Concurrent Powers in South Africa

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1 Introduction

The South African system of multilevel government produces a number of manifestations of concurrency. In very general terms, it can be said that concurrency as a constitutional mechanism permits two or more levels of government to exercise powers in the same functional area, subject to overrides or dispute-resolution arrangements. It may thus offer a platform for regulated competition for power in the same functional area and open space for subnational governments seeking to assert power. On the other hand, concurrency may also have a centralising effect when subnational government is pitted against a stronger central government.¹

The effect of concurrency thus depends on the context within which the powers are exercised. This includes matters such as the history of the multilevel or federal polity, current political dynamics, and capability levels of national and subnational governments. In this chapter, it will be argued that concurrency has had a centralising effect on South Africa’s nine provinces. This is because the space for centralisation offered by concurrency has been used very effectively by the central government in critical policy sectors, with the backing of a powerful ruling party. It will also be argued that, insofar as concurrency affects the third order of government, namely local government, a different picture emerges, with local governments effectively asserting their constitutional authority.

2 History and Context

The emergence of South Africa’s multilevel government system with the introduction of the post-apartheid democratic order has been extensively

documented. It does not need to be traversed in detail here, except to emphasise a number of points that explain and underscore the importance of this context to South Africa’s framework, policy and practice of federalism.

First, provincial constitutional competence did not emerge on the back of formerly independent units coming together into one federal structure. Rather, it was a result of the federalisation of a formerly centralised state structure. Secondly, the nine provinces that were created by the 1993 Constitution amalgamated four provinces and ten homelands with great variation in governance capability among them. The four provinces that made up the Union of South Africa (namely, Transvaal, Orange Free State, Natal and the Cape) had existed since 1910 and had developed a reasonable administrative capability that was, of course, used to pursue an undemocratic and racist policy. The ten homelands were more recent creatures of the apartheid state – illegitimate, fragmented and starved of authority, resources and economic potential. Their incorporation into the provincial system brought specific challenges for the provinces affected, leading the National Development Commission to remark in its National Development Plan that ‘[p]rovinces that incorporated substantial former homelands consistently perform worse than others’. In general, the capability of provincial governments to discharge their constitutional functions is uneven at best and in some cases non-existent, prompting national government to take over the administration of provincial departments in four provinces in 2011.

Thirdly, the African National Congress (ANC) is the dominant political party across all three spheres of government. It controls the central government and eight of the nine provinces with outright majorities. In more than 85 per cent of the country’s municipalities, it controls the municipal council. The 2014

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