

INTERGOVERNMENTAL RELATIONS AND COOPERATIVE GOVERNANCE IN SOUTH AFRICA: CHALLENGES AND PROSPECTS

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ABSTRACT

Over the past 20 years, South Africa has made important strides in building its intergovernmental fiscal relations, such as general budget and financial management reforms, budget preparation and budget implementation. The current legislative provisions and court decisions referred to in the article confirm the distinctiveness, interdependence, and interrelatedness of the various spheres of government and are also an indication that the national-provincial-local government nexus chain is still holding. There are, however, incidents that reflect some challenges within the system, some of them structural. The incidents of boundary disputes that led to violent protests might be an indication that there are weaknesses/challenges in the government-civil society interface. Incidents of interventions and litigations among the various spheres of government might be an indication that the level of mutual trust and good faith within various spheres of government needs some improvement. It is, however, submitted

that the National Council of Provinces, as an oversight body mandated to safeguard the interest of provinces, can play an important role in promoting the government-civil society interface as well as intergovernmental relations and cooperative governance.

INTRODUCTION

In terms of section 40 of the Constitution of the Republic of South Africa, 1996, government is constituted as national, provincial and local spheres that are distinctive, interdependent and interrelated. The system of intergovernmental relations and cooperative government in South Africa is enshrined within the Constitution and embodies the best ideals of democracy. Cooperative governance refers to a form of government that espouses political flexibility, negotiation, compromise and less reliance on the rigid distribution of powers between the three spheres of government. It also requires a synthesis and coordination of the functions and endeavours of the three spheres of government working together for the common

good of the nation as a whole (UNISA, 2005:72).

It was anticipated that the establishment of such a system will enable all three spheres of government to continually strive to cooperate with one another in mutual trust and good faith.

Despite positive developments in the past there are, however, indications that the system has encountered some challenges over the past years. Some of the challenges that have been identified are:

- Tensions within the implementation of plans, strategies, programmes, funding and other resources, quality of leadership, capacity building and training and the practical cooperation of all spheres (Layman, 2003:79).
- Incidents of interventions and settlement of intergovernmental disputes through litigation despite the constitutional provisions that spheres of government should avoid legal proceedings against one another.
- Tensions within the various spheres of government that is seen in the litigations among the spheres.

The aim of this article is to provide an overview of intergovernmental relations and cooperative governance in South Africa, as well as the challenges and prospects, and the possible role of the National Council of Provinces (NCOP) as an oversight structure to promote synergy within the system. For this purpose the article attempts to respond to the following questions:

- Is the chain within the South African national-provincial-local government still holding?
- What is the state of the South African government civil society interface?
- Is the South African intergovernmental relations system working as prescribed in the Constitution?

The article comprises nine sections: Section 1: Introduction; Section 2: Definitions; Section 3: *Intergovernmental Fiscal Relations Act (IFR Act)* and the division of revenue as tools and mechanisms for Parliament to advance the needs of the people; Section 4: Evolution of the IGR system in South Africa; Section 5: Challenges to intergovernmental relations and cooperative governance in South Africa; Section 6: Incidents of litigations among spheres of government; Section 7: The role of the NCOP in promoting cooperative government and intergovernmental relations; Section 8: Conclusion; and Section 9: References.

DEFINITIONS

The two concepts of intergovernmental relations and cooperative governance, although interrelated, are, however, not the same. Intergovernmental relations refers to the relationships between the three spheres of government as stipulated within the Constitution. In terms of section 40(1) of the South African Constitution, in the Republic, government is constituted as national, provincial and local spheres that are distinctive, interdependent and interrelated. For this reason, provincial and local government are

spheres of government in their own right, and are not a function or administrative implementing arm of national or provincial government. Although the three spheres of government are autonomous, they exist in a unitary South Africa and they have to work together on decision-making and must coordinate budgets, policies and activities, particularly for those functions that cut across the spheres.

In spelling out the principles of cooperative government and intergovernmental relations, section 41(1) of the Constitution binds all spheres of government and organs of state in each sphere of government to three basic principles:

1. A common loyalty to the Republic as a whole, meaning that all spheres are committed to secure the well-being of the people of the Republic and, to that end, must provide effective, transparent, accountable and coherent government for the Republic as a whole.
2. The distinctiveness of the spheres should be respected and each sphere must remain within its constitutional mandate and, when exercising its powers, must not do so in a manner that encroaches on the geographical, functional or institutional integrity of another sphere, except where specifically directed otherwise.
3. The spheres of government must take concrete steps to realise cooperative government by fostering friendly relations, assisting and supporting one another, informing one another of, and

consulting one another on, matters of common interest, coordinating their actions and legislation with one another, adhering to agreed procedures, and avoiding legal proceedings against one another.

According to Malan (2005:228), intergovernmental relations refers to the fiscal and administrative processes through which spheres of government share revenues and other resources generally accompanied by special conditions that must be satisfied as prerequisites to receiving assistance. The author further views intergovernmental relations as a set of formal and informal processes, as well as institutional arrangements and structures for bilateral and mutual cooperation within and among the three spheres of government.

It is in the event of failure by one sphere to meet any prerequisites or provide the assistance required, or a failure to cooperate or to compromise, that tension might arise within intergovernmental relations. Malan (2005) is of the view that the nature of interaction among different spheres of government varies constantly in terms of the degree of cooperation, depending on the dynamics of the system and the role players involved, at any given time, and in accommodating and managing interdependence, geographical and social diversity as well as ongoing comprehensive transformation.

Cooperative governance, in terms of the Constitution, requires that the three spheres of government should work together, and

cooperate with one another in mutual trust and good faith to provide citizens with a comprehensive package of services. The Constitution also requires that the three spheres have to assist and support each other, share information and coordinate their efforts. Cooperative governance further refers to a form of government that espouses political flexibility, negotiation, compromise and less reliance on the rigid distribution of powers between the three spheres of government. It also requires a synthesis and coordination of the functions and endeavours of the three spheres of government working together for the common good of the nation as a whole (UNISA, 2005:72).

To further intergovernmental relations and cooperative governance principles, section 41(2) of the Constitution requires that an Act of Parliament must establish or provide structures and institutions to promote and facilitate intergovernmental relations and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The Constitution further provides that an Act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. For this reason, Parliament has passed the following pieces of legislation: the *Intergovernmental Relations Framework Act, 2005*, and *Intergovernmental Fiscal Relations Act, 1997*.

The purpose of the *Intergovernmental Relations Framework (IRF) Act, 2005*, is to

establish a framework for the national, provincial and local governments to promote and facilitate intergovernmental relations, and also to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes and to provide for matters connected therewith.

The *IRF Act*, as a tool and mechanism, creates the following intergovernmental forums and structures to advance the needs of the people – President’s Coordinating Council (PCC), National Intergovernmental Forum (NIF), Provincial Intergovernmental Forum (PIF) and Municipal Intergovernmental Forum (MIF).

The roles of these forums and structures serve as the consultative forums and structures, among others, as well as:

- To discuss performance in the provision of services in order to detect failures and to initiate preventive or corrective action when necessary.
- To consider reports from other intergovernmental forums on matters affecting the national interest and other reports dealing with the performance of provinces and municipalities on service delivery.

The Act further provides that the cabinet member responsible for the functional area for which a national intergovernmental forum is established may, in consultation with the President, refer any matter discussed in the forum to the PCC or refer the matter to the Budget Council or Budget

Forum, if such matter has implications for the national budget.

Nothing stops any of the forums above, especially the NIF, PIF and MIF, from referring any matter discussed in the forum to the NCOP or any of its committees especially if such a matter has policy or budgetary implications.

INTERGOVERNMENTAL FISCAL RELATIONS ACT AND THE DIVISION OF REVENUE AS TOOLS AND MECHANISMS FOR PARLIAMENT TO ADVANCE THE NEEDS OF THE PEOPLE

The purpose of the *IFR Act* is to promote cooperation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters; to prescribe a process for the determination of an equitable sharing and allocation of revenue raised nationally; and to provide for matters in connection therewith.

The Act further makes provision for the establishment of the Budget Council and Local Government Budget Forum, a process of sharing revenue among the three spheres of government and the role of the Financial Fiscal Commission (FFC) in the division of revenue among the three spheres of government.

The Budget Council (that comprises the Minister of Finance and MECs for Finance of each province) is a body in which the national government and the provincial governments consult on:

- any fiscal, budgetary or financial matter affecting the provincial sphere of government.
- any proposed legislation or policy that has a financial implication for the provinces, or for any specific province or provinces.
- any matter concerning the financial management, or the monitoring of the finances, of the provinces, or of any specific province or provinces.
- any other matter which the Minister has referred to the Council.

The Local Government Budget Forum consists of the Minister of Finance, the MEC for Finance of each province, five representatives nominated by the national organisation recognised in terms of the *Organised Local Government Act, 1997*, and one representative nominated by each provincial organisation recognised in terms of that Act. The local Government Budget Forum is a body in which the national government, the provincial governments and organised local government consult on:

- any fiscal, budgetary or financial matter affecting the local sphere of government.
- any proposed legislation or policy that has a financial implication for local government.
- any matter concerning the financial management, or the monitoring of the finances, of local government.
- any other matter that the Minister has referred to the Forum.

The process for the sharing of revenue raised nationally among the national, provincial and

local spheres of government in terms of section 214(1)(a), the division of the provincial share among the provinces in terms of section 214(1)(b), and any allocation of money to the provincial governments, local government and municipalities in terms of section 214(1)(c) of the Constitution, must be effected in accordance with section 8 of this Act.

The *Division of Revenue Act* is passed for each financial year to provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government for that financial year, and to provide the respective responsibilities of all three spheres pursuant to such division. The Act also makes provision for various categories of conditional allocations (grants) to provinces and municipalities. The grants are allocated to supplement the funding programmes or functions funded from provincial and municipal budgets. There are provisions in the Act for the role of transferring a national officer and receiving officers at both provincial and local spheres. The Act is passed as required by sections 214(1) of the Constitution and 7(3) of the *Money Bills Amendment Procedures and Related Matters Act* (Act No. 9 of 2009).

Section 214(1) of the Constitution of the Republic of South Africa, 1996, requires an Act of Parliament to provide for:

- (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government.
- (b) the determination of each province's equitable share of the provincial share of that revenue.

- (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

Section 7(3) of the *Money Bills Amendment Procedure and Related Matters Act, 2009* (Act No. 9 of 2009), requires the introduction of the Division of Revenue Bill at the same time as the Appropriation Bill¹ is introduced by the Minister of Finance.

EVOLUTION OF THE INTER-GOVERNMENTAL RELATIONS SYSTEM IN SOUTH AFRICA

According to the government policy document, intergovernmental relations refers to "the complex and interdependent relations among three spheres of government as well as the coordination of public policies among the national, provincial and local government" (DPLG, 2008:7). The term "intergovernmental relations system" is further used in policy documents to refer to the various components of the governance, administrative and fiscal arrangements operating at the interface between national, provincial and local governments. The following components, which are described overleaf, contribute to the effective functioning of intergovernmental relations and include:

¹ An Appropriation Bill is a bill introduced to Parliament to appropriate money from the National Revenue Fund for the requirements of the State for a particular financial year.

- Legislation and regulation related to IGR which, *inter alia*, describe the distribution of powers and functions between and within spheres of government.
- IGR structures (such as forums and other bodies).
- Intergovernmental processes such as planning and budgeting.
- IGR instruments (such as implementation protocols and guidelines).
- Mechanisms for monitoring, communication, support and supervision.
- Intergovernmental dispute resolution procedures.

The development of the nascent IGR system in South Africa may be categorised into the three main phases: the period 1994-2000, 2001-2004 and 2005 to date (DPLG, 2008:8).

Transforming the Macro-Organisation of the State and Creating an IGR System (1994-2000)

This phase centred around the creation of a single public service incorporating the ex-homeland administrations, establishment of the nine provincial governments, cabinet reforms such as the introduction of the cluster system and an end to the transitional phase of local government transformation, culminating in the demarcation of 283 municipalities. The primary focus was initially on the creation of specialist intergovernmental forums and processes, especially in regard to concurrent functions.

This period is also characterised by the development of key legislation and policy documents with regard to the system of intergovernmental relations and cooperative governance. The first is the Constitution, 1996, that lays down the principles of cooperative governance and intergovernmental relations and also stipulates the need for intergovernmental relations legislation.

The second amendment of the Constitution of the Republic of South Africa, 1996, was introduced so as to amend the manner of determining the different types of municipality to be established in a province; and to provide that, where a municipal boundary is determined across a provincial boundary, national legislation must make provision for establishing a municipality of a type agreed to by the provincial governments concerned, and for the exercising of executive authority over that municipality. The amendment was enacted by Parliament and signed by then President Mandela on 28 September 1998 and it came into force on 7 October of the same year.

This was followed in 1998 by the White Paper on Local Government in South Africa. Section C of this White Paper situates local government within a system of cooperative government. It notes that, under the new Constitution, local government is a sphere of government in its own right, and not a function of national or provincial government. While acknowledging that the system of intergovernmental relations requires further elaboration, the section provides a preliminary outline of the roles and responsibilities

of national and provincial government with respect to local government. It also provides a summary of national departmental programmes that impact on local government, and notes that local government is increasingly being seen as a point of integration and coordination for the delivery of national programmes. This section concludes with a discussion on the role of organised local government, and horizontal relations between municipalities.

Subsequent to the White Paper on Local Government was *the Local Government-Cross Boundary Municipal Act* (Act No. 29 of 2000) and *Local Government: Municipal Systems Act* (Act No. 32 of 2000).

The *Cross-Boundary Act* gave effect to section 155(6A) of the Constitution by authorising the provincial executives affected to establish cross-boundary municipalities and to provide for the redetermination of the boundaries of such municipalities under certain circumstances.

The *Municipal Systems Act* established a framework for support, monitoring and standard setting by other spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the overall social and economic upliftment of communities in harmony with their local natural environment. The Act is based on the recognition of the fact that the Constitution of our non-racial democracy enjoins local government not just to seek to provide services

to all the people, but to be fundamentally developmental in orientation.

The 1998 budget processes saw the introduction of the three-year medium term expenditure framework (MTEF) as part of intergovernmental budget process. The intergovernmental budget process is guided by the *Intergovernmental Fiscal Relations Act* (Act No. 97 of 1997), which took effect on 1 January 1998. The Act establishes a formal process for considering intergovernmental budget issues and is designed to facilitate consultation and promote a budget-making process that is fair and equitable. It provides a legislative basis for cooperative governance through the Budget Council, which brings together the Minister of Finance and provincial Finance MECs, and the Budget Forum, which, in addition, includes organised local government.

The introduction of the MTEF process has improved intergovernmental coordination and led to several new initiatives in the budget process. National departments, provinces and local governments came together to play a much more crucial role in the development of sectoral policy, particularly in the areas of education, health, welfare and personnel expenditure.

The 1998 Budget tabled by the Minister of Finance included the Division of Revenue Bill (later passed as *Division of Revenue Act* (No. 28 of 1998) with three-year allocations for the national government, the nine provinces and local government. These allocations reflected the outcome of a lengthy

consultative process among stakeholders and the application of an objective, demographically based formula in determining the provincial equitable shares.

The *Public Finance Management Act* (Act No.1 of 1999) as amended by Act No. 29 of 1999, has been enacted to give effect to various sections (213, 215, 216, 217, 218 and 219) of the Constitution. The sections require national legislation to establish a national treasury, to introduce generally recognised accounting practices, introduce uniform treasury norms and standards, to prescribe measures to ensure transparency and expenditure control in all spheres of government, and to set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.

The Act and the Constitution confer certain powers on national government, in particular the national treasury, to determine the financial management framework over all organs of state in all spheres of government.

Operationalising the IGR System (2001-2004)

The period 2001-2004 is seen as the operationalisation of the IGR system, since it was during this phase that the IGR system unfolded rapidly with only minimal regulation. To give operational substance to the concept of cooperative government, many non-statutory national and provincial intergovernmental forums emerged (such as the President's Coordinating Council, the

Forum of South African Directors-General, provincial intergovernmental forums). This period also saw increased organised local government engagement in IGR, as well as increased collaborative joint work, programmes and projects across the three spheres. It was, perhaps, prudent to go this route, since institutions that were initially envisaged to be crucial have proven ineffective and been superseded by more effective institutional arrangements. The period was further characterised by the promulgation of some legislation, in particular within the local sphere of government.

Consolidating the IGR System (2005 to date)

The introduction of the *Intergovernmental Relations Act* of 2005 sketched out a broad, general statutory framework for the practice of IGR, regulated IG forums and provided a basic framework for the settlement of intergovernmental disputes. With the increased formalisation in the regulatory environment came a shift of emphasis to intergovernmental instruments facilitating the effective practice of IGR.

CHALLENGES TO INTERGOVERNMENTAL RELATIONS AND COOPERATIVE GOVERNANCE IN SOUTH AFRICA

Boundary Disputes

Some of the intergovernmental relations and cooperative governance challenges, experienced over recent years in South Africa,

are disputes over boundaries, some of which turned violent and led to the destruction of properties. According to Naidu and Narsiah, while the notion of cross-border municipalities and the challenges associated with them is not unique to South Africa, they are an indication of certain weaknesses in the demarcation of boundaries. They indicated that the violent uprising in Khutsong, and widespread community anger in Matatiele, Moutse and Bushbuckridge, should tell us that the process of demarcating provinces in South Africa, as far as those communities are concerned, had significant shortcomings. Issues of public participation, intergovernmental relations, as well as the exercising of undue political influence, as opposed to the will of the people, were three of the major challenges encountered in the South African context (De Villiers, 2009:17).

Since their establishment, cross-boundary municipalities (in terms of the *Cross-Border Municipalities Act 29 of 2000*) have been difficult to administer. They were jointly administered by Members of the Executive Councils (MECs) responsible for local government in the provinces whose boundaries they straddled. The joint administration was, however, limited to the exercise of executive authority falling within the portfolios of local government. Legislation and executive authority, exercised by other departments, were administered separately by the responsible MECs. According to the

memorandum submitted to the Presidential Coordinating Council (PCC), this resulted in different provincial legislation applying to the same municipality (PCC: 2000).

The *Constitution Twelfth Amendment and Cross-Boundary Laws Repeal and Related Act, 2005*, led to a number of court challenges for different reasons in Matatiele, Merafong and Moutse. Although in Matatiele the court found the amendment and the Act invalid, and the question relating to the rationality of the Twelfth Amendment was left undecided, it was decided in the Merafong and Moutse cases. In the latter cases, the Court held that the objectives of the Twelfth Amendment were: (a) to introduce new criteria for the determination of provincial boundaries; (b) to abolish cross-boundary municipalities; and (c) to create viable and sustainable municipalities.

The passing of the *Twelfth Constitutional Amendment and Cross-Boundary Municipalities Laws Repeal and Related Matters Act, Act 23 of 2005*, led to a legal challenge in Matatiele that nearly led to a constitutional crisis² that might have led to the breakdown in the orderly operations of government. The crisis was, however, averted when the Constitutional Court ruled that the order declaring the laws invalid was suspended for eighteen months to afford Parliament and the Legislature for the Province of KwaZulu-Natal time to remedy

² The Court ruled that the parts of the Constitution Twelfth Amendment of 2005 and Cross-Boundary Municipalities Laws Repeal and Related Matters Act, Act 23 of 2005, which transfers the area that previously formed the local municipality of Matatiele from KwaZulu-Natal to Eastern Cape, were declared to be inconsistent with the Constitution and, therefore, invalid – CCT 73/05 para 114.

the defect (2006: para.114). The events following the passing of the two amendments showed some weaknesses in the intergovernmental relations and cooperative governance processes.

In the Moutse Demarcation Forum case, the boundary dispute was triggered by the then *Cross-Boundary Amendment Act, 2005*, where the applicants requested the court to declare the Act, as well as the *Constitution Twelfth Amendment Act*, invalid on the basis of inadequate public participation processes and the rationality of the Act. The Court, however, found no basis for such allegation (2011: para. 43 and 82).

What can be deduced from this case is that while the Forum tried to cast doubt on the legitimacy of the legislation, its own credibility remains questionable to the extent to which it reflected public interest. While interest groups might be a viable option in complex issues, the extent to which such a group adequately reflects public interest will depend on whether it represents diverse or concentrated interests. An interest group with diverse interests has the potential to misrepresent public interest, unlike a group with concentrated interests. These are the issues public participation processes should capture to avoid any discord. However, this might be a strong argument for calls of a referendum in some situations.

In the Merafong case, the application to the Constitutional Court opposed parts of the Twelfth Amendment of the Constitution and Cross-Boundary Municipalities Laws

Repeal and Related Matters Amendment Bill incorporating Merafong into North West Province. The applicants opposed the incorporation on the basis that the Gauteng Provincial Legislature (2008: para. 41):

- failed to facilitate public participation.
- also failed to exercise its legislative powers rationally.

The case was heard on 20 September 2007 and was decided on 13 June 2008. The findings of the Court were that (2008: para. 116):

- the Gauteng Legislature created a reasonable opportunity for the public to express its views and those views were taken into account.
- the Legislature did not exercise its powers irrationally.

Despite the Court ruling, protests against the incorporation of the area into North West Province continued until government reviewed its position and reincorporated the area into Gauteng by the Constitution's Sixteenth Amendment Bill and along with Cross-Boundary Municipalities Laws Repeal and Related Matters Amendment Bill. The pieces of legislation were passed by the NCOP on 19 March 2009 and signed into law by then President of the country, Kgalema Motlanthe (2009:1).

This latter government decision vindicated Sachs when he said in the "Doctors for life case" (para. 231), "in our country active and ongoing public involvement is a

requirement of constitutional government in a legal sense, thus, where the legislature makes a decision, and such decision does not correctly reflect what was deduced during the public participation process, the legitimacy of legislation which flows from such a decision will be tainted".

According to Narsiah and Maharaj (1999: 44), despite its historical and socio-economic baggage, the Bushbuckridge border dispute might have been aggravated by the failure of political intervention. The then premiers of the Northern and Mpumalanga provinces went to Bushbuckridge and came out against a referendum on the grounds that the dispute was a purely political issue and, thus, could be solved via political mechanisms (1999:44).

They also indicated (1999:51) that the struggle of the people of Bushbuckridge (for incorporation into Mpumalanga from then Northern Province) was rooted in the material conditions of their existence. Their struggle was to redefine provincial borders, so that their material conditions could be addressed.

Despite the final incorporation of Bushbuckridge into Mpumalanga, the situation does not seem to have improved, as the municipality has been under administration since 17 April 2013 in terms of section 139(1)(b) of the Constitution. Section 139(1)(b) provides for provincial intervention in a municipality when such a municipality cannot, or does not, fulfil an executive obligation in terms of the Constitution or legislation.

Structural Challenges

The Bushbuckridge/Merafong/Moutse/Matatiele situations are not unique cases, but a symptom of structural challenges facing the local sphere of government, which might be an indication that the intergovernmental relations system has challenges. Such structural challenges include capacity constraints and a low revenue base that inhibits some municipalities from delivering appropriate services. Some of the reactions to these challenges were the introduction of the Project Consolidate, Siyenza Manje Project, Local Government Turn-Around Strategy, Operation Clean Audit and Back to Basics.

The current Municipal Demarcation Board municipal mergers have already led to government being on a collision course with some communities and other spheres of government.

The residents of Zamdela outside Sasolburg staged a violent protest, in January 2013, over the proposed merger of the Metsimaholo and Ngwathe municipalities. The Municipal Demarcation Board (MDB) later announced, in August 2013, that it had withdrawn its proposal to merge the Metsimaholo Municipality in Sasolburg with the Ngwathe Municipality near Parys in the Free State. The board had taken a decision not to further pursue the mergers after conducting further consultations and investigations, and was convinced that the proposal did not comply with the criteria set in the legislation (SABC News, 2013:1).

Recently, the Malamulele community vowed to continue with protest action after its bid to have its own municipality failed with the Municipal Demarcation Board and this raised fears that Malamulele could become another Khutsong, where residents protested for months and refused to vote in local government elections about eight years ago (*City Press*, 2011:1).

While the African National Congress (ANC) welcomed the Municipal Demarcation Board's announcement that it was to merge the Midvaal Local Municipality with Emfuleni Local Municipality to form a new metropolitan, the Democratic Alliance (DA) felt the decision was politically motivated and threatened to take court action. The ANC is in control of Emfuleni Municipality while the DA controls Midvaal Municipality (*City Press*, 2011:1).

Project Consolidate

In May 2004, Project Consolidate was introduced to address challenges within local government, with a particular emphasis on a hands-on, practical programme of engagement and interaction by national and provincial government with local government for the period 2004-2006.

Project Consolidate was followed by the Siyenza Manje programme, which was initiated in June 2006, and was funded by the National Treasury and managed by the Development Bank of South Africa. The programme was seen as a complement to Project Consolidate. It was a response to

severe skills constraints in under-performing municipalities, especially in relation to engineers, project managers, financial experts and development planners. It was, however, later reported that, from 1 April 2011, the Bank would not be responsible for the Siyenza Manje programme anymore. Financial management would fall under the Department of Finance and technical aspects under the Department of Cooperative Governance and Traditional Affairs (PMG, 2011).

Local Government Turn-Around Strategy

The failure of Project Consolidate led to the Local Government Turn-Around Strategy (LGTAS). The *City Press* quoted then Cooperative Governance and Traditional Affairs Departmental spokesperson, Vuyelwa Vika, as saying that one of the weaknesses of Project Consolidate was that it was not sustainable and that in the last two years of its implementation (2004 and 2006), symptoms of fatigue had emerged. Furthermore, the programme could not resolve persistent internal challenges, such as the high staff turnover of the municipal management, corruption and non-compliance in practices (2011).

The LGTAS was approved by Cabinet during December 2009 and was seen as the overarching strategy that includes flagship projects such as Operation Clean Audit (OPCA), Business Adopt a Municipality, Revenue Enhancement, as well as the Special Purpose Vehicle (SPV) now called the Municipal Infrastructure Support Agency (MISA).

Local Government Performance on Audit Outcomes

The Auditor-General's (AG) latest MFMA Report (2013) shows that the progress towards clean audits has been slow, with the number of clean audits remaining at the same low level of 5 percent for the past three years, and the overall audit outcomes regressed, as 41 auditees improved, but 50 auditees regressed. The report also shows that the local government is experiencing capacity constraints with regard to certain crucial skills that are necessary for service delivery. It further shows that a lack of capacity in local government is affecting its ability to account for the public resources it has to administer on behalf of society. At 73 percent of the auditees, vacancies in key positions and key officials, without the minimum competencies and skills, continued to make it difficult for these auditees to produce credible financial statements and performance reports.

National and Provincial Interventions

Over the period 2009-2013, since the introduction of LGTAS, there has been a total of 37 legislative interventions, of which 27 were triggered by section 139(1)(b) of the Constitution, one was triggered by section 139(1)(c) of the Constitution, two were triggered by section 139(4) of the Constitution, one was triggered by section 139(5)(b) of the Constitution, two were triggered by section 100(1)(b) of the Constitution, one was triggered by section 139(5)(a) of the

Constitution, and three were triggered by section 136(2) of the *Municipal Finance Management Act* (Act No. 56 of 2003) (Tau, 2014:3).

The effectiveness and sustainability of the interventions referred to is something that might call for further research. The Financial Fiscal Commission (2012:5) has, however, indicated some of the weaknesses that need urgent attention. The first challenge is the lack of enabling legislation and the misalignment between constitutional provisions that apply to municipalities and provinces. Second, the framework for intervention at provincial level is found less developed and objective compared to that of local government. The Commission is of the view that this is also the case for the constitutional framework and subordinate legislation (i.e. the PFMA and its regulations).

The Commission shows that the local government intervention framework (outlined in the MFMA of 2003) is more detailed, explicit and objective. It clearly sets out different types of interventions (financial recovery plans) and factors under which provinces may initiate voluntary or mandatory interventions. The MFMA also provides a system of checks, balances and protection, by calling for an obligatory consultation between the MEC and the Mayor before intervention and allowing municipalities to apply for a stay of legal proceedings against creditors during the intervention. Unlike the PFMA, the MFMA also sets out criteria for determining the seriousness of financial problems, such as the failure to make

payments or approve budgets, and adverse audit opinions (2012:5).

The Department of Cooperative Governance and Traditional Affairs indicated during the public hearing in Parliament that, while cooperative governance was vital for the proper application of Section 139 interventions, it had been hamstrung by the practice of voluntarism coupled with vague policy guidelines (PMG, 2010:1).

Back to Basics

The programme followed on the sentiments made by the President, Jacob Zuma, during his State of the Nation Address, on 17 June 2014, and also the Minister of Cooperative Governance and Traditional Affairs' 2014 Budget Vote speech (Department of Cooperative Governance and Traditional Affairs, 2014:1).

The vision portrayed within this approach is that of a "developmental local government system that would be the building block on which the reconstruction and development of our country and society was built, a place in which the citizens of our country could engage in a meaningful and direct way with the institutions of the state" (Department of Cooperative Governance and Traditional Affairs, 2014:4).

Despite some of the achievements made over the period 1994 to date, the government acknowledges that there are still challenges within the local sphere of government. Some of these challenges are institutional

incapacity, widespread poverty, unviable municipalities, low revenue collection by municipalities, slow or inadequate responses to service delivery challenges, and inadequate public participation (2014:6).

The essence of the government's Back to Basics approach is to ensure that municipalities (2014:7):

- put people and their concerns first and ensure constant contact with communities through effective public participation platforms.
- create conditions for decent living by consistently delivering municipal services of the right quality and standard.
- be well governed and demonstrate good governance and administration.
- ensure sound financial management and accounting and prudently manage resources, so as to sustainably deliver services and bring development to communities.
- build and maintain sound institutional and administrative capabilities administered and managed by dedicated and skilled personnel at all levels.

What may, however, be seen as a challenge to the success of this programme is the collaboration by various role players within the various spheres, as well as the availability of appropriate resources and skills to monitor and implement the programme.

For this reason, it is recommended that there should be an effective utilisation of the existing forums and structures, as well

as the dedication of the required resources (monetary and human) to this programme.

Unintended Consequences of the Norms and Standards

The principles of cooperative governance bind all spheres of government in a close relationship to ensure that public services are delivered in an efficient and seamless manner. For this reason, there is a clear division of powers and functions among the various spheres of government. National government sets policy and legislation while the responsibility for, and accountability of, implementation resides within the provincial and local spheres of government. Although norms and standards are seen as powerful mechanisms for national government to contribute towards the achievement of policy outcomes, they might lead to unintended consequences.

In a situation where such norms and standards are costly to implement, they compromise the autonomy of provincial and local spheres of government to spend their equitable shares of the budget as they deem fit. Jitsing, Govender and Chisadza (2014:1) are of the view that "when prescribing norms and standards, it is important to understand their cost implications and identify the appropriate sources of funding within the fiscal framework". They recommend that such a framework "should ideally be formulated in conjunction with provinces and local government, so that all spheres of government share a common understanding of the purpose of norms and

standards as well as the fiscal implications" (2014:16).

Perceived Failure to Provide Socio-Economic Rights

Apart from the basic human rights, the South African Constitution enshrines a group of socio-economic and social rights, such as the right to education, health, housing and social assistance.

What should be noted is that any perceived failure by government to provide such a socio-economic right may prompt judicial intervention. In some instances, such judicial intervention might have far-reaching consequences within the intergovernmental relation system; that is, creating a need for additional funding, support or intervention.

In the *City of Johannesburg vs Blue Moonlight* case, the court was called upon to consider whether the City's policy, which excluded people evicted by private landowners from the provision of temporary shelter, was consistent with section 26(2) of the Constitution. The Court ruled that, while the City is entitled to approach the province for assistance, the City, however, has the power and the duty to finance its own emergency housing scheme (2012: para. 74).

LITIGATIONS AMONG SPHERES OF GOVERNMENT

Other challenges faced by intergovernmental relations and cooperative governance in the country were characterised by situations

where various spheres took each other to court. Section 41(3) of the Constitution provides that organs of state, involved in intergovernmental dispute, must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute. Incidences of court cases among the spheres might be an indication of some of the challenges with the existing dispute resolution mechanisms and procedures.

City of Cape Town vs South African National Road Agency and Others Case

On 27 March 2013, the City filed an urgent application in the court for an interdict against South African National Roads Agency Limited (SANRAL) from proceeding to implement or advance the N1/N2 Winelands Toll Highway Project, including the conclusion of any contract and the commencement or undertaking of construction activity, and for an order compelling SANRAL to provide a complete record of documents. On 21 May 2013, the City's application for an interdict against SANRAL was granted, restraining SANRAL from taking any steps to implement the proposed project pending the final determination of the City's review application (2013: para. 1).

The City was given the interdict and was also successful in its application that SANRAL be compelled to provide a number of documents that formed part of SANRAL's

decision-making process, and which SANRAL had been refusing to provide (2013: para. 116).

The decision by the City was taken after the intergovernmental dispute resolution process could not resolve the dispute. On 16 March 2012, the facilitator, in terms of the intergovernmental dispute resolution process, reported, in terms of section 43(1) (b) of Act 13 of 2005, that the dispute resolution process had come to an end (2013: para. 20).

Minister of Police vs Premier of Western Cape and Others Case

On 28 November 2011, the Women's Legal Centre, acting on behalf of several non-governmental organisations, delivered a complaint to the Premier of the Western Cape (Premier) regarding alleged inefficiencies in the South African Police Services (SAPS) and the City of Cape Town Municipal Police Services (Metro Police) operating in Khayelitsha. The complainants requested the Premier to appoint a commission of inquiry to deal with the complaint. The Premier forwarded the complaint to the Minister of Police, National Commissioner of the SAPS and the Provincial Commissioner of the SAPS.

Correspondence was exchanged between the various parties over a period of approximately eight months. Eventually, the Western Cape Provincial cabinet approved the appointment of a commission of inquiry (Commission) and the Premier conveyed

to the public her decision to appoint the Commission on 22 August 2012. The Commission issued subpoenas to various members of the SAPS.

The applicants approached the Constitutional Court after dismissal of its application by the Western Cape High Court. The Constitutional Court also refused to make an order declaring the Premier's decision to establish the Commission inconsistent with the Constitution and invalid, and further held (2013:1) that:

- Section 206(5) accords a province the power to establish a commission of inquiry into policing.
- Section 41 of the Constitution does not require the Premier to declare a dispute before she exercises powers properly vested in her.

Premier of Limpopo Province vs Speaker of Limpopo Provincial Legislature and Others

In this case, the application had been referred to the Constitutional Court by the Premier of the Limpopo Province pursuant to the provisions of section 121 of the Constitution that concerns the authority of provincial legislatures to pass legislation dealing with their own financial management (2011: para.1).

The Court ruled that the Bill is unconstitutional, because the Provincial Legislature does not have the legislative authority to pass legislation with respect to its own financial management (2011: para. 60).

Mnquma Local Municipality and Others vs Premier of Eastern Cape Province and Others

This application concerns a decision taken by the Provincial Executive Council of the Eastern Cape Province in terms of the provisions in section 139(1)(c) of the Constitution to dissolve the Municipal Council of the Mnquma Local Municipality (2009: para.1).

The Court found that the jurisdictional facts applicable to the exercise of the provincial executive's power were absent and, as a consequence, the provincial executive acted *ultra vires* in dissolving the municipal council (2009: para. 100).

For this reason, the Court ruled that the decision of the Provincial Executive Council of the Eastern Cape Province to intervene in the Mnquma Municipality, in terms of section 139(1)(c) of the Constitution and to dissolve the municipal council of the said municipality, was invalid and set aside (2009: para. 103).

Premier of Western Cape and Others vs Overberg District Municipality and Others

The Provincial Executive of the Western Cape decided, on 14 July 2010, to dissolve the council of the Overberg District Municipality (the council) in light of its failure to approve an annual budget for the municipal financial year that started on 1 July 2010. The cabinet further decided to approve a

temporary budget for the municipality and to appoint an administrator until the election of a new council (2011:2).

The decision of the Provincial Executive of the Western Cape was overturned by the Cape High Court and its appeal to the Supreme Court of Appeal also failed. The Court held that where the Council failed to approve the budget (2011: para. 53):

- the provincial executive must intervene, in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget is approved.
- the provincial executive is under no obligation to dissolve the council and may ensure the approval of the budget by any legitimate means such as, for example, persuading the council under threat of being dissolved to approve a budget.

Uthukela District Municipality and Others vs President of the Republic of South Africa and Others

In this case, the three applicants were Category C municipalities whose respective areas of jurisdiction fell within KwaZulu-Natal (KZN). In three separate applications, they applied to the Natal High Court for orders declaring section 5(1) of the *Division of Revenue Act, 2001*, unconstitutional due to its omission to accord applicants' entitlement to an equitable share of revenue raised nationally and allocated to the local sphere of government (2002: para. 5).

Section 5(1) of the Act stipulated that:

The national accounting officer responsible for local government must determine the allocation for each category A and B municipality in respect of the equitable share for the local sphere of government as set out in Schedule 1 for the financial year, and such determination must be published by the Minister in a Gazette by 15 May 2001 (Section 5(1) of the *Division of Revenue Act, 2001*).

At the Constitutional Court, the applicants sought an order confirming the High Court's order, as well as an order directing the national government to pay them their respective equitable shares. When the application was heard at the Constitutional Court, the 2001 Act had been repealed by the *Division of Revenue Act, 2002*, and the parties had also made a settlement.

In dealing with the matter, the Court took cognisance of the following provisions of section 172(2)(a) of the Constitution:

The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. (Section 172(2)(a) of the Constitution)

The Court ruled that in the circumstances, and in the interest of cooperative govern-

ment, the Court should not exercise its discretion to decide the confirmation issue. It must first be left to the organs of state to endeavour to resolve, at a political level, such issues as there may still be (2002: para. 24).

THE ROLE OF THE NCOP IN PROMOTING COOPERATIVE GOVERNMENT AND INTER-GOVERNMENTAL RELATIONS

In terms of section 60 of the Constitution, the NCOP is composed of a single delegation from each province consisting of ten, of which four are special delegates and six permanent delegates. Section 67 of the Constitution further provides provision for a maximum of ten part-time representatives designated by organised local government. Although such representatives may not vote, they may participate in NCOP proceedings, such as its committee meetings, plenaries and other activities to influence decision-making in the NCOP.

The NCOP is there to represent the provinces in order to ensure that provincial interests are taken into account in the national sphere of government. The NCOP, therefore, serves as a vital link between national and provincial spheres of government. The NCOP is seen by Honourable Mahlangu, Chairperson of the NCOP, as carrying the responsibility to ensure that decisions that are taken at national level do not impact negatively on the provinces. But, in order to do this, he shows that it is important to understand the interests of each province. According to

him, permanent delegates are in Parliament to represent the interests of, *first*, their individual provinces and, *second*, collectively the nine provinces. For that reason, he shows that there must be a strong relationship between their offices in Parliament and their provinces (2010:1).

Mandating Procedures of Provinces Act, 2008, provides for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf, as required by section 65(2) of the Constitution. It is through the mandating procedures and processes that provinces influence the decisions taken in the NCOP, especially when decisions are taken in terms of sections 74 and 76 Bills. Section 74 Bills deal with the amendment of the Constitution, while section 76 deals with ordinary bills affecting provinces.

Apart from the legislative duty, the NCOP also has the oversight role over the executive across the three spheres of government. Honourable Mahlangu emphasises that when performing oversight, with a view to promoting cooperative government and intergovernmental relations, NCOP delegates should, at all times, keep in mind the following objectives (2010:2):

- To ascertain whether each sphere is playing its role accordingly (that is, carrying out its responsibility in line with its powers and functions).
- To ascertain whether there is conflict between the interests of the different spheres, in respect of a particular service

delivery area, that may compromise implementation.

- To ascertain whether decisions at national level, or nationally driven programmes, serve to advance plans at provincial and municipal level, or are informed by them (for instance, national programmes must be informed by Integrated Development Plans that are informed by the direct needs of the people).
- To ensure that where there are conflicts related to service delivery, between the provincial and local government, that these are resolved within the spirit and letter of the Constitution (in this regard, the Constitution states that "an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute").
- To ascertain whether there is cooperation in the provision of services to the people, in order to avoid each sphere of government working alone, while the implications of its service may impact on other spheres of government.

The NCOP also plays an active role when there are interventions in terms of sections 100 and 139 of the Constitution.

- Section 100(1) of the Constitution provides that when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation,

the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.

- Section 139(1) of the Constitution has similar provisions but pertains to provincial government intervening in a municipality within its jurisdiction.

The NCOP must approve or not approve the intervention within stipulated time frames after the intervention began. In deciding whether or not to approve, the NCOP considers two crucial aspects, that is, compliance with both procedural and substantive requirements.

CONCLUSION

Over the past 20 years, South Africa has made important strides in building its intergovernmental fiscal relations such as general budget and financial management reforms, budget preparation and budget implementation. The current legislative provisions and court decisions *supra* confirm the distinctiveness, interdependence and interrelatedness of the various spheres of government, and are also an indication that the national-provincial-local government nexus chain is still holding. There are, however, incidents that reflect some challenges within the system, some of them structural. The incidents of boundary disputes that led to violent protests might be an indication that there are weaknesses/challenges in the government-civil society interface. Incidents of interventions and litigations among the various spheres of government might be an indication that the level of mutual

trust and good faith within various spheres of government needs some improvement. The National Council of Provinces, as an oversight body mandated to safeguard the

interests of provinces, can play an important role in promoting the government-civil society interface, as well as intergovernmental relations and cooperative governance.

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REFERENCES

- Auditor-General. 2013. Media releases. Auditor-General buoyed by local government leaders whose commitment has resulted in their entities' improved audit results. Pretoria: AGSA.
- City of Cape Town vs South African National Road Agency Ltd (6165/2012) [2013] ZAWCHC 74. 21 May 2013.
- City of Johannesburg vs Blue Moonlight 2012(2) SA 104 (CC)*.
- City Press. 2011. Mission abort on Project Consolidate. 12 March.
- Department of Cooperative Governance and Traditional Affairs. 2014. Back to basics – Serving our communities. Pretoria: COGTA.
- Department of Cooperative Governance and Traditional Affairs. 2014. Back to basics – Serving our communities better. Summit Review. Pretoria: COGTA.
- Department of Provincial and Local Government. 2008. The White paper on local government. Pretoria: Government Printer
- De Villiers, B. 2009. Crossing the line: Dealing with cross-border communities. Johannesburg: Konrad Adenauer-Stiftung.
- Doctors for Life International vs Speaker of National Assembly and Others* 2006 (12) BCLR 1399 (CC):1428-1462.
- Jitsing, A. Govender, M. & Chisadza, S. 2014. Rethinking the fiscal implications of different types of norms and standards. Financial and Fiscal Commission (FFC) 20th Anniversary Conference. Pretoria: FFC.
- Layman, T. 2003. Intergovernmental relations and service delivery in South Africa. August 2003. Final report. Pretoria: The Presidency.
- Malan, L. 2005. Intergovernmental relations and cooperative government in South Africa: The ten-year review. *Politeia*, 24(2):226-243.
- Mandating Procedures of Provinces Act* (Act No. 52 of 2008). 19 February 2009.
- Matatiela vs The President of the Republic of South Africa and Others*. (1) (CCT73/05) [2006] ZACC 2, 2006(5) BCLR 622.
- Merafong Demarcation Forum vs President of the Republic of South Africa and Others*. (CCT 41/07) [2008] ZACC 10, 2008(5) SA 171.
- Minister of Police vs Premier of Western Cape and Others* (CCT 13/13 [2013] ZACC 33, 2013(12) BCLR 1365 CC. 01 October 2013.
- Mnquma Local Municipality and Others vs Premier of Eastern Cape Province and Others* (231/2009) [2009] ZAECBHC 14, 05 August 2009.
- Moutse Demarcation Forum vs President of the Republic of South Africa and Others*. (CCT 40/08) [2011] ZACC 27, 2011 (11) BCLR.
- Narsiah, S. & Maharaj, B. 1999. Borders of dissent in South Africa: The Bushbuckridge saga. *Transformation*, 40:36-54.
- Parliament of the Republic of South Africa. 2010. *Parliamentary Monitoring Group Report, 01 November*. Joint workshop with national and provincial legislatures on the application of section 139 of the Constitution and the need for legislation in terms of sections 139(80). Cape Town: Parliament.
- Parliament of the Republic of South Africa. 2011. *Parliamentary Monitoring Group Report*, 31 May. Cape Town: Parliament.
- Premier of Limpopo Province vs Speaker of Limpopo Provincial Legislature* (CCT 94/10) [2011] ZACC 25, 2011 (11) BCLR 1181 CC. 11 August 2011.
- Premier of Western Cape and Others vs Overberg District Municipality and Others* (801/201) [2011] ZASCA 23; 2011 (4) SA 441 (SCA). 18 March 2011.
- Republic of South Africa. 1996. *Constitution of the Republic of South Africa, 1996*. Pretoria: Government Printer.
- Republic of South Africa. 1997. *Intergovernmental Fiscal Relations Act* (Act 97 of 1997). Pretoria: Government Printer.
- Republic of South Africa. 1997. *Organised Local Government Act* (Act 52 of 1997). Pretoria: Government Printer.
- Republic of South Africa. 1998. *Division of Revenue Act* (Act 28 of 1998). Pretoria: Government Printer.
- Republic of South Africa. 1999. *Public Finance Management Act* (Act 1 of 1999). Pretoria: Government Printer.

- Republic of South Africa. 2000. *Local Government Municipal Systems Act* (Act 32 of 2000). Pretoria: Government Printer.
- Republic of South Africa. 2000. *Cross-Boundary Municipalities Act* (Act 29 of 2000). Pretoria: Government Printer.
- Republic of South Africa. 2001. *Division of Revenue Act* (Act 16 of 2001). Pretoria: Government Printer.
- Republic of South Africa. 2003. *Local Government Municipal Structures Amendment Act* (Act 1 of 2003). Pretoria: Government Printer.
- Republic of South Africa. 2003. *Local Government Municipal Finance Management Act* (Act 56 of 2003). Pretoria: Government Printer.
- Republic of South Africa. 2005. *Cross-Boundary Municipalities Laws Repeal and Related Matters Act* (Act 23 of 2005). Pretoria: Government Printer.
- Republic of South Africa. 2005. *Intergovernmental Relations Framework Act* (Act 13 of 2005). Pretoria: Government Printer.
- Republic of South Africa. 2009. *Money Bills Amendment Procedure and Related Matters Act* (Act 9 of 2009). Pretoria: Government Printer.
- South African Broadcasting Corporation (SABC). 2013. Most Zamdela residents unemployed or earning very little, 22 January. <http://www.sabc.co.za/news/a/e1a245004e4710858a33bff251b4e4e2/Most-Zamdela-residents-unemployed-or-earning-very-little:-SAIRR-20130122> (Accessed on 16 July 2015).
- Speech by the Chairperson of the National Council of Provinces (NCOP) Hon. M.J. Mahlangu on the NCOP and Provincial Legislatures' oversight role in promoting cooperative governance and intergovernmental relations, 02 November 2010.
- Tau, M.L. 2014. Concept paper on intergovernmental relations and cooperative government. 24 January 2014.
- Unisa. 2005. *Constitutional Law*. Only study guide for CSL101-J.
- Uthukela District Municipality and Others vs President of the Republic of South Africa and Others* (CCT 7/02) [2002] ZACC 11; 2002 (11) BCLR. 12 June 2002.