Intergovernmental dispute resolution

'Jaw, don't war'

Conflict is one of the realities of political and social life. All gov ernments face similar challenges as they cope with the pressures of modern social and economic life. How they respond to those challenges is an important ingredi- ent in the well-being of their citizens. Local government will also have its share of dis- putes – among municipalities, but also with the other spheres of government.

Co-operative government

The chapter on co-operative government in the Constitution requires that organs of state must try to avoid litigation in settling intergovernmental disputes. A court may refer a dispute back to the parties where they have not exhausted all other remedies.

Section 41 requires that there must be national legislation providing for appropriate mechanisms and procedures to help settle such disputes.

The question that has to be answered is, what mechanisms and procedures may serve this purpose? Local government must participate in this debate.

Systems approach to inter-governmental dispute resolution

'Dispute systems design' has evolved in many countries in recent years. This involves planning, designing and implementing a set of structures and processes that deal comprehensively with all aspects of dispute prevention, management and resolution. The system should be developed through transparent and consultative processes. It requires resources and infrastructure to establish and sustain the system, and its effectiveness

key points

- Intergovernmental disputes should be resolved through political processes rather than through the courts.
- Dispute resolution managers with the responsibility for the management of disputes are one option to consider.

depends on appropriate training and education for those participating in it.

This systems approach can be contrasted with situations in which disputes are dealt with in an ad hoc way, usually at a late stage in their escalation, by those with indirect responsibility for their management.

In many countries this occurs in the name of alternative dispute resolution, known as ADR. ADR holds that it is often better to talk through problems than fight over them, as encapsulated in slogans such as 'mediate don't litigate' or 'jaw, don't war'. There is scope for developing ADR in relation to governmental disputes.

Dispute resolution systems must have clear and stated goals relating to fairness, flexibility, affordability, efficiency and effectiveness. For public law disputes there may be additional goals, for example, to reinforce and strengthen the political process. In the context of inter-governmental disputes in South Africa this is also a constitutional requirement: wherever possible 'political' disputes should be resolved through the political process and not by being presented to the courts as 'legal' disputes.

Where possible political disputes should be resolved by refinements to the political process, not by being presented to the courts as legal disputes.

Modern dispute resolution practice requires diagnosing conflicts to determine the most appropriate forms of intervention. Qualified 'gatekeepers' must undertake the selection of appropriate dispute resolution processes, though in some cases the processes might themselves be the subject of negotiation.

In broad terms there are three possible categories of dispute settlement, each with a number of individual concrete processes:

- facilitative processes, in which an outsider (an intervener) assists the parties to make decisions but is not able to make binding decisions for them (for example, mediation);
- advisory processes, in which the intervener assists the parties to make decisions and, where they are unable to do so, uses his or her expertise to guide and advise them on possible outcomes (for example, case appraisal); and
- determinative processes, in which the intervener investigates the case, hears the evidence and arguments of all sides, and makes a decision that is final and binding on the parties (for example, arbitration).

Modern dispute resolution practice requires early intervention and the initial use of low cost, internal, informal and non-adversarial processes. These are designed to deal with disputes quickly and locally and to prevent their escalation. Only at later stages should there more formal, external, competitive and resource-intensive practices be used, such as legal processes and the courts. The idea is to design systems so that processes are used in an incremental and systematic way, rather than automatically resorting to competitive and costly processes.

Dispute resolution systems also require identifying circumstances in which external interveners are required. The interveners could be independent investigators and fact-finders, neutral expert advisers, facilitators or arbitrators, who bring an independence and objectivity to the dispute resolution process that the parties and their professional advisers cannot.

Education and training are required for all those involved in dispute resolution systems, in relation to knowledge of conflict and its management, in the skills and techniques required for conflict intervention, and in the ethics and other values appropriate for the practice concerned.

Protocols and codes of conduct can provide guidance as to the appropriate role and conduct of the respective parties and a benchmark against which their conduct can be measured, for example in the event that a court wished to determine whether there had been adequate compliance with a binding dispute resolution procedure.

Dispute resolution managers system

One option of managing disputes is for each organ of state to have a dispute resolution manager (DRM), who would operate within the political

and administrative structures and have some autonomy in exercising his or her DRM functions.

DRMs would have primary responsibility for dealing with disputes relating to their organ of state. They would only be facilitators of the dispute resolution process and would not act as judges or umpires. Their decision making would be limited to how the dispute is managed. – for example, diagnosing dispute situations to determine which options should be pursued (such as investigation of facts and law, negotiation between responsible officials, or referral to the legal department concerned). The DRM would be the process facilitator.

The DRM in a particular organ of state would be obliged to liaise with their counterpart in the other relevant organ. Both would be required to diagnose the dispute and crystallise the issues requiring resolution – to get agreement at least on the nature and parameters of the dispute.

The DRMs would be professionally trained in the knowledge, skills and ethics of conflict management. For example, they could be trained in ways of extracting parties from positional negotiation, in avoiding the dynamics of conflict escalation and in focusing interest on the bargaining process.

Interveners

There may often be a need for an outsider to assist in the dispute resolution process and for this purpose there would be panels of independent dispute resolution interveners, such as mediators, conciliators and arbitrators. They could be drawn from both the private sector and from relevant state departments, provinces and municipalities.

Flexible system

There should be flexibility in the dispute resolution system for very small organs of state, for whom resource constraints may require the development of separate and different protocols.

The system would interface with existing inter-governmental structures. For example, there might be specific reference to the role of the local government Minmec in appropriate cases, or for inter-governmental forums to be used where the dispute is about a general principle and affects all other spheres of government.

Courts

It is inevitable that courts would be called on to assess whether there has been adequate compliance with a dispute resolution protocol so that the respective parties can institute legal proceedings. Where it is alleged that there has not been good faith compliance with the requirements of section 41 of the Constitution, courts would be able to review the conduct of the respective organs of state. If there has been no compliance they would be able to order a stay of proceedings.

It would be advantageous to develop the system in a context not coloured by existing disputes and political positions.

Conclusion

Even though inter-governmental disputes are currently rare it is a good time to develop a system as a precautionary step. It would be advantageous to develop the system in a context not coloured by existing disputes and political positions.

Here it is suggested that not only is there a constitutional imperative to set up mechanisms and procedures for inter-governmental dispute resolution, but there are also positive incentives in that good ADR can be considerably better for all parties than court experiences.

However, good ADR requires some degree of professional input and this leads to the focus on the dispute resolution managers as having the prime responsibility for the management of disputes. The DRMs would work under common procedures with a common language and would be subject to the same protocols and codes of conduct. The system would provide a basic structure, but would allow flexibility and opt-out options, and accommodation of smaller entities.

Laurence Boulle
Bond University
Australia