

FOREWORD

The Constitution of South Africa in Chapter 3 defines the principles of cooperative government as follows: 'government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'. Article 41 of the same chapter defines the 'principles of cooperative government and intergovernmental relations'. These principles are the most detailed and elaborate provisions relating to intergovernmental relations and cooperative government of any existing constitution in the world.

Political analysts nevertheless continue to debate whether the South African political system is a federal state or a type of decentralised unitary system. One could argue that this intellectual differentiation does not matter vis-à-vis the real functioning of a political system. But this is not true: it makes a big difference whether the provincial and local levels are structured as agencies of the national government or as self-reliant subjects. As subordinate organs they could be used for policy implementation only and excluded from the formulation of policies. It is therefore crucial how spheres derive their powers – be it from a constitution or from legislation.

Another misconception is that intergovernmental relations require political control of the national, provincial and local authorities by one single party. According to this view a pluralistic multiparty system must be understood as a real threat to a multilayered cooperative government structure. However, lively competition between several political parties is the basic characteristic of real democracy, and change of government and opposition between political parties is normal. International experience demonstrates that

politically differently composed governments at three levels should not be an obstacle to or impede efficient service delivery. While a competitive political system is one of the cornerstones of a living democracy, political parties do not compete against the different levels of the state. A cooperative government system complies with its constitutional obligations as long as the political parties – in government or in opposition – recognise and respect the provisions of the constitution.

The idea of intergovernmental relations is supported by the founders of the South African Constitution who decided against a competitive federalism. Instead, with many similarities to the German Bundestag, the drafters of the Constitution wanted it to be clear to future generations that the spheres of government should conduct their affairs in a constructive and integrated way.

The Konrad-Adenauer-Stiftung (KAS) was involved in South Africa's constitutional development process from its inception. Based on the positive experience within the German federal and decentralised system – and convinced that the principle of subsidiarity is the most participative and effective way to serve the interests of the people – KAS supports the ongoing political debate in South Africa. We hope that the paper will be received in this way by its readers.



Werner Böhler
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COOPERATIVE GOVERNMENT: THE OIL OF THE ENGINE

Bertus de Villiers and Jabu Sindane

1. INTRODUCTION

'The oil of the engine' describes the role of inter-governmental relations (IGR) within a multilayered system – hence the notion 'cooperative government' in the South African Constitution. It is the lubricant that allows friction to be channelled into positive energy and movement; it is the unseen layer that allows the various parts of government to operate, to reach their potential and to serve the interests of the whole. Cooperative government is meant to strengthen each of these spheres and not to reduce or curtail their effectiveness.¹

IGR can be defined succinctly as 'the relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs'.² In one of its first decisions the Constitutional Court of South Africa observed as follows about the reality of two governments being responsible for the same functional area:

Where two legislatures have concurrent powers to

make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation.³

Without sound and effective IGR a multilayered system would grind to a halt and competition, litigation, stalemate and conflict would replace cooperation.⁴ The Constitutional Court commented as follows on the logical place of IGR in a system of multilayered government:

Intergovernmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government.⁵

The founders of the South African Constitution had the vision to include in Chapter 36⁶ of the Constitution the most detailed and elaborate provisions about IGR and cooperative government of any constitution at the time, and since then.

They envisaged a multilayered constitutional arrangement

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whereby the different spheres of government would cooperate, consult and coordinate while respecting the powers and functions of each other. They foresaw a single, *unified* (not to be confused with *unitary*) state, but with three spheres that would separately and together serve the interests of the people in a unique way without engaging in unnecessary litigation. They used the word 'sphere' rather than 'tier' or 'level' to demonstrate the equality and respect that ought to characterise the interaction between national, provincial and local areas of government.⁷

Chapter 3 contains the vision and spirit of South African cooperative government, and required the enactment of an Act on IGR. The Act was intended to provide the detail that would give effect to the vision of cooperative government contained in the Constitution. It took some time for the Act to be finalised, but in 2005 the IGR Framework Act 2005 was enacted. The legal framework for IGR is now complete. All that is needed is for the three spheres of government to work in a manner consistent with the legal framework. It is generally understood that IGR are a work in progress that never reach a point of perfection.

The notion of 'cooperative government' was introduced in the vocabulary of the Constitution to reflect the intention of the founders that the spheres of government should engage each other as partners and not as adversaries. Being partners does not rule out competition, but IGR provide channels for constructive engagement without necessarily resorting to litigation.

While many federal-type states have had experience with what is called 'competitive federalism' and litigation, the drafters of the South African Constitution wanted it to be clear to future generations that the spheres of government should conduct their affairs in a constructive and integrated way, with disputes being settled through agreement rather than litigation. Although the total system of government comprises three spheres, the spheres must operate in unison to serve the interests of the people.

It must be noted, however, that 'cooperative' governance/federalism must take place within the realm of respect and cooperation, and not be used as a tool or slogan for coercion and domination by the national sphere.⁸

This vision of IGR reflects the way in which the new democratic South Africa came into being. It was a

unified country that decided to establish provinces for the purposes of improved government.⁹ It was not – as was the case with many classical federations – various colonies or separate states coming together to form a federation.

One can understand that in cases such as the United States (US), Australia and Canada the entities which came together viewed each other, and particularly the national government, with a degree of suspicion and as a result their engagement with each other was often competitive. This contrasts with the spirit of the South African Constitution where provinces were created through a process of constitutional decentralisation from the national government, and where interaction between the provinces and the national government is essentially amicable and friendly (for now).

Since the enactment of the 1993 (interim) Constitution and then the 1996 (final) Constitution, IGR have developed a momentum of their own. From the first months after the enactment of the Constitution, forums and institutions at the executive and bureaucratic levels were established to facilitate cooperation between the various spheres of government. In the beginning some ministers and departments were more eager than others to get discussions under way. But in due course the network of IGR ran from the Office of the President to ministries, heads of departments and premiers' offices.

The 2005 IGR Act solidifies the informal institutions and structures that existed before 2005 to ensure that certain minimum standards for the conduct of IGR are adhered to by all spheres of government. The IGR Act does not intend to prevent spontaneous IGR but provides at least the minimum forums and procedures for cooperation.

South Africa now has close to 17 years' experience in the conduct of IGR. The aim of this research is to reflect, by way of a scoping exercise, on some of the experiences with cooperative government and to see if general trends can be identified and recommendations formulated.

About this research

This research provides a general albeit brief overview of the system of cooperative government and an assessment of how the system operates in practice. There are many stories of success to be shared but

there are also many areas where improvements can be made to strengthen the institutions and processes.

The scale of the research is limited and it is not intended nor can it be regarded as an 'all-of-government' assessment. A complete assessment of IGR is a mammoth task that requires substantial financial and human resources. Time, resources and budgetary constraints make such a wide-ranging and in-depth assessment impossible.

Our methodology was to conduct individual and focus group interviews with civil servants who are closely involved in the conduct of IGR on a day-to-day basis. We provided each interviewee with a framework questionnaire and also had a more extensive questionnaire at our disposal to direct and facilitate discussions.

The interviewees come from diverse backgrounds and different departments at national, provincial and local spheres. They were encouraged to share their personal experiences and perspectives on the basis of anonymity. We would like to thank all those who participated in the interviews; without them this research would not have been possible.

We do not claim that the findings presented here are necessarily representative of all government institutions. However, the focus group and personal interviews enabled us to develop a good and thorough understanding of how the machinery of government operates, and we trust that those involved in the conduct of IGR would be able to find common ground with some of the perspectives we offer.

The Konrad-Adenauer-Stiftung (KAS), which kindly supported this research, has been involved for many years in facilitating the research and practice of cooperative government in South Africa.¹⁰ Our sincerest appreciation goes to KAS for its support of this research. We thank in particular Tshepo Rikhotso who helped to arrange meetings and appointments.

It is hoped that this research, as has been the case with previous publications, will contribute to the deepening of democracy in South Africa and the improvement of the general process of government and administration.

Use of the term 'policy paper' to describe this publication indicates that the content is intended to be

concise, focused and aimed at decision-makers. It is not within our scope to cover the entire field of IGR or to analyse the functioning of each sphere and government department in depth. Our aim is to provide decision-makers with an easy-to-read overview and assessment of a topic that sits at the core of the functioning of the governmental system.

The paper will consider:

- the birth of IGR and cooperative government in South Africa;
- whether the federalism–unitary debate matters for the conduct of IGR;
- other countries' experiences with IGR;
- IGR developments between 1993 and 2005;
- key forums under the IGR Act 2005; and
- the practical experiences of civil servants who operate within the system.

2. THE BIRTH OF INTERGOVERNMENTAL RELATIONS: HOW DID IT ALL BEGIN?¹¹

In 1993 South Africa found itself implementing a federal-type constitutional dispensation, which was completely unlike anything that had been experienced by the country during the previous three centuries. Although the Act of Union of 1910 and later the Constitution of the Republic of South Africa of 1961 provided for four autonomous provinces, the provinces were always subjected to the sovereign will of the national parliament. The powers and functions of the provinces could therefore be varied by parliament. This eventuated in 1986 when parliament disbanded elected provincial governments and replaced them with appointed executive committees.

The federal framework that had been developed through the constitutional principles since 1991¹² and guaranteed by the 1993¹³ and 1996 constitutions required a special effort by all South Africans to ensure that the legal breakthroughs made in negotiations were turned into practical advances.¹⁴

It was especially in the field of IGR where South Africans had limited experience. The experience that negotiators and advisors gained from other federal-type dispensations had shown just how important sound IGR are within the functioning of a multilevel system.

The importance of IGR or ways to structure it in a new constitutional dispensation had received very little

attention in negotiations leading to the 1993 interim Constitution. Although the Constitution protected provincial governments as second-sphere legislative and executive authorities, the approach of various political parties to the relationship between provincial and national authorities had been conflicting.

During the negotiations the attitude of some protagonists of strong federal government had been based on what can be termed 'dual' and competitive rather than cooperative intergovernmental arrangements. Others had recognised the need for provincial government, but sought 'weak' provincial governments in order to ensure that the provinces did not frustrate the will of the national parliament. A balance had to be found between competition and cooperation in IGR.

It was widely recognised at the time that, on the one hand, the quality of governmental activities should not be detrimentally affected because of animosity or conflict between the respective spheres of government. On the other hand, a certain level of effective government and even competition is required where effective decisions are made and a 'joint decision trap' – whereby decisions are not made due to an absence of consensus – is averted.

Sound and effective IGR in South Africa and in other multitiered governmental systems are important and necessary for a variety of reasons. Some of these include:

- the increased complexity of modern governmental activities;
- the increased number of concurrent legislative matters;
- the interrelatedness and interdependence of many government functions, even in areas of exclusive competencies;
- spillovers in services;
- the importance of joint planning and implementation of policies;
- integration at a horizontal level between government departments;
- modern communication and the free movement of people;
- competition between levels of government;
- scarcity of resources and economic constraints; and
- popular accountability and grassroots pressure.

It was realised at the time of the negotiations and

completion of the 1993 and 1996 constitutions that South Africa could benefit from other countries' experiences with IGR, although such experiences had to be adapted to suit local circumstances.

The following conclusions were drawn at the time, based on international experiences:

2.1 Older versus recent federations

None of the older federations provide explicitly in their constitutions for extensive intergovernmental forums and relationships. This can be attributed to various historical, circumstantial, constitutional, political and economic factors. Although some institutions are more geared towards IGR, for example the German *Bundesrat*, no explicit mention is made of IGR. The main reason is that the older federations were established by integrating a number of independent states or colonies and that these states did not want to relinquish too much of their sovereignty to the federal government. Federalism was therefore seen as a dual relationship between 'separate' levels of government, with the constitution guaranteeing separate spheres of powers to the respective levels of government with limited interaction between them.

The younger federations and regional-type dispensations show a greater inclination to provide for extensive constitutional and statutory provisions dealing with IGR. They have tried in some cases to constitutionalise arrangements similar to the voluntary forums established in some older federations.

Present-day requirements and the opportunity to start anew have therefore given the younger states the opportunity to constitutionalise cooperative and coordinative IGR.

2.2 From dual to cooperative federalism

The older federal constitutions were drafted in the period when federalism was viewed as a framework to bring together spheres of government with separate functions and which functioned in a rather isolated way. The need for IGR was therefore neither felt nor anticipated. IGR in older federations often came into being not by way of a grand design but through necessity and common sense.

The practical circumstances associated with modern government brought the realisation that the respective

levels of government could not operate in isolation from each other and that constitutional, statutory and voluntary arrangements were required to improve the ability of all levels of government to fulfil their responsibilities.

The newer federations came into being in the era of cooperative federalism, which recognises the integrated nature and mutual dependence of tiers of government. The consequence is a new style of government and a different culture of IGR based on cooperation, coordination and interdependence.

2.3 Range of intergovernmental forums

From an international perspective there is a wide range of governmental and non-governmental organisations involved in IGR. An interesting factor is the spontaneous and pragmatic way in which many of these forums came into being. In some cases the forums that were provided for in the constitution have become defunct, while others which are better adapted to particular requirements have been able to survive.

It is apparent that although the constitution plays a pertinent role in providing a framework for IGR, ample room should be provided for other statutory and informal arrangements to develop. In many cases, for example the US, Germany and Australia, the federal constitution – viewed in isolation from other agreements on IGR – does not provide an accurate picture of the complexity of the government or the conduct of IGR.

2.4 Current IGR

The success of federal and regional-type systems depends to a large extent on the success of IGR. The difficulties that face present-day governments require greater cooperation, coordination, joint planning and sharing of resources than was the case at the turn of the previous century.

Many regional governments have informally relinquished their right to conduct their own affairs by joining forces with other regions and the national government to ensure more effective planning, management and implementation of policies. This is especially evident in the number of specialised institutions that have come into being, the cooperation that exists between line function departments and the integrated planning exercises that are being conducted.

2.5 Cooperative provincialism

Shortly after the enactment of the 1993 Constitution a number of recommendations were made for the future structuring of IGR.¹⁵ South African circumstances required a high level of 'cooperative provincialism' (as it was called at the time), which meant that a range of networks should exist between the provinces themselves and with the national government.

Unfortunately, at the time of drafting of the Constitution (and even today) some political parties, interest groups and individuals viewed the relationship between national and provincial governments from a largely 'dual' and 'competitive', rather than a 'cooperative', perspective. A cooperative perspective does not mean an absence of competition between the various spheres of government but rather that, where required, partnerships would be established.

It was recommended that sound intergovernmental cooperation in South Africa is required for various reasons, one of the most important of which is the need to address the extreme disparities that exist between the provinces and between local governments. Training of staff, secondments, intergovernmental assistance and interprovincial transfers were identified as mechanism to rectify these imbalances.

South Africa has had the advantage that it could to a large extent start with a clean slate in developing a framework for IGR. The international community offered, and continues to do so, various relevant lessons and these could be considered against the background of local circumstances as the Constitution is implemented and IGR are refined.

3. DOES THE FEDERALISM OR UNITARY CLASSIFICATION MATTER TO THE CONDUCT OF INTERGOVERNMENTAL RELATIONS?

There is much political sensitivity in South Africa when the word 'federal' is used to describe the form of state under the 1996 Constitution. Although most observers describe the three-sphere system as a form of 'federation', the government refers to it as a 'unitary' system.¹⁶ Use of the word 'federation' often brings back the raw feelings of the homeland past, the lively and emotional debates that went on during the constitutional negotiations, and the concerns about division and conflict.

IGR are not limited to federations: all multilayered

dispensations, be they federal or decentralised unitary, have a need for IGR. The division of powers between national, provincial¹⁷ and local governments – be it by way of a constitution or through legislation – can never be absolutely water tight. In addition, the challenges facing modern day governments and the scarcity of resources demand that all governments cooperate, consult and integrate their activities for the betterment of society.

IGR are therefore not the sole domain of federations. Classical unitary systems such as the United Kingdom, France and Japan also have IGR since some form of cooperation and consultation is needed between the respective levels of government and departments.

South Africa is not alone in its ambivalence towards the word 'federation'. Similar sensitivities exist in several other countries: the Constitution of India uses the term 'union'; the Constitution of Australia uses the term 'Commonwealth'; and the Constitution of Spain refers to itself as a 'unitary state' despite its strong federal characteristics.

In some recent federations such as Sudan and Ethiopia the word 'federal' often raises fears of secession and division. Even in international relations the word 'federation' has been rejected by some experts to describe the European Union's integration process.

One could identify the key characteristics of a federation as being a written, entrenched constitution which sets out the powers of the respective spheres of government under the supervision of the judiciary, with provinces being represented in a bicameral parliament. In a simple, one-dimensional analysis it is therefore relatively straightforward to assess the constitutional arrangements of countries to determine if they are federal or unitary. However, the practical operation of constitutions is far more nuanced than the texts under which they operate. In some unitary systems, for example, provinces may have more powers than in some federal systems. Refer for instance to the new powers of the Scottish parliament which, *vis-à-vis* Westminster parliament, exceeds in many instances the powers of the states of (federal) India.

International experience therefore suggests that some federal states may in practice be more centralised than unitary states, while regions in some unitary states may in practice be more decentralised than many states in federations. Is it therefore immaterial whether

provinces and local governments derive their powers through a constitution or through ordinary legislation? Absolutely not. It is of crucial importance how spheres derive their powers – be it from a constitution or from legislation. The way in which the powers and functions of national, provincial and local governments are protected has a direct bearing on the style and culture of IGR.

If the powers of national, provincial and local governments are set out in a constitution, the notions of equality and interdependence are much stronger than when powers are set out in ordinary legislation that can be amended or revoked by the sovereign parliament. If the central government is the sole source of powers of provinces and local governments, it can dictate the extent and scope of the powers, the way power is exercised, the manner in which IGR are conducted and the way conflicts are resolved.

In systems where the powers of provincial and local governments are derived from a statute of parliament, the likelihood of a top-down approach is much stronger than in a system where all spheres derive their powers from the constitution.

The framework for the conduct of IGR in South Africa is determined by the text of the Constitution, not whether it is classified as 'federal' or 'decentralised unitary' by academics or political parties. The classification of the Constitution as federal, unitary or quasi-federal is not material or conclusive, albeit interesting from an academic perspective. In practice, however, it is the text of the Constitution and the interpretation of the Constitution by the judiciary that determines how IGR in a formal sense should be conducted.

The text of the South African Constitution sets the following standards for the conduct of IGR:¹⁸

- The government of South Africa comprises three spheres – national, provincial and local.¹⁹
- Each sphere has constitutionally allocated powers which are supervised by the Constitutional Court.
- The spheres are distinctive and yet interdependent and interrelated.
- The spheres must work in unison to address the challenges facing South Africa as a developmental state.

- The effective cooperation and integration of the three spheres depend on an effective system of IGR where conflicts are resolved through negotiation rather than litigation.²⁰

These principles dictate that IGR should be conducted in a non-adversarial manner with conflict being resolved through agreement and with the respective spheres approaching each other with mutual respect.

IGR are therefore not merely a convenient channel whereby the national government can convey instructions to the provinces and local governments in a top-down fashion or where provinces and local governments can be bludgeoned into submission. IGR represent a network of forums where governments meet as equals under the Constitution with the view to jointly formulating policy, as well as ensuring consultation, coordination and assessment of policy implementation.

It is therefore the constitutional duty of political leaders and civil servants to conduct their daily IGR in a manner that respects and adheres to both the letter and spirit of the Constitution.

4. INTERGOVERNMENTAL RELATIONS IN OTHER COUNTRIES

While the South African Constitution was being drafted the country had the advantage of being able to draw from international experience, and it continues to reap benefits from the management and operation of other countries' constitutions. South Africa is now in turn becoming an example and case study for other young democracies. Experts from countries such as Ethiopia and Sudan have visited South Africa during the past few years to learn more about its IGR system.

Although this policy paper is not intended to provide an exhaustive study of international experiences with IGR, it is nevertheless beneficial to reflect briefly on some of the international experiences so as to gain insight into the progress that South Africa has made.²¹

4.1 United States

The drafters of the US Constitution did not pay much attention to the question of IGR, coordination and cooperation. At the time of drafting, emphasis fell largely on what was called 'dual' federalism. This notion emphasised the separate spheres in which the

state and federal governments acted on their own powers and functions.

Although the framers did not totally ignore IGR, little attention was paid to providing a constitutional framework or formal institutions to facilitate the development of such relations. It was assumed that the institutional framework provided for by the Constitution would be sufficient to deal with matters of IGR should the need arise.

Although interstate cooperation developed early within the federal system, the first step to formalise it was taken only in the 1930s when reference was first made to 'cooperative' federalism and 'intergovernmental' relations. This was due especially to the increase in federal government activities and responsibilities at the time. Since the 1950s particularly the federal, state and local governments have started paying serious attention to the structuring of IGR.

The US Constitution contains few provisions that deal directly with the issue of IGR. Two references to the matter concern the ability of the states to conduct foreign relations with the consent of Congress and extradition between states. However, the Constitution contains no explicit reference to federal-state relations, nor any provision related to federal grants-in-aid or the sharing of revenue. Some state constitutions contain references to IGR, although most have not felt the need to constitutionalise the matter.

Owing to its constitutional powers and responsibilities, the US Congress is the main institution responsible for defining IGR. However, Congress did not until the 1950s establish formal committees to deal with the matter.

Both the Senate and the House of Representatives have since provided for subcommittees responsible for IGR, although the Senate abolished its subcommittee in 1987. Since then the issue of IGR has been mainly the responsibility of the various congressional committees dealing with substantive policy and appropriation matters.

The US president is also a major role player in administrative IGR and coordination owing to his executive responsibilities. The president meets with the state governors at least twice a year, although they do not engage in formalised coordination. Various efforts to increase the role of the president in IGR have not proven successful.

The Supreme Court is in the final instance the umpire regarding IGR in the sense that it is responsible for settling intergovernmental disputes which cannot be resolved by means of legislative and executive actions. The Supreme Court plays a crucial role in providing the constitutional and legal ground rules for IGR by defining the extent of state and federal powers.

The respective state constitutions and governments also provide to a greater or lesser extent for intergovernmental arrangements. Each of the state legislative assemblies has a committee which deals with coordination and cooperation between the state and local governments as well as other intergovernmental matters. This also applies to the respective offices of the governors, which have staff responsible for IGR. A similar situation exists in some of the major cities where attention is also given to IGR.

A useful statutory institution established by the federal government was the Advisory Commission on Intergovernmental Relations (ACIR). The ACIR was established by Congress in 1959 to monitor and evaluate the operation of the federal system and to recommend improvements. The mission of the ACIR was to 'strengthen the American federal system and improve the ability of federal, state, and local governments to work together cooperatively, efficiently, and effectively'. The ACIR was abolished in September 1996. Its primary responsibilities were to:

- investigate and address specific problems experienced with IGR;
- make recommendations on the improvement of cooperation and coordination between federal and state governments; and
- seek ways to improve federal, state and local governmental relations, policies and practices, as well as to allocate resources equitably and to increase efficiency and equity.

Several states provide for institutions similar to the ACIR in order to address the relationship between state and local governments as well as federal-state relations. Normally the state commissions comprise county and municipal representatives, private citizens and representatives of the state legislature.

A number of interstate bodies have also been created to facilitate interstate cooperation. Some have a

general brief while others are more specialised. Provision is, for instance, made for a commission on education, uniform state laws and a model Uniform Commercial Code.

Most of the interstate bodies involve only a few states that have a direct interest in a particular matter.

There are numerous other intergovernmental forums, for instance the hundreds of regional councils operating in states. These councils comprise local governments and serve as discussion forums, providing joint services and preventing conflict.

There are many non-profit private sector associations involved in IGR at national and state levels, such as the National Governors Association, the National Conference of State Legislatures and the Council of State Governments. These associations are indirectly involved in facilitating IGR. They serve the interests of their respective members and act as lobbyists.

In summary, the US Constitution for various reasons does not provide an all-encompassing constitutional or statutory framework to deal with IGR, cooperation and coordination. There are, however, many US institutions active in the field of IGR. This is particularly visible in certain specialised policy fields, such as health, education, housing, transport and policing. Virtually every area of public policy has an intergovernmental dimension of some sort with a variety of elected representatives, officials and interest groups involved in and interacting with the formulation of policy.

The cooperation that has developed in the US over time might not have been provided for explicitly by the Constitution but is essential in ensuring that the cooperative basis underlying federalism is achieved. Practical circumstances and general constitutional provisions have led to the establishment of a network of institutions, organisations, associations and interest groups which are involved in improving IGR in the US.

4.2 Australia

Intergovernmental cooperation in Australia takes place through a variety of mechanisms, institutions and instruments. These include ministerial councils, conditional grant schemes, equalisation payments, intergovernmental agreements, joint administrative bodies, uniform legislative schemes and referrals from one level of government to another.

The following are some of the most important institutions and agencies that play a role in IGR in Australia:

The principal institution through which cooperation takes place is the meeting of the heads of state governments, generally known as the Premiers' Conference or the Council of Australian Government. The Premiers' Conference has its origins in the pre-federal period when leaders from the various colonies met to discuss matters of common interest.

The conference meets at least once a year, with one of its major considerations being financial matters. The allocation of general revenue funds from the federal to state governments and the distribution of equalisation grants to the states are the subjects that receive the most attention.

The Premiers' Conference may also deal with various other aspects of IGR such as the discussion and ratification of international agreements, coordination in the fields of particular policy areas (e.g. education, health, transport, environment, industrial relations and constitutional reform) and any other matter of relevance to coordination and cooperation between the states and the federal government.

The conference has been criticised over the years for being just a political discussion forum rather than an institution geared to taking decisions conducive to good and effective government and IGR. In recent years, however, changing circumstances have put pressure on the various levels of government to increase cooperation, especially when it comes to economic planning and management, the provision of health care and other areas where common standards are expected across the nation.

The range of matters discussed at the Premiers' Conference has also increased to include a variety of non-financial matters. Unlike the meetings of state governors in the US, it is rare for the state premiers in Australia to meet separately from the federal government. There may, however, be meetings between premiers within the context of their respective party affiliations.

The Loan Council was established in 1927 by virtue of the financial agreements between the federal government and the states entered into according to the provisions of the Constitution. The purpose of the

Loan Council is to coordinate the borrowing arrangements of the federal and state governments. All state and federal treasurers are represented on the Loan Council. The principal objective of the Loan Council is to approve the total annual amount borrowed by the federal and state governments and the allocation of such funds.

The main operational forums are the ministerial councils where members of the respective executive branches of the federal and state governments meet periodically. These councils deal with a wide range of policy issues aimed at formulating a coherent national policy in a particular area. They also undertake planning and implement policy.

The councils are the principal forums for conducting IGR. The agendas of the councils include a wide variety of topics such as the exchange of information, the negotiation of financial grants, the formulation of uniform legislation and the supervision of joint administrative agencies.

The participants in the councils vary depending on the matter under discussion. The responsible federal and state ministers normally attend the meetings, accompanied by technical advisers.

The federal prime minister and state premiers each have in their offices a department that deals with the management and coordination of intergovernmental matters. The federal prime minister's department also forms the secretariat for the prime minister-premiers' meetings. Some of the departments are more influential and effective than others. It is especially in recent years that their influence in general has increased due to the growing number of policy areas affected by IGR.

The Commonwealth Grants Commission is an advisory body established in 1933 to make recommendations on the distribution of equalisation payments. The commission was established after various inquiries and royal commissions had investigated the matter of grants to less developed states. It was established by statute, with a charter to recommend a distribution that would enable each level of government to offer substantially similar services without imposing taxes or charges that were markedly higher than those of the other governments.

The Commonwealth Grants Commission initially

focused only on the need for 'special' grants to 'claimant' states. Later its aims extended to include grants in general.

The commission measures and compares shortcomings in revenue and expenditure. It reports formally to the federal government, although its terms of reference for each review are set through consultation with the states.

One of the reasons for the success of the Commonwealth Grants Commission is that the disparities between the respective states are relatively small. This fact and the commission's limited brief have kept it clear of serious political controversy of the kind that has been experienced in some other federations. This does not mean that the commission functions without controversy; however, compared to many other federations the issues that cause division are relatively limited in scope.

Other institutions involved in intergovernmental matters in Australia include the following:

- *The High Court:* As in other federal-type dispensations it plays an indispensable role in IGR through its interpretation of the Constitution.
- *The Senate:* It provides for representation so that the states can participate in the formulation of national policy. It also provides a basis for intergovernmental coordination and cooperation. The Senate, however, is not primarily an IGR body.
- *The Federal Cabinet:* The membership of the federal cabinet is normally such that it reflects the respective state interests. An informal balance between the respective states is attained in this manner.

In summary, Australian IGR are regulated by a wide range of constitutional, statutory and informal agreements. The complexity of modern government as well as prevailing circumstances and economic realities necessitate close cooperation between federal and state governments. While the meetings of the political leaders of the respective governments are important, the real policy matters are hammered out at meetings of the respective ministers. The Grants Commission has played a crucial role in equalisation since its establishment in the 1930s. The Council of Australian Governments is arguably the most important policy formulating IGR body.

4.3 Canada

The establishment of the Canadian federal system can be attributed to a variety of historical, cultural and geographical factors. The federation comprises diverse cultural groupings, provinces with differing economic strengths and a vast land area. The interests of the provinces can be articulated through the representative institutions at federal and provincial levels as well as through the various provisions for IGR.

As with the US, it was originally thought in Canada that the relationship between the provinces and federal government would be characterised by dual federalism, which emphasises the separate areas of functionality. Consequently, the Canadian Constitution contains no formal means of encouraging and facilitating IGR. The following are, however, the most important examples of the formal and informal mechanisms that have developed over the years and which provide for the conduct of IGR.

The Senate is composed on the basis of equal regional, not provincial, representation. The fact that its members are appointed by the federal government has greatly undermined its functionality. Unlike most other federal systems, no formal provision is made for the provinces as constituent units of government to be represented in the federal parliament.

A gradual development, however, has been the convention that the federal executive is composed of at least one representative from each of the ten provinces. These ministers are expected to represent the interests of their respective provinces at federal level.

The Supreme Court has the final responsibility for adjudicating disputes regarding IGR. The Supreme Court was initially composed on the basis of equitable regional representation but since it has assumed the power of judicial review, judges are expected to be impartial.

The Canadian Constitution before 1982 contained no formal provision for its amendment, although an informal formula has developed over the years. The aim of the informal agreement was to ensure provincial participation in the amendment of the Constitution. Consequently it had been agreed that any amendment which affected the division of federal-provincial powers should require consent of all the central and provincial executives. After 1982 such consent is also required of the provincial legislatures.

Since the establishment of the Canadian federation the need for closer IGR and institutions to facilitate such cooperation has increased dramatically. The most important institutions that have developed over the years are the federal-provincial conferences. Although the Constitution does not mention these conferences, they have become the primary institutions for conducting and facilitating IGR.

The conferences take place at the following four main levels:

- *First Ministers' Conference*: These are meetings held between the heads of the federal and provincial executives. Since 1945 substantial policy decisions have been made at these meetings, particularly with respect to constitutional issues, shared-cost programmes, taxation and other financial arrangements.
- *Ministers' meetings*: These are meetings held by the various members of the federal and provincial executives, depending on what issues are discussed. These meetings have become crucial for formulating joint policy, harmonising legislation and undertaking joint programmes.
- *Civil service meetings*: These meetings are conducted between the civil servants of the federal and provincial governments. Most of the preparatory work and details of intergovernmental arrangements are sorted out at these meetings before such agreements are finally ratified at the political level.
- *Federal-Provincial Relations Office (FPRO)*: Irrespective of the level of formal federal-provincial relations, these interactions are supported by the FPRO. It has offices in Ottawa as well as in all the provinces. The FPRO has five main components, namely: liaison with the provinces; policy formulation and development; economic policy and programmes; social policy and programmes; and constitutional affairs.

In summary, although the Canadian Constitution does not provide for extensive arrangements to facilitate IGR, numerous arrangements have developed over the years by means of statutory arrangements and conventions. The First Ministers' Conference has become more elaborate and institutionalised as new circumstances have had to be overcome. The agenda

of these conferences is agreed upon by the federal and provincial governments, with each delegation being supported by political and administrative staff.

Meetings of the federal and provincial ministers of finance, health and others have increased in importance, and regular meetings are held at which cooperative programmes are worked out. These cooperative agreements have become even more prominent and urgent in the fields of financial and social policy, taxation and deficit reduction. The political meetings are supplemented by the various contacts that exist at an administrative level between the respective administrations.

4.4 Germany

One of the main characteristics of the German federal system is the multifaceted network of relations that exist between the federation and its states. These characteristics contributed to the major impact that the German federation had on South Africa's constitution drafters.

As is the case with the other federal dispensations, there is no single working relationship between the respective levels of government in Germany. One of the essential features of German federalism is the fact that most laws are enacted at the federal level, while the states (*Länder*) are mainly responsible for the administration of legislation. This not only increases the influence of the *Länder* over the promulgation of federal legislation but has also ensured a well-developed system of IGR.

IGR take place mainly by means of the following arrangements.

- Regular conferences are held between the heads of the federal and *Länder* governments. These conferences take place at intervals as frequent as every two to three months. Although the conferences were provided for since 1949 they only became consistently operative from 1969. The conferences are normally preceded by meetings of ministers and officials of the federal and *Länder* governments.
- Political parties have been very active in the field of federal-state relations. This is illustrated particularly by the conferences of the party leaders of the federal and *Länder* legislatures. The federal party executives also play an important role in this regard.

This is particularly true in the case of the Christian Democratic Union where extensive negotiations with its sister party in Bavaria normally precede negotiations between the federation and the *Länder*.

- The conferences of legislative presidents of the *Länder* and federal governments, assisted by their ministers and officials, are also very active in coordinating federal–*Länder* activities.
- The Permanent Treaty Commission plays a coordinating role in the field of foreign affairs. The commission was established in 1957 by agreement between the federal and *Länder* governments. The main aim of the Permanent Treaty Commission is to review international treaties before they are ratified in order to establish whether the relevant treaty encroaches upon the rights of the *Länder*.
- The *Bundesrat*, which is the second house of the federal parliament, represents the interests of the states and is arguably the most unique contribution to IGR made by the Constitution of Germany. Its members are appointed by the *Länder* governments. The composition of the *Bundesrat* ensures not only that the interests of the *Länder* governments are accommodated at the federal level but also that the *Länder* have the opportunity to participate in the federal legislative programme. The cooperative role of the *Bundesrat* is illustrated by the fact that the respective *Länder* have missions (offices)²² in Berlin, which provide a further contact between the *Länder* and federal governments. These missions also provide the basis for cooperation and interaction between the civil servants of the federal and *Länder* governments.
- In addition to the cooperation that takes place between the *Länder* at the federal level and in the *Bundesrat*, there are also special institutions aimed at facilitating what is called 'cooperative federalism'. The most prominent of these institutions are the Financial Planning Commission and the Planning Commission for Joint Tasks.
- In addition to federal–state relations the respective *Länder* governments also have numerous institutions which provide for inter-*Länder* cooperation and coordination. Examples of such institutions are heads of the state executives' conferences, the interstate ministers' conferences and meetings between the civil servants of the states.

The German federal system has reached a high level of sophistication in terms of IGR. This has been made possible by a number of factors, including the following:

- The German Constitution was drawn up and developed in the period of cooperative rather than dual federalism. This meant that the federal–state relationship was viewed as a partnership rather than a competitive endeavour.
- The participation of the states within the federal legislature and the exchange of views and opinions which followed this provided a culture conducive to cooperation.
- The role of the states as main administrators of federal legislation requires a high level of intergovernmental cooperation and coordination.

4.5 Nigeria

Nigerian federalism has gone through various phases since its establishment. An extensive period was characterised by military rule, the frequent creation of new states (from three to 36 and demands for more states are intensifying), and a struggle to obtain a balance between national integration and the protection of minority groups. The most unique aspect of the Nigerian Constitution for purposes of this overview is the provision of the National Council on Intergovernmental Relations (NCIR) and the National Boundaries Commission (NBC).

The NCIR is a neutral technical body which relates to the executive, legislative and judicial branches of federal and state governments.

Its objectives are to:

- monitor the functioning of the federal system and make recommendations on the improvement of IGR;
- undertake research and study and maintain data on the federal relationship;
- mediate in state–state and federal–state conflicts; and
- establish national and international contacts with organisations that have similar objectives.

The main functions of the NCIR are to:

- identify, analyse and study areas within the federal system which are likely to create stresses;
- study ways of improving taxation and the equitable distribution of resources, and to increase efficiency in the administration of the public revenue system;
- promote cooperation between the respective tiers of government;
- provide a regular forum for interaction between the various levels of government; and
- undertake other activities aimed at improving IGR in general.

The NCIR comprises representatives of the federal executive, parliament, the accountant-general, the chairperson of the Revenue Mobilization, Allocation and Fiscal Commission, state representatives and the director-general of the council.

The NBC is tasked to deal with any boundary disputes that may arise between states or between Nigeria and its neighbours, and to undertake investigations which the president may from time to time require. Similar institutions exist at a sub-regional level regarding the alteration of state boundaries.

Some of the non-constitutional forums that play a role in IGR include:

- meetings of state governors, which are normally aimed at solving certain common problems;
- meetings of local government leaders where matters of common interest are discussed at an intra- and interregional level; and
- meetings of state commissioners and speakers of the state legislatures, which are aimed at facilitating cooperation between the respective regions and, where possible, a certain level of uniformity.

4.6 Summary

International experience relevant to South Africa can be summarised as follows:

- In most countries there is no single institution

responsible for IGR. A wide range of formal and informal institutions exists. These institutions are often not created by grand design but by necessity for cooperation and consultation. New democracies such as South Africa, Ethiopia, Nigeria, Sudan, Iraq and Nepal can benefit from the experiences of the older federations and can design institutions that are suitable for the conduct of IGR.

- Newer federations can decide whether they want to establish intergovernmental forums informally or by statute, or through a combination of statute and informal arrangements. Most of the older federations have 'grown' their IGR institutions over time, but that does not mean that young federations have to take a similar approach of letting the IGR system evolve over a long period of time. New federations can follow what South Africa did in 1994 and 2005 – namely, to provide in the constitution and legislation for a detailed philosophy and framework of institutions for IGR, while at the same time allowing for spontaneous developments and interaction.
- A strong case can be made for a single, national institution to coordinate intergovernmental activities and assess the conduct relating to intergovernmental matters on an ongoing basis. In this way a consistent approach can be taken across governments and best practice can be established. The scarcity of resources and the need for coherent planning and joint management mandate calls for effective and consistent IGR. An *advisory commission* on IGR provided for by the constitution or legislation could be a useful way to analyse, evaluate and improve IGR in general. Such a commission could have various functions, ranging from merely investigative functions regarding the functioning of the system to the formulation of policy inputs and dispute arbitration. While similar functions could be conducted by a government department, the quality of assessment and objectivity that an independent body offers may not be available from a government department.
- The success of IGR generally lies in a balance between constitutional, statutory, specialised and informal forums and institutions. The constitution therefore need not endeavour to cover all aspects of IGR, but only provide a general framework which will encourage, facilitate and monitor cooperation.

5. LET THE WATER FLOW: INTERGOVERNMENTAL RELATIONS FROM 1993–2005

The 1993 interim Constitution set the scene for South Africa's multilayered system, although the lifespan of the Constitution was limited to a two-year period.²³ The interim Constitution contained elaborate constitutional principles to which the popularly elected Constitutional Assembly was bound and on which the 1996 'final' Constitution had to be based.²⁴

Very soon after the enactment of the 1993 Constitution, the concept of IGR became commonplace in South Africa.²⁵ Prior to that 'intergovernmental relations' was a relatively unknown concept, as illustrated by the lack of scientific publications and discourse on the topic prior to 1993.

In the negotiations that gave rise to the 1993 Constitution minimal attention was given to the details of IGR since the broad framework of a constitution had to be agreed upon and there was no time to focus on how the system and its various parts would function and interact. The dogmatic nature of the federal–unitary debate at the time also made it difficult to find common ground between the parties on a topic so abstruse as the conduct of IGR.

Soon after the enactment of the 1993 Constitution it became apparent that some form of IGR had to be provided for. Government departments had to talk to each other, ministers had to meet their provincial and local government counterparts and officials needed to liaise on many issues ranging from the formulation of policy to the implementation and assessment of programmes. The reality of cooperative federalism therefore dawned as soon as the practical day to day challenges of government were confronted.²⁶

During those initial years under the 1993 Constitution, IGR were at best ad hoc, spontaneous and without an all-of-government consistency. The groundwork was nevertheless laid for what later became meetings of the national president and provincial premiers, ministers and provincial members of the executive councils, directors-general, provincial premiers, local governments, and so forth.²⁷

It is not surprising that in the negotiations of the 1996 (final) Constitution much more attention was paid to IGR. This was mainly because the federal–unitary debate had subsided and because the dominant African National Congress (ANC) realised that IGR are normal

in a multilayered society. The ANC found itself increasingly comfortable with the notion of 'IGR' without having to consent to the 'federalism' characterisation of the Constitution.

There was a general and growing realisation that without proper functioning IGR, the entire multilayered system would grind to a halt. The ANC's thinking was particularly influenced by the German notion of *Bundestreue*, which signifies the trust, partnership and comity upon which federal-type systems are based. Key advisors of the ANC found comfort in the philosophy underlying *Bundestreue* and therefore wanted to include it in the Constitution as a binding code of conduct.²⁸

Chapter 3 of the 1996 Constitution remains unique in the world: it attempts to capture the soul and spirit of IGR by referring to the interaction between the spheres as 'cooperative government'. The drafters endeavoured to move away from any notion of competitive federalism in favour of cooperative and friendly relations. While Chapter 3 recognises that in some instances litigation between spheres may occur, it sets a standard that until and unless all avenues to resolve a matter by agreement have been exhausted, disputes may not be taken to the courts.²⁹ The Constitutional Court has also determined that it cannot deal with a dispute if it is essentially a political dispute which ought to be solved at the level of policy makers.³⁰

No constitution since has provided for IGR in such detail. Debates are, however, taking place in several federations – notably Ethiopia, Sudan and Nepal – on the question of whether IGR should be encapsulated in constitutional and legislative instruments in the way South Africa has done.

Chapter 3 also envisaged the enactment of an IGR Act to provide for more detail with regard to intergovernmental structures and processes. After some delay, the IGR Framework Act was promulgated in 2005.

5.1 Main IGR forums

The main IGR forums that came into being under the 1993 and 1996 South African Constitutions include the following:

Senate and National Council of Provinces

The 1993 Senate had weak legislative and IGR powers.

There was little if any direct contact between senators and their provincial legislatures, the Senate had no clear mandate in the field of IGR and the Senate took no action to involve itself in the conduct or oversight of IGR. It was observed that:

it is therefore not surprising that the Senate became the subject of a substantial overhaul in the new Constitution. It is safe to observe that the single most revised aspect of the 1996 Constitution compared to the interim Constitution is to be found in the composition and powers of the National Council of Provinces (NCOP).³¹

The NCOP, it was hoped, would constitute a closer and intimate link between the national and provincial legislatures. The purpose of the NCOP is to represent provincial interests in the national legislative process and to obtain a mandate from the provincial legislatures on issues before the national parliament. The same can be said for the involvement of local government in the NCOP.

The fact that the ANC so totally dominates both houses of parliament does not detract from the potential that the NCOP still holds to represent provincial interests in the national legislative process, and in so doing it could in future be a potent player in the field of IGR.

Little has come from the NCOP as a house of the provinces or as a forum for IGR. This may change, however, if in future the political scene changes with parties other than the ANC governing at provincial or national spheres.

Commission on Provincial Government

The interim Constitution established a Commission on Provincial Government³² with the mandate to: facilitate the establishment of provincial government; advise the Constitutional Assembly on aspects of the provincial system; and make recommendations about the number and demarcation of provinces. The commission had mixed success and the 1996 Constitution did not provide for it to be continued.

The Department of Cooperative Government and Traditional Affairs (CoGTA) has taken over some of the functions of the Commission on Provincial Government, but there is no independent body that assesses the conduct of IGR on an ongoing basis. It is strongly

recommended that government again consider the establishment of an independent advisory commission on IGR to analyse, assess and comment on the conduct of IGR.

Fiscal and Financial Commission

The Fiscal and Financial Commission was established by the interim Constitution³³ to advise all levels of government on financial and fiscal requirements. An important function was to set criteria for the allocation of financial and fiscal resources between the three levels of government.

Intergovernmental Forum

The first IGR forum to be established after the enactment of the 1993 Constitution was the Intergovernmental Forum (IGF).³⁴ The forum was designed for the national president, ministers and provincial ministers to meet. In due course national and provincial ministers convened their own line function meetings with their counterparts. The premiers also established a premier's forum to discuss matters of common concern. The regularity of meetings of the IGF declined over time as other bodies, such as Minmecs, commenced their activities.

Minmecs

Minmec is the acronym referring to meetings between national ministers and provincial members of the executive councils in functional area where they have concurrent responsibilities. During the initial stages the Minmecs functioned informally and without any protocols, but over time they have become more regular and consistent.³⁵

Premiers' Forum

The Premiers' Forum allows premiers of the various provinces to meet to discuss matters of common concern and to develop a response to national policy initiatives. The Premiers' Forum has had little success as the dominance of the ANC makes it unlikely that premiers would take a position inconsistent with the party line.

Technical Intergovernmental Committee

The Technical Intergovernmental Committee comprised directors-general and senior civil servants from the

respective line function ministries. The main objectives of the committee were to prepare the agenda for meetings of ministers, coordinate on matters of a technical nature and implement Minmec decisions.

5.2 Ten-year assessment

In a ten-year review entitled 'Intergovernmental Relations and Service Delivery in South Africa' commissioned by the Presidency, Layman made the following observations in 2003 about key challenges that face the system:³⁶

- Clarification is required on the status, roles, governing principles and relationship between executive authorities so as to prevent unfunded mandates and 'recommendations' being interpreted as 'decisions', and to avoid the risk of unconstitutional conduct in that decisions are made by unauthorised IGR forums.
- Intergovernmental forums, and in particular the President's Coordinating Council, need to be formalised.
- The attendance and participation of local government in intergovernmental structures need to be improved.
- The functioning of provincial IGR needs to be improved in order to align strategic plans, and coordinate legislation and cooperation around areas of joint responsibility.
- Active forums within the intergovernmental field need to be integrated to ensure an all-of-government approach to challenges.
- Clarity concerning the ground rules for IGR needs to be improved, including integrated planning and service delivery.

The period 1993–2005 presented a strong learning curve for IGR in South Africa. The implementation of a new constitution is not a simple task and the complexities of a multitiered system add additional challenges.

South Africa also had to deal with the transformation of the civil service and the integration of the previous homelands into the new provinces. Given the history of the country, it took many by surprise that all these

implementation challenges went ahead without major disruption of services.

In essence the IGR developments of the period 1993–2005 can be summarised as follows:

- Spontaneous IGR forums came into being but those forums were ad hoc and the meetings were inconsistent and often lacked follow-up.
- A realisation dawned as to the importance of IGR in a multitiered system, but political discretion by ministers to decide if meetings would be called, what the agenda would be, and who would attend meant that IGR functioned well below the required standard.
- Uncertainty was rife about the status of IGR 'decisions', as well as who was responsible for follow-up of recommendations, who could be held accountable if there was a failure to implement and general accountability of those serving in IGR structures.
- The political dominance of the ANC was overwhelming within IGR and as a consequence party discipline stifled open debate. There were, however, many examples of debates within the ANC about policy measures but such debates were not open to public scrutiny, and the final decision was always that of the party and not the wishes of the electorate.
- There was in general a lack of all-of-government integration around policy planning and implementation. The various spheres functioned to a large extent in practical isolation or at best with lack of integration and coordination.
- The general consensus was that South Africa needed consistency in IGR as far as structures, processes, representation, decision-making, accountability and reporting were concerned – and thus the enactment of the IGR Act.

6. INSTITUTIONS ARISING FROM THE INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 2005

The purpose of the Intergovernmental Relations Act is:

To establish a framework for the national government, provincial governments and local

governments to promote and facilitate IGR; to provide mechanisms and procedures to facilitate settlement of intergovernmental disputes; and to provide for matters connected therewith.³⁷

In its preamble the IGR Act emphasises that the challenges facing South Africa in addressing poverty, underdevelopment and the legacy of apartheid can best be addressed 'through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'.³⁸

The object of the IGR Act is to provide, within the principles set out in Chapter 3 of the Constitution, a framework for the conduct of IGR to facilitate coherent government, the effective provision of services, the monitoring of policy implementation and legislation, and the realisation of national priorities.³⁹

Several principles are set to promote the object of the IGR Act, including:⁴⁰

- taking into account the circumstances, interests and budgets of each sphere when powers are exercised;
- consultation with other organs of state;
- coordinating actions when implementing policy; and
- avoiding duplication or jurisdictional contests.

6.1 Key IGR institutions

The following are, in brief, the key institutions provided for in the IGR Act:

President's Coordinating Council⁴¹

The President's Coordinating Council is the main IGR forum and comprises the president, deputy president, minister in the Presidency, relevant minister for IGR, ministers responsible for finance and public service, premiers of the provinces and a representative of organised local government.

The President's Coordinating Council is a consultative forum where matters of national interest that are relevant to provincial and local government are discussed. Other matters dealt with include: implementation of national policies and legislation;

coordination and alignment of priorities and policies; identification of shortcomings; and consideration of reports on IGR provided by intergovernmental forums.

The council's meetings are convened by the president and s/he determines the agenda. Suggestions for agenda items can be submitted in accordance with the framework determined by the president. The council meets at least twice a year and the secretariat is provided by CoGTA.

National Intergovernmental Forums (Minmecs)⁴²

Any cabinet minister 'may' establish a national intergovernmental forum to promote and facilitate IGR within the functional area for which that minister is responsible. These forums are known as Minmecs and comprise the national minister, deputy minister, members of the provincial executives with responsibility for the particular functional area and a representative of local government (if the functional area of the forum is a matter assigned to local government).

A Minmec is chaired by the minister. In general Minmecs meet each quarter but this is not a statutory requirement.

The role of a Minmec is to:

- consider matters of national interest within the concurrent functional areas, for example, education, tourism, health, environment and agriculture;
- consult on the development and implementation of national policy in regard to the functional area;
- coordinate strategic and performance plans in regard to the functional area;
- consider any other matter of relevance to the functional area; and
- discuss performance of services and corrective action.

Minmecs do not have decision-making powers or executive authority but they fulfil an essential role in coordinating the actions of the executives. A Minmec must also report to the President's Coordinating Council on any matter that has been referred to it. It may also refer a matter to the Budget Council or Budget Forum.

Ministries may also be combined into a 'cluster' of departments where ministries and departments with similar broad objectives can be better organised through horizontal cooperation. The clusters are not created by statute but by agreement among cabinet ministers.

There are currently six clusters, namely:

- infrastructure development;
- economic sectors and employment;
- human development;
- social protection and community development;
- governance and administration;
- international cooperation, trade and security; and
- justice, crime prevention and security.

Premier's Intergovernmental Forum⁴³

Each province must establish a Premier's Intergovernmental Forum to promote relations between the province and local governments in the province, and to align their actions with provincial and municipal strategic plans.

Each province's Premier's Intergovernmental Forum must comprise the premier, the member of the executive responsible for local government, any other MEC appointed by the premier, the mayors of district and metropolitan authorities, an administrator that may have been appointed, and a councillor designated by organised local government.

The premier of each province chairs the intergovernmental forum and sets the agenda. The forum is consultative in nature and may consider a wide range of issues of mutual concern to the province and local governments, for example: implementation of national policy and legislation relevant to local government; any matters arising from the President's Coordinating Council and/or Minmecs; draft national and provincial policies that affect local government; development of legislation affecting local government; coordination of provincial and local government development planning; and coordination and alignment of strategies and performance plans.

The forum must also report to the President's Coordinating Council at least once a year on the progress with implementation of national policy and legislation as well as on any matter of national interest that has arisen in the forum.

Provincial Minmecs⁴⁴

The premier of a province 'may' also establish provincial Minmecs where the MEC of a particular functional area links with local government to promote IGR. A provincial Minmec may also be established for only a part of the province where specific issues require close IGR between the province and the local governments within the functional area.

The cluster system of departments has also been replicated within provinces. Examples of provincial clusters are economic affairs, social affairs, infrastructure, and governance and administration.

Interprovincial forum⁴⁵

The premiers of two or more provinces 'may' establish an interprovincial forum to promote and facilitate IGR between those provinces. The composition, role and functioning of the forum are determined by agreement of the participating provinces.

The role of an interprovincial forum is to provide a basis for provinces to discuss and consult in matters of common interest, for example, sharing of information, exchange of best practice, joint capacity building, coordinating development and any other matter of strategic importance affecting the participating provinces.

District intergovernmental forum⁴⁶

There is a district intergovernmental forum for each district and it must promote and facilitate IGR between the district municipality and local municipalities in that district. The forum comprises the mayor of the district municipality, the mayors of local municipalities in the district and an administrator, if one has been appointed.

The mayor of the district municipality chairs the forum, convenes meetings and sets the agenda. The forum must meet at least once a year with service providers concerned with development in the district.

The role of the forum is to serve as a consultative body for the district and local municipalities where matters of relevance to them can be discussed. Such matters would include: draft national and provincial policy and legislation that may affect local government; the implementation of national and provincial policy and legislation; matters arising from the Premier's

Intergovernmental Forum; coherent planning and development of the district; and any other matter of strategic importance that affects the interests of the district. In essence the forums must ensure that integrated planning and service delivery occur.

Intermunicipality forum⁴⁷

Two or more municipalities 'may' establish an intermunicipality forum to promote and facilitate IGR between them. The composition, role and functioning of the forum are determined by agreement between the participants.

The role of the forum is to enable municipalities to discuss and consult with each other on matters of common concern, for example: information sharing, best practice and capacity building; cooperation in development challenges affecting the parties; and any other matter of strategic importance that affects the parties.

Intergovernmental technical support structures⁴⁸

An intergovernmental forum 'may' establish an intergovernmental technical support structure to provide technical support to the forum. Such a support structure 'must' consist of officials of the organs of state that make up the intergovernmental forum and may also include other persons who may assist in supporting the intergovernmental forum. The internal rules of the structure are determined by the members thereof.

Forum of directors-general⁴⁹

The Forum of South African Directors-General (Fosad) brings all the most senior civil servants together to improve policy making and implementation across all of government. Fosad also strives to prevent duplications between departments by forming clusters. The Fosad clusters are aligned with the ministerial clusters.

Budget Council and Budget Forum⁵⁰

The Intergovernmental Fiscal Relations Act established the Budget Council and Budget Forum. They comprise the national minister of finance and the provincial MECs responsible for finance. Provision is also made for the participation of local government. The main function of the two bodies is to facilitate cooperation and consultation between the respective spheres during the budgeting process.

6.2 Implementation protocols⁵¹

Implementation protocols 'may' be entered into by organs of state that jointly exercise a power. An implementation protocol 'must' be considered when the topic has been identified as a national priority, the protocol will assist the national or provincial government to support local government, or an organ of state lacks the necessary capacity to discharge a function allocated to it.

An implementation protocol 'must' contain information about challenges faced, the roles and responsibilities of each organ of state in performing a function, the priorities, aims and desired outcomes, and indicators to measure effective implementation of the protocol and dispute-resolution mechanisms.

6.3 Settlement of intergovernmental disputes⁵²

The point of departure for dealing with disputes between spheres of government is that litigation must be avoided as far as possible. The Constitutional Court has in fact referred a dispute back on the grounds that all conflict-resolution mechanisms and options had not been exhausted by the parties.⁵³

All organs must therefore make 'every reasonable effort' to settle interjurisdictional disputes without resorting to judicial proceedings. Any formal agreement between organs for the exercise of a power or function 'must' therefore also include a conflict-resolution mechanism.

If a conflict in an intergovernmental institution is declared the parties must convene a meeting to consider the nature of the dispute and identify mechanisms that may assist to resolve the conflict. The minister or provincial MEC may also convene a meeting in certain circumstances. If parties fail to attend a meeting convened by the minister or MEC or the parties fail to designate a facilitator, the minister or MEC may appoint a facilitator on behalf of the parties.

The facilitator must assist the parties in the dispute to settle it and must submit reports to the parties and/or the minister or MEC.

It is generally acknowledged that the political dominance of the ANC has contributed to the relative lack of litigation and conflict between the national and provincial spheres. The positive aspect of such dominance, however, is that it gave the multilayered

system time to settle, whereas if conflict had started from the beginning the implementation process may have been disrupted. The real test for IGR and cooperative government will, however, come when the national, provincial and local governments are governed by different parties.

6.4 Integrated planning and development

Numerous planning strategies and policy papers have been developed since 1996 to integrate the actions of the respective spheres of government and to provide the guidelines according to which government decisions are made and budgets are allocated.

Intergovernmental planning is not the responsibility of a single government department but is coordinated within the National Planning Framework of the national government.

The National Planning Framework was adopted by cabinet in July 2001 for the purposes of integrated planning and development. The National Planning Framework has given rise to a three-year rolling budgetary review on the basis of fixed meetings each year. All spheres are therefore expected to coordinate their activities and meetings to correlate with the national planning schedule.

The following are the main planning instruments:

- An integrated development plan (IDP) is a five-year local government plan of development objectives within the area of a municipality and how it links up with provincial and national strategies.⁵⁴ Each local government's IDP is supposed to be the main planning document that directs and guides all planning, management, budgeting and decision-making for the area. The objective is that every decision taken in regard to a local municipality must fit into the spectrum of objectives identified by the local IDP.⁵⁵ The ideal is to harmonise the IDP process to ensure that all spheres of government plan and act in unison. This is consistent with the philosophy that 'the legitimacy of the state at the local level can only be strengthened if authorities are able to respond to the legitimate needs of the population'.⁵⁶
- Provincial growth and development strategies (PGDSs) are development strategies adopted by each province for the area under its jurisdiction. A

PGDS must be informed by the IDPs of municipalities in the province and must also link with the national development strategies. The provinces therefore play a key role, at least in theory, by linking national and local development. This is consistent with the constitutional mandate of provinces to promote the development of local government and build its capacity.⁵⁷

- The national spatial development perspective (NSDP), which was adopted in 2003 by the national cabinet, is a planning tool for all of government and seeks to promote informed economic investment, regional growth and development planning. An NSDP consists of a spatial narrative, supported by a set of maps, indicating what is to happen where and a strategic response.

6.5 Self-assessment by government

In a recent department publication entitled 'IGR Working Together for Development: A Series of Six Case Studies',⁵⁸ CoGTA identified the following 'key lessons' for IGR practitioners:

- It is important to obtain clarity in the allocation of powers and functions across the three spheres of government, and a keen understanding is needed of the exact roles and responsibilities within specific service delivery sectors.
- Effective IGR structures provide meaningful opportunities for strategic engagement and decision making. A strategic approach needs to be adopted towards the establishment of IGR structures as in certain cases dedicated, issue-specific structures can be advantageous whereas in other cases the use of general coordinating structures may be more useful.
- The IGR system is characterised by a high degree of complexity and IGR practitioners need to seek ways of managing this complexity.
- The IGR system appears to function more effectively when the role-players share a specific objective that needs to be achieved within a non-negotiable period of time.
- Government departments and municipalities require a certain minimum capacity to be able to engage effectively in IGR activities.

- Planning and intergovernmental fiscal relations are a critical aspect of the IGR system; clearly allocated powers and functions and effective intergovernmental planning is inextricably linked to questions of funding and accountability. Harmonised reporting systems and common key performance areas also support cooperative governance.
- Challenges remain in moving beyond cooperative governance to integrated governance. Financing and implementation protocols provide a useful tool for managing the move towards greater integration of planning, financing and execution of joint projects.

7. THE PRACTICE OF INTERGOVERNMENTAL RELATIONS: PRACTICAL EXPERIENCES AND PROPOSALS FOR IMPROVEMENT

This part of the research was principally based on small group and individual interviews conducted during September and October 2010. The analysis and assessment of the functioning of South Africa's multilayered system has attracted surprisingly little attention in scientific literature. An overview of recent publications (2005–2010) shows that few scientists have established themselves as experts in the field, and overall relatively limited information is available on the practical functioning of the three-sphere system.

The responses from interviewees are presented in the form of a quotation that represents some of the views on a particular topic, followed by a brief discussion of the experiences and comments of interviewees. The outcomes of the interviews are presented under the following headings: IGR philosophy; IGR structures and processes; outcomes of meetings; conflict resolution; strengths; and suggestions for improvement.

7.1 IGR philosophy

'IGR mean cooperation between the spheres of government'

It is generally understood that IGR entail interaction between spheres of government on the basis of mutual respect and equality. In practice, however, the national ministries and departments play a strong role which, linked with the political dominance of the ANC, brings about a highly centralised system of IGR.

Intergovernmental structures are often used in practice for purposes of top-down communication and instructions, but account must also be taken that due

to a lack of capacity at provincial and local levels the opportunities that do exist for bottom-up inputs are not always used. The blame for top-down communication therefore cannot always be placed at the door of the national sphere. If local and provincial spheres are not capable of or are slow to put forward proposals, the governance process must continue. The reasons for centralisation are therefore often more complex than merely putting the blame on the actions of the dominant governing party.

'IGR must allow for more bottom-up inputs'

A very strong sentiment expressed was that national and provincial policy formulation is not sufficiently informed and influenced by local needs and requirements. As a result, policies are often adopted at national or provincial levels that are of little relevance to or out of touch with the needs of local communities.

Several examples were highlighted where infrastructure developments in towns – such as the building of roads, erection of clinics and provision of water – were not built where people actually reside and where their needs are. In one example someone demonstrated how the provincial plans, if overlaid with the local government IDPs, were not synchronised at all. The official explained how services were provided that were not needed, or where the service was indeed needed but it was provided at the wrong location.

'IGR do not have teeth'

The constitutional and legislative framework for IGR in South Africa is arguably the most advanced and detailed in the world, but there is no efficient mechanism to ensure that the spirit of IGR is implemented and adhered to in daily practice. Leaders and officials cannot be forced to cooperate and consult, and with the dominance of a single political party there is limited public accountability. The very nature of IGR is voluntary and as a result there is insufficient compliance with the spirit of the Constitution.

The 'people factor' must be taken into account when the operation of IGR is assessed. This means that regardless of the sophisticated nature of the constitutional and legal system, the operation depends on the training, skills and attitude of people.

In its inaugural report on IGR, the Department of Provincial and Local Government (DPLG) expressed

concern at the slowness of officials to participate in IGR and it recommended 'legislative intervention to enforce IGR cooperation . . .' (emphasis added).⁵⁹ The department does not suggest how cooperation could be 'enforced' but it signifies the frustration experienced by government at the slow rate of compliance with the spirit of cooperative government.

The *quantity* of IGR institutions must not lead to the assumption that there is always *quality* in the consultation. As one senior official said: 'We have a beautiful piece of legislation but to get people to leave their political, historic and personal baggage at the door and to cooperate is not always easy.'

'IGR are not linked to federalism'

It is widely understood that the conduct of IGR is determined by the Constitution and the interpretation thereof. The theoretical debate whether South Africa is a federation or a decentralised unitary system is of little practical assistance to civil servants who operate and manage within the system of IGR. What is important, however, is the Constitution's emphasis that each sphere must respect the other, the obligation to work together and consult, and the involvement of all spheres in the formulation of policy and the implementation thereof.

The practice of the past 16 years shows that the operation of the IGR system is highly unitary even if the constitutional framework is federal. Since the constitutional framework is that of a federation, it is possible that as the political system matures and other political parties take office – be it at the local, provincial or national spheres – the IGR system may become more tested.

'IGR should receive more attention and recognition in departments'

It was widely felt that IGR should receive more status within the executive and administrative processes of governments, that specialist IGR officers should be appointed in departments and that department and staff performance appraisals should include the operation of IGR.

There is still some confusion across government as to who is responsible for IGR. Should it be a central office – for example, the Office of the Premier – or should

each line function ministry have IGR objectives as part of its performance objectives and indicators?

The fact that IGR are not included in the duties of officials and the strategic plans of departments means that the conduct and effectiveness of IGR cannot be audited or appraised. As a result it is often a neglected field. This concern is consistent with the finding by the DPLG in 2008 that 'there is currently a lack of process or regulatory guidance in managing integration'.⁶⁰

'Training in IGR is completely inadequate'

A common complaint raised was that the training of new staff in the theory and practice of IGR is inadequate. In general, IGR do not form part of the induction programme for new staff members. Many officials are therefore exposed to and involved in IGR activities without knowing what they are, what the philosophy is and what their role is. The organisational culture is not yet so deeply embedded that new officials are assimilated into an atmosphere of IGR.

Many officials attend intergovernmental meetings with the expectation of receiving instructions from a higher sphere, rather than making inputs on behalf of their sphere as to what can be done.

It is especially at local and provincial spheres where new staff members often assume that IGR mean taking direction and instruction from the national sphere. As a consequence they do not exert the influence they could on national and provincial policies. The lack of bottom-up inputs is exacerbated by the strong centralist culture within the ANC.

In some provinces the university sector and training colleges offer specialist education and training courses on IGR. This should be expanded to ensure that all civil servants above a certain level of seniority are required to attend some training in IGR.

Ministers must also be made aware that it is in their interest for IGR to function well. They should therefore not see IGR consultation and coordination as a threat or an erosion of their political power.

It is acknowledged that the training pack (toolkit) developed by CoGTA⁶¹ is very useful to assist new persons to understand how IGR operate and that it should be made part of standard induction programmes for new civil servants.

'Colleagues often do not have a good understanding of IGR'

There are many differences of opinion within departments and between spheres as to what is meant in practice by IGR. Many examples were used during the interview to illustrate the merit of this observation. Sometimes a minister would telephone colleagues or meet them at a political function and then inform staff that a decision had been made without proper record, minutes or performance indicators of what must be done by whom and when.

It was acknowledged that although there is nothing wrong with ministers liaising, the entire system of IGR cannot be driven by private inter-ministerial communications as a substitute to formalised structures and processes.

Another concern expressed was that IGR meetings are often attended by junior staff or persons who are not properly briefed on the topic under discussion or the position of the sphere of government they represent on the matter. This means that recommendations cannot be finalised or that discussions do not sufficiently take into account the interests of a specific sphere. The high turnover of staff at all spheres exacerbates the problem that new staff do not understand what is expected of them in terms of IGR.

'Assessment of IGR does not happen'

No thorough and consistent assessment of the conduct of IGR is provided by the auditor-general, CoGTA or external researchers. As a result it is impossible to identify good practices or to address shortcomings in a holistic manner. An independent advisory council on IGR may fulfil a useful observation, research, auditing and training function.

During interviews several positive developments in IGR were identified but these often came as a surprise to attendees since there is no effective way for spheres and departments to learn from one another and to exchange information.

It is essential that the conduct of IGR is included in the strategic plan of each department and that the terms of reference of IGR institutions are clear and practical. In this way the attainment of goals can be audited. Several interviewees observed that departments often do not include IGR in their strategic plans for the very purpose of avoiding auditing.

'The party and state cannot be separated'

An assessment of the IGR system and centralised decision-making cannot be done without taking into account the dominance of a single party on all spheres of government. The party discipline of the ANC is prevalent in and characterises the entire IGR system. This does not mean that debate within the ANC does not occur at all, but the ferocity of discussions is tempered by the discipline of the party.

It has also been observed in the literature that:

if party hierarchy is mirrored in district-local appointments, then it is unlikely that local councillors, as the more junior party members, will assert themselves as equals when in conflict with district officials, their party seniors.⁶²

A further complicating factor is that persons in decision-making structures may be junior to persons in ANC party structures. Decision-makers are therefore often curtailed not just by the needs of the population they serve, but also by the political demands of the party structures.

Some examples referred to in this regard include the following: projects are culled due to political infighting; decisions are not implemented due to an external party leader interfering with the departmental decision-making process; the next election cycle determines which priorities the party will pursue rather than the needs expressed by a local community; and the controversy that often surrounds the appointment of administrators to run local governments.

One senior official summarised the situation saying: 'When you work for government you must be careful of what you say and do since political calculations effect everything.'

The concern expressed by Malherbe when the IGR Act was enacted may be reflected in the observations of interviewees. He predicted that:

The conclusion is evident. The IGR Framework Act reflects the present centralising tendency from the side of the national government, and it will serve to confirm, no, reinforce, the *de facto* status of the other spheres as delivery agents of the national government.⁶³

In short, IGR are political and politics is IGR.

'Local government IDPs should be the core driver of IGR'

The success or failure of government is ultimately dependent on the quality of service delivery at local level. As a result, local IDPs that set out the needs of communities must be the main driving force of IGR. Instead of working upward towards the agenda of the national government, the national and provincial governments should work down towards the local governments. It happens too often that national planning is insufficiently informed by local needs or that the budgetary process does not reflect the IDP priorities. On the other hand it must be acknowledged that some municipalities do not have finalised IDPs or IDPs have been so ambitious that they have little practical value.

Many examples were given to demonstrate that even in instances where local IDPs were fully developed, the provincial PGDS or the party may set completely different priorities.

A recent example of where the local IDP has been fully integrated with a provincial strategy is the Agricultural Master Plan of the North West Province. The plan, which was developed with the assistance of the Development Bank of Southern Africa, involved extensive local consultation and assessment of the resource base of the province prior to developing a provincial strategy. The master plan also took into account information about areas of importance to agriculture, for example, roads and public works. The Office of the Premier was the coordinating point for the development of the master plan and it now forms part of the province's PGDS. As a result the provincial plan informs the IDPs and the IDPs in turn influence the provincial plan.

'IGR need a stable and reliable workforce'

The conduct of IGR is inextricably linked to the quality of persons that serve in institutions and structures.

One of the most consistent comments made by interviewees concerned the pressure experienced by IGR institutions due to the lack of a stable and professional staffing sector. Staff turnover within government departments is extremely high and as a result corporate knowledge and experience is constantly lost. For example, in one North West Province district municipality staff turnover over a five-year period was 65%. Staff turnover in the agricultural

services of the same province was 23%. This inevitably impacts on the quality of IGR.

'Powers and functions may have to be revisited'

A comment frequently heard was that the existing allocation of powers and functions in the Constitution may have to be reassessed and revisited in the light of the practical experiences of the past 16 years. The allocation of powers and functions during the constitution-drafting process was largely a theoretical exercise based in part on international experiences. With the wealth of experience gained since the commencement of the South African Constitution, the functionality and practicality of powers and functions require an assessment.

This is not to say that interviewees believed that the powers of the provinces and local authorities should be reduced. There is, however, a widely held view that an assessment of the allocation of powers and functions in the Constitution is warranted.

'IGR should involve all-of-government ministries not just those with concurrent powers'

The national ministries most involved in IGR are those with concurrent functions with local and provincial governments. It was pointed out a number of times, however, that at a local level it is essential for ministries with exclusive functions also to be part of the IDP and IGR processes.

For example, if the police (an exclusive national competency) are not aware of the practical issues and service delivery frustrations that face communities, they may not be able to develop strategies to combat crime or to defuse public protests.

The same can be said of other departments. If, for example, the Department of Justice and Constitutional Development is unaware of the causes of community unrest it may adopt an attitude when responding to community unrest that exacerbates tension rather than resolving conflicts and bringing about stability.

This also applies to the Department of Foreign Affairs where cross-boundary issues may impact directly on local communities and the conduct of foreign relations with neighbouring states.

It is therefore essential that, at a local and district

level, all ministries (not just those with concurrent powers) that are active in the area must be present at meetings to hear what people are saying and to explain policies.

There are instances where success has been achieved. For example, one district municipality in the Free State has all provincial and national ministries with functions in the area represented at meetings.

In another example, after civil unrest in municipalities the Department of Justice and Constitutional Development has placed prosecutions on hold based on the department's improved understanding of the causes of the unrest. The department realised that prosecutions may exacerbate conflict which was caused by poor service delivery to local communities.

7.2 IGR structures and processes

'IGR take place formally and informally'

It is generally understood that IGR are not limited to the discussions in formal institutions but that they also involve a wide range of informal and personal interaction between governments and staff at a vertical and horizontal level. This is precisely why new employees in the civil service must be made aware that IGR are not limited to a specific office, person or department, but that all senior staff in all spheres of government are from time to time involved in formal or informal IGR.

One of the benefits of the dominance of the ANC is that people often know who to contact or that they feel at ease since they know each other through political linkage. It is more complex when a province or local authority is governed by another political party because staff may be concerned that they could be criticised for working too closely with the 'opposition'.

Senior officials expressed a keen awareness that they had to find a balance between working with the 'opposition' in provinces or local authorities on a professional basis, while at the same time facing the risk that they may be accused of disloyalty.

A grave concern expressed was that success by a province or municipality that is governed by another party may count against them as officials. As one official said: 'We may have the best system in the world but people are often allergic to each other.'

'Clusters and Minmecs have become standard practice'

It is a statutory requirement for ministries to establish Minmecs with their provincial counterparts. Even in instances where a national department has exclusive jurisdiction over a particular area, for example foreign affairs, Minmecs have been established to facilitate cooperation and consultation. Most of the Minmecs form part of the all-of-government annual schedule of meetings. The meetings provide a basis for certainty and stability in planning.

While the introduction of 'clusters' of ministries has improved IGR at a horizontal level, much more can be done to harmonise the actions of different departments within the same sphere. Ministries and their departments often continue to work in 'silos' paying scant attention to the bigger picture.

The clusters do, however, enable national ministries to coordinate their activities holistically before the sectoral Minmecs take responsibility for implementation with their provincial counterparts. The flip side of the coin, however, is that the clusters are often far removed from local communities and their IDPs, and as a result policy initiatives at the national level may insufficiently resemble practical needs at the local level. There is also a perception that a cluster is another 'level' of government that moves farther and farther away from the population.

'The President's Forum and Minmecs meet regularly and the processes are well understood'

The President's Forum meets at least twice a year and Minmecs generally meet every quarter. The president or national minister respectively chairs the meetings and the agenda is set after inputs are received from the technical forums. The meetings form part of the government's national calendar and are therefore predictable and certain.

This is not to say that all Minmecs are equally effective and inclusive. Some ministers are more keen and willing to involve provincial and local inputs than others. This is probably the same in all systems where IGR are practiced. However, given the dominance of the ANC in legislative institutions, ministers who do not actively engage in IGR are not readily held accountable through open political processes.

It is essential that ministries have stable and well-

trained staff to service the IGR processes. Staff must provide consistency between changes of government. It must, however, also be noted that IGR staff in the office of the minister or MEC are often replaced after an election, and this impacts on the quality and consistency of IGR that follow.

'Attending IGR meetings is often a nightmare'

Many interviewees complained about attending IGR meetings saying that, among others: officials are not properly briefed; they are too junior to commit to recommendations; they are sent to fill a seat; there is insufficient reporting of what happens between meetings; and juniors dare not speak up if they have political or promotional ambitions.

Although there is a measure of consistency within some departments in terms of seniority and experience, the general picture was one of frustration. The lack of consistent attendance at intergovernmental meetings by senior and well-briefed officials has been a source of concern and criticism since 1993.⁶⁴

'The Premier's Forum presents a mengelmoes (mixed bag)'

The importance of the Premier's Forum in the respective provinces is not taken seriously by all premiers. This is due to a number of reasons, for example: the establishment of such forums is not obligatory; premiers may not wish to be scrutinised by local governments; political tension and competition within the governing party may make a premier reluctant to convene a forum; provinces are often bypassed by local and national governments; and the benefits of IGR are not always properly understood.

These comments echo concerns expressed in the 2003 Layman review which mentioned that: 'The practice of provincial IGR forums to effect these objectives is, however, patchy at best.'⁶⁵

An example mentioned was where a local municipality's IDP identified a specific service as being of great importance to that area. Although this was endorsed by the MEC responsible for the particular function, when it came to implementation the item was completely removed from the agenda because the premier believed that his opponents (within the same party) would be given too much credit if the project succeeded.

'IGR are complicated by inconsistency in functions at an institutional and staff level'

There is a certain degree of asymmetry within the multilayered system whereby not all institutions have exactly the same functions. For example, not all district municipalities have the same powers and functions. In some areas a district municipality may have a function while in another area the same function is the responsibility of a local municipality. This presents a situation where IGR may have to involve a district municipality in one area, but in another area all local municipalities have to be involved. And all this takes place within the same province.

It is therefore challenging for officials to determine who should be involved in meetings, and it is equally challenging for local level officials to obtain proper briefs and instructions prior to meetings.

Another example where clarity is sometimes required is where the allocation of functions for IGR lies between the Office of the Premier and the provincial CoGTA. Some interviewees observed that a national department with a provincial office could erode the role of the provincial premier in the conduct of IGR in that it could, consciously or unconsciously, encourage municipalities to bypass the provincial administration. It is not always clear to MECs, local government leaders and officials who is responsible for what – the Office of the Premier or the provincial CoGTA – regarding IGR matters.

It was also observed that in some government departments the IGR function is highly centralised and confined to a few senior staff members, while in other departments it is seen as a general staff responsibility.

'Local issues governance – national issues political'

There are many examples of a local-national dichotomy or contradiction in priorities pursued by the respective spheres. At local level, communities are faced with certain survival issues such as the provision of clean water, electricity, clinics, refuse removal, transport and housing. These issues may not synchronise with political issues at the provincial or national levels.

An often repeated comment was that 'big projects are planned in Pretoria but the national mandates are not always welcomed by local communities'.

To make matters worse, local issues can often be linked to a specific political or interest grouping that may not be in favour with the provincial or national leadership.

An example was highlighted where an important local issue was vetoed by a party official at a higher level because it had been approved by a faction within the party that was not supportive of the senior official.

A person in local government observed that: 'If the local issue is linked to a political grouping or faction not in favour with the provincial or national leadership, the political priority prevails and the local need is ignored.'

It is therefore not surprising that if the causes of public protests in local communities are assessed, some of the reasons for community complaints could have been addressed much sooner with the necessary provincial intervention and assistance.

At the same time another local government leader's observation must be noted. She said that 'even if the philosophy of bottom-up planning is accepted, the capacity to turn it into practical actions is often absent'.

'The people dimension must not be underestimated'

'Good plans fall apart and so a good system is being broken' lamented one local municipality administrator when he spoke about the lack of human resources. The skills shortage and high staff turnover are most visible at local level. Municipalities must often deal with minimal skills despite this being the level where the practical outcomes of policies are most important.

The lack of well-trained staff not only impacts on the delivery of municipalities, it also undermines the ability of municipalities to: make inputs into provincial and national policy processes; represent the interests of their communities; resist policy proposals that are not reflective of the local IDP; and scrutinise proposals. The problem is acknowledged by provincial and national authorities where skills shortages also exist, albeit it not to the same extent as at the local sphere.

On the one hand policy planning and budgeting cannot be delayed to wait for all municipalities to come on board. On the other hand policies may be approved that do not reflect local needs.

'Implementation protocols must be clear, concise and specific to enable auditing'

There is a widespread view that IGR will only become effective, consistent and free from undue political interference and manipulation if they are audited by the auditor-general. The absence of 'teeth' makes IGR statements and endeavours weak.

The concern expressed in Layman's 2003 review about the lack of integrated strategic planning continues to resonate:

However, in practice the alignment of strategic planning between spheres of government is weak or absent. It thus becomes difficult to cascade national priorities into provincial and municipal strategic planning, and to match local development opportunities articulated in municipal IDPs with the resource allocation decisions of national and provincial governments.⁶⁶

The IGR institutions' terms of reference, the implementation protocols within provinces and the job descriptions of key senior staff must all contain measurable deliverables on which persons can be audited and assessed.

It is accepted that IGR generally do not allow for such performance appraisals; however, in the light of the constitutional duty of cooperation, coordination and consultation it is essential that more than lip service is paid to IGR. In essence, as one observer said, IGR 'need more teeth and more accountability'. Another official remarked bluntly: 'We have perfected the art not to have objectives and so we cannot be measured and as a result we get clear audits.'

Strengthening the checks and balances on IGR may go some way towards reducing the levels of staff turnover since new staff would have clear objectives to work towards.

'Structures in some areas are in a chaotic state'

Local government structures in many areas are in a perilous state. This inevitably affects the quality of planning, implementation and IGR – the king's feet are of clay.

Any assessment of the IGR system must therefore be cognisant that 'relations' cannot be conducted

effectively if the primary institutions of decision-making and administration are failing. If local governmental systems are failing, intergovernmental institutions become a conduit of 'instruction' rather than 'consultation'. As has been observed: 'The national developmental agenda (seemingly) promotes decentralisation but practices centralisation.'⁶⁷

'IGR in some provinces are in a chaotic state'

Strong criticism has been expressed about the state of IGR in some provinces. Comments included the following: the Office of the Premier does not provide sufficient leadership; the IGR institutions that exist do not have clear and measurable terms of reference; the Premier's Coordinating Forum is comprised in a manner not authorised by the IGR Act; meetings take place without proper agendas, minutes or outcomes; and the frequency of meetings is entirely arbitrary.

'The mindset of IGR is centralising and prescriptive, not cooperative'

It is difficult to find a balance between the need to get things done (often top-down) and the need to consult (bottom-up). There are many factors that impact and contribute to IGR processes being centralised and one sided.

The DPLG's annual report mentions the 'role of IGR in driving integrated service delivery and policy implementation . . .'.⁶⁸ This reflects the top-down, agency approach to provincial and local spheres, with emphasis on policy 'implementation' and not policy 'formulation'.

'Provinces with regional offices: What happens to district municipalities?'

Several provinces have established regional offices within the province, which creates the impression of a 'fourth sphere' in the minds of people. One clearly frustrated official referred to the regional offices as 'mini-monsters'. The irony is that some provincial administrations complain about national departments having provincial offices, which may erode the role of the provincial departments.

There are concerns that the regional offices may erode the credibility of the municipalities and district municipalities. It may also encourage individuals to approach the provincial structures directly without

giving local authorities an opportunity to address concerns.

The provinces for their part believe that the regional offices are intended to bring government closer to the people, to fill the gap that often exists at a local level and to have an 'early warning system' in place before trouble flares out of control.

'Metros and provinces: Who wags whom?'

It is widely recognised that the relationship between provinces and the metropolitan governments require attention. In most, if not all, cases the relationship is strained. In one example it was observed that 'there is no relationship at all'.

In general, the poor relationship between provinces and metros impacts on IGR within the entire province. A city manager may see himself as superior to the provincial director-general, and financially a metro may have a larger budget and more discretion in programmes and funds than the province within which it is situated.

'Needs-driven IGR is not advisable'

Needs-driven IGR in essence entails crisis management where IGR occur due to a breakdown in service delivery and not as a general strategy of good governance to anticipate and resolve problems before they arise. IGR are also called upon as the 'ambulance service' when a problem gets out of hand.

One person explained that the MEC to whom she reports views IGR as a 'fire brigade' that only responds when there is a crisis. She said that this needs-driven IGR is 'killing' IGR because there is no consistency, planning, agenda or certainty.

IGR must be driven by the IDPs with clear milestones, responsibilities, deliverables, reporting and follow-up. In this way IGR become the oil that keeps the engine running.

'IGR do not bind government'

It must be stressed that IGR institutions can only make recommendations for consideration by the respective spheres. The recommendations can carry substantial political weight but this does not remove the fact that no binding decisions can be made.

This has positive and negative elements.

On the positive side, IGR cannot erode the legislative powers of the spheres or reduce their accountability. The IGR institutions also cannot usurp the power of legislatures. On the negative side, senior leaders often do not attend IGR meetings for the very reason that binding decisions cannot be made. The recommendations are also subject to consideration by the respective spheres and it is not always clear what happens to recommendations.

In some departments a department management committee or similar structure has been established to ensure that recommendations made by IGR institutions are followed up and that reports are given regarding implementation progress.

Not all IGR meetings are conducted with a clear agenda, minutes, action lists, milestones, persons responsible, etc. Much depends on the leadership of the relevant minister, MEC or premier.

'Setting up structures does not mean that cooperation is successful'

South Africa's constitutional and statutory system of IGR is arguably the most sophisticated in the world, but in practice much needs to be done to give practical effect to the spirit of cooperative government. The structures are often used by the national ministries to 'convey messages' or to 'instruct' and not to 'consult'.

A balance must also be maintained by allowing the system of intergovernmental cooperation to be flexible and to respond to new challenges, rather than being a highly regimented system where institutions are prescribed but actions do not follow.

'Effective IGR structures do not necessarily mean services are delivered'

Meetings for the sake of meetings do not resolve practical issues and challenges faced by communities. Several interviewees expressed concern that many essential services are collapsing, at risk of collapse or are not at the required standard in several local areas regardless of the effectiveness of IGR structures.

The increase in violent public actions at grassroots level is indicative of the failure of institutions to meet people's reasonable demands for adequate service

delivery. Complaints are often heard that preventative work is being neglected and that crisis management has become standard practice. Examples referred to were crisis experiences in such areas as water purification, electricity provision, ground water pollution, sub-standard education and failures in basic health care. It must, however, be acknowledged that this research focuses on the institutional aspects of governance and not on the causes of poor service delivery.

'Clarify role of CoGTA and the Office of the Premier'

Some confusion seems to exist with regard to the interaction between CoGTA and the offices of premiers respectively and local governments. While CoGTA has a mandate to coordinate and support local government, the provinces through the Office of the Premier also have a constitutional duty to assist local governments.

Improved coordination and integration is required in some provinces to ensure that duplication does not occur, that programmes are coherent and that confusion is minimised.

'Clarify role of premier in president-MEC outcomes approach'

The 'outcomes approach' whereby the president and national ministers enter into outcome agreements with provincial MECs runs the risk of by-passing the premier of the province. The risk is twofold: the authority of a premier may be eroded; and the premier may frustrate or undermine the execution of the agreement. MECs may be torn between complying with the instructions of the national minister and those of the premier.

Current IGR structures do not cater for these agreements, and adjustments have to be made to ensure proper consultation and coordination.

7.3 Conflict resolution and IGR

'Conflict is natural'

Many interviewees noted that their views on conflict and IGR had matured since first becoming involved in IGR, particularly in the area of conflict management. They understand now that conflict is normal in a multilayered system and that it is healthy to debate contentious policy issues.

There was a general understanding among interviewees that conflict is synonymous with a multitiered system. They commented on the 'healthy debate' in many IGR structures but emphasised that clear terms of reference could reduce conflict or prevent conflict from spiralling out of control. Clear terms of reference serve as a road map whereby parties are guided towards an agreed goal. The ability of uncooperative persons to obstruct or derail processes is therefore limited and curtailed.

'The party can solve conflicts'

Several interviewees indicated that they would rely on the 'party' (the ANC) to resolve a conflict that they could not deal with. The reliance on an external facilitator as provided for by the IGR Act (s40) is therefore minimal and litigation (between ANC-controlled provinces and local governments) is unthinkable. Owing to the dominance of the ANC in governmental processes it was said that 'a conflict can always be resolved at a higher political level' and this explains the absence of serious conflict or litigation.

The role of the ANC political party has been recognised in literature:

Intergovernmental relations are heavily influenced by politics, as the main political parties in South Africa operate in all spheres of government. The dominance of the ruling ANC party in parliament, the provinces and most municipalities means that most disputes are usually resolved through party structures not through cooperative intergovernmental relations.⁶⁹

'Dealing with multiparty arrangements in a multitiered system'

It is acknowledged that the 'real' test for IGR will come if the political control of the national, provincial and local authorities is less dominated by a single party. A change in political composition of national and/or provincial and/or local administrations would bring real challenges to the IGR structures. However, several interviewees observed that few or no particular challenges have been experienced due to the political status of the Western Cape Province in IGR structures. It was also observed that although the ANC is currently the dominant party, the factions and interest groups within the party are such that IGR discussions are often very lively and challenging.

7.4 What is working well in IGR?

'Constitutional and legislative scheme is excellent'

The constitutional and legislative scheme for IGR is the most detailed and elaborate in the world. It:

- provides a basis for certainty and stability;
- helps with education and training;
- assists in accountability to ensure that forums are established and that meetings occur;
- does not prevent informal IGR or interaction but provides the basis for all formal interaction between spheres of governments; and
- brings institutional certainty and depth, which in future may become very important.

'Corporate knowledge has been built up'

Since the commencement of IGR after the 1993 interim Constitution, corporate knowledge within the political, administrative and scientific spheres has increased enormously.

While IGR was basically a foreign concept in the mid 1990s, it is now part of the local vernacular.

Many senior officials have had five to ten years' exposure to IGR and this is evident in the effective functioning of the President's Council and many of the Minmecs. Academics have taken an interest in the topic and this contributes to research, conferences, commentaries and proposals on how the system can be improved.

'Marked improvement on a few years ago'

The past five years have witnessed a marked improvement in the clarity of roles and the regularity of IGR meetings. Before the enactment of the IGR Framework Act the conduct of IGR was sporadic and at the discretion of the relevant political functionary. Since the enactment of the Act there is an objective benchmark to which all functionaries are held accountable.

The content of IGR and the regularity of exchanges are at a much higher level than was the case five years ago.

'Most Minmecs are well structured, properly planned and well staffed'

Much of the improvement has been in the functioning of Minmecs. Minmecs have been operative since 1993 and are generally well founded, hold regular meetings, and have staff dedicated to the functioning and proper scheduling of proceedings.

The fact that Minmecs often form part of the government's overall annual calendar of events further contributes to their status within the governmental process.

'Accountability in Minmecs has improved'

Minmecs have become such an integral part of the governmental system that ministers can be held accountable if the structures do not function properly. Minmecs' terms of reference assist to give direction and purpose to activities.

At present the accountability is mainly political and by way of some pressure by civil servants, but strong views have been expressed that the functioning of Minmecs should be made part of each department's strategic plan and should be audited on an annual basis.

The DPLG's annual report also envisaged that 'functional benchmarks' would be introduced for purposes of monitoring the performance of IGR.⁷⁰ Such benchmarks, if clear and specific, may contribute to greater accountability.

'Progress with priority projects through Minmecs'

Minmecs have also demonstrated in some instances how urgent projects could be given priority for funding and attention. In one example referred to, a Minmec agreed that provinces would contribute from their own resources for a human settlement project in a particular area due to the urgency thereof. Provinces demonstrated a willingness to allow some of their funds to be used for the critical project.

'Clusters improve horizontal cooperation between ministries'

The forming of clusters of government departments is one of the major steps forward in terms of IGR. The horizontal integration of planning and implementation by national departments is essential for cohesive

policies, and clusters provide an excellent forum where policies can be initiated and inputs made. The cluster system can be used with greater effect in the provinces.

'Best practice experiences become available'

Compared to a decade ago, there are now many IGR best practice case studies that can be referred to in training programmes. Unfortunately the successes are not always well known and more must be done to develop models of best practice by way of practical examples.

There is, however, clear evidence of how best practice experiences are exchanged and pursued especially at the level of civil servants.

'IGR are part of government philosophy'

In the mid 1990s IGR were entangled in the federalism-unitary debate, and as a result there was some reluctance to engage in the topic. This has changed and IGR are now part of government philosophy. It is seen as a pragmatic institution necessary to make things work, and is linked to the text of the Constitution and the Act rather than to the federalism debate. As a result of these changes, politicians and civil servants are far more willing than in the past to engage in IGR, to consider ways to improve it and to learn from international experiences.

7.5 Recommendations for IGR improvements

'Follow best practice in all of government'

The successes of IGR are not sufficiently researched, written up and propagated. The ability of best practice to be made available for wider use must therefore be strengthened. One of the strengths of federalism is that it allows for experimentation and imitation once a workable solution is found. There are many examples in South Africa of how IGR are working well in practice but these are often not shared and are poorly displayed. An advisory commission on IGR may provide an essential role in research and training and may improve the system of IGR.

It is essential that standardisation of IGR for all the main forums be developed. This would bring about certainty and would be an important tool to reduce the negative impact of high staff turnover and political interference in the way forums function.

For IGR to be the effective oil that keeps the engine going, it must be stable, consistent, certain, predictable and nonpartisan.

'Accept that IGR are a work in progress'

The dynamic nature of IGR and the institutions that facilitate it must be respected. Although it is important for all the institutions and forums to be in place, the culture of IGR must be worked on.

The style of government remains very much centralised and top-down with little room for effective input from the local and provincial spheres. IGR by their very nature are a work in progress. International experiences show that IGR go through ups and downs depending on various circumstances.

'Include IGR in strategic plans'

Each department's strategic plan should make provision for the way in which it will give effect to IGR and cooperative government. In some departments, such as those with concurrent functions, it may be more extensive but no department can say it has no contribution to make to IGR. The strategies must be such that they can be audited to ensure compliance. In this way an all-of-government approach to IGR would emerge.

'Include IGR in key deliverables'

All forums that play a role in IGR must provide for key deliverables in their terms of reference, which can be scrutinised and audited. These deliverables must be linked to staff performance indicators. This would contribute to each person working not just in a silo but taking into account how their activities impact on others. In this way IGR would become the underlying culture of government.

This would place South Africa at the forefront of nations that deal with IGR and would do justice to the world-class legal framework contained in the South African Constitution and legislation.

'Give projects a spatial dimension'

Planning documents are often so voluminous and complicated that those dealing with them do not fully understand what is meant to happen. It is essential that projects are given a spatial dimension at a local

level to enable everyone to see exactly what is planned and where it is planned. This would address problems such as water being delivered where there are no human settlements or roads being built unnecessarily.

Department projects must be superimposed spatially to enable officials to get a complete and integrated picture.

'Take IDP off the shelf'

A comment heard all too often is that IDPs have been shelved because they are too complicated, difficult to understand and insufficiently reflective of local needs. It is essential that the IDP is a living document that reflects local needs and aspirations on an ongoing basis. It must be the driving force of all local actions and the basis upon which local leaders and officials are held accountable.

The IDP is also an essential tool to defuse local conflict and unrest since people can see their needs and aspirations receive formal recognition and action. Account must further be taken that the IDP applies to all of government, and failure by a department on the ground would be detrimental to the credibility of the local IDP.

'Audit the conduct of IGR'

As a general rule, the conduct of IGR must be taken from the philosophical to the practical. This means that general statements must be supported by actions that can be audited.

International experience shows that IGR are often conducted behind closed doors, with the public left in the dark about what happens in the consultation process.

It is accepted that not all discussions between ministers and civil servants can be made public, but conversely there is a risk of IGR becoming like a 'closed shop' where decisions are made outside the ambit of executive and legislative accountability. The need for external assessment and auditing of the functioning of IGR is even more critical in cases such as South Africa where one party has complete dominance over IGR.

Through the auditing of IGR, South Africa could bring the processes out into the open and ensure that all role-players comply with the same standard of conduct.

'Require plans to be signed off by relevant departments and municipalities'

It is essential that national and provincial plans are signed off by lower spheres before being adopted. This would ensure that bottom-up policy formulation is given practical content. The discrepancy between local IDPs and provincial and national plans is one of the most concerning aspects of the current status of government and IGR.

It is essential that when an MEC or a minister approves a plan, s/he must be satisfied that the provincial and/or local spheres have sited it, commented on it and ideally approved it. This will facilitate integrated planning.

It is acknowledged that municipalities and district municipalities often do not have the necessary expertise to engage in detailed planning. Account must, however, be taken of the constitutional duty of the provinces to assist local governments in this regard.

'Set clear implementation plans'

It has been shown that IGR meetings often amount to nothing as officials in the relevant departments do not follow up or give proper briefings about what has been discussed or agreed to.

After each IGR meeting the secretariat must provide a list of 'actions arising' in which it is clearly stated what must be done, by whom and when, and detailing report backs. This would remove reliance on personal recollection of what was discussed at meetings and would provide a basis for management and control.

'Improved briefing prior to and after meetings'

An essential area requiring much work is the proper briefing of politicians and staff before IGR meetings and de-briefing after meetings. Many examples were referred to where staff who attend meetings were too junior, not properly briefed, sent at the last minute or had no expertise in the field under discussion.

Departmental processes must be aligned to ensure that management meetings occur before and after IGR forums. Staff attending the IGR forums must be briefed at the management meeting regarding the department's approach to a particular matter. After the IGR forum staff must give feedback at the management meeting.

'Improve training and induction'

The improved training and induction of new staff and political leaders in the general field of IGR is essential for the long-term stability and deepening of government. The massive turnover of staff and regular political changes bring instability to the IGR system. As a result there are serious discrepancies between different departments and within departments about the conduct of IGR.

Standardised training on an ongoing basis is essential to bring the awareness of IGR good practice to the attention of all.

'Improve transparency of IGR structures'

IGR structures are principally advisory in nature since consultation takes place between the executives of the respective spheres and decisions must be taken within each sphere. There is, however, a concern that much of what happens in South Africa is currently within the sphere of the executive and within the confines of IGR, which means that public access to decisions is limited. This is exacerbated by the dominance of a single political party. International experience may shed light on how transparency, accountability and accessibility of decisions made in IGR structures could be facilitated.

'Show confidence in local leaders'

An essential element of a multitiered system is that local leaders must be given authority to deal with local issues in a manner that satisfies the population, provided that national norms and standards are adhered to. South Africa is too diverse and large to have a one-size-fits-all approach. Local leaders are, however, often reluctant to do anything without the upper sphere's approval or without the political party's go ahead.

The party political system whereby people are 'deployed' by the party into government positions enhances civil servants' and politicians' fears of being re-deployed or recalled if they do anything that angers members of their political structures. At the time of writing five directors-general had been replaced in a short period of 18 months. This not only erases corporate memory but creates an atmosphere of fear and angst.

As one person said: 'If the president [Thabo Mbeki] can be recalled, who will protect me if I do something

that my seniors in the party do not approve off?' As a result, initiative and experimentation are often stymied.

'Encourage tertiary institutions to become involved in training, research and assessment'

It is surprising how little involvement tertiary institutions have in the study and analysis of IGR. Library searches confirm that the topic is not receiving the attention it should compared to other multitiered systems in Nigeria, India, the US and Germany. The entire governance process could benefit if IGR specialists were more involved in monitoring and analysis. It is especially at the provincial and local levels where tertiary institutions could provide an essential service in terms of training and research.

8. CONCLUSION

Cooperative government and IGR in South Africa have developed in leaps and bounds since 1993 and have become part of standard government vernacular and practice. IGR are not viewed with suspicion and are generally seen as an essential philosophy and practice for effective governance in South Africa. It is widely recognised that the complexity of the challenges facing South Africa makes central planning and administration impossible.

The South African Constitution and IGR Act are by far the most elaborate and detailed intergovernmental legal framework in the world. The Constitution sets the philosophy and tone of IGR, while the IGR Act provides for structures and conflict-resolution mechanisms.

The structures created by the IGR Act are similar to those in other multitiered systems, which took decades to develop. The benefit of having the structures created by statute is the certainty and predictability it brings. Although the IGR Act creates institutions it does not, however, prevent spontaneous developments and ad hoc arrangements between the spheres.

It is generally accepted that IGR and cooperative government are a work in progress: it never comes to an end and can always be improved and refined. New staff must constantly be trained and changes in political parties bring about adjustments.

It must be stressed, however, that although providing for intergovernmental structures by way of legislation

is an important step, an even greater requirement is the way in which political leaders and civil servants approach IGR. Institutions and structures do not by themselves bring cooperative government or intergovernmental success. It is the attitude, dedication, leadership, commitment, training and skills of people that bring success.

There are many examples where officials from local and provincial governments view intergovernmental forums as venues where they are instructed what to do rather than an opportunity for joint policy formulation. There are, however, also promising examples where real and effective joint planning has occurred.

In this research we obtained a very brief and limited view of the world of IGR in South Africa. We have shown that impressive progress has been made in a relatively short space of time but that much remains to be done. The people we interviewed showed extraordinary dedication and commitment to make the system work even better. A world-class system is indeed possible if their suggestions are taken up by political leaders.

It is especially in the training of new staff and the monitoring of IGR that gaps have been identified. It must be acknowledged, however, that South Africa is a developing country with a very young democracy. It will therefore take time before an IGR culture similar to the German *Bundestreue* is deeply imbedded in the minds and actions of political leaders and civil servants.

We have identified areas where the conduct of IGR can be improved. We have also shown that the conduct of IGR is inevitably influenced by party dominance, internal squabbles and competition for positions within the dominant party.

The spirit and practice of IGR and cooperative governance will be tested in South Africa if parties other than the ANC start winning local and provincial elections.

The ability of spheres to reach agreement without litigation will be challenged when the dominance of the single party diminishes. India, for example, had to adjust to multiparty politics after many years of Indian National Congress party dominance of all tiers of government. In Mexico it took even longer for minority parties to make their mark at the local and regional levels.

'Cooperative government' is the concept that made it palatable for the ANC to accept a constitutionally guaranteed multilayered system, and the concept has become embedded in the governance process. South Africa has more intergovernmental institutions and

dynamics now than it ever had under the 1910 Union or the 1961 Republic constitutions. The networks of intergovernmental forums and planning instruments, and the dedication of staff to make it work, are impressive for such a young democracy.

ENDNOTES

- 1 The Constitutional Court in its decision to certify the 1996 Constitution emphasised that cooperative government and the obligation to refrain from litigation between spheres should not be construed as 'invasive of the autonomy of a province'. *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) par 292.
- 2 S1 *Intergovernmental Relations Framework Act*, No 27898, 2005.
- 3 *In re: The National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (CC), 1996 3 SA 289 (CC) par 34.
- 4 For a general discussion about managing conflicts in federations refer to 'Unity in Diversity – Learning From Each Other', Conference reader, 4th International Conference on Federalism, New Delhi, India, 5-7 November 2007.
- 5 *In re: Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC), 1996 4 SA 744 (CC) par 290.
- 6 Refer to Appendix 1.
- 7 The irony of using the word 'sphere' against the backdrop of the federal-unitary debate should not be lost. The use of 'sphere' is consistent with classical federalism theory which describes federalism as a non-centralised system in the sense that 'the power of governments within them are diffused among many centres, whose existence and authority are guaranteed by the general constitution, rather than being concentrated in a single centre'. Elazar DJ, *Exploring Federal Systems*. Tuscaloosa, AL: University of Alabama Press, 1987, p 34. Kincaid points out, however, that even in non-centralised federations there are trends towards centralisation and decentralisation depending on the surrounding conditions faced by the countries. Kincaid J, 'Comparative observations'. In Kincaid J & Tarr GA, *Constitutional Origins, Structure and Change in Federal Countries* Vol 1. Montreal: McGill-Queen's University Press, 2005, p 428.
- 8 Elazar has observed that even in the US where the concept of 'cooperative federalism' was coined, it has 'become an excuse for federal coercion'. Elazar DJ, *Federalism and the Way to Peace*. Kingston, ON: Queen's University, 1994, p 67.
- 9 For a discussion on the process of creating the provinces refer to De Coning C, 'The territorial imperative: Towards an evaluation of the provincial demarcation process'. In

- De Villiers B (ed), *Birth of a Constitution*. Kenwyn: Juta, 1994, pp 189-223.
- 10 Examples of research on IGR conducted by Bertus de Villiers and published by the Konrad-Adenauer-Stiftung (KAS), Johannesburg, are: *A Constitutional Scenario for Regional Government in South Africa: The Debate Continues*, KAS Occasional Paper Series, December 1992; *Intergovernmental Relations: Guidelines for South Africa*, KAS Occasional Paper Series, September 1993; *Bundestreue: The Soul of an Intergovernmental Partnership*, KAS Occasional Paper Series, March 1995; *Local-Provincial Intergovernmental Relations: A Comparative Analysis*, KAS Occasional Paper Series, May 1997; *National-Provincial Cooperation – The Potential Role of Provincial Interest Offices: The German Experience*, January 1999; De Villiers B (ed), *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice*, November 2008; and De Villiers B (ed), *Crossing the Line: Dealing With Cross-border Communities*, July 2009.
- 11 De Villiers B, 'Intergovernmental relations: A constitutional framework'. In De Villiers, *Birth of a Constitution*, op cit, pp 256-280.
- 12 For a brief discussion of the technical discussions that contributed to the creation of the provinces and defusing the political tension at the time, refer to De Villiers B, *The Future of the Provinces – the Debate Continues*. KAS Policy Paper No 2, Johannesburg, 2007, pp 6-7.
- 13 Refer to Appendix 2 for a copy of the constitutional principles and particularly the sections italicised that deal with the provincial and local governments.
- 14 For a discussion of the role of the constitutional principles in the certification of the 1996 Constitution refer to Butler A, 'The 1996 Constitution Bill, its amending power and the constitutional principles'. *Human Rights and Constitutional Law in South Africa* 1996, p 24.
- 15 De Villiers B, 'The institutionalisation of intergovernmental relations: An international overview and guidelines for South Africa'. Working document prepared for the Commission on Provincial Government, 1 July 1995.
- 16 In a publication by the then Department of Provincial and Local Government it is stated that 'the eventual compromise that emerged in the interim Constitution of 1993 and consolidated in the 1996 Constitution was a *unitary* system but not overcentralised'. 'DPLG Intergovernmental Relations Framework Act – Evolution and Practice', 2006, p 5 (emphasis added).
- 17 'Provinces' being the terminology used in South Africa and Canada refer to second-tier governments, which are also referred to as states, cantons, regions or *Länder* in other federations.
- 18 Chapter 3 of the Constitution and ss4-5 IGR Act.
- 19 S40 of the Constitution.
- 20 S41(3) of the Constitution.
- 21 For a very useful overview of international experiences refer to Meekison JP (ed), *Intergovernmental Relations in Federal Countries*. Forum of Federations, Ottawa, 2001.
- 22 De Villiers, *National-Provincial Cooperation*, op cit and De Villiers B, 'Improving cooperation between national and provincial governments: The role of provincial interest offices – the German experience', *SA Public Law*, 1999, pp 381-412.
- 23 For a general discussion refer to Rautenbach IM & Malherbe EFJ, *Constitutional Law*. LexisNexis/ Butterworths, 2004, pp 241-290.
- 24 For a discussion of these principles refer to De Villiers B, 'The Constitutional Principles – content and significance'. In De Villiers, *Birth of a Constitution*, op cit, pp 37-49 as well as De Villiers, *The Future of the Provinces – the Debate Continues*, op cit.
- 25 For a general discussion refer to Mentzel C, 'Development perspectives on policy management and the dynamics of intergovernmental relations, with specific reference to the national and meso levels of government in South Africa'. D.Phil thesis, RAU, 2000.
- 26 In the Department of Provincial and Local Government's inaugural report on the implementation of intergovernmental relations, it identified three phases, namely: creating the system of intergovernmental relations (1994-2000); operationalising the system (2001-2004); and consolidating the system (2005 to current.) DPLG, 'The implementation of the Intergovernmental Relations Framework Act – An Inaugural Report 2006/06 – 2006/07'.
- 27 For a discussion and assessment of the early intergovernmental relations structures refer to De Villiers B, 'Intergovernmental Relations in South Africa', *SA Public Law*, 1997, pp 197-213.
- 28 For a discussion of the meaning and content of *Bundestreue* refer to De Villiers B, *Bundestreue: The Soul of an Intergovernmental Partnership*, op cit and De Villiers B, 'Intergovernmental relations: *Bundestreue* and the duty to cooperate from a German perspective', *SA Public Law*, 1994, pp 430-437. Also refer to Laufer H, *Das foderative System der Bundesrepublik Deutschland* in particular the chapter on 'Politikverflechtung im kooperativen Federalismus', 1991, pp 168-202.
- 29 Refer to the following decision of the Constitutional Court in which it refused to grant direct access to the parties on grounds that they did not exhaust all options to resolve the dispute other than through litigation. *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC), 2002 2 SA 715 (CC).

- 30 *Uthukela District Municipality v President of the RSA 2002*
11 BCLR 1220 (CC), 2003 1 SA 678 (CC).
- 31 De Villiers, 'Intergovernmental Relations in South Africa', op cit, p 203.
- 32 S163 of the 1993 Constitution.
- 33 S198 of the 1993 Constitution.
- 34 Established on 12 November 1994.
- 35 For a critical analysis of the functioning of Minmecs during the initial years refer to De Villiers, 'Intergovernmental Relations in South Africa', op cit, pp 208-210.
- 36 Layman T, 'Intergovernmental Relations and Service Delivery in South Africa'. Paper commissioned by the Presidency as part of the Ten Year Review, August 2003, pp21-28.
- 37 Long title IGR Act.
- 38 Preamble IGR Act.
- 39 S4 IGR Act.
- 40 S5 IGR Act.
- 41 SS6-8 IGR Act.
- 42 SS9-15 IGR Act.
- 43 SS16-23 IGR Act.
- 44 S21 IGR Act.
- 45 S22-23 IGR Act.
- 46 S24-29 IGR Act.
- 47 S28-29 IGR Act.
- 48 SS30 IGR Act.
- 49 Not established by the IGR Act.
- 50 Established by the Intergovernmental Relations Fiscal Act 1997.
- 51 SS35-38 IGR Act.
- 52 SS39-45 IGR Act.
- 53 *National Gambling Board v Premier of KwaZulu-Natal 2002* 2 BCLR 156 (CC), 2002 2 SA 715 (CC).
- 54 In general an IDP would consist of: integrated sectoral programmes; a five-year financial, municipal and capital investment plan; an integrated spatial development framework; and integrated programmes for poverty alleviation, environment protection, disaster management and HIV/Aids.
- 55 The importance of local government within the system of cooperative government is highlighted by the following observation made by President Mbeki in his State of the Nation address on 3 February 2006: 'Integration of planning and implementation across the government spheres is . . . one of the prime areas of focus in our programme for the next term of local government. In this regard we will be guided by the Intergovernmental Relations Framework Act. We must in practice respect the system of cooperative governance, and within this context ensure that we empower local government to discharge its development and service delivery obligations.'
- 56 Fleiner T, Kalin W, Linder W & Saunders C, 'Federalism, decentralisation and conflict management in multicultural societies'. In Blindenbacher R & Koller A, *Federalism in a Changing World: Learning from Each Other*. Montreal and Kingston: McGill-Queen's University Press, 2003, p 210.
- 57 S139 of the Constitution empowers a province to 'intervene' in a local authority when it cannot or does not fulfil its obligations. Up to the end of 2007 such intervention took place in 24 local authorities. DPLG, Inaugural Report, op cit, pp 50-51.
- 58 December 2008.
- 59 DPLG, Inaugural Report, op cit, p 53.
- 60 Ibid, p 47.
- 61 See, http://www.cogta.gov.za/cgta/index.php/documents/cat_view/134-intergovernmental-relation-toolkit.html.
- 62 Kirkby C, Steytler N & Jordan J, 'Towards a more cooperative local government: The challenge of District Intergovernmental Forums', *South African Public Law*, 2007, p 160.
- 63 Malherbe R, 'Does the Intergovernmental Relations Framework Act 13 of 2005 confirm or suppress national dominance?', *Journal of South African Law*, 2006, p 818.
- 64 Edwards T, 'Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations', *Politeia*, 2008, p 83.
- 65 Layman, op cit, p 22.
- 66 Ibid.
- 67 Edwards, op cit, p 77.
- 68 Department of Provincial and Local Government, Annual Report 2008-2009, p 35.
- 69 Forum for Federations, 'Roundtable participants agree: Intergovernmental relations in South Africa driven by party politics'. Available at <http://www.forum.org/en/events/event.php?id=379/>
- 70 DPLG, Annual report, op cit, p 62.

APPENDIX 1**CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996****CHAPTER 3: CO-OPERATIVE GOVERNMENT****40. Government of the Republic**

- 1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- 2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

41. Principles of co-operative government and intergovernmental relations

- 1) All spheres of government and all organs of state within each sphere must –
 - a) preserve the peace, national unity and the indivisibility of the Republic;
 - b) secure the well-being of the people of the Republic;
 - c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - d) be loyal to the Constitution, the Republic and its people;
 - e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - f) not assume any power or function except those conferred on them in terms of the Constitution;
 - g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- 2) An Act of Parliament must –
 - a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- 3) 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.
- 4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

APPENDIX 2**CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993,
SCHEDULE 4****CONSTITUTIONAL PRINCIPLES** (*with relevant parts to provincial and local government highlighted by authors*)**I**

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like

common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

The powers, boundaries and functions of the national government and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform

functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. *The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.*
2. *Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.*
3. *Where there is necessity for South Africa to speak with one voice, or to act as a single entity – in particular in relation to other states – powers should be allocated to the national government.*
4. *Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.*
5. *The determination of national economic policies,*



and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* –

- a) for the purposes of provincial planning and development and the rendering of services; and**
- b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.**

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions

and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.
2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.
2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.
3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.