

Codification of “Intergovernmental Relations” by Way of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems

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Abstract

Young multitiered systems often do not have the luxury to develop intergovernmental institutions, forums and practices over a long period of time as may have been the case in established federations and decentralised unitary arrangements. The pressure for young multitiered systems to deliver services across an entire nation commences immediately after the enactment of a new constitution. The experiences of South Africa in setting up intergovernmental institutions and practices shortly after the promulgation of its 1993 Interim Constitution and the 1996 Final Constitution may be instructive to other emerging multitiered systems. South Africa has gone through

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two phases of intergovernmental development. The first phase (1994-2005) of intergovernmental relations was predominantly informal and spontaneous, while the second phase (2005 – ongoing) was predominately statute-driven after the enactment of the Intergovernmental Relations Framework Act (IGR Act). This article considers the experiences of South Africa and draws conclusions about some of the benefits that may arise for young multitiered democracies from enacting a statutory framework to guide the conduct of intergovernmental relations.

I. Introduction

The question addressed in this article is what the benefits are, in light of the South African experience, for young multitiered systems to enact a statute in which the philosophy and essential institutions responsible for the conduct of intergovernmental relations are set out.

Young federations and decentralised unitary systems (“multitiered systems”) must often, soon after the enactment of a new constitution, respond to a challenge that they are generally unprepared for – how to facilitate, coordinate and integrate the activities of the respective levels of government by way of intergovernmental relations so as to ensure all levels maximise their available resources and optimise service delivery.¹ Intergovernmental relations refer, in general, to the formal and informal processes, institutional arrangements, agreements and structures for bilateral and multilateral cooperation between the respective levels of government.²

The experiences of multitiered systems such as South Africa, Kenya, Iraq and Ethiopia show that often so much energy goes into the drafting of new constitutional arrangements, that insufficient attention is given as to how, in practice, the respective levels of government would cooperate, coordinate

¹ Intergovernmental relations are not limited to federations. Intergovernmental relations are also required in decentralized unitary systems, refer for example to decentralized unitary arrangements such as Japan, the United Kingdom, Kenya and Italy where extensive intergovernmental relations forums exist. *J. S. Jun/D. S. Wright* (eds.), *Globalization and Decentralization*, 1996; *M. Laffin*, *Comparative British Central-local Relations, Public Policy and Administration* 22 (2012), 74 et seq.; *J. Blom-Hansen*, *Avoiding the Joint-Decision Trap: Lessons from Intergovernmental Relations in Scandinavia*, *European Journal of Political Research* 35 (1999), 35 et seq.; *J. P. Meekison* (ed.), *Intergovernmental Relations in Federal Countries*, 2007.

² Refer for example to the South African White Paper on Local Government March 1998: Pretoria, at 38.

and integrate in the discharge of their functions immediately after the constitution takes effect.

South Africa's experience to develop a system of intergovernmental relations may offer useful insights to other emerging multitiered systems. The decentralisation process in South Africa took place against a background of no historic experience of democratic government and fierce resistance and suspicion to any form of regional government that may limit the powers of the national government to address inequality.³ Since the enactment of its 1993 Interim Constitution and subsequently the 1996 Final Constitution, South Africa has developed a refined and extensive network of intergovernmental relations so as to link the national, provincial and local levels as well as, where applicable, the traditional authorities.

South Africa has followed a two-pronged approach with the rolling out of its system of intergovernmental relations. During the first phase (1994-2005) intergovernmental relations were principally *ad hoc*, spontaneous and generally at the discretion of national ministries who decided when to convene meetings with their provincial counterparts, the agenda of meetings, and the regularity of meetings. In the second phase (2005 ongoing) legislation was enacted to set up a basic framework for the conduct of intergovernmental relations and institutions to facilitate interaction between the respective spheres of government *in addition* to ongoing informal forums and interaction.

The reason for the relevance of the South African experience to other emerging multitiered systems is that in established federations such as the USA, Australia and Canada, the conduct of "intergovernmental relations" has over many decades and even centuries developed into a unique, albeit complex and confusing art-form of interaction between governments with extensive policies, institutions, protocols, conventions and practices in place to facilitate contact and interaction between the respective levels of government.⁴ By far the majority of intergovernmental forums and meeting points

³ Various other reasons justified the creation of a multitiered system, for example the geographical size of South Africa; the size of its population; the need to deepen democracy; the importance to involve local and provincial leaders in decision-making; leadership development; and bringing government closer to the people. Refer for example to the following report which was developed as a source document for all political parties during the pre-1993 negotiations: Regions in South Africa: Constitutional options and their implications for good governance and a sound economy (15.3.1993); B. de Villiers, *The Future of Provinces in South Africa – the Debate Continues*, 2007, 5 et seq.

⁴ The complexity of intergovernmental relations in the USA has been described as so complex, intricate and nuanced that it is "difficult to generalize succinctly" about the practical operation of intergovernmental relations in that country. J. Kincaid, *Intergovernmental Relations in the United States of America*, in: J. P. Meekison (note 1), 33 et seq., at 33. For general

in the older federations are informal,⁵ spontaneous and *ad hoc*, with no explicit mention in the constitutions of “intergovernmental relations”.⁶ In these older federations the conduct of intergovernmental relations was generally the result of pragmatism rather than a philosophical scheme or master-plan. Multiple “meeting-points”, each with its own agenda, composition, rules and procedures, have therefore become commonplace as a result of *need*, rather than from *design*.

Young multitiered systems generally do not have the luxury of time to wait for intergovernmental forums to develop spontaneously. Young democracies are generally required to make a new multitiered system work from the day of its inception. This is because the demands of modern day government require close cooperation, consultation and integration between the respective spheres of government so as to maximise the standard of service delivery, maximise the use of scarce resources and provide minimum standards of services to all persons regardless of where they reside in a country. Young multitiered systems are often born from conflict and violence. Time to get the governmental systems moving and integrated is therefore a scarce commodity.

The question often posed in young multitiered systems is whether legislation should be enacted to provide for a formal framework for the conduct of intergovernmental relations or whether, as in the case of the established multitiered systems, intergovernmental institutions, policies and processes should be allowed to develop spontaneously over time as the need arises.

reading refer to *D. Cameron/R. Simeon*, Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism, *Publius: The Journal of Federalism* 32 (2006), 49 et seq.; *R. Agranoff*, Autonomy, Devolution and Intergovernmental Relations, *Regional and Federal Studies* 14 (2004), 26 et seq.; and *N. McGarvey*, Intergovernmental Relations in Scotland Post-Devolution, *Local Government Studies* 28 (2002), 29 et seq.

⁵ Reference to “informal” is not meant as an absence of institutions that are involved in the conduct of intergovernmental relations. There are many institutions in established federations that conduct intergovernmental relations on a daily basis, for example second houses, parliamentary committees, and financial and fiscal commissions. “Informal” refers to the absence of an explicit constitutional obligation to conduct intergovernmental relations. As far as executive intergovernmental relations are concerned refer for example to *F. W. Scharpf*, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, Public Administration, 1988, 239 et seq.

⁶ *Simeon* observes as follows after having compared the conduct of intergovernmental relations in various federations: “Despite these differences (between federations), intergovernmental relations are ubiquitous and pervasive in all of them ... But the institutions and processes that these countries have developed to manage intergovernmental relations vary widely in several dimensions. They vary from country to country, and within countries between different time periods and between different policy areas. The word ‘fluid’ to describe relations among governments crops up repeatedly ...” *R. Simeon*, Conclusion, in: J. P. Meekison (note 1), 91 et seq., at 91.

In this article an overview is given of the background to the two-phased system of intergovernmental institutions that has evolved in South Africa; the rationale behind the 2005 enactment of a statutory framework for intergovernmental relations is investigated; and potential lessons are identified for consideration by other young multitiered systems should they opt for an act of parliament to set out the basic framework and institutions for intergovernmental relations.

II. South Africa – A First Taste of Intergovernmental Relations

Democratic South Africa's first "taste" of intergovernmental relations followed the enactment of the 1993 Interim Constitution (Interim Constitution).⁷ The Interim Constitution provided, for the first time in the history of South Africa, for constitutionally entrenched provincial government on the basis of principles that are associated with federations.⁸ Informal intergovernmental forums were established soon after the Interim Constitution took effect since it "became clear that the establishment of the three spheres of government brought about changes to the governmental process, especially as far as the need for consultation and co-ordination is concerned".⁹

⁷ Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). Refer for example to *B. de Villiers*, Intergovernmental Relations: A Constitutional Framework, in: *B. de Villiers* (ed.), *Birth of a Constitution*, 1994, 256 et seq.; *A. Bernstein*, *Policy Making In a New Democracy: South Africa's Challenges for the 21st Century*, 1999.

⁸ For example a written, entrenched constitution, constitutional guarantees of national and provincial powers, oversight by the judiciary and the right of provinces to enact their own constitutions. Refer to Chapters 1, 4 and 9 of the Interim Constitution as well as Schedule 4 of the Interim Constitution in which the Constitutional Principles that had to be complied with in the drafting of the final constitution, were set out. One of the agreements reached between the parties in the negotiations leading to the 1993 Constitution was that the 1993 Constitution would contain certain Constitutional Principles that would bind the Constitutional Assembly when it writes the "final" Constitution. The Constitutional Court had to certify that the "final" Constitution, which was enacted in 1996, complied with the Constitutional Principles. For a discussion of this process refer to *B. de Villiers*, *Constitutional Principles – Content and Significance*, in: *B. de Villiers* (note 7), 37 et seq. For a general overview of the post-1993 development of intergovernmental relations, also refer to *F. M. Mathebula*, *Intergovernmental Relations Reform in a Newly Emerging South African Policy*, University of Pretoria, 2004.

⁹ *P. M. Sokhela*, *Intergovernmental Relations in the Local Sphere of Government in South Africa with Specific Reference to the City of Tswane Metropolitan Municipality*, University of Pretoria, 2006, 106.

The Interim Constitution contained no explicit reference to intergovernmental relations or to any obligation to the respective levels of government to cooperate with each other. Some recognition was given to the conduct of intergovernmental relations through the Senate, the establishment of the Financial and Fiscal Commission and the Commissioner for Provincial Government. There was, however, no statutory philosophy to guide intergovernmental relations and no other statutory institutions were established with the explicit aim to facilitate cooperation.

The Interim Constitution was implemented on the assumption that cooperation and consultation, if any, between the levels of government would be spontaneous and *ad hoc* as the need arises. The Interim Constitution provided for the establishment of a Commission of Provincial Government that had the obligation to conduct further research into the functioning of the provincial system, the improvement of relationships between the levels of government and to make recommendations in regard to any matter that was of relevance to the Commission's objectives.¹⁰

Various informal intergovernmental forums were established in a very short space of time after the enactment of the Interim Constitution to facilitate cooperation and integration between the levels of government. It was observed at the time that –

“amazing progress had been made in a very short time in the structuring and conduct of intergovernmental relations. For a country that has no history of democratic provincial government, where the notion of intergovernmental relations was totally unknown until 1993 and where there was a background of suspicion of any form of federalism, once cannot but be struck by the pragmatism and urgency that have led all those involved to establish a myriad of intergovernmental relations forums. Compared to other developing countries this is even more remarkable.”¹¹

None of those forums had a clear philosophical vision or a formal statutory base. Although meetings took place with varied regularity between the President and provincial premiers; between national and provincial ministers; between directors-general and technical experts; and between provincial premiers and local governments within their respective provinces, the

¹⁰ Sections 161 and 164 Interim Constitution.

¹¹ For an overview of the intergovernmental forums that were established under the Interim Constitution and continued under the 1996 Constitution refer to *B. de Villiers, Intergovernmental Relations in South Africa*, South African Public Law 12 (1997), 197 et seq., at 212. Also refer to a discussion of the system of intergovernmental relations in South Africa in the following publication by the Department of Provincial and Local Government: *Intergovernmental Relations in South Africa*, Pretoria, 2012.

system of intergovernmental relations was rather disorganised and lacked reliability.¹² The meetings were largely *ad hoc*, spontaneous but often without clearly spelt out agendas or objectives.

Intergovernmental relations under the Interim Constitution reflected the practice in many other multitiered systems whereby intergovernmental relations are principally conducted without a constitutional imperative, in informal arrangements with no statutory basis, with maximum flexibility in regard to regularity of meetings; and where little, if any, public accountability applied.

Whereas the concept of intergovernmental relations was initially regarded with some suspicion by ANC in the debates leading to the Interim Constitution as being typical only of "federations", it soon became obvious to all involved that without effective intergovernmental relations, government processes would not be able to be conducted optimally.¹³ The need for a functioning system of intergovernmental relations assisted the parties to move beyond the dogmatic debate about "federal" and "unitary" forms of state so as to focus on practical challenges of cooperative government that face a newly established multitiered system.¹⁴ Intergovernmental relations therefore became a "neutral" word in constitutional debates, whereas "federal" and "unitary" were stigmatised by historic experiences. The reality of how important intergovernmental relations are in a multitiered system was aptly observed by the Constitutional Court when it commented as follows about the need for sound and effective intergovernmental relations in South Africa's system of cooperative government:

¹² For a general discussion refer to *C. Mentzel*, 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. *T. Rapoo*, Concealed Contest – MINMECs Provincial Debate, Policy Brief No. 18, December 1999.

¹³ Refer for example to the new thinking of the ANC about intergovernmental relations as is reflected in the Party's constitutional proposals submitted to the Constitutional Assembly in which the following is said about intergovernmental relations and cooperative government: "The guiding principle of cooperative governance is that all state organs or entities should act in concert to the benefit of the people and nation-building. This implies a duty on the different levels of government to cooperate with each other. Intergovernmental relations should be established on the premise that cooperation between the levels of government, and between the various provincial governments should be promoted ..." <<http://www.constitutionnet.org/files/6473.pdf>>.

¹⁴ According to *P. M. Sokbela* (note 9), 63 the Constitution has federal and unitary elements but the federal features were included so as to provide greater comfort to the respective power-basis in the country.

“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.”¹⁵

The final 1996 Constitution (“Constitution”)¹⁶ is imbued with the letter and spirit of intergovernmental relations. The most important philosophical basis for the conduct of intergovernmental relations is found in Chapter 3 of the Constitution. Chapter 3 deals with importance of “cooperative government” between the respective “spheres” of government.¹⁷ Chapter 3 also envisaged that in due course an Act of Parliament would be promulgated so as to regularise and facilitate the conduct of intergovernmental relations. Chapter 3 of the Constitution therefore sets out the spirit of cooperative government, while the Intergovernmental Relations Framework Act (which was enacted in 2005) provides for the detail of the intergovernmental relations institutions and matters associated therewith.

The drafters of the Constitution envisaged a multi-tiered constitutional arrangement whereby the different spheres of government would cooperate, consult and coordinate with each other while simultaneously respecting the powers and functions of each other. The Constitution is, according to the majority-ANC, a single, decentralised *unified* (not to be confused with a *unitary*) state, with three spheres that would separately and together serve the interests of the people in a unique way without engaging in unnecessary litigation. Senior ANC figures have, however, accepted that the Constitution contains federal elements.¹⁸

The Constitution uses the word “sphere” rather than “tier” or “level” to refer to the respective national, provincial and local governments so as to demonstrate the equality and respect between them, rather than a hierarchical arrangement where one sphere is the senior of another.¹⁹ Chapter 3 not

¹⁵ In re: The National Education Policy Bill No. 83 of 1995 1996 4 BCLR 518 (CC), 1996 3 SA 289 (CC) par 34.

¹⁶ Constitution of the Republic of South Africa, 1996 (Act 108 of 1996). The Constitution repealed the Interim Constitution.

¹⁷ Sections 40-41 of the Constitution.

¹⁸ Refer for example to an address made by senior government minister, *Pravin Gordhan* (Minister of Finance) on 26.8.2010 to the National Council of Provinces in which he spoke about the role of the second house in the conduct of intergovernmental relations. He said as follows when referring to the federal nature of the Constitution: “Our constitution recognises that centrifugal focus operate within a *quasi federal* system.” (author emphasis) *P. Gordhan* (Minister of Finance) (2010). Available at <<http://www.polity.org.za>>.

¹⁹ The irony of the use of 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 the federalism as a non-centralized system in the sense that “the power of government within them are diffused among many centres, whose existence and authority are

only places an obligation on the respective spheres to cooperate with each other, it also prohibits the spheres from litigating against each other unless and until all other avenues to resolve a dispute by way of agreement had been exhausted.²⁰

The detailed nature about the philosophy and spirit of intergovernmental relations as encapsulated in Chapter 3 is unique amongst modern constitutions.²¹ Although there have been efforts in other federations to assess and report on the conduct of intergovernmental relations by way of an advisory commission on intergovernmental relations (refer for example to the USA and Nigeria), no other multitiered system provided for the philosophy and detail of intergovernmental institutions in the way that the Constitution and the IGR Act do collectively.

At the time of the drafting of the Constitution, there was general and growing realisation among the key negotiation parties that without proper functioning intergovernmental relations, the entire multitiered system would grind to a halt. The experience under the Interim Constitution proved that regardless of the classification of the Constitution as federal, unitary or quasi-federal, a sound system of cooperative government and effective intergovernmental relations were required to serve the needs of the young nation. The ANC's change in thinking in the early 1990s about intergovernmental relations was particularly influenced by the German notion of *Bundestreue* which signifies the trust, partnership and comity upon which federal-type systems and the relationship between the respective spheres of government are based. The Constitutional Court of Germany has said the following about the meaning of *Bundestreue*:

"In a federal state the federal government and the Länder have the common duty to preserve and maintain constitutional order throughout the entire union.

guaranteed by the general constitution, rather than being concentrated in a single centre". *D. J. Elazar*, *Exploring Federalism*, 1987, 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. *J. Kincaid*, *Comparative Observations*, in: *J. Kincaid/G. A. Tarr*, *Constitutional Origins, Structure and Change in Federal Countries*, 2005, 428.

²⁰ S41(3) of the Constitution provides that: "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

²¹ See the observation by *R. L. Watts*, *Intergovernmental Relations*, Department of Constitutional Development and Provincial Affairs, Pretoria, 1999, 7 that "while some federal or unitary constitutions include some provisions establishing intergovernmental structures, the South African Constitution is virtually unique in setting forth in Chapter 3 a specific set of Directive Principles for intergovernmental co-operation".

Where the federal government does not have the power in its own right to maintain constitutional order, but is dependent on the co-operation of the Länder, such Länder are obliged to act. This follows from the unwritten rule of the duty of *Bundestreue* ...²²

Key advisors of the ANC found comfort in the philosophy underlying *Bundestreue* and therefore sought to include the underlying spirit of inter-governmental relations in the Constitution as a binding code of conduct.²³ An important element of *Bundestreue* that is emphasised by the Constitution is that spheres do not engage in unnecessary litigation against each other²⁴ and this suited the ANC in particular since their negotiators were concerned that an adversarial multitiered system such as those found in the USA and Australia may not be in South Africa's best interests. The ANC also sought to emphasise the "partnership" between the respective spheres, rather than the adversarial relationship as arises from time to time in some of the older federations where litigation between levels of government is a regular occurrence.²⁵ *Watts* aptly observes as follows in regard to the federalism/unitary debate in South Africa during the 1990s:

"The issue, therefore, is not one of what classification is appropriate, but making the multi-sphere system work effectively through co-operative intergovernmental relations."²⁶

The Constitution sets the following standards for the conduct of inter-governmental relations:

- The government of South Africa comprises three spheres – national, provincial and local.
- 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 development state.

²² NJW, 1958, 1343.

²³ For a discussion of the meaning and content of *Bundestreue* refer to *B. de Villiers, Bundestreue – The Soul of an Intergovernmental Partnership*, 1995, and *B. de Villiers, Intergovernmental Relations: Bundestreue and the Duty to Cooperate from a German Perspective*, *South African Public Law* 1994, 430 et seq.

²⁴ Section 41(3) of the Constitution.

²⁵ Cooperative government seeks to "promote constructive relations" between the spheres but without ignoring differences or undermining "healthy debate". *L. P. Malan, Conservation Management and Intergovernmental Relations: The Case of South African National and Selected Provincial Parks*, 2000, 17.

²⁶ *R. L. Watts* (note 21), at 6.

- The effective cooperation and integration of the three spheres depend on an effective system of intergovernmental relations where conflicts are resolved through negotiation rather than litigation.²⁷

In its certification of the Constitution,²⁸ the Constitutional Court acknowledged that the principles of cooperative government were essential ingredients in the multitiered system of South Africa and that political disputes that should be resolved between the spheres of government should not be submitted to the Court for adjudication.²⁹ Refer for example to the decision of the Constitutional Court in *National Gambling Board v. Premier of Kwazulu-Natal* in which it refused to grant direct access to the Constitutional Court to the parties on grounds that they did not exhaust all options to resolve the dispute other than through litigation.³⁰

The philosophical framework for the conduct of intergovernmental relations as contained in the Constitution has been described as follows:

"IGR is therefore not a mere 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 represents 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."³¹

The period 1994-2005 presented a strong learning curve for the conduct of intergovernmental relations in South Africa. It was realised that there was no "watertight separation between the spheres of government".³² The implementation of the Constitution was a complex task and brought with it challenges that were completely new to South Africans. South Africa also had to deal simultaneously with the transformation of the civil service, the integration of the previous homelands into the new provinces, the rationalisation of local governments, recognition of traditional leaders, and decentralising powers to provincial and local governments. Given the history of the country, it took many by surprise that all these implementation challenges went ahead without major disruption of services. At the same time,

²⁷ Chapter 3 of the Constitution.

²⁸ As required by section 71 Interim Constitution.

²⁹ *Uthukela District Municipality v. President of the RSA*, 2002 11 BCLR 1220 (CC), 2003 1 SA 678 (CC).

³⁰ *National Gambling Board v. Premier of Kwazulu-Natal*, 2002 2 BCLR 156 (CC), 2002 2 SA 715 (CC).

³¹ *B. de Villiers/J. Sindane*, Cooperative Government – The Oil of the Engine, 2011, 9.

³² *I. M. Rautenbach/E. F. J. Malherbe*, Constitutional Law, 2004, 263.

however, the system of intergovernmental relations was “confusion and misunderstanding”.³³ The “informality and complexity of the structures and processes of intergovernmental relations that have developed since the Interim Constitution came into force, [and] the desire to reduce the confusion and set out guidelines that can shape attitudes and expectations is understandable”.³⁴

Some of the most important intergovernmental relations developments of the first phase (1994-2005) can be summarised as follows:³⁵

- Spontaneous intergovernmental relations forums came into being, but those forums were ad hoc; forums often had no clearly agreed objectives; and the regularity of meetings were inconsistent; often there was little or no follow-up, implementation or assessment of outcomes; and there was a lack of integration across the respective intergovernmental forums.

- A realisation dawned on all concerned, especially the dominant ANC, as to the importance of intergovernmental relations in a multitiered system. Unfortunately the discretion of ministers to decide if meetings were to be called, what would be the agenda, and who would attend meetings meant that intergovernmental relations functioned far below the required standard and the forums that existed often became forums of dominance by the national ministries and the Party, rather than forums of cooperation and consultation.

- Uncertainty was rife about the status of intergovernmental relations ‘decisions’ and ‘recommendations’, as well as who was responsible for follow-up of recommendations; who could be held accountable if there was a failure to implement recommendations; and uncertainty in general about the accountability of those serving in intergovernmental structures.

- The political dominance of the ANC was overwhelming within intergovernmental relations and as a consequence Party discipline often stifled open debate and eroded any chances of serious inputs from local and provincial spheres. Although there may have been debates within the ANC about policy measures, such debates generally did not occur within intergovernmental structures. The State and Party therefore became fused where decisions would be taken within the Party, but communicated via intergovernmental forums.

- There was in general a lack of all-of-government integration around policy planning, implementation and assessment. The various spheres functioned to a large extent in practical isolation or at best with lack of integration and coordina-

³³ R. Baatjies/N. Steytler, District Intergovernmental Forums: A Preliminary Assessment of Institutional Compliance with the Intergovernmental Relations Act, Local Government Project, 2006, 3.

³⁴ R. L. Watts (note 21), 10.

³⁵ B. de Villiers/J. Sindane (note 31), 37 et seq.

tion. There was little, if any, horizontal integration between the activities of various government departments.

- By 2005 there was a general consensus that South Africa needed more certainty and consistency in intergovernmental relations as far as structures, processes, representation, objectives, decision-making, accountability and reporting were concerned – and thus the *Intergovernmental Relations Framework Act* was enacted in 2005.

The second phase of the conduct of intergovernmental relations commenced in 2005 with the enactment of the IGR Act, as was mandated by the Constitution in 1996.³⁶ The delay to adopt the IGR Act can be attributed to several reasons. The implementation of the Constitution took time and there was no great urgency to bring rigidity to the system of intergovernmental relations which up to 2005 was very informal and flexible. There was also reluctance in the national executive to formalise intergovernmental relations in a manner where forums might be held accountable for their activities. The concern was also expressed that a statute may remove the flexibility and spontaneous nature of intergovernmental relations. In light of international experiences the view was held by senior government officials that the conduct of intergovernmental relations should remain within the discretion of national ministries.

The IGR Act, in essence, codified the informal arrangements that had been developing since 1994 in the field of intergovernmental relations. “Intergovernmental relations” are defined in the IGR Act as “the relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs”.³⁷

The IGR Act seeks to formalise intergovernmental forums and institutions by setting up a basic framework of institutions, but the IGR Act also leaves scope for informal meetings and spontaneous interaction between the respective spheres of government.³⁸ The IGR Act therefore seeks to strike a balance between the certainty that is brought by formal structures, and the flexibility that is brought by informal and spontaneous interaction between the respective spheres.

³⁶ Intergovernmental Relations Framework Act, Act 13 of 2005.

³⁷ Section 1 IGR Act.

³⁸ Although the use of the word “spheres” rather than “tiers” or “levels” of government is intended to reflect the absence of hierarchy between national, provincial and local governments, the use of the word has not by itself limited centralisation and erosion of provincial and local autonomy. Refer for example to *E. F. J. Malherbe, Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?*, *Journal of South African Law* (2006), 818. Section 1 IGR Act.

The IGR Act came into being principally for two reasons: Firstly, the Constitution foreshadowed in Chapter 3 on “cooperative government” that an Act to regulate intergovernmental relations would in due course be promulgated by Parliament. Secondly, there was an expectation in Parliament that certainty and predictability of intergovernmental relations would be better ensured if the essential intergovernmental institutions were established by statute without limiting spontaneous developments when and if the need arises.

Several reviews that were done on the health of intergovernmental relations in South Africa prior to 2005 were critical of the lack of certainty, reliability and predictability of intergovernmental relations; the wide discretion of individual ministers to determine whether meetings were convened; the lack of predictability in consultation and implementation in intergovernmental relations; and the lack of integrated planning and policy implementation as a result of weak intergovernmental relations processes. For example, in 1997 the following observation was made after a series of qualitative interviews with senior officials active at the national and provincial spheres in the field of intergovernmental relations:

“Amazing progress had been made in a very short time in the structuring and conduct of intergovernmental relations ... There is still an absence of a commonly accepted philosophy regarding the management of the new multi-tiered system ... A balance must be achieved between formalising intergovernmental relations and leaving sufficient space for spontaneous developments. Up to now intergovernmental relations has been characterised by spontaneous and ad hoc developments. This gave rise to criticism of lack of transparency and accountability.”³⁹

In the 10 year review done in 2003 for the Presidency entitled *Intergovernmental Relations and Service Delivery in South Africa*, Layman raised amongst others, the following two important observations in 2003 about key challenges that continued to face the intergovernmental system:⁴⁰ Firstly, improved integration of intergovernmental forums were deemed essential to ensure an all of government approach to challenges. This follows concerns that the different spheres and agencies were not working in unison and without the necessary degree of integration. Secondly, improved clarity was required about ground rules for intergovernmental relations;

³⁹ B. de Villiers, *Intergovernmental Relations in South Africa*, South African Public Law 1997, 212 et seq.

⁴⁰ T. Layman, *Intergovernmental Relations and Service Delivery in South Africa*, Report Commissioned by the Presidency, August 2003, 21 et seq.

integrated planning and integrated service delivery. These concerns arose from experiences that many intergovernmental forums were not consistent with the basic rules under which they operated. It was also apparent that due to a lack of integration in planning and service delivery, government agencies were not performing at their best ability.

The IGR Act therefore seeks to "codify" the informal institutions that existed before 2005 and to ensure certainty, predictability and accountability of those institutions in a manner that was not achieved while the institutions were operating in an informal way.

Several principles are set to promote the objectives of the IGR Act for example:⁴¹

- 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
- Avoiding duplication or jurisdictional contests

III. Key Intergovernmental Forums

The IGR Act provides for various intergovernmental forums, without thereby restricting the opportunity for additional forums to be convened as the need justifies. The most important forums established by the IGR Act are the following:

President's Coordinating Council⁴² – Meetings of the national President; provincial Premiers and a representative of local government to discuss matters of national concern. These meetings must occur at least twice per year. This is the peak intergovernmental relations body where matters that affect all spheres are discussed and national policy initiatives are launched. This Council is at the centre of the budgeting process and it is, in theory at least, the most important policy coordinating mechanism.

MINMECs⁴³ – Meetings of national and provincial line function ministries and where applicable, a representative from local government where matters of relevance to the particular line function, e. g. health, education or

⁴¹ Section 5 IGR Act.

⁴² Sections 6-8 IGR Act.

⁴³ Sections 9-15 IGR Act.

agriculture, are discussed. MINMECs are required to meet at least every quarter. Provinces also have the equivalent of MINMECs where provincial members of the executive council meet with representatives of local governments within the province. These meetings enable provincial and local governments to consider matters of common concern and also to address any issues that are delegated to them by the President's Coordinating Council. The clusters of ministries have facilitated improved vertical and horizontal integration between government departments in the respective spheres.

Clusters of Ministries – Meetings of horizontal groupings of ministries at national and provincial levels to integrate policy between departments in the same sphere, for example the following clusters have been established at the national level: 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. These clusters have proven to be essential in coordinating and integrating the activities of the national and/or provincial spheres.

Technical Forums⁴⁴ – Meetings of directors-general and/or senior officials of government departments at national and provincial spheres. These meetings are generally held in preparation of meetings of political functionaries and also for close cooperation between civil servants when it comes to implementation of joint programmes.

Premier's Forum⁴⁵ – Meetings between provincial Premiers and representatives of local governments within the province in regard to matters that affect the two spheres. The regularity of these meetings is not prescribed in the IGR Act and as a result some Forums have been more successful than others.

Interprovincial Forums⁴⁶ – Two or more provinces may establish a forum, be it permanently or *ad hoc*, to coordinate matters of mutual importance between the provinces. This may involve issues such as border communities; tourism; traditional authorities; movement of people; and access to resources.

⁴⁴ Section 30 IGR Act.

⁴⁵ Sections 16-23 IGR Act.

⁴⁶ Sections 22-23 IGR Act.

These intergovernmental forums that have been established by statute are typical to what has informally been developed in many other multitiered systems. What makes the South African experience unique and of potential relevance to emerging multitiered systems is, however, the codification of these structures as a result of a constitutional imperative. The *ad hoc* and spontaneous nature of intergovernmental relations prior to 2005 stands in contrast with the certainty and predictability that the IGR Act seeks to achieve.

International experience with intergovernmental relations suggests that institutions and forums to facilitate intergovernmental relations generally come about spontaneously and the forums often develop over a period of time as the need for interaction between the respective spheres of governments arises. This has been the case in the older federations such as the USA, Canada, Germany, Australia and India. These federations have allowed their intergovernmental institutions to develop as the need arose, particularly by way of executive interaction. There are generally no prescriptive, statutory requirements regarding the type of intergovernmental relations institutions, their composition, powers, frequency of meetings or dispute resolution mechanisms.

The fact that intergovernmental institutions are prescribed by law does not mean that intergovernmental relations are an unqualified success or that the letter and spirit of the IGR Act are complied with in post 2005 South Africa. It has been shown that even if intergovernmental meetings take place, the quality of such meetings is inevitably influenced by factors such as the briefing of attendees prior to meetings, the seniority of attendees, the clarity of objectives of a specific forum, and the impact of party political dominance in forums.⁴⁷ In a 2011 report on practical aspects about the functioning of intergovernmental relations under the IGR Act, some of the following strengths and weaknesses were identified:⁴⁸

⁴⁷ In a comment on the White Paper dealing with intergovernmental relations, *Watts* cautioned (note 21), that regardless of the statutory framework for intergovernmental relations, an important prerequisite is "the development of a capacity within each government in terms of educated personnel, financial resources, and technological facilities enabling them to engage effectively in intergovernmental interaction. To this end the provision of adequate financial resources and communications equipment to enable frequent informal exchanges of views are important. Also important will be the development of training programs for public servants."

⁴⁸ Refer to *B. de Villiers/J. Sindane* (note 31), 23 et seq. in which the experiences of senior civil servants in South Africa of the practical operation of intergovernmental relations under the IGR Act are assessed.

- The philosophy, aim and purpose of intergovernmental relations are well understood, although communication between the respective spheres principally takes place in a top-down way, with the Party (ANC) playing a dominant role.

- The codification of intergovernmental relations has contributed to greater certainty and transparency, but there remains ambivalence about the binding nature of decisions/recommendations and the inability of forums to supervise and enforce decisions.⁴⁹

- Ongoing training of politicians and bureaucrats is required to ensure that the letter and spirit of cooperative government are understood and complied with between all spheres of government and that the respective government departments comply with a report on their conduct of intergovernmental relations.

- The Party (ANC) and the state are highly integrated and this negatively impacts on the functioning of intergovernmental institutions. Officials are often reluctant to speak out against their political seniors and the independence of the civil service is thereby compromised. It is not an infrequent occurrence that a senior bureaucrat would be silenced by a junior bureaucrat because the latter is the senior within the ANC structures.⁵⁰

- The organisation of government departments around “clusters” within functional areas that belong together has been very successful. The clusters have facilitated horizontal and vertical cooperation between governments at all spheres.

- There is often inconsistency in intergovernmental meetings about the seniority of persons attending; a lack of continuity between meetings and a lack of high level expertise to give policy direction. As a result, the general quality of discussion in intergovernmental institutions is varied depending on the level of seniority of persons attending.

- Intergovernmental relations are a work-in-progress. Although the IGR Act is essential to set up the most important institutions, the practical functioning of those institutions depends on many factors such as political commitment, training, seniority of person attending meetings, and follow-up of decisions. The IGR Act is only a legal framework and it does not, by itself, make things happen. Ultimately it depends on human interaction to make intergovernmental relations perform optimally.

⁴⁹ R. Baatjies/N. Steytler (note 33), 26 comment that although much remains to be done to develop intergovernmental institutions to their full potential, at a local and district level the IGR Act has brought some certainty about the institutions that are required to be established, the composition of the institutions and their mandate.

⁵⁰ R. Baatjies/N. Steytler (note 33), 5 observe as follows: “In essence, combining ‘mayor’ and ‘municipal manager’ forums is tantamount to combining political and bureaucratic forums. This brings with it the danger that the forum will permit elected politicians to interfere, or even politicise, issues best left to municipal officials.”

IV. Potential Benefits Resulting from the Codification of Intergovernmental Relations

The following potential benefits can be identified from regulating intergovernmental relations by way of an Act of Parliament in similar vein as has been done by South Africa, without restricting thereby spontaneous developments and interaction between the respective spheres at vertical and/or horizontal levels:

1. Philosophy of Intergovernmental Relations

Intergovernmental relations in new multitiered systems are often an unknown, vague and an undefined concept. An IGR Act may assist to spell out the philosophy of intergovernmental relations, its aim and purpose and the core institutions that are responsible for the conduct of intergovernmental relations.

An IGR Act can contribute to everyone knowing what intergovernmental forums exist, the membership of forums, when the forums meet, the objectives of each forum, and what the functions of the respective forums are. Convening meetings is therefore a statutory obligation and not dependent on the discretion of a political functionary. The conduct of intergovernmental relations is thereby removed (at least to a certain extent) from exclusive political discretion of individuals.

Young multitiered systems frequently struggle to establish a spirit and psychology of cooperation, consultation and coordination between the respective spheres of government. The absence of a long tradition of decentralised government and a centralised political culture often leave all role players uncertain as to what exactly is expected of them in intergovernmental relations. Many senior functionaries in South Africa have a limited understanding of what the notions of intergovernmental relations and "cooperative government" are about in practice; what purpose it serves; and why it is so essential for the proper functioning of a multitiered government. The structuring of intergovernmental relations by way of the IGR Act sets a clear framework and, if read with Chapter 3 of the Constitution, lays the basis for the spirit of cooperation between all spheres.

A key message to leaders at all spheres in young federations is that intergovernmental relations are not the sole domain of a specific ministry, department, house of parliament or an office. Effective intergovernmental relations require an all of government approach with senior leaders in political

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and civil service positions involved in coordination, cooperation and consultation. Although a specific department may be responsible for the general training and assessment of intergovernmental relations (for example the Department of Cooperative Government in South Africa), the actual conduct and “doing” of intergovernmental relations requires the involvement of all departments and especially senior civil servants.

The IGR Act further affirms that intergovernmental relations are a constant feature of multitiered systems and should not only be relied on in times of crisis. Ultimately, however, it is the “human factor” that determines if the fine legal principles contained in the Constitution and the IGR Act are turned into practical reality.

2. Consistent Application of Intergovernmental Relations

The type of forums, the purpose of the forums and the regularity of their meetings are set out in an IGR Act. Instead of a minister calling an intergovernmental meeting, often as a result of crisis management or *ad hoc* arrangements, meetings are part of the “normal” business of government and take place consistently and regularly. The entire civil service is therefore (at least in theory) geared to and aware of the process of intergovernmental relations.

All main intergovernmental meetings are scheduled and coordinated within the all-of-government annual calendar of meetings. South Africa uses the all-of-government calendar whereby all important intergovernmental meetings are coordinated with the annual planning and budget cycle. It is therefore clear to all role players and the public when the main intergovernmental meetings occur; where meetings fit into the general government planning and budgetary cycle; and how to monitor the outcome of meetings.

Although intergovernmental forums are not by themselves legislative bodies, the functionaries within the institutions can be held accountable in their respective legislatures and even the media about the status and functioning of intergovernmental relations in a specific functional area. Departments must report to Parliament on the conduct of intergovernmental relations and the Department of Cooperative Government in South Africa does a regular assessment of the conduct of intergovernmental relations and submits a report to Parliament on strong and weak points of the intergovernmental system.

An IGR Act provides a basis for record keeping and reporting of recommendations made in the course of intergovernmental processes. An IGR Act is not a panacea that intergovernmental relationships will always be effective, but it provides at least for a secure legal framework from where political accountability can follow. Proper notices and agendas for meetings are circulated; staff can obtain instructions prior to a meeting on the position of their sphere or department on a specific issue; minutes of meetings and plans of action can be formulated at properly constituted meetings; and feed-back and reporting on progress can be given at the next meeting. The entire process and atmosphere are therefore akin to corporate decision-making rather than being entirely reliant on the discretion of a political functionary.

3. Joint Planning and Implementation

Consistent intergovernmental interaction by way of an IGR Act facilitates the notion of "cooperative government" in practice, and creates an environment for provincial and local governments to be actively involved with the national government in joint planning, policy formulation, assessment and implementation of legislation. Intergovernmental meetings therefore become much more than a mere informal interaction where provincial ministries and local governments are "instructed" or "informed" by the national ministry as to what is expected of them. It is rather an opportunity where all spheres can cooperate as partners in accordance to the letter and spirit of cooperative government.

Regular and consistent intergovernmental meetings create an atmosphere where the success of policies can be assessed, potential problems can be identified in time and resolved before turning into a crisis. A preventative approach is preferred to a crisis management style whereby in the case of the latter, meetings are mainly called to deal with a crisis, a collapse of a service, or some public upheaval. It is especially within technical forums where senior civil servants can raise problems being experienced or challenges faced with the implementation of policies. This may lead to variations of policies or other corrective action.

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4. Team Building and Training

Regular and consistent intergovernmental meetings between senior functionaries of all departments at all spheres create a spirit and atmosphere of team work, partnership and cooperation. Key decision-makers, advisors and technical experts get to know each other, a collegial atmosphere develops and exchanges of information and spontaneous contact are facilitated. It is far easier for members of a team to plan and resolve issues, than for strangers or officials who only see each other on an irregular basis, to cooperate. The formalisation of intergovernmental relations therefore creates an opportunity for increased and regular informal and spontaneous contact between key role players, the exchange of information and convening additional meetings if necessary.

An IGR Act facilitates the training of new politicians and staff in the basic philosophy and structures of intergovernmental relations, the processes and policies, conflict resolution mechanisms and the role of each individual in the overall mosaic of intergovernmental relations. It is a very useful tool for government departments to refer to in their induction programs for new civil servants and for parliaments to train new members in the conduct of cooperative government.⁵¹ It also assists members of the public and students to understand how the planning and decision-making processes of government work. The IGR Act has contributed to intergovernmental relations in South Africa becoming part of the general political and administrative vocabulary as well as the conduct of government business.

5. Institution-Building in Young Democracies

A major challenge for new democracies is to establish and secure institutions that can withstand the challenges of time and outlast a specific government or political party. Formalising intergovernmental relations by way of an IGR Act, even in times when there is a dominant elected party such as in South Africa, creates an opportunity to establish and solidify institutions and making them part of the political culture and decision-making processes. If or when more challenging political or economic times arrive, the intergovernmental institutions and a culture of cooperation will be in place to address new challenges. The IGR Act can therefore contribute to the

⁵¹ Refer for example to the intergovernmental “tool kit” that is made available by the Department of Cooperative Government. <<http://www.dplg.gov.za/subwebsites/igr/publications.html>>.

widening and deepening of democratic institutions and processes in young democracies.

South Africa relies heavily in the conduct of intergovernmental on *intra*-party relations due to the dominance of a single party at all spheres of government. This is similar to the experiences of Ethiopia, India and Mexico – the latter two had for many years after the enactment of their constitutions single-party dominant systems. This is for understandable reasons. Even in highly developed democracies intergovernmental relations often work more smoothly between governments that are governed by the same political party. Members of the same party are often more comfortable with each other and can either make decisions without great formality or wait for the senior leadership of the party to make a decision. The down side of over-reliance on *intra*-party intergovernmental relations is, however, that in the long term democratic institutions are weakened and are even undermined in the government process. Structuring intergovernmental relations through an Act reduces the reliance on crisis-based decisions and creates an opportunity for the civil servants to be more active and objective in the advice they give to political functionaries and to deal more effectively with provinces and/or local governments that in time may be governed by other political parties.

A well functioning and secure system of intergovernmental relations brings stability to governmental processes when there are changes in political parties, ministers or senior staff. The risk of an “individualisation” of intergovernmental relations is therefore countered with an “institutionalisation” of intergovernmental relations whereby institutions and processes continue to function regardless of changes in key leadership. This in turn contributes to the deepening of a democratic culture.

6. Informal Intergovernmental Relations Can Continue

An IGR Act does not preclude or prevent the conduct of intergovernmental relations on an informal level or the establishment of informal or formal forums for a specific purpose. In fact, formalising intergovernmental relations may lead to more informal interaction since leaders know each other better and feel confident to call a colleague to discuss problems. The experiences of South Africa demonstrate how, regardless of the IGR Act, informal meetings for the conduct of intergovernmental relations continue to be convened.

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V. Conclusion

In this article it has been shown that, based on the experiences of South Africa in the conduct of intergovernmental relations, a strong case can be made for young multitiered systems to enact legislation that deals with intergovernmental relations. The legislation can set out the basic philosophy underlying intergovernmental relations as well as the key forums and institutions where intergovernmental relations occur. The legislation can also clarify that informal and *ad hoc* interaction between governments may take place in addition to the statutory forums. The certainty, predictability and institutional development that are associated with an IGR Act seem to far outweigh any risks associated therewith.