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The Globalisation of Urban Governance

Legal Perspectives on Sustainable Development Goal 11

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10 City Regions in Pursuit of SDG 11

Institutionalising Multilevel Cooperation in Gauteng, South Africa

Jaap de Visser

Introduction

Metropolitan areas are becoming more and more important in shaping the future of the planet. In 2017 there were 34 megacities worldwide, i.e. cities with a population of over 10 million. It is expected that this number will grow to 41 by 2030 (United Cities and Local Governments (UCLG) 2017a, p. 44). There are many more smaller urban conglomerations that can be defined as metropolitan areas, using criteria such as continuous growth, levels of density and perhaps most importantly, functional interdependence (UCLG 2017a, p. 44).

Metropolitan areas are growing fast and face tremendous challenges. In both developed and developing countries, they experience sprawl, social fragmentation, economic challenges and environmental threats. In developing countries this is compounded by the reality that 880 million people worldwide live in slums, most of them within metropolitan areas (UCLG 2017a, p. 46). The growth of metropolitan areas presents tremendous opportunities for an increase of the wellbeing of the city dwellers within them, but the reality is that many of the challenges fly in the face of the aspirations of Goal 11 of the Sustainable Development Goals (SDGs).

The Fourth Global Report on Decentralization and Local Democracy attributes this in large part to the fact that public policy and reform has not kept up with the growing importance of metropolitan areas, resulting in "weak political cooperation, government fragmentation and inconsistent bureaucratic authority discourage[ing] joint efforts to tackle externalities" (UCLG 2017a, p. 46).

City regions fit a somewhat narrower definition than metropolitan areas in that they are usually associated with a regional tier or level of government that operates in addition to or instead of the city level (UCLG 2017a, p. 44). For example, the Gauteng City Region (GCR) is a conglomeration of cities and towns around the City of Johannesburg, South Africa. It is a major contributor to the economy of the country and indeed

the continent. Like its counterparts the world over, the population of the GCR is growing fast and its economy is vibrant.

However, spatial and institutional fragmentation in the GCR is hampering development. Some of the blame can be placed on the inability of government institutions in the GCR to align their programmes and projects, particularly with respect to infrastructure development. The Constitution of the Republic of South Africa, 1996 (the Constitution), in distributing powers with respect to infrastructure development across three jurisdictions, all of which are responsible for a space that is to all intents and purposes integrated, poses challenges to the GCR.

So what are the constitutional and legal options for closer collaboration? And how do these options relate to SDG 11 with its insistence on access to housing, transport systems, sustainable human settlement planning, resilience to disaster, linkages between urban, peri-urban and rural areas etc.? This chapter discusses these options with a specific focus on the provincial and municipal organs of state in the Gauteng Province of South Africa. It examines the question as to what legal avenues are available for the provincial government and municipalities to collaborate more closely around infrastructure development in order to support the development of the GCR. The question is whether in South Africa too, public policy and law reform have not kept up with the growing importance of its main metropolis in the pursuit of the SDGs, in particular SDG 11. The chapter commences with locating this debate in the international normative framework for decentralisation and urban governance.

The International Normative Framework and the Nature of South Africa's Multilevel Government

The international normative framework for decentralisation contains important pointers for the debate about suitable instruments for collaboration in the city region. The topic of intergovernmental collaboration does not feature strongly in instruments such as the European Charter for Local Self-Government (1985) and the International Guidelines on Decentralisation and Access to Basic Services for all (UN-Habitat 2009). However, the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (2014) (African Charter) places a high premium on collaboration across the levels of government.

The African Charter contains a number of provisions that encourage member states to facilitate collaboration between local governments and other actors in the development arena. For example, the Charter's rendition of the subsidiary principle in article 6(1) is immediately followed by article 6(2), which provides that "central governments shall create enabling conditions for cooperation and coordination between national and all sub-

national levels of government and shall empower local governments or local authorities to discharge their duties and responsibilities." Article 6(3) provides that "[l]ocal governments or local authorities shall cooperate with central governments and other local actors to achieve increased efficiency and effectiveness in public action for the delivery of public services." Other examples are article 7(3) on central-local collaboration with regard to development investments and article 11 on collaborative development planning across the levels of government. Lastly, article 17 encourages horizontal and international cooperation among local governments.

It is suggested that the difference in emphasis is a result of the African Charter's placing less emphasis on local autonomy than its European or global counterparts. Its language pertaining to local self-governance is significantly diluted in comparison with that of the European Charter and the UN-Habitat Guidelines. Clearly, it sees cooperation and integration as an integral part of decentralisation, perhaps even more so than an insistence on local autonomy.

As will be discussed in this chapter, South Africa's system of multilevel government combines the same insistence on collaboration, with a strong emphasis on local autonomy. This is a specific challenge for the GCR region. South Africa's system of multilevel government is sometimes described as an "hourglass" model (Steytler 2017, p. 328). The national government is strong, exercising key exclusive powers over the judiciary, land, policing and, importantly, in firm control of the most buoyant taxing powers. The nine provincial governments are relatively weak, with most of their powers held concurrently with the national government, and their finances almost entirely dependent on the national government. On the other hand, local government is strong, with municipalities exercising constitutionally protected powers including the power to generate revenue (De Visser 2017, p. 226; see also Fuo 2019, in this volume). This is particularly true for large cities and metropolitan municipalities, many of which are located in the Gauteng Province. Municipalities must raise the bulk of their own revenue and practice zero-based budgeting. This renders them more prone to exercising self-government than provinces that rely on central government funding and largely implement national legislation (see below). However, it is also true that municipalities and provinces operate in a system that expects high levels of integration across the levels of government. The constitutional principle of "cooperation" with its many detailed provisions in Chapter 3 of the Constitution is a clear manifestation of this. The practice of integration across the levels of government is complex, however, as the remainder of this chapter will point out. The implications of this complexity, in South Africa or elsewhere are relevant to the localisation of the SDGs, in particular SDG 11. First, an overview of the socio-economic context of the GCR and the case of collaboration will be given.

The Gauteng City Region

Introduction

The Gauteng City Region is defined here as the areas made up of the municipalities in the Gauteng Province, one of nine provinces in South Africa. This area has linkages and flows of goods, capital and people that extend beyond such boundaries into neighbouring provinces, further into Southern Africa, and even globally, so that the GCR displays all the hallmarks of a global city region. However, for the purposes of this chapter the discussion will focus on the provincial and municipal bodies in the Gauteng Province, and the question is asked how they can increase their collaboration in order to more effectively pursue SDG 11 between now and 2030. The background to this inquiry is the need for multilevel governance arrangements in city regions such as the GCR, to step up to the challenge of tackling the externalities occasioned by fragmented governance because, as will be highlighted below, these externalities are impeding South Africa's efforts to realise the objectives related to access to housing, efficient transport systems, sustainable human settlement planning, resilience to disaster, linkages between urban, peri-urban and rural areas and other subsets of SDG 11.

Population, Economy and Spatial Form

Gauteng is South Africa's smallest but most densely populated province. It comprises only 1.5 percent of the country's land area (18,178 km^2) but is home to almost 24 percent (23.9 percent) of South Africa's 54m population (Statistics South Africa 2014, p. 12). Over the past years, its population has grown faster than the national average of 1.44 percent per annum.

The province is predicted to have a population of between 14.7m – 18.7m by 2037 (Gauteng Department of Roads and Transport 2013, p. 11). A substantial portion of that growth is as a result of in-migration. For example, between 2011 and 2015, Gauteng's net in-migration was estimated to be 543,109 people, of whom 343,308 came from outside the country's borders (Gauteng Provincial Government 2016, p. 24).

The GCR's one trillion ZAR GDP comprises about 36 percent of the country's GDP. Relative to the continent of Africa, the GCR contributes 11 percent of the continent's GDP (OECD 2011, p. 25). Despite the GCR's significantly high levels of economic activity and a growing population, it also has high levels of poverty, social exclusion and spatial distortions, including inefficient human settlement patterns (Gauteng Provincial Government 2015, p. 29).

Apartheid planning, which included condemning the black majority to dormitory townships to serve the mines and establishing race-based local institutions, has left a stubborn, cynical imprint on the area. In this respect

the GCR was dealt a particularly hard hand in terms of setting out to achieve SDG 11's object of achieving inclusive urbanisation. The modern government institutions in the GCR have still not been able to make the desired progress in reversing this reality. This is in part for institutional reasons that are at the heart of this chapter.

Gauteng's spatial form is one of urban sprawl and fragmentation, which make it difficult to achieve the sustainability and inclusion that characterise the objectives of SDG 11. Its cities are struggling to combat inner city decline. The urban poor are spatially marginalised and travel long distances to work and to amenities. As an indication of the scale of the problem, households spend an inordinate proportion of their monthly income, about 21 percent, on transport (Gauteng Provincial Government 2016, p. 70). This disproportionally impacts black residents of the GCR. A study by Culwick et al. concluded that "African respondents travel 56 min to work compared with 42 min for white respondents. Black respondents consequently also start their daily journey to work much earlier in the day – 25 percent before 6 a.m. compared with just 5 percent of white respondents" (Culwick et al. 2015, p. 310).

To a large extent, race and income determine where people live. Transportation is car-oriented. There is a well-developed system of highways, particularly in high-income areas. Recent infrastructure development has largely followed this car-oriented model, and public transport remains seriously underdeveloped, despite the introduction of promising new initiatives such as rapid bus systems and the Gautrain (Gauteng City Region Observatory 2015, p. 6). The goal of "accessible and sustainable transport systems for all" thus remains a distant dream for the majority of the residents of the GCR.

Municipalities in the GCR

The GCR comprises three metropolitan municipalities –the City of Johannesburg, the City of Tshwane, and Ekurhuleni – and two district municipalities – Sedibeng and West Rand.

The three metropolitan municipalities have exclusive authority in their area and are responsible for all the local government functions

Table 10.1 Population growth in the Gauteng Province

Year	*Population size*
1996	7.6
2001	9.2
2015	13.2

Source: Gauteng Provincial Government 2016, p. 24.

(Constitution of South Africa 1996 Sec. 155(1)(a)). These functions include the supply of essential services such as water, sanitation, electricity reticulation, municipal public transport, municipal roads, waste management and planning (Constitution Sec. 156(1) read with Schedules 4(B) and 5(B)). The remainder of the province comprises of two-tiered local government structures, namely the two abovementioned district municipalities comprising a number of local municipalities – Emfuleni, Lesedi and Midvaal (part of Sedibeng) and Merafong, Mogale City, Randfontein and Westonaria (part of West Rand). These district and local municipalities share the responsibility for local government functions according to an intricate scheme set out in legislation (Constitution Sec. 155(1)(b)-(c) read with the Local Government: Municipal Structures Act 117 of 1998 ch. 5). The general thrust of this scheme is that the district municipalities are responsible for district-wide services, certain localised services, the bulk provision of services, and the performance of a coordinating and supporting role for the local municipalities. The division of the responsibilities between the district and the local municipalities is contested almost everywhere both inside and outside the GCR, and it has been on the agenda for legislative change for many years, adding complexity, instability and fragmentation to an already difficult GCR context (Steytler 2003, p. 241).

Fragmented Decision-making

It has proved to be difficult to address the spatial fragmentation inherited by apartheid. An important contributor to this problem is the issue of fragmented decision making and grant flows with respect to public and private infrastructure (National Planning Commission (NPC) 2011, p. 244). A few examples may elucidate this statement.

The provision of public transport services in the GCR, which is so critical to connect people to opportunities and amenities and central to the GCR's efforts to meet the targets set out in SDG 11, is often not aligned across the vertical and horizontal axes. Transport subsidies are paid by the central government to provincial governments, which perform many public transport services even when those public transport services begin and end within a municipality. Increasingly these transport subsidies are channeled through to municipalities but with considerable bureaucracy and delay. Similarly, grants for the building of subsidised housing are channeled to the provincial government even though the establishment of housing schemes intersects with a range of local government functions such as water, sanitation, electricity and municipal roads (De Visser and Christmas 2007, pp. 9–14).

SDG 11 enjoins South Africa to enhance its capacity for integrated and sustainable human settlement planning and to strengthen its national and regional development planning. The domestic legal and institutional

context is complex, however. Land-use planning and management (or town planning) responsibilities are scattered across provincial and municipal governments. The provincial government is responsible for regional planning while the municipalities are responsible for municipal planning (Berrisford 2011, p. 254). In fact, many sectoral departments responsible for functions such as environmental protection, agriculture and heritage protection also exercise control over land use (see below). Municipalities are central to the management of land use and take land use planning decisions. However, many of their decisions will impact on the surrounding municipal areas and indeed on the exercise by the province of its functions.

This institutional fragmentation is often blamed for the lack of alignment between provincial and municipal services. For example, when metropolitan public transport services are incompatible and commuters cannot seamlessly utilise public transport across (otherwise irrelevant) administrative boundaries, the fragmentation of the institutions responsible for public transport is a big part of the problem. When a subsidised housing scheme runs into endless bureaucratic delays or when houses are built without the necessary services, there is often a trail of intergovernmental disputes behind the situation.

The Case for Better Institutional Collaboration

In 2011 the Organisation for Economic Co-operation and Development (OECD) conducted a study of the GCR and observed that it lacks a clear and widely shared city-region vision, and that it needs a dynamic body capable of coordinating action in this field (OECD 2011, p. 234). Implicit in the second part of the observation is that the GCR is advised to revisit the institutional arrangements that seem to play a role in perpetuating the fragmentation of service delivery.

That does not mean that the problem had hitherto not been a priority. In 2003, already the Gauteng Intergovernmental Forum, an intergovernmental structure comprising provincial and municipal executives in the province (see below), had agreed on the need to develop a common Gauteng region that is competitive. It had also agreed on the need for improved mechanisms for integration and intergovernmental relations and for improved coordination and consultation at sectoral and provincial levels (Gauteng Provincial Government 2006, p. 20).

It is those institutional arrangements to which this chapter is dedicated. What options are there in law for the provincial government and the municipalities to collaborate more closely? Before attempting to answer this question in greater detail, two specific issues that shape this debate are discussed below.

The Challenge of Cooperation Across Jurisdictional and Political Lines

Introduction

The above discussion strongly suggests that collaboration across provincial and municipal jurisdictions is much needed in the GCR. However, realising the collaboration is a serious challenge. This section discusses two dimensions of this challenge, namely the constitutional and the political.

The Legal Dimension: An Emboldened Local Government Sphere

As indicated earlier, municipalities in South Africa enjoy strong constitutional protection of their powers. These powers have been confirmed and clarified in a series of six Constitutional Court judgments (City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others [2008] 2 All SA 298 (W); Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others [2013] ZASCA 13 (15 March 2013); Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others [2013] ZAWCHC 112 (14 August 2013); Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others 2016 (3) SA 160 (CC); Pieterse NO v Lephalale Local Municipality 2017 (2) BCLR 233 (CC); Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC)). In these judgments, which will be briefly introduced below, the Constitutional Court delineated national, provincial and municipal powers over land-use management. For three reasons these judgments form an important backdrop to any effort towards developing a GCR with a defined institutional character beyond a voluntary and informal approach. First, they go to the heart of municipal autonomy over a crucial aspect of infrastructure development, namely decision making with respect to what can be loosely defined as "town planning". Secondly, they have broader relevance because they define how the Constitution protects local government powers. These powers include matters such as "municipal public transport", "municipal roads", "water and sanitation services" and "electricity … reticulation", all of which are central to the GCR debate. Third, they also elucidate the framework conditions for realising SDG 11 in the GCR and in South Africa generally.

The narrative surrounding the protection of local government's infrastructure powers commenced in City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal. In this case the City of Johannesburg asked the Constitutional Court to declare parts of the Development Facilitation Act (DFA) unconstitutional. The DFA

empowered provincial planning tribunals to take land-use decisions, something that the Constitution reserves for municipalities, so the City argued. The Constitutional Court agreed with the City and declared the DFA unconstitutional. The judgment underscored the central role that municipalities play in land-use management and significantly reduced the scope for provincial interference with municipal powers. It essentially located municipalities at the centre of the land-use management framework.

In subsequent years more litigation surrounding municipal planning powers reached the Constitutional Court. In fact, this innocuous and technical part of the Constitution became the subject of five further Constitutional Court judgments, following each other in rapid succession. Without fail, each judgment confirmed the approach taken in Gauteng Development Tribunal, namely that national and provincial governments may not usurp the powers of municipalities with respect to "municipal planning". The national government does not trump municipal land-use decisions by issuing mining licences (Maccsand). Provincial governments may not subject municipal land-use decisions to a veto, even if the development impacts on an entire region (Lagoonbay). Provincial governments may also not subject municipal land-use decisions to provincial appeals (Habitat Council, Pieterse and Tronox). The six judgments are summarised below, for ease of reference.

The jurisprudential trend surrounding municipal powers and particularly how they interface with provincial powers is very clear. It indicates

Table 10.2 Overview of South African Constitutional Court judgments on "municipal planning"

Gauteng Development Tribunal (2010)	*Maccsand (2012)*	*Lagoonbay (2013)*	*Habitat Council (2014)/ Pieterse (2016)*	*Tronox (2015)*
Can province take "town planning" decisions?	Does having a national mining licence make municipal land-use approval unnecessary?	Can province overrule a municipality when the impact of the development straddles the municipal boundary?	Can the province be the appeal body for municipal planning decisions?	What if the provincial appeal board is an independent expert body?
No, the municipality takes town-planning decisions (rezoning and township development)	No, the municipality must still take its own decisions.	No, the municipality must still take its own decisions.	No, an appeal from a municipality to a province is not constitutional	No, an appeal from a municipality to a province is not constitutional (confirming Habitat Council)

that there are hard limits to how far the provincial government may go in imposing collaborative structures and mechanisms to facilitate the GCR. The provincial government may not pass any laws or take any action that removes executive authority from municipalities with respect to their constitutional powers. In the same vein, the provincial government may not pass any laws or take any actions that somehow "second-guess" municipal decision-making with respect to any of its constitutional powers, be they in the form of vetoes, appeals, or other attempts to override a municipality's powers. Lastly, the provincial government may not unduly circumscribe or restrict the exercise by municipalities of their constitutional powers.

It goes without saying that these constitutional realities limit the extent to which the Gauteng provincial government may impose collaborative structures and mechanisms on the municipalities in the province. The next section will examine the current relevant political realities, particularly as they have changed in the years preceding the publication of this chapter.

The Arrival of Competitive Politics

Recent changes in the political landscape in Gauteng present new challenges to the system of intergovernmental collaboration in Gauteng, and therefore to the GCR.

The government of the Gauteng Province was under the control of the African National Congress (ANC) from the time of the establishment of this province in 1994 until recently. Most of the municipalities in Gauteng were also governed by outright ANC majorities. In fact, before August 2016 all municipalities except Midvaal Local Municipality were governed by the ANC. Therefore, most of the municipalities in Gauteng were governed by the same party as that which governed the province. Intergovernmental relations in the province were complicated but not as a result of the dynamics between political parties.

The August 2016 local government elections brought about a significant change that was felt countrywide. The ANC lost a considerable amount of support, as evidenced by its national support dropping below 55 percent. More significantly, the ANC suffered major defeats in the metropolitan areas, losing three metros to the opposition, namely the City of Johannesburg, the City of Tshwane and Nelson Mandela Bay Metropolitan Municipality in the Eastern Cape. For intergovernmental relations in Gauteng, this means that two out of the three metropolitan powerhouses in the province are no longer controlled by the party that controls the provincial government.

A look at the financial aspect of this situation may underscore the significance of this development. Before the August 2016 elections the ANC controlled 85 percent of the 228-billion ZAR combined budget of the eight metros countrywide. The opposition Democratic Alliance (DA) controlled only 15 percent, because the City of Cape Town was the only city it controlled. The combined budget of the now opposition-controlled metros is

130- billion ZAR. The ANC has lost control of approximately 80 percent of the budgets of metros nationwide (Suttner 2017). A look at local government operating budgets throughout the country indicates that the ANC control of local government operating budgets has dropped from 82 percent to 41 percent, primarily as a result of the changes in the metropolitan municipalities.

For the GCR, the outcome of the 2016 local government elections makes intergovernmental relations more challenging than they were before August 2016. It will no longer be possible for intergovernmental disputes to be ironed out in party headquarters or for intergovernmental strategies to be informally sanctioned before the formal discussion. More reliance will have to be placed on the formal, institutional instruments for integration to which this chapter turns next.

The Instruments for Integration

Introduction

This section of the chapter provides a short overview of some of the most prominent legal instruments that could be utilised to institutionalise the Gauteng City Region and achieve greater integration. They are structured as a continuum of legal mechanisms that range from the most intrusive, i.e. involving interference with municipal autonomy, to the least intrusive, i.e. relying on voluntary cooperation.

Changing Municipal Institutions

On the far end of the spectrum is the changing of municipal institutions, i.e. the redrawing of boundaries and/or the recategorisation of municipalities in order to create a new GCR institution or institutions at municipal level. As indicated above, the GCR comprises of seven local municipalities, two district municipalities and three metropolitan municipalities. Redrawing boundaries, i.e. amalgamating municipalities has been considered in order to achieve greater coherence at local level. However, the provincial government does not have powers of its own to implement this. Boundaries are drawn by an independent Municipal Demarcation Board (Constitution Sec. 155(3)(b)).

Similarly, the declaration of more metropolitan municipalities could remove one level of complexity from the GRC scenario. If the GCR were to comprise metropolitan municipalities only, as has been mooted in the past, local government would comprise one tier only. The additional complexity of the district-local relations mentioned above could at least be eliminated. However, the same constraint as that in regard to the boundaries applies: the power to declare metropolitan municipalities resides with the Municipal Demarcation Board (Structures Act Sec. 4). Whether or not an area qualifies as a metropolitan municipality depends on three issues,

namely the economy, intensity and interdependence. First, the area must contain a centre of economic activity whose economy is complex and diverse. Secondly, the area must be characterised by high population density, the intense movement of people, goods and services, and extensive development. Thirdly, it must have multiple business districts and industrial areas and there must be strong interdependence between its constituent units. It must thus be an area that requires integrated development planning (Structures Act Sec. 2). If all of the above criteria are complied with, the independent Municipal Demarcation Board declares the area a self-standing metropolitan municipality (Steytler and De Visser 2016, pp. 2–20). Prior to the 2000 elections the Demarcation Board proclaimed six metropolitan municipalities in the country, namely Johannesburg, Ekurhuleni (East Rand), Tshwane (Pretoria), City of Cape Town, eThekwini (Durban) and Nelson Mandela Bay (Port Elizabeth); with the 2006 elections, two more were added, namely Mangaung (Bloemfontein) and Buffalo City (East London).

Multi-jurisdictional Institutions

It seems then that changing municipal institutions is not within easy reach. The power to take the relevant decisions lies elsewhere, namely with the national Demarcation Board. In any event, the amalgamation and reclassification of municipalities is often a heavy-handed and controversial instrument.

A less intrusive mechanism to pursue the GCR objective may be the creation of multi-jurisdictional institutions. This mechanism still involves amending public institutions. In other words, it goes further than the intergovernmental dialogue and consultation discussed below. It involves creating institutions that exist in addition to the municipal and provincial organs of state in the province. These would be public entities and would therefore have to be established in terms of specific statutory provisions. They would bring together two or more organs of state into one legal entity with a particular mandate, drawn from the participating organs of state. Such entities could be particularly useful in consolidating those aspects of a specific public service, such as public transport, that are delivered at different government levels, thereby dealing with the externalities caused by different government levels. Being juristic persons in their own right with their own internal decision-making structures, they would be decidedly different from the intergovernmental structures provided under the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA, see below), which are not juristic persons and depend on further decision making within the participating organs of state. In summary, the objective would be to create institutions that are (1) public in nature, (2) tasked with a joint mandate drawn from municipal and provincial spheres of responsibility and (3) managed jointly by the participating organs of state.

The question now is: what does the legal framework offer in this respect and how does it relate to the implementation of the global vision of good urban governance described in SDG 11? The reality is that the national legislative framework offers only a few options for the establishment of public entities that straddle jurisdictions. Key to the inquiry is the Public Finance Management Act 1 of 1999 (PFMA). For an institution to function as a public entity, exercising public functions, it must be recognised in terms of the PFMA, otherwise it may not handle public funds. The PFMA recognises national and provincial public entities, i.e. those that are accountable to Parliament or to a provincial legislature (PFMA Sec. 1). Furthermore, it recognises national and provincial business enterprises owned by national or provincial governments. However, when it comes to entities that straddle provincial and municipal jurisdictions, the PFMA offers little assistance. There is nothing in the PFMA on the basis of which a board, commission, company, corporation, fund, business enterprise or other entity that combines provincial and municipal governments can be duly recognised as a public entity. In other words, it does not recognise public entities that straddle national and provincial governments, or public entities that straddle two provincial governments. So it goes without saying that it does not recognise public entities that combine provincial governments and municipalities.

There are sector-specific laws that move closer to enabling a solution. The most prominent example is the establishment of an entity for the joint exercise of transport functions in terms of section 12 of the National Land Transport Act 5 of 2009. Section 12 provides for the combination of municipal and provincial functions into one arrangement which can be given effect by establishing a provincial entity. The provincial government may enter into an agreement with municipalities to provide for the joint exercise of functions. It goes a step further and provides that the province "may establish a provincial entity in this regard." However, the "provincial entity" referred to there is the same "provincial entity" defined in the PFMA as belonging to the province, not to the province and the participating municipalities. In other words, the joint entity becomes a provincial entity, making it unattractive for municipalities to take part in.

The local government legislation offers mechanisms for arrangements within the local government sphere. Section 87 of the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) sets out a framework for multi-jurisdictional service utilities. A multi-jurisdictional service utility is a utility in which two or more municipalities combine their jurisdictions and collaborate in the performance of a municipal function in a designated area. It is a juristic person set up by agreement that is governed by a board of directors but reports regularly to the parent municipalities. So, for example, the three metropolitan municipalities could establish a joint utility responsible for the management of municipal roads within the combined area. As an instrument for use in achieving

integration along the provincial-municipal axis, though, this mechanism is limited. It does not include the provincial government as a partner, and provincial functions may thus not be housed there. So, in our example the provincial road management functions could not be made a part of it. At best, the provincial government could be represented on the board of such a multi-jurisdictional service utility.

Furthermore, the legislation makes no mention of provincial involvement in the actual process of establishing the entity. (While the legislation acknowledges that senior levels of government may "trigger" such a collaborative arrangement, it somehow envisages this to be only the national government – Local Government: Municipal Systems Act Sec. 88.) The provincial oversight and coordination role also receives little attention in the law. While the national Minister is specifically mentioned as a possible "initiator" of a multi-jurisdictional service utility, the provincial government is not. This does not prevent the provincial government from actively engaging municipalities and facilitating the establishment of a multi-jurisdictional service utility, though. However, at the end of the day, it remains a "horizontal" arrangement.

In summary, the legal framework is not kind to the establishment of a provincial-local entity that (1) has separate legal personality and (2) is a public entity. It is suggested that the complaint registered in the Fourth Global Report on Decentralization and Local Democracy (United Cities and Local Governments 2017) resonates in this area of law in South Africa, namely that the growing importance of metropolitan areas in the pursuit of SDG 11 and the rest of the global urban development agenda is not matched by domestic law reform. It seems counterintuitive that a domestic legal framework is so parsimonious in offering safe statutory options for the members of the GCR to establish joint entities.

Other opportunities may need to be pursued if the establishment of a provincial-local entity is clearly on the cards. One example is establishing a private company under the Companies Act 71 of 2008, underwritten by an intergovernmental agreement. The legislation permits municipalities to establish or hold interests in private companies. Its interest does not have to be full ownership but may be a lesser interest as long as the other partners are provincial organs of state or municipalities (Local Government: Municipal Systems Act Sec. 86C). It becomes a PFMA-recognised entity if the ownership control is held by a national or provincial organ of state.

Provincial Regulatory Authority

A further option is for the provincial government to use its regulatory authority to achieve greater alignment in the GCR. This option does not involve the creation of any institution or agency but relates to the use of provincial regulatory power. It is suggested here against the backdrop of

the complaint about the lack of alignment among municipalities in the GCR and between municipalities and provincial governments. The lack of alignment, particularly around key minimum standards for the delivery of infrastructure is often cited as a key concern, with incompatible public transport infrastructure as a prominent example. For example, why can the rapid bus transport in the three metropolitan municipalities not operate according to the same basic infrastructural standards, such as bus height, bus lane sizes and ticketing systems?

This is where the provincial regulatory authority could be utilised more effectively. With respect to the municipal functions listed in the Constitution (such as municipal public transport), each municipality in Gauteng enjoys constitutional protection. The provincial government may not remove a municipality's executive authority or compromise its decision making, as was clearly determined by the Constitutional Court (see above). This does not mean, however, that the provincial government does not have regulatory authority over local government functions. The local government matters are listed as provincial powers in Schedules 4B and 5B of the Constitution. Municipal autonomy is protected because the Constitution limits provincial power to "regulating" the exercise of these powers "to see to the effective performance" (Constitution Sections 155(6) and (7) read with Schedules 4(B) and 5(B)).

In order to pursue the GCR objectives, the provincial government is constitutionally permitted to establish minimum standards for municipal functions. There is no reason why these minimum standards could not be aimed at achieving basic harmonisation of municipal functions in the GCR. To take the public transport example, the Constitution empowers the Gauteng Province to prescribe minimum standards for the installation of rapid bus infrastructure so as to make the various systems more compatible.

The reality is that provincial governments have been very reluctant to exercise their legislative authority in areas where they share power with national government. This applies to both the provincial functions as well as to the regulation of local government functions. The "hourglass" model of South Africa's multilevel government referred to earlier is an important determinant of this. South Africa's provinces are reluctant to push the envelope of their constitutional powers to regulate local government (De Visser 2017, p. 229).

An example of one of the major provincial functions, namely "housing", may explain this. The example is apposite as the function permeates many of the targets set under SDG 11, most notably those related to access to adequate, safe and affordable housing, slum upgrading and human settlement planning. "Housing" is an area over which both national and provincial governments have concurrent competence. In other words, both national and provincial governments have the same legislative and executive authority. In the event of a dispute, the matter is ultimately resolved by the Constitutional Court on the basis of a constitutional system of overrides.

Throughout the country the nine provincial departments responsible for housing delivery, command impressive budgets to deliver subsidised housing. The provincial spend is very significant. No less than 72 percent of the ZAR 29.1 billion human settlements budget of 2014/15 was spent by provinces (National Treasury 2015). However, the practice of determining standards for housing delivery does not reflect this. The national government determines the legislative framework and disburses the funds while provinces identify projects and act as implementing agents of the national government. The legislative framework, including matters such as standards for housing subsidies and mechanisms to devolve housing functions to municipalities, is determined nationally. The National Housing Act 107 of 1997 and the National Housing Development Agency Act 23 of 2008 are as yet unmatched by rival provincial legislation (De Visser 2017, p. 231). The few provincial legislative initiatives in the housing arena were unfortunate attempts to facilitate eviction, as is discussed elsewhere in this volume (see Riegner 2019, in this volume). The absence of provincial legislation is symptomatic for most of the areas where provincial governments share authority with the national government.

It also applies to those areas where the provincial governments share authority with the national government to regulate local government matters. The regulation of municipal public transport is such an area: both the national and provincial governments may regulate municipal public transport, but only national government has done so.

The Gauteng Provincial Government is no exception. It has shown very little appetite to exercise its legislative powers to adopt frameworks for local government that are specific to Gauteng. In its recently adopted Integrated Urban Development Framework (IUDF), the Department of Cooperative Governance remarks that "the dynamics in the Gauteng Province are unique and require a distinct dispensation for coordination" (Gauteng Provincial Government 2016, p. 53). In the context of its desire to facilitate the GCR, which is very much a Gauteng-specific issue, there may be good reason for Gauteng to explore this competence.

Combined Decision-making

An important aspect of the concern underlying the GCR relates to the possibility that fragmented decision making may impede the roll-out of public and private infrastructure of the kind necessary for the pursuit of the SDG 11 targets in the years to come. A single development such as the establishment of a low-cost housing scheme, a rapid bus lane or a mall may attract the attention of many organs of state in different spheres of government, all of which exercise some form of regulatory authority over the required changes in land use. For example, a housing project may require a rezoning decision from the municipality, an environmental impact assessment from the provincial government, an agricultural approval from the

department of agriculture and a water-use licence from the national government. It is not hard to imagine that these multiple approvals often result in delays in realising infrastructural development.

As this chapter moves from the most intrusive instruments (such as changing institutions or establishing new ones) to the less intrusive instruments (i.e. those that are more collaborative in nature), the statutory mechanisms to align decision making on land use come to mind. There are a number of provisions in legislation pertaining to land-use management that offer mechanisms to alleviate the burden of "red tape" caused by the many approvals required from different organs of state.

Section 30 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) empowers organs of state across spheres of government to jointly exercise their powers with respect to land use authorisation. In other words, when an infrastructure project in the GCR requires authorisation from more than one organ of state (as all big infrastructure projects do), they may exercise their powers jointly. They may do so in one of two ways. First, while issuing separate authorisations they may align the procedures to get there. For example, the provincial government and the city may combine their respective public participation procedures into one, but still take their own separate decisions. This already reduces the quantity of the red tape considerably. The second option goes further: the two may collapse their many separate authorisations into one single authorisation.

It is suggested that these mechanisms, if used effectively, could assist in mobilising organs of state in different spheres of government to collaborate around specific infrastructure projects.

Intergovernmental Relations

At the end of the spectrum of options to collaborate, on the cooperative side, exists a wide range of intergovernmental mechanisms. Most of them are regulated in local government laws or the IGRFA.

There is the Premier's Coordinating Forum (IGRFA Sections 16–20), a consultative structure where the Premier, selected members of the provincial cabinet (MECs) and the mayors meet. Another structure is the District Coordinating Forum (IGFRA Sections 24–27), of which the GCR region has two, one in each of the two districts. These are also consultative structures where the district mayor meets with his or her counterparts from the local municipalities. There are two more intergovernmental structures that do not have a basis in the IGRFA. The first is the Extended Executive Council, comprising of the entire provincial cabinet and the mayors of municipalities in the province. The second is the MEC-MMC forums (MEC stands for "Member of the Executive Council" (members of the provincial executive); MMC stands for "Member of the Mayoral Committee" (members of the city executive)), and "bilateral" forums where the

MEC responsible for a specific portfolio meets with his/her counterpart at the municipal level. The scope of work of these forums is limited to the functional area for which the MEC and the MMCs are responsible. All of the above forums are supported by technical structures where the relevant bureaucrats meet.

The IUDF points out that these forums have not been used optimally (Department of Cooperative Governance 2016, p. 45). From an institutional perspective there are two characteristics that crucially define all of these forums and set them apart from the more "coercive" or "institutional" options discussed above. First, they operate according to a consensus model: decision-making requires the agreement of all participating organs of state. Second, implementation depends on further decision making or adherence on the part of the participating organs of state. None of these forums are separate legal entities, and they are thus not capable to take executive decisions. From within the GCR, the question has arisen whether the regular intergovernmental structures are equipped to achieve greater alignment in the GCR region. IGR structures, where provincial and municipal executives come together, may take decisions, but these are not binding on the participating institutions. When one of them fails to follow through on a resolution taken by the IGR structure, there is little that can be done. They thus depend on voluntary participation and follow-through by the participating organs of state. In reality these forums have not been able to generate sufficient traction to facilitate the GCR.

A further intergovernmental relations mechanism to facilitate aligned infrastructure development is integrated development planning (IDP). Every municipality adopts a comprehensive five-year strategic plan called the IDP at the beginning of its term and reviews this annually (Local Government: Municipal Systems Act 2000 Ch. 5). This IDP is expected to be based on the aspirations expressed by communities, and triangulated with the resource capabilities of the municipality and the intergovernmental expectations of other spheres of government (also see van der Berg 2019, in this volume). It comprises and coordinates a range of municipal sectoral plans (on transport, water, economic development, electricity etc.) and, importantly, includes the municipality's spatial vision in the form of a spatial development framework (Local Government: Municipal Systems Act 2000 Sec. 26(3); SPLUMA 2013 Sections 20–21). All of this must be supported by a three-year financial plan (Municipal Systems Act 2003 Sec. 26(h); Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) Sections 17(3)(b), (d) and 53(1)(b)), rendering the IDP the most critical vehicle for community-based and intergovernmental infrastructure planning. The IDP is regulated in the Local Government: Municipal Systems Act, the MFMA and SPLUMA. All three of these laws emphasise and structure intergovernmental alignment, both horizontal (neighbouring municipalities) and vertical (national-provincial).

However, over the past 15 years it has proven to be very difficult to take IDP alignment from high level political commitments into project-based alignment. With community participation often politicised, the process highly cyclical and overregulated, and linkages between strategy and funding often lacking (see Fuo 2019, in this volume), the IDP framework has not become what government intended it to be, namely government's primary vehicle for coordinated development (Pieterse 2007, pp. 20–24). Pieterse attributes this to a number of factors including the "the pressures that emanated from national and provincial governments, which were driving forward demanding sectoral programmes [and] created a cacophony of contradictory pressures that led to municipalities remaining in a reactive, fire-fighting mode" (Pieterse 2007, p. 21). It is very unlikely that the IDP framework alone, in its current form, will be capable of efficiently facilitating the realisation of the GCR.

A more targeted instrument exists in the form of the implementation protocol (IP), which is also regulated in the IGRFA (Sec. 35). The IP is a written agreement among the organs of state involved in the delivery of a particular function or the implementation of a particular project or programme, in which they coordinate their actions. The IP deals specifically with issues such as the roles and responsibilities of each participating organ of state, the contributions to be made by each organ of state, dispute settlement, timelines etc. It could be the umbrella for specific collaborative strategies such as the alignment of land-use procedures or the collapsing of land-use authorisations (see above). It is submitted that, given the limited potential of the IGR forums and IDPs to drive the realisation of greater integration in the GCR, the use of implementation protocols, to support specific large-scale infrastructure projects could be considered.

Conclusion

In a report consolidating the views of 400,000 local and subnational governments on the localisation of the SDGs, UCLG remarked that "[s]tronger institutional frameworks and new channels of dialogue and coordination may be an opportunity for sub-national governments to raise their stance in the process of implementation of the [sustainable development] goals. Many countries refer to these arrangements as a 'multilevel approach' to coordination and cross-level coherence" (UCLG 2017b, p. 11). This rings true for every country's efforts to implement the SDGs. It also plays out differently in every country, given the vast differences in state structures, in the role and status of subnational governments and cities, in histories, in capabilities in the public sector, and in appetites for reform.

In this chapter it is argued that for South Africa it ought to trigger a consideration of the legal framework for the GCR. Given its strategic

importance for South Africa and Africa and given its challenges in ensuring alignment across the many organs of state active in the infrastructure sector, the GCR requires a robust institutional framework that can help unlock the potential of the GCR. The GCR must function as a coordinated platform to connect communities to opportunities right across its space, straddling the administrative boundaries of metropolitan, district and local municipalities as well as the provincial boundaries.

The constitutional and legal framework places a high premium on the protection of municipal and provincial autonomy. As has been pointed out in this chapter, the law, with its insistence on clear jurisdictional boundaries, is not always friendly towards collaboration. Aspects of it, such as the absence of a safe legal framework for multi-jurisidictional entities combining national, provincial and local authorities, may need to be reviewed.

While the Gauteng Provincial Government may wish to encourage and promote a more robust GCR framework, municipalities operate in a different incentive structure. They raise the bulk of their revenue and are held directly accountable for the implementation of their own budget. This does not incentivise them to surrender authority to opaque collaborative structures. In addition, competitive politics have arrived in Gauteng. At the time of writing, two of the three metropolitan municipalities are governed by a political party different from that governing the province. This has negated the use of party structures as viable mechanisms to seek policy and programmatic alignment around infrastructure projects and made intergovernmental relations in Gauteng more acrimonious. Reliance must be placed on the formal, legal structures to achieve alignment. Fortunately, there is no shortage of legal instruments and mechanisms, designed to facilitate collaboration across jurisdictional boundaries. Some of the possibilities arising from the existence of these those mechanisms have been discussed in this chapter. They range from the most intrusive actions, such as changing municipal boundaries and establishing institutions "co-owned" by provincial and municipal governments, to the least intrusive actions, such as utilising intergovernmental forums and concluding intergovernmental agreements. It has been argued that some of these mechanisms are under-utilised. Examples are the provincial power to regulate minimum standards for the delivery of infrastructure services and the conclusion of intergovernmental agreements.

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