

INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA: CONFLICT RESOLUTION WITHIN THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT

Nic Olivier

PART 1: INTRODUCTION

This chapter aims at providing an introduction to intergovernmental relations and conflict resolution in South Africa as provided for in the Constitution of the Republic of South Africa 108 of 1996. The brief identification of the three spheres of government is followed by a discussion of, firstly, the constitutional provisions pertaining to co-operative government (the basis of IGR in South Africa), and, secondly, of the most important statutory (formal) IGR structures. Reference is also made to the non-statutory (informal) structures that have been established. Information on the actual operation of the IGR structures (where available) is also provided. This is followed by a discussion of the conflict resolution mechanisms that have been created in order to resolve conflicts within the legislative arm of government. The conclusion contains a brief summary of the main shortcomings of the present system pertaining to IGR and conflict resolution in South Africa, as well as a number of recommendations on how the process of enhancing IGR and conflict resolution can be advanced.

PART 2: BACKGROUND

On 27 April 1994 the Interim Constitution of the Republic of South Africa 200 of 1993 came into operation. It provided for three levels of government (national, provincial and local), and for the allocation of certain powers to provinces, some which were in the exclusive domain of provincial legislatures. Pre-1994 legislation (national, provincial and homeland legislation) within these provincial functional areas was assigned to the provincial governments to be administered by them.

The final Constitution, the Constitution of the Republic of South Africa 108 of 1996, took effect on 4 February 1996. It provided for the continuation of all old order (pre-1994) legislation, as well as of all interim order legislation (made during the life of the Interim Constitution of the Republic of South Africa 200 of 1993), subject to any amendment or repeal, or consistency with the 1996 Constitution.¹



South Africa is an undivided state with 9 provinces.² A distinction is being made between the legislative, executive and judicial branches of government. Three spheres of government are recognized; national, provincial and local.

The founding principles of the South African state are found in section 1 of the Constitution:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism;
- (c) Supremacy of the constitution and the rule of law.

Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The Constitution of the Republic of South Africa 108 of 1996 is the supreme law of the country and any law (legislation, common law or customary law) or administrative (or other) conduct inconsistent with it is invalid. In addition, institutions and individuals are obliged to fulfil the obligations imposed by it.

PART 3: CO-OPERATIVE GOVERNMENT AND THE THREE SPHERES OF GOVERNMENT: FRAMEWORK FOR INTERGOVERNMENTAL RELATIONS

The Constitution of the Republic of South Africa 108 of 1996 provides for a distinction between the legislative, executive and judicial authority. Both the legislative authority and the executive authority are linked to the constitutionally determined spheres of government. The scheme of the Constitution deals with the relevant issues in the following sequence:

- Founding Provisions (Chapter 1)
- Bill of Rights (Chapter 2)
- Co-operative Government (Chapter 3)
- Parliament (Chapter 4)
- The President and National Executive (Chapter 5)
- Provinces (Chapter 6)
- Local Government (Chapter 7)
- Courts and Administration of Justice (Chapter 8)
- State Institutions Supporting Constitutional Democracy (Chapter 9)
- Public Administration (Chapter 10)
- Security Services (Chapter 11)
- Traditional Leaders (Chapter 12)
- Finance (Chapter 13)

- General Provisions (Chapter 14)
- Schedule 1 (National Flag)
- Schedule 2 (Oaths and Solemn Affirmations)
- Schedule 3 (Election Procedures)
- Schedule 4 (Functional areas of concurrent national and provincial legislative competence)
- Schedule 5 (Functional areas of exclusive provincial competence)
- Schedule 6 (Transitional arrangements)
- Schedule 7 (Laws Repealed)

Chapter 3 of the Constitution of the Republic of South Africa determines the establishment of the spheres of government as well as their interrelationship:

40(1) In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.

South Africa is thus constituted in three spheres of government:

- National sphere
- Provincial sphere
- Local sphere.

Within the *national sphere* the legislative authority is vested in Parliament, consisting of the National Assembly (NA) and the National Council of Provinces (NCOP). The Executive Authority consists of the President and the Cabinet (comprising the President, the Deputy President(s) and ministers). Cabinet's accountability and responsibility towards Parliament for the execution of their powers and functions powers are provided for in section 92 of the Constitution. Ministers may also assign any power or function to a member of a Provincial Executive Council or Municipal Council.³ Specific provision is made for the intervention by the National Executive when a province cannot or does not fulfil its executive obligations in terms of the Constitution or legislation.⁴

Within the *provincial sphere* the Provincial Legislature is the legislative authority. Executive Authority is vested in the provincial Premier, and is exercised by him together with members of the (provincial) Executive Council.⁵ These members are often referred to as MECs. The Provincial Legislature's power to pass legislation includes legislation in respect of matters referred to in Schedule 4 (functional areas of concurrent national and provincial domain) and Schedule 5 (functional areas of exclusive provincial domain) (see discussion below). The implementation of provincial legislation is "an exclusive provincial executive power"⁶ with respect to, amongst others, the matters referred to in Schedule 4 Part A and Schedule 5 Part A. (Local governments administer the functional areas referred to in Parts B of these Schedules – see below.) Accountability and responsibility towards the provincial legislature are regulated in section 133. A member of a Provincial Executive Council may assign any power or function to a Municipal Council.⁷ Provision is also made for a provincial government to intervene when a municipality cannot or does not fulfil its executive obligations in terms of legislation.⁸

The sphere of local government consists of municipalities.⁹ Both the executive and legislative authority of a municipality is vested in its Municipal Council. Neither the national government nor the provincial government concerned may act in such a manner as to compromise or impede the ability of a municipality to exercise its powers or perform its functions. Municipal councils are elected bodies.¹⁰ Municipalities must administer (and may make by-laws in respect of) the functional areas listed in Schedule 4 Part B as well as Schedule 5 Part B of the Constitution (see discussion below). In addition, the national government and provincial governments must assign to municipalities the administration of a matter falling within Schedule 4 Part A and Schedule 5 Part A (see discussion below) if such matter would most effectively be administered by the municipality concerned, and if it has the capacity to administer same.¹¹

PART 4: CO-OPERATIVE GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

Chapter 3 of the Constitution determines that co-operative government is the philosophy underlying and leitmotiv determining the relationship between as well as the conduct of government in South Africa. The notion of co-operative government implies that all governing structures and administrative systems should in their interrelationship as well as in the performance of their functions and the execution of their duties comply with and give substance to the fundamental principle of co-operation with institutions within the same sphere as well as with institutions in any other sphere (or with both of the other two spheres).

The underlying characteristics of the relationship between the three spheres of government are described in section 40(1) of the Constitution as being:

- Distinctive;
- Interdependent; and
- Interrelated.

Section 41 of the Constitution requires all spheres of government and all organs of state¹² within each sphere to conduct their affairs and to act in accordance with the principles of co-operative government as determined in section 41 of the Constitution.¹³ As far as intergovernmental relations are concerned, the last four principles are the most important ones of the section. The spheres must:

- respect the constitutional status, institutions, powers and functions of government in the other spheres (s 41(1)(e));
- not to assume any power or function except those conferred on them in terms of the Constitution (s 41(1)(f));
- 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 (s 41(1)(g)); and
- co-operate with one another in mutual trust and good faith by

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on matters of common interest;
- (iv) co-ordinating their actions and legislation with one another
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another (s 41(1)(h)).

Section 41(3) contains a clear injunction, binding on all organs of state involved in an intergovernmental dispute, to take all reasonable steps to settle disputes by means of appropriate mechanisms and procedures, and must exhaust all other remedies before a court is requested to resolve the dispute.¹⁴ A court deciding on an intergovernmental dispute has the option of referring the dispute back to the organ of state concerned if it is not satisfied that these section 41(3) requirements have been complied.¹⁵

The Constitution (s 41(2)) explicitly provides for national legislation to be passed for the establishment of structures and institutions to promote and facilitate intergovernmental relations, as well as to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.¹⁶ The national intergovernmental relations legislation has, however, not yet been passed by Parliament.

In addition to the above Constitutional provisions, the other sources of intergovernmental relations are legislation, international agreements and domestic agreements (between organs of state in South Africa).¹⁷ This regulatory context of (and for) intergovernmental relations is sometimes referred as to the static nature of intergovernmental relations.

In his discussion of the qualitative and dynamic nature of intergovernmental relations, Carstens also refers to the changes that they undergo over time (the so-called dynamic nature of intergovernmental relations).¹⁸ He describes the qualitative nature as follows:

The subjective opinion of politicians and public officials as to what the quality of a relationship between them entails is the main determinant of the qualitative nature of an intergovernmental relationship.

The relationship between the spheres of government and organs of state within the spheres are characterized by symmetry and asymmetry – which relates to the constitutionally created relationships between the spheres of government and the organs of state within the spheres.¹⁹ Within this context it can be said that²⁰:

- “Symmetrical intergovernmental relationships mean that the constitution apportions to all the governments in a particular sphere of government, the same powers”; and that
- asymmetrical relations exist between the three spheres of government (on account of the differentiated roles, powers and functions allocated in terms of the Constitution to the national, provincial and local spheres of government). Asymmetry can also be temporary – e.g., where national government uses its section 100 power of intervention where a

provincial government is unable or does not fulfill its executive obligations (or a provincial government its section 139 power of intervention when a municipality cannot or does not fulfill its executive obligations).

PART 5: INTERGOVERNMENTAL RELATIONS: STATUTORY AND NON-STATUTORY STRUCTURES AND SYSTEMS

In the absence of the constitutionally required national legislation, two categories of IGR structures have been established:

- statutory IGR structures established in terms of the Constitution and national legislation (the so-called formal IGR structures) and systems on how they function have been developed, and
- informal (non-statutory) IGR structures) which have – in the absence of explicit enabling legislation – also been put into operation.

These IGR structures aim at the co-ordination of intergovernmental relations within a particular sphere, and/or between two or more spheres.²¹ In addition, these structures may also be classified with regards to their composition:

- representatives from the three spheres (e.g. the National Council of Provinces (NCOP) and the Finance and Fiscal Commission)
- representatives of at least two spheres (Council of Education Ministers at the political level and the Heads of Education Departments Committee at the administrative level); and
- representatives from one sphere (e.g. the South African Local Government Association (SALGA)) that interacts with the other two spheres of government in respect of local government matters.

The following categories of co-ordinating IGR structures can be distinguished:

A. Co-ordination in the national sphere:

- The *National Council of Provinces (NCOP)* (part of the national legislative authority, representing provincial interests – see discussion below).
- The *Budget Council* established in terms of section 2(1) of the Intergovernmental Fiscal Relations Act 97 of 1997, consisting of the Minister of Finance as chairperson and the nine MECs for Finance (Members of the Provincial Executive Councils) and the chairperson of the Financial and Fiscal Commission. The Budget Council must be consulted by National, Provincial and local government as regards the provincial sphere, proposed policy or legislation affecting the provinces and issues pertaining to the management or

monitoring of any provincial finances. No direct provision is made for an enforcement mechanism.

- The *Council of Education Ministers (CEM)* established in terms of section 9(1) of the National Education Policy Act 27 of 1996, consisting of the Minister and Deputy Minister of Education and the nine MECs for Education (in their capacity as political heads of provincial education) (with observer status having been accorded to the national Director-General of Education and the chairpersons of the National Assembly's Portfolio Committee on Education and the NCOP's Select Committee on Education). Its functions include the promotion of the national education policy, the sharing of information, the co-ordination of matters of mutual interest to the national and the provincial government. In addition, the Minister must consult it before education legislation is submitted to Parliament. No direct provision is made for an enforcement mechanism.
- The *Heads of Education Department Committee (HEDC)* established in terms of section 10(1) of the National Education Policy Act 27 of 1996, consisting of the Director-General and other officials of the national Department of Education and the nine heads of the provincial education departments). Its functions include the facilitation of the development of a national education system, the co-ordination of administrative action, and to advise the national Department of Education on relevant issues. No specific mechanisms for the enforcement of decisions exist.
- The *Department of Foreign Affairs: Directorate Intergovernmental and Provincial Protocol* established in terms of general enabling legislation providing for the South African Public Service (s 197(1)-(2) Constitution). Its functions include co-ordination of overseas visitors, the promotion of provincial and local government, the training in protocol matters of officials in the national, provincial and local government spheres, the facilitation of international and co-operation agreements, maintaining contact with other IGR structures (e.g. the NCOP and SALGA), and the determination of guidelines for the co-ordination of foreign aid and investments.
- The *Financial and Fiscal Commission* established in terms of the Financial and Fiscal Commission Act 99 of 1997, consisting of a chairperson, a deputy chairperson and nine other persons appointed by the President, nine persons nominated by the Executive Council of each province, and two persons nominated by SALGA.²² Its functions include being a consultative and advisory body to organs of state in the national, provincial and local sphere of government in respect of financial and fiscal matters, the giving of advice during the budget process, and being consulted in respect of loans.
- The *President's Coordinating Council (PCC)* a non-statutory body, consisting of the President (Chairperson), the nine provincial premiers and the minister for Provincial and Local Government. It meets twice a year, and its functions include the enhancement of the ability of provincial executives to make inputs on the formulation of national policies, the promotion of inter-provincial dialogue, dispute resolution at an inter-provincial level as well as between provinces and the national government, improving co-operation between the national and provincial spheres of government (also as regards the strengthening of local government), and the co-ordination of cross-cutting programmes

- (e.g. rural development and urban renewal). As the PCC is a non-formal body, its decisions are not formally binding and enforceable.
- The *Forum of Provincial Directors-General*, a non-statutory (informal) body, consisting of the Director-General of Provincial and Local Government (chairperson), the Director-General in the Office of the President and the nine Provincial Directors-General. It functions as a technical support body for the PCC.
 - The Forum of South African Directors-General (FOSAD), a non-statutory body, consisting of the Director-General in the Office of the President (chairperson), the Director-General of Provincial and Local Government, all Directors-General of national departments as well as the nine Provincial Directors-General. It functions as a technical and administrative support body for the PCC, and is involved in the co-ordination of cross-cutting (interdepartmental and intergovernmental) issues such as rural development and urban renewal (as well as to make recommendations to Cabinet in this regard.) It is also responsible for finalising the agenda for the two annual South African Cabinet breakaways.
 - The *Loan Coordinating Committee* established in terms of the Borrowing Powers of the Provincial Governments Act 48 of 1996, consisting of the Minister of Finance and the nine provincial MECs responsible for provincial finances. Its functions include the co-ordination of borrowing requirements of provincial governments and reporting to the FCC (Financial and Fiscal Commission) as regards the debt position pertaining in the provinces. (This body is non-operative at present.)
 - The *Local Government Budget Forum (LGBF)* established in terms of section 5(1) of the Intergovernmental Fiscal Relations Act 97 of 1997, consisting of the Minister of Finance (chairperson) and the nine provincial MECs responsible for provincial finances. Its functions include being consulted on all fiscal, financial and budgetary matters affecting the local sphere of government. Decision-making is consultative, and no specific mechanisms for enforcement exist.

B. Co-ordination between the national government and provincial governments and within provincial governments:

- A number of *informal MINMECs*²³ (consisting of the relevant minister and provincial MECs) have been established. The MINMECs deal by and large with the functional areas within the concurrent national and provincial domain (Schedule 4 – see discussion below), and play an important role as regards the co-ordination of policy development and the implementation of policies and legislation. In the majority of instances they are complemented by the so-called Technical MINMECs, consisting of a senior official of the national department concerned and senior line functionaries from the provincial governments. They give technical and administrative support, as well as advice, to the (political) MINMECs. No provision exists for the enforceability of the decisions in any of these bodies.
- A number of *informal provincial co-ordinating structures* have also been established with the view on the enhancement of policy co-ordination and implementation within the

province concerned. Examples of such bodies (some of which are at the political level, and some at the senior official level; in a number of instances they are institutionalised as IGR offices in the provincial premier's office) are:

- Eastern Cape Province Political Intergovernmental Forum
- Free State Province Political PROVLOC (Provincial – Local Government)
- Gauteng Province Intergovernmental Forum
- Mpumalanga Province Cluster Committee
- Province of the Northern Cape Sub-Directorate: Intergovernmental Relations and International Relations
- Northern Province Directorate: International Relations and Protocol Services
- North West Province Directorate: Intergovernmental Relations and International Relations
- Western Cape Province Provincial Advisory Forum.

C. Co-ordination within the local government sphere, and between the local government sphere and the two other spheres of government:

- the *South African Local Government Association (SALGA)* recognized in terms of section 163 of the Constitution (with reference to the Organised Local Government Act 52 of 1997 (s 2(a)) as the national body representing municipalities, consists of provincial local government associations, municipalities which are members of provincial local government associations. Its highest decision-making body is the bi-annual national conference to which 200 delegates are nominated in a pre-determined ratio per province. Between the national conferences and the meeting of the General Council (a meeting of all members following on the last national conference with the view on the approval of the financial statements and the budget) the National Executive of SALGA is the highest authority. In addition, SALGA has a number of working groups, amongst others the Working Group on Intergovernmental Relations. SALGA has a number of important functions. It must be consulted by the Minister of Provincial and Local Government in respect of national and provincial government matters involving local government. It may approach any minister, consult any organ of state and nominate persons to be considered for appointment by the President to the Finance and Fiscal Commission. It may designate a maximum of 10 persons from the provincial nominees to participate in an advisory manner in deliberations of the NCOP involving local government issues. Although the Act does not contain any specific enforcement provision, members may be suspended or expelled if it acts in a manner detrimental to the interests of SALGA.

PART 6: CONFLICT RESOLUTION BETWEEN THE LEGISLATIVE BRANCH OF GOVERNMENT WITHIN THE NATIONAL, PROVINCIAL AND LOCAL SPHERES OF GOVERNMENT

In the *national sphere of government* a distinction is made between the legislature (Parliament), the Executive (the President and the National Executive) and the Judiciary.

Parliament (Chapter 4) consists of the National Assembly and the National Council of Provinces. The National Assembly is made up of not more than 400 and not less than 350 members, elected every five years on the basis of proportional representation (ss 46 and 49). Its primary functions are²⁴:

- to amend the Constitution;
- to pass national legislation²⁵ with regard to any matter (including a Schedule 4 functional area matter (within the concurrent legislative domain of parliament and the provincial legislatures), but excluding a Schedule 5 functional area matter;²⁶
- to assign any of its legislative powers (except the power to amend the Constitution), to any legislative body in another sphere of government (i.e. the provincial legislatures and the municipal councils);
- to deal with legislation by considering, passing, amending or rejecting any legislation before it; and
- to initiate or prepare legislation (except Bills dealing with money matters).²⁷

In addition, the National Assembly must provide for mechanisms for ensuring accountability to it by the executive organs of state in the national sphere and oversight of national executive authority (including as regards the implantation of legislation), and of all organs of state.²⁸

The National Council of Provinces consists of 10 delegates per province (based on proportional representation of the political parties in the province concerned, including the premier or his/her nominee, ordinary members of the Provincial Executive and 6 permanent members²⁹ who may not be simultaneously members of the Provincial legislature concerned, but who may attend and participate (but not vote) in the provincial legislature concerned.³⁰ Its main functions are³¹:

- to participate in amending the Constitution (as determined in section 74);
- to pass, in accordance with section 76 (dealing with ordinary bills affecting provinces), legislation with regard to any matter within a Schedule 4 functional area as well as any other matter required in terms of the Constitution to be passed in accordance with section 76; and
- to consider, in accordance with section 75 (ordinary bills not affecting provinces), any other legislation passed by the National Assembly.

In addition, the National Council of Provinces may³²

- in accordance with Chapter 4 of the Constitution (Parliament) consider, pass, amend, propose amendments to or reject any legislation that is before it; and

- initiate or prepare legislation falling within a Schedule 4 functional area (functional areas of concurrent national and provincial; legislative competence) or other legislation referred to in section 76(3),³³

However, it may not initiate or prepare money Bills³⁴.

A number of provisions regulate the settlement of potential disputes within the national sphere of government between the National Assembly and the NCOP with respect to the passing of legislation:

- Bills amending the Constitution:
 - the amendment of s 1 (founding provisions)³⁵ and of s 74(1) itself: in the case of the National Assembly: a supporting vote of at least 75% of its members; and in the case of the NCOP: supporting vote of at least 6 provinces³⁶
 - the amendment of Chapter 2 (Bill of Rights)³⁷ or any other provision³⁸ of the Constitution: NA: two thirds of its members; NCOP a supporting vote of at least six provinces³⁹
- Ordinary bills not affecting provinces (s 75): the National Assembly may decide to ignore any amendments thereto or a rejection thereof by the NCOP and pass such legislation.
- Ordinary bills affecting provinces (s 76): as a general rule such bills must be passed by means of an ordinary majority in both the NA and the NCOP; should the NCOP refuse to pass such bill, the NA can pass it with a two-thirds majority.⁴⁰ Provision is made for a dispute resolution mechanism, the Mediation Committee,⁴¹ to resolve disputes between the NA and the NCOP regarding Bills.
- Money Bills: dealt with in a manner similar as ordinary bills not affecting provinces (s 77); see above.

Within the provincial sphere the legislative authority is vested in the provincial legislatures (Chapter 6).⁴² They have legislative powers in respect of the following matters:⁴³

- a provincial constitution;⁴⁴
- legislation within the functional areas of concurrent national and provincial legislative competence (Schedule 4);⁴⁵
- legislation within the functional areas of exclusive provincial legislative competence (Schedule 5);⁴⁶
- matters outside the Schedule 4 or Schedule 5 functional domains that have been expressly assigned to the province concerned by national legislation; and
- any other matter for which the Constitution specifically requires provincial legislation.

Parliament may pass legislation assigning the power to provincial legislatures to make legislation on (aspects of) one or more so-called functional areas in the national domain (that is, functional areas not contained in either Schedule 4 or 5.

Schedule 4 of the Constitution refers to the functional areas of concurrent national and provincial legislative competence. This means that the provincial legislatures are entitled to pass legislation with regard to any of these issues. Schedule 4 Part A contains the functional domains

in respect of which the provincial government is the administering authority. Schedule 4 Part B contains those functional areas (local government matters) in respect of which the provincial legislatures may pass legislation, but the executive authority and the right to administer vests (in terms of the Constitution) in the local authorities (municipalities).⁴⁷ The national legislature may also pass legislation in respect of the functional areas referred to in Schedule 4, but only to the extent that section 146(2) and (3) provides for such overriding national legislative power.

Schedule 5 of the Constitution contains the functional areas of exclusive provincial legislative competence. The administration of the functional areas listed in Part A vests in the provincial government, whilst the executive authority and the right to administer the functional areas listed in Part B vest in local government (municipalities).⁴⁸ Provincial legislatures are in principle entrusted with the passing of legislation with regard to any of these functional areas. In terms of section 41 Parliament has severely limited powers of intervention for the passing of national legislation as far as these functional areas of exclusive provincial competence are concerned.

In terms of section 155(6) and (7) provincial governments have the legislative and executive authority to pass legislation and implement other measures in order to monitor and support local government, and to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 Part B and Schedule 5 Part B. (The rights of the national government in this regard are determined by reference to its overriding powers (s 146(2)-(3): Schedule 4: concurrent national and provincial domain), and its power of intervention (s 44: Schedule 5: exclusive provincial domain).

Section 146(5) of the Constitution provides that provincial legislation prevails over national legislation in respect of all Schedule 4 Part A functional matters. However, section 146(1) provides for a mechanism to deal with conflicts between national and provincial legislation. Section 146(2)-(3) (the so-called overriding power of Parliament) determines that national legislation will prevail over provincial legislation only if a national law that applies uniformly with regards to the country as a whole deals with matters that can only be regulated effectively from a national perspective (e.g. norms and standards, frameworks or national policies, or where there is a need for uniform national legislation (e.g. the maintenance of national security and/or economic unity, and the protection of the environment), or where the national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the interests of another province or to the country as a whole, or impedes on the implementation of national economic policy.⁴⁹

Section 146(4) gives a specific instruction to the courts on how to deal with a specific dispute category: should a dispute over the prevalence of national regulation over provincial legislation on the basis of section 146(2)(c) (necessity for national legislation) be brought before the court for resolution, it should take into account the view of the NCOP when it passed the national legislation.

Section 146(6)-(8) gives a specific dispute resolution role to the NCOP to determine whether conflicting national or provincial subordinate legislation (e.g. proclamations, regulations, notices and other such instruments) should prevail.

Conflicts between national legislation and provisions of provincial constitutions are to be resolved as follows:

- Where the Constitution specifically requires national legislation, such legislation prevails;

- Intervention by means of national legislation (with respect of a Schedule 5 exclusive provincial functional domain) made in terms of section 44 prevails over provincial constitutions; and
- As regards Schedule 4 matters (functional areas of concurrent national and provincial legislative competence), the principles as set out in section 146 (see above) apply as if the provincial constitution were an ordinary provincial act.

With respect to a conflict between national legislation issued in terms of section 44(1) (the intervention power of Parliament with respect to Schedule 5) and provincial legislation, such national legislation prevails over the provincial legislation concerned.⁵⁰

The Constitution also foresees the possibility that a court may find that it is impossible to resolve a conflict: in such a case the national legislation prevails over the relevant provisions of the provincial constitution concerned or over provincial legislation, as the case may be.⁵¹

A ruling by a court that certain legislation prevails over other legislation does not invalidate the other legislation, but has the effect to make said other legislation inoperative as long as the conflict remains.⁵²

Section 150 contains a clear instruction to courts on the approach to be followed in the interpretation of conflicts between national and provincial legislation (including a provincial constitution): it must prefer any reasonable interpretation that would avoid a conflict over any other interpretation that would result in a conflict.

In the local government sphere the Constitution enables municipalities to make and administer by-laws, which may in principle not conflict with either national or provincial legislation.⁵³ In cases where either national or provincial legislation is inoperative on account of a conflict with other national or provincial legislation (as the case may be), the by-law is regarded as valid for as long as that legislation is inoperative.⁵⁴

The local sphere of government consists of municipalities.⁵⁵ The Executive and legislative authority of a municipality is vested in the Municipal Council. The role of national and provincial government as regards local government is clearly delineated: municipalities are entitled to govern local government affairs of its community, and its ability or right to exercise its powers or perform its duties may not be compromised or impeded by the national or provincial government.⁵⁶

In terms of section 155(7) (see above), national and provincial government must see to the effective performance by municipalities of their functions (with reference to Part B of Schedules 4 and 5). In addition, national and provincial governments must assign to municipalities (by agreement and subject to conditions) the administration of a matter listed in Schedule 4 Part B and Schedule 5 Part B if that matter would most effectively be administered locally, and the municipality concerned has the capacity to administer it.⁵⁷

PART 7: THE ROAD AHEAD: ONGOING POLICY DEVELOPMENT

In a recently undertaken audit of intergovernmental relations (the *Intergovernmental Relations Audit* (1999))⁵⁸, the present state of IGR in South Africa is described as

a largely informal, interacting network at national, provincial and local levels, still relatively rudimentary but nonetheless developing into a method of intergovernmental relations, more or less appropriate to our institutional arrangements.

The South African Presidency has been restructured by the introduction of six intersectoral Committees in the Cabinet Office, and the appointment of key personnel in the President's office responsible for the co-ordination of policy development and implementation within and across the spheres of government.

The main recommendations of the *Intergovernmental Relations Audit* (1999) are focussed on the redefinition of the role of the existing instruments of intergovernmental relations (e.g. the PCC, MINMECs (statutory and non-statutory), FOSAD and organised local government structures). In addition, due to the proliferation of (informal) IGR structures, more co-ordination should be effected in order to "avoid duplication and to ensure linkages with other IGR fora."

National government's powers of supervising and supporting provinces (and that of provinces in the case of local government) as well as the power of intervention by respectively national and provincial government should be spelled out clearly in legislation. The *Intergovernmental Relations Audit* also recommended a review of the NCOP as it

... is perceived as not working effectively and its functions and structures need to be reviewed for the following reasons, some of which are operational, while others are structural.⁵⁹

As regards financial intergovernmental relations, the existing tensions should be addressed by re-assessing the present assignment of revenues, the role of provincial taxation powers, and the introduction of a more asymmetric approach to provincial governments taking into account existing provincial capacities with the context of the institutional development prevailing in the individual provinces. Monitoring, co-ordination and alignment, the issue of unfunded mandates, the introduction of improved information systems and capacity building were identified as some of the issues that could be considered for policy development.

The *Intergovernmental Relations Audit* also proposed a delay in the enactment of the national legislation (envisaged in section 41(2)(b) of the Constitution) to provide for the establishment of structures, mechanisms and procedures in order "to allow for the maximum of flexibility and informality" within the context of developing sound intergovernmental relations.

In the Department of Provincial and Local Government's *Discussion Paper: Strategic Initiatives to Enhance the Effectiveness of Intergovernmental Relations: Executive Summary* (2000) a number of key issues to be considered by government (with appropriate measures proposed for the short and medium term) were identified:⁶⁰

- The locus and management of IGR structures and systems (including the development of policy and organising to enhance the effectiveness of the present IGR system);
- The role of the NCOP in co-operative government;
- Monitoring and intervention by the national and the provincial governments in respectively provincial and local government;

- IGR and foreign relations;
- Provincial Affairs and Intergovernmental Relations (PAIR) Institute (role of PAIR as independent institution specializing in IGR research);
- Capacity-building and IGR;
- Regional IGR (Provincial and Local Government) and information flows between national and subnational government;
- IGR and disaster management;
- Intergovernmental fiscal relations;
- Traditional leadership and IGR; and
- “(M)echanisms to ensure that role clarity exists where spheres of government have concurrent functions” (which requires further research).

The Discussion Paper: Executive Summary contains a two-pronged approach:

- “propose measures to deal with IGR through *governance, public administration and management* over the (a) *short* and (b) *medium* term”⁶¹ (with reference to the above-mentioned issues that require further consideration); and
- “to provide a framework of a Bill for particular issues to be dealt with through legislation (Intergovernmental Relations Bill)”⁶²

The envisaged (s 41(2)(a) Constitution) IGR Bill should provide for (amongst others) the following matters:⁶³

- Intergovernmental co-operation principles;
- Intergovernmental co-operation;
- Establishment of intergovernmental structures;
- Costing of policies and legislation which could affect other spheres of government (unfunded mandates);
- Multi-jurisdictional co-operation;
- Intergovernmental conflict and settlement of disputes: and
- Management and administration of the IGR Act.

In conclusion the following can be said to be some of the main characteristics of the IGR system that is currently in operation in South Africa:

- The legislation envisaged in section 41(2)(a) of the Constitution (which should deal with mechanisms and procedures to promote sound IGR and resolve IGR conflicts) has not been submitted to the South African Parliament.
- There are a number of formal (statutory) IGR structures with their own internal procedures.
- There are an increasing number of informal IGR structures that have been established in the absence of clear enabling mechanisms and function without any legally binding force. Compliance with their decisions depends to a large extent on the will (and political pressure) to act in a consensus manner.

There is a clear need to address the duplication of IGR structures and to introduce by means of legislation mechanisms and systems that will provide for the co-ordination of IGR structures and systems as well as for the extra-judicial resolution of disputes and conflicts. Within this context an audit of existing best practices should first be undertaken in order to inform the drafting of the proposed legislation. In addition, the necessary framework to enable the conclusion of standard agreements between the spheres of government and organs therein (e.g. between two provincial governments or between a provincial government and a municipality) should be established. Provision should also be made for the conclusion of transnational (cross border) relations between constituent units (be they provincial or local government in status) between South Africa and neighbouring countries.

1. Item 2 Schedule 6 Constitution of the Republic of South Africa 108 of 1996.
2. S 103: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West and Western Cape.
3. S 99 (subject to certain requirements and taking effect only after proclamation in the Government Gazette by the President).
4. S 100. In addition, s 216(6) also provides for the stoppage of funding to provinces.
5. Ss 125 and 132-136.
6. S 125(5)
7. S 126 (subject to certain requirements and taking effect only after proclamation in the Provincial Gazette by the Premier).
8. S 100. In addition, s 216(6) also provides for the stoppage of funding to provinces.
9. S 151. Section 115 provides for the establishment of three categories of municipalities.
10. S 157-160.
11. S 156 (subject to certain conditions).
12. S 239 contains the following definition of an organ of state:
 - (a) any department of state or administration in the national, provincial or local sphere of government; or
 - (b) any other functionary or institution
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.
13. Section 41.(1) contains eight different clauses. The first four are included in this footnote. The other four are included in the text. The section reads as follows:

S 41.(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;
14. S 41(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.
15. S 41(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.
16. S 41(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.

17. See Carstens, "Intergovernmental Relations and Transfrontier Regionalism in Southern Africa" (Paper delivered at the PAIR Institute IGR School, Pretoria, 11 October 2001) p. 7.
18. Carstens, p. 7
19. Carstens, p. 11.
20. Carstens, pp. 11-12.
21. The material in Part 5 is drawn from Thornhill, *et al.*, 2001 *Reference Book: National and Provincial Intergovernmental Structures* pp. (iii)-(iv) and pp. 1-93.
22. See below for a discussion of SALGA.
23. The following (political) MINMECS (with, in brackets, the relevant support body (Technical MINMEC or similar body) consisting mostly of officials) have been established: MINMEC for Department of Agriculture (Intergovernmental Technical Committee for Agriculture - ITCA); Arts, Culture, Science and Technology MINMEC (Arts, Culture, Science and Technology Technical Committee); Department of Environmental Affairs and Tourism: Tourism MINMEC (Department of Environmental Affairs and Tourism: Tourism MIPTECH); Department of Environmental Affairs and Tourism: Environment MINMEC (Department of Environmental Affairs and Tourism: Environment MINTECH); Health MINMEC; Housing MINMEC (Committee of Heads of Housing Departments); Local Government MINMEC (Local Government Technical MINMEC); MINMEC for Public Works (Heads of Departments Committee of Public Works); MINMEC for Safety and Security; MINMEC for Social Development (Committee of Enquiry into a Comprehensive Social Security System); MINMEC for Sport and Recreation (Technical Intergovernmental Committee for Sport and Recreation - TIC); MINMEC for Traditional Affairs (Technical MINMEC for Traditional Affairs); MINCOM (Committee of Transport Officials - COTO); and the Department of Water Affairs and Forestry MINMEC (Department of Water Affairs and Forestry MINMEC Technical Committee -MINTEC). See for a discussion Thornhill et al 2001 Reference Book: National and Provincial Intergovernmental Structures 31-65; IGR Audit 1999 34-46.
24. S 44(1)(a) (read with s 44(3)-(4)) and s 55(1)-(2).
25. In terms of s 239 national legislation includes:
 - (a) subordinate legislation made in terms of an Act of Parliament; and
 - (b) legislation that was in force when the Constitution took effect and that is administered by the national government.
26. Subject to the overriding intervening s 44(2) power of Parliament which may be used in respect of the Constitution Schedule 5 matters within the exclusive domains of provincial legislatures:

44 (2) Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary -

 - (a) to maintain national security;
 - (b) to maintain economic unity;
 - (c) to maintain essential national standards;
 - (d) to establish minimum standards required for the rendering of services; or
 - (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.
27. See s 77 for a definition of a money bill. Money bills are dealt with by Parliament as an ordinary bill not affecting provinces (see s 75) – which implies that the National Assembly can, notwithstanding rejection by the NCOP or amendments proposed by the NCOP, pass the legislation and submit same to the President for assent.
28. S 55(2).
29. S 60 read with s 61
30. Ss 60 – 61 read with s 113.
31. S 44(1)(b).
32. S 68.
33. S 76(3) refers to:
 - (a) section 65(2) ("national legislation for a uniform procedure in terms of which provincial legislatures confer authority on their delegates to cast votes on their behalf");
 - (b) section 163 (recognition by an Act of Parliament of organized local government);

- (c) section 182 (public protector established by national legislation);
 - (d) section 195(3) and (4) (national legislation ensuring the basic values and principles governing public administration);
 - (e) section 196 (regulation of the Public Service Commission by national legislation); and
 - (f) section 197 (structure and functions of the Public Service, as regulated by national legislation).
34. S 68(b); see also s 77.
 35. See above.
 36. S 74(1)(b).
 37. S 74(2).
 38. S 74(3).
 39. S 74(2)(b) and s 74(3)(b) (if it relates to a matter affecting the NCOP, deals with provincial boundaries, powers, functions or institutions, or amends a provision that deals specifically with a provincial matter).
 40. S 76.
 41. S 78 (establishment) and s 76 (specific role).
 42. In terms of s 239 provincial legislation includes:
 - (a) subordinate legislation made in terms of a provincial Act; and
 - (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.
 43. S 104.
 44. Ss 142 – 143.
 45. *Schedule 4 Part A* refers to the following functional areas in the concurrent national and provincial domain: Administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases ; Casinos, racing, gambling and wagering, excluding lotteries and sports pools; Consumer protection; Cultural matters; Disaster management; Education at all levels, excluding tertiary education; Environment; Health services; Housing; Indigenous law and customary law, subject to Chapter 12 of the Constitution; Industrial promotion; Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence; Media services directly controlled or provided by the provincial government, subject to section 192; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; Pollution control; Population development; Property transfer fees; Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; Public transport; Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; Regional planning and development; Road traffic regulation; Soil conservation; Tourism; Trade; Traditional leadership, subject to Chapter 12 of the Constitution; Urban and rural development; Vehicle licensing; and Welfare services.
Part B: The following local government matters to the extent set out in section 155(6)(a) and (7): Air pollution; Building regulations; Child care facilities; Electricity and gas reticulation; Firefighting services; Local tourism; Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; Stormwater management systems in built-up areas; Trading regulations; and Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.
 46. *Schedule 5 Part A* refers to the following functional areas in the exclusive provincial domain: Abattoirs; Ambulance services; Archives other than national archives; Libraries other than national libraries; Liquor licences; Museums other than national museums; Provincial planning; Provincial cultural matters; Provincial recreation and amenities; Provincial sport; Provincial roads and traffic; and Veterinary services, excluding regulation of the profession.

Part B: The following local government matters to the extent set out for provinces in section 155(6)(a) and (7): Beaches and amusement facilities; Billboards and the display of advertisements in public places; Cemeteries, funeral parlours and crematoria; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport facilities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise; Air pollution; Pounds; Public places; Refuse removal, refuse dumps and solid waste disposal; Street trading; Street lighting; and Traffic and parking.

47. S 156(1).
48. S 156(1).
49. S 146(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
 - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
 - (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing B
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
 - (c) The national legislation is necessary for B
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that B
 - (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - (b) impedes the implementation of national economic policy.
50. S 147(2).
51. S 148.
52. S 149. This implies that e.g. that the other legislation would automatically become operative again, once the prevailing legislation is repealed.
53. S 156(3).
54. S 156(3).
55. S 151(1).
56. S 151(2)-(3).
57. S 156(4).
58. The information in the first section of this Part is found in *Intergovernmental Relations Audit* 1999, pp. 189-204.
59. *Intergovernmental Relations Audit* 1999, pp. 197-201. The following examples of problem areas were identified (198):
 - There are too few permanent members to deal with the large number of bills especially since both section 75 and 76 bills receive its attention.
 - The system is too complex and the resources are too limited.
 - The special delegates play little or no part in the committee system.
 - There is very little time to study documentation sent by the NCOP to the provinces.
 - The provincial legislatures are unable to apply their minds to issues (due to the shortness of the legislative cycle).

- Provinces do not have the required research capacity or available MPLs (members of Provincial Legislatures) to make informed decisions.
 - Tight time-frames set by the NCOP make it difficult for all concerned to deal expeditiously with the legislative cycle and there is hardly an opportunity for a *considered* view to be heard from the provincial legislatures through public hearings.
60. The points in this paragraph are drawn from *Discussion Paper: Executive Summary* May 2000, pp. 3-33.
61. *Discussion Paper: Executive Summary* May 2000, p. 3.
62. *Discussion Paper: Executive Summary* May 2000, pp. 2-3.
63. *Discussion Paper: Executive Summary* May 2000, pp. 26-33.