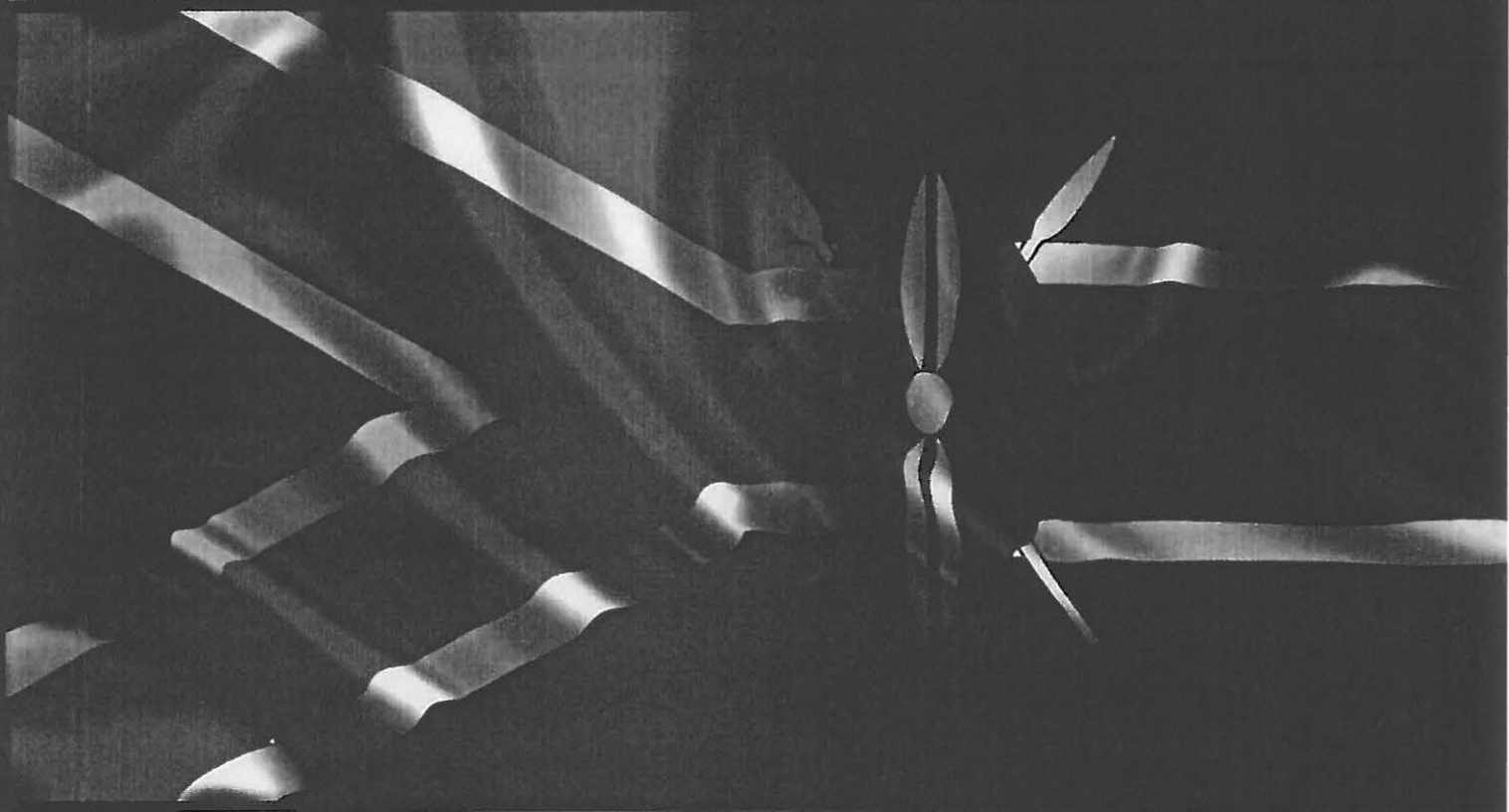


 JUTA

KENYAN-SOUTH AFRICAN DIALOGUE ON DEVOLUTION



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(EDITORS)

National Cohesion and Intergovernmental Relations in South Africa

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1	Introduction	302
2	Historical context	303
3	Inclusion and cohesion through the national legislature and executive	304
	3.1 National Parliament	304
	3.1.1 National Assembly	304
	3.1.2 National Council of Provinces	305
	3.2 National executive: cabinet and civil service	306
4	Coherent government: legislative and executive cooperation	308
	4.1 Legislative intergovernmental relations	309
	4.2 Executive intergovernmental relations	311
	4.3 Intergovernmental dispute settlement	314
5	Social solidarity: preventing provincial and local state failure	316
	5.1 Duty of support	317
	5.2 Interventions in provinces	317
	5.3 Interventions in municipalities	319
6	Conclusion	320

1 INTRODUCTION

The creation of provinces in 1994 gave effect to the grand compromise of the 1993 negotiations, but also raised fears about the deleterious consequences they could hold for national cohesion. A first concern was that provinces would work against national political cohesion, fanning the fires of separatism and entrenching ethnic enclaves. In 1993 an apparent case in point presented itself when the KwaZulu Legislature, dominated by Chief Mangosuthu Buthelezi's Inkatha Freedom Party (IFP), adopted a draft constitution for the then non-existent state of KwaZulu-Natal which would operate in a confederal system for South Africa (Ellmann 1993). Similarly, the fear was that a Western Cape governed by the National Party (NP) would perpetuate the apartheid legacy. Both the IFP and NP, however, deemed themselves national parties, and they, too, wanted to be part of the national scene where resources and power were mainly located.

Adding to these fears was a second concern that, given that key social functions were to be shared by the national government and provinces, devolution would lead to a lack of governance cohesion and result in poor service delivery to citizens. Moreover, considering how new most of the provinces (and later municipalities) were, a third concern was that devolution could impair social cohesion if subnational governments failed the inhabitants in their jurisdiction.

These negative consequences of devolution were addressed through various constitutional measures. At national level, the nation, divided into provinces, was brought together politically in the national legislature, though only marginally so in the national executive. Intergovernmental institutions and processes, including provinces and local government, sought to engage with the challenges of incoherent government, while national supervisory powers over provinces (and provinces over municipalities) aimed to guard against and correct state failure at subnational level.

Because all three dimensions of national cohesion concern the exercise of state power, political contestation and competition inevitably came to the fore, testing not only the adequacy of constitutional design but also, and more importantly, the political culture of democracy and tolerance in which intergovernmental relations should be embedded. South Africa has been grappling with these issues over the past two decades and may provide some instructive lessons for Kenya.

2 HISTORICAL CONTEXT

As discussed in Chapter 2, the main liberation movement in South Africa, the African National Congress (ANC), advocated a strong centralised system of government in order to effect the radical transformation of the apartheid state. The white minority government, on the other hand, sought to limit the prospect of the ANC controlling all levers of power and thus propagated a federal solution that would weaken the centre. Aiming to build a nation from the fractured past, the ANC vehemently opposed federalism because it feared this would perpetuate the divide-and-rule policy of apartheid's ethnic-based Bantustans. The compromise that was eventually reached was not federalism but something more attenuated and best referred to as 'devolution', in the way the term is used in the Kenyan Constitution.

The ANC's acceptance, albeit reluctant, of provinces was made palatable by adopting the German model of 'cooperative' government rather than the American one of 'competitive federalism' (Murray and Simeon 2009). In Powell's words (see Chapter 2), this saw the establishment of a 'fudged federalism', in terms of which provinces had hardly any significant exclusive powers, seeing as all functional areas of service delivery were to be exercised concurrently with the national government. The elevation of local government to a sphere of government by the 1996 Constitution further reduced the powers of provinces. Moreover, although no national intervention powers

were provided in the interim Constitution, they became a prominent feature of the 1996 Constitution.

3 INCLUSION AND COHESION THROUGH THE NATIONAL LEGISLATURE AND EXECUTIVE

The major breakthrough in the 1993 negotiations was agreement on the principle of a government of national unity, one which would thus avoid a winner-takes-all outcome. Specifically in the interests of nation-building, minority parties gaining above 20 and five per cent of the seats in the National Assembly were entitled to designate a deputy president and a member of the national cabinet, respectively. This was a temporary measure for the first Parliament, but had only a partial life because in 1996 the NP vacated both the deputy presidency and the cabinet posts; the IFP remained in the cabinet, and Chief Mangosuthu Buthelezi was appointed on occasions even as acting president. The ANC continued the practice of an inclusive (though very diluted) cabinet from the second Parliament onwards, with the president inviting leaders of mostly small minority parties to serve as ministers.

The principle of a government of national unity had no direct provincial dimension, but, as above, was linked instead to political-party representation in the national executive. In contrast, the composition of the national legislature has, theoretically, a strong provincial basis.

3.1 National Parliament

The national Parliament with its two chambers — the directly elected National Assembly (NA) and the indirectly elected National Council of Provinces (NCOP) — functions within the usual limitations of the Westminster parliamentary system. Unlike Kenya's complete separation between the legislature and the executive, the executive is drawn from the NA which, in turn, dominates the NCOP.

3.1.1 *National Assembly*

With the specific purpose of securing as inclusive an NA as possible, proportional representation based on party lists was the overarching principle of the electoral system from the start (see De Ville 1996). With only a natural threshold, any party receiving 0.25 per cent of the national vote (or even less) is entitled to one of the 400 seats in the NA. In practice this has meant that provincially-based parties, such as the United Christian Democratic Party (North West) and Minority Front (KwaZulu-Natal), were represented (Petlane 2009). The number of minority (and micro-) parties has doubled from six in 1994 to 12 in 2014.

The electoral system was also to give further content to the devolved nature of the South African state by providing for provincial party lists; half of the 400 MPs are elected on a national political party list, while the remaining 200 are elected on provincial party lists (proportionally split between the

nine provinces), with the proviso that the overall allocation of seats ensures overall proportional representation.

Theoretically, then, there is strong provincial representation in the NA. However, this arrangement has had hardly any impact on the functioning of the NA. No noticeable provincial voices have been heard, which is not surprising given that the ANC has captured between 62 and 69 per cent of the vote (62.1 per cent in 2014) in the past five elections, in addition to exercising strong party hierarchy and discipline. Even the official opposition party, the Democratic Alliance (DA), with its strong base in the Western Cape, speaks and functions as a national party. The only value of the two party lists is that political parties are compelled to ensure an equitable spread of representatives across all provinces.

3.1.2 National Council of Provinces

The NCOP is designed to perform a strong integrating function, namely bringing provinces into important national decisions to represent provincial interests. With close links to the provincial legislatures, delegates to the NCOP also play an important role in informing provincial legislatures about national interests (Murray and Simeon 1999).

The NCOP is an unhappy concoction of parts hailing from the German Bundestag, US Senate and British House of Lords. It comprises 90 members, consisting in turn of ten-member delegations from each province (a *Bundesrat* concept, with the equal-representation element borrowed from the US Senate). The delegation is split into two components. Six members are elected by the provincial legislature to represent it in the NCOP for the duration of the national Parliament; they are 'permanent' delegates but may be recalled and removed at any time by the provincial legislature. The other four 'special' delegates are members of the provincial legislature, with the provincial premier the leader of the delegation (*à la* the *Bundesrat*). There are also ten non-voting occasional members from organised local government.

Although the NCOP has only a partial veto with regard to legislation affecting provinces (section 76 bills, discussed below), it has a stronger role in deciding major national issues which have no direct bearing on provinces. First, the NCOP must approve by a majority of six provinces any amendment dealing with the foundational values of the Constitution (s 1) or the Bill of Rights (s 74). Secondly, reminiscent of the US Senate, it co-determines with the National Assembly the ratification of all national treaties (see Murray and Nakhjaveni 2009), as well as a state of national defence. Thirdly, the NCOP elects four of the 23 members of the Judicial Service Commission (JSC) which selects judges. Fourthly, its weakest form of participation is the approval of legislation that does not affect provinces (so-called section 75 bills), but with only a delaying power similar to that of the House of Lords. In making the latter decision, the NCOP does not operate as nine provincial delegations; instead, each member has an individual vote.

Thus far the NCOP has shown very little interest in the above functions. First, when deciding on the co-ratification of treaties — its most powerful position — there has hardly been any debate. This could be attributed to the NCOP's relatively weak position in a parliamentary system under the strong hand of the executive and hence the ruling party. Delegates are also politically relatively weak; in the political rankings they are elected *after* the National Assembly and the Provincial Legislatures have been constituted, and many of delegates are drawn from the list of unsuccessful candidates for those two legislatures. It is not a prized position either, because delegates, unlike MPs and MPLs, may be removed at any time by a provincial legislature, giving them a sense of insecurity. Once elected, the 54 permanent delegates (the 36 special delegates mainly attend big occasions) face an uphill battle against the numerically superior NA. Moreover, as the ANC controls eight of the nine provinces and exercises strong party discipline, no independent provincial voice has yet sounded from the NCOP.

3.2 National executive: cabinet and civil service

Unlike the case in Kenya, there is no constitutional measure to ensure that the president attracts broad support across the provinces. Following the parliamentary system, the party with the majority in the NA elects, from among its members, the president, who then resigns from Parliament. However, this does not establish an executive president independent of the NA; the latter can remove him or her by a vote of no confidence. Whether the president has broad provincial support depends on the internal functioning of his or her party. In the case of the ANC, it has become very much province-based: not only has the provincial state structure of government been replicated in ANC party structures, but its functioning has also been 'provincialised' (Steytler 2004; Steytler 2014).

Apart from the first five years of a constitutionally mandated government of national unity, the president had an open hand regarding cabinet appointments, but since 1999 the ANC has included minority parties in cabinet. This was not always to ensure provincial representation, although it happened to be the case in respect of the IFP with its heartland in rural KwaZulu-Natal. After the initial government of national unity, President Mbeki included members of the IFP in his cabinet in 1999, but the IFP declined the offer in 2004. However, the ascendancy of Jacob Zuma, who is seen as an even greater Zulu traditionalist than Buthelezi, led not only to a decline of IFP support in KwaZulu-Natal from 36.8 per cent in 2004 to 22.4 per cent in 2009, but to a situation in which no cabinet position was offered to the party (Francis 2009).

The inclusive cabinet practice has not included the main opposition party, the Democratic Alliance. It should be noted, though, that the ANC government has consistently appointed DA members to ambassadorships, the most notable instance being when Zuma sent the former leader of the DA, Tony Leon, to Argentina.

The ANC has also sought to bring in vocal minority voices to the centre. Mbeki made the leader of an Africanist and socialist party, AZAPO, a minister in 2004, despite the fact that this party garnered only 0.25 per cent of the vote at the polls. Zuma went in the other political direction by appointing the leader of the Afrikaner right-wing party, Freedom Front Plus, as a deputy minister of agriculture; although the party attracted only 0.88 per cent of the vote, it represents an important farming lobby (Heyn 2009).

This analysis has been concerned so far with the inclusion of external parties that may or may not have a provincial base. The more difficult question, of course, is how the ANC deals with representivity within its own ranks both with regard to race and ethnicity. Non-racialism and non-ethnicity are core principles of the ANC, yet questions of representivity always bubble under the surface. Race, with reference to whites, has no provincial dimension, but Indian and coloured representation may have a provincial connection to KwaZulu-Natal and the Western Cape, respectively. The ethnic link is much stronger, as seven of the nine provinces have a dominant language.

Although never openly aired, one of the accusations made against Mbeki in his leadership battle with Zuma in 2007 was that his government was the 'Xhosa Nostra'. Giving credence to this claim was the fact that nearly half of his cabinet were Xhosa-speakers whose linguistic home is the Eastern Cape (Van Onselen 2013). By contrast, fears were expressed that under Zuma there would be a 'Zulufication' of the executive. As far as the 2009 cabinet was concerned, Zulu-speakers accounted for no more than their national demographic figure of 22.4 per cent (Van Onselen 2009). However, Mashele (2012) points out that the majority of cabinet members as well as most heads of security agencies came from KwaZulu-Natal (KZN). He also asks: 'As most important international events are hosted in KZN, how would our Zulu compatriots defend themselves against the accusation that they are not different from the Kalenjins of Kenya?'

Given South Africa's history of racist rules and sexist practices, the focus in the Constitution is primarily on racial and gender representivity in public office. For instance, in the case of judicial appointment by the JSC, the Constitution states that 'the need for the judiciary to reflect broadly the race and gender composition of South Africa must be considered' (s 174(2)). A similar requirement applies to appointments to the various commissions supporting constitutional democracy — that is, the Human Rights Commission, the Commission on Gender Equality, and the Electoral Commission (s 193(2)). The inclusive term 'broad representation' is used only with reference to the public service, but this, too, is linked to 'the need to redress the imbalances of the past to achieve broad representation' (s 195(1)(i)). The reduction in the number of whites in the public service over the past two decades has been dramatic but their representation is still higher than their

demographic figure of ten per cent. Much less 'transformed' has been the judiciary, where only 60 per cent of judges are black — a vast improvement nevertheless from 1993 when there was only one judge of colour.

A provincial dimension, however, has crept in with regard to the racial category of coloureds in the Western Cape. The Department of Correctional Service's policy is that its personnel demographics in each province must be similar to the national demographics. Consequently, although coloureds comprise 51 per cent of the Western Cape's population, the Department will employ coloureds in that province only up to 8 per cent of its workforce and ranks. Affected personnel successfully appealed to the Labour Court that the policy was discriminatory on the basis of race by not taking the provincial dimension into account when determining quotas. The final ruling has yet to be given by the Constitutional Court.

While race is ever-present as a factor, the focus may well shift to linguistic or ethnic concerns, particularly if the perception emerges during Zuma's two terms of the 'Zulufication' of top positions in the civil service.

4 COHERENT GOVERNMENT: LEGISLATIVE AND EXECUTIVE COOPERATION

The new system of devolved government was premised on the notion that 'cooperative government' would ensure coherent governance. The chapters in the Constitution dealing with national, provincial and local government are thus prefaced by a short chapter on cooperative government that establishes two broad principles.

The first is the recognition of the distinctiveness of each sphere of government, which requires that the powers, functions, and institutional integrity of each sphere be respected by the others. The second principle emphasises that the end-goal of all three spheres of government is to 'provide effective, transparent, accountable and coherent government for the Republic as a whole' (s 41(1)(c)). To this end, all spheres of government 'must 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 action and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another (s 41(1)(g)).

That coordination and cooperation are necessary stems from a complex set of rules, set out in Chapter 8, as to how powers and functions are allocated to the three spheres. National government exercises concurrent powers with the provinces over key social functions (Schedule 4), and both the national and provincial governments must concurrently regulate and supervise local

government (Schedules 4B and 5B). In addition, the cut-off points between the powers of each sphere are at best murky (Steytler and Fessha 2007). For coherent governance, a high level of cooperation is thus required at both legislative and executive levels.

As the system of government includes local government, the latter must also form part of the national system of intergovernmental relations. The constitutional assumption is that the nine provinces would represent themselves in their relations with the national government. Such an assumption was not feasible with regard to local government, which at the time of the drafting of the 1996 Constitution comprised 824 local authorities. Uniquely, from a comparative perspective (Steytler 2009), the Constitution provided for organised local government to represent the voice of all municipalities; national legislation must provide for the recognition of national and provincial organisations representing municipalities, and determine how they consult with the national and provincial governments (s 163). In terms of the resultant Organised Local Government Act of 1997, the South African Local Government Association (SALGA) has been recognised as the organisation representing municipalities nationally. Its leadership has been drawn mainly from the mayors of the larger, mostly metropolitan, municipalities.

In the Constitution it is envisaged that intergovernmental relations and cooperative government are effected by the two branches of government — the legislatures and the executives. In the legislative branch the NCOP is envisaged as playing the paramount role of ensuring cooperation and coordination with regard to the national legislative framework; in reality it is eclipsed by the executive and the political environment in which it operates.

4.1 Legislative intergovernmental relations

One of the NCOP's primary functions is to bring a provincial dimension to the national legislative process. Section 42(4) expresses this as follows:

The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

In the legislative process, the NCOP must approve any bill that 'affects' provinces (a so-called section 76 bill), a requirement that the Constitutional Court has interpreted generously (*Tongoane and Others v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC)). Where the NCOP rejects a bill which the NA has approved, the bill first goes to a mediation committee, comprising equal members from each house, which seeks to find a compromise. Should that fail, the NA may override the NCOP with a two-thirds vote. For a vote on a section 76 bill, a provincial delegation, voting *en bloc*, must obtain a mandate from its provincial legislature, which follows

after a debate in the latter. A bill is passed with the support of five of the nine delegations. In the case of a constitutional amendment, six of the nine must be in support.

During the past 17 years, the NCOP has played a limited role in the national legislative process and has done little to stem the tide of centralising provincial functions such as social welfare grants and further education colleges (Powell 2015; see also Parliament 2008). A study of the third Parliament (2004 to 2009) revealed that, of the 230 bills introduced, only 39 (17 per cent) were section 76 bills (Mafilika 2013). Merely one bill was introduced in the NCOP, which meant that in all other cases the NCOP debated bills only after the NA had the first bite at the cherry. Furthermore, most of the public input occurred during the NA's public hearings, including those of organised local government. The NA effected changes in 81 per cent of the bills. Although the NCOP did not trail far behind, with suggested changes to 70 per cent of the bills, such amendments were mostly technical or editorial in nature and acceptable to the NA, with no referrals having been made to a mediation committee. However, in 2014 the NCOP showed some resistance to a bill passed by the NA; the Traditional Courts Bill was allowed to lapse because key ANC-controlled provincial legislatures — Gauteng, Eastern Cape, Limpopo and KwaZulu-Natal — rejected the bill (see Hlongwane 2014).

As mentioned earlier, the NCOP's performance should be seen in the context of the dominance of the ruling party over the entire system of multilevel government (Murray and Simeon 2009). First, as already noted, the NCOP has been likened to representing the 'third team' of political parties, after the election of MPs and MPLs to the NA and provincial legislatures, respectively. They are unlikely to muster much opposition against the voice of the first team in the NA. Secondly, provincial legislatures have been functioning poorly. They have passed limited legislation (no more than five laws per year) and, being subject to a strong party hierarchy, have not formulated mandates for their delegates that would directly contradict national legislation. Thirdly, within the parliamentary context where the NCOP's 54 permanent members have limited access to research capacity, they are no match for the 400 MPs in the NA, let alone for party discipline.

Intergovernmental institutions and processes take a long time to mature. The second house in the Indian Parliament was moribund for years and only came to life when the Indian Congress began to lose power in the country's states. Despite its design deficiencies, then, the NCOP may still play an independent role in the future, but that may be a long way off.

Since 1994, opposition parties have held no more than two provinces (1994: two; 1999: one;¹ 2004: none; 2009: one; 2014: one). For the 2014

¹ The Western Cape was initially won by a coalition of the Democratic Party and the National Party, which then formed the Democratic Alliance. When some members of the National Party

election the DA had high hopes of capturing an additional province or two — the Northern Cape and perhaps Gauteng — but these came to naught. However, it is only after capturing four provinces that opposition parties can play a meaningful role in the NCOP by blocking certain constitutional amendments. Unlike the case in the NA, where only 34 per cent of the vote is needed to block constitutional amendments, five provincial block votes (or 44 per cent) are needed in the NCOP. Even if in 2019 the DA captures the Northern Cape (the least populous province) and Gauteng (the most populous province, with ten times the population of the Northern Cape), it will not change the balance of power in the NCOP.

Such a swing in party support will have a much greater impact on the NA as it will translate into at least 34 per cent of opposition seats in that chamber, providing the opposition with a blocking vote in regard to constitutional amendments. Because of the equality of provinces, and voting in blocks, political changes through the NCOP will be much slower.

4.2 Executive intergovernmental relations

Given the dominant role that the executive plays in the parliamentary system, intergovernmental relations (IGR) between executives of the different governments are crucially important to governance. In South Africa these relations are managed through both formal and informal institutions and processes. The Constitution has sought to formalise and institutionalise intergovernmental relations: section 41(2)(a) requires that an Act of Parliament must 'establish or provide for structures and institutions to promote and facilitate intergovernmental relations'. Even before the 1996 Constitution came into operation in February 1997, informal intergovernmental relations fora had sprung up when provinces were established in 1994. The national ministers and the nine members of the provincial executives (MECs) dealing with the same concurrent functional areas (health, transport, local government and so on) established informal fora, called MinMECs, to serve as vehicles for consultation and cooperation. Only the IGR fora for education and finance were given statutory form.

In terms of the Intergovernmental Fiscal Relations Act of 1997 a Budget Council and Budget Forum were established, with the former comprising the minister of finance and the nine MECs for finance, while the Budget Forum included organised local government as well. An all-inclusive Intergovernmental Relations Council, presided over by the president, had a short shelf-life as it proved to be unwieldy and unproductive (DPLG 1999). The policy adopted by the national department responsible for intergovernmental relations (at the time called the Department of Provincial and Local

broke away to join the ANC (and the electoral law was amended in 2001 to accommodate this), the ANC also took control of the Western Cape. The DA won the 2009 election in the Western Cape and has since held power in that province.

Government) was that the informal system should mature before effect was given to the constitutional mandate of national legislation. It was only when the Constitutional Court commented on the absence of similarly mandated legislation relating to the settlement of intergovernmental disputes (s 41(2)(b); *National Gambling Board v Premier, KwaZulu-Natal* 2002 (2) SA 715 (CC)) that the process began of drafting such an Act, which culminated in the Intergovernmental Relations Framework Act of 2005 (IGRFA).

The IGRFA established a system of interconnected IGR fora as well as principles and mechanisms for dispute settlement. At the top of the system is the President's Coordinating Council (PCC), comprising the president, five national ministers (the deputy president, the minister in the Presidency, the minister responsible for provincial and local government, the minister of finance, and the minister for the public service), the nine provincial premiers and the chairperson of SALGA. In the various sectors of concurrent jurisdiction, MinMECs continue to function but have to include SALGA if the sector has an impact on local government. Each of these fora is to be supported by a technical forum comprising officials from the participating governments.

Comparative federal practice and theory suggest that an IGR forum is the meeting place of equals; each government has its allocated powers and functions which it exercises with a measure of autonomy, and a forum thus facilitates consultation between and coordination among such autonomous governments (Watts 2001). The language of IGRFA suggests, however, a clear top-down hierarchy, resulting in what has been termed 'coercive' intergovernmental relations (Steytler 2011).

The objects of the Act are given as: (a) coherent government; (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) realisation of national priorities (s 4). Their primary purpose appears to be the pursuit of national priorities, which would determine which services are to be effectively provided. Such services should be provided in a coherent manner, with their effective implementation being monitored. The national IGR fora are then envisaged as vehicles for conveying 'national priorities', the effective implementation of which they then monitor. The PCC is thus couched as a consultative forum 'for the President' (s 6, emphasis added), not for both the president and premiers operating as equals. The president may also use the council 'to discuss performance in the provision of services in order to detect failures and to initiate preventive and corrective action when necessary' (s 7(c)). To this end, the president may use the forum to consider reports 'dealing with the performance of provinces and municipalities' (s 7(d)(ii)).

A MinMEC performs a similar function: its role is described as 'a consultative forum for the Cabinet member responsible for the functional

area' (s 11, emphasis added). The linkages between the PCC and MinMECs also give effect to the top-down hierarchy. The PCC may refer matters to MinMECs, who must then report back to the PCC. The possibility of communication upwards is more complex. A cabinet minister may refer a matter to the PCC only in consultation with the president, that is, with the agreement of the president (s 12(2)).

In sharp contrast to national-provincial hierarchy is the more egalitarian approach to provincial-local relations. The role of the Premier's Intergovernmental Forum is to be 'a consultative forum for the Premier of a province *and* local government in the province' (s 18, emphasis added). The overall conception is that the national IGR fora are important governing and monitoring rather than consultative fora and that they are, by implication, not sites where equals meet. Although provinces cannot be seen as equal to the national government in powers and resources, they have a measure of autonomy, and it is with respect to that autonomy that they must be treated as equals. In a system of 'coercive' intergovernmental relations, IGR fora become instruments of centralised control and, in the name of 'coordination', vehicles for national command. Although in theory the IGRFA expressly provides that IGR fora are not executive decision-making bodies and meant only for consultation and discussion (s 32), practice tells a different story.

Alongside the formal institutions and process are the informal practices of engagement. The most important are the twice-yearly extended cabinet meetings: in the first of these, held in January, the national government's comprehensive programme of action for the year is adopted, and in the second, held in July, progress towards it is reviewed. The full national cabinet is joined by the nine premiers and the chairperson of SALGA. While the latter may serve to provide a provincial and local perspective, they are also drawn into the centre by having to submit to cabinet quarterly reports on the programme of action (Powell 2015).

The practice of intergovernmental relations is informed by and embedded in the broader political context of one-party dominance. Working within a strong hierarchical party structure, ANC premiers are not likely to articulate contrary provincial positions, given, after all, that they have been appointed to their positions by the president. Under his presidency of the ANC, Mbeki selected the premiers, which often did not include the leader of the provincial party structure. After the 2007 ANC electoral conference at which Mbeki lost to Zuma, the centralised appointment process was softened slightly: the provincial structure could nominate three names to the national party bosses in order of preference. After the 2009 provincial elections, because all eight of the provincial chairpersons who topped the nomination lists were male, four of them made way for centrally appointed female premiers. A strong line of accountability thus runs from the premier to the ANC president (Murray and Simeon 2010; Steytler 2014).

The resignation of the premier of Limpopo, Cassal Mathale, in July 2013 is illustrative. Zuma, acting in his capacity as president of the ANC, recalled the luckless premier from his holiday in Italy to give him his marching orders for allegedly not supporting his (Zuma's) candidature at the 2012 ANC electoral national conference. After the 2014 election seven of the eight provincial chairpersons, all men, were appointed as premiers, the sole exception being in the Northern Cape where a woman was nominated as premier (probably because the provincial chairperson was facing serious fraud charges). The same top-down pattern prevails in the MinMECs. Meetings have been described as information sessions given by national departments to provinces, and the provincial MECs in the MinMECs are sometimes jokingly referred to as the national minister's deputy ministers.

Where serious differences of opinion emerge between ANC premiers and the national government, they are seldom aired in the formal space of an IGR forum but dealt with through the party's hierarchical structures. Although it is reported that discussions in the PCC are open and frank and that consensus is sought (Powell 2015), it is likely that only the opposition-held province of the Western Cape would use IGR fora to articulate contentious issues. Whatever happens at a political level, the real coordination work is done by officials in the various technical IGR structures and outside them (Powell 2015).

4.3 Intergovernmental dispute settlement

A further component of the IGRFA is the formalisation and structuring of methods to settle intergovernmental disputes. The Constitution requires organs of state to avoid litigation and empowers courts to refer disputes back to parties if they have not made 'every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose' (s 41(3); see further Steytler 2001). Where specific sectoral legislation or service agreements do not provide for such mechanisms and procedures, the IGRFA requires the formal declaration of a dispute, after which the parties must agree on an alternative dispute-resolution mechanism. If the parties fail to reach an agreement, the national minister may provide assistance.

The Constitutional Court has stated that 'the obligation to settle disputes is an important aspect of co-operative government which lies at the heart of Chapter 3 of the Constitution' (*National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 44). This flows from the basic premise of the system of multilevel government, namely that it does not embody 'competitive federalism' but 'co-operative government' (*In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 287). This, in turn, entails that where possible disputes should 'be resolved at a political level rather than through adversarial litigation' (*National Gambling Board*, at para 33).

The Constitutional Court has taken compliance with this duty seriously, holding that a court would 'rarely decide an intergovernmental dispute unless

the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level' (*Uthukela District Municipality v President of the Republic of South Africa* 2003 (1) SA 678 (CC) at para 14). On a number of occasions the courts have refused to entertain a matter because the parties had not complied with this obligation.

The duty to avoid litigation, however, is no bar to approaching the courts. Due to the strong party hierarchy, litigation between ANC-controlled governments has been very rare. The only example is when the ANC-controlled Johannesburg Metropolitan Council challenged the ANC-governed Gauteng Provincial Government over the proper definition of 'municipal planning' and won (*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC)).

The disputes that arise publicly and frequently end up in court are tussles between different political parties. During the first Parliament (1994–99) the KwaZulu-Natal government under the IFP, and the Western Cape under the National Party, challenged the national government on a number of issues, although not always successfully. The same trend continued during the second Parliament, but then only in the case of KwaZulu-Natal, still under IFP control.

When the DA captured the City of Cape Town in 2006 and the Western Cape in 2009, what ensued was political contestation rather than the 'fostering of friendly relations' and 'avoidance of litigation'. When the DA won the City of Cape Town under the leadership of Helen Zille, the DA's national leader, the ANC sought to clip her wings. The Western Cape provincial government, which had introduced a strong executive mayor system, attempted to change it unilaterally into an executive committee system that not only gave the ANC a proportional number of seats on the executive committee but also significantly reduced the mayor's power. It was only through an intervention by the national minister that a compromise was reached and litigation avoided (Akintan and Christmas 2006). In the High Court, Zille also successfully contested Premier Ibrahim Rasool's appointment of a judicial commission of inquiry into alleged misuse of municipal funds for party use (*Mayor of the City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C)).

Since the DA took charge of the Western Cape, it has sought to test the constitutional space of provincial powers, which has provoked strong opposition from the national government. For instance, the premier, Helen Zille, appointed a commission of inquiry — headed by Justice Kate O'Regan (a retired Constitutional Court judge) and Mr Vusi Pikoli (a former National Director of Public Prosecutions, who was fired by President Mbeki for charging the national commissioner of police on corruption charges) — to inquire into poor policing in Khayelitsha, a large black township wracked by violent crime.

Policing is a national function but provinces have a limited supervisory role to play, including the appointment of commissions of inquiry (s 206(5) Constitution). The national minister of police strongly contested the premier's right to appoint the commission on the grounds, among others, that there was no proper prior consultation and that the premier acted outside the Constitution by giving the commission subpoenaing powers. The High Court rejected the minister's application to interdict the commission from proceeding, but the Minister appealed against the adverse decision. The Constitutional Court eventually found that the premier had acted within her constitutional powers and that the commission could proceed (*Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC)).

What the relations between the Western Cape and the national government show is that real intergovernmental relations take place when there are political differences between the power-holders of different orders of government. Politicians and officials often remark that cooperative government is achieved where the governments of two orders of government belong to the same party. This is true, of course, but intergovernmental relations are then mainly dealt with through the party system, which is likely to be strictly hierarchical. But a devolved system of government is not designed on the assumption that one party will be in control of all political institutions; on the contrary, the aim is to accommodate a diverse set of interests. Healthy intergovernmental relations and cooperative government come to the fore precisely when there is political contestation. Tolerance then becomes the vital political value; while political competition takes place, cooperation in the interest of the community must continue.

5 SOCIAL SOLIDARITY: PREVENTING PROVINCIAL AND LOCAL STATE FAILURE

While there are spaces where the different spheres can operate as equals, there are also areas where the relationship should be hierarchical when the national government exercises supervisory powers over provinces (and the provinces over municipalities). Supervision has two dimensions: the first is the duty of support, and the second, the power (and sometimes duty) to intervene.

In South Africa the need for supervision soon became evident. The establishment of new provinces and municipalities, coupled with the unevenness of skills distribution across the country, required considerable support to stem the tide of maladministration. As the old discredited and corrupt homeland administrations were absorbed by some of the new provinces, these institutions continued to be a vehicle for many to accumulate wealth, resulting in elite capture and corruption. For example, education departments in the Eastern Cape and Limpopo became dysfunctional and unable to provide decent education to millions of learners; similarly, in a number of municipalities basic services such as clean water and

sanitation are not provided. Thus, to ensure a minimum level of uniform service delivery across provinces and municipalities, supervisory measures are needed to ensure social solidarity and effective governance across the nation.

The Constitution hence imposes the duty of support on the national government with respect to both provinces and local government, and on provinces with respect to local government. Also, in certain circumstances the values of autonomy and the principles of cooperative government give way to decisive interventions. However, when an intervention takes place within a charged political context of inter-party or intra-party contests, it is possible that such powers may be abused for political ends.

5.1 Duty of support

The Constitution obligates the national government to assist provinces 'to develop the administrative capacity required for the effective exercise of their powers and the performance of their "functions" (s 125(3)). This may take the form of legislation or other measures. Likewise, the national government and the provinces 'must support and strengthen the capacity of municipalities to manage their own affairs' (s 154(4). See also s 155(6) on the provinces' duty of support). In respect of municipalities, there have been a number of national support programmes, such as Operation Clean Audit, none of which has been a sparkling success, mostly because the provision of external support does not necessarily change the internal capacity or culture.

5.2 Interventions in provinces

Section 100(1) of the Constitution provides that the national executive may intervene when a province 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'. The national executive may take any 'appropriate steps to ensure the fulfilment of the obligation', including issuing a directive (a command) and assuming responsibility for that obligation in the place of the province. As the latter measure is a drastic breach of provincial autonomy, it may take place only to the extent necessary (a) to maintain essential national standards, or to meet established minimum standards for the rendering of a service; (b) to maintain economic unity or national security; or (c) to prevent the province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole (s 100(1)(b)).

Certain checks and balances were built into the system, given that there was strong awareness of the abuses of presidential rule that occurred in India under Indira Gandhi's regime, where states were taken over by the Union government merely because the Congress Party had lost state elections (Dhavan 1998; Narang 2007). As the provincial voice, the NCOP is given the mandate of reviewing the intervention; at any time after an intervention began it may terminate the intervention, which, in any event, may not

continue after 180 days if there has not been a positive approval of the intervention. Following its usual procedure, a supportive vote of five provinces is required to veto the intervention. It should be noted that the national executive has no power to suspend or dissolve a provincial legislature (and hence has no power to dismiss the premier).

The power of assuming responsibility for a particular obligation was first exercised in 2011 when the national executive intervened in the Eastern Cape's shambolic Department of Education. Then, in January 2012, decisive action was taken against Limpopo, where, in addition to the Provincial Treasury and Department of Education, three other departments were placed under administration until February 2015. At the same time, similar measures were taken in respect of departments in the Free State and Gauteng. These actions signalled a break with past practice, where 'informal' interventions took place in the form of active support but formal sanctions against wayward ANC-controlled provinces were otherwise avoided in order to steer clear of political embarrassment.

During the intervention in Limpopo, its premier, Cassal Mathale, lashed out at the national government, claiming that the intervention served merely as punishment because he and the ANC provincial structure had not supported Zuma's re-election as president of the ANC; other provinces, it was contended, were in equally poor shape.² The claim (which Mathale did not later pursue) raises questions about the NCOP's effectiveness as a check on the exercise of this national power. As noted above, the NCOP can veto such interventions at any time in the form of peer review. Two conflicting forces bear on this review process. On the one hand, in theory the provinces can stop the intervention by setting the bar for an intervention very high, prompted in doing so by self-interest in protecting themselves from interventions in the future. On the other hand, the provinces under ANC control are bound by party discipline and are unlikely to go against a national decision. In Limpopo the maladministration was so egregious that political abuse of the intervention power could not seriously be raised.

A second form of intervention, though indirect, is the temporary stoppage of transfer of funds (including the equitable share) if a province commits a serious or persistent breach of the requirements of good financial management (s 216 Constitution). Such an intervention is also subject to the review of the NCOP, not by veto but by the same processes as those required for the passing of section 76 legislation (affecting provincial interests).

However, despite poor financial management in the majority of provinces, this provision has not yet been used against provinces. In March 2015 the National Treasury stopped the transfers to 58 municipalities which were in

² As noted previously, Mathale was first removed as chairperson of the ANC provincial committee when the latter was disbanded, and was then told by Zuma to resign as premier in July 2013.

arrears with their payment of ESKOM, the national electricity utility, until they made suitable arrangements for repayment of their debt. SALGA contested the measure on various procedural grounds, but the nub of the problem lies in the fact that the sanction may affect the community — in particular the poor who are dependent on free basic services — when such services are reduced because of cash-flow problems.

5.3 Interventions in municipalities

Municipalities are subject to a more intrusive intervention regime. In the 1996 text of the Constitution the regimes governing intervention into provinces and municipalities were exactly the same, with provinces exercising the supervisory power over municipalities (s 139). This was changed over time, first, by allowing indirectly for the dismissal of elected municipal councils, and then, in 2003, by allowing for mandatory intervention when municipalities are in a financial crisis.

Three types of interventions are now provided for. The first is the ordinary discretionary type, which includes measures such as the assumption of responsibility and the dissolution of a council 'in exceptional circumstances' (s 139(1)(c)). In the case of an assumption of responsibility, the NCOP again performs its review function, similar to that in respect of provinces. In addition, the national minister responsible for local government may also veto the intervention. The dissolution of a council takes effect only 14 days after the minister and the NCOP have been notified, and if neither of them has vetoed the intervention within that period. The second type of intervention, financial in nature, obliges the provincial executive to take appropriate steps, which may include the dissolution of the council, where the latter has failed to approve a budget before the commencement of the new financial year. The third type also gives broad powers to the provincial executive to intervene when there is a financial crisis. It should be noted that in the latter two modes of intervention the NCOP does not play a review function at all.

Provincial interventions in municipalities have occurred with worrying regularity in the past two decades due to their high levels of maladministration and corruption. By 2014, 67 interventions had been recorded, a number which indeed ought to be much higher: no financial interventions took place despite the fact that only 22 municipalities obtained clean audit reports for the 2012-13 financial year, with the majority receiving either disclaimers or qualified audit reports. The NCOP appears to have performed its review mandate with diligence.

There have been very few claims of politically motivated interventions. One concerned the dissolution of an ANC-controlled district council by the DA-led Western Cape provincial executive because the former failed to pass a budget by the due date. It turned out that the province did not actively support the municipality to convene a council meeting where the budget could be passed. Because such a financial intervention was not subject to

NCOP review, the matter was reviewed by the courts, which set aside the decision on an interpretation of the Constitution and statutory law (*Premier of the Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA)). Even in cases where the NCOP has approved interventions, municipalities have successfully challenged them in court on substantive grounds (*Mnqunu Local Municipality v Eastern Cape Provincial Government* [2009] ZAECBHC 14 Eastern Cape High Court).

It is reported that none of the interventions undertaken up to 2013 have proven successful (Lund 2013). Twenty of them simply lapsed because of an intervening election, leaving the problems unresolved. As for the rest, a number of factors worked against success. When an intervention has taken place, the problems of maladministration are so deep-seated it requires considerable skill and resources to fix them, resources that provinces do not have. Moreover, provincially appointed administrators may be sent to rescue a municipality, but when they leave, it simply signals a return to the previous ways of maladministration and corruption. The call has thus been made repeatedly that problems should be addressed before they become intractable, an approach that necessitates an early-warning monitoring and support system.

Several lessons emerge from both the provincial and the municipal interventions. First, newly created institutions often have serious establishment problems requiring intervention. Secondly, rural areas face significant difficulties in attracting suitably skilled staff to govern them efficiently and responsibly, a challenge which makes sustained support necessary. Thirdly, capture by a rent-seeking elite is likely to happen where provincial and local government provide an avenue to wealth accumulation. Fourthly, a quick drop-in intervention that does little to change the environment on the ground is unlikely to bear fruit.

6 CONCLUSION

National political cohesion in South Africa has been informed by politics and one-party dominance conducted in the shadow of the Constitution. Although the NA could articulate a strong provincial voice through its 'nine multi-member provincial constituencies', the dominant position of one political party cuts across provincial interests. The constitutional checks-and-balances role the NCOP should play on behalf of provinces has also been much diluted by the ANC's dominance in eight of the nine provinces, as a result of which the NCOP has not served as a brake on the centralisation of various provincial functions. The constitutional institutions designed for national cohesion and drafted in the abstract may not impose restraint on the national government until such time as a more evenly balanced political dispensation has emerged.

Inclusion in the national arena remains as important as the exercise of subnational self-governance. With regard to the national executive and administration, there is little constitutional guidance to ensure an inclusive

national government. Here, politics are dominant and only inclusive politics will result in national cohesion. On this score, the ANC has had a long track record of maintaining an inclusive cabinet through its inclusion of minor opposition parties, but while the ethnic and/or linguistic composition of the cabinet and the administration has remained under the surface so far, it may become more visible in the future.

Given a complex division of powers and functions, coherent governance is vital for the delivery of shared services, yet difficult to achieve. While the Constitution and legislation may provide guidance for coordination and cooperation, intergovernmental relations have been subject to the pressure of centralisation through the design and functioning of intergovernmental institutions and processes. The goal of coordination often becomes simply a code-word for centralised control. Operating under the aegis of a dominant party, official institutions and processes remain surface manifestations of cooperative government, with the real relations conducted within the party hierarchy. Where intergovernmental relations function across party-political boundaries, a political culture of tolerance and give-and-take negotiation is crucial (Watts 2001). In the absence of such a culture, as now seems to be the case with regards to the Western Cape, it becomes inevitable that intergovernmental disputes are settled only through litigation.

Where social solidarity is placed in jeopardy by subnational state failure, the rule of law, and not politics, must dominate; when politics drives the decision whether or not to intervene, the abuse of such power can often be stemmed only by the courts. In the present political configuration where the NCOP has not yet articulated a clear provincial voice, an effective review of national interventions may not always be forthcoming.

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