)equality in the relationship between local government on the one hand and provincial and national government on the other hand depends, inter alia, on the subject matter.

Until the circumstances, which create subordination (hierarchy), exist, the spheres are equal partners

with regard to their respective functional areas. Therefore, a sweeping statement, saying that municipalities *must always* (in both unequal and equal relations) seek to integrate the exercise of their authority with national and provincial does not appreciate the varying application of co-operative government. In relations of equality, co-operative government can never mean that local government *must integrate* with national or provincial government. Rather, its application will emphasise respect for the institutional status of local government.

The exception under Section 3(2)

The savings clause in section 3(2)

does not help to meet the challenge against the Bill's erroneous view of co-operative government.

Unnecessary repetition

Firstly, the exception to local government's duty to seek integration with national and provincial government is superfluous: section 151(4) of the Constitution already states that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Deleting subsection (2) would make no difference since section 151(4) of the Constitution has general and overriding application.

Respect for institutional integrity is inherent to co-operative government

Secondly, subsection (2) has the potential to create confusion. Co-operative government obliges the different spheres of government to co-operate with each other and consider, whatever actions are being taken, not only their own interest but also the interest of the totality. Crucial in the application of co-operative government is respect for one another's institutional integrity (s 41(1)(e) of the Constitution). Respect for the constitutional status and the duty to abstain from compromising or impeding that status is *inherent* to co-operative government and *not an exception* to it.

Subsection (2) is directed at the wrong sphere

Thirdly, subsection (2) reiterates section 151(4) of the Constitution out of context. Section 151(4) is *directed at national and provincial spheres* and instructs *them* to guard, in the exercise of their powers, against compromising or impeding local government's insti-

tutional status. In its present form, subsection (2) is *directed at municipalities* and seems to allow them to refrain from seeking integration if that would result in a threat to their own constitutional status as if the onus is on local government to prevent their participation in the unconstitutional exercise of authority by other spheres.

Recommendations

The Centre proposed an alternative wording of subsection 3(1) to the members of the two parliamentary committees. This alternative wording no longer speaks of municipalities having to 'integrate with national and provincial spheres', but rather of a duty on municipalities to "*co-operate* with national and provincial spheres of government and other municipalities by *co-ordinating* the exercise of its legislative and executive authority with the policies, programmes, legislation and institutional arrangements of those other spheres of government and municipalities". Cooperation between municipalities is thereby rightly put under the co-operative government paradigm. Further, the use of the words 'co-operate' and 'co-ordinate' is not only in accordance with the text of section 41 of the Constitution, but also appreciates the reciprocity of the duties, imposed by it. It was further recommended to delete sub-section 3(2).

The savings clause in section 3(2) does not help to meet the challenge against the Bill's erroneous view of co-operative government.

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