

**MUNICIPAL REPRESENTATION AS A MECHANISM TO ENHANCE LOCAL
GOVERNMENT EFFICIENCY: THE ROLE OF ASSOCIATIONS FOR LOCAL
AUTHORITIES**

by

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Municipal Representation as a Mechanism to Enhance Local Government Efficiency: The Role of Associations for Local Authorities

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



November 2016

.....
Mr ANIROOD SINGH

.....
DATE

To my dear wife, Charmaine

... at my side through it all

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SUMMARY

Conceptually, South Africa is “one sovereign democratic state”, with a three-sphere governmental system operating co-operatively. Each sphere of government has “original” or constitutionally-allocated powers and functions, as well as legislative and executive powers. Thus, the governmental system is a hybrid or one *sui generis*, not benefiting from appropriate precedents. The status and autonomy given local government makes it somewhat unique in the world. Application of the principle of subsidiarity, and the mandate for local government to be developmental has resulted in the roles and responsibilities of municipalities being substantially increased, notwithstanding that most suffer from a lack of resources and capacity.

Local authorities moved from the establishment of the first one in 1682 as providers of basic municipal services on the basis of race and affordability to democratically-elected ‘wall-to-wall’ municipalities in 2000. With 257 municipalities serving a population of 55.6 million, South African local authorities are comparatively large, spatially and demographically.

Given the constitutional-statutory framework and the resultant complex operating environment, it is imperative that all municipalities are able to represent their interests in an intelligent, forceful, and unified manner on decision-making institutions to ensure a close fit between policies/programmes and peoples’ needs. Hence, effective municipal representation by knowledgeable, ethical and committed persons is imperative.

The study provides a history of representation and local authority ‘development’ and underdevelopment in South Africa; a theoretical basis for representation; a review of formalism and government’s approach to development; co-operative governance and intergovernmental relations as a mechanism to facilitate municipal representation; an analysis local government powers, functions, status, autonomy, objects, rights and duties of municipalities; local participatory and representative democracy; and the establishment of municipalities. The constitutional and statutory provisions provide the foundation and framework to facilitate municipal representation. The study continues by analysing other mechanisms that enable municipal representation; a comparative review of local government and co-operative governance in certain select countries.

It goes on to review the formal framework for organised local government in South Africa, including an overview of the South African Local Government Association (SALGA). Finally, findings and recommendations are made toward a model for municipal representation in South Africa.

Key words: Co-operative governance; intergovernmental relations; organised local government; association for local authorities; spheres of government; local participatory democracy; municipal international co-operation; municipal representation; Co-operative Governance and Traditional Affairs; the South African Local Government Association.

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LIST OF ABBREVIATIONS AND ACRONYMS

AAM	Austrian Association of Municipalities
ACIR	Advisory Commission on Intergovernmental Relations (US)
A-G	Auditor-General
ANC	African National Congress
CBO	community-based-organisation
CEMR	Council of European Municipalities and Regions (EU)
CLRAE	Congress of local and Regional Authorities (EU)
CODESA	Congress for a Democratic South Africa
CoF	Council of Federations (Canada)
CoGTA	Co-operative Governance and Traditional Affairs
CoR	Committee of Regions (EU)
DCoG	Department of Co-operative Governance
DFA	Development Facilitation Act
DoRA	Division of Revenue Act
DPLG	Department of Provincial and Local Government
DPME	Department of Performance Monitoring and Evaluation
DPSA	Department of Public Service and Administration
EU	European Union
FCM	Federation of Canadian Municipalities
FFC	Financial and Fiscal Commission
GALA	Gauteng Association for Local Authorities
GGCR	Gauteng Global City Region
ICT	information and communications technology
IDP	integrated development plan
IGF	intergovernmental forum
IGPE	Intergovernmental Affairs and Public Engagement (US)
IGR	intergovernmental relations
IRFA	Intergovernmental Relations Framework Act
ISRDP	Integrated Strategic Rural Development Plan
JMC	Joint Ministerial Committee (Canada and the UK)
KPA	key performance area
KPI	key performance indicator

LED	local economic development
LGTA	Local Government Transition Act
MEC	Member of Executive Council (of a province)
MEIA	Monitoring, Evaluation and Impact Assessment
MFMA	Municipal Finance Management Act
MinMEC	Ministers and Members of Executive Councils
MoU	Memorandum of Understanding
MP	Member of Parliament
MPC	Municipal Planning Commission (US)
NCoP	National Council of Provinces
NDP	National Development Plan
NEMA	National Environmental Management Act
NGO	non-governmental-organisation
NPC	National Planning Commission
NPM	New Public Management
OLGA	Organised Local Government Act
PCC	President's Co-ordinating Council
PLGA	provincial local government association
PMS	Performance Management System
QUANGO	quasi non-governmental organisation
RDP	Reconstruction and Development Programme
SACN	South African Cities Network
SADC	Southern African Development Community
SALAR	Swedish Association of Local Authorities and Regions
SALGA	South African Local Government Association
SMART	specific, measurable, achievable, responsive and time-bound (objectives)
SPLUMA	Spatial Planning and Land Use Management Act
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
URP	Urban Renewal Programme
US/A	United States of America

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

It is trite that the South African government currently is in crisis. Although the Republic has a three-sphere governmental system, problems and challenges manifest themselves in the local sphere almost daily. Four occurrences serve to highlight this apparently chronic dilemma. These serve to provide background and context to the situation local government finds itself in today. It also highlights the complex environment municipal representatives operate in.

Twenty-two years after South Africa became a democracy on 27 April 1994, youth constitute 36.2 per cent of the country's 55.6 million population.¹ The unemployed numbered 9 218 000.² High unemployment correlates with residents' low ability to pay. This, in turn, has an adverse impact on municipal revenue and concomitantly limited capability of delivering basic public goods and services. Despite the state setting down a detailed and comprehensive constitutional and legislative framework as well as guidelines for equitable and sustainable socio-economic development, poverty and inequality persist and grow because the implementation of policies and programmes has not yet reached an acceptable level.

A second depiction of the malaise is poor peoples' discontent with government is exhibited by community protests perceived to be due to poor service delivery by municipalities. Starting at 10 in 2010, rising to 129 in 2015.³ There is, however, no evidence of a uniform standard or yardstick to measure the number and reasons for such unrest, as apparent from different figures: The South African Police Service stated that "there were 1 907 violent protests across South Africa in the 2013-2014 financial year, more than double the 812 that occurred in 2007-2008."⁴ While there may be many reasons behind community protests and all may not be based on dissatisfaction with service delivery and municipal performance, one reason for increase in numbers and of violence could be that these "uprisings give a voice to those who feel

¹ Community Survey 2016, www.statssa.gov.za, accessed 21/11/2016.

² www.tradingeconomics.com, accessed 21/11/2016.

³ SALGA (2015) *Community Protest: Local Government Perceptions*, 8.

⁴ Mabuza, Kingdom and Graeme Hosken (2015) 'Ghetto blaster', Johannesburg: *The Times*, 22/01/2015.

powerless,” a self-help strategy mechanism reflecting, to some extent, inadequate representation in poor urban areas. The situation regarding service delivery and economic development in rural areas would be more dire. As an example, one case may serve to highlight an underlying cause of the present situation.⁵

The SA Human Rights Commission has placed the blame for the Malamulele [Limpopo] impasse at the door of the Department of Co-operative Governance and Traditional Affairs. ...Residents are demanding that their municipality be removed from the jurisdiction of the Thulamela [district] municipality... [accusing] the council of providing better services to more affluent areas.⁶

In a letter to *The Times* on 22/01/2015, Minister of Co-operative Governance and Traditional Affairs (CoGTA), Pravin Gordhan, pointed out that “The Malamulele Demarcation Task Team matter is a dispute of long standing, dating back to 2000.” While the establishment of a municipality, *per se*, is no guarantee of better services, it is evident that CoGTA and the Municipal Demarcation Board (MDB) appear to have ignored the wishes of the community for fourteen years, that is, until violence erupted. This attitude seems to indicate the low status of local government compared with national and provincial governments.

The ruling party determined that the principal mechanism for attaining its developmental ideals would be through effective service delivery by municipalities.⁷ However, former President Thabo Mbeki did admit that the local sphere of government was the most neglected in the negotiations for a democratic state.⁸ The situation remains largely the same in 2016. The parlous state of present-day municipalities can be gauged from research underlying the third revelation, that municipal officials are trusted by only 49 per cent of the population, little better than the police (46 per cent) and political parties (43 per cent).⁹ Given service delivery failures as the root cause of protests, “only half of all South Africans indicate that they have confidence in this sphere.¹⁰

⁵ Fakir, Ebrahim (2014) ‘Protests are a cry for political recognition’, Johannesburg: *Mail & Guardian*, 29/08/2014.

⁶ Dlamini, Penuell and Kingdom Mabuza (2015) ‘Gordhan gets the blame for violence’, Johannesburg: *The Times*, 22/01/2015.

⁷ President Thabo Mbeki’s *State of the Nation Address*, Cape Town, 9/02/2001.

⁸ *Ibid.*

⁹ Ndlovu, Andile (2010) ‘Blacks, whites worlds apart’, Johannesburg, *The Times*: 8/09/2010, based on the book by Roberts, Benjamin, Mbithi wa Kivilu and Yul Derek Davids (Eds) (2010) *South African Social Attitudes, 2nd Report: Reflections on the Age of Hope*, Pretoria: Human Sciences Research Council (HSRC) Press.

¹⁰ De Ryhove, Shannon (2012) *Doubt over local government capacity to deliver- survey*, article in www.polity.org.za, on Institute for Justice Reconciliation (2012) *SA Reconciliation Barometer Survey :2010 Report*.

The fourth illustration is based on the present financial situation of local government, graphically and concretely shown through interpretation of information provided by the Auditor-General showing that unauthorised; irregular expenditure rose from R7.3 billion in 2010-11 to R14.7 billion in 2014-15, while fruitless and wasteful expenditure increased from R284 million in 2010-11 to R1.3 billion in 2014-15.¹¹ In the year to 30 June 2013, municipalities and their entities had a total expenditure of R268 billion, made up as follows:¹²

- Employment cost (including councillor remuneration) R 62 billion (23%)
- Goods and services R166 billion (62%)
- Capital expenditure R 40 billion (15%)

A high percentage is spent on goods and services, but if one considers that this amount includes repairs, maintenance and rehabilitation, profits, administrative and other costs related thereto, the actual number and value spent on goods and services may be relatively low. Fifteen per cent on capital development indicates not much was spent on housing and infrastructure for bulk water storage, reticulation and purification, sewerage and sewage treatment, roads and storm water, power supply, and purchase of essential equipment for fire-fighting, emergency services, health, and so on. To ensure significant real benefits, more should be allocated to capital expenditure. Employment costs at 23 per cent reflect the current situation of many municipalities having limited-capacity. When vacant positions are filled by experienced professionals, the percentage would be higher, financed by ‘savings’ from other categories. This could worsen the service delivery situation. These figures highlight municipal inefficiency but not all their underlying causes.

Of the 278 municipalities, 22 (7.9 per cent) received clean audits, while 8 (13.3 per cent) of the 59 municipal entities achieved this, in the 2012-2013 financial year. A major concern expressed by the Auditor-General was the high level of irregular expenditure, non-compliance with laws and regulations, the slow rate at which root causes were being addressed by the political leadership, a lack of consequences for poor performance and transgressions, the large number

¹¹ Auditor-General (2016) *Consolidated general report on the audit outcomes of local government, 2014-15*.

¹² Auditor-General (2014) *Consolidated general report on the audit outcomes of local government 2012-2013*, 16.

of critical positions that are vacant, and the situation where many key officials do not have appropriate competencies.¹³

In addressing the slow progress with Operation Clean Audit commenced in 2009, the Auditor-General said –

Although many advances had been made in transforming local government since 1994, the legislative reforms and the financial and performance reporting practices had not been institutionalised. ... Except for the 5% that received clean audit opinions, all the auditees had material findings on their service delivery reporting and/or non-compliance with laws and regulations.¹⁴

In the absence of a monitoring, evaluation and impact assessment (MEIA) system, the Auditor-General's annual reports may be one of few mechanisms to determine the financial and related performance status of local government, enabling assumptions and conclusions to be drawn, and inferences made. From these statements two points are to be borne in mind: the governmental system is a lifeless thing and will not work unless led and managed by competent and committed persons; and that the public should play their part for the governmental enterprise to operate efficiently. Based on the above findings, one could conclude that in the local sphere, representative government must be capable of efficiently articulating the needs of people in the various localities and contributing to policy development and its implementation. Municipal representation could be one of the mechanisms to achieve this as well as improved service delivery to address the challenges of unemployment, poverty, and hopelessness in the local sphere. In local participatory democracy, efficient representatives working with their respective communities could ascertain the real needs of people and assist with the design of programmes and projects that would be a close fit.

Municipalities cannot be held solely responsible for the current sad state of affairs as it is only one part of the governmental system wherein all have joint and several liability. The problem starts and ends with the Presidency, as shown by recent media reports. Two issues serve to further highlight this point:

The handling of government scandals, service delivery corruption, and rampant bribery have resulted in South Africa [dropping] five places in the Transparency International corruption perception index to 69th. There are 174 listed countries.¹⁵

¹³ Auditor-General (2016), *op cit*, 19, 28.

¹⁴ In the Foreword to the *Consolidated general report on the audit outcomes of local government 2010-11*, 13.

¹⁵ Hosken, Graeme (2012) 'South Africa slides down graft rankings: Transparency International report doesn't pull its punches', Johannesburg: *The Times*, 6/12/2012.

It is unclear how such measurement was done, that is, how corruption in all three spheres was analysed and the opportunity cost of maladministration. Another article underscores the country's dire situation:

Moody's credit ratings agency has lowered its outlook for South African banks to "negative" from "stable", citing the banks' overexposure to government debt, the deteriorating national economic outlook and unsatisfactory liquidity.¹⁶

The situation regarding the country's economic status and corruption in 2016 and currently with the issue of 'state capture' and moves to unseat the President.¹⁷ This issue has major (adverse) implications but cannot be discussed in detail as it is only currently unfolding. The above illustrations show that each sphere cannot fulfil governmental obligations on its own – there is need for national, provincial, and local governments to work seamlessly, in a holistic and integrated manner, using sound intergovernmental relations in a spirit of co-operative governance. However, dissatisfaction with service delivery manifests at municipalities. Given that from the earliest European settlement in South Africa in 1652, to the first democratic local government elections in 2000, local authorities served as agents of central government, operating in terms of provincial ordinances. No person of colour participated in the administration. Hence, there is a major deficit in skilled and ethical administrators in the local sphere. Municipal representation that is efficient and effective may go some way in resolving this dilemma.

¹⁶ 'Moody's downgrades South African banks', Johannesburg: *The Times*, 6/12/2012.

¹⁷ Mkentane, Luyolo, Tebogo Monama and Khaya Koko (2017) 'ANC war gets ugly'; Mkentane, Luyolo 'Molefe's days at Eskom numbered'; Siyabonga Mkhwanazi 'Investigation into public service graft'; Maqhina, Mayibongwe 'DA demands committee to prove capture'; Mkhwanazi, Siyabonga 'Mbetse vehemently against judicial overreach'; Koko, Khaya and Tebogo Monama 'NEC slammed over JZ inaction', Johannesburg: *The Star*, 30/05/2017; Ongmu, Kalden and Dennis Cruywagen (2017) 'Widen "state capture" probe', Johannesburg: *The New Age*, 30/05/2017; Skiti, Sabelo and Siphe Macanda (2017) 'Spin doctors of smear – UK public relations firm conspired with Guptas to paint Mcebisi Jonas as corrupt'; Hunter, Qaanitah 'Zuma's state in the balance'; Mabena, Siphon 'SA needs "day of reckoning"'; Mabena, Siphon 'DA sees lawyers about corruption', Johannesburg: *The Times*, 29/05/2017; Skiti, Sabelo (2017) 'Unmasked: the Gupta's SAA mole'; Jika, Thanduxolo; 'Here's proof, Mr President' Special Report (on "state capture"); Hunter, Qaanitah, 'Senior leaders lead offensive against Zuma', Johannesburg, *Sunday Times*, 28/05/2017.

1.2 PROBLEM STATEMENT

The *Constitution*¹⁸ prescribes for basic values and principles governing public service administration. With regard to the provision of services by all spheres of government, it stipulates that:¹⁹

- (a) A high standard of professional ethics must be promoted and maintained;
- (b) Efficient, economic, and effective use of resources must be promoted;
- (c) Public administration must be development-oriented;
- (d) Services must be provided impartially, fairly, equitably, and without bias; and
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

This obligation is reinforced by the *Constitution* requiring all spheres of government to provide effective, transparent, accountable, and coherent government for the Republic as a whole.²⁰ In the multi-sphere governmental enterprise local government was established for the purpose, amongst others, of providing basic services.²¹

Insofar as service delivery is concerned, it should be acknowledged that while tremendous strides have been made (albeit off a low base) in fulfilling the basic needs of the poor, the current governmental system is not operating optimally, especially in the local sphere. This is because alongside municipalities, national and provincial governments are also culpable as service delivery is a joint undertaking. This observation serves as a broader-scope problem statement that frames and contextualises the thesis. It is important, therefore, that the present governmental system is analysed rationally and objectively so as to facilitate the design and implementation of one that would work efficiently. This is a mammoth undertaking as the multitude of challenges facing the state and manifested, to some extent, in community protests, is beyond the scope of this thesis. Under the circumstances, one needs to be mindful that:²²

Constitutions, especially new ones which have yet to become deeply rooted, are no guarantee of democracy; they must be sustained by a democratic culture, and a supportive social and economic environment.

¹⁸ *Republic of South Africa Constitution Act*, 108 of 1996 (“*Constitution*”). Unless stated otherwise, all references to ‘the *Constitution*’ are to this version.

¹⁹ See sections 195 (1)(a)-(e) of the *Constitution*.

²⁰ See section 40(1)(c) of the *Constitution*.

²¹ This view is supported by section 152(1)(a) and (b) of the *Constitution* which states that the objects of local government are to provide democratic and accountable government for local communities, and to ensure the provision of services to communities in a sustainable manner.

²² Simeon, Richard (1998) *Considerations on the Design of Federations: The South African Constitution in Comparative Context*, Working Paper (2) (1998) University of Toronto, 3.

Local participatory democracy is an arduous process, taking considerable time to embed and institutionalise itself. Considering South Africa's limited experience, it is not prudent to advocate a *tabula rasa* approach or large-scale restructuring. This is more so because such an undertaking in a complex environment provides no upfront guarantees that new structures and processes will work better than those of the past. It is clear that government, especially the local sphere, must work smarter than at present in an environment of limited resources. The state has shown remarkable foresight and fortitude in establishing the current governmental system operating from the foundation and within the framework of the *Constitution*. Several policies, statutes, regulations, and priority programmes supplement and complement it to the extent that there is perhaps too much law and insufficient strategies to guide socio-economic development. Furthermore, legislation appears to be more regulatory, in the interests of local government compliance, than developmental. This situation may be a contributory factor to the high level of dissatisfaction among poor communities, a situation reminiscent of the 1980s.

The ideal of local participatory democracy, with emphasis on socio-economic development biased in favour of the poor, required a paradigm shift to achieve the goal of "human centred" and "people-driven" development espoused in the Freedom Charter and the Reconstruction and Development Programme (RDP) of the first democratic government. Whilst many countries face seemingly intractable problems of similar proportions, none suffered from the development challenges posed by institutionalised apartheid – hence the lack of appropriate "best practices" and the requisite experience by government officials in developing and implementing them.

The *Constitution* is the bedrock or foundation, framework, and skeleton on which the transformation of South Africa is based. It mandated the establishment of mechanisms deemed essential for the rapid transformation of the state.²³ Subsequent legislation, premised on policies formulated to meet the various needs of the country's heterogeneous population, added flesh to the constitutional 'bones', thus using law as a mechanism to guide, promote, facilitate, regulate, and monitor development as well as, to some extent, actors' behaviours.

²³ Some of these were the founding values, the supremacy of the *Constitution*, entrenchment of the *Bill of Rights*, the establishment of three distinctive spheres of government, co-operative government, the National Council of Provinces, the Constitutional Court, the Chapter 9 institutions, followed by pro-poor legislation and the promotion of local participatory democracy, as well as the mandate of local government to promote social and economic development.

The magnitude and nature of the changes required were such as to create much uncertainty and confusion, more so because some of the greatest challenges were unique to South Africa, while others required a change of hearts and minds, especially of those who controlled the state and its economy. Unpacking the *Constitution* revealed a range of initiatives that were imperative and had to be undertaken by several diverse role occupants. While certain actions were capable of being implemented individually, that is, by any one of the spheres of government, in the context of limited financial and intellectual resources as well as a highly competitive environment, joint action was deemed necessary to more efficiently address the challenges in the public service, especially in the local sphere.

One of the reasons for current poor management of municipalities is based on South Africa's unique history of local authorities. The first settlement for the Dutch was established in the Cape of Good Hope on 6 April 1652.²⁴ Mathenjwa (2013) argues that "local government for Blacks were developed only from 1 October 1986".²⁵ Democratic local government was established following the first local elections on 5 December 2000.²⁶ Compounding the situation today is the "failure of the Constitution to clearly specify" the status and powers of traditional leaders.²⁷ The situation still appears to remain unclear to some extent.

The period from 1652 was characterised by centralisation and exclusion of "non-whites" from government. The result is that black persons have had no experience of government at any level. Local authorities operated under provincial ordinances that were regulatory rather than developmental. Local 'government' functioned largely as agents of the state delivering basic municipal services on the basis of colour and affordability or willingness to pay. Representation on municipal councils was reserved for white ratepayers. Therefore, there were no opportunities for "non-whites" to become schooled in governance or municipal administration.

From earliest times, provincial government functioned to implement national policies, mostly of regulation and control, wherein local authorities operated under provincial ordinances. As a consequence, provincial political representatives worked as regional agents of the state and

²⁴ Thornhill, C and JJN Cloete (2014) *South African Municipal Government and Administration*, 2nd Edition, Pretoria: Van Schaik, 3.

²⁵ Mathenjwa, MJ (2013) *The Supervision of Local Government: Application of the Legal Framework*, unpublished LLD Thesis, Pretoria: Unisa, 18, footnote 7, quoting Cloete (1997) 13.

²⁶ Thornhill and Cloete (2014), *op cit*, 4.

²⁷ Mathenjwa (2013), *op cit*, 23.

served to protect and promote the interests of central government and had no say in national policy and developmental programmes.

In the apartheid era, local authorities also functioned as the state's main machinery to promote racial segregation and marginalisation of blacks. Hence, 'municipalities' were seen as a means of repression. Black 'councillors' co-opted and enticed by the state did not command the respect of the non-voting public. Thus they did not learn the art, science, and mechanics of good governance or municipal administration. There was no democratic municipal representation.

Following the 1961 constitution and the grand strategy of Total Onslaught against Communism, government became even more highly centralised, with local authorities serving as a monitoring and control mechanism of the majority. The 1983 constitution's attempt to co-opt coloureds and Indians while further marginalising Africans was a failure, giving rise to increasing civic unrest at the local level, with calls for the toppling of government.

Up to now, 'municipal representation' of the majority population was practically non-existent. It would appear that at the Congress for a Democratic South Africa (CODESA) deliberations, local government was not an issue. The acceptance of provinces was a political compromise rather than based on scientific design. While the role of national government may have been reasonably clear as envisaged by the 1993 constitution, that of provincial and local governments may have not been articulated in detail and agreed upon. In implementation, it later became clear that the *Local Government Transition Act*²⁸ was also a compromise-type of document and mostly process-oriented. The White Paper on Local Government²⁹ envisaged a developmental role for municipalities, thus widening and deepening their responsibilities, without ascertaining the likelihood of them being capable of delivering on their extended mandate.

Subsequently, local government was allocated fairly clear duties and responsibilities without there being a critical and detailed analysis of the structures, processes, and more importantly, the kind of people necessary to deliver on such high expectations in the context of limited resources and experience in democratic participatory local governance. While the *LGTA* did set the stage, and provided the framework for the establishment of municipalities on a democratic

²⁸ 209 of 1993 (*LGTA*).

²⁹ Ministry for Constitutional Development and Provincial Affairs (1998) *White Paper on Local Government*.

basis, it was not easy to implement at that stage. Municipalities in their present form were established from 2000. Thus, they have been operational for three terms.

It would seem that in the eagerness for democracy and the euphoria of that time the structures and processes of a government to implement the constitutional ideals and provisions may not have been thought through properly. The *Constitution* provided for the establishment of ‘wall-to-wall’ municipalities of different categories throughout South Africa. The mere consolidation of approximately 1 100 local authorities, some of which had little or no government in the conventional sense, may have added to the challenges rather than diminished them by a numbers exercise.

The *Constitution* set out their status in a three-sphere governmental system based on the principles of co-operation and integration (the three spheres working together seamlessly), as well as its status, powers and functions, and developmental duties. The *Constitution* was a pioneering and innovative one, given that South Africa had no history of democracy and there was an urgent need to reverse the injustices and injuries of the past.

In the absence of precedent, the current democratic governmental system was experimental. Municipalities went from being local agents of the state to the frontline of development, without the requisite tools, mechanisms, experience, and support from national and provincial government which were also ‘experimental’. It is therefore not unexpected that government, and especially municipalities, have not lived up to constitutional expectations.

While it is relatively easy to set down on paper the ideals a nation strives for through the formulation of policies and laws, their test lies in implementation. Without the requisite experience, commitment, leadership, and working in co-operation, the experiment could not be successfully executed. Although government has done much to uplift the poor; it could have done more with available resources and prudent governance. This is symptomatic of a government perhaps unclear on what it wants and the leadership not knowing how to achieve the constitutional goals. Although two decades of democratic government is not long enough to attain major developmental objectives, it is a sufficiently long period to enable the state to identify and address the problems that arise systematically. The *National Development Plan*³⁰

³⁰ National Planning Commission (2011) *National Development Plan*, published 11 November 2011.

sets the tone and provides a guideline, but it appears to have not diagnosed the government's ailments in adequate depth. It may be premature at this juncture to deem the governmental system a failure and propose its wholesale restructuring. However, it would have helped if a social cost-benefit, risk, strengths-weaknesses-opportunities-threats, and gap analyses were undertaken to identify and describe the problems, blockages, obstacles, etc, in the whole governmental system that are hindering development. For example, the costs and benefits of having regional or provincial governments have either not been ascertained or not disclosed. Again, this type of diagnosis was not undertaken perhaps because of political sensitivity. The state has seen fit to use law as a mechanism to promote and regulate development and has made very extensive provisions for this purpose. There was then an assumption that there would be sufficiently capable, competent, committed, and dedicated persons on hand to make these legally-prescribed mechanisms work efficiently. This has not been the case to date.

The present structures and processes of government may, however, be accepted as the best available under the circumstances currently, and to try to make it work. But this is one side of an equation in a democratic participatory state. Provisions have also been made for the education, training, and mentorship of persons who will drive and maintain the governmental machinery. However, something appears to be missing: This is the development of a cadre of committed and dedicated local government political leaders and administrators to enable municipalities to fulfil their extended mandate and to provide services efficiently

South Africa has not had a ministry of urban and/or rural development and only recently established an economic development ministry. The *Development Facilitation Act*³¹ attempted to get to grips with filling the vacuum, but was later repealed. The *Local Government: Municipal Systems Act*,³² set out in detail what municipalities are and what they are supposed to do, alongside that of local communities. The *Spatial Planning and Land Use Management Act*,³³ belatedly explained much of what had been missing. Hence, the *Constitution* and several subsequent statutes and regulations provide the legal foundation and framework of government. Municipalities have since 2000 moved from local agents of the state providing basic services to the select and mechanisms of political and economic repression, to instruments of social and economic development, especially of the poor, through efficient service delivery. This is a

³¹ 67 of 1995 (*DFA*).

³² 32 of 2000.

³³ 16 of 2013.

complete role reversal and the magnitude of the task is enormous. It appears daunting especially in a local participatory and representative democracy of 55.6 million people, where most politicians and government administrators have had no experience in this role, and where they are constitutionally-bound to fulfil their duties and obligations.

The problems of the state and government manifest in the local sphere, not so much with national and provincial government. A clear symptom of the malaise is service delivery protests that started around 2004 and have been increasing in violence and numbers since. After two decades, the state does not appear to have the solution. A challenge is diagnosis and planning in a systematic fashion to deal with these challenges. Another problem is lack of a long-term vision and mission for government as a whole, and then for each sphere. A third issue of concern is lack of continuity, with changes every five years. Planning then has a five-year window with adjustments and modifications annually, based on the State of the Nation Address (SoNA), instead of being led by the *National Development Plan*. This approach is replicated at sub-national levels in the “state of the province address” and the “state of the city address”. While provinces and local government must operate within the principles, policies, and priority programmes devised by national government, it does not mean they cannot be innovative as long as they harmonise, integrate, and align their work with those formulated at the national level. However, it is unclear how national priority policies and programmes are developed and allocated to each sphere of government, and how all of them would complement and support each other to implement them to fulfil the requirements of constitutional and statutory prescripts.

There doesn't appear to be any in-depth analysis of the governmental system and how it works (or should work) as a co-operative whole. Quite often, as is currently evident, the blame is laid at local government, without consideration of the underlying or root causes of the problem. No consideration appears to be given to the failure of national and provincial government in meeting their obligations to municipalities – such as support and capacitation. Each minister of CoGTA seems to have different ideas of the challenges facing local government and tackles one or more apparently in isolation. For example, while several reviews of local government or municipalities have been undertaken, these are long on articulating the problems and short of setting out a systematic approach to their resolution. Municipalities constitute one of the three spheres of government and attempting to solve the challenges facing one sphere is a piecemeal approach. Using systems theory, one needs to analyse the whole government system and to

address the root causes (and not the symptoms) of the malaise. History teaches us how one should not repeat past policies (mistakes) but learn from them to plan for the future. The current governmental system is innovative, one not benefiting from centuries of experience in democratic implementation. The structure and mechanisms are experimental, as are the role-players therein. Participatory democracy also is a novelty and poses new challenges. People have to be schooled in governance, including participation in structures and processes, without much financial reward. The *Constitution* and especially the *Systems Act* and the *Municipal Finance Management Act* prescribe many rights, obligations, duties, structures, and processes that municipalities and communities must comply with. This is onerous on both parties, especially in the context of numerous complex statutory and regulatory obligations without adequate knowledge of how to comply therewith. Some of the legislation may have been promulgated in haste for the rapid transformation to society, but many may be regulatory. A review on key legislation passed since 1994 is currently underway.³⁴ Residents, community leaders, and councillors have to be educated in governance and civic responsibilities, as must other stakeholders, like non-governmental-organisations (NGOs), trade unions, community-based-organisations (CBOs), etc.

Challenges facing the three-sphere governmental system are deep-rooted and multifaceted. In order for it to function smoothly as a whole, there is need to learn from systems theory and organisational theory. The governmental system has to be analysed as a whole as well as from the perspective of its different components. Such an exercise does not appear to have been done, or if undertaken by the National Planning Commission, does not seem to have been disclosed. While a thesis cannot undertake such a task, it can address one of the constituent parts – municipal representation as a means to more effective governance in the local sphere of government.

That is problem statement is lengthy is reflective of the many issues that need addressing in the transformation from apartheid era to the kind of democracy envisaged in the *Constitution*. It is also because there needs to be a complete understanding, based on historical underdevelopment

³⁴ ‘Motlanthe appointed to chair legislative review panel’ 19/01/2016, from www.polity.org.za, accessed 21/11/2016; Motlanthe, Kgalema (2016) ‘People’s efforts to travel long distances inspire hope’, Johannesburg: *The Star*, 17/10/2016; Nini, Asanda (2016) ‘Search for ineffectual laws starts’, Johannesburg: *The Times*, 18/08/2016; Smith, Janet (2016) ‘We have plenty of new laws, but are these any good?’ Johannesburg: *The Star*, 17/08/2016; Motlanthe, Kgalema (2016) ‘We’re pausing to assess the lawmaking of the past 2 decades’, Johannesburg: *The Star*, 15/08/2016.

of the majority population, of the innovative three-sphere governmental system functioning, for the first time, on a mutually-beneficial co-operative mode. It is only from an appreciation of such knowledge from which can be identified the gaps and shortcomings of service delivery and based thereon, the promotion of social and economic development by local government biased in favour of the poor. Hence, municipal representation should be contextualised and its role problematised to find an effective system.

Many key questions underlying and informing the research are analysed in this study in order to develop answers that would be helpful in ascertaining an ideal type of municipal representation as well as where and how it could be most effectively made:

- i. The *Constitution* created and entrenched municipalities as a sphere of government.³⁵ This gives them the powers and functions, and concomitantly the status, to operate alongside the national and provincial spheres without the disadvantage of being a (subordinate) creature of statute as in the past. Municipal representation would be facilitated by co-operative governance³⁶ in the three-sphere governmental system. However, given that most municipalities have had very little experience in government, the question is whether they would be accepted as an equal by the national and provincial spheres and work in accordance with the provisions of the Constitution.
- ii. The *Constitution* stipulates that an Act of Parliament “must establish or provide for structures and institutions to promote and facilitate intergovernmental relations”³⁷ based on a foundation and within the framework of co-operative governance. This creates space for municipalities to be a party to intergovernmental relations systems and processes. However, nowhere in this directive did it explicitly envisage any role for an association of local authorities. Hence, these institutions have not been recognised for purposes of co-operative governance but merely to represent the interests of municipalities. Nevertheless, an implied role is indicated in section 41(2)(a) of the *Constitution* which stipulates that Parliament must “establish or provide for structures and institutions to promote and facilitate intergovernmental relations”. The statute in

³⁵ Sections 40(1) and (2) of the *Constitution*.

³⁶ Chapter 3 of the *Constitution: Co-operative Government*, section 41.

³⁷ Sections 41(2)(a) and (b) of the *Constitution*.

question is the *Intergovernmental Relations Framework Act*³⁸ The South African Local Government Association (SALGA) does undertake this function. The *Constitution* even went beyond the norm in most developing countries by prescribing for the recognition of an association for local authorities and its consultation with the national and provincial spheres as well as for representation on the National Council of Provinces (NCoP) and the Financial and Fiscal Commission (FFC).³⁹ This directive makes it mandatory for municipalities to be represented on such institutions, a major advantage. The opportunities opened by this provision should be optimised. It would appear that SALGA has not been able to make full use of section 163(b)(i) of the *Constitution* for it to consult with national and provincial governments. The *IRFA* unfortunately appears to circumscribe such engagement by providing that:

- (a) Organised local government “may” be consulted only when there is a statutory obligation to do so and then only through an “appropriate intergovernmental structure”;⁴⁰
- (b) Organised local government would only have “speaking rights,” for whatever that is worth, if it is not represented in the structure in question that raises a matter impacting on local government;⁴¹ and
- (c) The Premier co-ordinates intergovernmental relations with local governments in a province, and not with organised local government or its provincial affiliate,⁴² but would be by giving a broad interpretation of section 239 of the *Constitution*. The above *IRFA* provisions appear to undermine effective municipal representation but are not unconstitutional as organised local government is not an organ of state in the conventional sense and the constitutional and statutory provisions only entrench their recognition and not their status, autonomy, and other essentialia. Notwithstanding this, since co-operative governance is a constitutional requirement, all structures engaged therein must comply with statutory directives. SALGA is represented on the President’s Co-ordinating Council and on national intergovernmental forums dealing with any local government matter; its provincial affiliate has representation on a Premiers’ intergovernmental forum.⁴³ Hence, there

³⁸ 13 of 2005 (“*IRFA*”).

³⁹ Section 31(1) of the *IRFA*.

⁴⁰ Section 31(2) of the *IRFA*.

⁴¹ Sections 31(1) and (2) and 37(b), respectively, of the *IRFA*.

⁴² Sections 6(1)(h), 10(1)(d), 11(b), and 17(1)(f) of the *IRFA*.

⁴³ Sections 6(1)(h), 10(1)(d), 11(b) and 17(1)(f) of the *IRFA*.

appears to be adequate provision for municipal representation, but this issue is analysed in this study.

- iii. The state has chosen law to facilitate development through rigid prescriptions, such as those in the *IRFA*. These may help, but such an instrument could also circumscribe flexibility and local innovation. This is so, especially in the case of co-operative governance, given that human relations, particularly ethics and morality, cannot be regulated and controlled or conducted through set formulae. Thus, South Africa's unique statutory-regulatory system is a necessary but insufficient mechanism to implement co-operative governance which goes beyond formal compliance with statutory provisions. The result is that South Africa's governmental system is a hybrid model based, to some extent, on compromise at the Congress for a Democratic South Africa (CODESA) deliberations. In trying to cater for a centralised, decentralised and local participatory approach, the *Constitution* may have failed to find the right balance in dividing responsibilities with minimal overlap or formal concurrency among the three spheres of government. Nevertheless, the current model has to be used for an adequately long period before wholesale restructuring could be attempted. Given the uncertainties and *de facto* weaker position of local government in this mix, effective municipal representation becomes crucial so that the needs of municipalities are brought to the fore and taken seriously. The power 'confusion' may create opportunities for local government to step into the breach and motivate for a bottom-up approach to development, such as municipalities' integrated development plans (IDP).
- iv. While co-operative governance and intergovernmental relations would be a mechanism to accommodate and facilitate municipal representation, the status and autonomy of local government alongside that of national and provincial needs to be assessed, would determine to some extent how effective it would be.
- v. Another enabler of municipal representation is the powers and functions of local government. While it may not be possible to clearly demarcate and retain them in a three-sphere governmental system that operates co-operatively, much confusion relating to the perceived lower status of municipalities have been cleared up by the High Courts and the Constitutional Court.

- vi. The objects of local government⁴⁴ appear extensive and daunting. Much can be achieved if national and provincial government fulfil their constitutional duty of strengthening and supporting the capacity of municipalities.⁴⁵ Municipal representatives can play a role in acquiring the requisite commitments and resources.
- vii. Municipalities are constitutionally obligated to deliver on the Bill of Rights to their residents. The *Systems Act* gives effect to many of the recommendations of the White Paper on Local Government, requiring it to be developmental. While residents can enforce their rights against municipalities, they also have civic duties. In such engagement and interaction, municipal representatives can play a facilitating role.
- viii. Municipal representatives can play a major role in safeguarding and promoting human rights and community participation in municipal decision making.
- ix. The type of municipality⁴⁶ has an influence and impact on municipal representation. For example, there is need for co-operation and collaboration between district and local municipalities. Once again, councillors can assist in establishing and maintaining harmonious relations.
- x. The *Constitution* and several subsequent statutes established a complex machinery that helps to facilitate municipal representation. These includes Parliament (the National Assembly and the NCoP) as well as representation on certain bodies.
- xi. The nature of co-operative governance and how it has been practised over a lengthy period in developed democracies would help to ascertain the nature and role of municipal representation and the kind of organisation that can give effect thereto.
- xii. It needs to be ascertained how one of the new institutions established pursuant to section 163 of the *Constitution*, namely an association for local authorities, could play a meaningful role in service delivery by representing municipalities within the framework of co-operative governance.

⁴⁴ Set out in section 152(1) of the *Constitution*.

⁴⁵ In terms of section 154(1) of the *Constitution*.

⁴⁶ Set out in section 155 of the *Constitution* and given effect to by the *Structures Act*.

The extended mandate as well as the constitutional and statutory obligations imposed on local government give rise to the question as to how new structures⁴⁷ can without an objectively proven and sound rationale for their existence and in an era of limited resources, function effectively. This matter is analysed in some detail, as answers thereto may have a major impact on the success or failure of the associations for local authorities. The absence of precedent and experience has adverse implications for the sustainable operation of these institutions at the local sphere in a democratic state, generally, but particularly when co-operative governance is a constitutional and statutory requirement, that is, formalised.

1.3 LITERATURE REVIEW

This literature review is based on and falls within the framework of the structure of the study, namely an examination of municipal representation by councillors, facilitated through co-operative governance and also currently as a collective undertaken by SALGA. It also arises from the topic and the problem statement, and thus could be divided into three distinct but inter-related components, namely the assumption that (a) effective municipal representation should (b) enhance the efficiency of local government in delivering basic municipal services as well as promoting social and economic development, and that (c) an association for local authorities can play a major role in this ideal through collective or consolidated municipal representation on national decision-making bodies.⁴⁸

The point of departure is an examination of the underdevelopment of local authorities in South Africa under the British colonial and apartheid regimes, to reform in the 1990s. This provides the background and context to understanding the current situation faced by many municipalities, that is, service delivery protests, some violent, even where the *Constitution* and several statutes have prescribed various mechanisms and processes for community participation in law-making and municipal administration.

⁴⁷ Particularly those promoting co-operative governance, such as SALGA and the NCoP.

⁴⁸ The literature review is structured largely based on two papers studied, namely Levy, Yair and Timothy J Ellis (2006) *A Systems Approach to Conduct an Effective Literature Review in Support of Information Systems Research*, 9 (2006) *Informing Science Journal*, 181-212, and Bolderston, Amanda (2008) *Writing an Effective Literature Review*, 39 (2008) *Journal of Medical Imaging and Radiation Sciences*, 86-92.

Theories underpinning political representation are presented to provide as a basis for understanding of the general history and of the current electoral and parliamentary system in South Africa.

A review of South Africa's constitutional and statutory provisions as well as mechanisms and processes facilitating municipal representation are presented next, again to highlight the paradigm shift in South Africa where historically local authorities functioned under provincial ordinances to being established by the *Constitution* as a sphere of government. A comparative study of co-operative governance incorporating local authorities and their representation is undertaken to provide lessons for South Africa, concluding with a review of SALGA as a municipal representative organ.

The focus of this study is municipal representation in South Africa, a topic of considerable current interest as evinced through the debate as to whether the Republic's political leaders practice responsible government through being accountable to the people, or serving party interests. This situation has dire consequences at the municipal level through possible politicisation of service delivery. Given the topic, the literature has to be selective so as not to become too generalised and attempt to ask and answer questions not directly relevant.

Explanation is provided on reasons for selecting literature and its possible contribution to answering the problem statement. This arises from use of argumentation where a claim is made and reasons or warrants therefor are proffered, based on evidence, that answers questions raised or claims made. Another way of saying this is to make a proposition based on evidence arising from the literature, provide an explanation of such warrant and use this to make a claim that is backed up by the data.⁴⁹

Literature more relevant to the thesis topic are reviewed and analysed where appropriate in the body of the thesis and not hereunder.

Understanding the history and evolution of local authorities and political representation in parliament from medieval times may aid in appreciating South Africa's current governmental situation. To this end, literature reviewed includes a brief history of parliament with a short

⁴⁹ Levy and Ellis, *op cit*, 201-202.

introduction to the rule of law, English constitutionalism, and parliamentary representation in England.

- *A Short History of Parliament* by the Parliamentary Education Office, Australia, www.peo.gov.au.
- MacPhail, IMM (1967) *An Introduction to the British Constitution*, London: Edward Arnold; O Hood Phillips (1967) *Constitutional and Administrative Law*, 4th Edition, London: Sweet & Maxwell.

The understanding of the English parliamentary system and conventions arising from common law is important for an understanding of the situation in present-day South Africa, given the Constitutional Court's judgment on the Nkandla matter,⁵⁰ and current moves to unseat the President by secret ballot.⁵¹

Local authorities in South Africa as creatures of statute functioned as the lowest level in a three-tier hierarchy from the first European settlement of the Cape of Good Hope by Jan van Riebeeck in 1652, to the coming into effect of the Interim Constitution and the *LGTA*. An appreciation of the history, framework, and context of the evolution of local government in the Republic provides the foundation for an appreciation of present-day difficulties in municipal representation. The history of underdevelopment of local authorities in South Africa is gleaned largely from the following texts:

- Hall, RJ (1928) *An Historical Introduction to Civics*, London: Longmans, Green & Co. This text is relevant to an understanding of the importance of community participation in government, facilitated by the *Constitution* and particularly the *Systems Act*⁵² and the *Electoral Act*.⁵³
- Macmillan, WA (1917) *The Place of Local Government in the Union of South Africa*, Johannesburg: Hortor.
- Green, LP (1957) *History of local government in South Africa: An introduction*, Cape Town: Juta.

Macmillan and Green specifically address the evolution of local authorities based on the British governmental system as applied in the Cape and Natal colonies and later to

⁵⁰ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

⁵¹ See footnote 17.

⁵² *Local Government: Municipal Systems Act*, 32 of 2000, as amended.

⁵³ 73 of 1998, as amended.

South Africa. Not much literature is available on local government in South Africa and these texts provide the necessary history and context to understanding the situation in present-day municipalities.

- Davis, Gordon, L Melunsky and FB du Randt (1959) *Urban Native Law*, Port Elizabeth: Grotius Publishers.

This text is one that provides an overview of the situation with respect to urban blacks and is necessary to understand the underdevelopment of the majority race group. It makes for required reading when attempting to understand the rationale behind the founding provisions of the *Constitution* and of its Bill of Rights.⁵⁴

Much of South Africa's legal system had been modelled on English and Roman-Dutch structures, policies, and processes, as depicted in the following texts:

- Hahlo, HR and Ellison Kahn (1960) *The British Commonwealth: The Development of its Laws and Constitution – Vol. 5: The Union of South Africa*, London: Stevens.
- Hosten, WJ, AB Edwards, Francis Bosman and Joan Church (1995) *Introduction to South African Law and Legal Theory*, Durban: Butterworths.

The situation of local authorities during the first Republican era (1961 to 1994) can be ascertained from the following texts:

- Cloete, JNN (1982) *Central, Provincial and Municipal Institutions of South Africa*, Pretoria: JL van Schaik; Craythorne, DL (1993) *Municipal Administration: A Handbook*, 3rd Edition, Cape Town: Juta; and Cameron, Robert (1995) 'The History of Devolution of Powers to Local Authorities in South Africa: The Shifting Sands of State Control', *Local Government Studies* 2(3), 396-417;
- Hofmeister, Wilhelm and Ingo Scholz (Eds) (1997) *Traditional and Contemporary Forms of Local Participation and Self-Government in Africa*, Johannesburg: KAS.

These texts set out the situation of historical local authorities to present-day municipalities. They serve to highlight how local authorities were structured as subordinate organs of state providing basic municipal services on the basis of race and class, to the complex municipality undertaking those functions on an equal basis while promoting social and economic development, biased in favour of the poor.

⁵⁴ Sections 1 and 3, and sections 9-35, respectively, of the *Constitution*.

The political transition that began in 1990 was largely the product of locally and nationally constituted social movements driven by organised workers, students, youth, professionals, women, and urban residents, led by the United Democratic Front, established in 1983. Due to South Africa's repressive regime supported by its draconian laws, it was only from then that large scale organised social movements could make a decisive impact on the structures, policies, and strategies of the state and mainstream economic institutions.

With neither reform from above nor revolution from below being distinct possibilities, attempts began to be made from the mid-1980s onwards to find negotiated solutions. ...it was sustained mass action that tended to have a more decisive effect.⁵⁵

A brief overview of the phased reform of local government from 1993 initiated by the Interim Constitution and the LGTA serves to introduce the (1996) *Constitution* establishing a unique three-sphere governmental system contemplated to work in co-operative rather than in a hierarchical manner. The following texts are consulted:

- Seidman, Ann and Robert B Seidman (1994) *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World*, New York: St Martin's Press;
- Atkinson, Doreen (1998) 'Local government in intergovernmental relations: Towards co-operative governance?' in Electoral Institute of South Africa: *From a tier to a sphere – local government in the South African constitutional order*, Sandton: Heinemann, 16-31;
- Pimstone, Gideon (1998)(a) 'Local Government: Constitutional Foundations' in Khoza, Meshack and Yvonne Muthien, *Regionalism in the New South Africa*, Aldershot: Ashgate, Chapter 9: 131-170;
- Pimstone, Gideon (1998)(b); 'The constitutional basis of local government in South Africa' in Electoral Institute of South Africa: *From a Tier to a sphere – local government in the South African constitutional order*, Sandton: Heinemann;
- Gordhan, Pravin (1999) 'Co-operative Government: A New Order for a New Nation' in Maharaj, Gitanjali (ed) *Between Unity and Diversity: Essays on Nation-Building in Post-Apartheid South Africa*, Cape Town: Idasa, 199; and
- Various publications by CoGTA and SALGA as well as High Court and Constitutional Court cases.

⁵⁵ Swilling, Mark (1997) 'Building Democratic Urban Local Government in Southern Africa' in Swilling, Mark (Ed) *Governing Africa's Cities*, Johannesburg: Wits University Press, 211-273.

Co-operative governance and intergovernmental relations is an innovation in South Africa, given that government was highly centralised with local authorities functioning under provincial ordinances. The *Constitution* and various statutes emanating therefrom are analysed, along with literature thereon. Co-operative governance may be the *sine qua non* for municipal representation and this subject is addressed in the study.

The current position of municipalities introduced by their history is depicted in:

- Cloete, JJN and C Thornhill (2005) *South African Municipal Government and Administration: The New Dispensation*: Dotsquare Publishing;
- Thornhill, C and JJN Cloete (2005) *South African Municipal Government and Administration*, Second Edition, Dotsquare Publishing; and
- Craythorne, DL (2006) *Municipal Administration: The Handbook*, Sixth Edition.

It is, furthermore, necessary to ascertain the powers and functions, and concomitantly the status of local government, as such an analysis could indicate what is permissible under the present system and how it could be supplemented and complemented with additional provisions to enhance local government effectiveness. Consideration of some literature on the subject could provide convincing arguments for and against the present system and suggestions for improvement. Analyses of certain High Court and Constitutional Court judgments provide clarity where there were ambiguities in the past. In this search, the opportunities, mechanisms and processes for municipal representation within the framework of co-operative governance are examined. Some of the literature are aimed at students and thus are largely a depiction of the constitutional and statutory provisions applicable to local government and as such have little or no analysis.

Writing largely on national-provincial executive intergovernmental relations in 2004, Mathebula argues that –

The limited availability of existing theory and therefore specific text material on IGR in South Africa created a reliance on primary information available at and from the South African government.⁵⁶

Twelve years later the situation remains largely the same. There is a dearth of material on co-operative governance in the local sphere since most literature deals with national-provincial

⁵⁶ Mathebula, Fortunate Mashebu (2004) *Intergovernmental relations reform in a newly-emerging South African polity*, unpublished DAdmin thesis, University of Pretoria.

relations, and a major part of discussions therein relate to structures established for intergovernmental relations prior to the promulgation of the *IRFA*. There is even less on organised local government, particularly SALGA. Hence, only a few recent studies relevant to the topic are mentioned below. The researcher could find little or no literature on municipal representation in South Africa; hence this thesis fills a niche.

A few studies largely addressing national-provincial governmental relations are mentioned insofar as they may be relevant for this study. Reference is made to the following texts relating or relevant to local government:

- i. Bekink, Bernard (2006) *The Restructuring (Systemization) of Local Government under the Constitution of the Republic of South Africa, 1996*, unpublished LLD thesis, University of Pretoria.

“Spanning over 22 chapters [in 730 pages], this work covers almost all legal aspects of the new local government dispensation”. As such it is a source of handy reference due to the detail and span of the study. The relatively short Chapter 9 titled: *Local government within a system of co-operative governance*, provides some useful insights. The value of the thesis is enhanced by its publication in 2006 as *Principles of South African Local Government Law*, Durban: Lexis-Nexis. Bekink’s text is referred to extensively in this study. However, in some instances, it is largely addressing the principles of law pertaining to local government. As such, it describes and discusses the *Constitution* and various statutes addressing the developmental duties of local government, intergovernmental relations, municipal powers and functions and service delivery. Municipal representation is dealt with only cursorily.

- ii. Shaidi, Elisante Walter (2013) *Investigation into Causes of Service Delivery Protests in Municipalities: A Case Study of Nelson Mandela Bay Municipality*, unpublished DPhil thesis, Nelson Mandela Metropolitan Municipality.

This thesis was reviewed to ascertain whether there was a link between (poor) municipal representation and service delivery protests in the Nelson Mandela Bay Metropolitan municipality. The hypothesis was that municipalities could render services effectively if certain shortcomings were addressed. This includes poor public participation and inadequate consultation, corruption, political infighting, poor intergovernmental relations, low youth unemployment, and low capacity of municipalities. The protests were largely based on the lack of or slow pace of service delivery rather than a

mysterious ‘Third Force’. Other causes were poor governance, unfulfilled election promises, and a “complex, onerous and inhibiting legislative environment that governs service delivery”. Municipal representation as a mechanism to enhance service delivery was not addressed, and hence Shaidi’s work does not adequately address this issue and there is no need to analyse this literature further.

- iii. Mathenjwa, Mbuzeni Johnson (2013) *The Supervision of Local Government: Application of the Legal Framework*, unpublished LLD thesis, Pretoria: Unisa.

While this study addresses provincial intervention in local government in terms of section 139 of the *Constitution*, it contains information relevant to this thesis. These are the history, status, powers, functions and objectives of local government in South Africa, co-operative governance and intergovernmental relations, establishment of municipalities and their developmental duties, and public participation in the business of local government by communities. Of significance to this study is the section titled, ‘The status and the role of organised local government bodies in the NCoP.’

- iv. Woolman, Stuart and Michael Bishop (2014) *Constitutional Law of South Africa*, Second edition, Cape Town: Juta.

This subscription service in five volumes analyses the *Constitution* and its Bill of Rights in considerable detail. As such, it is a source to turn to on local government law.

- v. Steytler, N and Jaap de Visser (2012) *Local Government Law of South Africa*, Durban: LexisNexis.

This text, in seventeen chapters, provides a full analysis of local government, from its ‘development’, establishment of municipalities, governance structures, electoral system, powers and functions, community participation, integrated development planning, municipal services, administration, revenue and expenditure, and local government in co-operative governance. It is thus a most useful source of reference.

- vi. Van Donk, Mirjam, Mark Swilling, Edgar Pieterse, and Susan Parnell (Eds) (2008) *Consolidating Developmental Local Government: Lessons from the South African Experience*, Cape Town: Isandla Institute.

This text deals with the developmental duties of local government and serves as a useful guide for socio-economic development by municipalities.

- vii. Currie, Iain, Johan de Waal, Law Society of South Africa (2013) *The Bill of Rights Handbook*, Cape Town: Juta.

Municipalities are in the forefront of delivering on the prescripts in the Bill of Rights in the *Constitution*, particularly sections 24 (environment), 25 (property), 26 (housing), 27 (health care, food, water, and social security), 28 (rights of children), 32 (access to information), and 33 (just administrative action). The duties of local government with respect to these rights and insofar as they relate to municipal representation are analysed in conjunction with some publications of the South African Human Rights Commission (SAHRC), namely:

- (a) Investigative Report Volume 7 (2015); and
- (b) Annual Report 2015.

- viii. Du Plessis, Anel (Ed) (2015) *Environmental Law and Local Government in South Africa*, Cape Town: Juta.

This text deals substantially with environmental law in 26 chapters, setting out in comprehensive detail the major role that local government can play in this field. It highlights the considerable responsibilities of municipalities to fulfil its extensive duties and to be the custodian of the environment for future generations. An appreciation of such responsibilities could assist municipal representatives in determining how they should educate themselves to care for the most vulnerable. While Du Plessis sets out in considerable detail the vast amount of responsibilities of municipalities in delivering on environmental rights,⁵⁷ it does not address municipal representation as a means of enhancing and protecting such rights. Hence, this text is not analysed in this thesis.

- ix. De Visser, Jaap (2005) *Developmental Local Government: A Case Study of South Africa*, Antwerp: Intersentia.

This work argues for and against decentralisation in South Africa, defines ‘developmental’ local authorities, powers, functions, status, supervision of and co-operation in local government. De Visser proposes an institutional model for developmental local government, arguing that this expanded role creates challenges and opportunities for municipal representation.

⁵⁷ Set out in section 24 of the *Constitution*.

The bulk of the literature reviewed is made up of the *Constitution* and several subsequent articles and statutes, set out in the bibliography. Where applicable, literature on the constitutional-statutory-regulatory provisions is analysed, insofar as providing insights on the operations of local government generally and particularly on municipal representation. There does not appear to be many contradictory views but those that are relevant are further analysed. The above literature review is undertaken to indicate the place and role for municipal representation and in the search for opportunities for this function.

The research examines the implementation of municipal representation from the time of establishment of SALGA in 1997, to date. This is undertaken through reviews by CoGTA and other bodies which are analysed to the extent relevant to municipal representation. Unfortunately, most if not all studies in South Africa deals with intergovernmental relations, as opposed to co-operative governance, within South Africa only. This is a limitation, as much attention is given to project implementation rather than local government representation. Furthermore, in a globalising and rapidly-changing world, co-operative international intergovernmental relations may be beneficial to improved service delivery through sharing of knowledge with foreign municipalities. This issue is addressed briefly through a review of municipal international relations.

An overview of local government representation, mostly through associations for local authorities, is undertaken using models employed in the United Kingdom, Germany, Austria, Belgium, France, Sweden, Denmark, Canada, and the United States of America. This is for comparative purposes and to draw therefrom lessons of experience for South Africa. Insofar as it relates to local government, there is a considerable amount of literature on its constitutional establishment in a three-sphere system, status and autonomy, powers and functions, co-operative governance, objects, rights and developmental duties, establishment of municipalities, and participatory local democracy. There is also sufficient data on the mechanisms and processes facilitating municipal representation, such as Parliament and the NCoP, as well as structures established by municipalities. There may be a surfeit of reviews and analyses of South Africa's innovative and therefore experimental governmental system, particularly the enhanced comparative role of local government. In the process, there could be much repetition and perhaps also contradictions. Academic and intellectual literature may be of little help to the practitioner struggling, to use a cliché, at the coalface. As Shaidi (2013) has said that South Africa has a “complex, onerous and inhibiting legislative environment that

governs service delivery”, let alone municipal governance. Much time and effort could be spent by practitioners in understanding the plethora of laws to ensure compliance while leaving less time and energy for promoting social and economic development through service delivery, especially to the poor and under-represented.

There is, however, a dearth of information on municipal representation *per se*, as well as on monitoring, evaluation and reporting on intergovernmental relations especially on local government’s involvement therein, achievements and failures since 2000, and the way forward. The enhancement of local government effectiveness through attainment of greater municipal efficiency is not adequately addressed in the literature. Neither is the role that municipal councillors can play in this function, alongside the administration, particularly in being an effective voice for the poor to ensure that national and provincial policies are based on and responsive to their needs through educated and strong local participatory democracy. This study fills that gap in the body of current knowledge, although much more work is required in this field. This lacuna has manifested itself through service delivery protests and the crisis of leadership, particularly of the executive.

1.4 RESEARCH METHODOLOGY

1.4.1 NATURE OF THE STUDY

The nature of the study calls for qualitative research which is seen as an interdisciplinary, trans-disciplinary and sometimes counter disciplinary field as it cuts across humanities and the social sciences.⁵⁸ This approach is capable of incorporating the disciplines of law, public and municipal governance and administration, social and economic development, and co-operative government, including intergovernmental relations and within such context, municipal representation. In such a study, it has been stated⁵⁹ that qualitative researchers do not start with a theory but rather to generate it from the data upon which it is grounded, with the aim of achieving an understanding of how the phenomena work.⁶⁰ It has also been suggested that the aim of the qualitative researcher is to describe and understand events “within the concrete,

⁵⁸ Ile, Isioma Uregu (2007) *A public administration approach to managing intergovernmental relations system in the governance of the state: A case review of Nigeria and South Africa*, Unpublished PhD thesis, University of Pretoria, 36.

⁵⁹ By Woods, P (2006) *Qualitative Research*, www.edu.plymouth.ac.uk, accessed 28/10/2015.

⁶⁰ *Ibid.*

natural context in which they occur”.⁶¹ Only if one appreciates events against the background of the whole context, and additionally how, in turn, such context confers meaning to the event concerned, that “one can truly claim to ‘understand’ the events”.⁶² The current research informs, and is informed by, local government programmes and projects that could be enhanced by co-operative governance and through participation by associations for local authorities. The study involves the integration of, relations between, and use of different theoretical and conceptual approaches and contexts that are outlined, and arguments justifying their use are set out. While the topic is municipal representation and as such relates to political science, public and municipal administration, and perhaps other disciplines, the research has a bias in law and its role and influence in local government representation.

1.4.2 RESEARCH DESIGN

The research is to some extent descriptive as it has been said that most qualitative studies “do not go beyond the construction of models and typologies, and that this ordered, descriptive detail is a perfectly legitimate pursuit.”⁶³ The qualitative research explores appropriate foreign national, regional, and local intergovernmental relations for comparative purposes and a guideline, as well as South African legislation as an enabling mechanism for municipal representation. This study continues with analysis of the establishment and operation of associations for local authorities in the promotion and maintenance of co-operative governance. Such review and analyses form the background and context to the focus of the study, namely municipal representation, which is investigated in depth. The nature of the research problem influences the research design. The descriptive part is to some extent based on observations made during the researcher’s long working experience in local government which, with the available literature, facilitates exploration and in-depth analyses of the topic, enabling a focus on municipal representation. Qualitative research, unlike quantitative research, does not allow one to determine choices and actions nor provide a step-by-step plan. Apart from existing theory and research, results of pilot studies or preliminary research, and experiments, one of the sources for constructing a theoretical framework or conceptual context is the researcher’s

⁶¹ Babbie, Earl and Johann Mouton (2001) *The Practice of Social Research*, Oxford: Oxford University Press, 272.

⁶² *Ibid.*

⁶³ Maxwell, Joseph A (2005) *Qualitative Research Design: An Interactive Approach*, www.engin.umich.edu/research/maxwell, accessed 26/09/2016.

experience and technical knowledge in local government.⁶⁴ This approach accommodates a degree of flexibility whereby the researcher is able to collect information that is open-ended. It also enables the unravelling of a research problem by uncovering insights into the phenomena rather than test specific predicts. Formalism, as adopted by South Africa, tends to focus primarily on governmental institutions, their legal norms, rules and regulations, as well as on political ideologies.

In the field of co-operative governance and intergovernmental relations in particular, the emphasis should be on human behaviour and the interactions between and among persons and the performance of the several role-occupants. This is because the harmony of the constituent parts of the system hoped for in the design of policies and implementation mechanisms may not materialise. In co-operative governance, the relationship is one of engagement, interdependence and interaction, which results in a situation that is far from harmonious or stable. It is thus the task of the researcher to “ascertain how change in any one of the parts of a political system affects other parts and the whole.”⁶⁵ In South Africa, the design of policies and systems is a distinctive national function, although citizens are allowed to make inputs through the National Assembly, the NCoP and through their municipal council processes. Hence, municipalities have little part in their formulation or design, save for SALGA making inputs on the legislative process in the NCoP and through CoGTA, but are required to implement them. This may be a cause of dissatisfaction among local communities. Legislation cannot prescribe and ensure human behaviour. Therefore, intergovernmental relations are fraught with tensions. Thus, the study has two main components: the structures designed to give effect to policies, and the behaviour of role players who execute them. Hence, observation and description facilitates analysing and understanding the patterned conduct and social processes of society. This approach enables the search for a practical model of municipal representation.

1.4.3 USE OF HISTORICAL SOURCES

This study covers, in synopsis form, the period from the earliest form of municipal government through parliamentary representation by local authorities in medieval England. This serves as a foundation to facilitate an understanding of South Africa’s local government history from

⁶⁴ Almond, Gabriel A and G Bingham Powell, Jr. (1978) *Comparative Politics: A Developmental Approach*, Boston: Little Brown, 3; 12-13.

⁶⁵ *Ibid.*

1652 and much later to representation based on race and class. It also sketches the history of local government reform from 1993 through the recognition of and establishment of organised local government in 1997, to the present. Since co-operative governance largely involves interactions within and amongst institutions, and the roles of those responsible for the interactions, an understanding of them through observation forms the background to this study. In examining the governmental system and its constituent parts, the “main problem could be divided into sub-problems”⁶⁶ for logical identification and assessment of developmental solutions. This also serves to provide a rational and logical explanation of events or situations in society and to facilitate a better understanding of human or social interactions.⁶⁷

Historical events have already occurred; therefore, the researcher cannot directly observe them. However, their study, description, interpretation, and analyses enable one to better understand the current situation and perhaps to predict emerging issues as they will to some extent be influenced by events and behaviours of people in the past. History facilitates a better understanding of the context, which, in turn, enables a deeper insight into the issue at hand. This is logical in the sense that human activities cannot be disassociated from their context. The historical information has been gathered from several sources.

Primary information sources, that is, government publications, have been used to a large extent to ensure validity and minimise errors. The nature of many of these documents is such that they have to be carefully analysed to verify their ‘authenticity’ and to find what have been left unsaid. Where necessary, secondary sources are utilised, with the same cautionary approach. While the researcher has used his observations based on his employment in local government and related institutions, no interviews or questionnaires have been employed.

1.4.4 CONSTRAINTS

The research is somewhat hampered by the following constraints:

- (a) Except for the Western Cape, provinces do not have constitutions, which could have provided for greater clarity on their roles *vis-à-vis* municipalities located therein, indicating what is permissible and what is not;

⁶⁶ Brynard, PA and SX Hanekom (1997) *Introduction in research in Public Administration and related academic disciplines*, Pretoria: JL van Schaik, 4.

⁶⁷ Brynard and Hanekom (1997), *op cit*, 6.

- (b) The complexities of the legal arrangements may in some cases be beyond the grasp of councillors and officials;
- (c) There had been no policy or legislation enacted to give effect to the constitutionally-imposed general development mandate for the local sphere, particularly the economic development imperative, until, to some extent, the appearance of the *National Development Plan*, while the *Systems Act* appears to be overly-prescriptive and the *Municipal Finance Management Act* highly regulatory to ensure local government compliance;
- (d) There was no policy or legislation providing for the establishment and functioning of institutions nationally and within the provinces for the promotion and monitoring of co-operative governance, until the promulgation of the *IRFA* on 15 August 2005; and
- (e) There is a dearth of research on formal, legally-constituted policies, strategies, structures, and procedures for the promotion of co-operative governance generally, and especially that pertaining to the local level, and specifically for municipal representation.

Research indicates that the drafters of the *Constitution* were strongly influenced by the German Basic Law and certain concepts therein.⁶⁸ Provisions for the formalisation of institutions and procedures for municipal governance and intergovernmental relations in South Africa have been largely based on German practice, albeit taken much further. The question arises as to whether such models are appropriate, given the vast differences, in many respects, between Germany and South Africa. Foreign good practices are generally unavailable for situations where the responsibility for municipal representation within the framework of co-operative governance rests with formally-constituted associations for local authorities, as most are voluntary organisations. However, their approach could have persuasive authority. Hence, it may be fruitful to identify other models for intergovernmental relations at the local level, and

⁶⁸ See generally publications by the Konrad Adenauer Stiftung, and particularly the occasional papers by Bertus de Villiers (1993) 'Intergovernmental Relations: Guidelines for South Africa'; (1994) 'Intergovernmental relations: the duty to co-operate: a German perspective' *SA Publiekreg/Public Law* 430-437 (1995) '*Bundestreue*: The soul of an intergovernmental partnership'; (1997) 'Local-provincial intergovernmental relations: A comparative analysis'; (1999) 'National-Provincial Co-operation –The Potential Role of Provincial Interest Offices: The German Experience'; (2008) *Review of provinces and local government in South Africa: Constitutional foundations and practice* 59-82; De Villiers and Jabu Sindane (2011) *Co-operative Government: The Oil in the Engine*, Policy Paper 6 and (2012) 'Codification of Intergovernmental relations by Way of Legislation: The Experiences and Potential Lessons for Young Multitiered Systems', *Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht*, 671-694.

to assess their successes and failures and, therefore, the likelihood of their replicability in South Africa, as a basis for municipal representation.

1.4.5 LIMITATIONS OF THE STUDY

The purpose of setting out the scope and limitations of the study is to maintain focus, with the understanding that the challenges facing municipalities are multi-faceted, deep and wide, and all cannot be addressed in this study.

The history of local government and therein municipal representation on the basis of race is well documented, as is its failure in this country. Much of the literature addresses the shortcomings or symptoms of the malaise, without seeing it within the context of present-day South Africa and its innovative governmental system. Hence, local government cannot be studied in isolation, especially in “one, sovereign, democratic state”⁶⁹ with nine provinces. However, to keep the research within acceptable limits, the historical aspects pertinent to the study are kept to a minimum as this is amply recorded.

The subject of socio-economic development at the local sphere is a large and complex one. Due to local authorities functioning as service delivery rather than policy formulation institutions, much of their work is of a practical nature and largely undocumented. Most available research is based on national-provincial relations and a large part of them is by academics, not practitioners. Notwithstanding that there is not much literature available, it is necessary to keep the study targeted and focused: Hence a degree of selectivity is essential. This is not to say that the large number and variety of other topics or issues are irrelevant to, or do not impact on, the subject matter. To incorporate the many important considerations, however, would make this work large and somewhat generalised. This is because the numerous issues that influence co-operative governance generally and at the local sphere in particular in sufficient detail to do justice, are really of a nature suitable as topics for individual dissertations and theses in their own right.

The South African “developmental state” is little more than transient jargon at this juncture and is therefore not analysed in detail, except insofar as it relates to municipal representation.

⁶⁹ Section 1 of the *Constitution*.

Although the institutions and practices in select foreign states are researched for lessons of experience, only a limited comparison is made between them and present mechanisms in South Africa through an overview of the implementation of the *IRFA*.

Co-operative governance in the provinces is not reviewed in detail, since intergovernmental relations do not appear to have been undertaken in a structured and systematic manner by them prior to the promulgation of the *IRFA*, and also because there is already much documented material.

The role of provincial government in municipal development and co-operative governance is discussed summarily and only insofar as they influence and impact these fields at the local sphere in relation to municipal representation. This is because to date there is little empirical evidence of such leadership, capacitation, monitoring, and oversight role in South Africa or of successful projects. There has already been much literature on the subject, albeit most describing structures and processes. However, this subject is examined where it influences or impacts on municipal representation.

The financial and fiscal aspects of local government operations, and intergovernmental relations related thereto, are important but vast subjects that cannot be dealt with in this research. Where relevant to municipal representation, brief references are made to such issues.

In one sense, local government is part of the public service, but legally at present in South Africa, it is not. This means that municipal officials are not subject to public service legislation and personnel do not fall within the jurisdiction of the Department of Public Service and Administration. However, they have to abide by the basic values and principles governing public administration.⁷⁰ While corporate governance and public service reform is currently underway alongside numerous other important restructuring and transformation exercises, this subject is too large to incorporate in this study, although it will have an influence and impact thereon.

The thesis presents data as depicted in the outline of chapters.

⁷⁰ Sections 195(1) and 2(a) and (b) of the *Constitution*.

1.5 OUTLINE OF CHAPTERS

The thesis title is *Municipal representation within the context of co-operative governance in South Africa: The place and role of organised local government*. The study would then have to analyse municipal representation, local participatory democracy, municipal and community members' respective rights, duties and obligations, service delivery, associations for local authorities (organised local government), and their role in municipal representation in the interests of efficient service delivery.

2: HISTORY OF LOCAL GOVERNMENT DEVELOPMENT AND UNDERDEVELOPMENT IN SOUTH AFRICA

The background to the study is depicted through setting out the early history and underdevelopment of local government in South Africa; early 'reform' of South African local government; 'reform' of local government in 1980s South Africa; reform of local government in 1990s South Africa; and lessons from South Africa's history of local government.

3: THE THEORIES, CONCEPT AND HISTORY OF REPRESENTATION

In this chapter systems, organisational, and conflict theories are reviewed to ascertain how they underpin and inform the design of systems, such as South Africa's three-sphere governmental enterprise. This is followed by the theory and concept of political representation. Next the history of representation is presented to show the evolution of municipal government and representation of local communities in Parliament. This provides the necessary background and context for understanding present-day municipal representation.

4: THE FOUNDATION, FRAMEWORK, CONTEXT AND MECHANISMS FACILITATING MUNICIPAL REPRESENTATION IN SOUTH AFRICA

Municipal representation based on and within the context of formalism, including use of formalism outside of an informing and directive systems theory; the origin of the mandate and the framework for municipal representation; constitutional and statutory provisions on local government, including: analysis of the three-sphere governmental system; status of municipalities in the multi-sphere government system; objects of local government; powers and functions of municipalities; establishment of municipalities; the electoral system; developmental duties of municipalities, obligations arising from the extended mandate, and the

implications in a local state that at this juncture faces numerous and complex challenges, a legacy of colonialism and apartheid; participatory and representative local democracy; and High Court and Constitutional Court interpretations on the above issues.

5: MECHANISMS AND PROCESSES FACILITATING MUNICIPAL REPRESENTATION IN SOUTH AFRICA

This is an extension of Chapter 4. Here the following topics are analysed insofar as relevant to municipal representation: an overview of Parliament, the NCoP, and municipal representation therein. It also examines municipal representation on the Financial and Fiscal Commission, the *Division of Revenue Act*, and in national, provincial, and traditional leadership mechanisms. This chapter reviews the instruments available for representation in the local sphere, such as submissions, petitions, and electoral reform. Finally, representation on a municipal council and its several committees are examined.

6: MUNICIPAL REPRESENTATION WITHIN THE FRAMEWORK AND CONTEXT OF CO-OPERATIVE GOVERNANCE: A COMPARATIVE REVIEW

This chapter sets out the background and challenges as well as the nature and content of co-operative governance and its application. It analyses the approach in the United Kingdom, Germany, Austria, Belgium, France, Sweden, Denmark, Canada, the United States of America, and in the developing world, setting out the lessons of experience from such states. Municipal international co-operation is reviewed and finally co-operative governance lessons for South Africa is depicted.

7: MUNICIPAL REPRESENTATION IN SOUTH AFRICA

Associations for local authorities are reviewed and compared, with some detail of their design and operation in Germany and Sweden as a means to differentiate them from SALGA. The constitutional-statutory framework for municipal representation is analysed through a review of the *Organised Local Government Act*⁷¹ and its provisions for recognition of associations for local authorities, their participation in the NCoP, the FFC, and consultation with the other two spheres of government are analysed to ascertain what room has been created for municipal representation and what other potential opportunities may exist or could be created for local government interests to be promoted or enhanced on these bodies.

⁷¹ 52 of 1997.

A review of SALGA is undertaken wherein its background, mandate, role, structures, processes, strategies, objectives and performance are examined within the context of developmental local government. The need and desirability of organised local government is analysed, with the approach of SALGA compared with that of the South African Cities Network.

8: CONCLUSION

This chapter concludes the study and makes a case for municipal representation. It highlights the issues researched and addressed and shows the existing and potential opportunities for municipal representation. Finally, it proposes a model for this function.

CHAPTER 2

HISTORY OF LOCAL GOVERNMENT DEVELOPMENT AND UNDER-DEVELOPMENT IN SOUTH AFRICA

2.1 INTRODUCTION

The current crisis of local government, largely caused by poor service delivery, could be attributed, *inter alia*, to municipal inefficiency. The present situation could to a considerable degree be the result of systematic underdevelopment of the majority of the population and the local authorities that ‘served’ during three centuries of colonial-apartheid rule. Given the institutionalisation of race-based policies and practices, it is no wonder that present-day political representatives and administrators lack the knowledge they could have gained through experience of democratic government based on the values and principles expressed in the *Constitution* during this period. In order to appreciate the current nature and operations of municipalities, it is necessary to understand the history of local authorities and how such ‘development’ has influenced and impacted on the way municipalities are functioning at present. Local underdevelopment, by design, is manifest today by poor service delivery, little or no local economic development, and generally poor performance by municipal representatives and administrations.

This chapter sets out the historical ‘development’ of local authorities in South Africa. While most of what follows is descriptive, it serves to provide the requisite background to assist in ascertaining, *inter alia*, the following:

- i. Whether the governmental system and the colonial-apartheid state’s policies and practices had beneficial and/or adverse influence or impact on the present local government situation;
- ii. Whether there were gaps or missing ingredients that could today help in improving the efficiency of municipalities through learning from good and bad practices;
- iii. Whether examination of the history of local authorities enables one to ascertain the contribution of municipal representation and how shortcomings could now be addressed by the local sphere of government; and

- iv. Whether the historical ‘development’ of local administration has shown the need, desirability, and potential role of associations for local authorities in contemporary municipal governance.

The brief view below serves to determine the correctness of the assertion that the nature, status, powers, role and functions of local authorities, the lowest-level administration in a three-tier hierarchical system, coloured and negatively influenced and impacted on the present-day situation of municipalities.

2.2 HISTORICAL OVERVIEW OF LOCAL GOVERNMENT DEVELOPMENT

2.2.1 TRADITIONAL SOCIETIES AND THE ANCIENT CITY STATE

Local administration preceded national governments: South Africa is no exception. Hence, it would be helpful to trace the history of municipal governance for an understanding of the current situation. Hall (1928) defines civics as the rights and duties of human beings who live in a political society, such as in a city, a province, or a state. He states that while politics is the “business of government,” with the politician being concerned with the “control and management of people living together in a political society”, civics, the science of citizenship, is the business of those who are governed.¹

In describing the origins of the city state, Hall (1928) asserts that, “In wandering pastoral communities, such as were the Hottentots, there was no division of the land.” He adds that uncultivated land had no value but the grass on it had, as cattle constituted the chief wealth. Increase in population concomitantly resulted in decrease in ability of old grazing grounds to support people and their livestock, compelling migration and occupation of fresh ground. An alternative was to develop new and better methods of obtaining a livelihood from the old settlements. This meant a move from the nomadic lifestyle to one of cultivation as a means of securing a subsidiary food supply.² He adds a description of the system of the Bantu will help interest of his people as a whole. He was the protector of the tribe against the individual selfishness of those within the tribe.³

¹ Hall, RJJ (1928) *An Historical Introduction to Civics*, London: Longmans, 3.

² Hall (1928), *op cit*, 30-31.

³ *Ibid.*

Hall (1928) states that in Europe, people lived in villages similar to a Zulu kraal, with their clans and tribes, based on blood relationships. No state as in the contemporary sense existed until these villages expanded to cover a large area. He adds that the growth of the city state in Greece, particularly that of Athens, “illustrates the change from the state based on kinship to the Civil State”. According to Hall (1928), Athens originally consisted of several separate villages located over a large area, each inhabited by kinship groups. Villagers met periodically at a convenient central place for festivals, trade, religious sacrifices, or settlement of disputes. The site, devoid of dwellers, became the location of the temple, market, courts, and the common assembly of the federated clans and family groups. These now large villages became contiguous and spread outwards, becoming a united whole. The kinship lines of the original clan-based villages blurred and they became what are known today as wards. With its large population, the city, then, was a place of refuge and a venue where citizens over the age of thirty could deliberate. This was the origin of the modern-day municipality, as distinct from central government.⁴ Hall (1928) contends that a typical Greek city state such as Athens between 508 BC and 338 BC did not have “any special class of people whose work was government”. The peoples’ assembly appointed individuals from among their number by lot to undertake administrative tasks. Hence, all citizens had equal opportunity to serve the state in an official capacity.⁵ This was the birth of municipal governance.

2.2.2 EARLY DEVELOPMENT OF TOWNS IN SOUTH AFRICA

Green (1957) and Cloete (1982) state that the Dutch East India Company’s Jan van Riebeeck landed at the Cape of Good Hope on 6 April 1652, setting up a victualling station there. The Company governed and administered the Cape, at that time the only part of South Africa occupied by whites, from then to 1795. This country’s first ‘formal’ local authority was established in 1682 at Eerste River, an area that was later incorporated into Cape Town. Subsequent history was confined almost wholly to the Cape of Good Hope until the middle of the nineteenth century.⁶ According to Green (1957) and Craythorne (2006), formal local administration had two historic sources:⁷ The Dutch source was pre-Napoleonic and exerted its influence through the *heemraden* and *landdrost* system of rural government and the urban Cape

⁴ Hall (1928), *op cit*, 41-42.

⁵ Hall (1928), *op cit*, 44.

⁶ Green, LP (1957) *History of local government in South Africa: An introduction*, Cape Town: Juta, 1; Cloete, JNN (1982) *Central, Provincial and Municipal Institutions in South Africa*, Pretoria, Van Schaik, 1-2.

⁷ Green (1957), *op cit*, 1; Craythorne, DL (2006) *Municipal Administration: The Handbook* (6th ed.), Cape Town: Juta, 9.

raad de geemente or Community council. Cloete (1982) explains that that these institutions were first established in the district of Stellenbosch where four *heemraden* were appointed in 1682, followed by a magistrate in 1685, occupying his office, the *drostdy*. The Court of *Landdrost* and *Heemraden*, vested with restricted judicial powers, also functioned as an administrative institution having charge, amongst other responsibilities, of municipal affairs.⁸ Several events, originating in the uprising at Graaf Reinet in 1795, led to the first major ‘reform’ of local government, culminating in the *Cape Municipal Ordinance*, 9 of 1836, the second, ‘original’ source of local administrative practice.⁹

2.2.3 DEVELOPMENT UNDER BRITISH RULE

After being governed for 154 years by the Dutch East India Company through several statutes, the Cape came under British rule in 1806. Some of the Dutch *placaaten* continued to apply until all but nine were repealed by the *Statute Law of the Cape of Good Hope* (1862).¹⁰ In terms of the *Cape Municipal Ordinance*, 1836, the British Colonial Office adopted responsible administration as an educational preliminary to responsible parliamentary government. This enactment was copied as the *Natal Ordinance* of 1845 and subsequently adopted by the Transvaal and Orange Free State republics,¹¹ thus becoming the starting point of ‘popular representation’.¹²

Hahlo and Kahn (1960)¹³ argue that “truly representative” institutions in urban local government made their appearance as municipal boards from 1837, elected by householders on a liberal property qualification, and enacting regulations subject to executive approval. They add that at this time there was no representative government at the top or centre. The municipal vote was a qualified franchise, the privilege of an economically-empowered white minority. The tiny settlements grew into villages, later becoming townships, expanding further into boroughs and then proclaimed as towns. Committees, overseeing the work of commissioners

⁸ Cloete (1982), *op cit*, 3.

⁹ *Ibid*; Steytler, Nico and Jaap de Visser (2007) *Local Government Law of South Africa*, Durban: LexisNexis, 1-3.

¹⁰ Hahlo, HR and Ellison Kahn (1960) *The Union of South Africa: The Development of its Laws and Constitution*, London: Stevens, 16.

¹¹ Hahlo and Kahn (1960), *op cit*, 21, 22, 24.

¹² Green (1957), *op cit*, 16.

¹³ Hahlo and Kahn (1960), *op cit*, 52.

and ward masters who had responsibility for service provision, ruled these localities. However, in reality, they did little more than oversee the operations of these functionaries undertaking the implementation of England's 'Poor Law',¹⁴ that is, ensuring the health of the ruling class by the provision of sanitary conditions. To this end, many local authorities, even into the 1980s, were 'health committee areas'.

According to Macmillan (1917), the administration of the Poor Law was a heavy financial burden, which "was a factor that gave English local government its real vitality".¹⁵ He adds that what gave people a vital interest in the work of government was that any fresh burden, anything going wrong, fell directly on themselves in the form of heavier rates. He further asserts that the complications arising out of the Industrial Revolution, the growth of large towns and the proletariat, and the chaos of the old Poor Law overwhelmed the old structures of parish, county, and borough in nineteenth-century England. Although the powers of the boroughs and county councils were extensive, they were, nevertheless, circumscribed, with the result that many local responsibilities were taken up by Parliament. In contrast to the numerous powers of local government in England, from the beginning of the nineteenth century, the kings in France and Spain were building up a highly centralised absolutism by the systematic overthrow of organs of local government.

Macmillan (1917)¹⁶ maintains that the "chief glory of British constitutionalism ... has hitherto been its remarkable faculty for avoiding revolutionary change by the adaptation of old institutions to new conditions", due largely to the strength of local institutions and to a high development of the political instinct deriving from the powers and duties of local self-government. He adds that this instinct, however, has its "weakness and its vicious counterpart in a love of 'compromise' which is apt to put expediency before principle". To adapt institutions whose essentials were based on the cares and functions of a central government that ranged very little beyond elementary law and order and national defence, without revolution, to serve in a modern, complex society, says much for the durability and flexibility of British institutions and approaches.

¹⁴ The new *Poor Law* of 1834 "ensured that the poor were housed in workhouses, clothed and fed. Children who entered the workhouse would receive some schooling." The cost was "paid for by the middle and upper classes in each town through their local taxes." www.nationalarchives.gov.uk, accessed 15/02/2015.

¹⁵ Macmillan, WA (1917) *The Place of Local Government in the Union of South Africa*, Johannesburg: Hortor, 8.

¹⁶ *Op cit*, 9.

Green (1957)¹⁷ is of the opinion that the “most outstanding feature of local government history in South Africa is its continuity” and that the “most important event in that history” was the Cape Municipal Ordinance, 9 of 1836, which broke the continuity of local government between the Dutch and British eras. Although hailed as an innovation, it was “rooted in the past history of the Cape and fashioned very largely by contemporary local opinion,” that is, limited to the views and wishes of the affluent white community. The 1836 Ordinance saw the consolidation of the functions of the Resident District Magistrate with those of the Civil Commissioners, which replaced the local boards of *Heemraden* or Municipal Councillors. The new Judicial Institutions of the Colony were concerned mostly with the administration of justice and the collection of revenue from the districts. The directions for promulgation of the Ordinance, dated 4 July 1834, provided that the new municipal boards would henceforth be relieved of such responsibilities and charged with the tasks of what we today would call the provision, rehabilitation, upgrading or improvement, management and maintenance of basic public goods and services. To undertake such work, they were “empowered with the sanction of government, to levy rates for the application of which they would be duly responsible”. The judicial and fiscal reforms of 1828 and 1829 saw the disappearance of the *landdrost* from the municipal field, and a change in the old appellation of *heemraden*. Local government ‘autonomy’ in South Africa, in the sense of levying rates and using locally-raised revenue within their own jurisdictions therefore has a fairly long history. The Cape Municipal Ordinance, 9 of 1836 was a link between the old and the new in politics, infusing indigenous (white) political institutions with a spirit of ‘democracy’ “born anew in eighteenth century Europe”, thus building the future of local government upon foundations first laid in Stellenbosch in the seventeenth century.¹⁸

The Cape’s 1836 Ordinance, although found unsuitable for large towns, was adopted by the Colony of Natal.¹⁹ Letters patent were the foundation of Ordinance No 2 of 1852, culminating in the adoption of the ‘Constitution’ by the British-ruled colonies of Western Cape and Eastern Cape, on 11 March 1853. This saw, for the first time in these colonies, a wholly (but not democratically) elected upper house, composed of the Chief Justice, as President, and fifteen members, and a lower house, the House of Assembly, comprising forty-six members, sent by

¹⁷ *Op cit*, 90.

¹⁸ Green (1957), *op cit*, 93.

¹⁹ Green (1957), *op cit*, 27.

electoral divisions.²⁰ Under this Constitution, African men enjoyed a qualified franchise until the *Union Act* of 1909 when membership of Parliament was taken away from Cape Native and Coloured voters.²¹ Such development was based on the idea of ‘responsible’ government, one that would be responsible to the people, as advocated by Lord Durham in 1838 in his report on governmental reforms in North America. Following this, “reformers in Nova Scotia established the first responsible government in the British Empire”.²²

Steytler and De Visser (2007) state –

In 1839 a municipality was established for Cape Town that was given a charter in a dedicated ordinance the following year. The Cape Parliament passed a Municipal Act in 1882 that applied until its repeal by a provincial ordinance after the formation of the Union of South Africa.²³

Green (1957)²⁴ contends that the Natal *Municipal Ordinance* of 1854 was a more marked innovation than that of the Cape’s, borrowing much from the English *Municipal Corporations Act* of 1835. The report on which this ordinance was aimed at reform rather than revolution by rendering local government indirect, less susceptible to the vagaries of public assemblies of citizens, and more capable of satisfying the local needs of the larger towns. Modelled on the well-tried reforms in England and Wales, this Ordinance introduced the mayor, the town clerk, committee system, the concept of a municipal corporation, and the substitution of the “professional servant of the corporation for the amateur wardmaster”.²⁵

Green (1957)²⁶ states that “popular participation is another long-standing feature of South African local government”, from the beginnings of rural institutions in Stellenbosch in 1682 to present. However, this statement is true only insofar as it relates to the minority white communities, or alternatively, the concept or practice of segregation based on race coincides with this history.

²⁰ Hahlo and Kahn (1960), *op cit*, 52-53.

²¹ <http://www.sahistory.org.za/archive/segregation-fallacy-and-other-papers-disenfranchisement-cape-native>, accessed 15/05/2017.

²² <http://www.the.canadianencyclopaedia.ca/en/article/durham-report>, accessed 15/05/2017.

²³ Steytler and De Visser (2007), *op cit*, 1 – 3.

²⁴ Green (1957), *op cit*, 94.

²⁵ *Ibid.*

²⁶ *Ibid.*

2.2.4 GOVERNMENT IN THE TRANSVAAL AND ORANGE FREE STATE

According to Green (1957), the first local government in Winburg, established in 1836, preceded the proclamation of the *Orange Free State Sovereignty* in 1848.²⁷ The Zuid-Afrikaansche Republiek signed its Constitution at the Volksraad in February 1858.²⁸ Green (1957) adds that the (British) Act 16 of 1880 repealed all previous legislation and permitted the establishment of municipal corporations in every town or village with at least 300 inhabitants. Needless to say, this refers to white residents, as all legislation was promulgated to protect and promote the interests of this minority group. This enactment provided for a mayor elected by a town council, eight councillors elected two per ward by (white) male suffrage for two years, management committees, a town clerk, town treasurer, and other professional officers appointed and paid by the council. Act 16 granted extensive powers of local government far beyond anything previously enjoyed, including borrowing with the government's consent, local rating on land and buildings, the licensing of trades, the making of by-laws subject to central government approval, the planning, construction and maintenance of public works, control over public nuisances, establishment and maintenance of water supplies and markets, the regulation of buildings, fire control, sanitation, public lighting, food inspection, and the appointment of constables.²⁹ Pursuant to this legislation, municipal corporations were declared in the existing towns of Potchefstroom, Rustenburg and Zeerust, and a town council was elected in Pretoria. However, six months after its promulgation, fighting broke out between the Boers and the (white) immigrants, nullifying Act 16, and causing serious administrative problems in the various boroughs and towns.³⁰

2.2.5 DEVELOPMENT OF JOHANNESBURG

Green (1957) contends that Johannesburg's local government had its genesis in the establishment of *ad hoc* smallpox or health committees, constituted after the outbreak of smallpox following discovery of gold on the Witwatersrand in 1886. Local health or sanitary committees, and diggers committees, established in accordance with the *Transvaal Gold Act*, 1871, superseded the *ad hoc* smallpox committees.³¹ Johannesburg was inaugurated on 8 September 1886 when the president of the Zuid-Afrikaansche Republiek, Paul Kruger, signed a proclamation opening the farms of Langlaagte and Randjeslaagte as public gold diggings.

²⁷ Green (1957), *op cit*, 77.

²⁸ Green, *op cit*, 44.

²⁹ Green (1957), *op cit*, 56.

³⁰ *Ibid.*

³¹ Green (1957), *op cit*, 61.

This gave rise to a large influx of people from many parts of the world, much turmoil, and heightened tensions between the pastoral Boers and the gold-seeking Uitlanders. The result was that for fourteen years thereafter Johannesburg's local administration was under tutelage. On 30 November 1887, regulations were published, dividing Johannesburg into five wards for purposes of elections for a health committee or a sanitary board. In February 1896, a draft bill provided for the replacement of the sanitary board by a *stadsraad* or town council, with a salaried *burgemeester* or mayor appointed (and removable only) by the President, for a period of five years at a time, responsible to the central government. The mayor was to be assisted in his day-to-day activities by two *schepenen* or aldermen elected by the council. The latter was to consist of twelve members, half of whom were to be elected by non-burghers. The *stadsraad* was legally constituted in December 1897. Over the next two years, the committee was extended to twenty-four, having jurisdiction over a spatial area of nine square miles, with responsibility for sanitation, fire, markets, streets, gas and electricity services, and the making and enforcement of local regulations or by-laws. The organisation, comprising nine departments, found it difficult to enforce the by-laws or exercise its other powers. This was due to its inability to collect the rates due to it and to raise loans for capital improvements. It was generally unable to serve its community of 102 000 people (1895), despite the local authority owning property valued on a capital basis at GBP 5 500 000.³² The situation worsened when Johannesburg was embroiled in the Anglo-Boer War of 1899-1902.³³ This War was a setback to municipal development due to lack of essential resources. The British military administration became authorised by Proclamation No 8 of 1902, to reorganise local government over the next four years. In terms hereof, local management boards, with the powers either of a town or a village management board, were appointed, with mostly *ex officio* functionaries.³⁴

In 1903 a system of elected municipal councils and urban district boards were established to replace the provisional institutions operating during the War. These were modelled on the basis of an indigenous and long-standing tradition of local self-government, and designed to render these institutions financially viable and responsible. Based on Johannesburg as a local government model or case study, the first municipal ordinance for Transvaal was proclaimed on 8 May 1901. This legislation drew largely from the Cape and Natal laws, thus linking it to a

³² Green (1957), *op cit*, 67.

³³ *Ibid.*

³⁴ Green (1957), *op cit*, 85, 88.

long-developed indigenous municipal tradition, supplemented by only one section on financial control by an obligatory finance committee, borrowed from the English *County Councils Act* of 1888.³⁵ A number of experiments ensued. Significant achievements that followed the reorganisation were the *Public Health Ordinance* of 1907, and the prototype of a form of local government for agricultural settlements and peri-urban areas introduced by private Ordinance 4 of 1907.³⁶

2.2.6 FORMATION OF THE UNION

Hahlo and Kahn (1960) state that the four colonies met at the National Convention in Durban on 12 October 1908 to debate the formation of a unified state. The *South Africa Act*, 1909, being the Constitution of the Union of South Africa that eventually emerged, “was a lengthy document of 152 sections and a Schedule, very little of it making fundamental law”. The Union was proclaimed on 31 May 1910. In the name of ‘unity’, centralisation became policy and key practice.³⁷ Green (1957) contends that the tendency towards uniformity in local government, beginning around 1912 and 1913 in the Transvaal and the Orange Free State respectively, opposed two very old features because “self-determination and variety are as representative of local government history in South Africa as continuity and popular participation”.³⁸

De Visser (2005) states –

In 1909 draft Constitution was passed by the British Parliament as the South Africa Act of 1909. It created a unitary state, modelled on the ‘Westminster’ system...the Statute of Westminster of 1931 conferred autonomy on the British dominions, including South Africa.³⁹

The principles enunciated in the reform ordinances, according to Green (1957), could not be implemented without appropriate local sources of revenue, available historically in the form of a wide variety of taxes. Such income was supplemented by voluntary service of thousands of people who gave freely of their time and energy to further the interests of the local communities in which they lived. This was supplemented by a growing partnership between such unpaid laypersons and a developing local government service of paid professionals who “are on tap

³⁵ Green (1957), *op cit*, 71.

³⁶ *Ibid.*

³⁷ Hahlo and Kahn (1960), *op cit*, 119, 126-127.

³⁸ Green (1957), *op cit*, 95.

³⁹ De Visser, Jaap (2005) *Developmental local government: A case study of South Africa*, Antwerp: Intersentia, 49.

but not on top”.⁴⁰ Such partnership became the keystone of the modern local government system, is the “hallmark of the Union’s system today and the one distinctive British contribution to its local political institutions”.⁴¹

The *South Africa Act*, 9 of 1909,⁴²

... did not recognise local government as a self-governing institution, but empowered the four provincial councils established by the Act to pass legislation governing local government in their respective provinces.⁴³

2.3 EARLY ‘REFORM’ OF SOUTH AFRICAN LOCAL GOVERNMENT

2.3.1 THE CENTRALISATION-DECENTRALISATION CONUNDRUM

Macmillan (1917)⁴⁴ points out that the grant of representative and self-governing institutions based on the British model in 1854, 1872, 1893 and 1906, left adjustment or institution of local machinery to the colonies concerned, adding that:⁴⁵

... the growing complexities of the new life make up a greater burden of responsibility than can be safely thrown onto one isolated central governing machine without very adequate provision for devolution to local authorities.

Macmillan (1917) argues that there must be scope for diversity in unity by allowing greater opportunities for self-expression to some of the divergent elements, ideas or interests which go to make up the modern state. In acknowledging this diversity, one should not confuse unity with uniformity.⁴⁶ In transcribing such thoughts to the South African context, Macmillan (1917) does not argue for provincial governments: his idea of decentralisation was basically only central and local governments.⁴⁷ He adds that local authorities require material financial assistance, but for the most part, the only way to get the best results is to “give them the fullest possible responsibility for their own affairs, while contriving to make the communities concerned the chief sufferers of their own negligence”.⁴⁸

⁴⁰ Green (1957), *op cit*, 95.

⁴¹ Green (1957), *op cit*, 97.

⁴² (9 Edw. 7, c. 9).

⁴³ Steytler and De Visser (2007), *op cit*, 1 – 4.

⁴⁴ *Op cit*, 12.

⁴⁵ At 14.

⁴⁶ *Ibid*.

⁴⁷ *Op cit*, 15.

⁴⁸ Macmillan (1917), *op cit*, 26.

The discussion hereunder covers the period 1910 to the end of the 1970s. Macmillan (1917) points out that South Africa, like most states, traditionally had a highly centralised local government system. Upon becoming a Union in 1910, the country adopted the Westminster system of government, noted for its centralisation of powers and functions of local authorities. Parliament was supreme; the second tier comprised four provinces, governed by a centrally-appointed administrator and elected (by white franchise holders) provincial councils, which created, defined the scope of, and supervised local authorities. The local administrations were single tier, multi-purpose institutions with both legislative and executive powers subordinate to the province concerned.⁴⁹

Macmillan (1917)⁵⁰ states that in Great Britain, unlike most European states even before 1914, there was a growing and inevitable recognition that some measure of devolution was necessary to “relieve the increasing congestion of business in the Imperial Parliament”. It is interesting to note that in 1913-1914 the total receipts of local bodies in the British colonies equalled the Imperial revenue. Hence, there was an acknowledgement that it would be difficult finding an alternative source of such large revenue capable of being raised with comparatively little friction as was the case with local taxes. There was, further, an understanding that parliamentary institutions can rest satisfactorily only on a strong basis of local government.⁵¹

Green (1957)⁵² argues that in 1917 the German Empire was the very pattern of autocracy and efficiency, based on a broad foundation of local government in twenty-six states. Most of these states had a vigorous tradition of local government, however undemocratic it may be, rooted far back in the Middle Ages. The *Local Government Ordinance* of 1912 and the consolidating *Local Government Ordinance* in 1913 firmly established a framework that remained essentially unchanged until South Africa became a republic in 1961.⁵³ However, these ordinances of general application were unsuitable for a town of Johannesburg’s size and complexity, but its application for exclusion and for the enactment of special legislation applicable to it only, was unsuccessful.⁵⁴

⁴⁹ Macmillan (1917), *op cit*, 10.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Op cit*, 30.

⁵³ Green (1957), *op cit*, 73.

⁵⁴ Green (1957), *op cit*, 76.

2.3.2 CENTRALISATION OF DECISION-MAKING

“The sovereignty of Parliament is traditionally conceived in South Africa in the sense of absolute power it gained in the Middle Ages, comprising indivisibility, originality and illimitability.”⁵⁵ Although the signing of the *Magna Carta* in 1215 could be seen as the establishment of democracy in the UK, a parliament only came into being in the late thirteenth century, and a qualified franchise was introduced by statute in 1429. Reforms led to the Glorious Revolution of 1688, which “laid the frame work for the modern constitutional monarchy”.⁵⁶ This led to:

The Bill of Rights of 1689 – which is still in effect – lays down limits on the powers of the crown and sets out the rights of Parliament and rules of freedom of speech in Parliament, the requirements for regular elections to Parliament, and the right to petition the monarch without fear of retribution.⁵⁷

According to Solomon (1983), in South Africa, as in the UK, notwithstanding the high level of centralisation, the local authorities were expected to be reasonably self-sufficient in terms of its finances. The major sources of revenue were property rates and taxes, and income deriving from trading services, that is, the provision of basic municipal services such as water, sanitation, electricity and gas.⁵⁸ Interestingly, Solomon (1983) points out, that in 1978 rates provided 16.3 per cent and trading services 55.9 per cent of current revenue, while grants by central government delivered through the provinces accounted only for 4.2 per cent of combined capital and current expenditure.⁵⁹

Cameron (1995) says that the “most distinctive feature of South African local government was the existence of a racial division of powers which has co-existed with the geographical division of powers”.⁶⁰ The principle of financial self-sufficiency resulted in black areas being in a deliberate state of underdevelopment, given their very limited resources.⁶¹

⁵⁵ Hahlo and Kahn (1960), *op cit*, 146.

⁵⁶ Worthington, Daryl, 5/05/2015, *History of Democracy in the UK*, www.newhistorian.com, accessed 17/05/2017.

⁵⁷ Darlington, Roger – A Short Guide to the British Political System, <http://www.rogerdarlington.me.uk/Britishpoliticalsystem.html>, 1-18, 1, accessed 17/05/2017.

⁵⁸ Solomon, D (1983) *The Economic and Financial Policies of Local Government in South Africa: A Theoretical Analysis*. Unpublished MA thesis, University of Cape Town, 23.

⁵⁹ *Ibid.*

⁶⁰ Cameron, Robert (1995) ‘The History of Devolution of Powers to Local Authorities in South Africa: The Shifting Sands of State Control’, *Local Government Studies* 2(3), 396-417, 398.

⁶¹ In terms of the *Natives Land Act*, 27 of 1913 and the *Native Trust and Land Act*, 18 of 1936.

Upon the National Party coming into power in 1948, separate residential areas were set aside for coloureds and Indians,⁶² with the intention that they evolve into ‘independent’ local authorities. This experiment failed because of political opposition, lack of economic viability, and poor administrative capability, given the non-participation of these groups in government.⁶³

Cameron (1995) calls the period 1910 to 1979 the “era of centralisation”, the principal aim of the state.⁶⁴

According to Cameron (1995), centralisation was a tendency in both unitary and federal states, a situation “exacerbated by the lack of restraints on the centre’s ability to accumulate power”.⁶⁵ Furthermore, based as it was on the English model, South African local authorities had no constitutionally-provided and protected or otherwise entrenched rights. As such, they were subordinate to national and provincial governments which, additionally, could declare null and void any actions not specifically devolved to local authorities, in terms of the doctrine of *ultra vires*. This situation allowed the four provincial governments to control and intervene or interfere in the affairs of local administrations. Cameron (1995) argues that in the absence of a uniform policy, there was no differentiation between large and smaller local authorities, or any recognition of their varying capacities and competencies.⁶⁶ The ‘one-size-fits-all’ approach did much harm to the development of local government, especially of stronger municipalities, as is manifest today.

2.3.3 THE POSITION OF URBAN BLACKS

Prior to Union in 1910, local authorities in the four colonies were “given a free hand in controlling Natives within their jurisdictions.”⁶⁷

⁶² In terms of the *Group Areas Act*, 41 of 1950.

⁶³ Cameron (1999), *op cit*, 398-399.

⁶⁴ *Ibid*.

⁶⁵ Cameron (1995), *op cit*, 399. See also Bekink, Bernard (2006), *Principles of South African Local Government Law*, Durban: LexisNexis-Butterworths, 21.

⁶⁶ *Op cit*, 400.

⁶⁷ Davis, Gordon, L Melunsky and FB du Randt (1959) *Urban Native Law*, Port Elizabeth: Grotius Publishers, 1.

Section 147 of the *South Africa Act*⁶⁸ “reserved to the Governor-General-in-Council the control and administration of Native Affairs throughout the Union”.⁶⁹

Following the *Native Affairs Act*,⁷⁰ a plethora of statutes, regulations and proclamations were passed, regulating almost every aspect of urban black dwellers’ lives.⁷¹

The *Natives (Urban Areas) Act*,⁷² established a Native Affairs Department in all local authorities.⁷³ The Minister of Native Affairs asserted that – The State determines policy and the local authorities are the assistants in its application ... as agents of central government.⁷⁴

Based on estimates of the tempo of urbanisation over the period 1946-1951, it was projected that –

The number of Bantu in urban areas will be more than 10 000 000 in the year 2000... These figures give some idea of the colossal problems confronting the Department of Native Affairs in the next 40 years and the necessity for long-term planning in order to cope with them.⁷⁵

The *Black (Urban Areas) Act*,⁷⁶ established Black Advisory Boards in urban Black townships, to advise the (white) municipal councils concerning management of such locations. This arrangement continued, in terms of the *Black (Urban Areas) Consolidation Act*.⁷⁷ The *Black Urban Councils Act*⁷⁸ established Black Urban Councils that replaced the Advisory Boards.

⁶⁸ 9 of 1909.

⁶⁹ Davis, Melunsky and du Randt (1959), *op cit*, 3.

⁷⁰ 23 of 1920.

⁷¹ See list in Davis, Melunsky and du Randt (1959), *op cit*, ix-xv.

⁷² 21 of 1923.

⁷³ Davis, Melunsky and du Randt (1959), *op cit*, 5.

⁷⁴ In an address on 17 September 1936, quoted in Davis, Melunsky and du Randt (1959), *op cit*, 5.

⁷⁵ Extract from the Tomlinson Commission Report, 1955, quoted in Davis, Melunsky and du Randt (1959), *op cit*, 6.

⁷⁶ 21 of 1923.

⁷⁷ 25 of 1945.

⁷⁸ 79 of 1961.

These councils, however, had limited municipal powers. The *Black Affairs Amendment Act*⁷⁹ undertook municipal functions in Black townships independently of the (white) municipalities. The functionaries were appointed by and accountable to the national government. Following urban uprisings in 1976, the state provided, for the first time, for elected community councils under the *Community Councils Act*.⁸⁰ These were upgraded by the *Black Local Authorities Act*⁸¹ to powers similar to white municipalities. However, Steytler and De Visser (2007) contend that “these authorities lacked any semblance of legitimacy and were the focus of much resistance in the years that followed.”⁸²

The *Promotion of Black Self-Government Act*⁸³ and the *National States Constitution Act*⁸⁴ laid the foundations for the removal of Blacks for their ‘development’ in the Bantustans or homelands. Consequently, Blacks were not allowed to own property in the 87 per cent of the country designated as ‘white’ South Africa, but could in the areas designated as “native reserves”. It has been the policy of successive governments since 1923 that blacks be permitted to enter white areas for labour purposes only, provided they lived in segregated residential areas, initially single-sex hostels. A corollary of this policy was the denial of political rights to non-whites at all tiers of government.⁸⁵ This kind of management, control and regulation of the majority of the country’s population, with no real rights and few ‘privileges’ has had an immeasurable negative impact on development in South Africa, especially at the local level.

In addition to the above statutes that directly and negatively impacted upon Blacks, two other enactments affected them also: The *Population Registration Act*⁸⁶ facilitated the division of the country along racial and was the foundation and framework of the state’s apartheid policies. Secondly, the *Group Areas Act*⁸⁷ reserved spatial areas on the basis of race classification and facilitated the removal of Blacks from urban areas.

⁷⁹ 45 of 1971.

⁸⁰ 125 of 1977.

⁸¹ 102 of 1982.

⁸² Steytler and De Visser (2007), *op cit*, 1 – 6.

⁸³ 46 of 1959.

⁸⁴ 21 of 1971.

⁸⁵ Cameron (1995), *op cit*, 398.

⁸⁶ 30 of 1950.

⁸⁷ 41 of 1950 and 36 of 1966.

2.3.4 TRADITIONAL AUTHORITIES

Mathenjwa (2013) states that “Indigenous African traditional government dates back prior to the occupation of South Africa by British and Dutch settlers.”⁸⁸ It comprised three tiers of authority: the chief or king as head of traditional central government and father of his subjects; the headman as head of the ward; and the head of the family. The chief had a range of powers over his subjects, exercised by him through traditional councils. “Traditional chiefs used councillors as a means of reaching to their people and important decisions were taken after discussion in councils.”⁸⁹ In the pre-colonial period, “Traditional councils were not created by statute”, and the nature of some of the chiefly powers, such as the levying of taxes, allocation of land, and delivery of basic services to the needy “would today be classified as local government powers.”⁹⁰ Hence, ‘municipal’ representation has a long history.

European occupation of South Africa spread from 1830s with the Bantu living on land under the control of whites.⁹¹ The *Native Administration Act*⁹² recognised the “application through a hierarchy of special tribunals” and provided for appointment of chiefs and headmen.⁹³ The Act gave the executive “wider powers of legislation and administration over Natives”.⁹⁴

“After the colonial conquest, the African leaders were subordinate to the settler governments” which became the primary source of traditional councils’ now largely eroded powers. After Union, Native affairs vested in the Governor-General.⁹⁵ The apartheid state further weakened the role of traditional authorities. Section 4 of the *Black Authorities Act*⁹⁶ created three levels of traditional government, namely, tribal, regional, and territorial authorities. Among other functions, regional authorities were empowered to make by-laws and to levy taxes, corresponding to present-day local government powers.⁹⁷

⁸⁸ Mathenjwa, Mbuseni Johnson (2013) *The Supervision of Local Government: Application of the Legal Framework*, unpublished LLD thesis, Pretoria: Unisa, 19.

⁸⁹ *Ibid.*

⁹⁰ Mathenjwa (2013), *op cit*, 20.

⁹¹ Hahlo and Kahn (1960), *op cit*, 317.

⁹² 38 of 1927.

⁹³ Hahlo and Kahn (1960), *op cit*, 330.

⁹⁴ Mathenjwa (2013), *op cit*, 20.

⁹⁵ *Ibid.* Section 147 of the *South Africa Act*, 9 of 1909.

⁹⁶ 68 of 1951.

⁹⁷ Mathenjwa (2013), *op cit*, 21.

2.3.5 REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT, 32 OF 1961

Devenish (2012) asserts that “When the National Party (NP) was formed in 1914, republicanism became one of its guiding principles” and to drive its ambitions, a republican constitution based on the principles of Christian nationalism was drawn up in 1941.⁹⁸ The Prime Minister declared that the republican form of government would only be established if voters in a general election wished it. On 5 October 1960, the white electorate voted in a “so-called ‘referendum’, which was a plebiscite.”⁹⁹ The vote in favour of establishing a republic was 850 408 with 775 878 voting against it.¹⁰⁰ At the Commonwealth Prime Ministers’ Conference in London some six months later, when it became clear the Union would be expelled from this club, South Africa withdrew its membership and became a republic on 31 May 1961, outside the Commonwealth.¹⁰¹

Act 32 of 1961 was “not a constitution in the continental sense of the word. It did not introduce a system of fundamental laws,”¹⁰² as Parliament reigned supreme and could amend or repeal any of its provisions. The *Act* was “both oligarchic and racist”, with four whites serving coloured persons in Parliament, while Africans and Indians had no parliamentary representation.¹⁰³ The 1961 constitution unambiguously and formally provided for the centralisation of decision-making in the hands of a minority white elite by stipulating that, “The legislative power vests in Parliament, which consists of the State President, the Senate and the House of Assembly.”¹⁰⁴

⁹⁸ Devenish, GE (2012), ‘The republican constitution of 1961 revisited: A re-evaluation after fifty years’, 18(1) *Fundamina*, 1-14, 2-3.

⁹⁹ Devenish (2012), *op cit*, 4.

¹⁰⁰ GN 1744 *Government Gazette* 6557 of 26 October 1960.

¹⁰¹ Devenish (2012), *op cit*, 4.

¹⁰² Devenish (2012), *op cit*, 7.

¹⁰³ Devenish, *op cit*, 12.

¹⁰⁴ Section 24(1).

White hegemony was further protected and entrenched by restricting membership of the Senate, House of Assembly, and provincial councils to registered white voters who are citizens of the Republic.¹⁰⁵ Centralisation is evident in the provision that Parliament is the “sovereign legislative authority”¹⁰⁶ and that “No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament.”¹⁰⁷

An interesting provision that could have contemporary application in the NCoP reads:

The State President shall when nominating senators have regard to the desirability of ensuring that the Senate will as far as practicable consist of persons having knowledge of matters affecting the various interests of the inhabitants of the Republic.¹⁰⁸

Similar qualifications would have been helpful today in nominating persons to serve on decision-making bodies although this type of provision would likely be unconstitutional where people have free choice in elections. Although the 1961 constitution repealed the whole of the *South Africa Act, 9 of 1909*, save for four sections, it did not delineate the powers and functions of the three tiers of government. The responsibilities of local authorities are not depicted. In section 84(1) it states that the provincial councils may make ordinances “in relation to matters coming within” twelve “classes of subjects”. This includes, as stipulated in section 84(l), which reads, “Generally all matters which, in the opinion of the State President, are of a merely local or private nature in the province”. Thus, it is evident that the State President alone, or with Parliament, had far-reaching, almost dictatorial powers.

Section 84(f)(i) provided that provincial councils by way of ordinances would be responsible for “municipal institutions, divisional councils and other local institutions of a similar nature”. Hence, local authorities were not a level of ‘government’ in the conventional sense and were subordinate to and controlled by provincial councils.¹⁰⁹ The following quote underlines disregard for or the low status of municipalities:¹¹⁰

Notwithstanding anything in this Act contained, all powers, authorities and functions lawfully exercised at the commencement of this Act by divisional or municipal councils, or any other duly constituted local authority or body contemplated in paragraph (vi) of section *eighty-five* of the South Africa Act, 1909, shall be and remain in force until varied or withdrawn by Parliament or by a provincial council having power in that behalf.

¹⁰⁵ Sections 34(b) and (d); 46(a) and (c); 68(2) and 69(1), respectively.

¹⁰⁶ Section 59(1).

¹⁰⁷ Except for section 108 (equality of English and Afrikaans as official languages) and 118 (repeal or alteration of laws by Parliament). These will be valid only if the Senate and House of Assembly sit jointly and at the third reading both houses pass the Bill by a two-thirds majority.

¹⁰⁸ Section 29(2)(a).

¹⁰⁹ See also Bekink (2006), *op cit*, 21.

¹¹⁰ Section 92.

The *South Africa Act* mainly addressed unification and centralisation, not devolution. Therefore, the powers and functions of subnational authorities were not spelled out, especially not that of local administrations. This arrangement, by design rather than default, increased centralisation.

2.3.6 MACRO-ECONOMIC OBJECTIVES

From a reading of the *South Africa Act* and the 1961 constitution, it appears that the belief of the politicians during that time was that only central government could ensure the formulation, execution, and oversight of macro-economic policies caused the state to increasingly encroach upon or involve itself in local authorities' activities. This was facilitated and enhanced by the centre's financial controls. With policy-making confined to a small elite, provincial councils and local authorities were effectively marginalised, with adverse implications for the development of efficient subnational government and effective political representation.

2.3.7 THE HISTORY AND DEVELOPMENT OF PROVINCIAL GOVERNMENT

The following historical view on provincial authorities could be still valid today:

The provincial structure has been called harsh names: 'a foreign innovation', a 'hybrid conglomeration', 'an unclassified monstrosity', a plain failure, yielding all the evils of the party system and none of the advantages. Within six years of Union the Jagger Commission was recommending that it be replaced either by smaller divisional councils, true local authorities, or by a federal structure. But neither proposal proved then or ever since a political possibility.¹¹¹

There has been no fundamental change in provincial structures since Union,¹¹² because since then the emphasis was on strong central government and decentralisation to local authorities.

De Visser (2005) argues that while South Africa became a unitary state, governed in accordance with the Westminster parliamentary system, it retained the four provinces, a departure from unitarism. He adds, however, that the "status of provinces has always remained weak." In addition, the role of the four provincial councils was limited.¹¹³

It is clear, however, that provinces were meant to play a role in development and management of the state. From the cases below, it is evident that law is more than mere administration – interpretation may be more important.

¹¹¹ Hahlo and Kahn (1960), *op cit*, 178-179.

¹¹² Hahlo and Kahn (1960), *op cit*, 175.

¹¹³ De Visser (2005), *op cit*, 49-50.

The Appellate Division ruled in *Middelburg v Gertzen*¹¹⁴ that authority conferred upon provincial councils was original and not delegated. While it was subordinate to Parliament, a provincial council was a “deliberate legislative body and ... its ordinances duly passed and assented to must be classed under the category of statutes and not merely by-laws or regulations.”¹¹⁵ In *Johannesburg Consolidated Investment Company Ltd v Marshalls Township Syndicate Ltd*, 1917 AD 662, at 666, it was held that within limits imposed, a provincial council could legislate as freely and effectively as Parliament. In *Bloemfontein Municipality v Bosrand Quarries (Prop) Ltd* 1930, AD 370, at 378, it was ruled that provincial councils were not agents of Parliament. The Appellate Division held that where the good part of an ordinance can be separated from the bad, the good must be given effect to, if it gives effect to the statute, or else the whole instrument is invalid.¹¹⁶ Such a test would apply to all types of legislation. Hence, while the Union constitution may appear not to have taken provinces seriously, the courts were able to interpret their powers to give a meaningful role to provincial councils, which in turn, ruled over local authorities.

Du Plessis (2011) asserts that:¹¹⁷

Because provincial councils were deliberative law-makers, provincial ordinances enacted between 31 May 1910 and 1 July 1986, though always subordinate to parliamentary legislation were, for example, by virtue of the *Gertzen* judgment, *original* – as opposed to delegated – legislation.

More recent views of provinces are enlightening. It had been contended that there will be a gradual decentralisation of powers to local government and that the respective roles of the three spheres will change over the next five to ten years to reflect this.¹¹⁸ Again, such opinions beg the question on the relevance and role of provincial government.

The role of provinces has been diminishing, to the extent that they may be reduced to “agencies for poverty alleviation and ‘purveyors’ of social grants and health services, as opposed to being catalysts for economic growth.”¹¹⁹ These sentiments, expressed in 2004, have been echoed for

¹¹⁴ 1914 AD 544.

¹¹⁵ Per Innes CJ, at 550.

¹¹⁶ *Johannesburg City Council v Chesterfield House (Pty) Ltd*, 1952(3) SA 809 (AD) at 822.

¹¹⁷ Du Plessis, L (2011) *The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some exploratory observation*, 14(4) *PER/PELJ*, 91-102, 97-98.

¹¹⁸ Views of the then Premier of the Western Cape, Ebrahim Rasool, at the NCoP meeting held at Empangeni, KwaZulu-Natal, 5 November 2004, as reported by Vapi, Xolisa: ‘Provinces have no power, says Rasool’, Johannesburg: *Sunday Times*, 7 November 2004.

¹¹⁹ *Ibid.*

several years thereafter, even by MECs and others in the ruling party. It was further asserted that if the specific role of each sphere was not clear, the whole of government would suffer.¹²⁰

The President, speaking on the role of provinces, responded that the NCoP has to reposition itself “towards improving the system of local government by increasing popular participation.”¹²¹ This was possible because of the diminished legislative role of the NCoP, but it has not come to fruition, as is evident from the following view:

So the usefulness of this middle layer of representative government has been greatly eroded. Provincial governments have also lost their social development functions, which have been shifted to a newly created agency for distributing social grants. On the other hand, local government has become more critical as the engine for socioeconomic upliftment.¹²²

Hence, from historical times, provincial governments served largely as a control mechanism overseeing local authorities. They have not capacitated them nor were themselves developmental.

2.3.8 THE ORIGINAL LEGAL STATUS OF LOCAL AUTHORITIES

Dönges and Van Winsen (1953) stated that –

A municipal corporation is a form of *universitas*, i.e. an aggregate of natural persons forming as a group a new subject of rights and duties, separate and distinct from the rights and duties of the individual persons who constitute the group. It is thus a legal abstraction or fiction by which the law has created a new entity out of a group of natural persons and has endowed it with a distinct juristic personality, capable of functioning in various respects as a natural person.¹²³

On a similar basis, the Council and Durban Corporation were established by way of Ordinance 1 of 1854, *For establishing Municipal Corporations within the District of Natal*, published in Durban on 3 May. The first Town Council, consisting of 8 members representing four wards, was elected to office 2 August 1854.¹²⁴

According to Steytler and De Visser (2007), a municipality consisted of its ratepayers who jointly constitute the corporation or the body corporate, that is, the municipality.¹²⁵

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Dönges, TE and LdV van Winsen (1953) *Municipal law with special reference to the Cape Province*, (2nd ed by Van Winsen, LdV, Lionel F Johnson and PJ Coetsee), Cape Town: Juta, 1.

¹²⁴ www.sahistory.org.za/topic/durban-timeline-1497-1990, accessed 25/10/2016.

¹²⁵ Steytler and De Visser (2007), *op cit*, 1 – 5.

Since the Municipal Council comprises several councillors, in taking decisions by way of resolutions adopted by the majority, it acts as an agent of the body corporate.¹²⁶ The municipal council has a trust or fiduciary relationship with its residents, similar to that of directors and shareholders of a company. Based on such a relationship, a ratepayer has *locus standi* and “could restrain a council from acting *ultra vires* acts or compel them to fulfil legal obligations.”¹²⁷ However, it has been said:

Despite the theoretically-sound democratic basis of municipalities, the story of local government since the incorporation of the Union was, then, how the local *universitas*...was defined for the next 80 years – with increasing vehemence and brutality – in exclusively racial terms.¹²⁸

2.4 ‘REFORM’ OF LOCAL GOVERNMENT IN THE 1980s

2.4.1 THE ‘TOTAL STRATEGY’

The National Party government eventually realised that the 1961 constitution was “unable to deal with the political rights and aspirations of coloured and Indian people”¹²⁹ and prepared a new constitution. The 1980s was introduced and dominated by what the then Nationalist Party (NP) Prime Minister, PW Botha, called the ‘Total Strategy’, a grand plan to counter what was perceived to be a communist ‘Total Onslaught’. The ‘Total Strategy’ was formulated by the Department of Defence in 1977 as a

... comprehensive plan to utilise all the means available to a state according to an integrated plan in order to achieve the national aims within the framework of the specific policies. A total national strategy is therefore not confined to a particular sphere, but is applicable to all levels and to all functions of the state structure.¹³⁰

This master plan incorporated a new constitutional deal for coloureds and Indians at central level, and at the local sphere for them as well as for blacks (indigenous Africans). This required devolution of powers, which again called for more liberal labour and urbanisation policies.¹³¹ Most of the major ‘reform’ policies in the 1980s were, according to Cameron (1995),¹³² crafted in a top-down, secretive manner by a small group of civilian reformers, who acknowledged that both political and economic reforms were necessary prerequisites to political stability in the Republic. They also held the firm view that “the principle of ‘power sharing’ without losing

¹²⁶ *De Villiers and Others v Beaufort West Municipality* 1924 CPD 501 at 504, quoted by Steytler and De Visser (2007), *op cit*, 1 – 5.

¹²⁷ Steytler and De Visser (2007), *op cit*, 1 – 5.

¹²⁸ *Ibid.*

¹²⁹ Devenish (2012), *op cit*, 12.

¹³⁰ RSA, Department of Defence (1977) *White Paper*, 5.

¹³¹ *Ibid.*

¹³² *Op cit*, 402.

control was to apply to all levels of government”. The desire to retain control meant that extensive or strategic powers could not be devolved to local authorities for fear that communities hostile to the state could take over.¹³³

2.4.2 REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT, 110 OF 1983

Cameron (1995) argues that the ‘reforms’ proposed by the ‘Total Communist Onslaught Strategy’ were manifested in the 1983 constitution which created the tricameral parliament for whites, coloureds and Indians, with Blacks being left out.¹³⁴ Section 7(b) established Houses of Parliament based on ethnicity: The House of Assembly for whites; House of Representatives for coloureds; and House of Delegates for Indians. Section 14(1) states that “Matters which specially or differentially affect a population group ... are own affairs in relation to such population group”. Hence, whites, coloured, and Indians had their own affairs debated in their respective houses. Matters not own affairs “are general affairs”.¹³⁵ In the case of ambiguity or lack of clarity whether an issue is one or the other, it “shall be decided by the State President”.¹³⁶ Again this constitution, like that of 1961, places serious power in the hands of the State President, thereby centralising decision-making on strategic matters.

Executive authority vested in the State President. Where it concerned own affairs, he acted on the “advice” of the Minister’s Council of the particular house, and when it was a general affair, the State President acted in “consultation” with Ministers in the Cabinet.¹³⁷ “Advice” is defined as ‘guidance or recommendations offered with regard to future action’, while “consult” means to ‘seek information or advice from someone, especially an expert or professional; or to seek permission or approval from’. These dictionary definitions imply that coloureds and Indians would have less persuasive authority than whites as the State President could choose to ignore their ‘advice’ which he could not do so easily when he acts after consultation with the House of Assembly. As with the 1961 constitution, legislative power is vested in the State President and Parliament, again centralising power with the white Assembly (166 members), as the Representatives and Delegates have 80 and 40 members respectively.¹³⁸ Franchise is limited to

¹³³ *Ibid.*

¹³⁴ Steytler and De Visser (2007), *op cit*, 1 – 7, 1 – 8.

¹³⁵ Section 15.

¹³⁶ Section 16(1)(a).

¹³⁷ Sections 19(a) and (b).

¹³⁸ Sections 30, 41(1)(a); 42(1)(a); and 43(1)(a).

whites, coloureds, and Indians who are South African citizens.¹³⁹ The constitution established the President's Council as an advisory body with the ratio of 20:10:5 members of the Assembly: Representatives: Delegates, with 25 appointed by the State President.¹⁴⁰ It is not stipulated that members of the President's Council need be experts, as was mentioned in the case of the State President nominating senators under the 1961 constitution.

The establishment of a State Revenue Fund and a State Revenue Account¹⁴¹ appears to be additional measures to centralise power. Section 93 stipulated that "The control and administration of Black affairs shall vest in the State President..." Again, this is proof of the powers of the head of state and centralisation of authority. The country's largest population group was ignored, marginalised, and peripheralised by one section of the Act. Thornhill (2008) adds that urbanised blacks were removed from the authority of white municipalities when their own local authorities were established. "These local structures were not accepted by the black urban communities". At this stage, the ability of municipalities to take policy decisions declined.¹⁴²

Schedule 1 refers to section 14 (own affairs) where 14 powers and functions allocated to provincial councils in the 1961 constitution now vest in the three ethnic houses which have responsibility for the management and administration of their own communities. Hence, provinces by design or default fell away, with powers being centralised in the State President and divided into three chambers of parliament. In operationalising this odd and unique 'constitution', local authorities were to be created for whites, coloureds and Indians, with overall control at the centre with the establishment of a Department of Local Government in each chamber. The creation of race-based, independent local authorities was contingent upon their financial viability.

¹³⁹ Section 52. Citizenship to the status as granted by the *South African Citizenship Act*, 44 of 1949.

¹⁴⁰ Sections 70(1) and 78(1) and (2).

¹⁴¹ Sections 81(1) and 82(1)(a).

¹⁴² Thornhill, Chris (2008) 'Local Government after Fifteen Years: Issues and Challenges', in De Villiers, Bertus: *Review of provinces and local government in South Africa: Constitutional foundations and practice*, occasional papers, Johannesburg: Konrad Adenauer Stiftung, 59-82, 60.

2.4.3 ‘DEVOLUTION’ OF POWERS IN THE 1983 CONSTITUTION

Devolution of powers to local authorities envisaged in the 1983 constitution was the result of an investigation and report by the President’s Council. This body accepted the principle of maximum devolution of authority and decentralisation of administration, and based thereon, recommended that provision be made for autonomy with the requisite legislative capacity being created at local government level.¹⁴³

According to Cameron (1995)¹⁴⁴ the three major objectives of devolution were –

- a) Self- determination and the protection of group rights of the minority races;
- b) Conflict-defusion, through depoliticising highly-contentious issues and reducing conflict areas at the centre by transferring local development problems to local authorities; and
- c) Effective administration, since central rule proved inefficient and unresponsive to local needs and conditions.

Cameron (1995)¹⁴⁵ contends that local government policy in the 1980s reflected elements of all the various forms of decentralisation, that is, devolution, delegation, decentralisation, and centralisation. He adds that a clear example of devolution was the establishment of Regional Services Councils (RSCs)¹⁴⁶ to provide services and extra revenue therefor, particularly in areas of limited economic growth. The rationale for redistribution was an attempt by the state to defuse ongoing township unrest by uplifting the quality of life in such locations. Although the Act made provision for 21 functions to be performed and funded by two taxes, namely a regional establishment levy and a regional services levy, the enactment retained central control over large elements. The RSC, however, failed to turn black local authorities into economically viable areas.¹⁴⁷ Cameron (1995)¹⁴⁸ points out that the state made extensive use of delegation as a form of decentralisation since it was felt that in a unitary state “there should always be a higher approving authority”. Deconcentration was also extensively used by the apartheid regime, with

¹⁴³ RSA, President’s Council (1982) *Joint Report of the Committee for Economic Affairs and the Constitutional Committee of the President’s Council on Local and Regional Management Systems*, 4-9, 49, 51, 105.

¹⁴⁴ *Op cit*, 404.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Regional Services Councils Act*, 109 of 1985.

¹⁴⁷ Cameron (1995), *op cit*, 405.

¹⁴⁸ *Op cit*, 406-409.

examples being the large-scale powers vested in provincial administrators with respect to the operations of the RSCs, and the extensive authority held by the Minister in charge of black local government regarding supervision of black local authorities. The distinguishing feature of centralisation was the greater macro-economic control by the Department of Finance over expenditure by local authorities.

2.4.4 FAILURE OF DEVOLUTION

Cameron (1995)¹⁴⁹ argues that none of the objectives of the government's devolution policy were met, mainly because of inherent contradictions in them. The failure is evinced in the observation that by the early 1990s the National Party was no longer committed to race group-based local authorities. He ascribes the failure of the state's devolution policy to the following causes:

- i. Lack of resources, particularly revenue;
- ii. Administrative inefficiency, due to lack of skilled administrative/clerical and professional staff;
- iii. Limits to total (central) control in an organisation;
- iv. Lack of resolve by bureaucrats in implementing devolution as this was seen as a threat to central and provincial departments; and
- v. Policy goals were often multiple, conflicting, and vague, leading to problems during implementation.

Cameron (1995)¹⁵⁰ quotes the then Prime Minister, PW Botha, who felt that the devolution policy required that central government and its departments be vested primarily with general policy and monitoring functions, while government functions should as far as possible be carried out at the lowest tier of government. This, according to Cameron (1995)¹⁵¹ was not devolution, but delegation and deconcentration of the administration and execution of functions by local authorities. The result was vagueness and ambiguity in the policy. Cameron (1995)¹⁵² contends that the failure of the 1980's devolution policy lay with the contradictions within the policy itself, and ascribes four main reasons for this situation:

¹⁴⁹ *Op cit*, 410-413.

¹⁵⁰ *Op cit*, 411.

¹⁵¹ *Ibid*.

¹⁵² *Op cit*, 412-413.

- (a) Reform policies were elitist, to ensure that the National Party shared power without losing control. Central and provincial governments, for security reasons, did not devolve extensive powers to local authorities, and the regional Services Councils (RSCs) were established and functioned in a manner that facilitated national objectives.
- (b) Centralisation was based on the viewpoint that local authorities' developmental processes had to be controlled from the top because of lack of skills, experience, and finance at the local level.
- (c) The continued need for central control was to ensure that decisions of local authorities were in line with the country's macro-economic objectives and strategies.
- (d) It was felt that in a unitary state, central government should be responsible for final legislative authority, resulting in a high degree of control over activities at the local level.

Hence, it could be said that the state's strategic objectives were the most significant obstacle to the devolution of powers to local authorities. The National Party's attitude to autonomous local authorities was dictated by national political considerations, foremost of which was the successful implementation of apartheid. This ideology resulted in much parliamentary legislation that circumscribed the autonomy of local authorities.

Cameron (1995)¹⁵³ argues that the "devolution policy, instead of depoliticising conflict from central to local level, led to major black township unrest which weakened the power of the NP government to rule".

Swilling (1997)¹⁵⁴ argues that the transformation of South Africa's local government system occurred in a way that is "probably unique from an international comparative perspective". Such uniqueness lies in the change from authoritarianism to democracy, which took place simultaneously at a national and sub-national level. National transformation was precipitated by the crisis at local government level – the strategy to make the country ungovernable by rents, services, and consumer boycotts promoted by civic and consumer associations. He adds that the political transition that began in 1990 was largely the product of locally and nationally-

¹⁵³ *Op cit*, 414.

¹⁵⁴ Swilling, Mark (1997) 'Building Democratic Urban Local Government in Southern Africa' in Swilling, Mark (Ed) *Governing Africa's Cities*, Johannesburg: Wits University Press, 211-273, 218-219.

constituted social movements driven by organised workers, students, youth, professionals, women, and urban residents. Due to South Africa's repressive regime supported by its draconian laws, it was only from the 1980s that large scale organised social movements were able to make a decisive impact on the structures, policies and strategies of both the state and mainstream economic institutions.

Swilling states that –

With neither reform from above nor revolution from below being distinct possibilities, attempts began to be made from the mid-1980s onwards to find negotiated solutions. ...it was sustained mass action that tended to have a more decisive effect.¹⁵⁵

The way out for the targets, largely local authorities, deprived of revenue, and the constituencies of the social movements, deprived of services, was local-level negotiations. Hence, South African local governments in the 1990s were highly unstable and thus led to the era of real democratic reforms in this era.

2.5 REFORM OF LOCAL GOVERNMENT IN THE 1990s

Swilling (1997)¹⁵⁶ points out that by the early 1990s, hundreds of local-level negotiations had broken out throughout the country. Those participating were representatives of local government structures, businesses, municipal service providers, civic associations and residents' organisations, political parties, trade unions, and numerous community organisations. Such engagement led to the creation of local negotiating forums. These fora became the schools of the new South African democracy, and created a new culture of governance and consensus-building. This situation led to the establishment of a support network of technical assistance NGOs across the country. The first and most well-known of the local negotiating forums was the Central Witwatersrand Metropolitan Chamber.¹⁵⁷

Swilling (1997)¹⁵⁸ contends that the situation of *de facto* "dual local power" (white and black local authorities) was unsustainable, and consequently, the National Local Government Negotiating Forum (NLGNF) was established in early 1993 to work via the local fora. The

¹⁵⁵ Swilling (1997), *op cit*, 219.

¹⁵⁶ *Ibid.*

¹⁵⁷ Bekink (2006), *op cit*, 23-28.

¹⁵⁸ *Op cit*, 219.

NLGNF rapidly negotiated a framework for guiding local government transition and promulgated the *Local Government Transition Act*¹⁵⁹ (LGTA) in 1993 for this purpose.¹⁶⁰ This Act provided for the “transformation of the local forums into statutory forums with prescribed structures and procedures”.¹⁶¹ The local forums, divided into “statutory” and “non-statutory” sides, were then mandated to negotiate “locally-appropriate solutions consistent with the principles of non-racialism, democracy, one tax base, accountability”, and so on.¹⁶² Their first task was to appoint new local government structures for a phased transition to democratic local governance, divided into the following stages:

- i. The pre-interim phase, being the period between the appointment of the new political leadership by the negotiating forums and the first local government elections;¹⁶³ and
- ii. The interim phase, defined as lasting from the time of the elections to the agreement at national level on a final Constitution, which will incorporate local government into a new three- ‘sphere’ system.¹⁶⁴

On 2 February 1990 when President FW de Klerk announced the unbanning of political parties,¹⁶⁵ there were approximately 1 100 existing local authorities. They did not cover the entire spatial area of the Republic¹⁶⁶ Indian and coloured municipal matters were dealt with by management committees and local affairs committees respectively. These had limited powers and functioned “within the policy and legal frameworks of so-called white municipalities.”¹⁶⁷

According to De Visser (2005), The Convention for a Democratic South Africa (CODESA) started negotiations on 20 December 1991, but ended inconclusively in May 1992. The Multi-Party Negotiating Forum (MPNF) resumed its work and finalised a negotiated settlement on 18 November 1993.¹⁶⁸

¹⁵⁹ 209 of 1993.

¹⁶⁰ See Bekink (2006), *op cit*, 27-31; Steytler and De Visser (2007), *op cit*, 1 – 10, 1 – 11.

¹⁶¹ Section 6 of the LGTA.

¹⁶² Section 7 of the LGTA.

¹⁶³ Section 6 of the LGTA.

¹⁶⁴ Section 8 of the LGTA. See also Steytler and De Visser (2007), *op cit*, 1 – 11.

¹⁶⁵ See www.sahistory.org.za, accessed 25/11/2015.

¹⁶⁶ Thornhill (2008), *op cit*, 60.

¹⁶⁷ *Ibid.*

¹⁶⁸ De Visser, Jaap (2005), *op cit*, 52.

Wooldridge (2002)¹⁶⁹ adds that –

The Local Government Transition Act was heavily process-oriented, and did not prescribe a detailed system of metropolitan local government. Rather, it allowed for key issues (such as the allocation of powers and functions between metropolitan council and metropolitan local councils) to be negotiated in each of the six designated metropolitan councils.

Swilling and Boya (1995)¹⁷⁰ assert that locally-driven negotiated local governance transformation was protected both by Chapter 10 of the 1993 Constitution and by the *LGTA*, adding that in terms of such provisions, “new local government structures cannot ... be imposed from above by provincial or national governments that were elected on 27 April 1994”.

Swilling (1997) contends that the great significance of the Interim Constitution and the *LGTA* was the provision of a framework for negotiation at local level that “compels stakeholders to negotiate by law”, acknowledging that this process of mandatory negotiation was relatively successful. By the end of March 1995, most forums had reached agreement on the establishment of transitional metropolitan councils (TMCs), and transitional local councils (TLCs) for their areas. The approximately 400 different agreements represented a groundswell of consensus-building around non-racial modes of governance at the grassroots of the society, a first for South Africa and perhaps the world.¹⁷¹

The first round of restructuring followed the proclamation of local authorities with nominated councils that functioned until the first local government elections of 1 November 1995, followed by elections in KwaZulu-Natal and the Cape metropolitan area on 29 May 1996, in a consolidated 842 municipalities. The third ‘transformation’ took place after the second local government elections in 5 December 2000, the first democratic ballot.¹⁷²

Whether negotiation rather than prescription was wise, is moot, as the situation gave rise to new problems. For example, the Premier’s Proclamation¹⁷³ establishing the Greater Johannesburg Transitional Metropolitan Council (GJTMC) gave the metro almost equal powers to its four

¹⁶⁹ Wooldridge, Dominique (2002) ‘Introducing Metropolitan Government in South Africa’ in Parnell, Susan, Edgar Pieterse, Mark Swilling and Dominique Wooldridge (Eds) *Democratising Local Government: The South African Experience*, Cape Town: University of Cape Town Press, 127-140, 131.

¹⁷⁰ Swilling, Mark and Lawrence Boya (1995) ‘Local governance in transition’ in Fitzgerald, Patrick, Anne McLennan and Barry Munslow *Managing Sustainable Development in South Africa* Cape Town: Oxford University Press, 168-194, 176.

¹⁷¹ *Op cit*, 220.

¹⁷² Steytler and De Visser (2007), *op cit*, 1 – 13, 1 – 14.

¹⁷³ Proclamation 24 of 3 December 1994 (Gauteng).

local councils. Hence, there was quintuplication, with attendant wastage, until the situation was remedied following the second local government elections when the ‘unicity’ was established.¹⁷⁴

2.6 LESSONS FROM SOUTH AFRICA’S HISTORY OF LOCAL GOVERNMENT

From the historical overview, it is clear that in 1682, South Africa’s first municipal administration institution was part of the Court of Landdrost and Heemraden. Since the Court was vested with limited judicial powers, it most likely functioned largely as a control mechanism mostly enforcing legal compliance. It was not developmental or democratic. Municipal boards, elected by white householders and those with a qualified franchise, from 1837 served mostly to protect the health of European inhabitants by ensuring sanitary living conditions. These were, also, neither democratic nor developmental. At this time, there was no representative government.

In 1853 an upper house and a (lower) House of Assembly were elected by white voters and those with a qualified franchise, thereby for the first time creating ‘representative’ government. Although municipal corporations established by the (British) Act 16 of 1880 had extensive ‘powers’, these were granted on the basis of decentralisation because the local authorities functioned as agents of central government. The establishment of representative and self-governing local institutions was a result of the realisation of the difficulty of parliamentary rule, the need to maintain the considerable and easily-collected local revenue from the colonies, and the practicability of making local authorities financially self-sufficient and self-administering. In England after 1906, decentralisation occurred out of necessity and convenience, without devolution of powers, based on the need for local authorities to have the “fullest possible responsibility for their own affairs”.¹⁷⁵ In South Africa, ‘devolution’ following the 1983 constitution was based on the same rationale, transferring problems to the local authorities. In practice, power was still centralised in race-based institutions overseeing their respective local authorities throughout the Republic. In both countries, there was no consideration of regional governments.

¹⁷⁴ *The Water Dialogues Synthesis Report 2009 – Johannesburg Case Study*, www.joburg.org.za, 66, accessed 14/10/2015.

¹⁷⁵ Macmillan (1917), *op cit*, 26.

The first division of a town (Johannesburg) into wards for the purpose of electing sanitary boards started in 1887, and a decade later for election of a town council. It is interesting to note that Johannesburg's nine departments and 24 councillors administering an area of nine square miles, home to 102 000 people between 1898 and 1899 failed to function effectively.¹⁷⁶ Hence, municipal inefficiency has a long history. Between 1970 and 1979, despite a high level of centralisation of powers, local authorities were expected to be financially self-sufficient.¹⁷⁷

The South Africa Act of 1909, the Republic of South Africa Constitution Act of 1961, and the Republic of South Africa Constitution Act of 1983 all centralised power in the State President alone or in collaboration with the supreme Parliament. All three enactments were not democratic in the conventional sense, did not cater for the development of 'non-whites', and in the process of disenfranchisement, left a void in that persons of colour were not allowed to participate in and learn from the business of politics and governance. Between 1682 and 2000, there was no clear division of powers among the three levels of authorities; power was at the centre with provincial councils having authority over their regions and local authorities therein. Hence, there was no education and experiential learning through participation in governance by persons of colour.

Following British practice, considerable powers were decentralised, not devolved, to local authorities, but they were prescribed on a racial basis with central government retaining control and the final say. Local authority powers, as was the case in Britain, were allocated more as a compromise, putting expediency before principle. Local authorities operating under the centrally-imposed principle of financial self-sufficiency and financial viability had to deal with problems at their localities. They would have had little help from the (centralised) State Revenue Fund and thus black areas were in a deliberate state of underdevelopment, given they had limited own local resources.

Uniformity in local authorities beginning in 1912 meant no differentiation between large and small institutions and of varying capacities and competencies. This 'one size fits all', practised currently, served as a brake on the development ideals of the stronger municipalities capable of innovative service delivery practices.

¹⁷⁶ Green (1957), *op cit*, 67.

¹⁷⁷ Cameron (1995), *op cit*, 399.

The ‘devolution’ ideal in the 1983 constitution was over-ridden by the need for centralisation because the local government developmental processes had to be controlled from the top due to lack of skills, experience, and finance within local authorities.¹⁷⁸ It would have made more sense for national and provincial governments to capacitate local authorities to undertake work decentralised to them such that after three decades, municipalities would be better equipped today to provide services. This would have had positive effect on the quality of contemporary municipal representation.

Capacity has been and is also a current problem, as evinced by research tabled by the Gauteng oversight committee showing that personnel in the Premier’s Office “lacked the skills to draft legislation” and that many new staff were “still acquiring the skills necessary”. A concern was that the Premier’s Office provided leadership, but an indicator of its capacity is that of the R329 million budget for the 2014-2015 financial year, it had “spent only 60.88% by the end of the third quarter”.¹⁷⁹ Consideration could be given to use of volunteers who may contribute their time and knowledge to development at low cost as they would be remunerated with an honorarium.

From the foregoing, the questions in the Introduction could now be answered:

- i. The governmental system, policies and practices from 1682 to the advent of democracy had an adverse influence and negatively impacted on the country and its majority population. They also did not permit persons of colour to be part of the state apparatus, thereby denying them the opportunity to learn politics and governance.
- ii. There were numerous gaps that if filled timeously would have facilitated a more efficient government machinery today. Some of these were the high level of centralisation of powers, especially in the State President and a (white) Parliament; lack of clear definition of provincial and local authorities’ roles and functions; disenfranchisement of non-whites resulting in non-representation; race-based legislation that divided the people in a ‘unitary state’; decentralisation without devolution of powers; lack of accountability to a largely non-existent electorate; local

¹⁷⁸ Cameron (1995), *op cit*, 411.

¹⁷⁹ Dlamini, Penwell ‘Dysfunctional premier’s office stymied by lack of skills’, Johannesburg, *The Times*, 16/02/2015.

authorities delivering basic municipal goods and services to a small white population and not being developmental or alleviating poverty; absence of a code of ethics to aid good governance; ‘reforms’ were antidemocratic; executive supremacy; non-democratic traditional authorities; the low status of local authorities; and many other essential but missing components.

- iii. No space or opportunity was created in the colonial-apartheid governmental system for effective or efficient and democratic municipal representation by persons who were not white. Hence, they could make no contribution to socioeconomic development and municipal administration. Under the current democratic government, there are many opportunities for political representation in and by municipalities as well as for representatives to be more effective than at present in influencing policy decisions in the other two spheres of government. This is a major part of the present research.
- iv. The absence of political and technical representation within local authorities and on provincial and national decision-making bodies points to a dire need for this function. In the process, there may well be the potential for associations for local authorities to contribute to efficient contemporary municipal practice.

2.7 CONCLUSION

This chapter traced the ‘development’ and ‘reform’ of local government from the 17th century to the early 1990s. It could be seen that the underdevelopment of people at the local sphere was a direct result of colonial and apartheid segregation ideologies, aimed at dividing and ruling, on the basis of race. The situation was exacerbated by the high level of centralisation of policies and management control of their implementation at the local level. The lack of rights of people of colour and absent mechanisms to enforce any that may have had ensured that they were marginalised and remained on the periphery of society. This situation, and the fact that the upper white classes at the local level protected and promoted their own economic interests, meant that communities were divided and thus unable to collectively fight for their autonomy. The policies and their implementation were self-reinforcing, to the extent that the apartheid ideology became untenable from the mid-1980s. It could be said that the road to democracy was built at the local level, with rent and services, as well as consumer boycotts, initiated and sustained by local civic movements.

The history of local authorities' development in South Africa shows that municipalities were the passive providers of basic public goods and services to those constituencies, mostly white, that could or were willing to pay for them. Whilst local authorities participated in the provision of welfare, they did so as agents of the state. Apartheid policies precluded them from promoting social and economic development on a level that would have made a positive impact on their communities of colour. Hence, today, the lack of experience in responsible democratic local self-government is manifest. This translates to municipalities not being able to deliver services efficiently due to, inter alia, institutional inefficiency, and concomitantly, not being able to represent their people effectively. The state's apartheid policies ensured that there was no need for organisations such as associations for local authorities. A long involvement in local government affairs during the apartheid era, perhaps alongside civic bodies and non-governmental organisations, would have better equipped municipal representative organs in assisting with the development of government at the local level. Over three centuries of underdevelopment is manifest today in the limited ability of many municipalities to undertake their constitutional duties efficiently. An in-depth, holistic, objective, scientific and integrated review by an independent, that is, impartial body may be required, so that the governmental system generally and municipalities in particular, could undertake restructuring (again), but on a more systematic basis than before. One among many issues is municipal representation.

CHAPTER 3

CONCEPT, HISTORY AND RATIONALE OF MUNICIPAL REPRESENTATION

3.1 INTRODUCTION

In this chapter, South Africa's approach to development over the past two decades is reviewed and analysed. The five-year State of the Nation (SoNA) approach is shown to be unsatisfactory. Consequently, it is necessary to identify problems causing systems failure or malfunction in the three-sphere governmental system to live up to ideals and expectations. To flesh out root causes, several theories are assessed in finding a means to develop a system based on sound scientific principles to base the governmental enterprise on, moving forward. The analysis of the theoretical basis and framework enable the concept of municipal representation to emerge. Even a comparatively young government like South Africa cannot exist in a vacuum: History has to a large extent influenced and shaped the Republic's model of governance. To show its origins, assemblies and representation in ancient times are depicted for background and context. This overview introduces the subject of municipal representation in South Africa.

Local authorities are the implementing agents of national policies and programmes; they deal with 'bricks and mortar' or 'bread and butter' issues, to use clichés. This type of work is usually not documented. Thus, there is little literature on theories of municipal representation, especially insofar as it relates to South Africa's somewhat unique three-sphere governmental system and the constitutional-statutory-regulatory approach. There are many theories that inform representation, many of which derive from mathematics, the social and natural sciences, and politics. The search, therefore, is for one or a combination that would be practical, relevant, and applicable. This model would have to make sense of the South African co-operative approach to governance, political representation generally and particularly by municipal councillors and administrators on their own structures as well as on those in the other two spheres of government. Such representation would be based upon the foundation and operate within the framework and context of co-operative governance and intergovernmental relations. In the belief that some theories or parts thereof could assist in the development of a governmental system or explain causes of some of its failures, a few are reviewed as an aid to analysis.

3.2 CURRENT APPROACH TO DEVELOPMENT IN SOUTH AFRICA

3.2.1 BACKGROUND

Present-day community protests are a reminder of the rents, services, and consumer boycotts at the local government level between 1976 and the late 1980s. Current dissatisfaction with service delivery could to a large extent be attributed to the failure of municipalities. However, local authorities are an integral part of South Africa's three-sphere governmental system. Failure of one component could have a domino effect. It is thus necessary to take a holistic view to ascertain the real reasons for failure and the contribution of national and provincial governments to the problems manifest in the local sphere.

Given its colonial-apartheid history and a nation divided on racial, class, ethnic, cultural linguistic and other lines,¹ South Africa's governmental system comprising three spheres reliant on co-operative governance is a bold experiment. Within this model an essential ingredient is intergovernmental relations, the "oil of the engine".² Absent the 'oil' or any of the constitutionally-prescribed *essentialia* or malfunctioning of any one of the constituent components could result in system failure. The result would be the governmental enterprise not functioning smoothly or according to expectations, as is the present case.

This analogy applies to machinery and therefore to the South African government if it was staffed solely by robots. However, it is applicable to the current governmental enterprise, where missing, malfunctioning or defective constituent parts result in the three spheres not working in unison. The failure of the system is manifest in community protests for better service delivery.³ Municipal representation is also reliant on effective co-operative governance and therefore any discussion thereon has to keep this in mind.

A contributory factor to systemic failure is the capabilities, competencies, and commitment of municipalities, with councillors and administrators as their visible faces. The human dimension in the governmental machinery does not appear to have been given much attention by national

¹ See Chapter 2 of this thesis.

² De Villiers, Bertus and Jabulani Isaac Sindane (2011) *Co-operative Government: The Oil of the Engine*, Policy Paper No 6, Johannesburg: Konrad Adenauer Stiftung, 1.

³ See Chapter 1 of this thesis.

and provincial governments over the past two decades, until recently.⁴ The instruction to municipalities by the Minister of CoGTA “to expel all senior municipal managers who are unqualified and incompetent” is a welcome but belated move. However, it is one side of a coin. The other is: had national government supported and capacitated provincial executives who could in turn do the same for municipalities,⁵ local government could perhaps be better-functioning today.

The failure of service delivery starkly exposed at the local sphere could be a diagnosis based on symptoms exhibited by an ailing patient. But the current crisis in local government was inevitable and had been long in the making, a chronic condition suffered over more than three centuries of neglect and underdevelopment.⁶ Nevertheless, there is need for specialist prognosis and diagnosis to ascertain the root cause of the malaise as a point of departure to base the design of the governmental system reliant on co-operative governance to make and keep it working.

Ile refers to four theoretical perspectives in the field of intergovernmental relations,⁷ the essential lubricant of the governmental system:

- (a) *Democratic approach*: This is a separatist view where all levels of government have a right to their existence and autonomy;
- (b) *Constitutional approach*: The constitution prescribes a hierarchy of governments and may make provisions for their relationships *inter se*;
- (c) *Financial approach*: Governmental relations are based largely on responsibilities and the related financial resources to execute them; and
- (d) *Normative operational approach*: This incorporates broad elements such as values, technical considerations, geographical factors, resource distribution, and so on.

It would appear that the Republic adopted all four of the above, and more, in the conceptualisation and design of its governmental system. However, given the complex nature of South Africa’s innovative three-sphere governmental system based on a constitutionally-mandate to operate co-operatively, one cannot say with certainty which theories and models

⁴ Mabuza, Kingdom and Shenaaz Jamal ‘Gordhan calls for firing incompetent town officials’, Johannesburg: *Sunday Times*, 8/03/2015.

⁵ In terms of their duties imposed by sections 154(1) of the *Constitution*.

⁶ Refer Chapter 2 of this thesis.

⁷ Ile, Isioma Uregu (2007) *A public administration approach to managing intergovernmental relations system in the governance of the state: A case review of Nigeria and South Africa*, PhD thesis, University of Pretoria, 60.

were used in its design. Hence, the above four theories are not discussed further, but a number are addressed below.⁸ Given the ‘value orientation’ of the *Constitution*, the hope or intention was that a “normative operational approach” would accompany the constitutional one, since these are not mutually exclusive. South Africa used the “constitutional approach”, supplemented and complemented by several accompanying statutes. The result could be excessive formalism, a theory criticised by Almond and Powell (1978) because of its emphasis on governmental institutions and their legal norms, rules and regulations, or on political ideologies, instead of performance, interaction, and behaviour. They argue that functional systems have a static or conservative bias and imply an equilibrium or harmony of its component parts, whereas in reality most political systems exhibit interdependence, not harmony and stability, given the large amount of interactions involved. The writers suggest that research needs to be directed at ascertaining how a change in any one of the parts in a political system affects other components and the whole.⁹ The degree of harmony, stability, and well-oiled functioning is contingent on the ‘quality’ of the actors, in terms of capabilities and competencies, on the one hand, and their ability to work effectively in an environment that may still be influenced by race, class, ethnic, cultural, gender, and other inhibiting factors. Systems theory could help such enquiry.

3.2.2 THE FIVE-YEAR STATE OF THE NATION ADDRESS APPROACH

Refer to Table 3.1, which is a snapshot of the five-year planning cycle with local government highlighted, to serve as a point of departure for the review that follows.

South Africa has concentrated its efforts on the establishment of structures and processes mandated by the *Constitution* and prescribed by several subsequent statutes. These mechanisms were supplemented by guidelines and “tool boxes” produced by CoGTA¹⁰ to explain how the enterprise would operate, theoretically or conceptually. Add the human dimension – leaders and managers directing machine operators and maintenance staff – the machinery could work well, but may not be as productive as originally estimated or may not be progressive.

⁸ Under 3.3 of this thesis.

⁹ Almond, Gabriel A and G Bingham Powell Jr (1978) *Comparative Politics: A Developmental Approach*, Boston: Little Brown, 3, 12-13.

¹⁰ Refer to Bibliography.

Date/President/Note	Statements directly relating to local government	Statements indirectly pertaining to local government
24/05/1994 Nelson Mandela Note 1	“The government will take steps to ensure the provision of clean water on the basis of the principle of water security for all and the introduction of proper sanitation sensitive to the protection of the environment.”	Government is “inspired by the single vision of creating a people-centred society”, “expansion of the frontiers of human fulfilment”, commitment to an entrenched human rights culture”, government’s ideals will be achieved through the RDP to which R2.5 billion will be allocated in the 1994/95 budget... rising to “more than R10 billion by the fifth year of the life of this government... think of new ways to meet the challenges of reconstruction and development”. “The government is determined forcefully to confront the scourge of unemployment, not by way of handouts but by the creation of work opportunities”.
25/06/1999 Thabo Mbeki Note 2	“The Municipal Infrastructure Programme is now beginning to progress. To increase the momentum requires further improvements in local government financial management. These matters affecting the critical local government sphere will be attended to in a vigorous manner.... We will also work with SALGA to lend all necessary assistance to ensure that this [local] sphere of government improves its effectiveness and efficiency, bearing in mind that this is the point at which our entire system of government delivers services to the people. In this context, we must make the point that to overcome the problem of urban poverty will require that local government adopts and pursues a consistent programme of poverty relief, without discrimination on the basis of race or colour. Our Government is ready and willing to support this effort.”	“The RDP and GEAR will remain the basic policy objectives of the new government to achieve sustainable growth, development and improved standards of living... The government will continue to give priority to the issue of job creation.... We will have to focus on an outcomes-based assessment as well as quality management systems.... We will speed up the completion of the skills and service audits currently being carried out. The audit is aimed at defining service needs, the availability of skills and the possibilities for redeployment to support the process of the restructuring of the public service. Action will be taken on the basis of the audit, as well as other initiatives, to right-size the public service, to improve skills levels, to improve the quality of management and release more resources for the actual provision of services to the people.”
21/05/2004 Thabo Mbeki Note 3	[Government has committed itself, <i>inter alia</i> , to] “Strengthen our system of local government”. “Within the next six months, we will complete the process of ensuring the harmonisation of municipal IDPs, the provincial Growth and Development Strategies and the National Spatial Development Perspective. Among other things, this will increase the capacity of local government to discharge its responsibilities with regard to the challenge of economic growth and development.”	[Government is committed to] “Further integrate our system of governance, responding effectively to the requirement of co-operative governance.” ...The government is also in the process of refining our system of Monitoring and Evaluation [M&E], to improve the performance of our system of governance and the quality of our outputs, providing an early warning system and a mechanism to respond speedily to problems, as they arise.” Forty goals/priorities articulated.
06/02/2009 Kgalema Motlanthe Note 4	“...household access to potable water has improved from 62% in 1966 to 88% in 2008; electricity (58% to 72%); and sanitation (52% to 73%).	“...made the fight against corruption one of the core areas of focus.” “...the Accelerated and Shared Growth Initiative (AsgiSA) is being implemented...”

<p>17/06/2014</p> <p>Jacob Zuma</p> <p>Note 5</p>	<p>“...the local government-based Community Work Programme will be expanded to provide a million work opportunities by the end of 2019....We would like our people’s experience of local government to be a pleasant one We have listened to the complaints and proposals of South Africans over the past five years, relating to the performance of municipalities... our plan of action to revitalise local government.... We have evaluated all our municipalities. We have inspected their financial management, how they work within legislative processes as well as their ability to roll out projects and to address capacity constraints.... how they respond to service delivery protests. There have been many successes... However we face a number of challenges in others. We are pleased that eleven municipalities [out of 278] stand out for consistent good performance in audits, expenditure on municipal infrastructure grants and service delivery.... One hundred numerous projects, mainly in water and sanitation, will be started and the objective is to complete them over the next 12 months.” National government will help five municipalities in four districts on infrastructure projects, while Johannesburg will be assisted with its billing system... “Meanwhile work is underway to eradicate the bucket system throughout the country.... A key focus area in local government in the next five years will be how to respond to the reality of rapid urbanisation. South Africa is becoming an urban country. By 2011 almost 63% of our population were residing in towns and cities and this trend is expected to continue over the coming decade. Our government’s Integrated Urban Development Framework will be finalised by 30 July 2014. It will... set out a policy framework on how the urban system... can be reorganised so that cities and towns can become inclusive, resource efficient and good places to live over the next 20 to 30 years. Together let us move local government forward!”</p>	<p>“In the February State of the Nation Address...we stated that South Africa is a much better place to live in than in 1994...However, as the National Development Plan [NDP] and the Presidency Twenty Year Review highlight, the triple challenges of poverty, inequality and unemployment continue to affect the lives of many people. As we enter the second phase of our transition from apartheid to a national democratic society, we have to embark on radical socio-economic transformation to push back the triple challenges. Change will not come about without some far-reaching interventions. We have put in place a programme of action based on the ANC Manifesto and the NDP. The economy takes centre stage in this programme.... We have set a growth target of 5 per cent by 2019.... Given the impact of the untenable labour relations environment on the economy, it is critical for social partners to meet and deliberate on the violent nature and duration of the strikes....</p> <p>Secondly, government will play its part in the implementation of the landmark Framework Agreement for a Sustainable Mining Industry....An Inter-Ministerial Committee on the Revitalisation of Distressed Mining Communities has been established...To further promote improved living conditions for mine workers, Government is monitoring the compliance of mining companies with Mining Charter targets...We will continue to engage business in promoting inclusive growth and to build a prosperous society...[through the] Presidential Business Working Group... We need to respond decisively to the country’s energy constraints...”</p>
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Table 3.1: President’s State of the Nation Address Relating to Local Government

Source: Compiled from government websites: www.gov.za; www.gcis.gov.za, accessed on 3/03/2015.

The theories hereunder, consolidated to inform the planning and construction of a system, may serve as a blueprint for designing the governmental machinery or used to methodically analyse causes for breakdown or failure. Select aspects of the SoNA are discussed briefly below.

3.2.3 A CRITIQUE OF THE FIVE-YEAR APPROACH

This *modus operandi* shows that the state used only part of the functional theory in the design of the governmental system, as the relational aspect only came to the fore when the *Intergovernmental Relations Framework Bill* was gazetted on 26 November 2004, becoming an Act of Parliament a year later. Again, this enactment mandates the establishment of structures and processes, without prescribing a mechanism determining how the role players in the several and diverse institutions would make them function effectively. Thus, for over a decade the state neglected to make provision for co-operative governance and for measurement of interventions and solutions to challenges as they arose during implementation. A real-time outcomes-based monitoring, evaluation and Impact Assessment (MEIA) system used regularly could have indicated problems and facilitated a ‘learning by doing’ process, enabling monitors to adjust the system to address breakdowns and failures. Absent this instrument, it would be difficult for leaders to know whether any plan or strategy would be successful as they would not have been informed by the past and present. A measuring mechanism, both for policies and people, is essential since the success of intergovernmental relations has much to do with human behaviour and particularly the interactions between and among persons involved, and the performance of role occupants.

Excessive statutory regulation also indicates that South Africa attempted a hybrid approach, incorporating all of the above and more, though neglecting the human dimension in representation and co-operative governance. The nature of a democracy, particularly one reliant largely on sound intergovernmental relations, is such that it would inevitably experience both co-operation and conflict, especially where powers and functions cannot be set out explicitly. Hence, overlaps and encroachment into another’s functional area would invariably occur.

The wording of the *Constitution* could be interpreted as a compromise, being all things to all people, a reflection of the Congress for a Democratic South Africa (CODESA) deliberations.¹¹

¹¹ Refer Chapter 2, Item 2.5: Reform of local government in the 1990s.

In practice, the *de facto* three spheres of government often appears to operate as tiers, thereby questioning whether the innovative South African system is itself one that generates conflict.¹²

Intergovernmental tensions could be minimised by better co-operation, communication, co-ordination, consolidation, cohesion, and harmonisation, a situation aided by legislation but not eliminated by statutory regulation as one is dealing with human interaction. The cause of the current service delivery protests may in part be explained by Cloete's (2008), view that the numerous constitutional and statutory provisions pertaining to the "autonomous local government sphere" have not been "fully and appropriately implemented", resulting in the inability of municipalities to execute their statutory obligations. He adds that the outcome and the current untenable situation is "not that of a bad constitutional system but rather of the bad implementation of an appropriate existing system".¹³ It may be fruitful to explore the underlying or deep-seated causes of the situation by using systems theory. A "system" is 'a complex whole; a set of things working together as a mechanism or interconnecting network; an organised scheme or method', while "systematic" is defined as 'done or acting according to a fixed plan or system; methodical.'¹⁴ It would appear that even with a National Development Plan (NDP) setting out a strategy to year 2030, national government appears to be reactionary, responding to crises after they occur, rather than planning and implementing policies and strategies on a systematic or methodical basis. The annual State of the Nation Address (SoNA) is indicative of this piecemeal approach, with restructuring every five years and annual modifications.

It would seem that these periodic changes are not based on sound monitoring and evaluation (M&E) of successes and failures over the past years. An outcomes-based M&E system would have formed a sound foundation for the largely unplanned SoNA and in its absence the speech

¹² See Chapter 2, Item 2.3.2: Centralisation of decision-making, on the historical tendency of centralisation. An example of this trend in the current three-sphere governmental system is highlighted by Mathenjwa, MJ 'Challenges facing the supervision of local government in South Africa', (1) 2014 *TSAR* 140-150, 147 where he states "...the inferior status of the local government representatives on the [National Council of Provinces] render them more or less helpless...". Another example of local government 'inferiority' is depicted in the work of the South African Human Rights Commission (SAHRC) where, in terms of section 18(4) of the *South African Human Rights Commission Act*, 40 of 2013, it reports on human rights violations by municipalities to the national and provincial executives to take action, requesting them to indicate whether they "intend taking any steps to give effect to" the findings or recommendations of the SAHRC. Other instances of the low status of municipalities are shown in several places in this study.

¹³ Cloete, F 'Service delivery: Conceptual and practical issues and challenges', in De Villiers, Bertus (Ed) (2008) *Review of provinces and local government in South Africa: Constitutional foundations and practice*, Occasional papers, Johannesburg: Konrad Adenauer Stiftung, 93-106, 101.

¹⁴ *South African Concise Oxford Dictionary*.

is an annual repetition of the challenges and rapid responses thereto, to be managed by the local sphere. There is need for a systematic approach to government and in this context, knowledge of potentially applicable theories may help reveal why something is not working in the three-sphere governmental system and how errors can be rectified timeously. This is particularly so when there are several role occupants and different institutions making up government and the need to work co-operatively in furthering its aims in “one sovereign, democratic state”.¹⁵ The summarised overview of the SoNA between 1994 and 2014 is depicted to show the apparently haphazard approach to formulating and achieving objectives of government and therefore indicates the need for a systematic approach to this crucial exercise. In the table, statements having a direct impact on local government are shown to highlight an inconsistent and unsustainable approach. With reference to Table 3.1, the following comments are made.

Note 1:

President Mandela’s speech did not articulate clear goals and priorities because it may have been too soon for the ANC government to give much thought to the way forward. However, the President stressed the need to address past injustices through the establishment of a “people-centred” society based on respect and promotion of human rights and dignity. This was to be done largely through implementation of the Reconstruction and Development Programme (RDP) and subscription to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Social and Economic Rights. Other instruments to redress poverty, inequality, and human dignity were employment creation, water security, and provision of adequate sanitation, expressed in a humanitarian-based philosophical tone rather than a project-based approach.

Note 2:

President Mbeki was known for unceremoniously dumping the RDP and replacing it with the Growth, Employment and Redistribution (GEAR) strategy. He reiterated the need for job creation to address urban poverty, perhaps through, *inter alia*, the Municipal Infrastructure Programme. Of interest was the skills and service audit to right-size the public service, but it appears nothing came of this and the implementation of an outcomes-based assessments. Furthermore, it seems that a disproportionate number of the President’s views were on municipalities without seeing them holistically, that is, within the context of the three-sphere

¹⁵Section 1 of the *Constitution*.

governmental system. The argument is for a systems or systematic or methodical approach, both to governmental design and the formulation of policies and projects.

Different theories are reviewed below to show how some and components of others may aid in making the current South African governmental system work better than it is doing currently. It ought to be remembered, though, that the state is not like a machine, and that in Abraham Lincoln's concept of representative democracy as "government of, by and for the people",¹⁶ the human dimension therein cannot be ignored.

There seems to be no report-back on the President's commitment to work with SALGA to improve local government's "effectiveness and efficiency". In his long speech, the President made statements on a large number of issues without articulating how so many 'priorities' could be successfully addressed in five years.

Note 3:

The President committed government to more than forty objectives for the forthcoming five-year period, a mammoth undertaking considering the apartheid legacy and limited resources. Of interest was the acknowledgement of the importance of local government and the need to "strengthen" it. He spoke of the need to "further integrate our system of governance" and co-operative governance and to "building government-civil society co-operation." The last-mentioned goal appears to have been abandoned as no concrete plans have been formulated and implemented. This comment is apt for the statement:

The government is also in the process of refining our system of Monitoring and Evaluation, to improve the performance of our system of governance and the quality of our outputs, providing an early warning system and a system to respond speedily to problems, as they arise.¹⁷

This is because although the Department of Performance Monitoring and Evaluation was established in the Presidency, not much has been reported on its implementation and no real-time M&E seems to have been done as evinced by service delivery protests. The objective to "complete the process of ensuring the harmonisation" of municipal, provincial and national spatial development plans "within the next six months" did not come to fruition.

¹⁶ Weisner, Claudia (2008) 'Democratic Legitimacy, Democratisation and Democratic Identity in the European Union – Old Questions, New Challenges', 12 (2008) *Redescriptions*, 96-122, 97.

¹⁷ SoNA by President Thabo Mbeki, 21/05/2004.

Note 4:

President Motlanthe's speech was more philosophical than concrete and precise. He introduced the Accelerated and Shared Growth Initiative (AsgiSA) but subsequently this strategy seems to have been abandoned, like the RDP was.

Note 5:

President Zuma's speech underlines government's piecemeal, disconnected, and reactionary approach to 'development'. The evaluation of all 278 municipalities appears to have been in isolation, that is, outside of the context that they are an integral part of the three-sphere government system and that the failure of local government cannot be attributed to it alone. A sudden focus on assisting municipalities, especially district ones, is a knee-jerk reaction to community protests. Likewise, attention to "distressed mining communities" arises from mineworkers' strikes and the killings in Marikana. The "one hundred numerous projects" to be completed in a year is again a fragmented, *ad hoc*, and unsystematic approach of appeasement. While welcome, it will not address the underlying causes of community discontent. Acknowledgement of rapid urbanisation and the formulation of the Integrated Urban Development Framework is a welcome response to this phenomenon.

General note:

The SoNA over two decades manifests a government taking a piecemeal and reactionary approach to development of the people. The five-yearly and annual statements are often a restatement of challenges with too many objectives to address them, without prioritising the priorities. These statements of intent often do not derive from evidence-based proof of the actual challenge or situation and therefore are rather ideals to strive for in satisfying voters through promises of a better life. Every year statements are made on employment creation and tackling corruption, without depiction of plans to deal with and report on them regularly. Another constant refrain is making government "more efficient, effective and responsive" but it's not clear what plans were in place or to be developed to achieve these aims. Absent a record of achievements and failures and a social cost-benefit and risk analysis, it is difficult to plan without being informed of the past. A project-based approach without analysing the root causes of underdevelopment is problematical. Also, this *modus operandi* does not facilitate institutional and thereby human development, that is, the capacity and competency of councillors and administrators. The approach is one of crisis management based on articulation of five-year objectives, often too many and not based on logical sequencing or a critical path,

with annual adjustments to take care of problems as they arise. There is much rhetoric without clear action plans, articulation of the “whats” and not much detail on the “hows”, and little or no report-back on previous five-year objectives to guide planning over the forthcoming period. While a thematic approach, such as five-year plans to “eradicate the bucket system” or to ensure every household has access to potable water, would be difficult as other priorities cannot be ignored in the meantime, there is need for systematic planning and monitoring of development.

The need to strengthen local government has been mentioned in a few SoNA, but no accompanying systematic plan has been forthcoming. Neither has mention been made of national and provincial governments’ intentions or plans to “support and strengthen the capacity of municipalities”.¹⁸ It was stated that national government “resolved to ensure that all national departments partner with municipalities to assist them to address their challenges”. A further statement reads, “Provincial governments should improve their support and oversight of the local sphere of government...”¹⁹ These statements are contradicted later in the speech when the Minister said, “...quite a number of municipalities were placed under section 139 and that they got out of it on technicalities...”²⁰ This is a repetition of the statement, “...we will not fail to intervene and act decisively in using sections 139 and 100 of the Constitution” made earlier.²¹ This ‘stick’ approach is one of corrective or curative action, rather than the often more economical and preferable preventive one based on sound forward planning. This could have been facilitated by a sound M&E system. With SMART²² objectives, key performance areas (KPA), key performance indicators (KPI) targets could be set for later measurement. They would, in turn, enable impact assessments to be undertaken. These, alongside minimum-scope social cost-benefit and risk analysis would guide government in prioritisation and selection of projects. It would seem that little or no objective impact assessments have been done to date on government’s planned interventions, priorities, and outcomes. With reference to the M&E, the ministers of the Department of Human Settlements (DoHS) and of the Department of Performance Monitoring and Evaluation (DPME) confirmed that monitoring was a challenge in the service delivery process and that it requires transparency, especially in overseeing how

¹⁸ In terms of the duty imposed by section 154(1) of the *Constitution*.

¹⁹ Minister for CoGTA, Richard Baloyi, in his SoNA debate, 15/02/2012.

²⁰ *Ibid*.

²¹ By the then Minister for CoGTA, Sicelo Shiceka in his SoNA debate, 4/06/2009.

²² Specific, measurable, achievable, realistic, and time-bound.

budgets are spent.²³ It would seem that provinces are quick to intervene in failing or apparently dysfunctional municipalities without first taking positive or proactive measures in terms of section 154(1) of the *Constitution* to capacitate and strengthen them. In the Gauteng Provincial Government's budget of R95.391 billion for 2015, no mention was made of such assistance in its "ten pillar programme".²⁴ The duty of a sphere to support another that fails to meet its obligations in the spirit of co-operative governance in "one, sovereign democratic state" was articulated by the Constitutional Court.²⁵

Failure of the SoNA approach

That the piecemeal SoNA approach to development is not working is manifest in increasing and often violent service delivery protests, sometimes fatal, based largely on general neglect of the poor, unfulfilled election promises, dissatisfaction with poor service delivery, the low rate of housing development, youth unemployment, corruption, and limited municipal capacity, as articulated by Shaidi (2013)²⁶ as applying to the Nelson Mandela Bay Metropolitan municipality but seems to have general application, as observed from recent protests. After being largely ignored for a long period, government now seems to be taking notice.²⁷ general dissatisfaction with the government, particularly the executive, the unconstitutional behaviour of the President and recent attempts to remove him office.²⁸ A rational, scientific and objective long-term approach to service delivery and socio-economic development is required. Hence, a systems approach based on theory may help.

²³ Views expressed at the South African Human Rights Commission's, 'The 2013 National Water and Sanitation Hearing' held on 21 March 2013, depicted in its *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa 2014*, www.sahrc.org.za.

²⁴ Tabled by the MEC for Finance on 3 March 2015.

²⁵ In *Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 CC, paragraph 74, quoted by Mathenjwa, Mbuzeni 'The constitutional obligations imposed on a provincial government in instances where a municipality cannot provide basic services as a result of crisis in its financial affairs' (1) 2015 *TSAR*, 59-75, 62.

²⁶ Shaidi, Elisante Walter (2013) *Investigation into Causes of Service Delivery Protests in Municipalities: A Case Study of Nelson Mandela Bay Municipality*, unpublished DPhil thesis, Nelson Mandela Bay Municipality.

²⁷ Smillie, Shaun (2017) 'The poor rise to rage against unjust system', Johannesburg: *Sunday Times*, 14/05/2017; Tlhabye, Goitsewang (2017) 'Gauteng in bid to tackle roots of protest', Johannesburg: *The Star*, 16/05/2017; Musyoka, Jason (2017) 'Call for accountable governments', Johannesburg: *The New Age*, 16/05/2017; Nkosi, Ntombi (2017) 'Unite against housing corruption', Johannesburg: *The New Age*, 17/05/2017; Mavuso, Sihle (2017) 'Service delivery protests increase', Johannesburg: *The New Age*, 18/05/2017; Zwane, Nokuthula (2017) 'Mashatile reports back to locals', Johannesburg: *The Star*, 22/05/2017; Nqobobo, Khanyisile 'Housing backlog protests addressed', Johannesburg: *The Star*, 22/05/2017; Oppelt, Phylcia, 'The forgotten part of a "world class" city'; Johannesburg: *The Star*, 22/05/2017.

²⁸ See Chapter 1, footnotes 17 and 50.

3.3 THE CONCEPT OF REPRESENTATION: THEORETICAL PERSPECTIVES

3.3.1 SYSTEMS THEORY

i. Definition

Systems theory is defined as a transdisciplinary study of the abstract organisation of phenomena, independent of their substance, type, or spatial or temporal scale of existence. In other words, it abstracts and considers a system as a set of independent and interacting parts, exploring both the principles common to all complex entities and models used to describe them. Its main goal is to study general principles of system functioning to all types of systems in all fields of research. As such, it serves as a bridge for interdisciplinary dialogue between what may be autonomous fields of study and within the area of systems science itself. The systems view is based on several fundamental ideas. It provides that all phenomena could be seen as a web of relationships among elements, or a system. Furthermore, all systems have common patterns, behaviours, and properties that can be understood. Such understanding allows one to use greater insight into the behaviour of complex phenomena.²⁹ Systems theory has been used to describe the interdependence of relationships in an organisation, and thus it could be of practical use in analysing intergovernmental relations.

ii. Systems

A system is an organised collection of parts or sub-systems that are highly integrated to accomplish an overall goal. Such integration means that if one of the components of the system is changed, the nature of the overall system is also changed. Thus, by definition, the system is systemic, meaning it relates to or affects the entire system. Complex systems comprise numerous sub-systems which are arranged in hierarchies, each with its own boundaries, inputs, processes, and outputs, working to achieve the goal of that sub-system and thereby that of the overall system. As such, complex systems usually interact with their environments and are called open systems.³⁰

²⁹ Ansari, Shahid (2004) *Teaching Note: Systems Theory and Management Control*, <http://faculty.dardenvirginia/ansaris/systems>.

³⁰ McNamara, Carter, <http://managementhelp.org/systems/systems.htm>, accessed 14/09/2014.

Since inputs, their processing, and the production of outputs, working together, achieve the planned overall goal of the system, it follows that lack of an objective or a clear one can cause breakdown of the system due to policy confusion and inconsistencies. This may be the case of South Africa where there is no precedent for democracy or its three-sphere governmental system. Consequently, it is an experiment with no clear or predictable outcomes.

In formulating his general systems theory, Von Bertalanffy (1997) asserted that

... there exist models, principles, and laws that apply to generalised systems or their subclasses, irrespective of their particular kind, the nature of their component elements, and the relationships or 'forces' between them. It seems legitimate to ask for a theory, not of systems of a more or less special kind, but of universal principles applying to systems in general.³¹

Bertalanffy (1997) also showed the assumption that a system could be broken down into its individual parts so that each component could be analysed as an independent entity and that the elements could be added in a linear fashion to describe the totality of the system, to be false. He asserted that a system is characterised by the interaction of its parts and the non-linearity of those interactions. Bertalanffy argued that systems operate through differentiation and co-ordination among its parts, and a characteristic of any organisation, whether a living organism or a society, are notions like those of wholeness, growth, differentiation, hierarchical order, dominance, control, and competition.³² This interaction of the parts, for the purpose of this study, is analogous to the relationship between the three spheres of government and their several role players. Unlike a motor car engine, one part or component, such as municipalities, cannot be removed and repaired if found to be malfunctioning and thereby placing the whole 'system' in jeopardy. The three spheres must function as an integrated and organic whole. The human dimension appears to have been neglected in the design of South Africa's governmental system generally, but particularly that of the co-operative governance 'sub-system'.

Co-operative governance should be understood in the context of order in a complex system. Such a system may require a spontaneous approach since it cannot comprise only of rules and regulations, and the expectation that they will work harmoniously. This is because the social order consists of a complex web of rules and institutions executing them, "leading to a recurrent social pattern of co-operation and co-ordination." Thus, there is a complex network of

³¹ Von Bertalanffy, Ludwig (1997) *General System Theory: Foundation, Development, Applications*, New York: Harper, 32.

³² Walonick, David S (1993) *General Systems Theory*, www.survey-software-solutions.com/walonick/systems-theory.htm, accessed 14/09/2014.

interrelated organisations with the interweaving of several different types of rules that are spontaneous, explicit or tacit, enforced deliberately or practised informally.³³

iii. Models and approaches in systems theory

In 1974 Kuhn formulated a model showing that the role of a decision is to move a system towards equilibrium, facilitated by communication and transaction. He argued that culture is “communicated, learned patterns ... and society as a collective of people having a common body and process of culture.” He argues that a subculture could be defined only relative to the current focus of attention. In his model, when society is viewed as a system, culture is seen as a pattern in that system. Kuhn posits that a study of systems can follow two approaches:³⁴

- (a) the *cross-sectional* approach, dealing with the interactions between two systems; and
- (b) the *developmental* approach, which addresses changes in a system over time.

A system from Kuhn’s frame of reference would be one made up of regularly-interacting and interrelating groups of activities. Open systems perspectives of the theory questioned conventional closed or cybernetic systems; thus, there was a shift from absolute and universal authoritative principles and knowledge to “relative and general conceptual and perceptual knowledge”.³⁵

This is different from conventional models, as used in South Africa, that focus on structures or departments or units or individuals separately, rather than acknowledging the interdependence or inter-relatedness between groups of individual role occupants and the structures and processes that enable institutions to work effectively. These, collectively make up the governmental system.

iv. Evaluation of sub-systems

Kuhn (1974)³⁶ states that there are three general approaches for evaluating sub-systems:

- (a) *Holism*: the holistic or *gestalt* approach examines a system as a complete functioning unit. It focuses on the arrangement of and the interrelationships among the constituent

³³ Chaumont-Chancelier, F (2003) ‘Civil society in a contemporary social order’ in Breton, A, G Galeotti, P Salmon and R Wintrobe (Eds) *The rational foundations of democratic politics*, Cambridge: University Press, 70.

³⁴ Kuhn, A (1974) *The Logic of Social Systems*, San Francisco: Jossey-Bass, 154-156.

³⁵ Bailey (1994: 3-8), quoted by Ansari (2004), *op cit*.

³⁶ *Ibid*.

parts in order to understand how the sub-systems link and work together as a unified whole. It does so without reducing an organisation or institution into its individual components in isolation. This is because the way the elements are organised and how they interact with each other determines the properties of the particular system, the behaviour of which is independent of the characteristics or peculiarities of the parts. Thus, one cannot understand the behaviour of the whole by studying the behaviour of its various parts. The holistic approach to understanding phenomena is useful because Hegel asserted that the whole is greater than the sum of its parts. This thinking relates to the idea that systems are made up of sets of many interrelated and interconnected parts that, put together, make the behaviour of the whole greater, different and distinct from the sum of the behaviour of its individual components. Generally, a system means a configuration of parts that are connected and joined together by a web or family of relationships among the members acting as a whole. The emphasis on systems theory is not on the constitutive parts but on their organisation.³⁷ This is because these parts are not static and constant or stable and in harmony, but dynamic processes. Systems theory provides the meta-language to resolve a problem regardless of the discipline.³⁸ This approach serves to warn designers of unintended consequences if they fail to appreciate the linkages and interrelatedness by focusing exclusively on the individual components. South Africa does not appear to have used the holistic approach advocated in systems theory in the design of its governmental system.³⁹ If it did, the three spheres may have worked better as one organic whole rather than as *de facto* tiers.

- (b) The *reductionist* approach looks downward and examines the sub-systems within the system. Reductionism advocates the study of properties or functioning of a system's individual parts in order to understand phenomena. It is therefore the opposite of the systems approach. This may have been part of a strategy used in South Africa and could explain the situation that the country is in today in relation to co-operative governance.⁴⁰
- (c) The *functionalist* approach looks upward to explore the role sub-systems play in the larger system. This is the situation in South Africa: The national sphere formulates

³⁷ Schein (1980: 4-11); Laszlo (1972: 14-15); Banathy (1997: 22), quoted by Ansari (2004), *op cit.*

³⁸ Ansari (2004), *op cit.*

³⁹ See generally, Smuts, Jan (1927) *Holism and Evolution*, London: Macmillan.

⁴⁰ Kuhn (1974), *op cit.*

policy and designs programmes that are implemented by municipalities through their integrated development plans (IDPs). Provincial government acts as intermediaries.⁴¹

It serves no real purpose in classifying or categorising the approach used in South Africa as its governmental system does not appear to be reliant on any theory of government.

v. Key concepts or tenets of the systems theory

Theorists⁴² assert that general systems theory incorporates at least six key concepts or tenets:

- (a) It is *open*⁴³ to and interacts with the *environment*. It is characterised by the dynamic interaction of its components, while the basis of a closed or cybernetic model is the feedback cycle. Open systems exhibit higher levels of organisation than closed systems.
- (b) Behaviour in systems is *teleological* or purposeful. The system studied has a goal, arrived at by a conscious decision.
- (c) An open system is an ongoing *process* of taking *inputs* from the environment and *transforming* them into *outputs* that go back into the environment in a constant exchange. Input is defined as the movement of information from the environment into the system, while output is the movement of information from the system to the environment. Both input and output involve crossing boundaries that define the system.
- (d) *Feedback* enables a system to achieve its desired or steady state. A high-functioning system continually exchanges feedback among its various components to ensure they remain closely aligned to and focused on achieving the system's objective. Should any of the parts or processes become weakened or misaligned, the system makes the necessary adjustments so that it can achieve its goals. There are two types of feedback loops: The negative or error control feedback is one on which the system reacts to after the fact, or after errors have occurred. The system uses this information on small errors to take corrective action. The feed forward control is anticipatory in nature: The system

⁴¹ *Ibid.*

⁴² Ansari (2004), *op cit*, quoting Kast and Rosenweig (1972); Walonick, *op cit*; McNamara, *op cit*.

⁴³ Emphasis in the original.

anticipates what may occur and takes preventive or corrective action before the errors or disturbances affect the system.

- (e) The concept of *homeostasis* refers to the ability of a system to achieve a state of dynamic equilibrium. However, the system does not return to its original state, but to one that maximises its chances of survival and growth. This state may or may not be one from which the system originally started.
- (f) *Equifinality* is defined as the ability of a system to attain the same final result from many different initial conditions.

3.3.2 SYSTEMS THEORY LESSONS FOR SOUTH AFRICA

From the foregoing brief analysis, some lessons emerge that are worth considering in the three-sphere governmental system in the context of co-operative governance and municipal representation in South Africa:

- i. A complex system, such as the government of a nation, should be seen as an integrated whole although divided into sub-systems, such as provincial and local government and further into departments in all spheres, and arranged in a hierarchy. Whilst each is a self-contained unit, none can function optimally without interacting and interrelating on an ongoing basis with others in achieving the goal of the whole system. The system cannot survive unless it is open (democratic) and constantly interacting with the environment, that is people and where they live, play and work. This notion of hierarchies calls into question the viability of South Africa's three spheres and the concept of 'equality'. Use of the term 'system' when applied to an integrated government means it comprises relationships, partnerships and networks as well as social, political, organisational, and cultural contexts that underlie them.
- ii. The whole being greater than the sum of its parts implies that policies, programmes, and projects in the provincial and local spheres must contribute to the attainment of the state's overall goals. This objective is more easily achieved if all sub-systems work holistically, harmoniously, and co-operatively, rather than competitively.
- iii. Any analysis and repairs to a part, say to an apparently dysfunctional municipality, outside the context of the entire system, would be counterproductive. Hence, to blame

local government for service delivery failure shows this is a reductionist approach, unless such criticism is justified after analysis of the whole system of governance.

- iv. The system must have a rationally-planned goal or else the confusion will cause it to flounder to the extent that the centre will not be able to hold.
- v. For the system to reach equilibrium or an ideal state, logical decisions need to be taken from time to time to keep it dynamic.
- vi. The functionalist-reductionist approach appears to come closest to the one adopted by South Africa. However, as stated above, there is no need for theoretical classification of the approach to governance. While the *Constitution* and statutes have facilitated the design and construction of policies, structures, frameworks, and guidelines, the operational or implementation aspects have not been adequately addressed. This relates both to the capacity and development of human resources, particularly to the measurement of their performance.
- vii. An organisation or institution functions through regularly-interacting and interrelating groups and their activities. Such relations should be constantly monitored and analysed to minimise risk, conflicts and breakdowns, and harmony encouraged.
- viii. A system works better when it facilitates transaction through interaction. Such requirement appears to be inadequate in South Africa's intergovernmental system. This means that a relational system, *per se*, or the mere statutory provision therefor is a necessary but insufficient requirement. It is essential to ascertain whether this approach helps or hinders service delivery for it may well be that some of the numerous structures established are themselves serving as blockages.
- ix. Within a complex system, clarity of roles, expectations, and mandates through effective communication and co-ordination among the relevant stakeholders are essential, although acknowledging that overlaps may occur. Also required is a culture of participation, commitment, and strong leadership. Ile (2007) argues for the need for cohesion and consistency, especially where local discretion is permissible and desirable

in order not to over-centralise or homogenise the system or to preclude broad autonomy of local institutions.⁴⁴

Systems theory has given rise to several other theories. Of relevance to this study is organisational theory.

3.3.3 ORGANISATIONAL THEORY

Theorists⁴⁵ argue that organisational theory derives from systems theory since organisations use complex, dynamic, goal-oriented bodies. The systemic view of institutions is transdisciplinary and integrative, as it transcends the perspectives of individual disciplines and integrates them on the basis of the formal apparatus provided by systems theory. This approach gives primacy to the interrelationships, not to the components, of the system. From these dynamic interactions, new properties of the (whole) system may emerge, providing useful insights into causes of failures or successes. Systems thinking incorporates techniques for studying phenomena in holistic ways. Thus, it is an improvement on conventional reductionist methods. Organisational development and the management of organisations or institutions have benefited from systems theory because:

Management control systems consist of all organization structures and sub-systems designed to elicit behaviour that achieves the strategic objectives of an organisation at the highest level of performance with the least amount of unintended consequences and risk to the organization.⁴⁶

Using general systems theory, management control systems could be viewed much like biological organisms that exist in constant engagement with their environment. If an institution is an open system constantly interacting with its environment, then the environment becomes very important in determining and explaining the organisation's behaviour. Hence, the study of a management control system ought to begin by understanding and characterising an institution's environment. Furthermore, general systems theory applied to management control asserts that the organisation would exhibit teleological or purposeful behaviour. The reason for control is to achieve the vision, mission, and strategic goals of the institution, and to minimise unintended consequences. Management control systems consist of many interrelated sub-

⁴⁴ Ile (2007), *op cit*, 68.

⁴⁵ McNamara, Carter, <http://managementhelp.org/systems/systems.htm>; Von Bertalanffy, Ludwig (1997) *General System Theory: Foundation, Development, Applications*, New York: Harper, 32; Walonick, David S (1993) *General Systems Theory*, www.survey-software-solutions.com/walonick/systems-theory.htm; Ansari, Shahid (2004) *Teaching Note: Systems Theory and Management Control*, <http://faculty.dardenvirginia/ansaris/systems> accessed 14/09/2014.

⁴⁶ Ansari (2004), *op cit*.

systems. Some are structural components, such as information, delegation of authority, policies or legislation, while others may be behavioural or cultural factors, such as motivating behaviour or building the right values. Because these systems are interrelated, each element must be designed while recognising its impact on the other parts. Thus, a management control system must bring together the institution's structural elements and mesh them with its behavioural and cultural components so that all three work together as a singular whole.⁴⁷

Walonick (1993)⁴⁸ argues that planned organisational or social change is an attempt to solve a problem or to catalyse a vision. Such change would affect other system variables. Knowledge of the non-linearity of relationships gives designers the potential to make large changes in a variable with relatively small changes in another. Thus, systems theory enables planners to widen their perspective by affording them the opportunity to consider how their decisions may affect the other parts of the system and the environment. He asserts that our culture and experience define our understanding of systems.

Since systems theory recognises the relativity of perception, it provides a framework for examining and understanding our environment and a common method for studying societal and organisational patterns. Organisations cannot function outside their context since there is a relationship between the institution and the environment in which it operates. This interaction is the primary source of complexity and interdependence.⁴⁹

Organisational theory, within the framework and context of systems theory, could have been used to better design South Africa's governance system, especially the sub-systems of powers and functions and of co-operative governance. The absence of such a theory in the design of the three-sphere governmental system may be manifest in the 'transformation' of governmental structures through frequent restructuring. Such piecemeal reorganisation sometimes has no sound rationale behind it, being based on the wishes or whims of the political leadership or of senior managers. At times, the transformation may be little more than a change in name of the department or a unit, such as in the case of CoGTA. This has adverse implications for institutional integrity and continuity.

⁴⁷ *Ibid.*

⁴⁸ Walonick (1993), *op cit.*

⁴⁹ *Ibid.*

Ile (2007)⁵⁰ argues that South Africa has attempted to establish an enabling environment through a constitutional and statutory regulatory framework, thereby using organisational abstraction. It has paid scant attention to functional abstraction, where the state consists of a set of institutions executing particular goals. In reality, one categorisation cannot exist without the other. Organisational categorisation may be a prerequisite for functionality of government, but in the context of intergovernmental relations, the emphasis is on functionality. If functionality was used as a basis for the design of structures for co-operative governance, the result may be better. This is especially so given the plural nature of South African society which requires multifaceted institutions to facilitate decentralisation and intergovernmental relations.

Since it involves human interaction, the nature of co-operative governance is such that it will generate conflict. It may thus be of assistance to provide a brief overview of conflict theory.

3.3.4 CONFLICT THEORY

According to Christian (2010), systems theory can be used to assess a conflict, thereby gaining a broad perspective on the social systems involved. In such an exploration, three factors are crucial:

- (a) analysing the workings of the entire system and its sub-systems;
- (b) determining the recurring patterns within the system that are connected to the conflict;
and
- (c) identifying individual contributions to the overall system.⁵¹

Rather than blaming one person as the cause of the entire conflict, it would help to look for a predictable chain of events because what an individual does will affect every other person involved in the conflict. There is a need to ascertain the role of each person in the system to help the process itself to change. Just as a person develops individual characteristics, an entire system, such as an institution, can also assume its own characteristics, influenced by the behaviour of role occupants therein. In a systems theory analysis, attention should be paid to the relationships rather than on individual behaviours. This is because the conflict and the way parties to it act can be different, depending on the relational type of the persons involved. A

⁵⁰ Ile (2007), *op cit*, 69-70.

⁵¹ Christian, Robin (2010) *How Systems Theory Relates to Conflict: How a Full Assessment of Conflict Can Aid Conflict Management*, www.associatedcontent.com, accessed 14/09/2014.

complete assessment of the conflict may enable the “introduction of new rules, understand and acknowledge micro-events, and have difficult conversations.”⁵²

A micro-event is defined as repetitive communication patterns that carry information about the underlying conflict structure, that is, a repetitive loop with the same outcome. A micro-event is a descriptive behaviour that can occur in clusters. Whilst not every interaction is a micro-event, non-defensive listening could assist in identifying those that are.⁵³

In addition to analysing the system and its sub-systems as well as conflicts therein, it may help to understand human behaviour. Symbolic interactionism focuses on the subjective aspects of social life rather than on objective, macro-structural components of social systems. For interactionists, humans are pragmatic actors who must continually adjust their behaviour to the actions of other role players. This is because society consists of organised and patterned interactions among individuals. Such change in behaviour is dependent on the ability to interpret the desired action. The attention paid to interaction and the meaning of events or situations to persons participating in them shifts attention of interactionists away from stable norms and values toward more changeable, continually readjusting social processes. Role taking is a key mechanism of interaction, enabling one to see things from another’s perspective and what one’s actions may mean to others.⁵⁴

An understanding of conflict theory based upon the foundation and within the framework of both organisational theory and systems theory may have enabled the design of a better and more complete system of co-operative governance thus enhancing harmony by reducing intergovernmental conflicts.

3.3.5 THEORIES OF REPRESENTATION

The concept of representation is based on the theory of authorisation and consent (See Table 3.2). Since it may be difficult for the majority to be present when decisions affecting them are taken by government, its wishes are conveyed by a representative chosen by the people.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ McClelland, Kent (2000) *Symbolic Interactionism*, <http://web.grinnell.edu/courses/soc111-01/IntroTheories/Symbolic.htm>, accessed 14/09/2014.

Thereby arose the theory of governmental accountability. Political representation based on the conception of a constituency as the aggregation of persons began in England with the *Curia Regis* or Kings Council after the Norman Conquest of 1066 (see Item 3.4 below). Since individuals cannot delegate all their authority or alienate all their rights, delegation was always subject to the reservation that the delegate does nothing contrary to the faith and to sound morals. This notion gave rise to the representative's accountability and responsibility to the constituency. An important function of the representative was to serve as a two-way channel of communication.⁵⁵

Theories of representation in literature on the American legislature are largely based on Hannah Fenichel Pitkin's notion of making "present that which is not literally present." This, in turn, is related to several theories:⁵⁶

- (a) The *authorization* theory derives its name from the representative being authorised by a constituency to represent its views, giving a person the right to act that he or she did not have before, with the proviso that the constituency takes responsibility for the consequences as if it had acted itself. This theory describes the initial relationship but not the process that takes place after the authority has been granted to the elected official.
- (b) The *standing for* theory incorporates two types of representation: 'Descriptive' representation refers to a situation where a person is a mirror of the people in a constituency and reflects its wishes. 'Policy' representation is the opposite end, where a constituency is represented by someone who does not necessarily share the common characteristics of the people in a particular locality.
- (c) The *acting for* theory merely provides a general description of a tie between the representative and those for whom he or she acts.

⁵⁵ http://science.jrank.org/pages/11124/Political_Representation;_11123-Medieval-Corporatism, accessed 17/09/2014.

⁵⁶ Summarised from: *Representation*, <http://web.missouri.edu/webberd/316/Rep.html>.

- (d) The *trustee* (or *independence*) theory pertains to the situation where the representative is entrusted to make decisions that will benefit the spatial area he or she represents, thus acting for a geographical-based constituency.
- (e) The *delegate* (or *mandate*) theory is based on the notion that the representative should act only on the instruction of the local group; and delivers that localised group's vote. The delegate may not act in accordance with his or her own conscience and does not need to take the good of the region (state or province) or country into account. The representative simply acts as the voice of those who are not literally present.
- (f) The *politico* theory is a skilful mix of the trustee and delegate models, and is associated with representatives who are career politicians acting in a way that will help them get re-elected.
- (g) *Liberalism* theory is based on many different interests, often associated with factions or interest groups.
- (h) *Burkean* theory differs from liberalism as it focuses on individual interests. It believes that the good of the nation does not lie in the opinions of constituents in any form, but in reason and judgment. This is similar to the symbolic mode of representation, where a delegate represents the nation, not just those in the constituency. In his *Speech to the Electors at Bristol at the Conclusion of the Poll* in 1774, British politician Edmund Burke spoke against the notion that elected officials should exactly mirror the opinions of the electorate.
- (i) The *transmission belt* theory derives from the responsiveness of the representative to the wants and needs of constituents in the form of policy, service, resource allocation, and so on. This theory incorporates both a delegate and a trustee version, with the representative acting according to the wishes of the constituency but any action must be in accordance with the good of the locality or the nation.
- (j) The *constitutive* theory combines the four major concepts of representation: authorisation, descriptive, symbolic, and acting for the electorate. In this theory, public opinion provides a circle within which the representative is free to act.

(k) *Social representation theory*⁵⁷ is based on the idea that for people in groups to talk with each other they need a system of common understanding, particularly of the concepts and ideas that are outside of such ‘common’ understanding or which have particular meaning for that group. Social representation is described as systems of values, ideas, and practices with a two-fold function. The first is to establish an order that will enable individuals to orientate themselves in their material and social world and to master it. The second is to enable communication amongst members of a community by providing them with a code for clearly naming and classifying the various aspects of their world and their individual and group history. This is because meaning is created through a system of social negotiation rather than being a fixed and defined thing. Furthermore, the interpretation of meaning may require an understanding of additional aspects of that social environment.

(l) *Dyadic theory* refers to that kind of representation where the degree and manner in which elected legislators represent the preferences or interests of their specific geographic constituencies.⁵⁸

This is the kind of constituency-based representation that opposition parties are calling for in South Africa at the national and provincial levels, rather than the existing proportional representation electoral system.

(m) *Collective theory* is defined by the answer to the question whether it is preferable that Parliament, or specifically the National Assembly, as an institution should collectively like a unit represent the people rather than an MP representing his or her district or constituency.⁵⁹

(n) *Command Theory or Imperative Theory of law* – This was expounded by John Austin (1790-1859), an English legal philosopher. He asserted that “law is the aggregate of the rules set by men as political superior or sovereign to men as politically subject”.⁶⁰

⁵⁷ Summarised from: http://changingminds.org/explanations/theories/social_representation.htm, accessed 17/09/2014.

⁵⁸ Summarised from: *Representation*, <http://web.missouri.edu/webberd/316/Rep.html>, accessed 17/09/2014.

⁵⁹ *Representation*, <http://web.missouri.edu/webberd/316/Rep.html>.

⁶⁰ <http://www.desikanoon.co.in/2012/08/the-nature-of-law.html> – accessed 16/05/2017 (“desikanoon”).

Law was seen as the command of a sovereign that imposed a duty backed by sanction for non-compliance.

While this theory may have had some or partial application during Austin's time and by present-day dictators, it cannot stand current scrutiny. There were laws that predate or are independent of a state; not all laws are general; not all laws can be expressed as commands; and there may be no sanctions for certain (civil) laws. The imperative/command theory makes no allowance for the existence and application of "customs, traditions, and unspoken practices"; international, constitutional and personal laws (such as Hindu, Mohammedan or Canon laws). It makes no mention of ethics nor the relationship between justice and law, or the purpose of law, such as to promote social welfare. It also ignores natural law or moral law.⁶¹ "In order to remain relevant, law has to grow with the development of the society...the definition of law is ever changing with the change in society."⁶² Austin's theory has no place in South Africa's constitutional democracy.

It is clear that in a democracy in South Africa, Austin's theory has no place as an executive president could do as a 'sovereign' pleases. The head of the executive or the President must act within the framework of the *Constitution*⁶³. Furthermore, laws are not made by the sovereign but by Parliament, with participation of the people⁶⁴ as prescribed, as the constitutionally-desired form of 'responsible government'. The people's dissatisfaction with the government and its leaders could lead to their removal, as shown by recent attempts to remove the President from office.⁶⁵

⁶¹ *Desikanoon, op cit.*

⁶² *Ibid.*

⁶³ As shown by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

⁶⁴ Where Parliament fails to engage with the public in its law-making process, this has been ruled unconstitutional – see *Mary Patricia King and Others v Attorneys Fidelity Fund Board of Control and Others*, Case 561/04, SCA, delivered 20 September 2005, paragraphs 1, 9 and 22; see, generally *Doctors for Life International v Speaker of the National Assembly* (CCT 12/05) ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006; *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50 (26 April 2017). See also Czapanskiy, Karen Syma and Rashida Manjoo (2008) *The Right to Public Participation in the Law-Making Process and the Role of legislature in the Promotion of this Right* 19(1) (2008) *Duke Journal of Comparative & International Law*, 19(1) (2008), 1-40.

⁶⁵ Refer Chapter 1, and footnotes 17 and 50, where this matter is discussed.

(o) *Free Will Theory* – is a “philosophical term of art for a particular sort of capacity of rational agents to choose a course of action from among various alternatives.”⁶⁶ It is connected with the concept of moral responsibility for one’s action. “Philosophers distinguish between freedom of action and freedom of will”. This is because the ability to carry out one of a range of actions successfully sometimes depends on factors wholly beyond the actor’s control, that is, because of external constraints or influences. The Free Will theory also presupposes that the person is capable of rational deliberation, capacity to reflect on desires and beliefs, and capable of control and causation. All of these point to one’s “capacity for deliberation and the potential sophistication of some of our practical reflections.”⁶⁷

The full application of the Free Will theory in contemporary society is moot. In South Africa, for example, the question is whether voters in an election exercise their free will in the context of incentives, intimidation, nepotism, corruption, and so on. Another question is whether elected representatives exercise responsible government, that is, represent the people, rather than their political party’s wishes or that of the President. This begs the question as to whether people in contemporary society have or can exercise free will. The current ‘state capture’ saga suggests not.

(p) *Theory of Intergovernmental Relations* – This subject, alongside co-operative governance, forms a major part of this thesis and is reviewed throughout the study. Hence, the theory of IGR is addressed only briefly and for the sake of completeness.

Agranoff and Radin (2014) argue that the first emergence of intergovernmental relations was in the nineteenth century during the construction of the nation-state. It was then that “legal distinctions of government were initially defined”, with emphasis on law and politics.⁶⁸ The

⁶⁶ <https://plato.stanford.edu/entries/freewill> (29/10/2010) - accessed 17/05/2017.

⁶⁷ *Ibid.*

⁶⁸ Agranoff, Robert and A Radin (2014) *Deil Wright’s Overlapping Model of Intergovernmental Relations: The Basis for Contemporary Intergovernmental Relations*, Paper: Deil Wright Symposium – Understanding Intergovernmental Relations: Reflections and Directions, 14 March 2014, 1-28, 5.

number of role players in IGR rose steadily from the early twentieth century to present day networks operating globally and where power “is evermore dispersed”. In the network IGR phase, officials from various levels of government, universities, non-profit NGO “sit down with one another at the same table to discuss, explore, negotiate, and solve issues interactively.”⁶⁹

Agranoff and Radin assert that relations between governments was identified by William Anderson in the 1930s, and published in his book, *Intergovernmental Relations in Review* in 1960.⁷⁰ They argue that Deil Wright in his book, *Understanding Intergovernmental Relations* (1978) posited three models of intergovernmental relations:⁷¹

- i. Co-ordinate authority model – which depicts distinct boundaries between the levels of government with a clear separation between “national and state/local relationships”;
- ii. Inclusive authority model – where intergovernmental engagement was based on a “hierarchical set of relationships” with the national level predominating; and
- iii. Overlapping authority model – where intergovernmental relations is depicted as a “set of overlaps between national, state, and local levels simultaneously”.

Agranoff and Radin (2014) argue that in the overlapping model, “autonomy and discretion” in any level is “constrained” and the power and influence that one level has is limited. In such a model, bargaining between and among levels becomes commonplace. They refer to Wright (1998:37) who contended that IGR, with “complex multiunit interactions beyond nation-state relationships”, includes a multitude of “activities and meanings that are neither explicit nor implicit in federalism”. The overlapping model is characterised by substantial intergovernmental interaction necessary for co-operative federalism. It also requires suitable methods of collaboration between the various levels or institutions of government while at the same time “preserving and strengthening” them as separate or distinctive actors.⁷² Malan (2005) defines intergovernmental relations as –

A set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral co-operation within and among the three spheres of government.⁷³

⁶⁹ Agranoff and Radin (2014), *op cit*, 23.

⁷⁰ Agranoff and Radin (2014), *op cit*, 3.

⁷¹ Agranoff and Radin (2014), *op cit*, 2.

⁷² Agranoff and Radin (2014), *op cit*, 3-4.

⁷³ Malan, L (2005) *Intergovernmental relations and co-operative government in South Africa: The ten-year review*, 24(2) (2005) *Politeia*, 226-243, 28.

She adds that IGR has become a necessity because of the current “complexity and interdependency of political systems.” Malan distinguishes IGR as a concept from co-operative governance, describing the latter as a “fundamental philosophy of government” governing all its aspects and activities, including deconcentration of power, organisation and exercise of political power. Co-operative governance is also the conceptual framework that aims to promote a development-oriented state.⁷⁴

Malan (2012) argues that whereas intergovernmental relations consist of the horizontal and vertical relationships among institutions and individuals in the three spheres of government, the principles of co-operative government lock these relations into a particular normative framework. The core of this framework is that the decentralisation of state power in terms of the *Constitution*...is not based on competitive federalism but on the norms of co-operative government.”⁷⁵

With South Africa’s intergovernmental relations directed by the *Constitution* and the *IRFA*, it seems that Deil Wright’s overlapping model is being implemented, although there is a long way to go in achieving the results desired by an emerging participatory democracy. A dozen years have passed since the promulgation of the *IRFA*; no scientific and objective review appears to have been done to indicate its successes and failures and how to proceed further with the *Act*. However, IGR in Africa is discussed briefly in this thesis.⁷⁶

Theories have been combined and modified to create political representation (See Table 3.2).

3.3.6 POLITICAL REPRESENTATION

Based on Hanna Pitkin’s definition, political representation is the activity of making citizens’ voices, opinions, and perspectives ‘present’ in public policy-making processes. Such representation occurs when political actors speak, advocate, symbolise, and act on behalf of others in the political arena. Representation requires the following four components (using examples relevant to this study):⁷⁷

⁷⁴ Malan (2005) *op cit*, 230.

⁷⁵ Malan, LP (2012) *Intergovernmental relations in South Africa: A revised policy approach to co-operative government*, 5(3) (2012) *African Journal of Public Affairs*, 115-124, 115.

⁷⁶ In Chapter 6, 6.4.10 Co-operative Governance in the Developing World.

⁷⁷ Stanford Encyclopaedia of Philosophy (2006) *Political Representation*, <http://plato.stanford.edu>.

Four views	Brief description	Main research questions in each view	Implicit standards for evaluating representatives
1. Formalistic Representation	The institutional arrangements that precede and initiate representation. Formal representation has two dimensions: authorisation and accountability.	What is the institutional position of the representative?	None.
(Authorisation)	The means by which a representative obtains his or her standing, status, position or office.	What is the process by which a representative gains power (e.g. elections) and what are the ways in which a representative can enforce his or her decisions?	No standards for assessing how well a representative behaves. One can merely assess whether a representative legitimately holds his or her position.
(Accountability)	The ability of constituents to <i>punish</i> their representative for failing to act in accordance with their wishes (e.g. voting a representative out of office) or the <i>responsiveness</i> of the representative to the constituents.	What are the sanctioning mechanisms available to constituents? Is the representative responsive towards his or her constituents' preferences?	No standards for assessing how well a representative behaves. One can merely determine whether a representative can be sanctioned or has been responsive.
2. Symbolic Representation	The ways that a representative stands – that is, the meaning that a representative has for those being represented.	What kind of response is invoked by the representative in those being represented?	Representatives are assessed by the degree of acceptance that the representative has among the represented.
3. Descriptive Representation	The extent to which a representative resembles those being represented.	Does the representative look like, have common interests with, or share certain experiences with the represented?	Assess the representative by the accuracy of the resemblance between the representative and the represented.
4. Substantive Representation	The activities of representatives – that is, the actions taken on behalf of, in the interests of, and as a substitute for the represented.	Does the representative advance the policy preferences that serve the interests of the represented?	Assess a representative by the extent to which policy outcomes advanced by a representative serve „the best interests“ of their constituents.

Table 3.2: Four views on representation (Adapted from the Stanford Encyclopaedia of Philosophy, 2006), accessed 14/01/2015.

- (a) a party that is representing, such as SALGA;
- (b) a party that is represented, such as municipalities in the province of Gauteng;
- (c) something that is being represented, such as the necessity of district municipalities;
and
- (d) a setting within which representation is taking place, such as an intergovernmental relations (IGR) forum.

Political theorists posit four main views of the concept of representation, but Pitkin argues that one must know its context in order to determine its meaning.

In 1997 David Plotke stated that emphasis on mechanisms of authorisation and accountability was especially useful in the context of the Cold War, but that in contemporary society one must broaden the scope of our understanding of political representation to incorporate interest representation. This requires further debate on the proper activities of representatives. Today, international, transnational, and non-governmental actors play a major role in advancing public policies on behalf of citizens. Thus, it is no longer desirable to limit one's understanding of political representation to elected officials within the nation-state. Furthermore, associational life through participation in social movements, interest groups, and civic associations is becoming increasingly important for the survival of representative democracies.⁷⁸

Jane Mansbridge refers to multiple forms of representation and thus the concept should not be conceived as a monolithic one. Nor should it be seen as consisting simply of a relationship between elected officials and constituents within his or her voting district, or one of principle-agent, and should not be territorially based.⁷⁹

Nadia Urbinati argues for representation as advocacy, which has two main features: the representative's passionate link to the elector's cause, and the representative's relative autonomy of judgment. This approach improves our understanding of deliberative democracy as it avoids the common mistake of focusing on the formal procedures of deliberation at the expense of examining the sources of inequality within civil society. Iris Marion Young asserts that it is unreasonable to assume that representation should be characterised by a 'relationship of identity' for the legitimacy of a representative is not primarily a function of his or her

⁷⁸ Stanford Encyclopaedia of Philosophy, (2006), accessed 14/01/2015.

⁷⁹ *Ibid.*

similarities to the represented. Furthermore, democratic representation is a dynamic process that moves between moments of authorisation and moments of accountability. It is the movement between these moments that makes the process democratic.⁸⁰

There are three persistent problems associated with political representation:⁸¹

- i. the proper institutional design for representative institutions in democratic polities;
- ii. ways in which democratic citizens can be marginalised by representative institutions, especially since these structures and role players therein may be biased; and
- iii. the relationship between representation and democracy.

The above challenges lead to the question: Does democratic representation require representatives to advance the preferences of democratic citizens or does it demand a commitment to democratic institutions? Since it cannot be presumed that all forms of representation are democratic, one needs to analyse the relationship between different forms of representation and ways that some may be undermining democratic representation.⁸²

3.4 HISTORY OF REPRESENTATION

3.4.1 ASSEMBLIES IN ANCIENT TIMES

The gathering of leaders to discuss and decide on important matters was common in many ancient cultures. Archaeological evidence shows that citizens' get-togethers were convened in Mesopotamia (modern-day Syria and Iraq) around 2500BC. The precursor of modern parliaments was the Assembly or Ecclesia in Greece around 500 BC that met 40 times a year and wherein male citizens of 18 and over could vote on matters by a show of hands. The Roman Republic, founded around 509 BC, was ruled by two elected Consuls acting on behalf of a *Senatus* or council of elders. This 'parliament' consisted of 300 members drawn from wealthy and noble families but representing all citizens. These assemblies did not initiate laws but approved them by vote.⁸³

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Adapted from www.peo.gov.au/learning; en. ParliamentofEngland, accessed 4/03/2015.

This is unlike South Africa where in the Union and during the (apartheid) republic, Parliament was the supreme law-making body, although not voted into power by the majority of the country's population.

An early model of representation originated with Cicero when an actor represented someone else on stage as if that person seemed present. The second method of representation originating in antiquity arose in the law courts where litigants appointed professional representatives. The client or an accredited authority, such as today's Legal Aid Board, had to authorise the representative. Such representation was nothing more than having the authority to act in the name of someone else as the authoritative person "was *not* present, but needed to be *represented* in such a way that their authority continued to hold good". Political representation refers to the act of authorising other people, such as members of Parliament, legislators, and executives, to speak and act in the name of the public.⁸⁴

Political representation could be traced to Iceland which claimed to have the oldest parliament or *althing* dating back to 930. The rule of law, however, may have emerged in 1037 when German Emperor Conrad II issued a charter stating that "no one will be imprisoned except according to the law".⁸⁵ This gave rise to the notion that the ruler is subject to and not above the law.

The *Cortes* or parliament's impositions on the power of the king in the kingdoms of Leon and Aragon in Spain predate and were more extensive than the *Magna Carta*. Lesser nobility or gentry in Hungary compelled the king to grant them significant rights and privileges.⁸⁶

3.4.2 EARLY ASSEMBLIES IN ENGLAND

In the Anglo-Saxon period, before the Norman conquest of 1066, England was divided into small 'regions' called shires. William the Conqueror, the powerful Duke of Normandy, France, distributed English land to his Norman followers in a manner that none of them could become a dangerous rival to the king. After the conquest, these sub-divisions became known as counties. This strategy gave rise to the feudal system wherein the king granted land and other assets to

⁸⁴ Skinner, Quentin (2008) 'Comments on Frank Ankersmit's "Political Representation and Political Experience: An Essay on Political Psychology"' (12) (2008) *Redescriptions*, 227-231.

⁸⁵ Adapted from www.peo.gov.au/learning; en. ParliamentofEngland, accessed 4/03/2015; MacPhail, IMM (1967) *An Introduction to the British Constitution*, London: Edward Arnold, 1.

⁸⁶ MacPhail (1967), *op cit*, 1.

barons and knights in exchange for their support, especially during times of war, and was adopted by most European countries in the Middle Ages.⁸⁷

The British Parliament had its origins in two early Anglo-Saxon assemblies, the *Witanegemot* or Witan, and the moots. The Witan, dating from the eighth century, advised the King on strategic matters. It did not have a permanent membership, being comprised of advisors and nobles who met when called by the King. The Witan had no lawmaking powers. After the conquest of England, the Duke of Normandy ruled with the aid of a smaller group of permanent advisers, the *Curia Regis* or King's Council, made up of noblemen and church leaders appointed by the King. Hence, they did not democratically or formally represent anyone. It was dissolved in 1215, to be replaced by the Parliament of England until 1707, when succeeded by the Parliament of Great Britain (1707-1801).⁸⁸ The geography of a country often determines its history. England's political development in many respects was based on the country's size. A large state like France was divided into separate provinces ruled by powerful nobles capable of defying the king. In Germany and Spain, the small size of the kingdoms or duchies made rebellion impractical. England was small enough for a king to control but also for people throughout the country to combine in united action against the monarch. England's long series of wars made it necessary for the kings to raise taxes beyond their ordinary revenues. This made them dependent on Parliament. The wars against the French strengthened English unity, enabling different classes of people to join in combined action. This was also facilitated by the small size of English cities (except for London), making it easier for residents of different classes to co-operate with the country gentry in the House of Commons.⁸⁹ The moots were assemblies held in each shire or county to address matters of concern to the community, and to hear legal cases. They comprised local lords, bishops, the sheriff, and four representatives from each village in the shire. The moot was the forerunner of the House of Commons and an example of constituency-based representation within a small geographical area.⁹⁰ In return for their support, the powerful subjects wanted restrictions on the power of the king. To this end, in 1215, King John of England signed the *Magna Carta*, agreeing to restrictions on his power, thereby setting a precedent for medieval limited monarchies. Thereafter representatives, known as Knights of the Shire, with some local clergymen, were summoned to attend Parliaments.⁹¹

⁸⁷ MacPhail, *op cit*, 1-3.

⁸⁸ *Ibid.*

⁸⁹ MacPhail (1967), *op cit*, 2-3.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Thus, (undemocratic) representation was of and by the wealthy landowning nobles, as in colonial and apartheid South Africa.

3.4.3 PARLIAMENTARY SUPREMACY IN BRITAIN

In Parliament's first sitting on 20 January 1265, two elected representatives from each county (knights of the shire) and city or town (burgesses) were summoned, for the first time representing constituencies of the commoners. From 1327 peoples' representatives sat permanently in what became known as the House of Commons, which with the monarch and the House of Lords, constituted Parliament. The Great Council evolved into the Parliament of England. One of the main functions of the Commons was to petition the King and the House of Lords to resolve local and national issues through laws. These petitions were the basis of bills or proposed laws, (a tradition practised in present-day democratic South Africa). The King needed approval of the Commons for the imposition of taxes as these had the greatest impact on the people.⁹²

In the late 14th century, the franchise was introduced, limited to the number of people who could vote in elections for the House of Commons. From 1430 onwards, the franchise was restricted to "Forty Shilling Freeholders", that is, men who held freehold property of this minimum value in the county where they vote. In the 16th and 17th centuries, Parliament was not a democratic representative institution, being dominated by the nobility and the clergy, with elections controlled by local grandees.⁹³

Over the centuries, the English Parliament progressively limited the power of the monarchy, culminating in the Glorious Revolution of 1688 when parliamentary supremacy became settled and the role of all future sovereigns was restricted to that of constitutional monarchs with limited executive authority.⁹⁴

The legislative supremacy or "sovereignty" of Parliament means that it exercises supreme control over all branches of government. The courts have no power to "review" parliamentary legislation and declare it unconstitutional. Parliament also supervises the general conduct of the executive. This was the approach in pre-democracy South Africa and practised as a virtual

⁹² MacPhail (1967), *op cit*, 1-3.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

democracy by the minority white elites. “Responsible government” means ministers are responsible to Parliament, that is, the House of Commons. “The key to responsible parliamentary government lies in the Cabinet system.” Representative government is based on the assumption that electors are free to organise themselves into political parties which emerged in England in 1688, dominated by the Whigs and the Tories.⁹⁵

This was not the case in South Africa where only the minority white group had the franchise, alongside the qualified franchise of some coloureds and natives in the provinces of the Cape and Natal. Secondly, local government largely served to protect and enhance the health and well-being of this small group by the provision of municipal goods and services rather than engaging in socio-economic development.

The “Mother of Parliaments” is the title given to the British Parliament.⁹⁶ This is a model adopted in South Africa after Union in 1910 and as a republic in 1961, with white enfranchised whites as rulers.

Following annexation by the British from the Dutch in 1806, to 1910, the Cape became a British colony.⁹⁷ As a member of the British Commonwealth, it adopted the laws and institutions of England, including the Westminster parliamentary system that applied to the four provinces, then to the Union after 1910, and the republic between 1961 and 1994. It has been said that during this period –

The sovereignty of Parliament is traditionally conceived in South Africa in the sense of absolute power it gained in the Middle Ages, comprising indivisibility, originality and illimitability.⁹⁸

Rule by a small white minority from 1652 to 1994⁹⁹ and application of the above model, with the franchise and representation during this period reserved for whites, people of colour were not given the opportunity to learn the art and science of government or representation therein. This lack of experience and expertise manifests itself in the leadership in all three spheres of government in South Africa today. Even after two decades of democracy, the current situation remains untenable. This is evinced, *inter alia*, by several service delivery protests at numerous

⁹⁵ Phillips, O Hood (1967) *Constitutional and Administrative Law*, 4th Edition, London: Sweet & Maxwell, 27-28.

⁹⁶ MacPhail (1967), *op cit*, 2-3.

⁹⁷ Hahlo and Kahn (1960), *op cit*, 5.

⁹⁸ Hahlo and Kahn (1960), *op cit*, 146.

⁹⁹ See Chapter 2 of this thesis.

municipalities; the ruling by the Constitutional Court that the President acted unconstitutionally in the Nkandla matter;¹⁰⁰ and current attempts to remove the President from office.

3.5 REPRESENTATION IN SOUTH AFRICA

3.5.1 BACKGROUND

Municipal representation should be understood within the framework and context of the evolution of local government in South Africa and of representation therein. This ‘development’ had been shaped by the constitutions and legislation since the first occupation of the Cape by Jan van Riebeeck in 1652. A notable feature of laws pertaining to government had been centralisation and concomitantly the low status of local authorities. The regulatory rather than developmental role of provinces further entrenched the weak position of local authorities. Continuation of this model resulted in the present-day situation where politicians and officials appear to lack the knowledge, experience, and understanding to be efficient municipal administrators. Not surprisingly, local authorities have been ill-prepared to play a meaningful role in community upliftment after almost 350 years as providers of basic public goods and services to a small, white, rate-paying public. Given divisions along class, ethnic, cultural, language, and other lines, it cannot be said that communities at the local level were homogeneous. Development or rather the provision of local government goods and services along racial divisions, further fragmented people in their localities.¹⁰¹

For an understanding of some of the dilemmas currently facing municipalities, it is necessary to appreciate the evolution of local authorities from historical times to present day. Since law was used as an instrument to regulate and control the populace, it would be helpful to trace how this mechanism was used and how it could have contributed to the problems faced by local government today. Within such a review, it may be opportune to analyse local government representation and whether and how it contributed to development or underdevelopment. Such an assessment may show the pitfalls of past practises and provide indicators on how not to design and implement democratic participatory local self-governance. The struggle for democracy began at the local level through rents and services boycotts to make the country ungovernable. The same mechanisms appear to be in use today to express dissatisfaction of the

¹⁰⁰ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

¹⁰¹ Refer Chapter 2 of this thesis.

majority protesting against denial of democratic rights, entitlements, privileges, and of poor service delivery.

Municipal representation through structures and processes can be better understood in the context of the times they were practised in. This requires an assessment of the history of local government,¹⁰² followed by democratic reforms debated within and outside the Congress for a Democratic South Africa (CODESA). The governmental reforms from the 1990s suggest a massive social re-engineering exercise opposite to the design of the grand apartheid experiment. Going from one extreme to the other means spanning a chasm and in the process, much could have been overlooked or glossed over in the ideal or in redressing rapidly the social injustices of apartheid.

Given the then extant problems of underdevelopment and exploitation of the masses, a strategy acceptable to the majority and the ruling elite had to be fashioned. This was the Interim (1993) Constitution. At the local level, developmental transformation was to be guided by the *Local Government Transition Act (LGTA)* of 1993 and then the 1996 *Constitution*. These were supplemented and complemented by several statutes and regulations. Hence arose one of the world's most comprehensive and complex governmental system.

The above discourse may assist in formulating a conceptual form of representation by an appropriate organisation of a constituency comprising 278 municipalities¹⁰³ in nine regions. Whilst the *Constitution* made a peremptory provision for the recognition of national and provincial associations representing municipalities,¹⁰⁴ it is silent on local organisation.¹⁰⁵ Thus it is necessary to ascertain the space or opportunities available for municipal representation, gaps in the system and how they can be filled, the nature of representation and representatives, and other issues.

¹⁰² Addressed in Chapter 2 of this thesis.

¹⁰³ The number was confirmed in the 'Summit Overview' at the *Presidential Local Government Summit 2014 – Back to Basics: Serving our communities better!* Johannesburg: 18 September 2014.

¹⁰⁴ Section 163(a) of the *Constitution*.

¹⁰⁵ Sections 163(b)(i), (ii) and (iii) of the *Constitution*.

3.5.2 THE FRAMEWORK AND CONTEXT OF MUNICIPAL REPRESENTATION

Several issues need analysis before a model for municipal representation could be formulated. These are depicted below and are addressed in the subsequent chapters of this study.

i. The origin of the mandate for municipal representation

- (a) Analysis of the three-sphere governmental system;
- (b) The structure of local government;
- (c) The status, powers and functions of local government, including High Court and Constitutional Court interpretations thereof;
- (d) Co-operative governance;
- (e) The duties and obligations of the three spheres of government, particularly the local state, including High Court and Constitutional Court interpretations thereof;
- (f) The developmental duties of municipalities;
- (g) Local participatory responsible self-governance;
- (h) The rights, privileges, entitlements, and duties and responsibilities of members of local communities;
- (i) The electoral system;
- (j) Service delivery by municipalities; and
- (k) A human rights-based approach to service delivery.

ii. The case for municipal representation

- (a) Need, desirability and rationale for municipal representation;
- (b) Nature of municipal representation;
- (c) Existing opportunities for municipal representation;
 - i. within municipalities, such as on a ward committee or a municipal council
 - ii. on national and provincial institutions, such as the NCoP, FFC, etc;
 - iii. on national and international bodies, such as the NPC and International Union of Local Authorities (IULA);
 - iv. research and developmental organisations, both domestic and international; and
 - v. others.

iii. Challenges to effective municipal representation

iv. Review of implementation of municipal representation

3.5.3 REQUIREMENTS FOR EFFICIENT MUNICIPAL REPRESENTATION

From the foregoing review and analysis, a model will be developed depicting the nature of municipal representation that will fulfil the mandate of local government, namely efficient service delivery as a means to enhance social and economic development in accordance with the prescripts of the *Constitution* and applicable statutes, biased in favour of the poor.

3.6 CONCLUSION

Chapter 1 set out the current situation regarding failure of local government to provide services efficiently and on an equitable basis, manifest by community protests since 2004 to date. The crisis of the local state gave rise to the problem statement (Chapter 1). The cause of the current dilemma should be understood through an understanding of local government history generally but particularly its under-development in South Africa, addressed in Chapter 2. Exclusion of the majority from participation in government and the economy did not prepare the present government to be effective and efficient. This was acknowledged in the CoGTA Minister's response to a journalist's query:

On the question of experience, I suppose there was nobody who was born a minister so there's no issue that somebody will say I've got no experience to do the work.¹⁰⁶

This is at the heart of the matter of municipal representation – the need for experienced, mature, knowledgeable, dedicated, and committed councillors and administrators. The unacceptable developmental model manifest in the five-year SoNA statements is fragmented, piecemeal, and reactionary approach to development practised at present is tantamount to crisis management. Service delivery is unlikely to improve if the same strategy persists in the future. One of the ways to address this dilemma is the correct calibre of public representatives, especially at the local level in a participatory and representative democracy. In concluding, the requirements thereof are set out and addressed in chapters that follow.

¹⁰⁶ Minister Collins Chabane's remarks at a media briefing on the Macro Structure of Government, 21/05/2009, www.gov.za, accessed 6/03/2015.

CHAPTER 4

THE FOUNDATION, FRAMEWORK, CONTEXT AND MECHANISMS FACILITATING MUNICIPAL REPRESENTATION IN SOUTH AFRICA

4.1 INTRODUCTION

This chapter analyses the constitutional and statutory provisions forming the foundation, framework, and context that could potentially accommodate, enable, and facilitate municipal representation in South Africa. These may also provide the opportunities to enable the search of a rationale and niche for municipal representation within a relatively prescriptive, rigid, and regulated environment, when compared with the approaches of older democracies. Many policies, strategies, priority programmes, factors, variables, and components shape, influence, and impact on representation and these should be read into their purposive interpretation. Given the plethora of constitutional, statutory, and regulatory directives potentially applicable, it is necessary to be selective and to review only those directly or indirectly related to the topic, municipal representation.

The aim is to ascertain how rights and duties and their fulfilment create spaces wherein municipal representatives could be proactive. The assessment, therefore, serves to identify those structures and processes that could accommodate municipal representation, any gaps or deficiencies therein, and how they could be addressed, all in the interest of increasing municipal competency and effectiveness. This chapter is prefaced by an overview of the state's approach to development over the past two decades. The formalistic, prescriptive, and managerialist *modus operandi*, a hallmark of the apartheid regime, albeit modified, continues to occupy centre stage in a democratic state, particularly in the local government sphere. It thus serves as foundation and context against which the current multi-sphere governmental system could be compared or measured. It also provides a motivation for community and human development within municipalities wherein councillors, technocrats, and community leaders could play a major role.

Following an analysis of formalism, the origin of the mandate and the framework for municipal representation is assessed through analysis of constitutional and statutory provisions affecting

or impacting on local government. This incorporates a review of the foundational values and rights-based approach espoused in the *Constitution*; an analysis of the three-sphere governmental system; local government as a party in the co-operative governance *modus operandi*; the status, powers, functions, objectives and developmental duties of municipalities; municipal representation as a means to promote and protect human rights; direct, participatory and representative democracy; establishment of municipalities; and the current municipal electoral system. Included in the review is discussion of issues and challenges arising from the constitutional-statutory-regulatory mandate and how the judiciary has addressed them.

4.2 MUNICIPAL REPRESENTATION IN THE CONTEXT OF FORMALISM

This section serves as an introduction to and a counter argument to South Africa's formal and prescriptive approach to government and development. It is addressed here because, on the one hand, state policy serves as a guideline for socio-economic upliftment via organs of state. On the other, if development of communities is incorporated as a holistic programme, the present *modus operandi*, then, is shown up as a partial approach. This is because it largely ignores the component that comprises residents, their leaders, and representatives who could play a meaningful role in local participatory democracy.

Formalism is defined as 'excessive adherence to prescribed forms; excessive concern with form rather than content.'¹ The use of formalism outside the context of an informing and directive systems theory constitutes a piecemeal, fragmented or partial strategy. It is argued that government is giving insufficient consideration to this approach, as was in the case of grand apartheid design.² In other words it can at best be part of a more comprehensive strategy and system of governance.

It is a truism that South Africa during the colonial but more particularly through the apartheid era was one of the most 'governed' countries in the world, with a multitude of legislation 'legitimised' by Parliament. This was supplemented, to a lesser extent, by provincial ordinances and local government by-laws, to entrench and advance minority white interests. At the same time, law was used as a leading instrument to disenfranchise, marginalise, and control the masses. Local authorities, as field agents of the centrally-controlled state, were the

¹ *South African Concise Oxford Dictionary*.

² See Chapter 3 of this thesis.

implementing mechanisms of these coercive and repressive laws, and consequently these localities were arenas of struggle for a new democratic order. A massive bureaucracy enforced the ‘rule of law’. Hence, the legal order was used as a strategic weapon to ensure development or underdevelopment, depending on one’s colour. Persons who were not white did not form part of the ruling class and therefore there were no political representatives to further or defend their interests.³

In a democratic state, however, law could be used to promote development in an equitable and sustainable manner if planned and implemented on a solid foundation such as that provided by the *Constitution*, supplemented and complemented by subsequent statutes and regulations. This is because:

Operating through law, the state, warts and all, serves as the organised polity’s primary instrument for the conscious social change that development requires ... The legal order constitutes the operative form of state policy. Government can only implement policy through laws directed at influencing the behaviour of people ... Government policy has no effective content until expressed as law.⁴

Yet, law, *per se*, is not and cannot be the magic wand that eradicates poverty and ensures equitable and sustainable socio-economic development. In a country attempting to establish a new society after the damage and ravages inflicted during 342 years of colonialism and apartheid, much more is needed. One of these mechanisms is democratic political representation at the municipal level, made possible from the elections of 5 December 2000.⁵

In the apartheid era, policy placed emphasis on centralisation of power and division of the populace largely on a racial basis. This massive social engineering experiment was doomed to failure. In the new dispensation, law is again the principal instrument to establish, monitor, and regulate the governmental system and development of the state and its peoples.

Based on the values and ideals of the *Constitution* to create a democratic and egalitarian society, power is allocated to three spheres of government which are to co-operate in giving effect to the laws establishing and maintaining a democratic governmental *modus operandi*.⁶ However, there appears to be insufficient attention to an essential ingredient that will enable this

³ See Chapter 2 of this thesis.

⁴ Seidman, Ann and Robert B Seidman (1994) *State and Law in the Development Process: Problem Solving and Institutional Change in the Third World*, New York: St Martin’s Press, 1.

⁵ In terms of the *Local Government: Municipal Electoral Act*, 27 of 2000; www.elections.org.za.

⁶ South Africa’s values are set out in section 1 of the *Constitution*; section 40(1) establishes the three-sphere governmental system; section 41 lays down the “principles of co-operative government and intergovernmental relations”.

mechanism to work, namely, the human dimension: the persons who will direct and operate this new and complex machinery. This is a major component of participatory democracy and therein political and technical representation.

Commentators have argued that in a complex and uncertain environment manifest at local government, the state has fallen back on “technocratic managerialism, i.e. performance management”.⁷ They add that the refined developmental local government agenda “rests on two tracks,” namely a content-driven one and the other based on institutional reform that concentrates on “financial management, intergovernmental co-ordination and performance management.” Performance management is “seen as a precondition for the former, but both tracks must be pursued in tandem.”⁸ “Technocratic managerialism” through statutory and regulatory instruments are extended and backed up by the Department of Co-operative Governance and Traditional Affairs (CoGTA’s) intentions relating to local government, apparently being seen as the only troublesome or malfunctioning component in the three-sphere governmental system. This is evident by several recent bids being called for various services.⁹ This strategy hints of crisis management, a reaction to the increasing number and intensity of community protests mostly against poor service delivery.¹⁰ As such, it is a short-term and a partial approach treating the manifest symptoms of a deep-seated problem. It has been said –

...government has a tendency to jump from one quick fix or policy fad to the next, rather than pursuing a long-term sustained focus on tackling the major obstacles to improving the performances of the public sector.¹¹

While one could agree with this view, it is argued that the *National Development Plan (NDP)* is also somewhat piecemeal as it has little to say on how municipal councillors, communities and their leaders could be developed to function efficiently. This is the demand side of the interventions that national government must supply, but CoGTA sees managerialism, a part of

⁷ Pieterse, Edgar and Mirjam van Donk ‘Developmental Local Government: Squaring the Circle Between Policy Intent and Impact’ in Mirjam van Donk, Mark Swilling, Edgar Pieterse et al (Eds) (2008) *Consolidating Developmental Local Government: The South African Experience*, Cape Town: UCT Press, Chapter Three, 51-75, 71 (“Van Donk et al”).

⁸ *Ibid.*

⁹ These bids were placed on the CoGTA website between 17/02/2014 and 12/12/2014, www.cogta.gov.za, accessed 11/03/2015, and included, inter alia, “Back to Basics”; competency assessments; forensic investigations; human resource experts; section 139 interventions; change management intervention in CoGTA; and monitoring and reporting system for local government.

¹⁰ See Chapter 1 of this thesis.

¹¹ The Presidency – National Planning Commission (2011) *National Development Plan (NDP)*, Chapter 13: Building a Capable State, 363-393, 364.

formalism, as the way out of the dilemma of poor service delivery by municipalities. The *NDP* states that the 2030 South Africa will include a “sense of togetherness” and a “mobilised, active and responsible citizenry.”¹² This is an ideal that could remain unfulfilled unless clear short and long-term sustainable action plans are designed, implemented, and monitored.

While CoGTA’s “A Programme for Change” aims to “put people and their concerns first”, the strategy document is little more than statements of intent on achieving “effective public participation and improvement of living conditions by consistently delivering municipal services to the right quality and standard.”¹³ One of the three priorities articulated by the CoGTA Minister was performance management, without mention of national and provincial government’s obligations to firstly capacitate municipalities.¹⁴ The five ‘building blocks’ to the “Approach” are good governance, public participation, financial management, infrastructure services, and institutional capacity.¹⁵ The onus is on municipalities to implement provisions of the *Systems Act* in relation to “public participation”, while CoGTA would do little other than monitor compliance therewith. Similarly, under the building block “institutional capacity”, CoGTA’s aim of “ensuring that administrative positions are filled with competent and committed people whose performance is closely monitored,” especially of persons occupying the top six posts is again a statement without unambiguous strategies and time/budget-bound measurable objectives and outcomes related thereto.¹⁶

The “provincial government programmes of enforcement and support” has the same ‘building blocks’ as that of national and local government, with emphasis on monitoring of municipalities to ensure compliance.¹⁷ While understandably at this early stage the “Back to Basics Approach” appears to be little more than oft-articulated statements of intent, the strategy is no more than a hurried reaction to service delivery protests. Hence this is, as before, a technocratic-managerialist approach to ‘development’ with scant attention paid to addressing the real needs of people that could be articulated through local public participatory democracy, especially the widening and deepening thereof. The six ‘priorities’ in the “putting people first” objective in

¹² *NDP, op cit*, Chapter 15: Transforming Society and Uniting the Country, 411-430, 414.

¹³ *Local Government Back to Basics Approach – ‘Summit Overview’* at the *Presidential Local Government Summit 2014 – Back to Basics: Serving our communities better!* Johannesburg: 18 September 2014, Strategy document, 7.

¹⁴ In terms of section 154(1) of the *Constitution*.

¹⁵ *Local Government Back to Basics Approach – Strategy document, op cit*, 10-12.

¹⁶ *Back to Basics Approach, op cit*, 12.

¹⁷ *Back to Basics Approach, op cit*, 15-17.

the local government sphere are simply short statements reminding municipalities to fulfil their responsibilities stipulated in the *Systems Act*, without mention of resources or support to be provided to municipalities by national and provincial government. The five-yearly State of the Nation Address (SoNA) with annual restatements highlight the apparently short-term approach of the state insofar as local government is concerned.

In his post-election address,¹⁸ President Mbeki, in summarising the SoNA presented three months previously, said the country committed itself, *inter alia*, to –

- “ensure that the public sector discharges its responsibilities to our people...;
- focus especially on raising skills levels within the public sector, and ensure its managerial and technological modernisation...;
- strengthen our system of local government;
- further integrate our system of governance, responding effectively to the requirement for co-operative governance.”

In the subsequent SoNA,¹⁹ President Mbeki did not report on the achievements since the last one, but restated that the country needed to –

...develop leadership...leadership qualities are needed to improve service delivery in local government, adjust to the ever-changing demands of local authority as well as address the inequalities of the past. Moreover, local government needs to change from an institutional to a developmental organisation. Vehicles to achieve these objectives are not embedded.

In the SoNA of 2008,²⁰ President Mbeki mentioned the state’s 24 Apex Priorities, and said, *inter alia*, that the state would –

- “...further strengthen the machinery of government to ensure that it has the capacity to respond to our development imperatives...;
- ... deliberately focus on matters of skills development...;
- ...continue this year with efforts to improve the machinery of government so that it meets the obligations to citizens;
- ...[continue] with the overall effort to improve the organisation and capacity of the state.”
- ...continue this year to intensify the efforts to strengthen local government capacity in line with the 5-year Local Government Strategic Agenda. To ensure strategic

¹⁸ 21 May 2004.

¹⁹ 11 February 2005.

²⁰ On 8 February 2008.

monitoring in this regard, SALGA [the South African Local Government Association] has agreed to provide quarterly reports on the work being done.

- ...assist the first 150 of our municipalities to develop anti-corruption strategies.”

It would appear that the Mbeki administration was well-aware of the need for governmental capacity, especially in the local sphere. On cue, the Minister of Provincial and Local Government stated that his ministry would design a new system of local government to implement “Vision 2014” and the Apex Priorities announced by the President in his SoNA of 2008. The SoNA approach implies that local government remains the lowest tier in a hierarchy in that it must accept and implement nationally-set priorities and programmes. With such a status, the integrated development plans (IDPs) of municipalities are given little consideration by national and provincial governments, resulting in no ‘bottom-up’ planning being accepted and undertaken jointly by the three spheres of government. This may result in service delivery as well as social and economic development by municipalities not being based on the real needs on the ground, perhaps resulting in service delivery protests.²¹ Furthermore, the promises of capacitation of local government since the Mbeki era appear not to have been fulfilled. Little is known of what became of this new local government system. Further, there does not appear to be reports of progress on the numerous priorities, programmes and projects. In this respect, Pretorius and Shurink (2007) contend that constant monitoring and evaluation is necessary.²² They quote Vil-Nkomo who said that –

‘a need exists to develop new skills in leadership... Technical or functional skills are no longer sufficient. Leaders are required to be strategic, to lead beyond boundaries, and importantly to keep sight of the vision ahead with their feet firmly on the ground.’ (Vil-Nkomo, 1998, 201).²³

CoGTA stated that in order to address the problem of service delivery and finances in municipalities, the Presidency in 2010 adopted “Outcome 9” for local government.²⁴ The Minister and Members of the (provincial) Executive Councils (MECs) reached consensus on trying to achieve agreed results in 7 critical issues to attain the overarching goal or vision of a responsive, accountable, effective and efficient local government system by 2014. These were: (i) a differentiated approach to municipal financing, planning and support; (ii) ensuring improved access to essential services; (iii) initiate ward-based programmes to sustain livelihoods in communities; (iv) contribute to the achievement of sustainable human settlements

²¹ The SoNA approach is described in Chapter 3, 3.2.2 and criticised in 3.2.3.

²² Pretorius, Dalen  and Willem Shurink (2007) ‘Enhancing service delivery in local government: The case of a district municipality’ 5(3) (2007) *SA Journal of Human Resources Management*, 19-29, 19.

²³ Pretorius and Shurink (2007), op cit, 20.

²⁴ www.cogta.gov.za, website accessed 24/02/2015.

and quality neighbourhoods; (v) strengthen participatory governance; (vi) strengthen the financial and administrative capability of municipalities; and (vii) address co-ordination problems and strengthen cross-departmental initiatives.

Given that national government annually makes several promises to improve and strengthen the governmental system particularly in the local sphere, it is essential to develop an outcomes-based monitoring, evaluation and impact assessment (MEIA) system to measure achievement of objectives. Municipal representatives can play a major role in policing such promises and holding government accountable for constitutionally-mandated capacitation and support. Little is known of the achievements on undertakings by provinces articulated in their annual state of the provinces addresses.

From the foregoing, it is clear that formalism is manifest in the supply side of CoGTA's statutes, regulations, policies, priority programmes, and interventions. The demand side is adequate service delivery, as a minimum of basic municipal services, designed and driven by competent community representatives (councillors) and an informed citizenry.

Two views on the managerial-regulatory approach are enlightening: Comparing the South African developmental strategy to that followed in Porto Alegre in Brazil, and Kerala in India, Heller (2001) argues that the Republic's post-apartheid –

...planning processes have served largely as instruments for exerting bureaucratic and political control and as vehicles for marketization, rather than as institutional spaces for democratic mobilization... [and that] the ANC's technocratic concern with getting the institutions right has all but obviated efforts to build local democracy and build local participation.²⁵

Friedman (2008) appears to agree with Heller as he contends that the “key to effective local government is not better technique and control but rather ‘a revived respect for democratic politics’.”²⁶ An analysis of constituent parts of government would have highlighted weaknesses and thus costs to the system, such as, historically and currently, the limited, if any, contribution to development by provincial government, particularly support to municipalities.

²⁵ Heller, P (2001) ‘Moving the state: The politics of democratic decentralization in Kerala, South Africa, and Porto Alegre,’ in 29 (1) (2001) *Politics and Society*, 131-163, 144,146.

²⁶ Friedman, Steven ‘A quest for control: High modernism and its discontents in Johannesburg, South Africa,’ in Ruble, B, R Stren and J Tulchin (Eds) *Urban governance around the world*, Washington DC: Woodrow Wilson International Centre for Scholars, quoted by Harrison, Philip ‘The Origins and Outcomes of South Africa's Integrated Development Plans,’ in Van Donk et al (2008) op cit, Chapter Fourteen, 321-337, 327.

As was evident from the Congress for a Democratic South Africa (CODESA) deliberations, provinces were retained more out of political expediency and compromise, than scientific design.²⁷ Lack of commitment to and capacity for implementation of any law makes it equally ineffectual. Thus, alongside policies and laws, there is a need for appropriate institutions for their development and enforcement, with competent and committed functionaries. While the governmental machinery has been constructed in accordance with the constitutional-statutory blueprint, the development of its drivers and maintenance crew through education, training, mentorship, and other mechanisms has largely been ignored. Hence, this ‘new’ strategy of CoGTA is, again, a partial and piecemeal approach.

Meeting the demand side through having qualified councillors, administrators, and community leaders, that is, through community and human development, as well as the building and maintenance of an enabling and developmental culture, is largely the responsibility of SALGA and individual municipalities. However, this is an area where the support of CoGTA and provincial government is necessary.

The Minister in the Presidency (2011) said that “at the core” of the *NDP* is a “focus on capabilities; the capabilities of people and of our country and of creating the opportunities for both.” Among these capabilities for individuals are education and skills.²⁸ The *NDP* states: “Between now and 2030, we need to move towards a state that is more capable, more professional and more responsive to the needs of its citizens.”²⁹ “Capable” is defined as ‘having the ability or quality necessary to do something’ and with reference to a person, it means ‘competent’.³⁰

The formalistic-technocratic-regulatory-managerialism *modus operandi* has been practised for two decades without adequate benefits. However, because there can be no upfront guarantee of the success of any governmental system and developmental model, a radical approach may not be prudent; rather use what exists and modify it through learning from experience.

²⁷ See the *NDP*, Chapter 13: Building a Capable State, 363-393, 385.

²⁸ Foreword to the *NDP* by Trevor Manuel, MP, Minister in the Presidency, on behalf of the National Planning Commission, 11 November 2011.

²⁹ The *NDP*, page 399.

³⁰ *South African Concise Oxford Dictionary*.

It would appear that neither councillors nor SALGA has taken national and provincial governments to task for partial or non-fulfilment of promises regularly and consistently made with respect to their capacitation and strengthening duties to municipalities, but little of substance has been undertaken. It may well be that this is due to lack of commitment or courage or intellect to present a strong case. This, then, is a call for capacitation and education of councillors and SALGA.

The Seidmans assert that using the problem-solving method, legislators could promulgate appropriate laws that would further development, provided institutions are changed or established so that they are of a nature that will ensure this goal. It is acknowledged that an institution is more than a self-contained organisation – rather it is one because its personnel behave in “repetitive patterns”.³¹ The legal order could directly or indirectly influence patterns of social behaviour but it cannot by itself and without the necessary institutional and mind-set changes ensure development. Nevertheless, within this framework, it is useful to analyse how law can be used to design, promote, protect, and monitor equitable and sustainable socio-economic development, particularly of the poor, in the local sphere through efficient service delivery aided by representation of South Africa’s 257 municipalities in the state’s decision-making structures. At this stage, it is necessary to analyse the constitutional and statutory provisions that collectively and individually provide the foundation, framework, context, directives, and guidelines for municipal representation.

4.3 CONSTITUTIONAL-STATUTORY MANDATE AND FRAMEWORK

The legal foundation and framework for, municipal representation is discussed hereunder.

4.3.1 BACKGROUND

The numerous constitutional and statutory directives that directly and indirectly influence or impact on municipal representation cannot be compartmentalised and discussed individually. Many provisions are inter-related and cross-cutting, with some introducing or serving to contextualise others. For purposes of clarity, they are reviewed under sub-headings. One needs to be mindful, though, that such categorisation is somewhat arbitrary, and that some duplication and overlaps are unavoidable.

³¹ Seidman and Seidman (1994), *op cit*, 1.

The central theme of this study is municipal representation within the framework and context of the three-sphere governmental system and therein a major guiding and shaping component, co-operative governance. Municipal representation may be divided into four distinct but inter-related components:

- (a) Councillors and administrators (technocrats) as representatives within their own municipalities;
- (b) Councillors and administrators as representatives on external bodies;
- (c) National and provincial representatives of associations for local authorities (ALAs) working with municipalities to enhance their efficiency; and
- (d) SALGA as a national institution acting for local government as a collective on external decision-making bodies.

It is assumed that ALAs are institutions that can add value to developing and maintaining efficient municipal representation. This entails promoting the interests of local government generally, but particularly on high-level decision-making institutions. The ideal result would be a significant contribution to enhancing the capability of municipalities in fulfilling their own core roles and functions in line with prescribed powers. Within this context, co-operative governance is acknowledged as a mechanism to facilitate municipal representation as one of the means to give effect to government's decision to use service delivery as the primary tool for poverty alleviation and socio-economic development. This developmental strategy places municipalities at the forefront as drivers and *loci* of various policies and programmes in the 'human centred' and 'people-driven' approach envisaged in the *Reconstruction and Development Programme (RDP)*. Unfortunately, this ideal appears to have been abandoned over the past two decades,³² as is evident from several SoNA and reaffirmed in the 'new' "Back to Basics" approach announced by the Minister of CoGTA regarding development of the local government sphere.³³

Given South Africa's history, it became imperative that the *Constitution* lays down the law and thus guides the fledgling democracy to address past injustices and to embark rapidly on a path to development of the people. The successes and failures manifest from implementation of the democratic government's model could facilitate a learning-from-doing approach based on

³² See Chapter 3 of this thesis.

³³ 'Summit Overview' at the *Presidential Local Government Summit 2014 – Back to Basics: Serving our communities better!* Johannesburg: 18 September 2014.

experiences gained from implementation. This will enable adjustments and amendments from time to time to legislation, policies, structures, and processes rather than a major restructuring. It is submitted that sufficient time has elapsed to enable decision-makers to acknowledge that monitoring and support of local government has been inadequate but also that no clear statute, programmes or policy has been formulated thus far to do so. One of these would be the development of leadership in municipalities and in their communities.

4.3.2 LOCAL GOVERNMENT IN A THREE-SPHERE GOVERNMENTAL SYSTEM

South Africa is “one, sovereign, democratic state” based, *inter alia*, on the foundational values of human dignity, equality, and human rights,³⁴ as well as on a common citizenship.³⁵ The *Constitution* and the values and principles it espouses are thus the bedrock on which a complete change from the colonial-apartheid past is founded. Upon this foundation is to be constructed a new government to establish and maintain a new society. Hence, socio-economic development through service delivery cannot, as was the case in the past, take place on the basis of skin colour and affordability, as ruled in the *Walker* case.³⁶ Here, in issue was the violation of the right to equality, as depicted in section 8 of the interim *Constitution*.³⁷ This arose from what was argued as unfair (or indirect) discrimination on the basis of differentiated tariffs for the same service delivered to whites and blacks.³⁸ Although municipalities are not part of the public service, they are nevertheless bound by the basic values and principles governing public administration.³⁹

All South Africans are “equally entitled to the rights, privileges and benefits of citizenship,” while also “equally subject to the duties and responsibilities” related to such status.⁴⁰ In expanding on the foundational values, the *Constitution* asserts that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights.”⁴¹ Hence, there is a duty or obligation on all spheres of government to give effect to them, subject to limitations,⁴² as the “Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs

³⁴ Chapter 1: Founding Provisions, section 1(a) of the *Constitution*. Note: South Africa is not defined as a unitary state but as “one sovereign democratic state.”

³⁵ Section 3(2) of the *Constitution*.

³⁶ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC), paragraph 93; see also *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); 1997 (3) BCLR 416 (T). See Chapter 1 of this thesis.

³⁷ Per Langa DP, paragraph 1.

³⁸ Paragraphs 5 and 6.

³⁹ Sections 195(1)(a)-(i) and 195(2)(a) and (b) of the *Constitution*.

⁴⁰ Sections 3(2)(a) and (b) of the *Constitution*.

⁴¹ Section 7(2) of the *Constitution*, in Chapter 2: Bill of Rights.

⁴² Section 7(3), referring to the limitation clause in section 36 of the *Constitution*.

of state.”⁴³ The rights relevant particularly to municipalities are equality; human dignity; environment; housing; health care and water; a child’s right to care by family or parents, and to basic shelter; access to information; and just administrative action.⁴⁴ Some of these rights may be cross-cutting or operate in conjunction with others. For example, the right to basic education⁴⁵ may be infringed if a child is unable to attend school due to inadequate provision of a basic level of water and sanitation on the premises. Likewise, an elderly or infirm person’s right to water may be infringed where he or she has to purchase it due to non-supply and further pay someone to fetch this basic necessity. The right of access to information entitles a resident to be informed of what a municipality plans or implements in the community⁴⁶ and in executing such action, protection is provided to residents through the right to just administrative action.⁴⁷

The package of rights places corresponding duties or obligations on municipalities which in fulfilling them are entitled to the support of national and provincial government in strengthening local government capacity. The *Constitution* prescribes that –

The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.⁴⁸

Use of the modal verb “must” signifies a duty or obligation. Such support and strengthening should precede provincial intervention undertaken when municipalities fail to meet a constitutional or statutory obligation.⁴⁹ This issue is dealt with extensively by Mathenjwa (2013).⁵⁰ He adds that “the Constitution values local government in principle equal to the other spheres of government.”⁵¹ He echoes the view of the Constitutional Court that held, “Local government is as important a tier of public administration as any.”⁵² Failure to satisfactorily fulfil this obligation is a contributory factor to local government’s low ability to provide services efficiently. Inadequate provincial support also impacts negatively on the competency or capability of municipal representatives to function effectively.

⁴³ Section 8(1) of the *Constitution*.

⁴⁴ Sections 9; 10; 24; 26; 27; 28(1)(b) and (c); 32; and 33, respectively, of the *Constitution*.

⁴⁵ In terms of section 29(1)(a) of the *Constitution*.

⁴⁶ Section 32 of the *Constitution* and the subsequent *Promotion of Access to Information Act*, 2 of 2000.

⁴⁷ Section 33 of the *Constitution* and the subsequent *Promotion of Administrative Justice Act*, 3 of 2000.

⁴⁸ In terms of section 154(1) of the *Constitution*.

⁴⁹ Provincial intervention in local government is authorised by section 139(1) of the *Constitution*.

⁵⁰ Mathenjwa, MJ (2013) *The Supervision of Local Government: Application of the Legal Framework*, unpublished LLD thesis, Pretoria: Unisa.

⁵¹ Mathenjwa (2013), op cit, 16.

⁵² *Pretoria City Council v Walker*, op cit, paragraph 93.

One of the principles of co-operative government and intergovernmental relations depicted in section 41(1)(h)(ii) of the *Constitution* is: “All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by assisting and supporting one another.” This is a mutual obligation of support. According to Steytler and De Visser (2014),⁵³ this is different from the section 154(1) provision. They assert that this “duty of support flows from the hierarchical position” of national and provincial governments *vis-à-vis* local government and that the duty of national government arises from its power to set the “framework and benchmarks within which municipalities must operate.” They add that the provincial duty of support arises from the MEC’s power to establish municipalities⁵⁴ and intervention therein.⁵⁵ The Constitutional Court⁵⁶ held that –

...the Province must, as the Constitution envisages,⁵⁷ “promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.”

Borgström and Naidoo (2016)⁵⁸ argue that the “power of support” or “support and strengthen”⁵⁹ is for the purpose of promotion of capacity. They add that the monitoring power⁶⁰ does “not represent a substantial power in itself. It is not a power to control local government affairs.”⁶¹

That the three-sphere governmental system is not without its challenges as manifested over two decades of operationalisation is understandable, because, in De Villiers’s (2012) view –

Young federations and decentralised unitary systems (“multitiered systems”) must often, soon after the enactment of a new constitution, respond to a challenge that they are generally unprepared for – how to facilitate, co-ordinate and integrate the activities of the respective levels of government...⁶²

The ‘problem’ of democratisation is compounded by the decentralisation process being designed and implemented in the absence of a “historic experience of democratic government”

⁵³ Steytler, Nico and Jaap de Visser ‘Local Government’ in Woolman, Stuart and Michael Bishop (2014) *Constitutional Law of South Africa*, Second Edition, Cape Town: Juta, Chapter 22, 22 – 133.

⁵⁴ In terms of sections 155(6)(a) and (b) and 155(7) of the *Constitution*.

⁵⁵ In terms of section 139 of the *Constitution*.

⁵⁶ In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9, at paragraph 27 (“Habitat”).

⁵⁷ In section 155(6)(b) of the *Constitution*.

⁵⁸ Borgström, David and Uday Kiran Naidoo, ‘Playing with Power: The Competing Competencies of Provincial and Local Government’ in (2016) *Constitutional Court Review Vol VI*, Cape Town: Juta, 57-74, 61.

⁵⁹ In sections 155(6)(a) and 154(1), respectively, of the *Constitution*.

⁶⁰ Granted to provinces in terms of section 139 of the *Constitution*.

⁶¹ These views may arise from the *First Certification Judgment*, particularly paragraphs 370, 372, 377.

⁶² De Villiers, Bertus (2012) ‘Codification of “Intergovernmental Relations” by Way of Legislation: The Experiences of South Africa and Potential Lessons for Young Multitiered Systems’ *Zeitschrift für ausländisches ö Recht und Völkerrecht (ZaöRV)* 72 (2012), 671-694, 672.

and in a unified, though not unitary quasi-federal system.⁶³ The *Constitution* does not define the nature of the state, particularly as to whether it is unitary or federal.⁶⁴ Only after implementation of the first decade of democracy was it realised that there was “no watertight separation between the spheres of government”.⁶⁵ The position and status of local government evolved and from time to time was clarified by the Courts. Regarding the importance of local government in the three-sphere system and particularly in respect of development through service delivery, the Constitutional Court said: Local government is the closest government can get to the people. That is where delivery must be seen to be taking place. The challenge facing government at local level is profound.⁶⁶

Budhu and Wiechers (2003) in interpreting several Court decisions,⁶⁷ state that the “restructuring of local government in a state of *continuous metamorphosis*”, particularly of those serving urban areas will be “extremely difficult and infinitely challenging”.⁶⁸

Galvin (1999) poses the question whether South Africa will “achieve an effective local government system with devolved powers or fall prey to centralising tendencies.” She argues that there are three conditions for accountable governance and development in municipalities: “effective devolution of powers to local government”, its synergy with civil society, and “cohesive local structures”.⁶⁹ As with the trend in other African countries, centralisation will arise due to local government’s lack of capacity and the “desire of the national government to control planning and development.”⁷⁰ Galvin (1999) adds that municipalities will have “neither the level of authority and autonomy nor the necessary funding adequately to address developmental problems on its own.”⁷¹ Thus, they will be reliant on assistance from the other two spheres of government, “each of which has its own aims and concerns and may try to exert

⁶³ De Villiers (2012), *op cit*, 673, 678.

⁶⁴ Budhu, S and M Wiechers (2003) ‘Current judicial trends pertaining to devolution and assignment of powers to local government’ 18 (2003) *SAPR/PL*, 468-474, 468.

⁶⁵ Rautenbach, IM (2004) *Rautenbach-Malherbe Constitutional Law*, 6th Edition, Durban: LexisNexis, Butterworths, 263.

⁶⁶ *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA* 1999 12 BCLR 1360 (CC) 1377, at paragraph 44.

⁶⁷ In particular, *Uitvoerende Raad van die Wes-Kaapse Wetgewer v President van die Republiek van Suid Afrika*, 1995 9 BCLR (C) 1253.

⁶⁸ *Op cit*, 471. Emphasis in the original.

⁶⁹ Galvin, Mary (1999) ‘The Impact of Local Government on Rural Development in South Africa’ 40 (1999) *Transformation*, 87-111, 87.

⁷⁰ *Ibid.*

⁷¹ Galvin (1999), *op cit*, 88.

control through centralisation.” Under such circumstances local government will need the support of civil society organisations and a *modus operandi* to work in partnership.⁷² Galvin (1999) quotes Evans (1996:19) who identified three properties necessary for successful state-society synergy, namely a high level of social capital, governmental capacity, and a supportive political regime.⁷³ Under the circumstances, strong and committed municipal leadership and representation are required to claim the resources and support required for municipalities to fulfil their constitutional and statutory obligations.

The *Constitution* lists five parties that have *locus standi* to approach a court of law seeking relief where a right in the Bill of Rights is threatened or infringed. Section 38 reads, “The persons who may approach the court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.”

This provides opportunities for any representative to act on behalf of an aggrieved community and is also a mechanism to force municipalities to fulfil their obligations and where they fail, to approach provincial and national government for redress. Another avenue is the Public Protector who may investigate an allegation of maladministration, *inter alia*,⁷⁴

“13(1)(b) on receipt of a complaint made by

- (i) a complainant acting in the complainant’s own interest;
- (ii) an association acting in the interest of its members;
- (iii) a person acting on behalf of a complainant;
- (iv) a person acting on behalf, and in the interest, of a group or class of persons; or
- (v) an anonymous person.”

A third mechanism is use of the Human Rights Commission. Its governing statute defines a “complainant” as a “person, group or class of persons, organisation and/or association as defined in article 2 of these procedures and whose fundamental rights, it is alleged, have been violated or threatened.”⁷⁵ Section 2 reads: “The following persons who allege an infringement or a threat of a fundamental right may lodge complaints with the Commission –

- 2.1 anyone acting in their own interest;
- 2.2 anyone acting on behalf of another person who cannot act in their own name;
- 2.3 anyone acting as a member of, or in the interests of a group or class of persons;

⁷² *Ibid.*

⁷³ Galvin (1999), *op cit*, 103.

⁷⁴ Section 13(1) of the *Public Protector Act*, 15 of 2016.

⁷⁵ Section 1.7 of the *South African Human Rights Commission Act*, 40 of 2013.

- 2.4 anyone acting in the public interest; and
- 2.5 an association acting in the interest of its members.”

Another organisation established in terms of Chapter 9 of the *Constitution*: “State institutions supporting constitutional democracy” that can be approached to enforce one’s right, where appropriate, is the Commission for Gender Equality.⁷⁶

From the foregoing, it is clear that the *Constitution* and several subsequent statutes made adequate provisions for the enforcement of human rights by residents and their municipal representatives. Unlike in the past where it was the local agent of the state and subordinate to it and provincial government,⁷⁷ local government is now constitutionally established with entrenched powers.⁷⁸ Steytler and De Visser (2007) state that –

Local government in South Africa is an integral part of the constitutional system of decentralised government ushered in by the democratic elections of 27 April 1994.⁷⁹

Although *de facto* it may be regarded as ‘inferior’ to the other two spheres, it is clear that the *Constitution* and the Constitutional Court see local government as an integral part of government.⁸⁰ This somewhat unprecedented and elevated status in itself creates many opportunities for local government acting through SALGA to present its case and demand representation on decision-making bodies. To do so effectively, councillors and technocrats should be qualified and competent.

4.3.3 LOCAL GOVERNMENT AS A PARTY IN CO-OPERATIVE GOVERNANCE

The status of local government within a multi-sphere governmental enterprise can be meaningfully ascertained only alongside that of the other two spheres. This requires a review and understanding of the constitutional concept and practise of co-operative governance. In

⁷⁶ Established under section 187 of the *Constitution*.

⁷⁷ See Chapter 2 of this thesis.

⁷⁸ Sections 40(1) and 151; Schedule 4: Part B and Schedule 5: Part B of the *Constitution*.

⁷⁹ Steytler, Nico and Jaap de Visser (2007) *Local Government Law of South Africa*, Durban: LexisNexis-Butterworths, Chapter 1, 1-3.

⁸⁰ See, *inter alia*, the following Constitutional Court decisions: *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT 7/980 [1998] ZACC 17, 1999 (1) SA 374, 1998 (12) BCLR 1458, paragraphs 38, 39, 41, 46, 55, 127 and 138 (“*Fedsure*”); *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA* 1999 12 BCLR 1360 (CC) 1377, paragraph 44; *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 at paragraphs 54, 55, 83; *Cape Metropolitan Council v Minister of Provincial Affairs and Constitutional Development* 1999 (11) BCLR 1229 (T) at paragraph 29; *Uthukela District Municipality v President of the Republic of South Africa* 2003 (1) SA 687 (CC) at paragraph 18.

devoting an entire chapter of the *Constitution* to this subject,⁸¹ and in making detailed provisions for it, South Africa may have gone beyond any other country in this field.⁸²

Section 40 of the *Constitution* reads:

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

While not written *ex abundanti cautela*, the *Constitution* nevertheless shows that co-operative governance is peremptory by its use throughout of the modal verb ‘must’, signifying an obligation and an insistence. These provisions are underpinned by the “principles of co-operative government and intergovernmental relations.”⁸³ The *Constitution* further provides that “An Act of Parliament must –

- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
- (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.”⁸⁴

Belatedly, the *Intergovernmental Relations Framework Act*⁸⁵ was enacted to give effect to the above provisions. Intergovernmental relations (IGR) is prescribed in and facilitated by Chapter 3 of the *Constitution* requiring all spheres of government to undertake such *modus operandi*. This study posits the hypothesis that local government efficiency may result in effective representation of municipalities by their councillors. A *condition sine qua non* for this cordial and mutually-beneficial intergovernmental relations based on the foundation and within the framework of co-operative governance. This is a major part of this thesis and discussed in greater detail below.⁸⁶

Organs of state are obliged to “make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies

⁸¹ Chapter 3.

⁸² Pimstone, Gideon ‘Local Government: Constitutional Foundations’ in Khoza, Meshack and Yvonne Muthien (1998), *Regionalism in the New South Africa*, Ashgate: Aldershot, Chapter 9: 131-170, 139-140.

⁸³ Section 41(1)(a)-(h) of the *Constitution*.

⁸⁴ Section 41(2)(a) and (b) of the *Constitution*.

⁸⁵ 13 of 2005 (*IRFA*).

⁸⁶ See 4.3.3 and 4.3.4 and Chapter 6 of this thesis.

before it approaches a court to resolve the dispute.”⁸⁷ If these prescripts are not followed, the court may ‘refer the dispute back to the organs of state involved.’⁸⁸

Thus, Chapter 3 is not aspirational, and, to use a cliché, not a ‘motherhood and apple pie’ type of provision or desideratum. It is one that recognises the “complexity of modern government, the existence of concurrent powers among spheres of government and intergovernmental competition in general.”⁸⁹

The language used in the *Constitution* is suggestive of a hybrid model – the division and allocation of powers and functions to three spheres of government, tempered with the provision that they cannot exercise them wholly autonomously. Chapter 3 enhances and protects the status of municipalities. This model, as opposed to the hierarchical one in the colonial-apartheid era where municipalities were little more than local agents of central government, theoretically creates opportunities for local government to engage with top policy formulators and decision-makers. The *Constitution* explicitly devolves powers in a mode unique thus far to decentralisation practices. It does this on the basis of three fundamental elements encapsulated in the terms “distinctive”, “interdependent”, and “interrelated”.⁹⁰

In relations between the provinces and local government, such terminology has the following meanings:⁹¹

- i. *Distinctive*: refers to autonomy in the sense that each sphere is a final decision-maker in a particular matter falling within its own area of competence, that is, one sphere’s decision is not subject to the discretion of another’s;
- ii. *Interdependent*: means that in the exercise of its autonomy a municipality may be supervised by the other two spheres, which can make final decisions binding on the local and state organs therein; and
- iii. *Interrelated*: signifies that each sphere exercises its autonomy not for its own ends, but for the good of the nation, by co-operating with each other.

⁸⁷ Section 41(3) of the *Constitution*.

⁸⁸ Section 41(4) of the *Constitution*.

⁸⁹ Pimstone (1998), *op cit*, 140.

⁹⁰ Section 40(1) of the *Constitution*.

⁹¹ Department of Provincial and Local Government (2002) *A Guideline Document for Provincial-Local Intergovernmental Relations*, 9-10.

Bekink (2006)⁹² adds that within the entrenched three specific spheres of government –

The word “distinctive” protects and confirms each sphere’s independence or autonomy and it influences the manner in which each sphere is to operate and fulfil its powers and functions. The words “interdependent” and “interrelated” in turn refer to the constitutional commitment to an overall system of co-operative government in the Republic.

The terms used indicate that the *Constitution* envisaged that all three spheres would work in a co-operative rather than as individual spheres to attain the obligations stipulated. Bekink asserts that the term “sphere” connotes a specific area of jurisdiction or territory, “emphasising a new relationship between the different branches of government”,⁹³ different from the previous hierarchical levels. The wording of section 40(1) of the *Constitution* envisaged that each sphere would have its own constitutionally-determined and entrenched powers and functions. Bekink (2006) argues that use of the term “sphere” rather than ‘level’ has positive implications and connotations for autonomy. He adds that there can be no autonomy if a government institution does not have a say or is not “permitted participation in the governmental processes that have a direct or indirect influence on its own powers and functions.”⁹⁴ Bekink (2006) further asserts that the word “sphere” enhances the autonomy of each while strengthening and advancing “intergovernmental participation and support”.⁹⁵ In this sense, South African local government is somewhat unique.

While the *Constitution* makes provision for co-operative governance in substantive terms, up to now such ideals do not appear to have been met in practice. This is to some extent because of the absence of sound and structured relationships between provinces and municipalities therein, and the co-ordination thereof. The result is non-alignment of policies and strategies, duplication of services, and absence of early warning systems to avert crises in municipalities.⁹⁶ This challenge to a certain extent can be remedied by effective municipal representation and the establishment and maintenance of sound relationships with the provincial leadership and administration.

⁹² Bekink, Bernard (2006) *Principles of South African Local Government Law*, Durban: LexisNexis-Butterworths, 63.

⁹³ *Op cit*, 64.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Department of Provincial and Local Government (2002) *Discussion Document: Towards a National Policy on Intergovernmental Relations*, 6.

The Minister of CoGTA, in presenting his *Back to Basics* approach,⁹⁷ mentioned that a third of municipalities were functioning adequately, a third was “just managing” and a third was “frankly dysfunctional”. This shows that while all municipalities are governed by the same laws and regulations, that is, a uniform system, they perform differently. In this context, De Visser and Steytler (2016) argue that “Local government cannot be seen as a uniform institution, operating in the same manner, facing the same challenges.”⁹⁸ The unsatisfactory performance of local government has many causes, but the question of viability of many municipalities, the (wrong) approach by national government to these challenges has been two-fold:

First, a persistent drive to continuously tighten the legislative framework for municipalities, and second, a series of support programmes. The first strategy is based on the vain belief that systemic problems can be legislated out of existence, whereas, in fact, the more regulation was poured over local government, the greater the lawlessness that ensued.⁹⁹

In a state divided into nine provinces with each having both legislative and executive authority and thus exhibiting many federal characteristics and behaviours arising from its history, the drafters of the *Constitution* perhaps found it necessary to provide specifically for co-operative governance as a means to minimise intergovernmental competition.

According to Bekink (2006), the values espoused in the *Constitution*¹⁰⁰ are based on the will of the general population. Thus, they are not merely lofty ideals to be ignored – they have profound implications for government, especially municipalities, to give effect thereto in a practical manner. South Africa follows the value-orientated approach to constitutional law, meaning that government is bound by the underlying values incorporated in the *Constitution*. These values, in turn, create aspirations and expectations, justifying governmental action since they legitimately call for both substantive rights and procedures for their fulfilment.¹⁰¹

The constitutional values can guide co-operative governance. Hence, local government has to establish appropriate mechanisms to deliver on these promises. This is easier said than done, given the resource and capacity constraints suffered particularly by this sphere. In attempting to fulfil the values, municipalities must in their workings be democratic, responsive,

⁹⁷ Department of Co-operative Governance and Traditional Affairs (2014) *Back to Basics: Serving our Communities Better!* www.cogta.gov.za/summit2014, accessed 6/11/2016.

⁹⁸ De Visser, Jaap and Nico Steytler, ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’, (2016) *Constitutional Court Review Vol VI*, Cape Town: Juta, 1-23, 1.

⁹⁹ De Visser and Steytler (2016), *op cit*, 4.

¹⁰⁰ In the Preamble and in sections 1(a) and 195(1) of the *Constitution*.

¹⁰¹ Bekink (2006), *op cit*, 4.

transparent, and sensitive to the needs of their various constituencies. The policies, strategies, legislation, communications structures, networks, and processes for participatory democracy are particularly onerous, since society was itself divided on racial, class, ethnic, religious, cultural, linguistic, and other bases, that government was autocratic and communicated minimally, and the nature of politicians and bureaucrats was such as to leave people out of important discussions affecting them. Not giving effect to the values and principles stipulated in the *Constitution* renders the acts and omissions of government unconstitutional. This calls for a culture of *ubuntu* and commitment to equitable socio-economic development designed, implemented, and monitored by competent councillors, administrators, and community leaders.

That local government is now a constitutionally-established part of the governmental system is in itself a major boost to its status, powers, and functions. This situation creates the space for municipalities and their representative national and provincial organs to become a major player in the state's policy and decision-making structures and processes. Municipalities should be capacitated through development of leaders and technocrats of the highest calibre to undertake this role efficiently in the interests of the country and especially of its poor.

The *Systems Act* addresses co-operative governance and therein section 3(3) applies to SALGA as it states: "For the purpose of effective co-operative government, organised local government must seek to –

- (a) develop common approaches for local government as a distinct sphere of government;
- (b) enhance co-operation, mutual assistance and sharing of resources among municipalities;
- (c) find solutions to problems relating to local government generally; and
- (d) facilitate compliance with the principles of co-operative government and intergovernmental relations."

The *National Environmental Management Act*¹⁰² explicitly provides for "co-operative environmental governance"¹⁰³ through the establishment, *inter alia*, of the National Environmental Advisory Forum; the Committee for Environmental Co-ordination; setting out the Procedures for Co-operative Governance; and provision for Environmental Management

¹⁰² 107 of 1998 (*NEMA*).

¹⁰³ In the Preamble.

Co-operation Agreements.¹⁰⁴ It remains to be seen whether the ideals espoused by this *Act* will work in practice. However, these mechanisms create opportunities for municipal representatives to be involved in policy-making in compliance with expectations of local government envisaged in sections 24(a) and (b) of the *Constitution*. It has been said that the extended developmental tasks of municipalities “must be executed in tandem with concomitant environmental duties.”¹⁰⁵ The Constitutional Court pronounced on this matter thus:

The Constitution recognises the interrelationship between the environment and development... [and] the need for the protection of the environment ...[alongside] social and economic development...It envisages that environmental considerations will be balanced with socio-economic consideration through the ideal of sustainable development.¹⁰⁶

In its Preamble, the *Intergovernmental Fiscal Relations Act*¹⁰⁷ seeks to “promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters.” Two persons “nominated by organised local government” may sit on the Financial and Fiscal Commission (FFC).¹⁰⁸ The *Act* created the Local Government Budget Forum for consultation by organised local government with the Minister of Finance and the MECs for finance, on the allocation of revenue raised nationally.¹⁰⁹ It is unclear what SALGA’s contributions and achievements have been on this body and whether representation is adequate. Although the *Municipal Finance Management Act*¹¹⁰ devotes an entire chapter¹¹¹ to ‘co-operative government’, the subject matter is dealt with cursorily, as the core content is finance. However, the *Act* does stipulate that national and provincial governments must assist in building municipal capacity;¹¹² provides for national and provincial allocations to local government;¹¹³ and sets out the requirements for promotion of co-operative government by municipalities.¹¹⁴

¹⁰⁴ Sections 3, 7, 11(4), 16(1), 17, 23(2)(d), 23(3), 24(7)(d) and (g), 28(4), 30(1)(c)(i), 31(1)(b), 31(5)(a)(ii), 35(2)(a)(i), 42(1)(b), and 46(1)-(4).

¹⁰⁵ Du Plessis, Anel (Ed) (2015) *Environmental Law and Local Government in South Africa*, Cape Town: Juta, 6.

¹⁰⁶ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) at paragraph 45.

¹⁰⁷ 97 of 1997.

¹⁰⁸ In terms of section 221(1)(c), as provided for in section 163(b)(iii) of the *Constitution*.

¹⁰⁹ Steytler, Nico and Jaap de Visser (2007), *op cit*, Chapter 22, 22-131.

¹¹⁰ *Local Government: Municipal Finance Management Act*, 56 of 2003 (MFMA).

¹¹¹ Chapter 5.

¹¹² Section 34(1) of the MFMA.

¹¹³ In terms of sections 214(1)(a) and (c) of the *Constitution*, given effect to by sections 34, 36 and 37 of the MFMA.

¹¹⁴ Section 37(1)(a) of the MFMA.

Whilst some provisions are merely exhortative, others are peremptory and hence innovative. As such, they may help to improve the financial position of municipalities, but there appears to be no provisions for their enforcement by those in need of assistance from the National Treasury.¹¹⁵

A puzzling qualifier negates some of the positive provisions of the *Act* in that inaction or non-compliance by national and provincial governments “does not affect the responsibility of a municipality” to comply.¹¹⁶ This provision appears to condone failure of the two other spheres of government to capacitate and support municipalities.¹¹⁷ It also seems to contradict section 154(1) of the *Constitution* which obliges national and provincial governments to “support and strengthen the capacity of municipalities”, and also section 34(1) of the *MFMA*. If there was no genuine desire to do so, no ‘motherhood and apple pie’ type of provision should be incorporated in legislation.

Sections 34-44 of the *MFMA* deal with co-operative government. Sections 34-37 restates and reinforces the constitutional directives for support of local government by national and provincial governments by providing for, respectively, capacity building, promotion of co-operative government by national and provincial institutions, allocations to municipalities, and promotion of co-operative government by municipalities. However, Steytler and De Visser (2014)¹¹⁸ assert that “the chapter incorrectly contains provisions” relating to stopping of funds to municipalities, stopping of equitable share allocations to municipalities, and stopping of equitable share allocations to municipalities.

¹¹⁵ Section 34(4) of the *MFMA*.

¹¹⁶ *Ibid.*

¹¹⁷ In terms of section 34(1) of the *MFMA*.

¹¹⁸ Steytler and De Visser (2014), *op cit*, Chapter 22, 22 – 131.

The *Spatial Planning and Land Use Management Act*¹¹⁹ repealed the *Development Facilitation Act*.¹²⁰ It regulates municipal and provincial planning.¹²¹ *SPLUMA*'s objectives are, *inter alia*, to “ensure that the system of spatial planning and land use management promotes social and economic inclusion”, co-operative government and sound intergovernmental relations.¹²² In addressing the delineation of municipal powers in land use planning, De Visser and Steytler (2016)¹²³ argue that in this field, both the *Structures Act* and the *Systems Act* –

...do little more than restate the Constitution. They do not provide for any alternative for the intricate and critically important scheme set forth by LUPO¹²⁴ and there is no neatly identifiable that can be removed to address the unconstitutionality.

They attempt to answer the question by reviewing four Constitutional Court cases.

In the stand-off between the Gauteng Development Tribunal and the City of Johannesburg,¹²⁵ the City argued that the powers for establishment of townships and subdivision of land within its jurisdiction fell within its “constitutional competency for ‘municipal planning’ and that provinces could not usurp those powers.” The Court agreed and struck down the provisions of the *Development Facilitation Act*¹²⁶ that empowered provincial tribunal to do such work.¹²⁷

In *Maccsand*¹²⁸ the issue was whether a company that had obtained a mining licence over the land in question from the Minister of Minerals and Energy obviated the need for to acquire the City's approval for land use planning. The assumption was that such licence trumps municipal authority. The Court dismissed this argument on the basis that the *LUPO* (15 of 1985) “regulates the use of land and not mining.”¹²⁹

¹¹⁹ 16 of 2013 (*SPLUMA*).

¹²⁰ 67 of 1995 (*DFA*).

¹²¹ In sections 2(1)(a) and (b), respectively.

¹²² Sections 3(b) and (e), respectively.

¹²³ De Visser, Jaap and Nico Steytler (2016), *op cit*, 6.

¹²⁴ *Western Cape Land Use Planning Ordinance*, 15 of 1985.

¹²⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC) (“*Gauteng Development Tribunal*”).

¹²⁶ 67 of 1995.

¹²⁷ De Visser, Jaap and Nico Steytler (2016), *op cit*, 5.

¹²⁸ *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC) (“*Maccsand*”).

¹²⁹ De Visser, Jaap and Nico Steytler (2016), *op cit*, 5; *Maccsand*, *op cit*, at paragraph 47.

In *Lagoonbay*¹³⁰, the impact of the proposed development would stretch beyond the boundaries of the George Municipality. The Court ruled that a validly enacted provincial law, in this case the LUPO, 15 of 1985, was “valid until set aside by the Constitutional Court.” Furthermore “Decisions taken in terms of those laws are valid, no matter how incompatible they may be with the Constitution.”¹³¹ This judgment placed emphasis on the rule of law.

It was argued that the MEC acted *ultra vires* by usurping a municipal planning function. He acted on the basis that the development would have effects beyond the one municipality, and this “triggered the province’s power to control provincial and regional planning. Reliance may have been placed on the interpretation by Jafta J in the *Gauteng Development Tribunal* case that the “functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments.”¹³² A contrary view, based on the recent judgments: is expressed thus:¹³³

The Constitutional Court’s approach implies that certain types of planning decisions are, by their very nature, always municipal – regardless of the impact of the actual activity in a case. There is no room for overlap. The functional areas are thus more hermetically sealed than it had previously suggested. This approach has the benefit of certainty and an element of predictability.

In the *Habitat* case,¹³⁴ the Court held that the “provincial appellate capability impermissibly usurps the power of local authorities to manage ‘municipal planning’ intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere.”¹³⁵ The appeal provision was section 44 of the *Western Cape LUPO*.¹³⁶

The above review of the powers and status of local government based on the municipal planning function gives some idea of the practical application of the constitutional provisions on powers and functions in the three-sphere governmental system. It also indicates that local government, objectively viewed, may not be the lowest institution in a hierarchy.

¹³⁰ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) (“*Lagoonbay*”), paragraphs 45-47.

¹³¹ De Visser, Jaap and Nico Steytler (2016), *op cit*, 7.

¹³² *Gauteng Development Tribunal*, *op cit*, paragraph 55; Borgström and Naidoo (2016), *op cit*, 67.

¹³³ Borgström and Naidoo (2016), *op cit*, 72.

¹³⁴ *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9, 2014 (4) SA 437 (CC), 2014 (5) BCLR 591 (CC) (“*Habitat*”).

¹³⁵ *Habitat*, *op cit*, paragraph 13.

¹³⁶ 15 of 1985.

4.3.4 LOCAL GOVERNMENT IN INTERGOVERNMENTAL RELATIONS

(a) Background

Based on experiences with multitiered systems in Kenya, Iraq, Ethiopia and South Africa, De Villiers (2012) argues that –

...often so much energy goes into the drafting of new constitutional arrangements, that insufficient attention is given as to how, in practice, the respective levels of government would cooperate, coordinate and integrate in the discharge of their functions immediately after the constitution takes effect.¹³⁷

He adds that most of the intergovernmental forums and meeting points in older federations are informal, spontaneous, and *ad hoc*, with no explicit mention of intergovernmental relations in their constitutions. These activities are based on pragmatism rather than on some philosophy or master plan, and a result of need rather than design. On the other hand, young multitiered systems do not have the luxury of time. In this sense, “Chapter 3 is unique amongst modern constitutions.¹³⁸ This view may have been based on that of Watts (1997) who observed that “while some federal or unitary constitutions include some provisions establishing intergovernmental structures, the South African Constitution is virtually unique in setting forth in Chapter 3 a specific set of Directive Principles for intergovernmental co-operation.”¹³⁹

De Villiers (2012) adds that the philosophy, duty and practice of co-operation between the German federal government and its *Länder* in the “unwritten rule of the duty of *Bundestreue* was accepted by the African National Congress (ANC) as “underlying the spirit of intergovernmental relations in the Constitution as a binding code of conduct.”¹⁴⁰ The then proposed White Paper on intergovernmental relations¹⁴¹ was intended to formalise the *ad hoc*, un-coordinated and often inefficient manner in which co-operative governance had to at that time been conducted. That this promised document was enacted only ten years later seems to indicate the difficulty of neatly compartmentalising activities or prescribing how they are to be conducted and managed, especially where it is human, interpersonal relationships constitute the subject matter.

¹³⁷ De Villiers (2012), *op cit*, 672-673.

¹³⁸ De Villiers (2012), *op cit*, 674, 679.

¹³⁹ Watts, RL (1997) *Intergovernmental Relations*, report commissioned by the Department of Constitutional Development and Provincial Affairs, 7.

¹⁴⁰ De Villiers (2012), *op cit*, 680.

¹⁴¹ Announced by the Minister of Constitutional Affairs in July 1995 (and published as the *Intergovernmental Relations Framework Bill* in 2004), reported by Atkinson, Doreen ‘Local government in intergovernmental relations: Towards co-operative governance?’ in Electoral Institute of South Africa (1998) *From a tier to a sphere – local government in the South African constitutional order*, Sandton: Heinemann, 16-31, 29.

The wisdom of regulating them at a time when there are insufficient clear practices emerging is questioned. This is because in many critical areas further empirical work is required. Among them is “the capacity of local government associations, the diversity of provincial approaches to local government”, and clarity on the role of local government in interdepartmental co-ordination in provinces and at the national level.¹⁴²

De Villiers (2012) contends that –

By 2005 there was general consensus that South Africa needed more certainty and consistency in intergovernmental relations as far as structures, processes, representation, objectives, decision-making, accountability and reporting were concerned...¹⁴³

In compliance with sections 41(2)(a) and (b) of the *Constitution*, the *Intergovernmental Relations Framework Act*¹⁴⁴ was enacted to give effect to its co-operative governance provisions. De Villiers (2012) argues that a second reason was that Parliament expected a statute would enhance certainty and predictability of intergovernmental relations albeit “without limiting spontaneous developments when and if the need arises”, that is, allowing for balance through allowing a measure of informality in such relations.¹⁴⁵ He adds that what makes the South African experience unique is the codification of intergovernmental “structures as a result of a constitutional imperative.”¹⁴⁶ De Villiers (2012) cautions that intergovernmental relations are a “work in progress” and that the practical functioning of these institutions –

...depends on many factors such as political commitment, training, seniority of persons attending meetings, and follow-up decisions. The IGR Act is only a legal framework and it does not, by itself, make things happen. Ultimately it depends on human interaction to make intergovernmental relations perform optimally.¹⁴⁷

(b) The Intergovernmental Relations Framework Act

This section briefly reviews and then analyses the *IRFA* and the structures and processes mandated by it relating to or potentially affecting municipal representation, to identify opportunities and spaces therefor. Its ultimate appearance as a framework rather than a conventional rigid, formal and prescriptive enactment, perhaps underlines the difficulty of prescribing what to a large extent relates to human behaviour and interactions.

¹⁴² De Villiers (2012), *op cit*, 683.

¹⁴³ De Villiers (2012), *op cit*, 684.

¹⁴⁴ 13 of 2005 (*IRFA*).

¹⁴⁵ De Villiers (2012), *op cit*, 684.

¹⁴⁶ De Villiers (2012), *op cit*, 687.

¹⁴⁷ De Villiers (2012), *op cit*, 688.

(i) Definitions

‘Consultation’ is defined as “a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered”. Steytler and De Visser (2014) contend that this is a “common law understanding of the concept”.¹⁴⁸ They refer to the Cape High Court’s acceptance of the definition: “The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice.”¹⁴⁹ From the dicta of High Court decisions¹⁵⁰ Steytler and De Visser (2014)¹⁵¹ assert that ‘consultation’ has three basic elements:

- (1) an invitation to hear the views of a particular party (or public in general on a specified matter);
- (2) an adequate opportunity to submit considered views; and
- (3) the party inviting views must consider the views in good faith.

Municipal representatives and SALGA ought to be mindful of the above definition.

A ‘forum’ is not defined by the *IRFA*, while an “intergovernmental forum” is, in terms of seven types listed in the *Act*.¹⁵² A forum is defined as ‘a place of or meeting for public discussion’.¹⁵³ Hence, it has no legal status in the conventional sense, nor does it have executive authority. If it did, then it would conflict with the powers held by organs of state. Since “any Cabinet member may establish a national intergovernmental forum” and given that any Ministers and Members of Executive Councils (MinMEC) forums existing or to be established qualify,¹⁵⁴ there could eventually be several forums, enhancing the risk of duplication, overlaps, wastage, and conflict. Meaningful representation on too many forums would put a strain on resources and on participants.

¹⁴⁸ *Op cit*, 22 – 134.

¹⁴⁹ Steytler and De Visser (2014) *op cit*, 22-135, quoting *Maqoma v Sebe NO and Another* 1987 (1) SA 483, 491E (Ck).

¹⁵⁰ *Robertson and Another v City of Cape Town; Truman-Baker Hayes and Another v City of Cape Town* 2004 (9) BCLR 950 (C) (“*Robertson HC*”) at paragraph 108.

¹⁵¹ *Op cit*, 22-134.

¹⁵² These are: National – President’s Co-ordinating Council (section 6 of the Act); National intergovernmental forums (section 9); Provincial – Premier’s intergovernmental forum (section 16); other provincial intergovernmental forums (section 21); Local – district intergovernmental forum (section 24); inter-municipality forums (section 28); and intergovernmental technical support structures (section 30).

¹⁵³ *The Oxford English Reference Dictionary*.

¹⁵⁴ Sections 9(1) and (2) of the *Act*.

“*Organised local government*” is limited to mean:

- (a) the ‘national organisation recognised by the Minister in terms of the *Organised Local Government Act, 52 of 1997*; or
- (b) in relation to a provincial intergovernmental forum, a provincial organisation recognised by the Minister in terms of that *Act* for the relevant province.

This implies that other organisations such as the South African Cities Network (SACN), not formally recognised, are excluded, unless invited to a forum or a structure by the chairperson thereof, to participate, in addition to SALGA, as a local government representative.

“*Organ of state*” is defined in section 239 of the *Constitution* (quote) as –

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

The *Act*, however, excludes Parliament and provincial legislatures, the Judiciary, institutions established under section 34 and Chapter 9 of the *Constitution*, and other constitutionally-independent structures. This is regrettable as such bodies can certainly do much to promote co-operative governance. This narrow definition restricts opportunities for municipal representation.

The definition of “*statutory power*” is limited but also somewhat vague and ambiguous when it is defined in the *Act* as “a power conferred by –

- (a) the Constitution or legislation; or
- (b) an agreement or other instrument emanating from the Constitution or legislation.”

There may be no limit to the number and nature of such ‘agreements’. It is unclear whether an assignment to a municipality by a Minister or MEC qualifies. As SALGA and the provincial local government associations (PLGAs) are recognised by statute, it is not certain whether an agreement they have concluded may be included in the definition which should be specific and restricted to those between organs of state in the three spheres of government, in terms of any specified constitutional provision.¹⁵⁵ Since municipal by-laws are legislation of their councils, as the highest decision making bodies of such institutions, the number of statutory powers can

¹⁵⁵ Such as, for example, section 156(4) of the *Constitution*.

be enormous, resulting in heightened confusion and potential for conflict as well as duplication, fragmentation, overlaps, and wastage. The lack of clarity also serves to marginalise local government and its representatives. However, this undesirable situation could prompt municipal representatives to make proposals in the interest of local government.

(ii) Provisions that may impact on municipal representation

The definition of “organ of state” is repeated and reinforced by the exclusion of certain institutions therein mentioned from application of the *Act*.¹⁵⁶ Only an organ of state may participate in an intergovernmental structure, subject to the qualification that it is specifically referred to in Chapter 2 of the *Act* or has been invited by the chairperson of the particular forum to take part.¹⁵⁷ While SALGA is not an organ of state as defined in section 239(a), it is in terms of section 239(b) of the *Constitution*. Notwithstanding this constitutional status, it can participate only by invitation or by it being a member of a particular IGR structure. This is a limitation or qualification on participation and representation on policy-formulation bodies and bodes ill for local government.

(iii) Object of the Act

The “Object of the Act”¹⁵⁸ is somewhat limited as it relates in some cases only to:

- i. the provision of a framework [only] for all spheres of government and all organs therein to facilitate co-ordination [only] in the implementation [only] of policy and legislation, thereby omitting certain other essential functions, such as inter-sphere planning, budgeting, consolidated inter-municipal services, and so on, that can aid co-operative governance and municipal representation therein; and
- ii. monitoring and implementation [only, not the formulation and planning] of policy and legislation, is again a limitation on local government participation and representation.

(iv) Intergovernmental structures

Chapter 2 establishes several consultative forums whose composition and roles are stipulated as are in some instances their meetings, reports and referrals.¹⁵⁹ A concern is whether

¹⁵⁶ Section 2(2) (a)-(g) of the *Act*.

¹⁵⁷ Section 2(3)(b) of the *Act*.

¹⁵⁸ Section 4.

¹⁵⁹ Sections 6-34 of the *Act*.

cognisance has been taken of research that highlighted several weaknesses associated with decentralisation generally and with co-operative governance in particular.¹⁶⁰ Since many of the institutions already created may be either dysfunctional or moribund, the need to establish more is questioned. Further, there are no assurances that new structures will fare any better, especially in the context of limited time, financial, and intellectual resources. Also, the commitment and culture of working co-operatively appears to be non-existent. Form follows function: The creation of new structures and the elaborate processes they have to implement and manage have the potential to sow further confusion and conflict, and the time for them to settle in often is so long that they could be inimical to rapid and sustainable socio-economic development. Legislating on and statutorily creating institutions are no guarantees of their success, but the *Act* is not as prescriptive as conventional statutes and it does create a framework to guide co-operative governance. As such, it ought to be implemented and lessons documented, so as to facilitate learning from doing. However, it provides limited opportunities for municipal representation; alternatively, it minimises such space.

While the provisions that a “municipal councillor designated” by SALGA for representation on the Premier’s Co-ordinating Committee (PCC) and the Premier’s intergovernmental forum is welcome,¹⁶¹ such participation in a national intergovernmental forum is limited to the functional area for which that particular structure is established. This effectively side-lines local government. A further qualification is that the provision applies only if it is covered by powers and functions applying to local government or if national legislation specifically provides for municipal membership. Hence, municipal representatives are relegated to the periphery even though almost every national policy and programme affects their councils directly or indirectly.

A Premier’s intergovernmental forum¹⁶² is a most useful structure where mayors of district and metropolitan councils are members. Given that local municipalities cannot be accommodated because of their large number, it is expected, or assumed, that the provincial affiliate of SALGA

¹⁶⁰ Among others, Department of Provincial and Local Government (1999) *Final Report on the Intergovernmental Relations Audit*; Layman, Timothy (2003) *Intergovernmental Relations and Service Delivery in South Africa: A Ten-Year Review*; and Department of Provincial and Local Government (2008) *15 Year Report on the State of Intergovernmental Relations in South Africa*.

¹⁶¹ Sections 6(1)(h) and 17(f) of the *Act*.

¹⁶² Section 16 of the *Act*.

can represent them effectively.¹⁶³ Unfortunately, representation will favour larger, stronger or more articulate municipalities that are physically closer to the centre of power. The provision assumes that the PLGAs will have the capacity and authority to efficiently represent their constituent municipalities. Consideration ought to be given to better functioning institutions, such as the SACN, perhaps as advisor, as they could add value to certain forums. However, ‘side-lining’ could be overcome or neutralised or minimised by the stipulation that the Premier may invite any person to the forum.¹⁶⁴ Some of the provisions, such as the establishment of interprovincial and inter-municipality forums and their roles are superfluous,¹⁶⁵ since provinces and municipalities have the legislative and executive authority to do so anyway.

While an intergovernmental technical support structure¹⁶⁶ of professionals and experts would be most useful in the efficient operation of a forum, this question is linked to the need for a specialist organisation, either akin to the German *Bundesrat*,¹⁶⁷ or the ACIR.¹⁶⁸

The NCoP is not akin to the *Bundesrat*, and a review of both these institutions may help in determining how the former can function more effectively, especially in facilitating better municipal relations therein.¹⁶⁹

¹⁶³ Sections 17(d) and (f) of the Act.

¹⁶⁴ Section 17(3) of the Act.

¹⁶⁵ Sections 22 and 23; and 28 and 29, respectively, of the Act.

¹⁶⁶ Sections 30(1) and (2) of the Act.

¹⁶⁷ “The *Bundesrat* is the forum through which the 16 Länder participate in the legislative process and administration of the Federation (see Art. 50 of the Basic Law). As a matter of principle, the *Bundesrat* participates in the passage of every law adopted by the *Bundestag*. The extent of its participation, however, depends on whether the bill in question is one to which the *Bundesrat* may lodge an objection or one requiring the *Bundesrat*’s consent. The German *Bundestag* is elected by the German people ... The most important tasks performed by the *Bundestag* are the legislative process and the parliamentary scrutiny of the government and its work. Another of its functions is election of the German Federal Chancellor.” www.bundestag.de, accessed 22/08/2016. Although not directly comparable, the *Bundestag* could be likened to South Africa’s National Assembly and the *Bundesrat*, to the NCoP.

¹⁶⁸ “The Advisory Commission on Intergovernmental Relations (ACIR) was an independent, bipartisan intergovernmental agency established by public law 86-380 in 1959. The mission of the ACIR was ‘To strengthen the American federal system and improve the ability of federal, state and local governments to work together cooperatively, efficiently, and effectively’. The ACIR was constituted by representatives of all three spheres, as well as, perhaps, suitable representatives from outside of government who could undertake research, formulate and disseminate policy, and advise the forums on co-operative governance and other related matters. The ACIR was disbanded in September of 1996.” <http://www.library.unt.edu/govinfo/digital-collections/acir>, accessed 22/08/2016.

¹⁶⁹ The NCoP is reviewed in Chapter 5 of this thesis.

The NCoP was established by section 42(1)(b) of the *Constitution* which provides for participation by “not more than ten part-time representatives designated by organised local government...to represent the different categories of municipalities.” These representatives participate “when necessary” and “may not vote.”¹⁷⁰ It would seem that the constitutional provision that local government “may designate representatives to participate” in the NCoP,¹⁷¹ has been watered down. It is not clear when a Premier’s “obligation ... to consult organised local government on any matter”¹⁷² arises and how this duty will be met in the Premier’s Intergovernmental Committee. If there is such lack of clarity, SALGA may effectively be marginalised through non-consultation. A qualifier or delimiting factor is that such interaction must be “conducted [only] through an appropriate intergovernmental structure” and not directly.¹⁷³ This is cumbersome and may delay development, especially if a matter is urgent. However, there are many opportunities, particularly within the political realm, for an executive mayor or MEC to bring important and urgent matters to the attention of decision makers either through an IGR structure or by appropriate communication outside of formal mechanisms.¹⁷⁴

A further limitation is that if SALGA or one of its provincial affiliates is not a member of a forum, a representative may only have “full speaking rights.”¹⁷⁵ There is no guarantee that organised local government is or will be a member of any intergovernmental structure. Furthermore, a ‘speaking right’ amounts to nothing of substance. Although the *Act*¹⁷⁶ provides inadequate opportunities for representation, the onus is on SALGA to make best use of these

¹⁷⁰ Section 31(1) of the Act.

¹⁷¹ *Ibid.*

¹⁷² Section 31(2) of the Act.

¹⁷³ Section 67 of the *Constitution*, providing participation by organised local government in the NCoP.

¹⁷⁴ Unfortunately, most of the structures are forums with no decision-making mechanisms that can influence lawmaking in the NCoP. Examples are the National Municipal Managers Forum and the South African Cities Network. The latter operates largely through grants from member municipalities (the nine largest cities in South Africa) and support from donors. For local government legislation to be done through municipalities and with representation from their residents, the NCoP ought to be reconstituted to incorporate better representation of local government.

¹⁷⁵ Section 163(b)(ii) of the *Constitution*.

¹⁷⁶ Sections 32(1) and (2).

structures to advance the interests of local government. By proving its effectiveness, albeit on a limited number of forums, it can request greater representation.

It is stipulated that “an intergovernmental structure is a forum for intergovernmental consultation and discussion.” As such it is “not an executive decision-making body.”¹⁷⁷ An intergovernmental structure is a forum or can be one, but a forum is not an intergovernmental structure, as defined, for the latter is limited to only certain specific forums.¹⁷⁸ No provision appears to be made for mechanisms that may arise in the future, outside of those statutorily provided for. The *IRFA* approach is anti-developmental as it does not incorporate the necessary degree of flexibility and informality requisite for a dynamic field that is intergovernmental relations through human interaction.

The 1993 Constitution¹⁷⁹ and *Local Government Transition Act*¹⁸⁰ mandated the establishment of several structures in all spheres of government. These were enlarged by the *IRFA*. The table below depicts those that could be relevant to co-operative governance from which SALGA could determine where municipal representation could be most effective.

(v) ***Analysis of the IRFA***

The South African *Constitution* is unique in going so far as even formalising and entrenching institutions and their practise of co-operative governance, as well as their relationships *inter se*. There are no directly comparable precedents to this innovation and hence the model is experimental. Consequently, institutions and practices should be allowed to grow and develop with time, such that our indigenous or endogenous models could become ‘good’ practices.

¹⁷⁷ *Ibid.*

¹⁷⁸ Only those established in terms of sections 6-34 of the *Act*.

¹⁷⁹ *Republic of South Africa Constitution Act*, 200 of 1993. It made provision for, *inter alia*, the Public Protector (section 110), provincial constitutions (160), Commission of Provincial Government (163), establishment of “categories of metropolitan, urban and rural governments, with differentiated powers, functions and structures...” section 174(2), A local government may, in its discretion, by means of a resolution of its council provide for the assignment of specified functions to local bodies or submunicipal entities within its area of jurisdiction – section 174(6), Recognition of Traditional Authorities and indigenous law (184), Provision for Establishment of Volkstaat Council (184A).

¹⁸⁰ *Local Government Transition Act*, 209 of 1993, established, *inter alia*, Provincial Committee for Local Government – section 3(1)(a), Establishment of Administrator – 4(1), Recognition and Establishment of Negotiating Forums (6), Local Government Co-ordinating Committee – 7(1)(c), Establishment of Transitional Councils – 8(1), Establishment of Local Government Demarcation Boards – 11(1).

STRUCTURE	SPHERES	FUNCTIONS	ESTABLISHED ¹⁸¹	ACHIEVEMENTS	NATURE
Judiciary	All	Adjudication	1994	Enforced <i>Bill of Rights</i>	Formal
Parliament: NA	National	Legislature	1994	Several enactments	Formal
Parliament: P legislatures	Provincial	Legislature	1994	To be researched due to limited activity	Formal
Parliament: NCoP	N – P	Legislation, monitoring and oversight; LG represented by SALGA	1996	Legislative functions burdensome; some P supervision; real need questionable	Formal
PCC *	N – P, includes Minister of COGTA	Implement N legislation; P policy and legislation, promote and supervise LG and co-op	2005	Too ambitious; very high expectations; delivery remains to be seen	Formal – executive co-operation
National IGF *	All, but mostly N – P and OLG (when appropriate)	Established by any Cabinet Minister for the functional area concerned	2005	Minimal, if any	Formal
Premier's IGF *	P-L	Executive co-operation	Post-IRFA	Not measured since formal establishment	Formal
Premier's Co-ordinating Forum	Premier, mayors, municipal managers, SALGA	Discuss common issues	Varies	Not clear; only Gauteng appears to be minimally operational	Informal; replaced by Premier's IGF
Provincial IGF *	Functional area of spatial part of a province	Inter-departmental within a province (internal)	Post-IRFA	Not documented	Informal
Interprovincial forums *	2 or more provinces	Matters of mutual interest	Post-IRFA	Not documented	Informal
District IGF *	District and local municipalities		Post-IRFA	Not documented	Informal
Inter-municipal *	2 or more municipalities		Post-IRFA	Not documented	Informal
MinMECs	N – P; SALGA represented only on sectoral issues	Concurrent responsibilities; sectoral executive, policy/strategies	1994	Minimal, if any; mostly information dissemination	Informal
Technical support *	All; officials and others	Formal technical support to a forum	Post-IRFA		Informal
FFC	All	Fiscal/financial m	1997	Reasonable progress	Formal
OLG (SALGA)	All	Represent LG	1997	Nothing of note	Formal
PLGA	P-L	Represent LG in P	1998	None	Informal
Budget Council Budget Forum	All	Fiscal relations	1997	Not clear	Formal (MinMEC)
HEDCom	National	Education Ministers	1997	None of note	Formal (MinMEC)
FOSAD	N – P	Admin/technical	1998	None	Informal
SACN	9 SA cities;	Co-operation, sharing	2001	Research, publications	Informal

Table 4.1: Co-operative governance structures (Refer list of abbreviations)

Source: Compiled from literature reviewed.

* 'Formal' means established in accordance with provisions of the *IRFA*.

¹⁸¹ Date structure came into effect.

The *IRFA* has been in implementation for over a decade. At this stage, there appears to be no indication of its achievements or usefulness – time will tell. The Constitutional Court¹⁸² lamented the delay by Parliament in enacting legislation in compliance with section 41(2) of the *Constitution*. Malherbe (2006), writing a year after the promulgation of the *IRFA*, states that it “does not contain much innovation or surprises.”¹⁸³ He argues that during the long delay in its emergence provinces functioned more as agents of the state than as a sphere of government and many have performed unsatisfactorily. Under the circumstances the use of formal and informal intergovernmental structures may have resulted in a *de facto* situation of national dominance¹⁸⁴ or national domination over the other spheres of government,” and that a major shortcoming is that it does not apply to Parliament.¹⁸⁵ Bekink (2006) argues that –Local authorities serve as an effective counterweight to the over-concentration of governmental authority in the other two levels/branches of government. This positive influence can be achieved only if local governments are afforded a certain measure of autonomy.¹⁸⁶

The *IRFA* does not prohibit informal intergovernmental relations or the establishment of forums to facilitate such engagement. Intergovernmental forums are not legislative bodies and as such participants cannot be held liable or accountable for decisions taken. They can be held liable to their own legislatures and they, in turn must report to Parliament on the conduct of intergovernmental relations.

De Villiers (2012) contends that codification of intergovernmental relations has contributed to “greater certainty and transparency” but that there remains “much ambivalence” about the nature of decisions and recommendations of the forums, as well as their inability to “supervise and enforce” them.¹⁸⁷ He points out that the *IRFA* facilitates training of new politicians and bureaucrats in the “basic philosophy and structures of intergovernmental relations”, its policies and processes, conflict resolution, and the “role of each individual in the overall mosaic of

¹⁸² In *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC) at paragraph 32.

¹⁸³ Malherbe, EFJ ‘Does the Intergovernmental Framework Act 13 of 2005 confirm or suppress national dominance?’ 2006 – 4 *TSAR*, 810-818, 813.

¹⁸⁴ Malherbe (2006), *op cit*, 812.

¹⁸⁵ Malherbe (2006), *op cit*, 817-818.

¹⁸⁶ Bekink (2006), *op cit*, 61.

¹⁸⁷ De Villiers (2012), *op cit*, 690.

intergovernmental relations.”¹⁸⁸ He adds that the *Act* can “contribute to the widening and deepening of democratic institutions and processes in young democracies.”¹⁸⁹

In conclusion, the view of De Villiers (2012) is helpful.

The certainty, predictability and institutional development that are associated with an IGR Act seem to far outweigh any risks associated therewith.¹⁹⁰

Notwithstanding certain shortcomings, the *IRFA* does create opportunities for municipal representation. In this respect, it is necessary for municipalities and SALGA to show their effectiveness in the limited spaces provided thus far and based on successes achieved thereon, request for more means of municipal representation on intergovernmental structures and processes.

4.3.5 STATUS AND AUTONOMY OF LOCAL GOVERNMENT

(a) Background

Unlike South Africa’s colonial and apartheid past when local government was subordinate both to Parliament and to provincial councils, it is now established and protected by the *Constitution* and operates alongside the national and provincial governments as a distinctive “sphere”. The relative autonomy granted constitutionally to local government makes it unique in the world. Whilst being innovative and developmental in a positivist sense,¹⁹¹ this distinction and recognition of what was previously the lowest tier in a hierarchical relationship also creates many challenges.

Atkinson (1998) argues that provisions for co-operative governance were premised on inherent and anticipated tensions between the three spheres, based on the “ambiguities and diversity which characterise central government policies.”¹⁹² The essence of the tension is the difference between the autonomy of municipalities, on the one hand, and their powers and functions, on

¹⁸⁸ At 688.

¹⁸⁹ At 692-693.

¹⁹⁰ De Villiers (2012), *op cit*, 694.

¹⁹¹ Positivism is based on the theory that laws derive validity from the fact of having been enacted by authority or deriving logically from existing decisions, rather than from any moral considerations (*South African Concise Oxford Dictionary*).

¹⁹² Atkinson (1998), *op cit*, 17.

the other.¹⁹³ Municipal autonomy in its clearest sense is depicted in the constitutional allocation of powers and functions.¹⁹⁴

Legal personality bestowed upon municipalities¹⁹⁵ means they can sue and be sued, as can their political office bearers and administrators, acting within the scope of their employment. While the local community is part of a municipality, they cannot be held liable for their actions.

(b) Status of local government

It has been said that –

Any discussion of local government often elicits a kind of cognitive dissonance. We know, and we are told by the courts and politicians, that local government is important. At the same time, local matters are associated with the parochial and petty, and are often viewed as being mundane or just unglamorous. Yet the work performed by municipalities marks our everyday experiences of government. These experiences in turn shape our perceptions of being governed.¹⁹⁶

While the *Constitution* and subsequent statutes have set out the powers and functions of local government, it has taken the Courts to point out in practical terms what they mean.¹⁹⁷

(c) ‘Relative’ or limited autonomy

Local government ‘inferiority’ is evident in the provision that a municipality’s “right” to govern on its “own initiative” is conditional in the sense that it is “subject” to national and provincial legislation.¹⁹⁸ However, the two (*de-facto*) superior spheres “may” not “compromise or impede” local government’s ability or right to function effectively.¹⁹⁹ The powers of local government were confirmed in the *Certification Judgment*²⁰⁰ and subsequently.²⁰¹ Thus,

¹⁹³ Sections 151 and 156, respectively, of the *Constitution*.

¹⁹⁴ In Part B of Schedule 4 and Part B of Schedule 5 of the *Constitution*.

¹⁹⁵ By section 2(d) of the *Systems Act*.

¹⁹⁶ Bergström and Naidoo (2016), *op cit*, 57.

¹⁹⁷ See, *inter alia*, *Fedsure, op cit*, paragraphs 26 and 38; *City of Cape Town v Robertson, op cit*, paragraph 60; *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1, 2007 (4) SA 276 (SCA), paragraphs 37-40. Although the following cases reviewed deal largely with municipal planning, the status of municipalities could be ascertained from the interpretation of the constitutional provisions by the Constitutional Court: *Gauteng Development Tribunal; Maccsand; Lagoonbay; and Habitat*.

¹⁹⁸ Section 151(3) of the *Constitution*.

¹⁹⁹ Section 151(4) of the *Constitution*.

²⁰⁰ *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 (CCT 37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), paragraphs 73, 78, 80 and 82.

²⁰¹ See Budhu and Wiechers (2003), *op cit*, 471.

intervention is not unconditional. Use of the modal verb ‘may’ implies possibility, that is, the other spheres of government in practice could compromise or impede a municipality’s right or ability to exercise its powers or perform its functions. There has been “judicial trends in recognising an increased level of autonomy of local governments” compared with those of national and provincial spheres. In arriving at a solution when faced with such a challenge, “the courts will certainly endeavour to give as much cognisance to local government autonomy as possible.”²⁰²

In *Fedsure*, the Constitutional Court ruled that –

Local governments have a place in the constitutional order, have to be established by a competent authority, and are entitled to certain powers...²⁰³

In a later case, the High Court²⁰⁴ held that the language used in certain sections²⁰⁵ of the *Constitution*, “is suggestive of an equality” among the three spheres of government, and that the “clear intention is that local government structures should not be penalised for showing industry and initiative in revenue gathering...”

Municipalities can only exercise their autonomy if they have the ability to do so. The *Constitution* stipulates that the other two spheres must capacitate and support them, as well as monitor such support.²⁰⁶ Apart from status and autonomy directly conferred by the *Constitution*, they also arise from powers and functions allocated to local government in other legislation. Although one perceives municipalities to constitute a “sphere” of government (rather than the lowest tier in a hierarchy), their subordinate status is evident from it being provided only executive, and not also legislative authority over matters listed in Part B of Schedule 4 and Part B of Schedule 5. This evident from the following constitutional provision:

A municipality has executive authority in respect of and the right to administer –

(a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.²⁰⁷

²⁰² Budhu and Wiechers (2003), *op cit*, 472.

²⁰³ *Fedsure*, *op cit*, paragraph 38.

²⁰⁴ *Uthukela District Municipality v President of the RSA* 2002 5 BCLR 479 (N), at 485G-H and 487D-H, following the precedent set by *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) 1255, at paragraph 115.

²⁰⁵ In sections 40(1), 151(1), 156, 230, 227(3) and 239.

²⁰⁶ In sections 154(1) and 155(6)(a) and (b) of the *Constitution*.

²⁰⁷ Section 156(1)(a) of the *Constitution*.

Legislative power, however, is conferred on municipalities to enable them to make “by-laws for the effective administration of the matters which it has the right to administer”.²⁰⁸ Furthermore, any by-laws in conflict with legislation of the other two spheres would be invalid.²⁰⁹ This relatively lower status is evinced in certain other provisions in the *Constitution*, for example:

- local government matters not addressed by the *Constitution* are to be prescribed by national and/or provincial legislation;²¹⁰
- an Act of Parliament providing for “equitable share” of revenue;²¹¹
- national legislation prescribing the form of municipal budgets;²¹²
- national legislation to prescribe a framework for procurement;²¹³
- national legislation, formulated on the advice of the Financial and Fiscal Commission (FFC), prescribing municipal loan guarantee compliance;²¹⁴
- municipal fiscal powers and functions regulated by national legislation;²¹⁵
- national legislation prescribing how a municipality may raise loans;²¹⁶
- provincial legislative powers over municipalities;²¹⁷
- provincial supervision of local government;²¹⁸ and
- local government may make only representations on national or provincial enactments affecting their own status, institutions, powers or functions.²¹⁹

²⁰⁸ Section 156(2) of the *Constitution*, referring to section 156(1)(a), that is, the “local government matters listed in Part B of Schedule 4 and Part B of Schedule 5”.

²⁰⁹ Section 156(3) of the *Constitution*.

²¹⁰ Section 164 of the *Constitution*.

²¹¹ Sections 214(1) of the *Constitution*.

²¹² Section 215(2) of the *Constitution*.

²¹³ Sections 217(3) of the *Constitution*.

²¹⁴ Sections 218(1) and (2) of the *Constitution*.

²¹⁵ Sections 229(1)(b); 229(2)(a) and (b) of the *Constitution*.

²¹⁶ Sections 230A(1)(a) and (b) of the *Constitution*.

²¹⁷ Sections 104(1)(a), (b) and (c); 104(3) of the *Constitution*.

²¹⁸ Section 139 of the *Constitution*.

²¹⁹ Section 154(2) of the *Constitution*.

Several statutes confirm the ‘relative’ autonomy or comparatively ‘inferior’ status of local government – see review below. While alluding to local government’s *de facto* subordinate status, these provisions nevertheless serve to align the three spheres and to highlight their interrelatedness and the need for them to function harmoniously. Notwithstanding what may be seen as limitations and qualifiers, which are necessary and correct, given that municipalities operate in association with national and provincial spheres in “one sovereign democratic state,”²²⁰ their status and autonomy is relatively high when compared to the situation before the 1995 local government elections. Such (minimal) limitations are justified as municipalities generally lack the know-how to go it alone, that is, without the co-operation and support of the other two spheres. Furthermore, within the context of co-operative governance, a three-level compartmentalised governmental system would be unworkable.

Steytler and De Visser (2014) contend that local government autonomy is a relative matter in the sense that it is exercised “subject to national and provincial legislation”.²²¹ They add that the limitation on local government autonomy is permissible subject to three conditions, namely that legislative oversight must be provided for in national and provincial legislation, as stipulated in the *Constitution*. Secondly, that the “nature and quality of such intervention is subject to an inner core of local autonomy”, wherein a municipality’s ability or right to exercise its powers or perform its functions may not be compromised or impeded. Thirdly, local government’s right to govern imposes a duty on national and provincial spheres of government to “allow a municipality to govern within its demarcated space”.²²²

Local government, however, cannot exercise its autonomy independently, as spheres are “interdependent”: It operates under the supervision of the other two spheres. Within the context of concurrency, the constitutionally-mandated responsibility for supervision of local government by provincial government comprises four “distinct but interrelated activities” namely regulation, monitoring, support, and intervention.²²³ Such type of actions can cause tension and conflict, requiring, perhaps, a mixture of formal and informal friendly relations.

²²⁰ Section 1 of the *Constitution*.

²²¹ Steytler, Nico and Jaap de Visser, ‘Local Government’ in Woolman, Stuart and Michael Bishop (Eds) (2014) *Constitutional Law of South Africa* (Second Edition), Cape Town: Juta, Chapter 22, 22 – 1.

²²² *Ibid.*

²²³ *Ibid.*

Any intervention should be strictly in accordance with the constitutional provision,²²⁴ and the *First Certification Judgment*.²²⁵ Where interventions are undertaken in accordance with the spirit and letter of the law as well as in compliance with the provisions of co-operative governance, they create the circumstances and opportunities for councillors and municipal technocrats to engage with their provincial counterparts. Although the *Constitution* states, “National legislation may regulate the implementation of this section, including the processes established” therein, no statute for this specific purpose has yet been enacted.²²⁶ Mathenjwa (2013) argues that the role of the NCoP and the Minister in such interventions “should be extended to include oversight of provincial government monitoring of local government.”²²⁷ More meaningful and stronger local government representation on the NCoP could assist this process. A most welcome provision of informing and consulting allows the public, municipalities, and organised local government to comment on draft national and provincial legislation affecting their functions and localities.²²⁸ There is a prior obligation on national and provincial governments before an intervention in a municipality. This relates to their duty to support and strengthen local government.²²⁹ The *Constitution*, then, presumes the existence of capacity, competency, and ability of SALGA to do so in a meaningful manner, but makes no provision for such views to be taken into account. Nevertheless, this is a well-intentioned clause that goes to further co-operative governance and could, in time, be used meaningfully by municipal representatives.

The *Constitution* circumscribes the powers and functions of municipalities and, according to Bekink (2006) thus have a “restrictive impact on the fulfilment of the sweeping duties and objectives”.²³⁰ Secondly, “they are ultimately exercised under the watchful eyes of the national and provincial governments.”²³¹ Bekink (2006) adds that “The biggest negative impact of a

²²⁴ Section 139. See Mathenjwa (2013), *op cit*, particularly 79-81, 322, 349-350, 358-359.

²²⁵ *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), paragraphs 264, 289, 359, 363, 370, 373.

²²⁶ Section 139(8).

²²⁷ On supervision and monitoring of and intervention in local government by provincial government generally, see Mathenjwa (2013), *op cit*, 93.

²²⁸ Section 154(2) of the *Constitution*.

²²⁹ In compliance with section 154(1) of the *Constitution*. See Bekink (2006), *op cit*, 110.

²³⁰ *Op cit*, 214.

²³¹ *Ibid*. See section 155(7) of the *Constitution*.

municipal council having both executive and legislative powers is the fact that the built-in checks and balances of one government body over the other is lost.”²³² However, the entrenched power of control and supervision of municipalities by national and provincial government,²³³ if exercised diligently, may be an adequate check over any abuse.

“Although the municipalities have been afforded a new status and autonomy, such autonomy is not absolute”, according to Bekink (2006).²³⁴ Both national and provincial governments have legislative and executive oversight and control over local government’s functions and responsibilities. Hence, although autonomy is enhanced on the one hand, it is limited on the other. Bekink (2006) argues that such autonomy corresponds with the intent of legislative drafters adding that “superior control and supervision ... is indeed essential in achieving the objects and developmental functions of local governments.”²³⁵ Furthermore, local government powers and functions are not absolute in the sense that they are subject to national and provincial legislation. Bekink (2006) asserts that they “must be exercised to fulfil constitutional objectives and developmental duties.”²³⁶ This kind of ‘hierarchical’ operationalisation of the three-sphere governmental system is dependent on co-operation amongst all spheres and support to local government. Bekink (2006) argues that local government does “not have a comparable autonomy to what national or even provincial spheres have”, and secondly that it is subject to intervention by the ‘higher’ spheres. Furthermore, local government autonomy can be compromised without the financial support and provision of infrastructure by them.²³⁷

Local government cannot have ‘full’ autonomy because this would be untenable in a multi-sphere form of government. However, the ‘relative’ or limited autonomy granted is adequate for it to function effectively within the system and context of co-operative governance. Hence, the innovative autonomy can be used by municipal representatives to strengthen the position of local government. Notwithstanding limitations, understandable in a three-sphere governmental system, municipalities have sufficient autonomy to be a major player in national policy-making

²³² *Ibid.*

²³³ In terms of sections 154(1) and 155(6)(b) of the Constitution. See Budhu and Wiechers (2003), *op cit*, 471-472; Bekink (2006), *op cit*, 62, 67, 69.

²³⁴ At 520.

²³⁵ *Ibid.*

²³⁶ At 523.

²³⁷ Bekink (2006), *op cit*, 65, 67.

through its representative organ. However, this requires leadership of the highest calibre to make a positive difference.

4.3.6 POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

(a) Background

The *Constitution*, though well intentioned, flexible and facilitative, has created certain confusion and contradictions insofar as local government is concerned. For example, municipalities are at the same time neither fully autonomous nor subordinate (as shown above), since they are –

... located in a complex web of power and function relationships which, while entailing a large measure of municipal integrity and distinctiveness, requires other spheres to take responsibility for initiating and controlling vital legislative and executive processes. This is essential to the functioning of a modern, unified democratic state.²³⁸

At the time of the Constitutional Assembly's deliberations, local government was not a priority agenda item. The compromises made by the Congress for a Democratic South Africa (CODESA) were evident in the *Local Government Transition Act*.²³⁹ The role of local government at that time was a work in progress and appears to remain so today. However, in arguing for a clearer demarcation of powers and functions, especially concurrent ones, it should be noted that the governmental system does not function by itself but through strong leadership and a competent and committed workforce. Even where precise allocation of roles and responsibilities is possible, problems could be encountered considering that fallible human beings mind the machinery of government. Within the context of autonomy, the *Constitution* provides local government with two sources of powers, original and assigned.

It has been said that there is need to –

Evaluate whether the powers and functions designated to local government enable it to effectively and efficiently meet this developmental mandate ...[because] there are significant shortcomings in the manner [in which they are] interpreted and implemented.²⁴⁰

²³⁸ Pimstone (1998), *op cit*, 162.

²³⁹ 209 of 1993, subsequently repealed by the *Constitution*.

²⁴⁰ Community Law Centre (2007) *Paper 1 – Developmental Local Government: Determining Appropriate Powers and Functions*, Cape Town: University of the Western Cape, 6-7.

(b) Original powers

In section 40(1) of the *Constitution*, the word “sphere” instead of ‘tier’ suggests that government is not hierarchically arranged, as in the past. The implication is that local government now has an elevated status, but it is not clear to what position. A dictionary definition of “sphere” is unhelpful in determining whether municipalities are autonomous. Since the status-conferring provision is an empowering one, municipalities, constituting a “sphere” of government having both legislative and executive powers as well as the “right to govern on its own initiative”, now have a standing ‘comparable’ with the other two spheres. Status and autonomy are important for the effective functioning of municipalities and consequently also for an association representing local government. But in and of themselves status and autonomy are meaningless if municipalities do not have adequate capacity to undertake their responsibilities. “Hence, the question arises: Which comes first, status or capacity?”²⁴¹ National government departments still almost exclusively formulate policies impacting on municipalities without much meaningful participation by them. This situation highlights the perceived and real low status of local government and its representative organ by national and provincial governments.

Steytler and De Visser (2014) argue²⁴² that the *Constitution* entrenched “local autonomy by listing the powers of municipalities, limiting the oversight powers of other spheres of government and, more importantly, securing a stable base for municipal revenue”.²⁴³

Section 43 of the *Constitution* vests local government with legislative authority alongside national and provincial governments. The Constitutional Court ruled that “the institution of local government as a sphere of government and the powers of municipalities are now recognised and protected by the Constitution”.²⁴⁴ This statement is also a reference to section 151(2) of the *Constitution* which states: “The executive and legislative authority of a municipality is vested in its Municipal Council.” The Court added that the exercise of legislative power by a municipal council is “no longer a delegated function subject to administrative

²⁴¹ Singh, Anirood (2000) *Co-operative Governance and the Promotion of Economic Development by Local Government Associations: A First Exploration*, unpublished LLM Dissertation, Pretoria: Unisa, 17.

²⁴² *Op cit*, 22 – 7.

²⁴³ In terms of section 227(1)(a) of the *Constitution* which provides that “Local government in each province is entitled to an equitable share raised nationally to enable it to provide basic services and perform the functions allocated to it.”

²⁴⁴ In *Fedsure, op cit*, paragraph 26.

review, but a political process that represents the will of the municipal residents.”²⁴⁵ This view is also based on the sections of the *Constitution* which provide:

A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the *Constitution*.²⁴⁶

And

The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.²⁴⁷

Steytler and De Visser (2014) assert that the word ‘right’ in these two provisions indicates an entitlement to govern and the term ‘govern’ “connotes a regulatory and policy making role” rather than one of implementing or administering laws.²⁴⁸ They contend that a municipality’s right to govern is facilitated by the provision of three constitutionally-mandated instruments, namely, executive authority,²⁴⁹ the right to administer, and the right to make by-laws.²⁵⁰ They add that the phrase ‘on its own initiative’ means that municipalities “do not have to await instructions from the other two spheres of government before “using their legislative, executive and administrative authority.” They argue that the detailed powers and functions of local government do not have to be firstly determined by a higher competent authority, such as a provincial or the national government, before a municipality can exercise its original power.²⁵¹ Section 151(4) of the *Constitution* refers to national and provincial governments, not to their legislation. However, municipalities must act in accordance with the constitutionally-mandated national and/or provincial legislation. Hence, local government does not enjoy unfettered autonomy. Section 156(1) of the *Constitution* sets out the executive and administrative functions of municipalities as listed in Schedule 4B and Schedule 5B. These are original powers that cannot be changed or repealed by national or provincial legislation but only by constitutional amendment.²⁵²

²⁴⁵ *Fedsure*, paragraphs 5-11, referring to section 151(2) of the *Constitution*.

²⁴⁶ Section 151(3) of the *Constitution*.

²⁴⁷ Section 151(4) of the *Constitution*.

²⁴⁸ *Op cit*, 22 – 44.

²⁴⁹ In terms of sections 156(1)(a) and (b) of the *Constitution*.

²⁵⁰ In terms of section 156(2) of the *Constitution*.

²⁵¹ Steytler and De Visser (2014), *op cit*, 22 – 45.

²⁵² See Budhu and Wiechers (2003), *op cit*, 473.

Municipalities have authority²⁵³ over specific matters enumerated.²⁵⁴ The listed powers can be added to, but not subtracted from, by provincial government, as they are constitutionally-derived or original powers. They cannot be removed by parliamentary legislation either. As plenary powers, that is, responsibility to regulate and administer particular functional areas, they do not have to be set out in detail. While provincial governments also have powers over those listed specifically for municipalities, they are limited to certain provisions only.²⁵⁵ A municipality's original powers have been confirmed in several cases by the Constitutional Court.²⁵⁶ A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.²⁵⁷

However, the listed powers are not allocated exclusively to local government in that they may be subject to or regulated by national and provincial governments or constrained by the *Constitution* itself, such as in its Bill of Rights.

Section 156(5) of the *Constitution* grants municipalities "the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." It is contended that local government's "constitutional authorisation" to perform ancillary functions is based on its original powers which "allow the repository to assume all those additional powers which are necessary and incidental to the exercise of such powers."²⁵⁸

²⁵³ In terms of sections 151(2) and 156(1) of the *Constitution*.

²⁵⁴ In Part B of Schedule 4 and Part B of Schedule 5 of the *Constitution*.

²⁵⁵ To those specified in sections 155(6)(a) and 155(7) of the *Constitution*.

²⁵⁶ See, *inter alia*, *Robertson, op cit*, paragraphs 59-60; *Gauteng Development Tribunal, op cit*, paragraphs 1, 43-48, 70. See also Budhu and Wiechers (2003), *op cit*, 473.

²⁵⁷ Per Moseneke J in *Robertson, op cit*, at paragraph 60.

²⁵⁸ By Budhu and Wiechers (2003), *op cit*, 473.

Budhu and Wiechers (2003) argue that where devolution of powers is concerned, Courts “will no doubt adopt a flexible, pragmatic approach” and that judicial reasoning would be based on the “idea of supporting the establishment of viable and successful local government.”²⁵⁹ They add that the judiciary would use a purposive approach and interpret local government powers and functions broadly to “ensure that the goals of social security, economic advancement, etc are well served”, giving “as much scope as possible” to them.²⁶⁰ This *modus operandi* will increase and enhance not only the powers and functions but also the obligations on municipalities. Hence, their representatives must be alive to the situation and lobby for the support from national and provincial governments as provided for in the *Constitution*. This would be on the basis of the constitutional directive of national and provincial governments’ duty to support and strengthen the capacity of municipalities.²⁶¹

Chapter 2 of the *Systems Act* sets out the legal nature of a municipality, its role in co-operative government, and the rights and duties of municipal councils.²⁶² It also stipulates the “rights and duties of members of the local community”.²⁶³ The *Act* also sets out the “Duties of municipal administrations”.²⁶⁴

Chapter 3 of the *Systems Act* sets out municipal powers and functions. Section 8 is titled “General empowerment”, under which the *Act* confirms local government’s constitutionally-entrenched and assigned powers and functions, with the qualifier that they must be exercised subject to Chapter 5 of the *Structures Act*.²⁶⁵ The second confirmation is that “A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.”²⁶⁶

²⁵⁹ *Op cit*, 471.

²⁶⁰ Budhu and Wiechers (2003), *op cit*, 470.

²⁶¹ In terms of sections 99, 126 and 156(1)(b) of the *Constitution*.

²⁶² Sections 2, 3 and 4, respectively of the *Systems Act*.

²⁶³ Sections 5(1)(a)-(g) and 5(2)(a)-(e), respectively, of the *Systems Act*.

²⁶⁴ Sections 6(1) and (2) of the *Systems Act*.

²⁶⁵ Section 8(1) of the *Systems Act*.

²⁶⁶ Section 8(2) of the *Systems Act*.

Section 11 of the *Systems Act* addresses executive and legislative authority of municipalities. Such authority vests in the council and can be exercised only within its geographical boundary.²⁶⁷ The *Act* lists 14 prescribed powers.²⁶⁸ It sets out legislative procedures that provide that “Only a member or committee of a municipal council may introduce a draft by-law in the council.”²⁶⁹ The *Act* provides, “A by-law must be made by a decision taken by a municipal council”,²⁷⁰ and in accordance with prescribed procedures.²⁷¹ “No by-law may be passed by a municipal council unless” certain prescribed procedures are adhered to.²⁷²

From the foregoing, it is clear that the *Systems Act* has made extensive and detailed provisions for executive committees, executive mayors, metropolitan sub-councils, and ward committees. Hence, representation by councillors is permissible on any of these structures.

A brief review of some decided cases serves to highlight the original powers of local government, even though most are based on municipal planning.

In the *Gauteng Development Tribunal* case, the Constitutional Court held that the Constitution’s allocation of governmental powers proceeds from a “functional vision of what was appropriate to each sphere.”²⁷³

In the *First Certification Judgment*, the Constitutional Court held that the power of national and provincial governments to monitor local government²⁷⁴ “does not represent a substantial power in itself, certainly not a power to control [local government] affairs”. It also does not bestow “additional or residual powers of provincial intrusion on the domain of local government”. It

²⁶⁷ Sections 11(1) and (2), respectively, of the *Systems Act*.

²⁶⁸ Sections 11(3)(a)-(g) of the *Systems Act*.

²⁶⁹ Section 12(1) of the *Systems Act*.

²⁷⁰ Section 12(2) of the *Systems Act*.

²⁷¹ Sections 12(2)(a) and (b) of the *Systems Act*.

²⁷² Sections 12(3)(a) and (b) and 12(4)(a) and (b) of the *Systems Act*.

²⁷³ *Op cit*, paragraph 53.

²⁷⁴ In terms of section 155(7) of the *Constitution*.

stated that the *Constitution* envisaged a “hands-off relationship” with regard to by other spheres of government *vis-à-vis* local government.²⁷⁵

Referring to the *Gauteng Development Tribunal* case, Cameron J in *Habitat* said –

...provinces should not be allowed to intervene in functions that the Constitution reserves for municipalities. This would be in direct conflict with this Court’s jurisprudence...no justification for a provincial power to overturn municipalities’ land-use decisions.²⁷⁶

Cameron J in *Habitat*²⁷⁷ quotes Moseneke J in the *Robertson* case:

The Constitution has moved way from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, ‘inviolable and possesses the constitutional latitude within which to define and express its unique character’ subject to constraints permissible under our Constitution...A municipality enjoys ‘original’ and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits.

Cameron J in *Habitat*²⁷⁸ quotes Mhlantla AJ in *Lagoonbay*:²⁷⁹

This Court’s jurisprudence clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; the constitutional vision of autonomous spheres of government must be preserved...

Detailed and extensive powers, perhaps ‘over-prescription’, has a downside in that municipal officials may be overwhelmed by them, especially those in weaker municipalities. In this context, it has been said that –

...many rules make compliance impossible, leading to compliance fatigue and the resultant lawlessness. The multiplicity of laws also threatens to undermine the municipalities’ constitutionally-entrenched independence and authority over their own affairs.²⁸⁰

Alongside a plethora of statutes and regulations requiring strict compliance therewith, the number of municipalities will reduce from 278 to 257, serving a population of 55.6 million.²⁸¹

Apart from population size, the spatial areas of South Africa’s municipalities are comparatively large as shown by Atkinson (2003):

Xhariep District Municipality in the Southern Free State is the size of Hungary; the Northern Free State District Municipality has the same diameter as Belgium; and the Namakwa District Municipality is almost as wide as Texas.²⁸²

²⁷⁵ *Op cit*, paragraphs 372-373.

²⁷⁶ *Habitat* case, *op cit*, paragraph 9.

²⁷⁷ *Op cit*, paragraph 11.

²⁷⁸ *Op cit*, paragraph 12.

²⁷⁹ *Op cit*, paragraph 46.

²⁸⁰ Ntliziywana, Phindile, ‘Adding Injury to Insult: Intrusive Laws on Top of a Weak System’ (2016) *Constitutional Court Review Vol VI*, Cape Town: Juta, 32-56, 32.

²⁸¹ Statistics South Africa: 2016 *Community Survey*, www.statssa.gov.za, accessed 7/11/2016.

²⁸² Atkinson, Doreen ‘Post-apartheid Local Government Reforms: A Small Town Perspective’ (2003) *Occasional Paper*, Johannesburg: Centre for Development and Enterprise, 2.

Ntliziywana (2016) argues that a “suit of parallel and overlapping laws were promulgated” by CoGTA, National Treasury and the Department of Public Service and Administration (DPSA) in their attempt to “professionalise municipal administration through regulation... This set the scene for tripwires of ‘must do’ requirements.”²⁸³ She adds that these regulations do “not meet the rule of law requirement that the law must be clear and must serve a rational purpose.”²⁸⁴ Ntliziywana (2016) contends that –

The practice of throwing laws at a problem can also potentially fail the constitutional test for violating its various provisions relating to the municipalities’ ability or right to exercise their powers and regulate their internal affairs without any impediments. The relevant provisions that are threatened by this practice are ss 151(4) and 160 of the Constitution.²⁸⁵

These regulations, then, may be unconstitutional, judging from the Constitutional Court’s rulings. Ntliziywana (2016) adds that the “problems experienced by poor-performing municipalities are not created by under-regulation, or necessarily solved by additional regulation.”²⁸⁶ She suggests that a “special Cabinet Committee on provincial and local government” be established to “discuss and scrutinise all policy and legislation on sub-national government before they go to Cabinet for decision.”²⁸⁷ This is supposed to be a task of the NCoP. But this view may be a confirmation that this house is not functioning effectively.

(c) Assigned powers

Assigned powers refer to municipal authority over matters delegated to municipalities by national and provincial governments. Assignment is prescribed under the following sections of the *Constitution*:

- 44(1)(a)(iii) From Parliament to any legislative authority;
- 99 By a Cabinet member to a Municipal Council;
- 104(1)(c) By a provincial legislature to a Municipal Council;
- 126 By a MEC to a Municipal Council; and
- 156(4) By national and provincial governments to municipalities.

These provisions have ostensibly been made because municipalities do not constitute a static sphere of government: They are expected to grow and develop, and in the progress of time

²⁸³ Ntliziywana (2016), *op cit*, 37-38.

²⁸⁴ Ntliziywana (2016), *op cit*, 47.

²⁸⁵ *Ibid.* Section 151(4) of the Constitution reads: “The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.” Section 160 sets out the internal procedures of a municipal council.

²⁸⁶ *Op cit*, 63.

²⁸⁷ Ntliziywana (2016), *op cit*, 55.

assume greater responsibilities. However, municipalities' capabilities or competencies vary greatly, and so they cannot be expected to develop uniformly. Hence, there is provision for asymmetry among municipalities where acknowledging that powers and functions will not be exactly the same, assignment would be made according to their differentiated capacities. Devolution of powers by provinces to local authorities is through assignment as well as by means of authorisations and adjustments. The two latter delegations are only by district to local municipalities within its jurisdiction.²⁸⁸

Assignment is the entrenchment or a concrete manifestation of the principle of subsidiarity in that national and provincial governments are compelled²⁸⁹ to assign to municipalities the specified functional areas of concurrent national and provincial legislative competence and of exclusive provincial legislative competence.²⁹⁰

Subsidiarity is defined as 'the principle that a central authority should have a subsidiary function and perform only tasks which cannot be performed effectively at a local level'.²⁹¹ Carpenter (1999) states that subsidiarity is "not the same as devolution"; the latter means that the centre holds the original power.²⁹² She asserts that –

The essence of subsidiarity is the recognition that certain responsibilities and powers belong not to the centre but at the edges – or lower down or further away, depending on how one likes to phrase it.²⁹³

De Visser (2010) argues that "neither the Constitution nor the Constitutional Court uses the term subsidiarity".²⁹⁴ He quotes Van Wyk²⁹⁵ who states that "use of the 'spheres' instead of 'tiers' renders the Constitution in principle one of the most 'subsidiarity-friendly'

²⁸⁸ Department of Provincial and Local Government (2002) *A Guideline Document for Provincial-Local Intergovernmental Relations*, 6-7.

²⁸⁹ In terms of sections 99, 126, and 156(4)(a) and (b) of the *Constitution*.

²⁹⁰ Depicted in Part A of Schedule 4 and Part A of Schedule 5 of the *Constitution*.

²⁹¹ *The Oxford English Reference Dictionary*.

²⁹² Carpenter, Gretchen (1999) 'Co-operative Government, Devolution of Powers and Subsidiarity: The South African Perspective', paper delivered at the Conference: *Subnational Constitutional Governance* and publication thereon, Johannesburg: Konrad Adenauer Stiftung, 45-54, 45.

²⁹³ *Ibid.*

²⁹⁴ De Visser, Jaap 'Institutional Subsidiarity in the South African Constitution', *Stellenbosch Law Review* (2010) (1), 90-115, 100.

²⁹⁵ Van Wyk, Dawid (1998) 'Subsidiariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag Lê' in Carpenter, Gretchen (Ed) *Suprema Lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 263.

Constitutions”.²⁹⁶ The subsidiarity principle is given effect, for example, by section 151(4) of the *Constitution*.²⁹⁷

Assignment is permissible provided the function can most effectively be administered locally, and that the municipality in question has the requisite administrative capacity, or else they could become dumping grounds of responsibilities vested in the other two spheres. Attainment of an acceptable level of socio-economic development as an objective of the state through the mechanism of service delivery is based on the assumption that all three spheres of government can function co-operatively. While national and provincial authorities may assign the administration of some of their functions,²⁹⁸ municipal powers are limited to narrowly prescribed activities, and then largely to their executive and administrative responsibilities only.²⁹⁹ Therefore, contrary to true devolution, where the principle of subsidiarity applies, that is, a function is undertaken by the lowest tier of government and assigned ‘upwards’ only if the municipality is incapable of its implementation and management, assignment is the opposite. Much of the wording in the *Constitution* connotes devolution of power, implying autonomy, discretion, choice, no direct control, and so on. However, use of terms such as “administration” suggests deconcentration, or limited or qualified assignment of powers. Such ambiguity can give rise to tensions, more so because, as Atkinson (1998) says, the system of co-operative governance “cannot operate dogmatically.”³⁰⁰ The confusion is exacerbated by the situation that municipalities have and do undertake functions outside of those listed in Part B of Schedule 4 and part B of Schedule 5 of the *Constitution*, and that ‘downward’ assignment of powers will largely rest on how they are prioritised by national and provincial governments.

Atkinson (1998) argues that the relationships between and among the spheres of government will “depend on their reciprocal attitudes and abilities,”³⁰¹ with the complex governmental system requiring some fine-tuning.

²⁹⁶ De Visser (2010), *op cit*, 100.

²⁹⁷ Section 151(4) reads: “The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.”

²⁹⁸ Those listed in Part B of Schedule 4 and Part B of Schedule 5 of the *Constitution*.

²⁹⁹ In terms of sections 156(1)(a) and (b) of the *Constitution*.

³⁰⁰ Atkinson (1998), *op cit*, 29.

³⁰¹ *Ibid*.

Section 9 of the *Systems Act* elaborates on assignments, while section 10 deals with assignment to specific municipalities. Section 10A provides that where an assignment is made in terms of sections 9 or 10 of the *Act*, the Cabinet member or MEC “must take appropriate steps to ensure sufficient funding and such capacity-building initiatives as may be needed” for execution of the assignment.³⁰² This should act as an incentive for municipal and community leaders and technocrats as the better performing municipalities will have more and greater assigned powers, accompanied (hopefully) by the necessary resources. The development of a committed and competent cadre of municipal officials is necessary so they can strive for greater achievements. Bekink (2006) argues that sections 9 and 10 of the *Systems Act* do not appear to address assignment by national and provincial governments to municipalities on the basis of subsidiarity, the administration of Part A of Schedule 4 and Part A of Schedule 5.³⁰³

(d) Agency and delegation

The *Constitution* makes provision for an executive organ of state in any sphere of government to delegate any statutory power or function to any other organ of state, on a delegation or agency basis.³⁰⁴ Thus, over time, local government could end up with many duties which it may or may not be capable of executing. To avoid loading municipalities with additional responsibilities, these functions should be assigned in strict accordance with the relevant constitutional and statutory provisions, and provided that it is objectively demonstrated that the municipality in question has the requisite capacity.

While the functions and responsibilities of municipalities will increase as more are assigned or delegated to them, municipal representatives can negotiate by requesting the requisite resources for them. Bekink (2006) argues that “functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.”³⁰⁵ This provides an opportunity for municipal representatives to engage with decision-makers for certain functions, such as Human Settlements, Water and Sanitation, Transportation, Energy, and so on, to be delegated with the necessary resources and support.

³⁰² In terms of sections 238(a) and (b) of the *Constitution*.

³⁰³ Bekink (2006), *op cit*, 215.

³⁰⁴ In terms of section 238 of the *Constitution*.

³⁰⁵ Bekink (2006), *op cit*, 215.

The comprehensive powers and functions of local government, operating in a three-sphere governmental system, enables municipalities and their representatives to achieve the constitutional and statutory ideals and duties. This could be facilitated and enhanced by capacitation, support, and monitoring of municipalities by national and provincial governments.

4.3.7 OBJECTS OF LOCAL GOVERNMENT

According to section 152(1) of the Constitution, “The objects of local government are –

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in them matters of local government.”

An “object” is ‘a goal or purpose’.³⁰⁶ A duty, on the other hand, is defined as a ‘moral or legal obligation’ or ‘a task required as part of one’s job’.³⁰⁷ Thus local government is, *strictu sensu*, not bound to deliver on its objectives, as can be evident from the choice of words used. “Provide” means ‘make available for use or to supply’; the verb “ensure” is defined as ‘to make certain that (something) will occur or be so’; “promote” means to ‘further the progress of’, or ‘encourage’ or ‘publicise’; while “encourage” is defined as ‘to give support, confidence or hope to’.³⁰⁸ Hence, the objects are goals or aims that municipalities must strive to achieve, but cannot be held responsible if for good reasons they fail to attain their objectives to a particular level or standard. Use of the word “sustainable” regarding provision of services is a qualifier since the term means ‘capable of being kept going over time or continuously’.³⁰⁹ If municipalities can show they are incapable of providing services in such manner, they cannot be held liable as they are not duty bound. Furthermore, they cannot force communities and their representative organisations to participate in local government matters, that is, to undertake or perform their civic duties. A further qualifier is section 152(2) of the *Constitution* which provides: “A municipality must strive, within its financial and administrative capacity, to achieve the objects

³⁰⁶ Defined by the *South African Concise Oxford Dictionary*.

³⁰⁷ *South African Concise Oxford Dictionary*.

³⁰⁸ *South African Concise Oxford Dictionary*.

³⁰⁹ *South African Concise Oxford Dictionary*.

set out in subsection 1.” “Strive” means no more than to ‘make great efforts’,³¹⁰ in other words, to try. The wording in the *Constitution* gives some credence to the argument by Bekink (2006) that “functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.”³¹¹

While local government’s objects cannot be equated with duties, they are goals to be aimed at and to be attainable over a reasonable period, especially if capacitated by national and provincial governments.³¹² Within this context, it is up to enlightened, committed and competent leaders and administrators to build a developmental culture with their communities so residents would be happy to undertake their civic duties and help municipalities achieve their jointly-planned goals and targets within a resource-constrained environment. Municipal representatives can play a major role in assisting to specify and achieve objectives. Bekink (2006) contends that setting down of specific objects for local government is linked to and founded upon the “traditional purpose of local authorities and is in confirmation of its role and duties.”³¹³ He adds that “in essence the specified objects are to confirm the new constitutional commitment to an overall democratic state and accountable government...”³¹⁴

In *Fedsure* the Court ruled that one of the objectives of local government is to eliminate disparities and disadvantages that are the consequences of past policies and to upgrade services in previously disadvantaged areas and to provide equal services to all as soon as possible.³¹⁵ These objects then become obligations on local government.

Municipalities need to form pacts with their communities and other parties to jointly plan and implement initiatives that contribute to fulfilling or meeting the goals and objectives of local government. Hence, sound leadership and civic responsibility are necessary. Therefore, municipalities must create a climate conducive to social and economic development.

³¹⁰ *South African Concise Oxford Dictionary*.

³¹¹ Bekink (2006), *op cit*, 215.

³¹² In terms of section 154(1) of the *Constitution*.

³¹³ Bekink (2006), *op cit*, 67.

³¹⁴ Bekink (2006), *op cit*, 68.

³¹⁵ *Op cit*, paragraphs 1464 and 1488.

4.3.8 RIGHTS AND DEVELOPMENTAL DUTIES OF MUNICIPALITIES

The former Minister of Provincial and Local Government said in 2007:³¹⁶

Although agreement has still to be achieved on a characterisation of the developmental state in South Africa, a broad consensus appears to exist around the idea that the process of development involves more than just economic growth but includes life-and-death issues such as poverty, personal security, distributive equity, social justice and environmental sustainability.

A developmental state incorporating developmental local government cannot be achieved without the participation of leaders, municipal representatives, and local communities. Although sub-titles or marginal notes have no legal standing, that introducing section 153 clearly states the “developmental duties of municipalities”. This is reinforced by the mandate to promote social and economic development,³¹⁷ and to participate in development programmes of the other two spheres.³¹⁸

Whereas local authorities were previously the providers of basic municipal services, they must now carry out their additional responsibilities, such as promotion of social and economic development and ensuring that rights are given effect to. These are functions that inadequately-resourced and insufficiently-committed municipalities may fail to do. Notwithstanding the problems associated with such additional duties, the lack of suitable precedents also throws up serious challenges to municipalities already stretched to render minimal services. The situation is ‘exacerbated’ when post-apartheid legislation is unmistakably pro-poor, and rightly so, by providing, upgrading and rehabilitation of services, including extension to hitherto un-serviced and under-serviced areas, without clarity and consensus on resources. Additionally, the provision of a minimum, nationally-set level of free basic services for all in order to aid the indigent, create enormous difficulties especially for weak local institutions. Despite such challenges, it is clear that the *Constitution* requires and mandates municipalities to be developmental; thus one sees law as an instrument for development, particularly for fulfilling the entitlements in the *Bill of Rights* operationalising what in most countries are entitlements or privileges or, as in the case of India, directive principles of state policy explicit and inherent in its Bill of Rights. Municipalities are constitutionally-bound to deliver the rights to equality; labour relations; environment; property; housing; health care, food, water and social security;

³¹⁶ At the Developmental State Seminar at Pretoria on 19 October 2007, quoted in the book edited by Ben Turok (2008): ‘Wealth Doesn’t Trickle Down: The Case for a Developmental State in South Africa’, Cape Town: *New Agenda*, 1.

³¹⁷ Section 153(a) of the *Constitution*.

³¹⁸ Section 153(b) of the *Constitution*.

children's rights; access to information; and just administrative action.³¹⁹ Such rights place correspondingly onerous duties, obligations, and responsibilities on municipalities. Even when they may be subject to limitations and qualifications restricting their implementation,³²⁰ most could be enforceable,³²¹ especially with innovative interpretation and where the courts are true to the *Constitution*, rather than towing the line set by the government of the day.

To fulfil their developmental duties, section 153 of the *Constitution* provides that: "Municipalities must –

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial developmental programmes."

The above "duties" do not amount to much of substance. However, Bekink (2006) argues that if it can be shown that a municipality did not give priority to the needs of its community and to promoting socio-economic development within its jurisdiction, "its actions or programmes will be contrary to the constitutional obligation" and could be declared "unconstitutional and invalid."³²² In such a situation judicial intervention is permissible.³²³ Municipal representatives and administrators need to heed this requirement. Following on the constitutional directive, certain governmental publications and enactments, such as *White Paper on Local Government* (1998) and the *Systems Act* required that local government become 'developmental'. This term has not been defined in the *Constitution* and has thus been variously interpreted by local government and other role occupants in this sphere. It was contended³²⁴ that this extended mandate had been imposed at a time when most municipalities were having great difficulty in fulfilling their primary or traditional role.³²⁵ The lack of precedent or appropriate 'best practices'

³¹⁹ Respectively, sections 9, 23, 24, 25, 26, 27, 28, 32 and 33 of the *Constitution*.

³²⁰ Section 36 of the *Constitution*.

³²¹ In terms of section 38 of the *Constitution*.

³²² Bekink (2006), *op cit*, 68.

³²³ In terms of sections 2, 8 and 172 of the *Constitution*.

³²⁴ By Singh, A (2000) *Co-operative Government and the Promotion of Economic Development by Local Government Associations: A First Exploration*, unpublished LLM Dissertation, Pretoria: Unisa, 1.

³²⁵ As provider of basic public goods and services on the basis of race and affordability.

in South Africa for the planning, promotion, and management of socio-economic development or even local economic development (LED), the limited human capital and material resources for their successful implementation, and the creation of new institutions and processes within the three spheres of government to fulfil the developmental mandate have resulted in much duplication and fragmentation, as well as unhealthy competition, thereby delaying, deferring, postponing, stifling or neglecting development.³²⁶

It has been argued that –

The current local government functions do not enable it to make the maximum social and economic impact envisaged by the Constitution and the White Paper... [as there is] this mismatch between the notion of developmental local government and the powers of local government.³²⁷

Local government now have significant powers and functions. It is how they prioritise their planning and operations so that it can be developmental requires qualified and competent leadership and technocrats. A disadvantage is the confusion created by the mandate of economic development and the various interpretation of this and LED in the local sphere. Municipalities, as governmental institutions closest to the people, feel the impact of underdevelopment first and most.

The *Constitution* prescribed local participatory democracy and in the process several policies were formulated and then concretised through statutes. The system, for the first time, involved the governed, through community engagement and consultation, with democratically elected councillors in the forefront. Several statutory obligations with a pro-poor bias were enacted whereby the mandate of local government was considerably increased, especially by the requirement of promoting social and economic development. A pooling and sharing of resources through working in a co-operative rather than a competitive mode could enhance service delivery. Municipal representation could facilitate this.

Duties connote obligations that municipalities are obliged to fulfil. The transformation of local authorities from agencies of the state providing basic municipal services to one of designers

³²⁶ For example, the Greater Johannesburg Transitional Metropolitan Council was established by Premier's Proclamation on 3 December 1994. The city was divided into a metropolitan council with seven metropolitan substructures, some six months later local councils were consolidated into four. There were, thus, five structures for practically all functions, until the 'unicity' was established after the local government elections of 2000, see www.joburg.org.za (archives).

³²⁷ Community Law Centre (2007) *Paper 1 – Developmental Local Government: Determining Appropriate Powers and Functions*, Cape Town: University of the Western Cape, 6-7.

and deliverers of sustainable socio-economic development constitutes a paradigm shift. Once again, local government must be assisted and supported by national and provincial governments to achieve this extended and onerous mandate. Municipal representatives must demand what has been promised by the *Constitution* and consistently in the SoNA in order to meet local authorities' hitherto unknown responsibilities. This relates particularly to capacitation by national and provincial governments.³²⁸ The Constitutional Court held³²⁹ that “the Province must, as the Constitution envisages, ‘promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.’³³⁰ In this context, the view of Mathenjwa (2013) is informative:

Despite the decision of the Supreme Court of Appeal in the *MEC for Local Government Mpumalanga* case³³¹ that courts cannot enforce provincial governments to support local government, the duty of provincial government to support local government is enforceable...if the conditions for support exist and the provincial government is able to render such support.³³²

While the judiciary is not a lawmaker, its job is to interpret the law. Post-1996 Courts appreciate the “important role local government fulfil not only in establishing a democratic foundation for the whole country, but also in performing most important developmental tasks.” Court decisions “often give direction and new meaning to existing legal norms and principles.”³³³

Cloete (2008) argues that the numerous constitutional and statutory obligations placed on local government have not been “fully and appropriately implemented,” adding that:

A contributing factor to bad service delivery is the weak quality of municipal councillors and the general political leadership and management at the local government level...³³⁴

Cloete (2008) asserts that the biggest challenge in the local sphere is bad management and implementation, not poor constitutionally-mandated structures and policies. Therefore, what is required is better municipal decision-making and management practices. He argues that the outcome is not that of a bad constitutional system but the poor implementation of an appropriate existing one.³³⁵ While one can agree that the governmental system, an experimental one, may have been appropriate at the time and under the circumstances, poor service delivery cannot be

³²⁸ In terms of section 154(1) of the *Constitution*.

³²⁹ In *Habitat*, *op cit*, paragraph 27.

³³⁰ In terms of section 155(6)(b) of the *Constitution*.

³³¹ *MEC for Local Government Mpumalanga v Imatu* 2002 1 SA 76 (SCA) 185.

³³² Mathenjwa (2013), *op cit*, 355.

³³³ Budhu and Wiechers (2003), *op cit*, 474.

³³⁴ Cloete, F ‘Service delivery: Conceptual and practical issues and challenges’ in De Villiers, Bertus (Ed) (2008) *Review of provinces and local government in South Africa: Constitutional foundations and practice*, Occasional Papers, Johannesburg: Konrad Adenauer Stiftung, 93-106, 101.

³³⁵ Cloete (2008), *op cit*, 104-105.

attributed to municipalities alone since they are part of a three-sphere system and to date the national and provincial governments have not lived up to the constitutional promises and expectations of capacitating local government. In this context, a committed, dedicated, and competent cadre of municipal leaders and representatives can make forceful demands for what is their due.

The *Systems Act* defines ‘development’ as “sustainable development and includes integrated social, economic, environmental, spatial, infrastructural, institutional organisational and human resources upliftment of a community aimed at –

- (a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and
- (b) ensuring that development serves present and future generations.”

This definition is unhelpful. “Develop” means ‘grow or cause to grow and become larger or more advanced’.³³⁶ It also does not elaborate on what is meant, more so in terms of community and human development.

Given the enlarged or expanded role of municipalities both functionally and geographically, they need to develop capacity speedily. Bekink (2006) argues that “municipalities will have to become more strategic in their orientation ... be open and flexible to new or unforeseen demands ... maximise integrated capacity, both inside and outside the municipal jurisdiction ... and be more community orientated.”³³⁷ Further, they have to “develop mechanisms to interact with community groups and to identify service needs and priorities.” The design, implementation and monitoring of new policies and strategies and policies require a “strong municipal leadership.” However, “it is ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.”³³⁸ It is argued that monitoring and oversight are only two responsibilities in a package that includes support and capacitation of municipalities. This must be done first and if municipalities thereafter fail then only intervention by provincial government should be permitted.

³³⁶ *South African Concise Oxford Dictionary*.

³³⁷ At 286-287.

³³⁸ Bekink (2006), *op cit*, 287.

Section 4(1)(a)-(c) of the *Systems Act* sets out the rights of municipal councils. Bekink (2006) highlights the importance of distinguishing between rights and duties, on the one hand, and powers and functions, on the other.³³⁹ While the *Constitution*³⁴⁰ explicitly prescribes the powers and functions of municipalities, it does not pronounce on their rights and duties.³⁴¹ The *Systems Act* does so in this section.

Section 152(2) of the *Constitution* constitutes a qualifier of the objects of local government set out in section 152(1)(a)-(e), in that it states a municipality has to “strive, within its financial and administrative capacity” to achieve them. Absent this capability, community members’ rights may be unfulfilled. Under such circumstances, it is incumbent upon national and provincial government to “support and strengthen the capacity of municipalities”³⁴² until they are able to meet their obligations. Section 4(2) of the *Systems Act* reinforces this constitutional qualifier by stipulating that the duty applies provided it is undertaken “within the municipality’s financial and administrative capacity and having regard to practical considerations.” An apparently contradictory provision is that the municipality must act “in the best interests of the community” when exercising its legislative and executive authority and using resources.³⁴³ It is unclear whether this stipulation overrides section 4(2) of the *Systems Act* where obligations are to be met to the extent that a municipality’s financial and administrative capacity permits them. Sections 4(2)(b)-(j) reaffirms and expands on the constitutional obligations and particularly on the rights to the environment; property; housing; health care, food, water, and social security; and education.³⁴⁴ These provisions have implications for municipal representatives in that a council has to operate optimally within a context of limited resources. In such a situation, intellectual capital can play a major role.

‘Developmental’ municipalities, since 2000, are something radically different from what local authorities, as providers of basic public goods and services in their geographical areas, have undertaken hitherto. They now have to promote and fulfil human rights, provide at least a minimum of their communities’ basic needs, while addressing inherited backlogs and spatial

³³⁹ *Op cit*, 83.

³⁴⁰ Section 156.

³⁴¹ Save for the stipulation of giving priority to the basic needs of communities in its administration, budgeting and planning processes, and local government participation in national and provincial programmes – sections 153(a) and (b) of the *Constitution*.

³⁴² In terms of section 154(1) of the *Constitution*.

³⁴³ Section 4(2)(a) of the *Act*.

³⁴⁴ Sections 24; 25; 26; 27; and 29, respectively, of the *Constitution*.

distortions, and providing safe, habitable living environments. This can be achieved through competent and committed municipal and community representatives and local government administrators, working in a co-operative fashion *inter se*, and with the provincial and national spheres of government. Bekink's (2006) summary of the current situation merits an extended quote:

The Constitution provides local government with a sound foundation as a distinctive sphere of government with its own entrenched autonomy and specified powers and functions. Local government will not be able to fulfil and comply with its various objectives and duties without the constructive assistance of other spheres of government, the positive and committed support of administrators, a purposeful and public-oriented, effective, efficient and accountable political leadership and a supportive, informed and fully committed local community.³⁴⁵

4.4 MUNICIPAL REPRESENTATION TO PROMOTE HUMAN RIGHTS

Chapter 9 of the *Constitution* establishes six state institutions supporting constitutional democracy. Section 181(1)(a) provides for the Public Protector; 181(1)(b) the South African Human Rights Commission (SAHRC); and 181(1)(d) The Commission for Gender Equality (CGE). These institutions are “independent, and subject only to the *Constitution* and the law”, and are accountable to the National Assembly to which they must report at least annually.³⁴⁶ These and several non-governmental-organisations as well as councillors and SALGA can function as representatives to promote the rights of citizens.

The Public Protector has the power, as regulated by the *Public Protector Act*,³⁴⁷ “to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,³⁴⁸ and “must be accessible to all persons and communities.”³⁴⁹ Hence, councillors, community leaders, and residents can use the services of the Public Protector.

The CGE “must promote respect for gender equality and the protection, development and attainment” thereof.³⁵⁰ It has the power, *inter alia*, to “monitor, investigate, research, educate,

³⁴⁵ *Op cit*, 78.

³⁴⁶ Sections 181(2) and (5) of the *Constitution*.

³⁴⁷ 15 of 2016.

³⁴⁸ Section 182(1)(a) of the *Constitution*.

³⁴⁹ Section 182(4) of the *Constitution*.

³⁵⁰ Section 187(1) of the *Constitution*.

lobby, advise and report on issues” within its mandate.³⁵¹ Any person can report or make a complaint on gender discrimination and abuse.

In terms of section 13.1(b)(v) of *South African Human Rights Commission Act*,³⁵² the SAHRC “must review government policies relating to human rights and may make recommendations”. Section 12.2(a) empowers it to make recommendations to all legislatures on the “adoption of new legislation which will promote respect for human rights and a culture of human rights”. Section 12.3(b) grants the SAHRC *locus standi* to “bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.” This is a powerful mechanism that councillors and community representatives can bring to force municipalities to fulfil their obligations or for local government leaders to demand support from the provincial and national spheres of government when municipalities fail to fulfil their constitutional or statutory obligations, especially in respect of the provisions in the Bill of Rights.

In advocating a rights-based approach to service delivery and a generic right to adequate water and sanitation, the SAHRC takes as a point of departure the rights to dignity, privacy, and a clean and healthy environment. It considers meaningful public participation an essential component in fulfilment of such entitlements. Provincial and national government should be held accountable where municipalities fail.

In attempting to fulfil these rights through service delivery, municipalities must have regard to the key principles of “active participation, social cohesion and community empowerment”.³⁵³ They have to provide evidence that “effective and interactive community participation” with active communication and proactive information sharing” took place in the “planning, implementation and evaluation of a project”.³⁵⁴ This requirement is based on the belief that adequate consultation in conceptualisation would provide local government with “clear insight of the community’s needs and its own capacity to respond accordingly”.³⁵⁵ In terms of the *Municipal Finance Management Act (MFMA)*, it is incumbent on the municipality to consult communities on the budget for specific projects within the context of the Medium Term

³⁵¹ Section 187(2) of the *Constitution*.

³⁵² 40 of 2013.

³⁵³ In the report, *Access to Information and Public Participation*, www.sahrc.org.za, accessed 27/03/2015.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

Expenditure Framework (MTEF), especially in regard to a municipality's plan to deal with water shortages. The SAHRC contends that "Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives."³⁵⁶ By a municipality complying with the *Promotion of Access to Justice Act (PAJA)* on all aspects of the project process, including tenders and how residents can access information, it can enable consumers to not only participate meaningfully but also to hold that municipality accountable. In most cases, the respondents (municipalities) have been shown to have failed to share information and consult, thus being in breach of their constitutional obligation.

Of interest is the SAHRC's Water and Sanitation Reports based on complaints received and investigations undertaken. In 2011 and 2013 there were reports on five municipalities.³⁵⁷ The SAHRC investigations are undertaken and reported on in a format established by international and domestic legal frameworks. Section 3 of the *Water Services Act*, 108 of 1997 provides (quote):

- (1) Everyone has a right of access to basic water supply and basic sanitation;
- (2) Every water services institution must take reasonable measures to realise these rights; and
- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

Section 5 stipulates that where a water services institution is "unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them." Regulation 3 of the Compulsory National Standards sets out the minimum standard of basic water supply services. Basic sanitation is defined as "The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households." The *Free Basic Sanitation Strategy*³⁵⁸ requires municipalities to ensure that every household has access to basic sanitation, as per the

³⁵⁶ *Ibid.*

³⁵⁷ Gareth van Onselen, on behalf of the *Democratic Alliance (Complainant) v Moqhaka Local Municipality, Free State Province* (Respondent), report signed 16/05/2011; Henro Kruger on behalf of the *Democratic Alliance (Complainant) v The Administrator: Emalahleni Local Municipality (Witbank) and the Municipality (Respondents)*, report signed 18/12/2013; George Mkhwanazi on behalf of residents of *Klipgat C (Complainant) v Madibeng Local Municipality, North West Province* (Respondent), report signed 18/12/2013; *South African Human Rights Commission* on behalf of residents of Senekal (Complainant) *v Setsoto Local Municipality, Free State Province* (Respondent), report signed 18/12/2013; and *South African Human Rights Commission* on behalf of residents of Henneman *v Matjhabeng Local Municipality, Free State Province* (Respondent), report signed 18/12/2013.

³⁵⁸ Department of Water Affairs and Forestry, 2009.

Constitution, Water Services Act, and the Systems Act. It acknowledges that there is “a right of access to a basic level of sanitation service” enshrined in the *Constitution*.³⁵⁹

In dealing with the constitutionality of the death penalty, the Constitutional Court in *S v Makwanyane*³⁶⁰ pronounced on the right to human dignity. It did so again in *NM v Smith*³⁶¹ where it was defined and the rationale for its value explained, alongside the rights to equality and freedom, as “justiciable and enforceable rights that must be respected and protected”.

Erasmus J of the Western Cape High Court in *Beja v Premier of the Western Cape*³⁶² held that:

Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with Section 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.

He added that section 73(1)(c) of the *Systems Act* sets down the minimum level of basic services and based thereon, there was violation of constitutional rights under sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing), and 27 (healthcare).³⁶³

In reading sections 152 and 153 of the *Constitution*,³⁶⁴ alongside the applicable provisions of the *Systems Act* and *Housing Act*, the Constitutional Court in *Joseph v City of Johannesburg*³⁶⁵ found that a “public right to basic municipal services” existed, imposing a duty on municipalities to provide them. The Court held that “electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.” It stated that the “provision of basic municipal services is a cardinal function, if not the most important function of every municipal government.” The Court added that the duty to deliver such services is a “central mandate of local government” and a “matter of public duty.”³⁶⁶ It held further that –

³⁵⁹ *Free Basic Sanitation Strategy, op cit*.

³⁶⁰ 1995 (3) SA 391 (CC).

³⁶¹ 2007 (5) SA 250 (CC) at paragraphs 49-51.

³⁶² (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011) at paragraph 147.

³⁶³ *Ibid*.

³⁶⁴ “Objects of local government” and “Development duties of municipalities”, respectively.

³⁶⁵ *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009).

³⁶⁶ *Joseph, op cit*, paragraphs 34 and 47.

... *Batho Pele* gives practical expression to the constitutional value of *ubuntu* which embraces the relational nature of rights. Courts must move beyond the common law conception of rights as strict boundaries of individual entitlement.³⁶⁷

Bilchitz (2010) refers to the ruling in *Joseph* as giving rise to a “‘new’ public law duty that government has towards its citizens to deliver basic services.” He argues that this could stem from three possible citizen-government relationships, namely, “Citizen as customer”; “citizen as a party to a social contract”; and “Citizen as a friend/Community.”³⁶⁸

*Residents of Bon Vista Mansions v Southern Metropolitan Local Council*³⁶⁹ was one of the first cases to explicitly recognise the constitutional right to water and concomitantly the duty of the local council to progressively provide for that entitlement.

In *Mazibuko v City of Johannesburg*³⁷⁰ the Constitutional Court confirmed section 27(1)(b), the right to sufficient water.

The North Gauteng High Court in *Federation for Sustainable Environment v the Minister of Water Affairs*³⁷¹ reaffirmed the responsibilities of local government as stipulated in section 152 of the *Constitution*.

In its report³⁷² the SAHRC stated that “Dignity is the recognition of the inherent worth and value of every human being” reiterating that the *Constitution* reinstated it as its “first founding value and as a substantive right in the Bill of Rights.” It goes on to suggest that “National treasury must specify that funds it allocates to local government must be “used to improve lives of the poorest communities” while building municipal capacity to manage them.³⁷³ It adds:

³⁶⁷ *Joseph, op cit*, footnote 39.

³⁶⁸ Bilchitz, David ‘Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in *Joseph* (2010) *Constitutional Court Review Vol III*, 45-78, 46.

³⁶⁹ 2010 (43) SA 55 (CC).

³⁷⁰ 2010 (4) SA 1 (CC).

³⁷¹ (35672/12) [2012] ZAGPPHC 128 (10 July 2012), at paragraph 14.

³⁷² SAHRC (2014) *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* 2014, 7.

³⁷³ Page 8.

The report highlights systemic failures in governance and budgeting, particularly in the implementation of and spending on projects. These failures point to the need for government to evaluate the current models of governance and funding.³⁷⁴

A concern in the SAHRC report was the proposed devolution by assignment of the human settlements function to accredited municipalities “given the current lack of capacity, skill and service delivery backlogs at local government.”³⁷⁵ During *The 2013 National Water and Sanitation Hearing*,³⁷⁶ a letter dated 3 June 2013 from the Minister of Finance showed that “during the period 2013/14, just over R30 billion was allocated to municipalities for delivery of water and sanitation services to poor households...” The Minister also stated national government’s concern that the substantial resources provided “are not being used optimally and that the pace of service delivery rollout suffers as a result.” This points to inefficient use of available financial resources and calls for monitoring of such funding. It is also indicative of National Treasury’s and CoGTA’s approach – the need for monitoring rather than only on capacitating and supporting errant and especially weak municipalities. The situation would be worse in rural areas.

The above investigations by the SAHRC highlight the need of the poor to be represented so that their plight can be brought to the attention of decision-makers. One method being used increasingly today is through violent community protests. A better alternative is for a local activist or a ward or opposition councillor to represent aggrieved residents or the municipality itself. Here, a view applicable to municipal representation may be apt:

Ultimately, however, it is the ‘human factor’ that determines if the fine legal principles contained in the Constitution and the IGR Act are turned into practical reality.³⁷⁷

This could be taken further by the Chapter 9 institutions and brought to the attention of Parliament. As the peoples’ representative, the House of Assembly and the NCoP, and in rural areas, the National House of Traditional Leaders, could demand that the executive urgently take appropriate action. Hence, representation is the preferred mode of making municipalities fulfil their obligations, and if they fail, for provincial government to intervene.³⁷⁸

³⁷⁴ Page 14.

³⁷⁵ Page 17.

³⁷⁶ With the theme “The Right to Water and Sanitation”, held on Human Rights Day, 21 March 2013, report pages 65-66.

³⁷⁷ De Villiers (2012), *op cit*, 690.

³⁷⁸ In terms of section 139(1) of the *Constitution*.

4.5 LOCAL PARTICIPATORY AND REPRESENTATIVE DEMOCRACY

Budhu and Wiechers (2003) argue that the *LGTA* and the *Structures Act* “lay the foundations for representative democracy in the local sphere of government in the whole of the country.” They assert that the “spheres of government have the obligation to consult each other and to co-operate.”³⁷⁹ This provides an opportunity for municipal representatives to demand that they be involved in policy matters affecting local government. The *Systems Act* operationalises many of the constitutional provisions pertaining to local government. It is an excellent example of how law can be used to promote social and economic development, particularly of previously disadvantaged or marginalised communities, through co-operative governance and service delivery. For municipalities to do this more effectively, they need to be represented on select decision-making structures.

Chapter 2 of the *Systems Act* sets out the legal nature and rights and duties of municipalities. With respect to the legal nature, sections 2(b)(i) and (ii) of the *Act* prescribe that a municipality is constituted by its political structures and administration, for the one part, and its community, on the other. Formal incorporation of the community as a component of a municipality has important implications and consequences for representation. Section 2(c) stipulates that a municipality functions within its territorial jurisdiction “in accordance with its political, statutory and other relationships between its political structures, political office bearers and administration and its community.” Bekink (2006) points out that the “constitutional objective of community involvement/public participation is specifically incorporated.” He adds that emphasis on the political dimension of the local structures is to show that they “represent the local interests within each municipal council.”³⁸⁰ This indicates that a municipality operates on the basis of both local participatory direct democracy and representative democracy.

The constitutionally and statutorily bestowed status on members of a community, alongside their rights and duties, concomitantly places onerous responsibilities on community and municipal representatives. Now more than ever, they must be equal to their tasks.

³⁷⁹ At 470, 473.

³⁸⁰ Bekink (2006), *op cit*, 82.

Section 4(3) of the *Systems Act* confirms and reinforces a municipality's responsibility in the exercise of its executive or legislative authority to "respect the rights of citizens and those of other persons protected by the Bill of Rights." The judgment in *Fedsure* made mention of the trust between a municipality and its ratepayers. This ruling was confirmed by the Supreme Court of Appeal,³⁸¹ where it was held that a fiduciary relationship exists between a municipality and its ratepayers.

Section 5(1)(a)-(g) of the *Systems Act* prescribes the rights of members of a local community, thereby confirming the right of public participation in municipal affairs. It also places an onus on the municipality to respond promptly to community inputs. The right to information on decisions of the council on residents' rights, property, and reasonable expectations is innovative in that municipalities cannot operate by might or stealth as in the apartheid past.

Disclosure of a municipality's state of affairs may provide early warning, thus enabling residents and ratepayers to act timeously to safeguard their rights and to exercise a measure of control over a municipality's actions. This community oversight and control is also facilitated by committee and council meetings being open to the public.

The corollary of citizens' rights are the duties imposed on them by sections 5(2)(a)-(e) of the *Systems Act*. One of them, 5(2)(b), is the duty,³⁸² to pay promptly services fees and surcharges thereon; property rates and other taxes; and any levies or duties. This provision appears to imply that where a community member without just cause does not pay as prescribed, his or her rights are null and void. It is incumbent on the municipal or ward representative to educate the communities on rights and responsibilities, as well as consequences relating thereto.

Section 6(1) of the *Systems Act* sets out the duties of municipal administration, stipulating that it is founded upon the basic values and principles governing public administration³⁸³ and reaffirming that these principles apply to "administration in every sphere of government" and to all organs of state.³⁸⁴ The provisions in sections 6(2)(a)-(b) and (d)-(f) of the *Act* apply to the

³⁸¹ In *Kempton Park/Tembisa Metropolitan Substructure v Kelder* (51/98) [2000] ZASCA 22; 2000 (2) SA 980 (SCA); [2000] 2 All SA 451 (A); (31 March 2000).

³⁸² Subject to exceptions stipulated in section 97 of the *Systems Act*.

³⁸³ Prescribed in section 195(1)(a)-(i) of the *Constitution*.

³⁸⁴ Sections 195(2)(a) and (b) of the *Constitution*.

administration's obligations and responsibilities to and relationships with the local community. Section 6(2)(c) requires the municipal administration to "take measures to prevent corruption."

Bekink (2006) emphasises that in the three-sphere governmental system –

Each component has its own rights and duties within that specific sphere of government, and strong interactions and co-ordination between the various components is a *sine qua non* for political stability, community participation, regular payment for services and a committed and effective local administration.³⁸⁵

Chapter 4 of the *Systems Act* addresses community participation. Sections 16-22 elaborate on what municipalities are duty-bound to do to promote local participatory democracy. Community participation is a welcome and innovative provision as for the first time it is explicitly stated that communities have rights and duties.³⁸⁶ Municipalities are therefore statutorily bound to establish a culture of community participation³⁸⁷ and to facilitate municipality-community engagement.³⁸⁸ Examples of the mechanisms to be set up are: making meetings open to the public³⁸⁹ and by establishing and maintaining effective communication systems.³⁹⁰ The definition of "community" is innovative as it incorporates visitors using services in localities where they are not resident, and local non-governmental, civic, private sector, and labour organisations. As such, they may be the bearers of rights, capable of enforcement and therefore adds to and complicates the role and responsibilities of municipalities and their representatives.

The rights of the community and individuals therein can place corresponding yet onerous responsibilities on the municipality, particularly its executive mayor, but it is a practical way of promoting participatory democracy. Council-community engagement can aid input by a representative body on strategic structures thus ensuring that policies and national priority programmes are designed on the real needs of the people. The clear import of such selective treatment and elaborate provisions is perhaps a genuine desire on the part of the state to attain a more egalitarian society through giving the governed a greater say in decisions affecting their lives and livelihood. The intention of engagement or interaction would be to get first-hand

³⁸⁵ *Op cit*, 87.

³⁸⁶ Chapter 4 generally, especially section 5, of the *Systems Act*.

³⁸⁷ Section 16.

³⁸⁸ Section 17.

³⁸⁹ Section 20.

³⁹⁰ Section 18.

information on needs and aspirations so as to achieve a better fit between them and the products and projects designed by the bureaucracy.

Local government policies and actions should be purposive, the end being development of the poor. The community now has specific rights³⁹¹ that the municipal chief executive is duty bound³⁹² to give effect to, through several prescribed mechanisms and procedures.³⁹³ The local community is now statutorily entitled to contribute to decision-making by the council and to make oral or written submissions, recommendations, representations and complaints, with prompt responses required thereto from the municipality, to regular disclosure of the municipality's state of affairs, and to be informed of decisions affecting their rights.³⁹⁴

The preamble to the *Systems Act* is considerably forward-looking and ambitious, and time will tell whether the ideals espoused therein will be achieved by the three-sphere governmental system. The large number of duties and responsibilities posited by the *Systems Act* in a context of resource constraints means that municipalities should find innovative ways of promoting socio-economic development and attracting investment for this purpose. It would also be necessary to work in partnership with a competent, committed, and enlightened leadership both in the council and within local communities. A municipality would need effective internal and external communications and knowledge sharing, raising awareness of human rights and obligations related thereto, and efficient municipal ward councillors.

Bekink (2006) argues that "one of the main objectives of local democracy is to ensure public involvement and participation." This requires accountable leadership which must be capable of motivating, encouraging, and sustaining community participation.³⁹⁵ Social inclusion is therefore an obligation on municipalities as is citizen participation on residents.

³⁹¹ Section 5(1).

³⁹² In terms of section 4(2).

³⁹³ Section 6(2) and Chapter 4.

³⁹⁴ Sections 5(1)(a)-(e).

³⁹⁵ *Op cit*, 72.

Bekink (2006) remarked that “public participation within all spheres of government is a constitutional prerequisite.”³⁹⁶ The *Systems Act* concretises this directive and that of accountability, responsiveness, and openness, insofar as local government is concerned.³⁹⁷

Bekink (2006) adds:

The process of ensuring participation and accountability in local government represents major challenges for all municipalities... Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes.³⁹⁸

Municipal leaders and administrators will have to be innovative in giving effect to the constitutional and *Systems Act* directives of local participatory and representative democracy. In such a system responsibility and accountability would be foremost. “Responsible” means ‘having an obligation to do something, or having control over someone’ while “accountable” is defined as ‘required or expected to justify actions or decisions’³⁹⁹ and includes an obligation to provide answers for specific actions or conduct. In this respect, the High Court held –

All three components of a municipality ... must be accountable in municipal matters. A system that encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.⁴⁰⁰

Chapter 5 of the *Systems Act* is devoted to integrated development planning. The integrated development plan (IDP) is an innovation, albeit introduced earlier by the *Local Government Transition Act* and the *Development Facilitation Act*. It requires⁴⁰¹ that municipal planning be “developmentally oriented”, and, as the title suggests, be integrated so as to fulfil the objectives of local government.⁴⁰² The *Act* stipulates the developmental duties of municipalities;⁴⁰³ and

³⁹⁶ At 309.

³⁹⁷ In compliance with sections (1) founding values) and 152 (objects of local government) in the *Constitution*. See also Bekink (2006), *op cit*, 476.

³⁹⁸ Bekink (2006), *op cit*, 476.

³⁹⁹ *South African Concise Oxford Dictionary*.

⁴⁰⁰ In *Umzinto North Town Board v Moodley* 1996 (1) SA 539 (D), at paragraphs 543-545.

⁴⁰¹ In section 23 of the *Systems Act*.

⁴⁰² As depicted in section 152 of the *Constitution*.

⁴⁰³ As set out in section 153 of the *Constitution*.

their contribution to realisation of fundamental rights entrenched in the *Constitution*.⁴⁰⁴ It is a practical mechanism to promote local participatory democracy as it allows the people to determine priorities and to shape the municipality's budgets. The *Act* provides that the IDP is the municipality's "principal strategic planning instrument" that guides and informs all planning, management, and development decisions.⁴⁰⁵ It states further⁴⁰⁶ that it binds the municipality's executive decisions. Express reference to "executive" means that the IDP does not bind the council in terms of its legislative acts.

It was envisaged that the IDP would be the mechanism through which national priority programmes would be implemented, with municipalities playing a leading role therein. This was not only overambitious but it places municipalities with a burden, as it requires local government to direct the other spheres of government on the basis of a programme or project being located within its spatial area of jurisdiction. The IDP and community participation provisions in the *Act* need to be tested in practice in the light of considerable and increasing service delivery protests. Holistic and integrated planning jointly by municipalities and their communities will enable a municipal representative body to consolidate, co-ordinate, prioritise, communicate, and thereby articulate clearly the needs of the various local communities to decision-making bodies. This will facilitate a better fit between nationally formulated policies and priority programmes with the needs of people in the municipalities.

Integrated development planning in the provincial and local spheres of government would now be based on the foundation, framework, and context of the *Spatial Planning and Land Use Management Act*.⁴⁰⁷ This enactment sets out a number of development principles, including: Spatial justice, that incorporates redressing past spatial and other developmental imbalances, the "inclusion of persons and areas that were previously excluded", "redress in access to land by disadvantaged communities and persons", access to secure tenure and incremental upgrading of informal areas; spatial sustainability; efficiency; good administration, including policies, legislation and procedures that "must be clearly set in order to inform and empower members

⁴⁰⁴ Sections 9, 23, 24, 25, 26, 27, 28, 32, and 33 of the *Constitution*.

⁴⁰⁵ Sections 35 and 36 of the *Systems Act*.

⁴⁰⁶ Section 35(1)(b) of the *Systems Act*.

⁴⁰⁷ 16 of 2013 (*SPLUMA*).

of the public.”⁴⁰⁸ There are several provisions catering for public participation.⁴⁰⁹ They create opportunities for municipal and community representatives for restorative justice and human development, as depicted in recent Court judgments.

Chapter 6 of the *Systems Act* deals with performance management. Sections 38-49 detail what municipalities must do to establish, maintain, and monitor performance. Performance management is an innovation in the public sector, formulated to ensure systematic and sustainable delivery of services by benchmarking and measuring performance. Much of these prescriptions, however, have been borrowed from European private sector practices, many of which have still not been perfected. However, performance management systems (PMS) is an essential tool to measure initiatives in co-operative governance enabling planners to make adjustments and to minimise unintended consequences through measurement, processing of information and feedback through inputs from and outputs to the environment. Section 42 of the *Systems Act* provides for community involvement in the PMS. With respect to performance management, the *Systems Act* requires:

- Establishment and development of performance management systems (PMS);⁴¹⁰
- Core components of community involvement in municipal PMS;⁴¹¹
- Setting key performance indicators (KPIs) and audit of performance measurement;⁴¹² and
- Reports on PMS and the making of regulations and guidelines.⁴¹³

Section 47(1) of the *Systems Act* reads: “The MEC for local government must annually compile and submit to the provincial legislatures and the Minister a consolidated report on the performance of municipalities in the province.” The report must identify municipalities that have under-performed during the year and propose remedial action to be taken. The report must then be published in the *Provincial Gazette*.⁴¹⁴ The MEC is also tasked to submit a copy of the report to the NCoP.⁴¹⁵ It is unclear what this institution is expected to do with it. The Minister

⁴⁰⁸ Sections 7(a)(i), (ii), (iii), and (v); 7(b), 7(c), 7(e), and 7(e)(v), respectively, of the *SPLUMA*.

⁴⁰⁹ Sections 12(1)(o), 13(1), 13(4)(b), 15(6)(b), 18(4)(b), 20(3)(b), 23(2), 24(1), 26(5)(a) and (b), 28(1), and 42(1)(c)(i) of the *SPLUMA*.

⁴¹⁰ Sections 38(a)-(c) of the *Systems Act*.

⁴¹¹ Sections 41(1)(a)-(e) and 42 of the *Systems Act*.

⁴¹² Sections 43(1)(a) and (b); 43(2); 44; and 45 of the *Systems Act*.

⁴¹³ Sections 46(1)(a)-(c) as substituted by the *Local Government: Municipal Systems Amendment Act, 44 of 2003*, sections 6 and 46(2) of the *Systems Act*.

⁴¹⁴ Sections 47(1)-(2) of the *Systems Act*.

⁴¹⁵ Section 47(3) of the *Systems Act*.

is permitted to make regulations or to issue guidelines to provide [for] or regulate certain issues.⁴¹⁶ When doing so, the Minister must distinguish between different kinds of municipalities.”⁴¹⁷

The core components of a PMS are: KPI’s; measurable performance targets; monitoring; review at least annually; measures to improve performance; and regular reporting to the council and public. The PMS must be so designed as to serve as an early warning system.⁴¹⁸ Meeting what appears to be onerous requirements needs competent leadership, administration, and municipal/community representatives. In this respect, Bekink (2006) states that: “The *Skills Development Act*⁴¹⁹ requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.”⁴²⁰ One serves local government, the LGSETA.

A performance management system is a useful tool to gauge individuals’ and the institutions’ achievements and failures. The latter is dependent and is the aggregate of councillors’ and technocrats’ performance. If not properly devised, the PMS would be little more than financial compliance, particularly spending the allocated capital and operating budgets. A system that measures or quantifies inputs and outputs is not an appropriate indicator of achievements in social and economic development through service delivery. What is needed is an outcomes-based monitoring, evaluation, and impact assessment (MEIA) system with objective and measurable KPAs, KPIs, and sanctions for failure to show how and to what extent communities, especially the poor, benefited over a particular period. The local PMS is related to Chapter 10 of the *Systems Act*, titled “provincial and national monitoring and standard setting. Section 105 addresses provincial monitoring of municipalities, while section 106 deals with non-performance by and maladministration within municipalities. Section 108 stipulates “essential national and minimum standards.” The *Systems Act* does not address the vexed issue of provincial intervention in municipalities authorised by section 139(1) of the *Constitution*.

⁴¹⁶ Sections 49(1)(a)-(k) of the *Systems Act*.

⁴¹⁷ Sections 49(2)-(4) of the *Systems Act*.

⁴¹⁸ Sections 41(1)(a)-(e) and 41(2) of the *Systems Act*.

⁴¹⁹ 97 of 1998.

⁴²⁰ Bekink (2006), *op cit*, 494.

In Chapter 7 of the *Systems Act* dealing with local public administration and human resources, section 50 provides that the basic values and principles governing local public administration is as depicted under section 195(1) of the *Constitution*. Section 51(a) reiterates that a municipality must “be responsive to the needs of the local community.”

Chapter 8 of the *Systems Act* defines and describes “municipal services”. Section 73(1) sets out a “general duty” whereby municipalities “must give effect to the provisions of the *Constitution*” and insofar as it concerns local communities, (a) give priority to their basic needs; (b) promote their development; and (c) “ensure that all members ... have access to at least the minimum level of basic municipal services.” Section 74(c) stipulates that “poor households must have access to at least basic services” through various tariff mechanisms. Section 86A(1)(b) provides for the “subsidisation of tariffs for poor households” through several stipulations.

Schedule 1 of the *Systems Act* is a Code of Conduct for councillors and traditional leaders, while Schedule 2 is a Code of Conduct for municipal staff members. Section 3 of the latter is titled “Commitment to serving the public interest”; no such provision applies to councillors and traditional leaders. These instruments alongside the PMS are supply-side measures to ensure effective municipal functioning based on aggregated performance of councillors and technocrats. There is need to measure and report on socio-economic development or failure thereof. Secondly, communities and individuals therein could assist in development planning, budget preparation, oversight, monitoring, and report-back. This could be facilitated by ward councillors and community leaders. SALGA could devise strategies and programmes to engage with and draw resources from communities resident in municipalities. Most supply side measures such as the PMS relate largely to financial accounting and not to achievements in community and human development.

The *Systems Act* provides an excellent foundation and framework to show that law can be used as an instrument for development. The statute, while faithful to the constitutional prescripts, is, on the whole, a ‘motherhood and apple pie’ type of legislation.⁴²¹ It is considerably long and detailed on the ‘whats’ but short on the ‘hows’ and the resources to achieve its admirable, pro-poor objectives. In practice, alongside other new legislation, it creates numerous onerous

⁴²¹ Note that chapters V and VI of the *DFA* were declared unconstitutional by the Constitutional Court – see *City of Johannesburg Metropolitan Municipality v Gauteng Planning Tribunal* 2010 (6) SA 182 (CC), paragraphs 1 and 70. The statute was repealed by the *Spatial Planning and Land Use Management Act* of 2013.

obligations on local government whilst not considering adequately their resource and capacity constraints. This is mentioned in passing in section 10A, but only on assigned powers and functions.

The *Structures Act* reiterates that municipal councils must strive to achieve the objectives stipulated in section 152 of the *Constitution*.⁴²² It furthermore stipulates that a municipal council must annually review, *inter alia*, community needs, priorities to meet those needs, processes for involving the community, organisational and delivery mechanisms for meeting community needs, and overall performance in meeting the constitutionally-prescribed objectives.⁴²³ A municipality is duty-bound to develop mechanisms for community consultation in performing its functions and exercising its powers.⁴²⁴ Section 74 depicts the functions and powers of ward committees.

The numerous rights, duties, obligations, responsibilities, and accountabilities create challenges, but also opportunities for representation of local communities within municipalities and on institutions in the other spheres of government. To do justice, the quality and commitment of representatives should be of the highest order. To achieve this, capacitation of municipalities by qualified top management and their monitoring and evaluation are required. More than going “back to basics” is necessary, as it has been shown that both national and provincial governments have failed in their duty to support and strengthen municipalities in the past sixteen years. The problems emanating from an extended local government mandate in a context of limited resources is that the ‘lowest’ sphere has to compete with the other two spheres of government, that decentralisation may result in more powers and responsibilities devolving to them without guarantee of the accompanying resources.⁴²⁵ Hence, municipal leadership and representatives have to be alert to these challenges and be capable of negotiating in the best interest of their residents. Bekink (2006) adds that the new government system should “result in a more effective and efficient local sphere of governance” because the “entrenched legal nature and divided rights and duties of local government institutions significantly contributes to the system that is envisaged in the Constitution.”⁴²⁶

⁴²² Section 19(1) of the *Structures Act*.

⁴²³ Sections 19(2)(a)-(e) of the *Structures Act*.

⁴²⁴ Section 19(3) of the *Structures Act*.

⁴²⁵ See Bekink (2006), *op cit*, 62.

⁴²⁶ *Ibid*.

While the *Constitution* with its supplementary and complementary statutes with their regulations does establish the system and processes for democratic government, its efficiency and efficacy would be tested in their implementation. The results have not been inspiring.

Bekink (2006) argues that “municipalities are often ignored when decisions are taken by the higher spheres of government and most lack the capacity to perform their functions.”⁴²⁷ National and provincial governments are constitutionally duty-bound to address this challenge and municipal representatives should be able to quantify and articulate it clearly.

The *Systems Act* articulates a new vision for local government that serves to create an essentially people-oriented public service in municipalities. This goal will be facilitated by the codes of conduct that will aid ensuring accountability and control. Bekink (2006) adds that the new legal framework lays a sound foundation for this purpose in the local government system.”⁴²⁸ However, the extensive detail depicted in the *Systems Act* points to the level of complexity of the current local government system. Since councillors, administrators and municipal representatives are in most cases duty-bound to deliver on their mandates, education and training to develop competent persons are necessary. Bekink (2006) remarked that –

Many commentators have in recent years suggested that both the two higher spheres of government are dragging their feet in completing the legal system for local government and that especially national government has failed timeously to fulfil its constitutional obligations.⁴²⁹

Should this major shortcoming be resolved timeously, municipalities should be able to deliver on their constitutional-statutory duties provided support from the national and provincial spheres is provided as envisaged and promised in the *Constitution*. The importance of the constitutional prescripts on public participation in the law-making process⁴³⁰ was confirmed recently by the Constitutional Court⁴³¹ which held:

...South Africa’s democracy contains both representative and participatory elements. These elements are not mutually exclusive. Rather they support and buttress one another. This Court has rejected the argument that the public need not participate in the legislative process as its elected representatives are speaking on the public’s behalf.⁴³²

⁴²⁷ *Op cit*, 214.

⁴²⁸ *Op cit*, 495-496.

⁴²⁹ At 526.

⁴³⁰ Sections 59 (National Assembly), 72(1)(a) NCoP and 118 (1) and (2) (provincial legislatures).

⁴³¹ In *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22, (“*Land Access Movement*”) at paragraph 57.

⁴³² Comments made by Madlanga J based on *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) at paragraph 115; *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC), at paragraphs 59-60.

The Court held that the “NCoP public participation process was unreasonable and thus constitutionally invalid”; that its “failure to comply with a constitutional obligation amounts to failure by Parliament as a whole.”⁴³³

4.6 ESTABLISHMENT OF MUNICIPALITIES

The *Local Government: Municipal Structures Act* (“*Structures Act*”)⁴³⁴, complying with constitutional directives⁴³⁵ provides for the establishment of municipalities covering the whole of South Africa. The *Act* prescribes different categories of municipalities;⁴³⁶ their establishment; the different types of municipal councils; internal structures and administrators; powers and functions; electoral systems; elections; method of allocating councillors; and a code of conduct for elected officials.⁴³⁷ Hence, there are two codes for councillors (the other is depicted in the *Systems Act*). This enactment is a guideline, regulation, and control mechanism. The *Act*, in accordance with section 155(1) of the *Constitution*, prescribes and limits the categories of municipalities to only three.⁴³⁸ This restriction inhibits innovation but there is room for creativity even within such a narrow framework,⁴³⁹ especially through powers delegated or assigned on the basis of municipal differentiation.

Although there is provision for consultation with organised local government and existing municipalities, it is clear that the Member of the Executive Council (MEC) for local government alone has the power to determine the types of and to establish municipalities.⁴⁴⁰ This derogates from the ‘autonomous’ status of local government. MECs are charged with establishing municipalities.⁴⁴¹ Bekink (2006) contends that they should do so in a manner that would promote the development of local government capacity so as to “enable municipalities to perform their functions and manage their own affairs.”⁴⁴² The large number and frequency of

⁴³³ *Land Access Movement, op cit*, at paragraph 82.

⁴³⁴ *Local Government: Municipal Structures Act*, 117 of 1998.

⁴³⁵ Sections 151(1), 155(a), (b) and (c); and 155(2), (3), and (4) of the *Constitution*.

⁴³⁶ In sections 8-10 of the *Structures Act*.

⁴³⁷ In, respectively, Chapters 1, 2, 3, 4, and 5; Schedules 1-5 of the *Structures Act*.

⁴³⁸ Sections 8, 9, and 10 of the *Structures Act*.

⁴³⁹ For example by delegation and assignment of powers by national and provincial governments, in terms of section 156(4) as well as by the principle of subsidiarity in section 156(5) of the *Constitution*.

⁴⁴⁰ In terms of sections 11 and 12 of the *Structures Act*.

⁴⁴¹ In accordance with sections 155(6)(b) and 155(7) of the *Constitution*, and in terms of section 12 of the *Structures Act*.

⁴⁴² *Op cit*, 288.

community protests seems to indicate that the MECs working with the Municipal Demarcation Board (MDB) and in consultation with CoGTA and SALGA have been far from successful.

A further shortcoming is that, given three categories (rather than a single one) of local government, power allocation within each is symmetrical: there is ‘equality’ in responsibilities and competencies, notwithstanding different degrees of capacity, competency, size, financial status, history, and so on. This places a burden on weaker municipalities especially when considering that while CoGTA has been attempting to enhance capacities through several programmes, provincial government has done little in this field. The peremptory provision, that a municipality’s highest decision-making body, the council, must annually review the needs and priorities of its communities, as well as the structures and processes for involving them in the better delivery of services and monitoring its performance in achieving set objectives, is helpful.⁴⁴³ However, the potential impact of this stipulation is diluted as it is only for an annual review; neither the *Constitution* nor this *Act* goes beyond and compels municipalities to do something beyond ‘reviewing’. This incomplete directive has adverse implications for determining and meeting peoples’ needs and thus for a municipal representative organ being able to influence national policies and priority programmes, thereby diminishing local government’s contribution.

The *Structures Act* makes it obligatory for the mayor to take several steps to identify and meet priority needs of the community in an economically efficient manner, mostly through the municipality’s integrated development plan (IDP), to monitor progress with implementation, and to report annually thereon.⁴⁴⁴ Such requirements for performance management and engagement with local communities are echoed throughout the *Structures Act* and the *Systems Act*, but do not appear to be working well due to many objectives, outputs and outcomes not being precisely defined and thus difficult to quantify and measure.

Although statutes promulgated by the post-apartheid government are reasonably clear and explicit, they have to some extent been ignored or circumvented following the 2000 local government elections when senior administrative appointments became based largely on political affiliations and connections, rather than on merit or competency (“cadre deployment”). This compounded the problem of capacity and commitment.

⁴⁴³ Sections 19(2)(a), (b), (c), (d), and (e) of the *Structures Act*.

⁴⁴⁴ In terms of sections 56(2) and (3) of the *Structures Act*.

The entrenchment of distinctive local government covering the entire spatial territory of South Africa is an innovation, more so in municipalities being recognised as part of government rather than as agencies of the state or its provinces. The *Constitution* provides for the establishment of three categories of municipalities.⁴⁴⁵ While a ‘standalone’ Category A local authority has both executive and legislative authority over its territory, categories B and C share such power *inter se*. A Category C or district municipality incorporates the local municipalities within its territorial jurisdiction. This in effect means a four-tier hierarchy in rural areas, making for a complex system. The situation is further complicated with the inclusion of traditional leadership and communal land to be serviced by municipalities.⁴⁴⁶ This has the potential for increased conflict and thus implications for co-operative governance. That the MEC has authority to “prescribe a role for traditional leaders in the affairs of a municipality”⁴⁴⁷ could be seen as a further limitation on the power of municipalities and intervention in local government autonomy. The powers and duties of the National House of Traditional Leaders are, *inter alia*, to co-operate with its provincial houses to “promote socio-economic development and service delivery.”⁴⁴⁸

Knoetze (2014) points out that “...the institution of traditional leadership... do not constitute a separate level of government.” She adds that the *Structures Act* introduced the concept of a consultative role for them.⁴⁴⁹ This view could be attributed to the provisions that these institutions function according to customary law which is subject to the *Constitution*.⁴⁵⁰ Knoetze (2014) asserts that the *Constitution* does not attribute developmental functions to traditional leadership. Furthermore, where a power is allocated to a particular sphere of government, the sphere so empowered cannot undertake that function or exercise the power concurrently with any traditional leadership institution.⁴⁵¹

Section 81 of the *Structures Act* provides for traditional leaders’ participation in municipal councils. Such persons will not have membership and therefore no right to vote. However, traditional leaders could stand for election as councillors and thereby protect customary law in

⁴⁴⁵ In terms of sections 155(1)(a), (b) and (c) of the *Constitution*.

⁴⁴⁶ In terms of section 81 of the *Structures Act*.

⁴⁴⁷ In terms of section 81(4)(b) of the *Structures Act*.

⁴⁴⁸ In terms of section 11(1)(a)(vi) of the *National House of Traditional Leaders Act*, 22 of 2009.

⁴⁴⁹ Knoetze, Elmarie (2014) ‘Legislative Regulation of the Developmental Functions of Traditional Leadership – In Conflict or Cohesion with Municipal Councils?’ 28(1) (2014) *Speculum Juris*, 161-195, 166.

⁴⁵⁰ Sections 211(1), (2) and (3) of the *Constitution*.

⁴⁵¹ Knoetze (2014), *op cit*, 169.

their communities. No person may become a member of a House if he or she is a member of Parliament or the provincial or municipal legislatures.⁴⁵² In such instances, the councillor will have to put the interests of the municipal council first. Knoetze (2014) states that “in 2011 there were 829 traditional leaders who were leading more than 830 traditional councils located across eight provinces.”⁴⁵³ This is an additional constituent that municipal representatives should work with and adds to the number of stakeholders to be consulted by district municipalities and local councils therein.

The *Structures Act* makes provision for election of councillors in Schedules 1 and 2. The details are depicted in the *Local Government: Municipal Electoral Act*.⁴⁵⁴ These two mechanisms serve to protect and develop local participatory and representative democracy. The *Electoral Act* contains many provisions to ensure free and fair elections so as to make the process as democratic as possible.⁴⁵⁵ Councillors and community leaders have to co-operate to make the system work.

4.7 CONCLUSION

This chapter set out the current approach and attitude of the state to development in the local sphere of government and the problems related thereto. Next, the constitutional-statutory foundation, framework, and context that established and empowered local government to function in a three-sphere governmental system was examined, followed by local government’s role as a party to co-operative governance and intergovernmental relations. The status and autonomy of local government as well as its powers and functions were analysed to ascertain how this sphere could function to serve its constitutional purpose. A review of the objects, rights and developmental duties were assessed, followed by an examination of service delivery related to the promotion and protection of human rights. The chapter concluded by assessing the establishment of municipalities.

The foregoing review and analysis was undertaken to ascertain the spaces and opportunities that are currently available for municipal representation on national policy and decision-making

⁴⁵² Section 5(a) of the *National House of Traditional Leaders Act*, 22 of 2009.

⁴⁵³ Knoetze (2014), *op cit*, 168.

⁴⁵⁴ 27 of 2000.

⁴⁵⁵ Sections 51(1), (2), and (3), 59(1), 65(1) and the Electoral Code of Conduct in Schedule 1.

bodies. Therefrom, an analysis could be undertaken of gaps, weaknesses, successes, and shortcomings that need to be addressed. A call cannot be made for more opportunities for municipal representation until a review and analysis has been undertaken of achievements in this field using existing mechanisms and processes. This is undertaken in Chapter 5 where implementation of representation is assessed since the establishment of SALGA.

CHAPTER 5

MECHANISMS AND PROCESSES FACILITATING MUNICIPAL REPRESENTATION IN SOUTH AFRICA

5.1 INTRODUCTION

This chapter analyses the structures and processes that have been developed to give effect to the constitutional and statutory prescripts, and then determine how they are supposed to or have functioned in the interests of residents in municipalities. One of the enabling or facilitating mechanisms is co-operative governance and through such *modus operandi* intergovernmental relations. The three-sphere governmental system has enabled the establishment of various mechanisms and processes to accommodate municipal representation. These opportunities are assessed from the point of view of local government.

5.2 PARLIAMENT

5.2.1 AN OVERVIEW

Parliament consists of the National Assembly and the National Council of Provinces (NCoP).¹ Both participate in the legislative process.² Section 42(3) of the *Constitution* reads:

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

This provision forms the basis of municipal representation by providing for democratic participatory governance and safeguarding the public interest through law-making and oversight over the executive. The *Constitution* vests national legislative authority in Parliament.³ The NCoP “represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.”⁴

¹ Sections 42(1)(a) and (b) of the *Constitution*.

² Section 42(2) of the *Constitution*.

³ Section 44(1)(a) of the *Constitution*.

⁴ Section 42(4) of the *Constitution*.

5.2.2 THE NATIONAL ASSEMBLY

The following are some of the key constitutional provisions defining the functions of the National Assembly that could be beneficial to co-operative governance and facilitate municipal representation:⁵

- i. law making, as the institution having legislative authority, in terms of section 43;
- ii. scrutinising and overseeing executive action, in terms of sections 42(3) and 55(2);
- iii. special oversight over the executive and any organ of state, particularly regarding implementation of legislation – sections 42(3) and 55(2)(b);
- iv. serve as a forum for public consideration of issues – section 42(3);
- v. ensuring that organs of state and independent constitutional institutions report and are accountable to it: sections 55(2)(a) and 181(5);
- vi. represent the people – section 42(3);
- vii. subpoena powers to compel appearance and presentation – sections 56(a)-(c); and
- viii. receiving and considering petitions – section 56(d);

If Parliament were to concentrate more on being a forum for and representing the people,⁶ it may do much to enhance service delivery by addressing peoples' grievances. This it now proposes doing. At this stage, apart from establishing some constituency offices, little has been achieved.⁷ However, since Parliament can play a major role in facilitating and promoting municipal representation, the opportunities and possibilities offered are examined below.

5.2.3 ASSESSMENT OF PARLIAMENT

In December 2006, the Speaker of Parliament and the Chairperson of the NCoP established an independent panel with the following terms of reference:

To inquire into, report and make recommendations regarding the extent to which Parliament is evolving to meet the expectations outlined in the Constitution and also to assess the experience and role of Parliament in promoting and entrenching democracy. The assessment will focus specifically on the extent to which Parliament ensures that there is accountability, responsiveness and openness regarding the implementation of matters enshrined but not limited to Chapter 4 and 5 of the Constitution.⁸

⁵ Gutto, Shadrack, Rushiella Songca, Mpho Mothoagae and Motshamonyane Phasha (2007) *A Study of Enhancing the Status, Role, Image and Positioning of the Parliament of the Republic of South Africa*, Centre for African Renaissance Studies, Pretoria: Unisa, 4-5.

⁶ In terms of section 42(3) of the *Constitution*.

⁷ Mkhwanazi, Siyabonga 'Growing service delivery protests lead to hearings', Johannesburg: *The Star*, 1/02/2009.

⁸ *Report of the Independent Panel Assessment of Parliament*, 13 January 2009, with summary of recommendations, tabled 14 January 2009. www.parliament.gov.za, accessed 25/04/2016. ("Report on Assessment of Parliament" by the "Assessment Panel").

Some of the recommendations that could have an impact on municipal representation are:

i. Parliament's legislative mandate

The Assessment Panel suggested, *inter alia*, that Parliament develop skills and capacity to review the impact of legislation, before and after its adoption. The Panel recommended that an Impact Assessment Report by the Executive on the likely impact of each Bill should be attached when it is tabled in Parliament.⁹ This would require the development of an outcomes-based monitoring, evaluation and impact assessment (MEIA) system.

Perhaps based on the Assessment Panel's recommendations, Parliament's Speakers' Forum established the High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change. The Panel has eighteen months, commencing January 2016, to complete its work. The first hearings were on 16-17 August 2016¹⁰ The Chairperson of the Panel said –

[There] are more than 1 000 new laws aimed at supporting our democracy...It is all very well to pass laws and to have facilitated public participation in their making. But what effect have these laws had on our lives and our aim of building a new society?¹¹

The Speaker of Parliament said that “the legislative sector is mindful of its role” prescribed by the *Constitution* that called “for the building of a socially-cohesive and economically stable nation – united in diversity.”¹² The laws referred to above are post-1994 legislation. It may be opportune to undertake a monitoring, evaluation, social cost-benefit and impact assessment two decades after the advent of democracy. Hopefully, the exercise would show up problems with the three-sphere co-operative governmental system, particularly the status and role of municipalities therein.

The Assessment Panel also recommended that the criteria in terms of which any discretionary power is exercised should be set out. Any impact assessment should incorporate “unintended consequences of legislation, failure by the Executive or other organs of state to take required

⁹ Report on Assessment of Parliament, (2009), *op cit*, Chapter 2: 28, 33.

¹⁰ www.parliament.gov.za, accessed 29/08/2016.

¹¹ Motlanthe, Kgalema ‘We’re pausing to assess the lawmaking of the past 2 decades’, Johannesburg: *The Star* 15/08/2016.

¹² Smith, Janet ‘We have plenty of new laws, but are these any good?’ Johannesburg: *The Star* 17/08/2016; www.polity.org.za, accessed 29/08/2016.

actions in response to legislation, and the extent to which the objectives and implementation targets of legislation is achieved.”¹³

These recommendations, if implemented and monitored, would help improve the quality of statutes and regulations, making them more practical and implementable, and especially in the local government sphere, perhaps more developmental than regulatory. However, municipal representatives must have the requisite ability to analyse Bills and make inputs to ensure interests of the public and municipalities are protected and promoted, for example, by rejecting ‘unfunded mandates’ imposed through assignment.¹⁴ In this context, the goal of “engaging with local government on legislation that could result in unfunded mandates” would help if implemented.¹⁵ This could be by design or default, considering the large number of Bills passed by Parliament: 1 238 between 1994 and 2014.¹⁶ It would appear that in 2015-2016 (to 6 May 2016) there were 188 Bills before Parliament.¹⁷

The Assessment Panel recommended that “outstanding constitutionally required legislation” should be identified and enacted urgently.¹⁸ Another recommendation was that the “scope of any law-making and other powers being delegated”, the necessity of such delegation, and the criteria “in terms of which any discretionary powers are to be exercised” should be reviewed.¹⁹ This would help improve the quality of legislation and serve as a disincentive for delegating powers to local government by assignment. Among Parliament’s programmes is enhancing the quality of legislation by, *inter alia*, providing technical support to committees during law-making.²⁰

Parliament acknowledged that “The courts recently declared legislation constitutionally invalid on various grounds,” and admitted that these judgments “provided clarity and direction” on its constitutional obligations.²¹ Given this situation, Parliament established a “fully-fledged unit to assist Members of both houses to initiate and draft Bills.”²²

¹³ Report on Assessment of Parliament (2009), *op cit*, Chapter 2: 31.

¹⁴ Such as through, for example, the *Disaster Management Amendment Act*, 16 of 2015.

¹⁵ Parliament of the Republic of South Africa (2015) *Strategic Plan for the 5th Democratic Parliament 2014-2019*, clause 1.7.2 p16. www.parliament.gov.za, accessed 13/05/2016.

¹⁶ *Strategic Plan for the 5th Democratic Parliament 2014-2019*, *op cit*, 13.

¹⁷ www.parliament.gov.za, accessed 20/05/2016.

¹⁸ Report on Assessment of Parliament (2009), *op cit*, Chapter 2: 31.

¹⁹ Report on Assessment of Parliament (2009), *op cit*, Chapter 2: 25-26.

²⁰ *Strategic Plan for the 5th Democratic Parliament 2014-2019*, *op cit*, 26.

²¹ *Strategic Plan for the 5th Democratic Parliament 2014-2019*, *op cit*, 15.

²² *Ibid.*

ii. Parliament's oversight mandate

An Oversight Forum “focuses on the work of Parliament’s more than 50 committees.” These constitute oversight and citizen participation, incorporating parliamentary hearings and public oversight visits.²³ While its preoccupation as a legislature is understandable, Gutto *et al* (2007) argue that Parliament should undertake its oversight function, and that of holding the executive accountable more vigorously.²⁴ This will benefit good governance and enhance co-operative government. Mindful of the various problems besetting poor communities, Parliament established the *Ad hoc* Committee on Co-Ordinated Oversight on Service Delivery under the theme: ‘Working together to ensure the delivery of quality service to communities’. This brings the Legislature to the people, under the five priorities of the Fourth Parliament:²⁵

- (a) strengthening the oversight function;
- (b) increasing public participation;
- (c) strengthening co-operative government;
- (d) widening the role of Parliament in international affairs; and
- (e) continuing to build an efficient, effective and powerful institution of democracy.

While such an attitude and approach can have a positive impact on democratic co-operative governance, it is necessary to ensure that there is no encroachment or overlap in responsibilities with organs of state. Nevertheless, this action would better enable it to judge the performance of members of the executive who are accountable collectively and individually to Parliament in the exercise of their powers and the performance of their functions, and to report regularly thereon.²⁶ In the context of the ideal of increased oversight and lack of mention of local government, the following statement is illustrative:

We seem to be oversubscribing and going to the same project or the same province so many times because there is no co-ordination. We shall have to work on that co-ordination so that as we increase our oversight, indeed we are able to address the stampeding that has been occurring.²⁷

The many problems associated with oversight visits are illustrated by the meeting of the Select Committee on Co-operative Governance and Traditional Affairs debating the reports on visits

²³ From www.parliament.gov.za, accessed 12/04/2016.

²⁴ Gutto *et al* (2007), *op cit*, 17, 129.

²⁵ Proceedings of the National Assembly 11/05/2010, reported in *Hansard*, 10.

²⁶ In terms of sections 92(2) and 92(3)(b) of the *Constitution*.

²⁷ Mr Obed Bapela, ANC MP, National Assembly debate, 11/05/2010, *Hansard*, 42-43.

to three local municipalities.²⁸ Perusal of the report highlights certain shortcomings and challenges:

- (a) possible duplication of work of the NCoP by CoGTA, SALGA, national departments, and provincial legislatures, especially in respect of oversight visits;
- (b) three reports on different municipalities using the same format and subheadings, as if working to a template and predetermined search for challenges. The problem here seemed that the same or almost identical responses were ‘submitted’ by these municipalities;
- (c) reports are based on committee members’ (politicians’) observations and are thus vague and ambiguous, with performance and shortfalls not quantified;
- (d) reports appear to lack technical details; and
- (e) there seems to be no follow-up actions or mention of persons responsible therefor.

The Select Committee stated that its members were not able to make much sense of the report and discussion thereon. If such a *modus operandi* is typical of the approach to oversight and intervention,²⁹ it may cause more conflict than harmony due to neglect of the constitutionally-imposed directive of capacitation of the errant municipality.³⁰ It seems that the visits and debates thereafter focus on symptoms and not on root causes and technical solutions thereto. This undesirable situation creates opportunities for proportional representation and especially ward councillors to make practical and insightful inputs at such hearings and visits. Of course, these should be based on councillors’ engagement with communities and not on the representatives’ own perceptions, views, and opinions.

The Assessment Panel recommended that an “extensive monitoring schedule” be developed and implemented for the oversight function, and further that Parliament should make better use of information emanating from State Institutions Supporting Constitutional Democracy. It further suggested that Parliament should engage with “recommendations of the report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions.”³¹ It is unclear which

²⁸ Select Committee on Co-operative Governance and Traditional Affairs: Reports on Oversight Visits to Sundays River Valley, Thembisile Hani and Moses Kotane Local Municipalities, 2/06/2010, reported by the Parliamentary Monitoring Group, 7/06/2010.

²⁹ In terms of section 139 of the *Constitution*.

³⁰ Report on Assessment of Parliament (2009), *op cit*, Chapter 3: 45-46.

³¹ In terms of the obligation imposed on national and provincial governments by section 154(1) of the *Constitution*.

(if any) of the Assessment Panel’s recommendations were implemented as the Strategic Plan does not deal specifically and in detail with these particular issues.

Parliament has developed an Oversight and Accountability Model as well as a Sector Oversight model. These would provide guidance on oversight work.³²

iii. Parliament as a forum for public consideration of issues

The National Assembly is mandated to “ensure government by the people ... by providing a national forum for public consideration of issues ... and by scrutinizing and overseeing executive action.”³³ A welcome approach is for the institution to hold hearings *in-situ*.³⁴ But in taking such action it should not replicate or do the work of the NCoP. Were Parliament to use its distinctive and shared powers effectively, it would certainly help improve and enhance co-operative governance as well as socio-economic development through contribution to policy formulation and oversight over their implementation, alongside the executive. This will benefit good governance and enhance co-operative government.

The Assessment Panel recommended, *inter alia*, that “Parliament should take steps to improve the quality and substance” of its debates and should debate current matters of public concern timeously.³⁵

iv. Public Participation

The Assessment Panel recommended that “structures and processes around constituency work should be comprehensively reviewed and assessed.” Furthermore, the Public Participation Model being developed “must include detailed consideration of the constituency system, the responsibilities of constituency work, and how these structures and processes relate to the newly established Parliamentary Democracy Offices.”³⁶ Parliament has an obligation to involve the

³² Carim, Yunus ‘Intergovernmental and Inter-Legislative relations in a democratic developmental state – Perspectives and Lessons’, Paper delivered at the *Conference: Building strong Legislatures through collaboration: The role of Parliament and Provincial Legislatures in a Democratic Developmental State*, Buffalo City, 3 October 2012, 1-18, 12.

³³ Section 42(3) of the *Constitution*.

³⁴ Mkhwanazi (2009), *op cit*.

³⁵ Report on Assessment of Parliament (2009), *op cit*, Chapter 4: 52.

³⁶ Report on Assessment of Parliament (2009), *op cit*, Chapter 5: 66.

public in its lawmaking processes and “failure to comply with this obligation rendered the resulting legislation constitutionally invalid.”³⁷ This was confirmed by the Constitutional Court.³⁸ To enhance public involvement and participation in parliamentary processes with the object of realising participatory democracy, Parliament intends implementing its public involvement model, incorporating eight strategic objectives, by 2019.³⁹ During the 4th Parliament, the “legislative sector developed the Public Participation Framework for Parliament and Provincial Legislatures.”⁴⁰ No mention is made in the *Strategic Plan* whether the Framework was implemented and monitored, nor how it would assist local government.

It has been said that making the constitutional ideal of adults having an equal say in determining how and by whom they are governed a reality “requires effective and responsive representative institutions”. This is because representation is “not guaranteed by the act of voting” but is dependent upon the “strength of the relationship between voters and their elected representatives.” Voter turnout is also dependent on the “quality of representation.”⁴¹

5.2.4 THE NATIONAL COUNCIL OF PROVINCES⁴²

i. Background

Section 42(4) of the *Constitution* established the NCoP. It “opened its doors as a fully-fledged second House of Parliament on 6 February 1997, thereby replacing the old Senate.”⁴³ On its 15th anniversary, the chairperson said, “A hallmark of the work of the NCoP has always been

³⁷ *Strategic Plan for the 5th Democratic Parliament 2014-2019, op cit*, 15.

³⁸ In *Doctors for Life International v Speaker of the National Assembly and Others* CCT12/05 [2006] ZACC 11; 2006(12) BCLR 1399 (CC); 2006 (6) SA416 (CC) (17 August 2006), paragraphs 209, 211, 213. See also Czapanskiy, Karen Syma and Rashida Manjoo (2008) *The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right*, 19(1) (2008) *Duke Journal of Comparative and International Law*, 1-40, 2-6, 9; *King and Others v Attorneys Fidelity Fund Board of Control and Another* (561/2004) [2005] ZASCA 96; [2006] 1 All SA 458 (SCA); 2006 (4) BCLR 462 (SCA) (29 September 2005), paragraphs 1-2, 9, 11-12, 17, and 22; *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50 (26 April 2017), paragraphs 1, 18, 23, 28, 34, 58, 93, 98, and 142.

³⁹ *Strategic Plan for the 5th Democratic Parliament 2014-2019, op cit*, 16-17, 20-21, 28.

⁴⁰ Parliament of the Republic of South Africa (2015): *Orientation Towards Policy Priorities for the 5th Democratic Parliament 2014-2019*, 7, 11. www.parliament.gov.za, accessed 15/04/2016.

⁴¹ Ben-Zeev, Keren (2012) *Peoples Power: People’s Parliament*, A Report of Proceedings and Issues at the People’s Power Conference – A Civil Society Conference on South Africa’s Legislatures, Cape Town: 13-15 August 2012, 6-7.

⁴² Refer sections 42(4); 44(1)(b); 44(2) and (3); 68; 146(6); 231(2) and (3) of the *Constitution*.

⁴³ Levy, Moira (2012) Editorial, *In Session: Saluting the NCoP 15 Years On*, Vol 12 Issue 1 Jan/Feb 2012, 5, www.parliament.gov.za.

the extent to which it is prepared to engage ordinary citizens.’⁴⁴ This is true only to a limited extent as shown by the views expressed above and below. The publication celebrating the NCoP is a self-congratulatory one, with most of the articles having no bearing on this institution’s work. After 15 years of existence (2012), it appears to have achieved little. An exception is the work of its 15-member *ad hoc* committee that visited 9 provinces in 4 weeks to debate the *Protection of State Information Bill* in 2012, particularly on the question of whether to include the public interest defence clause in the Bill.⁴⁵ The Bill was adopted by the NCoP by 34 votes to 16,⁴⁶ showing that it is still a rubber stamp of the National Assembly. Another controversial Bill that amalgamates the Scorpions with the police and promoted vigorously by government, was adopted in the NCoP by 29 votes to 9.⁴⁷ During a debate on the South African Reserve Bank Amendment Bill on 26 August 2010, the chairperson of the NCoP went to great lengths to describe its role without outlining its contribution to the development of the country. In a short response, the Minister of Finance, Pravin Gordhan, pointed out that the second house is a “product of political negotiations and compromises” during the constitutional negotiations.⁴⁸ He added:

The question for us is whether the way in which co-operative governance and intergovernmental relations are structured today and the way the NCoP works enhances this kind of objective.⁴⁹

The NCoP cannot be faulted for trying to assist in the country’s development. For example, to visit all nine provinces during Provincial Week, 7-11 September 2009, to gather information about service delivery.⁵⁰ It is unclear what came of this exercise. It may be indicative of this institution not working on long-term plans but being reactive to service delivery crises arising frequently at many municipalities. This reinforces the criticism of duplication and “stampeding”, mentioned earlier.

De Vos (2010), referring to Co-operative Governance Minister, Sicelo Shiceka’s remarks on the relevance of the NCoP and the present constitutional arrangement for provincial government, arguing for a review, said that the “NCoP has not been a great success;” is not

⁴⁴ *In Session: Saluting the NCoP 15 Years On* (2012), 6.

⁴⁵ *In Session: Saluting the NCoP 15 Years On* (2012), 11-14.

⁴⁶ Ferreira, Emsie (2012) ‘ANC pushes secrecy Bill through NCoP’ *Mail & Guardian Online*, 29/11/2012.

⁴⁷ Hamlyn, Michael ‘NCoP passes Scorpions Bills’, *Mail & Guardian Online*, 19/11/2008.

⁴⁸ Peoples Assembly 26/10/2012 www.pa.org.za, accessed 19/05/2016.

⁴⁹ *Ibid.*

⁵⁰ ‘NCoP to assess service delivery in provinces’, *Mail & Guardian Online*, 2/09/2009.

fulfilling its envisaged function; and thereby the “distinct voice and perspective of each province is lost.” He adds that despite its failures, the second house is likely to remain.⁵¹ Perhaps as a result of criticism since 1994, the ANC considered “doing away with provincial legislatures, as most had failed to perform their oversight functions.” However, it decided that their powers and functions be reviewed and strengthened.⁵²

Southall (1998) contends that the idea of co-operative government is “embodied in the replacement of the Senate by the NCoP as the second chamber of Parliament.” He asks the pertinent question as to whether the new structures are “constraining or deepening democracy.”⁵³ Friedman (1999) argues that there is a belief in the NCoP that it could become a dynamic part of our political process if parties relax their internal discipline and allow delegates to vote according to their perceived provincial interests rather than to toe the party line. Co-operative governance could serve to suppress conflicts and to reduce provinces to “conveyor belts for the centre”.⁵⁴

ii. Powers, role and functions

The NCoP has powers directly and indirectly related to the legislative function, including the provision of a forum for public debate on provincial matters, and the task of facilitating public participation in its processes,⁵⁵ a function that it has up to now not lived-up to. While both houses have national legislative authority,⁵⁶ that of the NCoP is less numerically than that of the National Assembly.⁵⁷ With ten representatives each, the provinces appear to be adequately represented numerically in this institution,⁵⁸ *vis-à-vis* local government that is allowed ten part-time representatives who do not have voting rights.⁵⁹ Hence, municipalities are factually

⁵¹ De Vos, Pierre, ‘Don’t say goodbye to the NCoP yet’, *Constitutionally Speaking*, 6/09/2010, www.constitutionallyspeaking.co.za, accessed 12/05/2016.

⁵² Tabane, Rapule ‘Call for provinces to stay, but not in current form’, *Mail & Guardian Online*, 9/03/2012.

⁵³ Southall, Roger ‘A deepening of democracy? Establishing provincial government in South Africa’ 28 (1998) (1&2) *Africa Insight*, 5-18; 7.

⁵⁴ Friedman, Steven ‘Power to the Provinces’ 4 (1999) *Siyaya!* 45-46.

⁵⁵ Sections 72(1) and (2) of the *Constitution*.

⁵⁶ In terms of sections 44(1) -(4) of the *Constitution*.

⁵⁷ Section 60(1) of the *Constitution*.

⁵⁸ Sections 60(1) and (2) of the *Constitution*.

⁵⁹ Section 67 of the *Constitution*.

accorded a lower status than provinces. There is no obligation on the NCoP to incorporate any inputs from the provinces, or from local government through SALGA.

The NCoP has a (theoretically) strategic function of initiating, preparing, considering, passing, amending or proposing changes to certain types of legislation.⁶⁰ As such, it has the potential, directly, or indirectly through the provinces, of improving the status of local government and enhancing its role in lawmaking. The NCoP's pre-eminent role is to pass bills affecting the provinces, and concomitantly, municipalities therein.⁶¹ This is significant. It has, in addition, authority to be involved in certain important legislative matters at the national sphere, such as participation in amending the *Constitution*, passing laws on Schedule 4 powers, and considering legislation passed by the National Assembly on Schedule 5 powers.⁶² The NCoP is permitted to participate in legislation that may not directly have a potential impact on provinces and thereby on municipalities.⁶³ Since both the National Assembly and the NCoP have national legislative powers means that there could be potential for conflict, but more so where national and provincial governments have concurrent legislative competence.⁶⁴ The legislative process is, however, geared towards conflict-avoidance through use of mediation, voting, and veto power.⁶⁵ No conflict appears to have arisen, particularly because the NCoP operates as a 'rubber stamp'. Thus, what the NCoP does in the legislative field has major consequences for and impact on local government. The indications thus far are that in following the dictates of lawmaking executives of the ruling party, the interests of local government, through their provincial representatives, have not been safeguarded or promoted.

A second major role of the NCoP is to allow the public access to and involvement in the work of the Council.⁶⁶

⁶⁰ Sections 68(a) and (b) of the *Constitution*.

⁶¹ In accordance with section 76 of the *Constitution*.

⁶² Sections 74 and 44(1)(b)(i), (ii) and (iii), respectively, of the *Constitution*.

⁶³ In accordance with section 75 of the *Constitution*.

⁶⁴ Functions listed in Schedule 4 of the *Constitution*.

⁶⁵ Department of Provincial and Local Government (1999) *Final Report on the Intergovernmental Relations Audit*, 91-92.

⁶⁶ Sections 72(1) and (2) of the *Constitution*.

A third crucial function is in the field of intergovernmental relations:

The NCoP is the institutionalisation of co-operative governance at the national level since it brings the national, provincial and local government spheres into a single structure ... being the eyes and ears of the public.⁶⁷

This view may be incorrect insofar as it relates to local government since it has no vote in this institution. The NCoP does not currently appear to be appropriately structured to play the intergovernmental role meaningfully, that is, represent the people and the local sphere of government. Representation is limited and qualified. On the other hand, municipal representatives must be of the calibre that can make a positive difference on the few platforms available to them.

iii. Legislative

The NCoP's legislative contribution thus far has been insubstantial, being "limited to the correction of textual errors and some fine tuning."⁶⁸ Furthermore, up to now there appears to have been no major conflict between it and the National Assembly. Judging from debates mentioned earlier, it appears that the NCoP adds little value to the legislative process and that the need for such an institution, especially in this field, is questionable. Understandably, only the NCoP defends its own position. In fairness, some of these earlier views of writers were based on observations covering only the first few years of the institution's operations; however, it would seem that the situation has not changed much since. Given its poor performance, it was suggested that it was an opportune time to do "an ongoing revaluation of the work of Parliament"⁶⁹ and particularly the NCoP. Actions suggested on the Second House were:⁷⁰

Conduct an assessment of what weaknesses may exist; what improvements can be effected; how are the delegates appointed; is the quality or calibre of representation up to standard; are numbers of the delegates sufficient to carry out the task or is the structure bloated; are the provinces effective and efficient in carrying out their responsibility; are the provinces too many and should the number be reduced (as the minister of Provincial and Local Government has alluded to); should the role of provinces be reconsidered, i.e., increase their powers or curtail them.

The NCoP's website does not indicate whether any of the above recommendations were considered, let alone implemented.

⁶⁷ Gutto *et al* (2007), *op cit*, 60.

⁶⁸ Speech by the Minister of Defence and First Chairperson of the NCoP, Mosiuoa Lekota, on the NCoP Summit on Intergovernmental Relations and Co-operative Governance, Cape Town: 2/05/2007.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

It was stated that in drafting the *Constitution* which “gave birth to the NCoP ... two of the most important principles were participatory democracy and co-operative governance.”⁷¹ On the tenth anniversary of the NCoP in 2007, the President said: It is at a cutting edge of intergovernmental relations and serves to entrench co-operative governance across the three spheres ...

It is a vital bridge in our democracy, straddling and drawing together South African citizens on the one hand and the legislatures, the executive and administrative organs of the state on the other. ... Accordingly, ten years after the inception of the House, the most logical thing to do is to ask ourselves whether the NCoP has achieved its key objectives and realised its strategic vision ...⁷²

Some ten years after SALGA and the NCoP were established, the Minister of Finance in addressing the shortage and inappropriateness of skills bedevilling South Africa’s desire for rapid socio-economic development, indicated that there was need to re-evaluate the number of provinces as well as the assignment of powers and functions. He stated that in writing the *Constitution* “we imbued the NCoP with a custodial role over our provinces” and unprecedented responsibilities, adding that there is need to enforce its accountability for performance “more vigorously in the context of our intergovernmental system.”⁷³

It is clear that expectations of the NCoP have not been met to date. In fairness, it is not only this institution that has not delivered, and one needs to take cognisance of its unique but seemingly subordinate role to that of the National Assembly and the apparent lack of leadership and resources for its effective functioning in the legislative and representative roles. The NCoP’s failure may also be due to a lack of precise definition of the powers and functions of provinces and their general ineffectiveness, thus again prompting the question of their need and that of the NCoP.

Research has shown that the institution’s limited efficiency and efficacy are due to:⁷⁴

- i. the legislative system being too complex;
- ii. functional overload – with too much work for its too few permanent delegates;
- iii. limited human resources;

⁷¹ *Ibid.*

⁷² Address of the President, Thabo Mbeki, at the 10th Anniversary of the NCoP, Cape Town: 4/05/2007.

⁷³ Manuel, Trevor (2007) *Not enough skills in South Africa to run nine provinces*, address by the Minister of Finance to the NCoP, Cape Town: 6/05/2007.

⁷⁴ Friedman, Steven ‘Power to the provinces’, (4) (1999) *Siyaya!* 45-46.

- iv. its status as subordinate to the National Assembly, and the problem that bills reach it at the end of the legislative process;
- v. time constraints;
- vi. the intergovernmental relations processes having effectively eclipsed the function of the NCoP, in that specific inputs could more meaningfully be made in the MinMECs (Ministers and Members of Executive Councils) and other instruments of co-operative governance; and
- vii. limited time spent in and with the provinces.

The *Constitution*⁷⁵ provides that only ordinary bills affecting provinces and listed in Schedule 4 may be introduced in the NCoP. Up to 2004, the second house had not used this provision since only three Bills successfully introduced since 1994 were by members of the National Assembly.⁷⁶ In its defence, however, the Chairperson of the NCoP asserted in 2013 that his Council made “numerous technical and substantial amendments to the *National Credit Act*, 34 of 2005, *Consumer Protection Act*, 68 of 2008, and the *Protection of State Information Act*, 41 of 1913.⁷⁷ However, it is a truism that the “significance of the NCoP is a contested issue” and one cannot make bold assertions about the Council because:

Very little research has been conducted on the role of the NCoP even though it has been in existence since 1997. Previous research also did not cover an entire parliamentary term of five years ... The NCoP is a unique institution and hence there are no similar houses against which it can be assessed or benchmarked.⁷⁸

NCoP delegates do not vote in the National Assembly. In the Council, they vote as individuals or as a block, based on their mandates from their provincial legislatures.⁷⁹ In the National Assembly decisions of the NCoP on section 76 Bills (those affecting provinces) may be defeated by a two-thirds majority, but only a simple majority is required to overturn the Council’s decision on other Bills.⁸⁰ This shows the subordinate status of the NCoP *vis-à-vis* the National Assembly. In the legislative field, the Council’s power is limited to “consider, pass, amend, propose amendments to or reject any legislation” before it, and to “initiate or prepare

⁷⁵ Section 76(3).

⁷⁶ Democracy Development Programme (2004) *Members’ Legislative Proposals: A Guide for the National Council of Provinces and Provincial Legislatures*, 28-29, ddp.org.za, accessed 9/04/2016.

⁷⁷ Mafilika, Vuyokazi Abegail (2013) *The Impact of the National Council of Provinces on Legislation*, mini-thesis for the degree of Master of Philosophy in Law, University of the Western Cape, 1.

⁷⁸ Mafilika (2013), *op cit*, 4.

⁷⁹ In terms of the *Mandating Procedures of Provinces Act*, 52 of 2008.

⁸⁰ Mugoya, BC (2010) ‘Evaluation of the Impact of the National Council of Provinces’, paper presented at the *Democracy Development Programme’s 6th Annual Government Conference*, Durban: 14-15 October 2010, 4-5.

legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3)” (ordinary bills affecting provinces).⁸¹ It is prohibited from initiating or preparing money Bills.⁸²

While this subordinate status is understandable because there cannot be two houses of Parliament with the same powers, it raises the question of the need for the second house. Its ability to promote and protect the interests of the provinces is largely dependent on the ability of provincial legislatures, and particularly on how they assimilate and process information from municipalities within their jurisdiction. In this respect, sound relations between municipal councils and provincial legislatures are necessary and within this context, the competency, and commitment of municipal representatives is key.

Provision is made for participation by local government in provincial legislatures, either by organised local government or municipalities or both, as observers.⁸³ Other structures provided for are provincial and district advisory forums, as well as provincial intergovernmental forums and premier’s co-ordinating forums.⁸⁴ While structures and processes have been established, there is little to indicate their implementation and monitoring, including their successes and failures. There appears to be little concrete co-operative governance beyond that needed for integrated development plans of municipalities.⁸⁵ Legislatures’ reports have little concrete evidence of provincial laws passed.⁸⁶ There is also little substance in progress reports of parliamentary Bills. For example, that of Gauteng’s Legislature in 2013 had 30 section 75 Bills and 16 section 76 Bills, all but one “informally referred” by the National Assembly.⁸⁷ Notwithstanding the constitutional power of the NCoP on legislation affecting provinces, most of it “emanates from the National Assembly.”⁸⁸ This may be due to the weakness of provincial legislatures to project and promote their perspectives into national policy.’⁸⁹

⁸¹ Sections 68(a) and (b), respectively, of the *Constitution*.

⁸² In terms of section 68(b) of the *Constitution*.

⁸³ Department of Provincial and Local Government (2006) *A Guideline Document on Provincial-Local Intergovernmental Relations*, Clause 3.7, p9.

⁸⁴ *A Guideline Document on Provincial-Local Intergovernmental Relations* 2006), *op cit*, 16-18.

⁸⁵ Such as in, for example, Gauteng Provincial Government (2010) *Gauteng Intergovernmental Relations Framework*.

⁸⁶ See, for example, *Gauteng Legislature Annual Report 2013-2014*, www.gautengonline.gov.za, accessed 17/05/2016, (336 pages).

⁸⁷ Gauteng Provincial Legislature: *Progress Report of Parliamentary Bills*, 11 October 2013, www.gautengonline.gov.za, accessed 17/06/2015.

⁸⁸ Mugoya (2010), *op cit*, 5.

⁸⁹ Comment by the President in *The National Council of Provinces – Perspectives on the First Ten Years*, (2008), 30, www.parliament.gov.za, accessed 17/05/2016.

Research has shown that insofar as its legislative role is concerned, the NCoP “plays a superficial role in Bills not affecting the provinces”; that the “electoral system has weakened the calibre” of its delegates; and that the Council may be “misguided about its role at times and not strategically situated to focus on matters of provincial competence.”⁹⁰ Hence, its ability to promote and protect the interests of municipalities through their representative structures, the provincial legislatures, is dubious.

Absent a track record in the legislative field, the NCoP could reconsider its role in lawmaking, perhaps leaving it to the National Assembly. Unfortunately, if it does not play a legislative role, its ability to further or enhance provincial interests at all times will be diminished. Therefore, it may not be the legislative role, *per se*, that is the problem, but how the NCoP participates in that function. Moreover, in a system that is no longer strictly hierarchical, it is not a foregone conclusion that local government will be better served if provincial interests are more efficiently represented. In view of the provinces’ shaky record and the unlikelihood of their performance improving in the near future, it would be preferable to have stronger direct representation for local government in the NCoP – even for the institution to become the ‘National Council of Provinces and Local Government’. Of course, making such provision is relatively easy, effective representation would still be a problem, mostly due to inadequate capacity of local government.

iv. Review

The NCoP has an important review function where, in specified instances, national and provincial executives may not act without its explicit consent. While this role may be limited in scope, it is “most significant in policing the relationship of interdependence between the spheres and to ensure that their distinctiveness is maintained as far as possible”.⁹¹ This function, if carried out efficiently, could indirectly affect local government beneficially in that the NCoP could veto national and provincial executives when they intervene in the integrity of a province or a municipality by taking up their responsibility for fulfilment of executive statutory duties. The NCoP’s constitutionally-explicit review and related functions, alongside the National Assembly, that could indirectly affect the health of municipalities and contribute to co-operative governance, are:

⁹⁰ Mafilika (2013), *op cit*, ix.

⁹¹ Department of Provincial and Local Government (1999) *Final Report on the Intergovernmental Relations Audit* (“Intergovernmental Relations Audit”) 95.

- i. Review of delegated legislation;⁹²
- ii. Review of the stopping of transfer of funds from Treasury to a province insofar as it may adversely affect municipalities therein;⁹³ and
- iii. Review of provincial supervision of and intervention in municipalities.⁹⁴

The NCoP does not have a record of its actions, if any, in the above fields. However, the views of Mathenjwa (2013) are relevant:

The Constitution confers the power on the national executive to intervene in local government, but is silent on the review of such intervention by the legislature. This is anomalous to the spirit of the Constitution, particularly where provision is made for the review of provincial government intervention in local government by the NCoP and the national Minister of Local Government.⁹⁵

Mugoya (2010) contends that “some of the review functions such as approving of national defence and national intervention in provinces have never been exercised in practice.”⁹⁶ The subordinate status of the NCoP is also evident in that the national executive is accountable to the National Assembly only and not also to the second house.⁹⁷

v. Oversight

Section 42(3), read with section 55(2) of the *Constitution*, expressly authorises the National Assembly to scrutinize and oversee executive action. Section 42(3), which describes the role of the NCoP, is silent on this function. Section 66(2) provides that the NCoP may require a minister, etc, to attend a meeting or a committee meeting. This implies that the NCoP may call the executive to account in the same way as the National Assembly does. The overwhelming view appears to be that the NCoP since its inception had not carried out this responsibility competently in that the “quality of scrutiny is not good”; that the institution is “very disorganised”; lacks focus and capacity; has “no real understanding of its oversight role”; and that “members are poorly prepared”.⁹⁸ Furthermore, there has been limited, if any, oversight

⁹² Sections 146(6)-(8) of the *Constitution*.

⁹³ Section 216(3) of the *Constitution*.

⁹⁴ In terms of section 139 of the *Constitution*. For definitions of the terms “supervision”, “monitoring” and “intervention”, see Mathenjwa (2013), *op cit*, 77-81.

⁹⁵ Mathenjwa (2013), *op cit*, 357.

⁹⁶ Mugoya (2010), *op cit*, 10.

⁹⁷ Sections 55(2)(a) and (b) of the *Constitution*.

⁹⁸ *The Intergovernmental Relations Audit* (1999), *op cit*, 97.

over the provinces, *per se*, particularly with respect to their responsibilities over municipalities and their relationships with SALGA.⁹⁹ An increase in the number of interventions¹⁰⁰ and site investigations thereon could overstretch the NCoP's capacity, and such actions may encroach on a province's executive authority. As part of its review functions, the NCoP is bound to be informed by the provincial executive within fourteen days of its intervention in a municipality; approve or disapprove it; review the intervention regularly; be notified of the dissolution of any municipal council; and if deemed appropriate, set aside such dissolution.¹⁰¹ In this context, the following view is enlightening:

However, the NCoP has in practice almost usurped the duties and responsibilities of the provinces in matters of intervention in local government. The NCoP is now immersed in management of the interventions and holding the provincial executive to account in the same manner as the PL.¹⁰²

This approach is inimical to local government interest as well as those of provinces, duplication of functions, and a deviation from the Council's core responsibilities. Again, the question arises as to the need and desirability of the NCoP.

In contributing to the Fourth Parliament's five priority areas being implemented under the theme 'Working together to ensure the delivery of quality services to communities', the NCoP undertakes an annual programme called 'Provincial Week'. For five days, the permanent representatives of a province visit their 'constituency' to ascertain problems relating to service delivery therein. While the political leadership and 'key stakeholders' in any province, as well as SALGA were consulted, it is not clear how the people were engaged with. The issue of duplication and reference to the "stampede" were echoed.¹⁰³ Provincial Weeks were introduced

⁹⁹ According to the *Intergovernmental Relations Audit* (1999), *op cit*, 94-95.

¹⁰⁰ In terms of section 139 of the *Constitution*.

¹⁰¹ In terms of sections 139(2)(a)(ii); (b)(ii); (c); (3)(a)(ii) and (b), respectively, of the *Constitution*.

¹⁰² Mugoya (2010) *op cit*, 12, basing his argument largely on De Visser, Jaap (2008) *Developmental Local Government: A Case Study of South Africa*, 189-190; Murray, C and Y Hoffman-Wanderer 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) 18 *Stellenbosch Law Review* 7, 24-27.

¹⁰³ Proceedings of the National Council of Provinces, 5/11/2009, *Hansard*.

in 2001 and were generally welcomed as a mechanism for increasing participation. “However, the link between the NCoP and the provincial legislatures remain weak.”¹⁰⁴ One of the reasons for this may be the Council’s limited capacity since only 54 of the 90 delegates are permanent and have to attend a multitude of committee meetings and undertake other tasks.¹⁰⁵ The proceedings of the NCoP mentions a report covering its activities for the period 2004 to 2009, but no specific reference had been made and this document is nowhere to be found. It is also not clear whether a consolidated ‘Provincial Week’ report had been tabled and debated. It would appear that the same problems or challenges are faced by every poor rural community visited, but they do not seem to have been quantified or measured scientifically or objectively. Hence, an NCoP meeting recorded in 133 pages consists of little more than repetitive statements, many self-congratulatory. It seems that this approach has been going on since 2002, but there does not appear to be any record of actions and achievements. SALGA, a participant, has been at times singled out for criticism.¹⁰⁶ It would seem that while the institutions have the resources and time to contribute to improved service delivery through co-operative governance, there is much talk, stampeding, duplication, and wasted effort, with local government bearing the brunt.

vi. Municipal representation in the NCoP

The NCoP is a constitutionally-established body, organised local government at the national level is not, and need not be.¹⁰⁷ Neither is SALGA a statutory institution in the conventional sense, as it is only ‘recognised’ by the Minister by way of notice in the *Gazette*. Steytler and De Visser (2014) assert that SALGA is a voluntary body but has “official status through the executive act of recognition.”¹⁰⁸ Under the circumstances, representation of a province on the NCoP could be by the MEC for local government serving the interests of municipalities within the jurisdiction of that province, as a special or permanent delegate,¹⁰⁹ supported by a technical

¹⁰⁴ Mugoya (2010), *op cit*, 7.

¹⁰⁵ In terms of section 60(2) of the *Constitution*.

¹⁰⁶ Proceedings of the National Council of Provinces, 5/11/2009, *Hansard*.

¹⁰⁷ Organised local government is ‘recognised’ and not established by the *Organised Local Government Act*, 52 of 1997 or the *Recognition of Organised Local Government: (Government Notice R175, GG 18645 dated 30 January 1998*.

¹⁰⁸ Steytler, Nico and Jaap de Visser ‘Local Government’ in Woolman, Stuart and Michael Bishop (2014) *Constitutional Law of South Africa*, Second Edition, Cape Town: Juta, Chapter 2, 22 – 1- 22 – 138, 22 – 128.

¹⁰⁹ In terms of sections 60(2) and (3), respectively, of the *Constitution*.

team comprising provincial and local government professionals and experts. This, then, would be a statutory body, operating in a manner that does not duplicate work of any organ of state, and is formally approved by municipalities governed.

It would be impractical for all 257¹¹⁰ municipalities to individually engage directly with the other two spheres of government, the NCoP, or any other existing or proposed mechanisms of governance. Hence, an effective representative organ is an ideal that should be pursued, a role that SALGA is supposed to play. “It has a number of statutory and constitutional duties which it executes with varying degrees of success.”¹¹¹ Pimstone (1998) contends that present institutional workings of co-operative government are unsatisfactory in that municipalities are, if not excluded, then inadequately represented by SALGA.¹¹² While the larger urban areas may have no need for organised local government as presently constituted and operational, the co-operative structure “may inadvertently be stifling the voice of weaker local authorities.”¹¹³

Any engagement with SALGA is further constrained by the discretion of the government organ by which it is called to consult. Furthermore, while the *Constitution* gives a voice to the associations in the NCoP, it does not oblige that their voice be heard as any inputs can be ignored. The provision for representation in the NCoP is well intentioned and a wonderful opportunity for local government to ‘state its case’.¹¹⁴ However, Steytler and de Visser (2014) argue that “local government’s participation in this body would appear to be an afterthought.”¹¹⁵ Currently there are three practical problems with municipal representation on the NCoP that needs to be addressed:

- i. Representation is by “organized local government” – the assumption is that SALGA will be able to represent different or a wide range of local government (municipalities’) interests efficiently. However, membership of an association for local authorities is voluntary and as such these organisations cannot formally represent non-member

¹¹⁰ Reduced from 278 for the local government elections of 3 August 2016. Powerpoint presentation of SALGA’s Councillor Induction Programme, 2016 by Dr Thoahlane Thoahlane for incoming and returning councillors. See slide 15.

¹¹¹ Steytler and De Visser (2014), *op cit*, 22-128.

¹¹² Pimstone, Gideon (1998) ‘The Constitutional Basis of Local Government in South Africa’, *Occasional Paper*, Johannesburg: Konrad Adenauer Stiftung, 9.

¹¹³ Singh, Anirood (2000) *Co-operative Government and the Promotion of Economic Development by Local Government Associations: A First Exploration*, unpublished LLM Dissertation, Pretoria: Unisa, 20.

¹¹⁴ In terms of section 67 of the *Constitution*.

¹¹⁵ Steytler and de Visser (2014), *op cit*, 22-128.

municipalities. Where the benefits of participation are not sufficient to justify joining, the association could well find itself not being fully representative, and acting for the minority, or only for the wealthier and more articulate municipalities. The voluntary nature of association membership is a factor that weakens the organisation, but it cannot be otherwise, without undermining the ‘autonomy’ of municipalities. Hence, status, capacity and representivity of organised local government are important, ultimately, for the association’s effective functioning in the NCoP.

- ii. A second problem is that participation occurs only “when necessary”. Therefore, it is a privilege, not a right. If the NCoP is not convinced as to the importance of local government representation on a particular issue, that matter would not be aired. This could occur frequently if, due to poor communications or lack of institutional capacity of municipalities and their representative organisation, the latter is unable to articulate their case clearly and forcefully. In addition, the *de facto* subordinate status of municipalities means that issues affecting them may be seen as unimportant. Perception could be reality; with such situation continuing, the view of subordination and low priority could become entrenched.
- iii. Thirdly, organised local government has no voting rights in the NCoP. This is indicative of both the *de iure* and factual low status of organised local government and municipalities. In the absence of an independent review of SALGA’s performance regarding municipal representation, would a vote really change anything? In this instance, a merely advisory role in the NCoP may be inadequate: there is need to influence decisions. The requisite status for SALGA could ensure this, but without adequate resources, the quality of inputs from local government would be poor, with adverse implications. Again, this is a reflection of capacity.

Both status and capability, it seems, are inadequate to justify the existence of what has been seen by critics as a ‘Cinderella’ institution, the NCoP. This is because the primary role of the second house is to look after the interests of the provinces. How can it effectively do so where all but one is controlled by the ANC and when –

All the members are beholden to party bosses for their positions on the election lists and a 70% majority gives the president and party leadership massive control.¹¹⁶

Perhaps the media will take the NCoP more seriously only when it assertively promotes the interests of the provinces through rejecting cabinet legislation approved by the National Assembly, in the “face of the wrath of party leaders.”¹¹⁷ The NCoP attempted this when it made a motion without notice that was approved but retracted a week later, in fear of upsetting the President himself.¹¹⁸ Under the circumstances, it is not clear what voting power to SALGA would mean in an institution that is ineffective and unlikely to promote local government.

The *Constitution* provides the opportunity for local government and its representative organisations to influence legislation that may affect them by means of comment on draft enactments.¹¹⁹ These bodies, however, must themselves have the requisite intellectual capacity to make meaningful input and also to engage with their constituents to be able to gather sufficient intelligence from the ‘grassroots’. Such experiential knowledge can be invaluable in ensuring a better fit between need and aspirations, on the one hand, and the policies, programmes and projects designed to deliver them, on the other. The *Constitution* recognises the importance of local government and has made apparently adequate provision for its participation in important institutions and processes directly affecting it. It is imperative that the institutional capacity of municipalities and associations for local authorities is enhanced by the other two spheres of government, to enable these organs to play a meaningful role in their prescribed activities. A further mechanism to facilitate or foster provincial-local government relations is for SALGA to be accorded observer status in provincial legislatures. This would aid transparency of provincial decision-making; will keep provincial legislatures informed of local government developments within the province concerned; and help align policies, plans, and programmes between the two spheres of government. While the Gauteng Legislature has put this proposal into practice, it is unclear as to whether organised local government has to date been able to make much meaningful contribution. The question arises as to whether SALGA is to be strengthened to play this role or whether municipalities alone, or with the Premier’s Intergovernmental Forum (PIF), should be accorded observer status.

¹¹⁶ Hartley, Wyndham: ‘Cinderella house must assert itself to be noticed’, Johannesburg: *Business Day*, 10/11/2004.

¹¹⁷ *Ibid.*

¹¹⁸ Notice without motion by the opposition Democratic Alliance against statements made by the President, adopted by the NCoP in the first week of November 2004, retracted a week later. Hartley (2004), *op cit.*

¹¹⁹ Section 154(2) of the *Constitution*.

Although municipalities are not directly represented on the Budget Council,¹²⁰ established for interaction between the national and provincial governments, they can have five representatives nominated by SALGA and one by each provincial association for local authorities.¹²¹ While such provision is laudable and a genuine attempt by the Treasury to incorporate the views of municipalities, the problem is that SALGA and her affiliates do not appear to have the capacity to effectively represent the country's 257 municipalities. A strong voice is essential, as the forum deals with certain matters essential to the health and wellbeing of municipalities, especially the process of revenue sharing.¹²²

Even where there is strong municipal representation, the limited effectiveness of the NCoP may nullify gains or retard progress. Steytler and de Visser (2014) argue that since the NCoP looks after the interests of provinces as a sphere of government, then local government “should also be accorded such an opportunity.”¹²³ They assert that the hierarchical nature of the spheres prevails in practice and that local government's engagement in legislation is merely consultative.¹²⁴ Under such circumstances, the provincial legislatures cannot, and will not, effectively represent the interests of municipalities within their jurisdictions. Steytler and de Visser (2014) add that “it is therefore not surprising that SALGA has put little effort into participating in the NCoP.”¹²⁵ They argue that the limitation implied by the term ‘when necessary’ in section 67 of the *Constitution* should be “generously interpreted”, considering that “any legislation that affects local government triggers the participation right” of SALGA. This also applies to the review by the NCoP of a provincial intervention in a municipality, and to its oversight function.¹²⁶

Mathenjwa (2013) argues that one sphere of government (provincial) cannot represent another (local government) in the NCoP. He adds that interpretation of section 67 of the *Constitution* means representation of local government is “optional” and equivalent to “observer status”,

¹²⁰ Section 2 of the *Intergovernmental Fiscal Relations Act*, 97 of 1997.

¹²¹ Section 5 of the *Intergovernmental Fiscal Relations Act*.

¹²² Section 8 of the *Intergovernmental Fiscal Relations Act*.

¹²³ Steytler and de Visser (2014), *op cit*, 22 – 129.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Steytler and de Visser (2014), *op cit*, 22 – 130.

confirming the “inferior status of local government.” He calls for “more effective local government representation” on the NCoP.¹²⁷ He adds that the shortcomings of the constitutional provision for local government representation on the NCoP can be resolved by constitutional amendment allowing permanent representatives from local government with full membership and thus with the right to vote.¹²⁸ However, such status may not amount to much if the NCoP itself is largely ineffective. It needs to be dissolved or restructured to play its envisaged or revised role.

vii. Current status of the NCoP

The general consensus on the NCoP, based on its activities from 1997 to 1999 and as reviewed by the *Intergovernmental Relations Audit* but perhaps still holding true today, is that it “was not working”.¹²⁹ It is contended that this is largely due to its ineffectiveness in applying itself to its main function: looking after provincial interests. Criticism is that in the process, there has been duplication of roles with the National Assembly; that the NCoP was unfocused; diffuse; that the component parts of the institution did not function optimally; and that it has not facilitated SALGA’s role in it.¹³⁰ The last shortcoming may be more that of organised local government than of the NCoP itself. Municipal participation in the NCoP plenaries is qualified in that they may do so only “when necessary”; only when a matter affects them; and that there shall be only one representative from SALGA. These restrictions are not clearly defined, resulting in ambiguity and confusion.¹³¹ In fairness it should be noted that much of the criticism of the NCoP was made when it was a new institution, functioning without any close precedent (the German *Bundesrat* is not an equivalent but was used as a guide by the Constitutional Assembly), hence “reaching a full understanding of its role is difficult” as it is still a “work in progress.” While such views¹³² are based on an evaluation of only its first few years of operation, it would seem that the NCoP has since made little progress in identifying, affirming,

¹²⁷ Mathenjwa (2013), *op cit*, 339-341.

¹²⁸ Mathenjwa (2013), *op cit*, 367.

¹²⁹ Report on Assessment of Parliament (2009), *op cit*, Chapter 4: 52.

¹³⁰ *Intergovernmental Relations Audit*, *op cit*, 98-100; Speech by the Minister of Defence and First Chairperson of the NCoP, Mosiuoa Lekota, at the NCoP Summit on Intergovernmental Relations and Co-operative Governance, Cape Town: 2/05/2007.

¹³¹ Rule 114 of the NCoP.

¹³² By Murray, Christina and Richard Simeon ‘From paper to practice: The National Council of Provinces after its first year’ 14(1) (1999) *SAPR/PL* 96-141, 96; and Pimstone (1998), *op cit*, 9.

and implementing its role. Hence, the criticism is valid even today, as can be confirmed by perusal of *Hansard* and the Report on the Assessment of Parliament.

The Assessment Panel noted that the “topics of debate in the NCoP do not always reflect a specific focus on the challenges faced by citizens on provincial and local level.” It recommended that this institution should “adopt a more focused approach in terms of its specific mandate.” The Assessment Panel further recommended that Parliament should “strive to timeously debate current matters of public concern.”¹³³

The Assessment Panel met with the chairpersons of the NCoP who listed their concerns. This included their “lack of capacity with regard to their size, budget, oversight and even their researchers’ capability.” The chairpersons stated that the NCoP’s relationship with the National Assembly and provincial legislatures “could be viewed as strained.” It was noted that public hearings on section 76 legislation were not held in provinces and the NCoP “did not have the mandate to enforce such public hearings to be held.” It was further noted that the “involvement of the local government sphere in the law-making process was erratic and inconsistent.” Deliberations on Bills were short compared to that in the National Assembly. This situation “reinforced the view that the NCoP was merely a process that needed to be followed.” It was stated that the NCoP’s engagement with provinces was problematic as it only did so on section 76 matters. In its defence, the NCoP argued that it is the “only arena in which all three spheres of government could engage on matters” as it was the custodian of intergovernmental relations, but admitted that “this did not function well.”¹³⁴

The Assessment Panel questioned the necessity of the NCoP within Parliament as well as its representation. The representative function of this institution was also queried as was “whether the will of those represented were properly represented.” The Assessment Panel stated that the accountability of Ministers to the NCoP was part of its mandate since they were accountable to Parliament, of which the NCoP was a constituent part. The Assessment Panel stated that “99% of the Bills originated from the national departments” and asked, “why they could not originate from the provinces as well, or from the NCoP.” A further question asked by the Assessment Panel was whether the NCoP represented the view of the people or that of provincial

¹³³ Minutes of the meeting between Committee of Chairpersons of the NCoP and the Panel for Assessment of Parliament, dated 22 October 2007, www.pmg.org.za, accessed 25/04/2015.

¹³⁴ *Ibid.*

legislatures. In this regard, one needs to consider whether and how provincial legislatures take in the views of municipal councils' legislatures that should be considering the views of their residents. The Chairperson of the Assessment Panel stated:

The reach and impact of public participation initiatives such as “Taking Parliament to the People” and the Women’s Parliament should be carefully reviewed to ensure that such initiatives result in tangible outcomes, including feedback to participating individuals and communities. It is necessary to review the process whereby issues raised during these events are referred to relevant committees so that they may be incorporated into formal participatory processes.¹³⁵

It should be noted that the NCoP “is a political institution designed to represent the provincial legislatures and to articulate political positions.”¹³⁶

The Constitutional Court’s recent judgment highlights a major failure of the NCoP:

The NCOP public participation process was unreasonable and thus constitutionally invalid. Failure by one of the houses of Parliament to comply with a constitutional obligation amounts to failure by Parliament. The deficient conduct of the NCOP in facilitating public participation in passing the Bill taints the entire legislative process and is a lapse by Parliament as a whole.¹³⁷

As the NCoP celebrates its 20th anniversary, its chairperson stated that it “is determined to forge its own identity and stop being seen as a rubber stamp for the National Assembly.”¹³⁸ She stated that when it was established, the Council was supposed to play a “distinct” role, and that it “can’t repeat what the National Assembly has done.” She queried whether 54 members were sufficient for this body as delegates are “over-stretched”. She contradicted her statement on the ‘distinctiveness’ by stating that, “We do exactly what the national Assembly is doing with fewer numbers”.¹³⁹ This raises the question on the need and desirability of the NCoP. The chairperson of the Council did not indicate how this body could be ‘distinctive’ and why, and how many delegates would be sufficient. The interview was a manifestation of muddled thinking by the head of the NCoP and may be a reflecting of the Council as a whole.

Absent a track record of achievements since its inauguration almost two decades ago, it is doubtful whether stronger and increased local government representation on the NCoP will achieve any useful purpose. The Council’s indirect representation of municipalities via their respective provincial legislatures does not disclose any benefits for local government. Whether there is a need for provinces and their representative organ in “one sovereign democratic

¹³⁵ *Ibid.*

¹³⁶ Steytler and de Visser (2014), *op cit*, 22 – 130.

¹³⁷ Per Madlanga J in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22, at paragraph 82.

¹³⁸ Chairperson Ms Thandi Modise in an interview, Johannesburg: *The New Age*, 8/02/2017.

¹³⁹ *Ibid.*

state”¹⁴⁰ has been asked since Union in 1910, but remains unanswered. In the event that the current three-sphere governmental system remains, there would be a need to ascertain how best all three spheres of government can perform co-operatively. Such research may provide answers as to how local government can best serve the people and how it can play a strategic role in policy formulation and implementation in a democratic, participatory developmental state.

5.3 OTHER MECHANISMS FACILITATING MUNICIPAL REPRESENTATION

Numerous institutions, instruments, mechanisms, and processes for development of the country proposed by the *Constitution* have been established through subsequent statutes. Some of these that may influence and impact on local government in general and municipal representation in particular, are addressed briefly below.

5.3.1 FINANCIAL AND FISCAL RELATIONS

The *Constitution* makes detailed provision for financial and fiscal matters affecting provinces and local government.¹⁴¹

i. The Financial and Fiscal Commission

The Financial and Fiscal Commission (FFC) is an independent, objective, impartial and unbiased constitutional advisory institution. It is a permanent expert Commission with a constitutionally-defined structure, set of generic responsibilities and institutional processes. The Commission advises and makes recommendations to Parliament, provincial legislatures, organised local government, and other organs of State on financial and fiscal matters. Its primary role is to ensure the creation and maintenance of an effective, equitable and sustainable system of intergovernmental fiscal relations in South Africa.¹⁴²

Steytler and de Visser (2014) argue that –

In contrast to local government’s ambiguous participation in the NCoP, the constitutional mandate for its participation in the FFC is more forthright.¹⁴³

¹⁴⁰ Section 1 of the *Constitution*.

¹⁴¹ Chapter 13 of the *Constitution*, particularly section 214 (Equitable share and allocations of revenue).

¹⁴² Summarised from www.ffc.co.za, accessed 15/05/2016.

¹⁴³ Steytler and de Visser (2014), *op cit*, 22 – 130.

Representation by provinces on the FFC has been reduced from nine to three.¹⁴⁴ Local government representation on the FFC is by “two persons selected after consulting organised local government”.¹⁴⁵ Adequate provision is made in the *Constitution* for the financial health of municipalities by, *inter alia*, the following provisions:

- i. The equitable division of revenue raised nationally;¹⁴⁶
- ii. Consultation by the FFC with organised local government;¹⁴⁷
- iii. That the FFC must take into account:
 - (a) the need to “ensure that provinces and municipalities are able to provide basic services and perform the functions allocated to them”¹⁴⁸
 - (b) the “fiscal capacity and efficiency of the provinces and municipalities”¹⁴⁹
 - (c) the “developmental and other needs of the provinces, local government and municipalities”¹⁵⁰
 - (d) economic disparities within and among the provinces¹⁵¹
 - (e) obligations of provinces and municipalities to national legislation¹⁵²
- iv. Revenue allocated to local government is a direct charge against the province’s Revenue Fund¹⁵³
- v. Provincial and local governments’ entitlement to revenue raised nationally¹⁵⁴
- vi. The power of municipalities to impose rates, taxes, and other levies¹⁵⁵

¹⁴⁴ Sections 221(1)(c) of the *Constitution*, complied by section 5(1)(c) of the *Financial and Fiscal Commission Act*, 99 of 1997, as amended.

¹⁴⁵ Section 5(1)(b) of the *Financial and Fiscal Commission Act*, 99 of 1997, as amended.

¹⁴⁶ Section 214(1) of the *Constitution*.

¹⁴⁷ Section 214(2) of the *Constitution*.

¹⁴⁸ Section 214(2)(d) of the *Constitution*.

¹⁴⁹ Section 214(2)(e) of the *Constitution*.

¹⁵⁰ Section 214(2)(f) of the *Constitution*.

¹⁵¹ Section 214(2)(g) of the *Constitution*.

¹⁵² Section 214(2)(h) of the *Constitution*.

¹⁵³ Section 226(3) of the *Constitution*.

¹⁵⁴ Section 227(1) of the *Constitution*.

¹⁵⁵ Section 229(1) of the *Constitution*.

While some of these prescriptions accentuate a hierarchical relationship and therefore the possibility of conflicts and tensions, it nevertheless highlights the importance of provincial and local government, and make for clear and unambiguous provisions in co-operative governance.¹⁵⁶ Hence, competent municipal representatives are required to protect and promote local government interests.

ii. Division of Revenue Act¹⁵⁷

Another statute that is crucial to the financial well-being of municipalities is the (annual) *Division of Revenue Act (DoRA)*. The purpose of this statute is “to provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government and the responsibilities of all three spheres pursuant to such division.” Municipalities have an unusually high level of financial autonomy, defined in terms of its access to revenue not being subject to the discretion of another sphere of government.¹⁵⁸ A province does not dictate revenue and expenditure as the FFC has given local government sufficient autonomy in management of own revenue. Again, sound municipal representation is essential to promote local government interests.

5.3.2 MUNICIPAL REPRESENTATION IN NATIONAL – LOCAL RELATIONS

The only constitutionally-mandated opportunity for municipalities to engage directly with national government is through participation in national development programmes,¹⁵⁹ although how this would be undertaken is unclear. Another way of direct engagement is with certain ministries that do not have provincial counterparts. Some statutes require inter-departmental co-operation for them to function effectively,¹⁶⁰ however, in all other cases contact is by remote control, through SALGA, a situation not ideal but practical, in the sense that not all municipalities can individually participate in structures at the national sphere.¹⁶¹ While the constitutional provisions are welcome, the health and well-being of local government depend largely on how its representative organ participates and makes the voice of municipalities heard. Thus far it is little more than a plaintive cry for help, which has been largely ignored.

¹⁵⁶ Respectively, sections 214, 215, 216, 217, 218, 220, 226, 227, 228, 229 and 230 of the *Constitution*.

¹⁵⁷ The *Division of Revenue Act* is an annual statute.

¹⁵⁸ *Discussion Document: Towards a National Policy on Intergovernmental Relations* (2006), *op cit*, 4.

¹⁵⁹ Section 153(b) of the *Constitution*.

¹⁶⁰ Such as the *National Environmental Management Act*, 107 of 1998 and the *Spatial Planning and Land Use Management Act*, 16 of 2013.

¹⁶¹ In the President’s Co-ordinating Council; NCoP; FFC; and Budget Council.

5.3.3 MUNICIPAL REPRESENTATION IN PROVINCIAL – LOCAL RELATIONS

Statutorily,¹⁶² engagement is supposed to be undertaken collectively, through the PLGAs, although most interaction is informal, as these institutions are largely dysfunctional. Hence, there is a clear void, which is disadvantageous to municipalities.

It has been suggested that

The role of provincial legislatures be refocused, and mechanisms to strengthen legislatures should be developed. Consideration should be given to *municipal representation in legislatures* to strengthen participatory democracy and representation.¹⁶³

Carim (2012) argues for a “definite role for legislatures” when a provincial government intervenes in a municipality. He further asserts that provincial government should be accountable to local communities where services are funded by the Provincial Equitable Share. He adds that the “interface between citizens and provinces also needs to be strengthened” so that residents can become involved in the “passing of provincial bills.”¹⁶⁴

5.3.4 MUNICIPAL REPRESENTATION IN TRADITIONAL LEADERSHIP

Up to the coming into operation of the *Local Government Transition Act*¹⁶⁵ in 1993, traditional authorities performed some local government functions in the former “homelands” or Bantustans.¹⁶⁶ This role fell away with the advent of ‘wall-to-wall’ municipalities from 2000 whereby all land would fall within the spatial and functional jurisdiction of municipalities.¹⁶⁷ Traditional leaders may attend municipal council meetings and participate in them, but their role would be limited as they are not democratically-elected councillors. As such, they have no right to vote.¹⁶⁸

The *Constitution* recognises the “institution, status and role of traditional leadership” as well as traditional authorities and customary law practised by them.¹⁶⁹ The *Constitution*¹⁷⁰ makes provision for legislation to give effect to the role of traditional leaders.¹⁷¹ This results in an

¹⁶² In terms of section 2(1) of the *Organised Local Government Act*, 52 of 1997.

¹⁶³ Carim (2012), *op cit*, 12. Emphasis in the original.

¹⁶⁴ Carim (2012), *op cit*, 14-15.

¹⁶⁵ 209 of 1993.

¹⁶⁶ Steytler and De Visser (2014), *op cit*, 22 – 41.

¹⁶⁷ *Ibid.*

¹⁶⁸ In terms of section 81(1) of the *Structures Act*; Steytler and De Visser (2014), *op cit*, 22 – 42.

¹⁶⁹ Sections 211 and 212 of the *Constitution*.

¹⁷⁰ Section 212 of the *Constitution*.

¹⁷¹ *Traditional Leadership and Governance Framework Act*, 41 of 2003.

increase of the number of role players at the local government sphere in rural areas and thus the potential of increasing conflict. The *de facto* rural governance hierarchy is depicted in Figure 5.1, showing how complex and confusing the local government operating environment is, especially in rural areas. While the *Constitution* and its supplementary and complementary statutes set out how the governmental system is structured and to be operated, the situation on the ground may be different and could be attested to by residents of rural areas under traditional leadership. This has implications for effective municipal representation.

5.3.5 MUNICIPAL REPRESENTATION AND COGTA

CoGTA's vision is stated thus: A functional and developmental local government system that delivers on the constitutional and legislative mandates within a system of cooperative governance.¹⁷²

From the foregoing, it would appear in its current form, CoGTA has no direct responsibility over provincial government. Its mission statement indicates that the department plays a supportive and promotional role, based on its mandate deriving from chapters 3, 5, 6 and 7 of the *Constitution*.¹⁷³ CoGTA's "primary mandate" is to:¹⁷⁴

- "Develop and monitor the implementation of national policy and legislation, seeking to transform and strengthen key institutions and mechanisms of governance to fulfil their developmental role;
- Develop, promote and monitor mechanisms, systems and structures to enable integrated service delivery and implementation within government; and
- Promote sustainable development by providing support to and exercising oversight over provincial and local government."

¹⁷² CoGTA Annual Performance Plan 2016/17, 6.

¹⁷³ *Ibid.*

¹⁷⁴ CoGTA Annual Performance Plan 2016/17, 7.



Figure 5.1: Rural Governance Hierarchy

From consideration of the above, it appears that CoGTA plays a largely regulatory role to ensure compliance by municipalities. Furthermore, CoGTA is mostly process-oriented, rather than an institution contributing to development through capital projects. It also does not seem to have held provincial government to account, particularly with respect to its obligation to strengthen and support the capacitation of municipalities, in terms of section 144(1) of the *Constitution*.

CoGTA has nine priority areas in its “performance environment”.¹⁷⁵ These seem to be too many, appear to be vague and ambiguous, and more like statements of intent than specific, measurable, attainable, realistic, and time-bound (SMART) goals. Its current endeavour to strengthen local government is the “Back to Basics” Programme, based on five “pillars” that appear vague, as do its six programmes, seven goals, eleven strategic objectives, twelve outputs, and twenty-one performance indicators in its “Programme Performance Plans for the 2016/17 financial year.”¹⁷⁶ It is stated that “The Department does not manage any long-term infrastructure and capital plans.”¹⁷⁷ CoGTA has three public entities reporting to it and to which it provides minimal funding.¹⁷⁸

From the foregoing, it appears that CoGTA is not a significant player in the development of South Africa. Hence, there appears to be no mechanisms or opportunities for municipal representation. However, one of its strategic objectives could be used to leverage it:

Depending the relationship between citizens and local government through improved citizen engagements by March 2019.¹⁷⁹

To fulfil its constitutional duty to support local government¹⁸⁰ in an environment with persistent and chronic challenges, CoGTA embarked on several “short-term deployment interventions”:¹⁸¹

- i. Project Consolidate;
- ii. Joint Initiative on Priority Skills Acquisition (JIPSA);
- iii. *Siyenza Mange* Project;
- iv. Municipal Finance Management Programme;

¹⁷⁵ *CoGTA Annual Performance Plan 2016/17*, 9.

¹⁷⁶ *CoGTA Annual Performance Plan 2016/17*, 10, 13-50.

¹⁷⁷ *CoGTA Annual Performance Plan 2016/17*, 42.

¹⁷⁸ In the 2016/17 financial year: SALGA (R567 611), Municipal Infrastructure Support Agent (R349 889), and Municipal Demarcation Board (R58 720), *CoGTA Annual Performance Plan 2016/17*, 43.

¹⁷⁹ *CoGTA Annual Performance Plan 2016/17*, 13.

¹⁸⁰ In terms of section 154(1) of the *Constitution*.

¹⁸¹ Ntliziywana, Phindile ‘Adding Injury to Insult: Intrusive Laws on Top of a Weak System’ (2016) *Constitutional Court Review Vol VI*, 32-56, 36.

- v. Local Government Leadership Academy and Municipal Leadership Development Programme;
- vi. Five-Year Local Government Strategic Agenda;
- vii. Local Government Turnaround Strategy; and the current
- viii. Back to Basics Strategy.

It has been said that the above initiatives and “legislative interventions in human resource practices” results in over-regulation, “overreach and a lack of coordination” that “now threaten to stifle local government and threaten the rule of law.”¹⁸² Given overregulation of local government with attendant duplication, overlaps, and confusion, Ntliziywana (2016) suggests:

The establishment of a special Cabinet Committee on provincial and local government whose aim will be to discuss and scrutinise all policy and legislation impacting on sub-national government before they go to Cabinet for decision.¹⁸³

This appears to be an *ad hoc*, piecemeal or partial solution. Government has been operational for over two decades. While a major overhaul of the governmental system is not recommended, there is need for a long term and sustainable approach to socio-economic development, guided by the *National Development Plan*, with local government playing a major role. At this juncture, a review of what plans and institutions are working, and what’s not. Institutional assessments are required, especially the efficiency, efficacy, and role of some ministries, as well as of the *IRFA*, *CoGTA*, the *NCoP*, and *SALGA*. It may be an opportune time to do this, in light of the 2019 national and provincial elections.

5.3.6 MUNICIPAL REPRESENTATION AND SUBMISSIONS

A submission may be made when called for publicly by Parliament or a provincial legislature when a Bill is discussed therein. It is one way for a member of the public making his or her voice heard before a Bill becomes an Act of Parliament.¹⁸⁴

5.3.7 MUNICIPAL REPRESENTATION AND PETITIONS

The *Constitution* makes provision for the receipt of petitions by the National Assembly and the *NCoP*.¹⁸⁵ A petition is a “formal request to Parliament for intervention in a matter” by way of either a “request for assistance with a specific issue or for the redress of a grievance.” It is a

¹⁸² *Ibid.*

¹⁸³ Ntliziywana (2016), *op cit*, 55.

¹⁸⁴ From parliament.gov.za, accessed 18/05/2016.

¹⁸⁵ Sections 56(d) and 69(d), respectively.

way of making one's voice heard after a bill has become law and thus may be a request for changing it.¹⁸⁶ A national petitions act has been mooted,¹⁸⁷ while the Gauteng Government has been proactive in passing one,¹⁸⁸ as has the City of Johannesburg, within one of its standing committees, the Petitions and Public Participation Committee.¹⁸⁹

5.3.8 MUNICIPAL REPRESENTATION AND ELECTORAL REFORM

The Assessment Panel recommended that the “impact of the party list electoral system as it is currently structured” and “potential alternative systems” should be considered by Parliament.” It believed that the present model “should be replaced by a mixed system” which could “capture the benefits of both the constituency-based and proportional representation electoral systems.”¹⁹⁰

A mixed or hybrid electoral system is used for municipal elections. For metropolitan municipalities, there are two types of elections: ward and proportional representation (PR). In all other local municipalities, there are 3 types of elections in each ward: local council ward, local council PR, and district council PR.¹⁹¹ Much dissatisfaction has been expressed with this system by political parties and commentators. It has been argued that the PR system rewards loyalty to parties and their leaders. Such councillors cannot really be held accountable by the public, something the Van Zyl Slabbert Commission asked for in 2002. The chief electoral officer of the Independent Electoral Commission (IEC) countered by saying, “The truth must be told – elections and electoral system are complex issues.”¹⁹² The matter of accountability could be addressed if an open list PR system was used, instead of the closed one which creates a system of patronage.

Chiroro (2008) cautions that “changing the electoral system alone might not enhance accountability,” arguing that “political reforms require much political skill in order to reconcile contradictory interests in a peaceful manner.”¹⁹³

¹⁸⁶ From www.parliament.gov.za, accessed 18/05/2016.

¹⁸⁷ ‘National Petitions Act mooted’, www.gov.za, 25 July 2012.

¹⁸⁸ *Gauteng Petitions Act*, 5 of 2002.

¹⁸⁹ From www.joburg.org.za, accessed 18/05/2016.

¹⁹⁰ Report on Assessment of Parliament (2009), *op cit*, Chapter 3: 45.

¹⁹¹ Electoral Commission – www.elections.org.za, accessed 21/05/2016.

¹⁹² *Ibid.*

¹⁹³ Chiroro, Bertha ‘Electoral System and Accountability: Options for electoral reform in South Africa’, *Policy Paper*, Issue No 3, January 2008, Johannesburg: Konrad Adenauer Stiftung, 20.

It has been said –

The current closed PR system limits democracy and doesn't encourage citizenship and citizen participation.... The current electoral system permits very little real participation by the public ...¹⁹⁴

Fakir (2014) observed that in the 2014 national and provincial elections, nine parties shared 6.5% of electoral support and 30 seats among them, a manifestation of “excessive proliferation and fragmentation amongst ‘opposition’”.¹⁹⁵ He argued that –

Each electoral system has distinct advantages and disadvantages ... Mixed systems may minimise disadvantages and maximise advantages, but depending on the mix used can potentially create such overwhelming systemic complexities that they are rendered indecipherable to citizens.¹⁹⁶

Although a single-member constituency system has many defects, the elected representative would be more accountable to his or her constituency than is possible in the present system. While a pure mixed system at local government has the potential for better accountability and responsiveness, it is no guarantee of success in South Africa. However, it has the benefits of inclusivity and fairness arising from the PR system.¹⁹⁷

On electoral reform, Fraser (2015) states that “no action has been taken in the last 10 years,” adding that the disadvantages of the PR system “in practice seem to outweigh the supposed benefits,” especially with respect to accountability.¹⁹⁸ Moses (2012) argues that:¹⁹⁹

The ETT assessed the PR system on four key values: fairness; inclusiveness; simplicity; and accountability. It found that the existing PR system was strong on principles of fairness, inclusiveness and simplicity, but the team remained doubtful whether this system satisfied the principle of accountability.

While the majority of the Electoral Task Team (ETT) recommended that the existing structure be replaced by a mixed electoral system, the minority report “advocated that the PR system should be retained in its current form,” a position adopted by Cabinet.²⁰⁰

¹⁹⁴ Khathwane, Ntombenhle ‘Why we need electoral reform’, Johannesburg: *Mail & Guardian*, 14/08/2012.

¹⁹⁵ Fakir, Ebrahim ‘The electoral system: Is there vice or virtue in reform?’ Johannesburg: *Daily Maverick*, 22/05/2014.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ Fraser, Ashleigh ‘Electoral Reform – What Political Parties Have To Say’ Johannesburg: *Helen Suzman Foundation*, 25/04/2015.

¹⁹⁹ Moses, Meshay ‘Electoral Reform in South Africa’, Southern African Catholic Bishops Conference, Parliamentary Liaison Office (2012) *Briefing Paper* 285.

²⁰⁰ *Ibid.*

5.4 MUNICIPAL REPRESENTATION IN LOCAL GOVERNMENT

By way of illustration, the Council and committees of the City of Johannesburg are depicted below.²⁰¹ The nature and composition of committees are mechanisms for local participatory and representative democracy.

5.4.1 COUNCIL AND MAYORAL COMMITTEE

The City of Johannesburg comprises a legislature (Council); an executive arm (comprising the executive mayor and the mayoral committee); and the administration. The Council focuses on legislative, oversight and participatory roles, principally as lawmaker and the processes underpinning this function. The Council delegates its executive function to the executive mayor and the mayoral committee. Council is made up of 260 councillors. It has the following structures:

- i. The Speaker (Chairperson of Council);
- ii. The Chief Whip;
- iii. Standing committees; and
- iv. Section 79 committees.

5.4.2 STANDING COMMITTEES

These are permanent committees dealing with Council matters. They have some decision-making powers related to the legislature.

- i. Chairpersons;
- ii. Ethics/Disciplinary;
- iii. Municipal Public Accounts;
- iv. Petitions and Public Participation;
- v. Programming;
- vi. Rules; and
- vii. Audit.

²⁰¹ From www.joburg.org.za, accessed 22/05/2016.

5.4.3 SECTION 79 COMMITTEES

Section 79, or portfolio committees, monitor the delivery and outputs of the executive. Each one monitors a council portfolio and may call departments, municipal entities, and members of the mayoral committee to account. They have an oversight role but no delegated decision-making powers. The current committees are:

- (a) Corporate and Shared Services;
- (b) Community Development;
- (c) Development Planning;
- (d) Economic Development;
- (e) Environment, Infrastructure and Services;
- (f) Finance;
- (g) Health and Social Development;
- (h) Housing;
- (i) Transport;
- (j) Public Safety;
- (k) Oversight Committee on Gender, Youth and People with Disabilities;
- (l) Oversight Committee on Governance; and
- (m) Oversight Committee on the Legislature.

The *Systems Act* empowers municipalities to establish private companies, service utilities, and multi-jurisdictional service utilities.²⁰² Parent municipalities have prescribed duties and responsibilities over its entities, as well as governance requirements.²⁰³ Thus, municipal representatives' roles and responsibilities may be wide-ranging and calling for different skills and competencies.

5.4.4 WARD COMMITTEES

Municipal councils must be accountable to their local communities. They can be more so if they use their constitutional right to participate in municipal matters.²⁰⁴ The structure facilitating this is the ward committee. The object of a ward committee is to enhance participatory democracy.²⁰⁵

²⁰² Sections 86C, 86H, and 87, respectively.

²⁰³ Sections 93A-J of the *Systems Act*.

²⁰⁴ Sections 152(1)(a) and (e) of the *Constitution*.

²⁰⁵ Section 73 of the *Structures Act*.

The eThekweni municipality sets out that such a committee:²⁰⁶

- i. Is an advisory body without any executive powers;
- ii. Is independent;
- iii. Represents the interests of the ward residents; and
- iv. Is impartial and performs its functions without fear, favour or prejudice.

Proportional representation (PR) councillors are deployed by the Speaker of Council to serve in ex-officio capacity to assist and complement the work of the ward councillors and participate in, deliberate, but do not have a vote.²⁰⁷ Ward councillors are not remunerated, except for out of pocket expenses.²⁰⁸

5.5 CONCLUSION

This chapter analysed the mechanisms and processes that make provision for municipal representation. It has shown that there are many opportunities for representing local government, that is, of people resident in the 257 municipalities. However, such representation is based on or contingent upon all three spheres of government functioning co-operatively. This relates largely to institutions and their processes that accommodate municipal representation. This representation is largely dependent on sound intergovernmental relations with the national and provincial spheres recognising the role of local government and providing space for their participation in the development of South Africa. However, it has been shown that government in practice still operate in tiers, with local government at the bottom of the hierarchy. This is shown starkly in local government representation in the NCoP and this institution's *modus operandi*.

Local government representation through SALGA is inadequate but the major flaw is in the design of the NCoP. It represents the interests of provinces and not those of the local government sphere. Furthermore, provincial legislatures cannot represent a 'distinctive' sphere of government. SALGA is 'recognised' but is not a statutory body in the conventional sense. Being a voluntary organisation, it cannot effectively represent government even where it has

²⁰⁶ eThekweni Municipality (2005) *Rules Regulating the Establishment and Operation of Ward Committees*, 1.

²⁰⁷ *Ibid*, 2.

²⁰⁸ *Ibid*, 6.

been given the space to do so. This is because the NCoP has not been designed, and does not function to promote and protect the interests of municipalities. If provinces and the NCoP are to be retained, the Council should be redesigned through constitutional amendment to incorporate representing the interests of local government.

CHAPTER 6

MUNICIPAL REPRESENTATION WITHIN THE FRAMEWORK AND CONTEXT OF CO-OPERATIVE GOVERNANCE: A COMPARATIVE REVIEW

6.1 INTRODUCTION

The *Constitution* established “national, provincial and local spheres of government which are distinctive, interdependent and inter-related.”¹ Section 41(1) further provides, *inter alia*, that “all spheres of government and all organs of state within each sphere must –

- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the *Constitution*;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in the other spheres; and
- (h) co-operate with one another in mutual trust and good faith.”

The *Constitution* stipulated that “an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations.”² In compliance with this directive, the *Intergovernmental Relations Framework Act*³ was enacted.

Given what appears, on paper, to be almost equivalent status to national and provincial government, it would seem that the *Constitution* provides only eight opportunities for national – local government and its communities’ interaction:

- i. Election of members of Parliament;⁴
- ii. By way of petitions, representations or submissions to the National Assembly;⁵
- iii. Public involvement in the legislative and other processes of the National Assembly;⁶

¹ Section 40(1) of the *Constitution*.

² Section 41(2) of the *Constitution*.

³ 13 of 2005 (*IRFA*).

⁴ In terms of section 46(1) of the *Constitution*.

⁵ In terms of section 56(d) of the *Constitution*.

⁶ In terms of section 59(1)(a) of the *Constitution*.

- iv. Local government representation on the NCoP;⁷
- v. By way of petitions, representations or submissions to the NCoP;⁸
- vi. Public involvement in the legislative and other processes of the NCoP;⁹
- vii. Local government participation in national development programmes;¹⁰ and
- viii. Commenting on draft legislation.¹¹

The above indicates what appears to be limitations on local government's participation in formulating national policies that would be implemented in its localities.¹² Given that local authorities became an integral part of the three-sphere government, it is imperative that municipal representatives play their role in promoting and protecting the interests of their councils and residents. The co-operative governance and intergovernmental provisions enable and facilitate such participation. In the process, municipal representatives could engage in national policy formulation. However, being an emerging participatory democracy, the Republic does not enjoy the benefit of local government precedents within its unique governmental system. Additionally, it does not want to experiment with its new-found freedoms and powers as this could come at a price. Thornhill (2008) contends that since Union in 1910, the approximately 1 100 local authorities were agents of central government, functioning in accordance with provincial ordinances. The change in status to "government" from after 1994 was a paradigm shift.¹³

This chapter examines the background to and challenges faced by co-operative governance; its history, evolution nature, characteristics, and content. It reviews how the subject has been approached, managed, implemented, and reformed in certain countries that have engaged in it for a reasonably long time such that lessons of experience can be gleaned that could inform how best to design municipal representation. This would be informed by the nature of central, regional and local authorities and their relations *inter se*, with particular interest on the status of municipalities in such intergovernmental systems. From such overview, it is hoped that the need and desirability, nature, status, powers, role and functions of a local government

⁷ In terms of section 67 of the *Constitution*.

⁸ In terms of section 69(d) of the *Constitution*.

⁹ In terms of section 72(1)(a) of the *Constitution*.

¹⁰ In terms of section 153(b) of the *Constitution*.

¹¹ In terms of section 154(2) of the *Constitution*.

¹² See Chapter 4 highlighting inadequate representation of local government in the NCoP.

¹³ Thornhill, Chris 'Local Government after Fifteen Years: Issues and Challenges', in De Villiers, Bertus (2008) *Review of provinces and local government in South Africa: Constitutional foundations and practice*, occasional papers, Johannesburg: Konrad Adenauer Stiftung, 59-82, 60. See Chapter 2 of this thesis.

association as municipal representative can be determined. In the process, it would evaluate whether the current system, with an external, politically-driven agency, the South African Local Government Association (SALGA), is the best vehicle for municipal representation.

Co-operative governance is a wide, deep and complex field. This is because –

The South African Constitution and IGR Act are by far the most elaborate and detailed intergovernmental legal framework in the world. The Constitution sets the philosophy and tone of IGR, while the IGR Act provides for structures and conflict-resolution mechanisms.¹⁴

The issue is whether a detailed, formalised intergovernmental relations system is appropriate for an emerging democracy. Space limitations do not allow for detailed studies of any system. This is, firstly, because they may not, eventually, be found to be suitable. Rather, this study undertakes overviews of practical approaches that may enable one to draw from the best of many. This is facilitated greatly by South Africa's constitutional and statutory provisions that provide the foundation, framework, context and guidelines that permit use of a combination of both formal and informal approaches in a flexible and accommodative manner. While proceeding from a *tabula rasa* could be daunting, some comfort may be gained from learning through successes and failures of municipal representation through co-operative government as applied in other countries. The overviews enable the question to be put and answered as to how co-operative governance can be designed, implemented and managed to best serve the interests of local government and whether there is a role for associations of local authorities generally, but particularly in post-apartheid South Africa.

6.2 BACKGROUND TO AND CHALLENGES OF CO-OPERATIVE GOVERNANCE

In most countries throughout the world local authorities had historically been viewed and accepted or acknowledged as the lowest tier of government in a hierarchical relationship. Hence, often their status was not formalised constitutionally or statutorily. As such, they operated mainly as service delivery agencies implementing policies of the centre, within their respective spatial jurisdictions for the communities resident therein, as in South Africa. This situation would not be problematical if central government itself was able to meet the

¹⁴ De Villiers, Bertus and Jabu Sindane (2011) *Co-operative Government: The Oil of the Engine*, Policy Paper No 6, Johannesburg: Konrad Adenauer Stiftung, 36.

reasonable needs of diverse and far-flung localities.¹⁵ The following quotation succinctly sets out the historically low status of municipalities:¹⁶

The Constitution of the United States of 1786 was silent on local government, rendering local government a residual matter under the states' jurisdiction. This was also the case with the Swiss Constitution of 1848. In the Canadian Constitution of 1867 local government was mentioned, but only to designate it as a field of provincial competence. The Brazilian Constitution of 1891 was silent on the matter, as was the Australian federal constitution of 1901. Exceptions to this practice before World War Two were the Weimar Republic of 1919 and the Austrian republican constitution of 1920, where the right of local self-government was recognised.¹⁷

According to Tilkorn (2004), the historical evolution of local self-government can be traced, largely, from developments especially in Germany. "Even in the early Middle Ages, a process started where communes were given self-government rights by the rulers of the German states," wherein citizens were allowed "honorary participation in matters of local community." In 1835 a guiding pattern for local self-government, including administration, in the economic, professions, cultural, and social fields was approved and implemented.¹⁸ Article 28(2) of the *Grundgesetz* (German Basic Law or Constitution) of 1949 gave communes the guaranteed right and responsibility to regulate all the affairs of the local community in compliance with legal provisions, as expected in a *Rechtsstaat*, a state governed by law.

The *European Charter of Local Self-Government*¹⁹ clearly spelt out the status, role and other responsibilities and entitlements of local government, including its right to associate and co-operate both within the Union and internationally, as well as for its legal protection. The *Charter* could have been the catalyst for a wave of reforms in European local government.

¹⁵ Except for Scandinavian countries and some in Europe, for example Germany, as shown in this study. See Chapter 3: 3.4.2: Early Assemblies in England; 3.4.3: Parliamentary Supremacy in Great Britain; and 3.5: Representation in South Africa, for a review of historical local authorities and representation.

¹⁶ In this study the terms 'local authorities', 'local government', and 'municipalities' are used interchangeably, as are 'co-operative governance' and 'intergovernmental relations'; all are to be understood to have an equivalent meaning.

¹⁷ Steytler, Nico 'An international perspective on the constitutional recognition of local government' in (2006) *Outline of Grand Design for Protection for Local Self-Government II – Local Self-Government System Study Group Report*, Tokyo, www.nga.grip/english/nga/pdf20061211, 1-2.

¹⁸ Tilkorn, Erich 'Local Self-Government in Germany: An Outline' in (2004) *Reforming Public Administration: Efforts and Perspectives in South-East European Countries*, Zagreb: Friedrich Ebert Stiftung, 7.

¹⁹ Council of Europe (1985) *European Charter of Local Self-Government*, Strasbourg, 15 October 1985, European Treaty Series No 122.

It has been said that intergovernmental relations –

...flows from the inevitable fact of interdependence among the constituent governments, a result of the complexities of the contemporary policy agenda and the impossibility, even when the inspiration was to create water-tight compartments of drawing clear and separate lines of responsibility.²⁰

Most of the literature on co-operative governance in foreign countries is on national-regional or federal-state relations, except, as in the Nordic states and some European countries, where interaction is with associations representing regional or county and local governments. Some of these are reviewed to identify good practices that could be adopted by South Africa. Co-operative governance is analysed in its two constituent parts, namely:

- i. Intergovernmental relations within sovereign states, that is, nationally; and
- ii. International intergovernmental relations, largely through a municipality in one country entering into a relationship with a local government institution in another.

This approach is dictated by South Africa being part of a globalising economy where rapid communication enables learning without much expense. In a knowledge-based society, the experiences of other countries could serve as lessons in planning and implementing approaches that have worked elsewhere.

Literature in this field generally is limited, being a neglected area, particularly where legal instruments establishing the government's predetermined relations and their operations and engagement or interaction are along prescribed lines. The reason for this dearth of information is that in almost all countries intergovernmental relations are not constitutionally and statutorily prescribed as inter-governmental co-operation would be a legitimate expectation of a state, be it unitary, federal, or whatever. This is also because the subject matter concerns human and largely political, rather than administrative relations and have thus tended to be informal, and often not recorded as minutes or otherwise documented. The paucity of knowledge, theory, and empirically-proven 'good practices' are particularly felt at the local level. According to Agranoff and McGuire (1988), the result is that generally and quite widely, there is little clear understanding of both the inter-organisational and the operational complexities faced by the local government practitioner, especially in a multi-organisational context.²¹

²⁰ Chattopadhyay, Roopak (2016) *Intergovernmental Relations: A Comparative Survey of Structures and Processes*, Opening Address at the International Conference on Cooperative Federalism, New Delhi, India, 21 January 2016, 1-20, 1.

²¹ Agranoff, Robert and Michael McGuire 'The Intergovernmental Context of Local Economic Development' 30(3) (1998) *State and Local Government Review*, 150-164, 150.

In this study emphasis is placed on local authorities' relations *inter se* and with other levels or tiers of government, as this is the main subject of analysis. The intention is to acquire a clear-enough picture of the nature, dynamics, scope, purpose, structures, and processes of intergovernmental relations in certain countries in order to determine how an effective approach could be formulated therefrom for use to benefit the local sphere of government in South Africa. The aim is a search for an appropriate model of municipal representation in both councils and particularly by an association representing local government, such as SALGA.

6.3 NATURE AND CONTENT OF CO-OPERATIVE GOVERNANCE

6.3.1 ORIGINS OF CO-OPERATIVE GOVERNANCE

It is necessary to have a clear understanding of what co-operative governance or intergovernmental relations is and isn't, as well as what it entails, so as to be able to ascertain what mechanisms and practices could be adapted for application in South Africa. Most of the available literature that is useful in any way is based on federal-state relations, especially as practised in the United States (US) and Germany. Although these countries' systems and procedures are different from the Republic's, their actual implementation of policies, legislation and service delivery activities could provide useful pointers of what may be good practices: These, with some modifications, could be attempted in South Africa on a pilot basis. On co-operative governance in South Africa it has been said that:

These principles are the most detailed and elaborate provisions relating to intergovernmental relations and co-operative government of any existing constitution in the world.²²

This unprecedented approach may have been based on the constitutional drafters' rejection of coercive or competitive federalism and believing in the existence of or desiring a culture similar to the German "Bundestreue," determined that the spheres of government should conduct their "affairs in a constructive and integrated way."²³ Again, based to some extent on the German system, South Africa opted for decentralisation using the principle of subsidiarity and the promotion of local participatory democracy.

²² Werner Bohler in the *Foreword* to De Villiers and Sindane (2011), *op cit*, 1.

²³ *Ibid*

There isn't much literature on co-operative governance perhaps because –

Intergovernmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government.²⁴

Whatever the system, government cannot function without each level engaging each other horizontally and vertically, but no constitutional or statutory provision may be necessary for human interaction. It goes without saying that co-operation is a necessity, for competitive or antagonistic or coercive approaches could see the collapse of the state. Steytler (2006) asserts that there has been no explicit mention of intergovernmental relations in most constitutions even in the Swiss Constitution as recently as 1999.²⁵

The German constitution establishing the federation and the *Länder* in 1949 made provision for these two levels of government to practise co-operative governance through regular conferences. This became a feature only from 1969.²⁶ Article 79 of the *Grundgesetz* prescribes inter-communal co-operation. Article 10 of the *European Charter of Local Self-Government* provides for local authorities to co-operate in and form consortia or associations to carry out tasks of common interest. They may also co-operate with counterparts in other countries. In a report on implementation of the *European Charter of Local Self-Government* in Germany, the Monitoring Committee recommended that the state “strengthen and institutionalise the participatory rights of associations of local authorities both at federal and regional or provincial (*Land*) level.”²⁷ In Germany, an association of local authorities is two or more of them uniting to enjoy the benefits of agglomeration or economies of scale, undertaking joint planning, service delivery, etc.²⁸ It is not a separate institution, like SALGA.

Specific constitutional provision on co-operative governance for South Africa's hybrid system appears to have been followed by Kenya. Its *Intergovernmental Relations Framework Act*²⁹

²⁴ *In re: Certification of the Constitution of the RSA, 1996*, 1996 10 BCLR 1 253 (CC), 1996 4 SA 744 (CC) paragraph 290.

²⁵ Steytler (2006), *op cit*, 13. See, generally, Mbondenyei, Morris Kiwinda and Tom Ojienda (2013) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Pretoria: Pretoria University Law Press, 26.

²⁶ De Villiers and Sindane (2011), *op cit*, 13.

²⁷ Council of Europe (2012) *Local and regional democracy in Germany*, Report of the Monitoring Committee to the 22nd Session, 14 March 2012, <https://wcd.coe.int>, accessed 10/06/2015.

²⁸ *Ibid.*

²⁹ 2 of 2012.

establishes “a framework for consultation and co-operation between the national and county governments and amongst county governments ... and for the resolution of intergovernmental disputes.”³⁰ This statute does not mention local authorities. However, decentralisation and IGR in Kenya are discussed further below.³¹

Writers contend that in the United Kingdom (UK) local and regional governments are ruled from Whitehall and Westminster. The government has for centuries been communicating with the country’s devolved administrations in Scotland, Wales and Northern Ireland by way of memoranda of understanding (MoUs), agreements, concordats, and other instruments, guided by conventions, and mostly undertaken informally. To date there does not appear to have been any ‘inter-governmental’ disputes that have come to public notice.³² Swenden and McEwen (2014) point out that in the UK, asymmetric devolution was implemented in 1999. Such a model was “conducive to bilateral and weakly institutionalised IGR.” It is not surprising that this was followed from 2007 with “widespread occurrence of party incongruence”. Devolution (unlike federalism) “implies a constitutional hierarchy between levels”, but UK governments have used their powers with some restraint. This may be partly for fear of losing electoral support and legitimacy among their voters and in the “absence of wide-scale intergovernmental conflict.”³³ McDowell (1997) argue that in the US, the concept of intergovernmental relations arose with the establishment of the temporary Commission on Intergovernmental Relations in 1953. Upon completion of its final report, this body was replaced by the Advisory Commission on Intergovernmental Relations (ACIR) in 1959.³⁴ The need for such a body grew out of the large number of decentralised federal programmes on social and economic development which required a certain level of harmonisation and co-ordination amongst federal, state and local

³⁰ In the Preamble.

³¹ In 6.4.11.

³² Trench, Alan (2010) *Devolution: Coordination between UK and Devolved Governments*, www.devolution.ac.uk/final%20conf/devolution%20relations.pdf, accessed 15/09/2015; Bolleyer, Nicole, Nicola McEwen and Wilfred Swenden (2010) *The Dynamics of Intergovernmental Relations in the UK*, paper presented at the Public Service and Administration Conference, Edinburgh, 1/04/2015.

³³ Swenden, Wilfried and Nicola McEwen ‘UK devolution in the shadow of hierarchy,’ *Comparative European Politics*, (2014) 12, 488-509, 488. See also Trench, Alan ‘Challenges of Welsh devolution,’ *The Law Society Gazette* (2016) 8 February 2016, www.lawgazette.co.uk, accessed 6/06/2016.

³⁴ Public Law 83-109; 67 Stat 145 and Public Law 86-380; 73 Stat 703, www.library.unt.edu/govinfo, accessed 12/09/2015.

governments. The complexity of management both of the relationships and the programmes necessitated division into a political and an administrative component.³⁵

The ACIR was dissolved on 30 September 1996 when Congress under the Clinton administration felt it had become irrelevant to the issues facing it. The primary reason for its demise was the Commission's handling of unfunded federal mandates, passing costs to local authorities.³⁶ Markell (1994) and McDowell (1997) state that the *Superfund Reform Act* of 1994 was established by the US Environmental Protection Agency (EPA) to address abandoned waste sites. The ten EPA regional offices worked with states and communities and was a practical example of intergovernmental relations and civic engagement. Although successful, the Act never became law.³⁷

6.3.2 NATURE OF CO-OPERATIVE GOVERNANCE

According to Agranoff and McGuire (1998), co-operative governance mainly involves the addressing of issues on a routine, day-to-day basis, rather than analysing and resolving problems of a nature that requires fundamental changes or transformation in structures and processes, or a substantial realignment to fit in with national systems of governance. It is not of a nature amenable to the development and implementation of a strategic five-year plan reviewed annually. Furthermore, intergovernmental relations are not something that concerns or can be managed by formal, rigid, legalistic, standardised mechanisms and procedures; nor is it a one-time or occasional occurrence, capable of fitting into a framework that could subsequently become a straitjacket. It lacks that kind of precision where decisions or actions can be reduced to writing and formally ratified subsequently. The vertical context, engagement by local authorities with provincial and national tiers of government, while, on the one hand, often being unclear and unsophisticated and requiring bargaining, cajoling, lobbying, networking, caucusing, advocacy and pleading, has, on the other, necessarily to be "patterned, purposive, and persistent".³⁸

³⁵ McDowell, Bruce D 'Advisory Commission on Intergovernmental Relations in 1996: The End of an Era', 27(2) (1997) *Publius*, 111-127, 111.

³⁶ *Unfunded Mandates Reform Act*, 1995, www.library.unt.edu/govinfo, accessed 12/09/2015.

³⁷ www.epa.gov/superfund/about.htm; www.govtrack.us/congress/bill.xpd?ill=h103-3800&tab; McDowell (1997), *op cit*; Markell, David L "Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994's Approach to Intergovernmental Relations' (24) (1994) *Environmental Law*, 1055-1095, 1055.

³⁸ Agranoff and McGuire (1998), *op cit*, 158.

The vertical and horizontal or inter-local context of co-operative governance is complex, involving, as it does, a multitude of role players, and several operational barriers related to time, costs, incompatibilities, conflicts, complexities, opposition, and so on. Moreover, a local authority should develop internal capacity and political and business support to be able to surmount or break down internal and external barriers. This is particularly important where interdependencies are essential rather than accessorial, especially in the context of limited resources and the need to optimise economies of scale or agglomeration. The collaborative approach is possible and easier today with sophisticated information and communications technology because local authorities in a country and across the world suffer similar challenges. Hence, co-operation and collaboration, more so where mutual needs and concerns are involved, is a cost-efficient way of undertaking complex tasks through the sharing of knowledge and tasks. However, one cannot disregard or ignore the barriers and complications, both internal and external, and competitiveness, which can thwart the best of intentions and plans.

Schaller (2001) contends that intergovernmental relationships are characterised, *inter alia*, by:³⁹

- (a) being both vertical and horizontal;
- (b) dealing explicitly or largely with politics rather than the administrative;
- (c) encompassing a variety of mechanisms and processes, from formal agreements to loose co-operative affiliations;
- (d) a high level of frequent, informal engagements and communication, mostly bilateral;
- (e) building on interdependence among stakeholders;
- (f) engaging non-profit and private sector organisations alongside government agencies;
- (g) encouraging and involving greater public participation;
- (h) leveraging complementary strengths and resources;
- (i) acknowledging interdependence as a lynchpin for intergovernmental co-operation;
- (j) striving for mutual benefits not normally achievable by one role player or a municipality acting solo, working in a closed or insular fashion;
- (k) financial autonomy, as agreed by the spheres of government;
- (l) trust and goodwill, which can be easily lost; and
- (m) respect for boundaries of competence that exist or are prescribed constitutionally or by statute.

³⁹ Schaller, Bruce 'Building Effective Relationships Between Cities and Regional, State and Federal Agencies,' (2001) *National Cooperative Highway Research Program (NCHRP) – Synthesis 297: A Synthesis of Highway Practice*, National Research Council: Transportation Research Board, 7.

6.3.3 APPROACHES TO CO-OPERATIVE GOVERNANCE

Intergovernmental relations, in theory, can occur through at least two polar approaches: where policy and legislation define formal *modus operandi*, as does the *IRFA* for South Africa; or through an informal collaborative model. The formal and informal approaches could be loosely termed coercive and co-operative methodologies, respectively, but both could be used together.

May and Burby (1996) argue that where, as in the US, the federal government uses state and local authorities in carrying out what is termed federal regulatory mandates, the latter are burdened with additional planning and regulatory responsibilities. While the demand and trend or preference may be towards flexible and informal intergovernmental relations, the question arises as to what happens when such strategies do not work. The problem is doubled if coercive or incentive approaches are also dysfunctional. This may occur when central government, as in the UK, impose substantive or procedural or both requirements on subordinate authorities, either as conditions tied to assistance, or as direct orders. In such instances, sub-national authorities function as regulatory agents that follow rules prescribed by central government. Since these mandates set out detailed standards and procedures for achieving policy goals, they limit regional and local government discretion, and additionally, impose penalties for non-compliance and deviation.⁴⁰ Fortunately, this approach is not prescribed by the *IRFA*.

May and Burby (1996) contend that while coercive mandates do consider capacity-building within lower levels of government to facilitate compliance, this is a secondary consideration to establishing and embedding monitoring systems and penalties. Coercive mandates are generally more paternalistic than co-operative or collaborative ones, and there are many variants of the two types of approaches, with the main aim being to achieve higher order objectives, that is, substantive compliance. While coercive methodologies require adherence to well-defined prescriptions, backed up by sanctions for non-compliance with substantive objectives, co-operative approaches seek adherence to the intent of policies or strategies, or legislation, by relying on incentives and shared values to reach substantive compliance. Unfortunately, evaluation of compliance in collaborative strategies is more problematical than coercive approaches because there is less clear, detailed prescription of both substantive and procedural requirements. The relative effectiveness of both approaches depends on the level of commitment of the subordinate authorities. Co-operative approaches encourage and enhance a

⁴⁰ May, Peter J and Raymond J Burby 'Coercive v Cooperative Policies: Comparing Intergovernmental Mandate Performance' 15(2) (1996) *Journal of Policy Analysis and Management*, 171-201, 171, 173.

facilitative planning and implementation style, while coercive mandates foster a more formal and legalistic approach. The coercive mode could be termed one that uses law as an instrument of control and regulation, in contradistinction to the collaborative method where law could partly be used to facilitate development. However, each could be used individually to ensure policy adherence. Both prescribe planning and process elements to be followed, but the co-operative approach does not set out the particular means and details thereof, in achieving desired outcomes. The wide latitude granted in the co-operative mode is encouraged and enhanced by financial and technical assistance to lower-tier governments, but failure to comply would still entail sanction. Hence, desired or required outcomes are achieved ultimately.⁴¹

Markell (1994) contends that these two differentiated intergovernmental approaches each have their own strengths and weaknesses. He argues for a third, better *modus operandi* would be where the two are consolidated, using the *essentialia* and strengths of each. This would yield desired outcomes more economically and efficiently. Intergovernmental relations are too complex and dynamic to be managed and monitored by policies backed up by statutes and regulations only. Therefore, law can be used as an instrument for development, but not simply as a stick – it must also be facilitative, permissive, flexible, developmental, and broad enough to incorporate innovation and informality.⁴²

6.3.4 INTERGOVERNMENTAL MANAGEMENT

Intergovernmental management refers to:

The array of problem solving activities, procedures, techniques, and forms of steering, guidance and control, which persons deploy, which operate at the interfaces of the different government agencies. They operate within the given intergovernmental constitutional and relational framework of the intergovernmental system.⁴³

Toonen *et al* (2007) argue that intergovernmental management may be divided into statutory control, on the one hand, and administrative control on the other. The former is characterised by administrative reform, and recognition of authority, while the latter exhibits administrative regulation and bargaining. In between these extremes can be a system that manifests a combination of statutory regulation and joint decision-making by persuasion.⁴⁴

⁴¹ *Ibid.*

⁴² Markell (1994) *op cit*, 1057.

⁴³ Toonen, Theo, Trui Steen and Frits van de Meer (2007) *Local Government Finance and Intergovernmental Relations: Comparative Institutional Analysis*, research essay submitted to the Ministry of Home Affairs, Netherlands: Leiden University, 13.

⁴⁴ *Ibid.*

According to Toonen *et al* (2007), the Scandinavian countries and the UK undertake intergovernmental relations using general norms, statutes, regulations, and criteria that must be observed by all authorities involved. France, Italy, and Spain, in contrast, manage more by administrative regulation through direct and detailed guidance. Hence, many decisions of local authorities require the involvement or intervention of central government officials in individual cases. In some states of northern Europe, management by statutory regulation is undertaken in the name of decentralisation, while in Southern Europe both the voice of local government as a whole and of individual municipalities are heard at the centre, thus influencing national policy-making.⁴⁵ This is not so in South Africa where SALGA has no vote in the NCoP.

6.3.5 COMPARISON OF LOCAL GOVERNMENT SYSTEMS

A country's governmental system underlies and informs the nature, structures, and processes of intergovernmental relations and consequently, municipal representation. Table 6.1 undertakes a comparison but it should be noted that this is a generalised and brief overview and comments therein cannot be seen as watertight. It is used to facilitate the discussion that follows, on how co-operative governance is practised in selected foreign countries.

6.4 OVERVIEW OF CO-OPERATIVE GOVERNANCE IN PRACTICE

6.4.1 MECHANISMS FOR COMPARATIVE ANALYSIS

i. A framework for comparative analysis

Given the dearth of literature on intergovernmental relations at the local level throughout the world, attention is paid here to those countries where information has been documented and where co-operative governance has been practised for a sufficiently long time to show successes and failures. Unfortunately, most of such is confined to countries having the federal system of governance where most relationships are between the national government and the states (or provinces or regions). Such models are not directly comparable with “one, sovereign democratic state”⁴⁶ with a ‘three-sphere governmental system’⁴⁷ that is South Africa. However, the nature of the governmental system is unimportant as co-operation, consultation, co-ordination, consolidation, mutuality, harmonisation, and integration are necessary in today's globally-competitive environment, whatever the governmental system. Neither can powers and functions in a multi-level system be absolute and watertight.

⁴⁵ *Ibid.*

⁴⁶ Section 1 of the *Constitution*.

⁴⁷ Section 40(1) of the *Constitution*.

CRITERIA	UK	GERMANY	FRANCE	SCANDINAVIA	S. AFRICA
Establishment	Evolutionary, legal	Constitutional, legal	Legal	Legal	Constitutional, legal
Establishment by charter	Yes	No	No	No	Yes ⁴⁸
LG predates state ⁴⁹	Yes	Yes	Yes	Yes	Yes
LG a creature of statute	Yes	Constitutionally established	No	Yes	No. Established by Constitution
Development	Evolutionary, legal	Evolutionary	Evolutionary	Evolutionary	Legislation
System	Hierarchy	Democratic hierarchy	Integrated hierarchy	Hierarchy with local autonomy	Constitutional democracy, LG autonomous 'sphere'
Status	Unclear, low ⁵⁰	Clear, high	Unclear, low	Clear, high	Clear, high
Power/functions	Unclear	Clear	Unclear	Clear	Unclear
Allocation of responsibilities	Asymmetrical	Asymmetrical	Asymmetrical	Asymmetrical	Symmetrical (same for all)
Decentralisation with devolution of power to LA	No	Yes	No	Yes	Yes
Legislative competency	No	Yes	No	Yes	Yes
Own revenue	Limited	Own + transfers	Transfers	Own + transfers	High
Community	diverse, affluent	Homogeneous, affluent	Homogeneous, affluent	Homogeneous, affluent	Mixed, mostly poor
Franchise	Yes	Yes	Yes	Yes	Only from 1994
Local economy	Integrated	Integrated	Integrated	Integrated	Dual
Landownership as devel. mechanism	Yes	Yes	Yes	Yes	No, only from 1991
Local democracy	Yes	Yes	Yes	Yes	Only from 1994
Law for control and regulation	Limited	No	No	No	Yes
Developmental LG	Limited	Yes	No	Yes, limited	Yes, but only after 1996
Political/admin dichotomy	Yes	Yes	No/Yes	Yes	Blurred
Role of regional authorities	Minimal	High, important	Minimal	Minimal	High 1910-94, then uncertain
Size of local authorities	Small	Small	Small	Small	Medium, large after 2000
Tiers of government	Centralised, with devolved powers to 3 countries	3, with parallel, interlinked roles	3, interlinked	Dual (national-local)	3 'spheres'
Formal IGR	No	No	No	No	Yes

Table 6.1: Comparison of foreign and South African local government systems (Compiled from literature)

⁴⁸ Referring to Natal and the Cape Colony initially, and then by provincial ordinances, and finally by the *Constitution* and the *Local Government: Municipal Structures Act*.

⁴⁹ In the sense of early settlements that were 'self-governing' until consolidated later and divided into different categories, possibly based on spatial and population size.

⁵⁰ British local authorities are generally agents of the (central) state that have devolved powers. Reform underway may enhance their status.

In analysing local government taxation and intergovernmental financial relationships, Toonen *et al* (2007) prepared an international comparative institutional framework that has been useful in reviewing intergovernmental relations in Germany, Sweden, Denmark, and France. They argue that in intergovernmental relations the well-known distinction between autonomy and co-governance cannot be seen as a zero-sum contradiction or management dilemma. Autonomy relates to a balance between the “organisational ability to act with a fair degree of independence and a minimum of transaction costs.”⁵¹ Co-governance requires the need and potential to affect and co-operate with other interests and power holders so as to participate and influence joint decision-making as well as agenda-setting. There may be trade-offs between autonomy and influence or co-determination, the volume often determined by trust.⁵² Toonen *et al* (2007)⁵³ analyse intergovernmental relations using a set of components, namely:

- (a) intergovernmental constitution, under which for comparative purposes, they distinguish between federalism, unitarism, legislated reform, and institutional transformation;
- (b) intergovernmental relations, which incorporates field organisation, inter-wovenness, and interdependency; and
- (c) intergovernmental management.

ii. Intergovernmental constitution

For comparative purposes, the distinction between federal and unitary states is seen as a formal legal one as “Indeed, only God knows what the unitary principle is and he has been remarkably reluctant to let mere mortals into the secret.”⁵⁴ Toonen *et al* (2007) argue that it would be useful to distinguish, firstly, between federal and unitary states, and secondly between federal and unitary systems of governance and public administration. It should be noted that from a sociological, political or administrative viewpoint, unitary states may function as federalised systems or that federal-type of implementation may operate in a unitary state. This approach may be evident in Scandinavia where local authorities implement and administer national agreed-upon policies and, as such, whether formally or *de facto*, they do influence national

⁵¹ Toonen *et al* (2007), *op cit*, 2.

⁵² Toonen *et al* (2007), *op cit*, 5-6.

⁵³ Toonen *et al* (2007), 7-13.

⁵⁴ Bulpitt, J ‘Walking Back to Happiness? Conservative party governments and elected local authorities in the 1980s’ in Crouch C and D Marquand (Eds) (1989) *The New Centralism: Britain out of step in Europe?* Oxford: Basil Blackwell, quoted by Toonen *et al* (2007), *op cit*, 7.

policy formulation.⁵⁵ For comparative purposes, Toonen *et al* (2007) identify four classical types of intergovernmental constitution:

- (a) federalism or dual federalism, characterised by authority;
- (b) co-operative federalism;
- (c) consensus unitarism, with both (a) and (b) characterised by interdependency; and
- (d) unitarism, with Westminster and Jacobin (France) as examples, characterised by hierarchy.⁵⁶

iii. Federalism

In an analysis of intergovernmental systems, it would be useful to distinguish between (i) co-operative or horizontal federalism (for example, Germany) and (ii) dual or vertical federalism (for example, the US). In the latter, with respect to legislation and administration, different policy areas, tasks and competencies are assigned to each layer of government. In co-operative or horizontal federalism, one level sets the rule while another implements. Both require the formulation and implementation of complex intergovernmental relations the basic nature of which may differ.⁵⁷

iv. Unitarism and legislated reform

Toonen *et al* (2007) assert that unitary states should not be treated as an undifferentiated category. Since the 1980s, the archetypal Jacobin French and British Westminster varieties cannot be juxtaposed as ‘centralised’ and ‘decentralised’. These inclusive authority models will encounter problems in administrative adaptation and modernisation processes. The application of clearly circumscribed powers and competencies (the *ultra vires* doctrine) means that intergovernmental reform can only be done through parliamentary legislation. They argue that the Dutch ‘decentralised unitary state’ is a concept that theoretically cannot exist as decentralised centralisation is self-contradictory. They add, however, that from an historical perspective, “this principle of a ‘decentralised unitary state’ reveals characteristics which reflect the constitution of what can more appropriately be called a ‘consensus state’.”⁵⁸

⁵⁵ Toonen *et al* (2007), 7-8.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Toonen *et al* (2007), *op cit*, 9.

v. Institutional transformation

In consensual systems, the intergovernmental constitution and other parts of the co-operative governance system would most likely be conducted in an organic manner with “framework legislation very often following pragmatic and step-by-step transformation of the system.” In the organic systems of both federal (Germany) and unitary (the Netherlands and Sweden) there is room for ‘reform bargaining’ and for institutional transformation without (legislated) reform.⁵⁹

vi. Field organisation

According to Toonen *et al* (2007), intergovernmental relations in France are characterised by the principle of verticality or administrative deconcentration whereby the centre sets the rules but also undertakes their implementation by means of field agencies in the regions. While the (former) Prefectorial system in France is the most notable example, a similar model is followed in Italy, Spain, Greece, Portugal, and Belgium. In the decentralisation and reform processes of the 1980s and 1990s, the territorial boundaries of the French system have now become more political than administrative/bureaucratic. The Departments were granted democratic legitimisation by substituting the Prefect for a democratically-elected mayor and council for executive action at sub-national and local level. These reforms were workable because of the flexibility created in enhancing and politicising territoriality in the administration and control of service delivery. Field administrations execute or implement functions that have been assigned to them by central government. Germany, in contrast to the French model, applies the principle of local self-administration in the relations among the *Bund* (federal) and *Länder* (provinces) and among the *Länder inter se* and municipalities therein.⁶⁰

vii. Interwovenness and interdependency

Comparison of intergovernmental relations is also facilitated by the degree of political and administrative interwovenness of the different levels of government, according to Toonen *et al* (2007). The dual British system, using the doctrine of *ultra vires*, is characterised by statutory regulation with a rigid and high degree of separation of the different layers of government. This approach has been termed “steering from a distance.”⁶¹

⁵⁹ Toonen *et al* (2007), *op cit*, 10.

⁶⁰ Toonen *et al* (2007), *op cit*, 11-12.

⁶¹ *Ibid.*

Toonen *et al* (2007) argue that by contrast, in Germany, joint decision making is done among the various levels of government where the horizontality principle creates a “fundamental interdependency relationship.” In such systems, local authorities are an integral part of the overall state structure often taking a larger share of governmental expenditures and of the overall budget than national and regional or county governments. In any system, there must be a need for “complementarity, co-ordination, and reduction of duplication and overlap in central-local relations.” Also required is the need to disentangle intergovernmental relations on behalf of the ‘lower’ governments.⁶²

According to Toonen *et al* (2007), in the UK it was only after post-Thatcher reforms that national administration become involved in local issues and more recent experiences have contributed to a “considerable modification of this conventional wisdom.” In contrast, the archaic French municipal government system is being reformed by osmosis – the development of a complex interplay of forces with a high level of interwovenness and interdependency. This works with a non-executant role of central government coupled with local self-administration and recognition of the importance of local economies to the state.⁶³

In reviewing the approach to intergovernmental relations in Canada and Spain with the aim of formulating a comparative framework, Mazarella (2009) distinguishes between vertical/horizontal, and multilateral/bilateral relations, as well as relations by acts (written agreements) and by organs (such as forums). Issues to be considered in the development of an analytical framework include consideration of the level of formalisation, that is, the legal status of co-operation and of its results; the legal and political procedural framework; compulsory or voluntary use of co-operation tools; legal or merely political effect of decisions; judicial protection of the parties engaging in intergovernmental relations; and the concrete impact of co-operation outcomes on the enforced policies.⁶⁴

viii. Intergovernmental management

This component has been addressed under section 6.3.4 above. Table 6.1 may assist in understanding the comparisons below.

⁶² *Ibid.*

⁶³ Toonen *et al* (2007), *op cit*, 12.

⁶⁴ Mazarella, Marco (2009) *Towards a comparative framework for intergovernmental relations: gleanings from two experiences*, Research Paper No 9/2009, Sant’Anna Legal Studies, <http://stals.ssup.it>, 7-8, accessed 12/11/2015.

The above review shows the complexity of co-operative governance and intergovernmental relations. Notwithstanding this situation, most countries have not seen fit to regulate the matter. This raises the question of whether prescribing legislation to regulate intergovernmental relations was necessary. However, the *IRFA* is a framework type of statute that serves as a guideline.

6.4.2 CO-OPERATIVE GOVERNANCE IN THE UNITED KINGDOM

i. Background

Although England may have the closest analogy to South Africa, a former colony, the unequal nature of central-local relations; the low status of local authorities;⁶⁵ and the fact that municipalities are service delivery agencies, alongside non-governmental organisations and the private sector, points to a situation where inter-local relations may be non-existent or unnecessary in that country. Local authorities function under powers laid down under various Acts of Parliament and thus have no general competencies. This means that the principle of subsidiarity does not apply. Parliament defines the ‘powers beyond which’ (*ultra vires*) local authorities cannot go. Central government grants and equalisation schemes make up the bulk of sub-national government budgets.⁶⁶ The UK’s Westminster parliamentary system is characterised as being “adversarial, competitive, majoritarian and winner-take-all politics”,⁶⁷ as system adopted by the apartheid regime but alien to the co-operative governance models of Germany and South Africa.

According to Loughlin (2001) and Bolleyer *et al* (2010), local authorities’ powers and functions declined from about the 1930s, with the post WW II welfare state resulting in greater centralisation of policy-making. Centralising accelerated in 1979 when Margaret Thatcher became Prime Minister. ‘Reforms’ resulted in transfer of functions to central government agencies, reducing the discretion of local authorities. Their powers were further eroded when service delivery became largely outsourced through privatisation, compulsory competitive

⁶⁵ The UK is ruled from Whitehall and Westminster and has four devolved units of government (England, Scotland, Wales and Northern Ireland). The Thatcher ‘reforms’ reduced local governments to agencies of the state, until reforms in 2002 and 2007. Bolleyer *et al* (2010), *op cit*. See also Loughlin, John (2001) ‘The United Kingdom: From Hypercentralization to Devolution’ in Loughlin, John (ed) *Subnational Democracy in the European Union: Challenges and Opportunities*, Oxford: University Press, 37-60; Compared to most Scandinavian and European states, South Africa, and countries assessed in this study, local governments in the UK were found to be ‘weak’.

⁶⁶ See Loughlin (2001), Bolleyer *et al* (2010), *op cit*.

⁶⁷ Chattopadhyay (2016), *op cit*, 11.

bidding, and best value tendering.⁶⁸ In 1997 the Congress of Local and Regional Authorities of Europe (CLRAE) denoted the UK as a country “with serious deficiencies in the practice of local democracy” due, *inter alia*, to considerable reduction in their power, the amalgamation of many of them into a single level (symmetry) and the disestablishment of others, creation of quasi non-governmental organisations (QUANGOs), limits on expenditure, and reducing revenue to them. Much concern was raised about the state of local government. Engagement between the Local Government Association and the Department for Communities and Local Government has resulted in a lowering of tensions. The state’s policy to devolve power commenced with the Greater London Authority. The government’s White Paper of 2006 recommended that counties become stronger as they “represent the best alternative for local power.”⁶⁹

ii. Informal intergovernmental relations

The centre’s relationship with devolved territories, that is, the UK government’s engagement with those in Scotland, Wales and Northern Ireland, may provide some lessons for inter-sphere co-operative governance. Notwithstanding the absence of directly comparable systems and processes, it would be useful to study documented intergovernmental relations so as to derive lessons of experience for use in South Africa. This is because developed countries have a much longer history of democratic, multi-tiered government than do developing states. In most nations, however, local authorities have been neglected or even ignored in the design and practice of co-operative governance. Within sub-national units there is a lack of structures and processes to involve municipalities in policy formulation. This section examines the subject more broadly first, and then focuses on particulars. The functioning of a country is to a large extent shaped, influenced, and impacted on by its history, governance system, constitutional-legal prescripts, settlement patterns, religion, culture, allocation of powers and functions, status of sub-national governments, and other factors. These contribute to determining the nature of the relationships between organs of state and their officials. Table 6.1 may aid in explaining the rationale for the approach adopted.

The devolution statutes: *Northern Ireland Act*, *Scotland Act*, and the *Government of Wales Act*, all promulgated in 1998, created various devolved bodies and established the framework within which they exercised their powers. But they did not set out how the centre will practise

⁶⁸ See Loughlin (2001), Bolleyer *et al* (2010), *op cit*.

⁶⁹ *Ibid*.

intergovernmental relations with them or how they engage each other and with England. Notwithstanding the existence of four governments following the devolved elections of 2007:⁷⁰

Relations between the UK Government and the devolved administrations have been remarkably harmonious since 1999. There has been no intergovernmental litigation before the Judicial Committee of the Privy Council; no disputes have been referred to the Joint Ministerial Committee; and even behind the scenes there have been relatively few spats.⁷¹

One reason for this harmonious situation is the structure of the UK's intergovernmental system, which incorporates the following features:⁷²

- (a) *Asymmetry*: Different powers are devolved to the four governments;
- (b) *Dual role*: The UK Government is responsible for non-devolved or reserved functions as well as for the governance of England;
- (c) *Devolved units*: Having only four devolved units make for easier and smoother intergovernmental relations; and
- (d) *Bilateral relations*: Rather than having multilateral engagement across the UK, the government can engage with a devolved unit through bilateral relations.

Given that the “powers of the regions are very limited and there are no directly elected regional governments except for London” makes for relatively dispute-free relations.⁷³ This situation is also due to there being little ideological differences between the various parts of the UK, generous increases in public spending, flexibility built into devolution arrangements, ingrained habits of co-operation between officials and departments, and a single, stable and non-politically aligned public service.⁷⁴ However, Trench (2010), *op cit*, argues that: “These factors are each likely to be short-lived.”⁷⁵

iii. Move toward a more ‘formalised’ informal system

In acknowledging that intergovernmental disputes will come, the House of Lords Constitutional Committee Report on devolution in 2002 said:

We recommend that further use should be made of the formal mechanism for intergovernmental relations, even if they seem to many of those presently involved as excessive. Formal mechanisms, such as the Joint Ministerial Committee, are not intended to serve as a substitute for good relations in other respects, or for good and frequent informal contacts, but rather to serve as a framework for such relations and to act as a fall-back in case informal personal relations cease to be sufficient. Such mechanisms are likely to become increasingly important when governments of different political persuasions have to deal with each other.⁷⁶

⁷⁰ Bolleyer *et al* (2010), *op cit*, 2.

⁷¹ Trench (2010), *op cit*, 1.

⁷² *Ibid.*

⁷³ Toonen *et al* (2007), *op cit*, 12.

⁷⁴ *Ibid.*

⁷⁵ Trench (2010), *op cit*, 1.

⁷⁶ Trench (2010), *op cit*, 3.

Following on the House of Lords recommendation, suggestions have been made on the mechanisms for sound intergovernmental relations.⁷⁷

- (a) Accept disputes as a necessary and proper part of intergovernmental relations;
- (b) Transparency to be a key element in the working of government;
- (c) Ensure that the general machinery of co-operative governance functions;
- (d) Review the intergovernmental relations machinery to ascertain what works and what does not;
- (e) Establish an independent standing committee of technical experts to provide well-informed advice;
- (f) Acknowledge that certain issues, particularly financial, are complicated and that workable solutions involve both technical and political considerations; and
- (g) Legal issues should be aired publicly, adjudicated by the UK Supreme Court.

Harmonious intergovernmental relations have existed up to now despite traditional British Parliamentary democracy being adversarial in character and political debate dominated by competition between government and the opposition, due to party incongruence. This situation is more likely in a multilevel system of government if composed of different parties and in the UK is likely to increase after the 2007 elections and devolution. Party political incongruence affects intergovernmental relations in an organisational and a programmatic sense, and in both vertical and horizontal engagements.⁷⁸

The assessment of the impact of party congruence or incongruence on intergovernmental relations requires consideration of two dimensions: (i) the degree of formalisation or institutionalisation of the processes of intergovernmental engagement; and (ii) the nature of intergovernmental interaction and policy co-ordination. The degree of formalisation or institutionalisation can range from irregular and *ad hoc* arrangements, such as in Spain and Canada, to very organised, as in Scandinavian countries, Germany, Switzerland, and the US. Party congruence or incongruence affects the nature of intergovernmental relations. Congruence, as in South Africa, contributes to co-operation and collaboration while the opposite occurs when parties are incongruent. It should be noted that intergovernmental interaction, *per se*, does not guarantee intergovernmental agreement.⁷⁹

⁷⁷ Trench 2010), *op cit*, 3-4.

⁷⁸ Bolleyer *et al* (2010), *op cit*, 2-3.

⁷⁹ Bolleyer *et al* (2010), *op cit*, 4-5.

In a unitary state, even with decentralised and regionalised units, the central level has the final say in allocation of powers and competencies, thus creating ‘a shadow of hierarchy’. This may be used to resolve intergovernmental co-ordination challenges or sub-national units may co-operate to maximise their influence.⁸⁰

Symmetry makes multilateral engagement, regular co-decision making, and institutionalisation of intergovernmental relations easier than asymmetry, the latter putting a strong premium on bilateralism and flexibility, as shown in the UK. Shared and exclusive powers and functions or competencies can also influence the design and implementation of intergovernmental structures and processes.⁸¹

The processes of intergovernmental relations “in the first eight years of devolution were scarcely formalised” in Scotland and Wales.⁸² The low level of institutionalisation of intergovernmental relations is due to several practices evolving over a long period, including party political congruence, asymmetrical systems, bilateral relations, uniformity of policy standards, the formal legal structure being non-federal, the devolved units in a ‘union state’ exercising a degree of administrative autonomy, and the UK Parliament not legislating on devolved matters without the express consent of the governments of these territories.⁸³

The flexible, non-formalised nature of intergovernmental relations in the UK has been workable, being based on several agreements, which are similar to those used in many other countries. The base or foundational document is the memorandum of understanding (MoU), with supplementary and complementary agreements such as concordats used mostly for bilateral relations between government departments, and arrangements for meetings between governments, with the highest importance accorded the Joint Ministerial Committee (JMC). The MoU sets out the key principles for intergovernmental engagement and in practice these have been found to be communication between administrations; co-operation; sharing of information, statistics, and research; and respect for the confidentiality of information shared. Some of the instruments, such as concordats, Legislative Consent Motions, standard operating procedures, Devolution Guidance Notes, based on convention, have no constitutional or legal

⁸⁰ Bolleyer *et al* (2010), *op cit*, 5

⁸¹ Bolleyer *et al* (2010), *op cit*, 5-6.

⁸² Bolleyer *et al* (2010), *op cit*, 10, 12.

⁸³ Bolleyer *et al* (2010), *op cit*, 10-11.

basis, being ‘soft law’; are relatively limited in scope; and far less formal compared with countries such as Spain and Canada.⁸⁴

The formality is even less in practice than what the existing mechanisms suggest, given the high level of interaction between governments and the inability of a rigid, formulaic system to cope with such intensity of engagement, mostly confined to the executive branch of government. It has been said that the formal aspects account for only 20 per cent of inter-administration relationships, while 80 per cent is informal, given the personal chemistry and goodwill of actors involved.⁸⁵

iv. Move toward greater formality in intergovernmental relations

The House of Lords acknowledged the need for goodwill and that it is necessary for and explains the high level of informality. It, however, expressed concern that “goodwill appears to have been elevated into a principle” of intergovernmental relations, as its present levels may diminish over time, especially with a change of government. Informality based on goodwill has worked to date largely because senior politicians of different parties have known each other as Members of Parliament (MPs) for a long time and the differences they deal with are currently limited, but there is need to make more use of the existing formal instruments.⁸⁶

Given the consensual nature of intergovernmental relations, the following mechanisms for dispute resolution are available, but have not yet been tested:⁸⁷

- (a) the Joint Ministerial Committee for political disputes;
- (b) the courts, for legal disputes; and
- (c) the Chief Secretary to the Treasury and the UK Cabinet, for financial disputes.

The UK has had a long history of constitutionality and democracy with the ruling party taking cognisance of the will of the people and the views of the strong Opposition. This applies to most countries of the developed world. There has thus developed a culture of goodwill and trust amongst politicians and even civil servants, a situation not prevailing in South Africa, nor is

⁸⁴ Bolleyer *et al* (2010), *op cit*, 10-12, 15.

⁸⁵ House of Lords Select Committee on the Constitution (2002) Chapter 1: clauses 16-29.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

likely to in a long time. The House of Lords Committee said that “it would be dangerous to assume that future crises affecting devolved functions will be capable of being solved in the same [informal, bilateral] way.”⁸⁸ Whilst not advocating the constitutionalisation or statutory prescription of intergovernmental relations, the House of Lords recommended that existing instruments be used as guiding mechanisms as they can, with periodic amendments, cater for changing circumstances. It has also been said that informal mechanisms would work better within a formal framework, for in the absence or abandonment of such a mechanism, “the informal approach will become increasingly *ad hoc* and reactive, rather than integral to government. ... The value of the JMC is that it spurs other meetings to take place within the structure of formal meetings.” The House of Commons Justice Committee commenting on the current intergovernmental machinery said that it was “not fit for purpose.”⁸⁹ These views vindicate South Africa’s approach to co-operative governance through the constitutional-statutory framework, supplemented and complemented by informal relations.

v. Reform of local government

Graham Allan MP, Chairman of the House of Commons Political and Institutional Reform Select Committee said:

While debates about devolution and independence rage, local government has been reduced over recent decades to little more than an agent of central government. We need to have the ambition and leadership to set ourselves free from the chains of Whitehall, become an equal partner, and enjoy the same independence as it has in most western democracies.⁹⁰

The Committee proposed a “Code entrenching independent local government” and the relations between central and local government.⁹¹ The *Code* in its Preamble states that “Parliament recognises free and independent local councils in England accountable to local citizens.” The Code provides for independence in both powers and finance, within the law enacted by the House of Commons and the House of Lords sitting jointly. The Code does not apply to devolved territories but is, nevertheless, a radical move away from centuries of central rule.⁹²

⁸⁸ Committee formed to deal with the outbreak of Foot and Mouth Disease in Scotland. House of Lords, 2002, Chapter 5.

⁸⁹ Local Government Association (2012) *Independent local government: Next steps*, 4.

⁹⁰ Local Government Association (2012), *op cit*, 3.

⁹¹ House of Commons Political and Constitutional Reform Committee (2012) *Illustrative Draft Code for central and local government*, www.parliament.uk, accessed 20/12/2015.

⁹² Toonen *et al* (2007), *op cit*, 16.

The British system of government with Parliament being the supreme lawmaker applied to South Africa in colonial and apartheid times when local authorities were governed by provincial ordinances. The Thatcher ‘reforms’ that centralised power and largely outsourced service delivery has been acknowledged as an error. This is being rectified through recent reforms. However, British local authorities are still not comparable with South Africa’s local government. With nearly a thousand years of democratic practice, representation is in the House of Commons and House of Lords wherein local authorities have no say. Complete democracy only came in the 20th century for the UK.

6.4.3 CO-OPERATIVE GOVERNANCE IN GERMANY

i. Background

Germany is a relatively young constitutional democracy, rising from the ashes of World War II with a sense of urgency.⁹³ Du Plessis argues that –

The Basic Law perceives fundamental rights as anterior to the state and ‘the state’s law’ as subject to the objective order of values enshrined in the Basic Law. Law and morality (and law and politics) can therefore not ‘neatly be separated.’⁹⁴

South Africa borrowed heavily from the Basic Law; for example, section 1 of the Republic’s *Constitution* reflects largely the German provision that, “All state authority emanates from the people...and is exercise by the people...”⁹⁵

Germany’s co-operative federalism is characterised by a systematic, almost ‘constitutional’ separation of policy-making and its execution by various levels of government. This results in a high degree of political and administrative interwoven governance through participation by the various levels. Intergovernmental management is organic, being a process of co-operative, joint decision-making in a *Rechtsstaat* (state governed by law).⁹⁶

ii. Constitutionally-prescribed local government autonomy

Government in Germany comprises the *Bund* (federal authority), *Länder* (plural: provinces), of which there are currently 16, *Kreise* (‘counties’), and *Gemeinden* (local authorities). The federal

⁹³ D Plessis, L (2005) *Learned Staatsrecht From the Heartland of the Rechtsstaat*, 8(1) (2005) *PER/PELJ* 76-106, 83.

⁹⁴ Du Plessis (2005), *op cit*, 85.

⁹⁵ Article 20(2) of the Basic Law.

⁹⁶ Summarised from www.tatsachen-ueber-deutschland.de and www.bundestag.de, accessed 2/09/2016.

structure is constitutionally protected.⁹⁷ Articles 20(1) and 28(1) of the *Grundgesetz*⁹⁸ stipulate that Germany is a republican, democratic nation conforming to the *Sozialstaatsprinzip* and *Rechtsstaatsprinzip*, that is, the principles of a social federal state functioning under the rule of law and constitutionalism. Hence, the nation's exercise of a democratically legitimised political power is limited by civil rights.⁹⁹

The idea of strong government as the guarantor of a successfully-functioning polity dates from the early nineteenth century.¹⁰⁰ Article 20(2) prescribes that today's German Federal Republic utilises the principle of people's sovereignty, signifying that all state authority emanates from the people in a model where representative parliamentary democracy predominates. The same principles of a social state governed by the rule of law also apply to its provincial governments. Local authorities are guaranteed the right to democratic local self-government, both by Article 28 and by the constitution of the *Land* they fall under.

iii. Functional and spatial division of powers

Since the *Länder* were precursors of the nation state, the specifically-federal view of how tasks should be divided among the various political levels emerged early in German constitutional theory. The *Bundestag* (from *Bund*, meaning federation and *tagen*, to confer), the lower House of Parliament, and the *Bundesrat* (*rat* meaning council), the upper House of Parliament, are the principal legislative levels with most laws centralised. The *Bundestag* sets out the boundaries of a *Land's* legislative power. Local government structures and powers are not uniform throughout Germany as each *Land* has its own *Gemeindeordnung* (local authorities' ordinance) that can make specific differentiation among municipalities. *Gemeinde* play an important role in the execution of both *Land* and *Bund* law. The *Länder* presume specific responsibilities unless the Constitution explicitly states that the competence for a particular matter lies at a higher level. Hence, administration is a direct function of the *Länder*, which enforce federal laws within their respective spatial jurisdictions. Each *Land* has to be involved in the formulation of federal legislation through the second chamber, the *Bundesrat*.¹⁰¹

⁹⁷ Constitution or Basic Law, of 1949.

⁹⁸ Bullmann, Udo (2001) 'Germany: Federalism under Strain' in Loughlin, John (ed) *Subnational Democracy in the European Union: Challenges and Opportunities*, *op cit*, 83-85; www.bundestag.de, accessed 6/06/2016.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid*; Toonen *et al* (2007), *op cit*, 22.

The *Bundesrat*, a powerful body, is composed of the executive of the *Land* governments. Thus, executive federalism is inserted into the federal legislative process where the *Bundesrat* speaks directly on *Länder* interests. Hence, it is not a forum such as South Africa's NCoP where delegates vote according to the mandates from their provincial legislatures and where party interests predominate.¹⁰²

The German parliamentary system has been described as shared and integrated federalism. The emphasis is not on status and role differentiation, but of collective responsibility for both formulation and implementation of legislation. Under such a system, it is necessary to constitutionally and statutorily establish a set of institutions and rules to govern how they will operate in order to manage the complex system. IGR in Germany is thus institutionalised and formalised,¹⁰³ an approach to a large extent followed by South Africa.

Since *Länder* operate according to the subsidiarity principle, local authorities have, through long German tradition, a high degree of autonomy and responsibility. They have a dual role: functioning as independent governments competent to take any necessary action in their community's interest, and operating as agents of both federal and state governments. Recently there has been pressure to provide a more consistent approach to matters of national policy and consequently the autonomy of the *Länder* has subsequently been reduced. At the same time, powers have devolved from the *Land* to the local level where authorities are encouraged to see their role as part of a comprehensive national network of public administration and service provision. The 'modernisation' of local government in Germany commenced only in the early 1990s.¹⁰⁴

Reform of federalism, starting in 2006, was aimed largely at restructuring the power balance and to ease the decision-making process of the *Bund* and the *Länder*, with an emphasis on clarifying accountability and enhancing efficiency. Germany has a comprehensive and detailed legal framework for budgetary processes for the different levels of government, all of which are responsible for taxation and redistribution. Equalisation, based on solidarity, is a complex process with the aim of spreading finances to guarantee an equal standard of living throughout

¹⁰² Chattopadhyay (2016), *op cit*, 7.

¹⁰³ Chattopadhyay (2016), *op cit*, 5.

¹⁰⁴ Naschold, Frieder (1996) *New frontiers in public sector management: Trends and issues in state and local government in Europe*, Berlin: de Gruyter, 132-135.

the country. Germany's legal tradition is reflected in the way oversight is organised, by the courts. New Public Management is the model used for administrative reform. It is highly political, with a co-operative system that will still be "strongly law oriented."¹⁰⁵ *Länder* representatives serve their regional interests through the *Bundesrat* and through other kinds of interactions with the federal government. They participate in the preparation and formulation of new federal initiatives. Their more crucial role is the reactive function of either accepting or rejecting them. Such an approach is possible due to the veto power of the *Bundesrat* and to the requirement of unanimity on 'joint tasks'.¹⁰⁶

iv. Nature of local authorities

In terms of the *Grundgesetz*, local authorities are public bodies falling within the competence or rule of the *Land* and a constituent part of it. However, in the constitutional understanding of democracy and in political practice, they are seen as an independent third level of the political and administrative system. Current functions of municipalities are varied while counties have a supra-local responsibility.¹⁰⁷

Municipal statutes are structured within the framework of the Basic Law under *Land* legislation and all *Länder* provide for the direct election of mayors to head the local administration.¹⁰⁸

Some *Land* local government constitutions prohibit municipalities from engaging in economic activity, save in exceptional circumstances. This arrangement is to protect the private sector and to minimise the local authority's exposure to risk.¹⁰⁹ Where a power is assigned or delegated to a local authority on the basis of subsidiarity, it is usually, but not always, accompanied by the requisite resources.¹¹⁰ Therefore, the problem of 'unfunded mandates' does not usually arise. Other local government operations that work well in Germany and which are stipulated unambiguously in provincial constitutions are:¹¹¹

¹⁰⁵ Toonen *et al* (2007), *op cit*, 23.

¹⁰⁶ Blom-Hansen, Jens (1999) 'Avoiding the "joint-decision trap": Lessons from intergovernmental relations in Scandinavia, (35) *European Journal of Political Research*, 35-67, 44.

¹⁰⁷ Bullmann (2001), *op cit*, 92.

¹⁰⁸ Bullmann (2001), *op cit*, 93.

¹⁰⁹ Hashke, Dieter (1998) 'Local Government Administration in Germany', paper, *German Law Archives*, 6, 26-27.

¹¹⁰ Gosciniak, Gregor and Andrew Stevens (2006) 'Local government in Germany shaped by regional differences', paper downloaded from *City Mayors* website, www.localgovt.co.nz, 1/09/2015.

¹¹¹ Hashke (1998), *op cit*, 29-31.

- (a) annual financial audits;
- (b) state executive's supervision of municipalities' right to local autonomy;
- (c) state executive legal supervision of the municipality's performance of its tasks and its administrative activities; and
- (d) expert supervision of delegated tasks for lawfulness and appropriateness.

v. Co-operative governance

Unlike the federal system in the US, Canada, Australia, and India (and also dissimilar to the situation in apartheid South Africa), the German model avoided a dual political structure with state systems working in parallel, preferring a model of interlinked competences, with a specific division of labour and responsibilities between the two levels of government. The relationships of the national authority with the provinces and between the regions themselves are “central to the functioning of the political system, permeating all aspects of German political life.”¹¹² Such detailed prescriptions have the advantage of providing certainty and protection of the various role players. Germany follows a dual approach to local government.¹¹³ The federal constitution, on the one hand, establishes and protects local authorities as the third tier of government,¹¹⁴ while details of its organisation, powers and functions are determined by the respective *Länder* as one of their ‘exclusive’ powers, subject to adherence to any conditions imposed by the *Grundgesetz*. Local authorities function under the constitution of the particular *Land* which clearly sets out their responsibilities. Therefore, there is no ambiguity as with South Africa’s concurrent powers. Furthermore, their effective functioning is facilitated by good local-state relations promoted and managed by the *Bundesrat* itself. There was, therefore, no need to formalise intergovernmental relations by means of a statute.

Du Plessis describes the German IGR system as not competitive but co-operative federalism, a system that counteracts fragmentation and impels co-operation through the principle of *Bundestreue*. This was essential to achieving the Basic Law giving “foundational prominence” to human dignity, equality and the promotion of human rights,¹¹⁵ as followed by the drafters of the South African *Constitution*, particularly section 1 and the Bill of Rights.

¹¹² Goetz, Claus H (1995) ‘National Governance and European Integration: Intergovernmental Relations in Germany’ 33(1) *Journal of Common Market Studies*, 91-116, 92.

¹¹³ De Villiers, Bertus (1997) ‘Local-Provincial Intergovernmental Relations: A Comparative Analysis’ *Occasional Paper*, Johannesburg: Konrad Adenauer Stiftung, 5.

¹¹⁴ Section 28 of the German Basic Law.

¹¹⁵ Du Plessis (2005), *op cit*, 92.

The strong position of the *Land* through constitutionally-endowed authority over its constituent municipalities and its representation in the *Bundesrat* functions well to serve the interests of the localities. This is particularly so since *Länder* have considerable influence over national legislation, especially because of the trend in the *Bundesrat* towards joint policy-making, unlike the case of South Africa's NCoP. The German intergovernmental system is seen as 'quasi-federalist' rather than purely federalist, as its federal structures and processes lay more emphasis on vertical and horizontal sharing of powers, responsibilities and resources, than their rigid separation, as in Canada. This approach gave rise to a constitutional practice called the *Verbundsystem*, resulting in collaboration, co-operation and co-ordination in all stages of the policy-making process becoming a central characteristic of the federal system. Such policy-interlocking mode of operation is a decision-making mechanism that served to institutionalise the need for broad consensus and thus entrenched intergovernmental relations. This democratic, inclusive, and facilitative practice has, in turn, enabled a high degree of legal standardisation.¹¹⁶

The *Länder* are the implementing agencies of the federal government, and they generally have greater administrative capacity than the centre to do so. Hence, vertical linkages both politically and technically are highly developed, as are networks within the province incorporating local authorities, to the extent that implementation practices have become harmonised among the *Länder*.¹¹⁷ Intergovernmental relations and all it entails are the almost exclusive powers of the executive, with the legislature playing a minimal role. A vast network, as well as structures and processes within and between both the political and administrative spheres, have been established to harmonise and synchronise the development, formulation and implementation of public policy. The political decision-making body in a city or town is its council, the *Stadtrat* or the *Gemeinderat*. Most income of local authorities derives from grants by the federal and *Land* governments.¹¹⁸

The Teutonic level of efficiency, supplemented and complemented by the practice of *Bundestreue*, have consolidated to provide Germany with a very workable intergovernmental relations system and practice, one that is internationally unique, and thus serves as a model for other countries to emulate. It is worth noting that *Bundestreue* in German constitutional theory

¹¹⁶ Goetz (1995), *op cit*, 92.

¹¹⁷ *Ibid.*

¹¹⁸ Goetz (1995), *op cit*, 94-96.

and practice: Entails a legal obligation which rests on the federation and *Länder* governments to assist each other, to integrate efforts to serve the people and to share capacity and information where and when required.¹¹⁹

It is a reflection of the same founding values and spirit expressed in the Preamble to the South African *Constitution* and supposed to be underlying the notion of co-operative governance, but is unambiguous and universally accepted in Germany. It has through time become institutionalised, unlike the concept of *ubuntu/batho pele* in South Africa. *Bundestreue* is a guiding light for co-operative federalism in modern federal theory and has been recognised as a binding legal principle by the German Constitutional Court.¹²⁰

In balancing co-operation and conflict inevitable in intergovernmental relations:

The German model is predicated on the idea that the centre and the *Länder* act together. Hence co-operative governance and loyalty to the federation, *Bundestreue*, lie at the heart of the system. Decision-making at all levels stresses the need for cooperation and consensus. Most intergovernmental mechanisms require unanimity, and then become binding.¹²¹

Consensus-based, binding, formal decision-making and the *Bundesrat*'s unique integration of parliamentary and executive federalism itself constitutes a dispute resolution mechanism. This is different from IGR that functions through forums for discussion, exchange of ideas and information and where executives remain accountable to their legislatures,¹²² for example, as in South Africa and Canada. Co-operative federalism “promotes the functioning, performance and stability of the German Republic”.¹²³

vi. Provincial-local government interaction

There is no formal assembly or forum or similar such equivalent to the federal *Bundesrat* in the *Land* where the latter meets with local authorities. However, various mechanisms have evolved for this purpose through convention and more recently by means of statute. In the German intergovernmental system, organised local government in the form of *Kreisetag* (league of counties), and *Staedtebund* and *Gemeindebund* (league of towns and local authorities,

¹¹⁹ De Villiers, Bertus (1999) ‘National-Provincial Cooperation – the Potential Role of Provincial Interest Offices: The German Experience’, *Occasional Paper*, Johannesburg: Konrad Adenauer Stiftung, 1.

¹²⁰ *Ibid.*

¹²¹ Chattopadhyay (2016), *op cit*, 11.

¹²² Chattopadhyay (2016), *op cit*, 13.

¹²³ Chattopadhyay (2016), *op cit*, 19.

respectively) facilitate and manage relations between municipalities, the *Land*, and the federal government. *Mitwirkungsrecht* or right of co-operation ensures that local authorities are informed by the federal and *Länder* governments on matters affecting them.¹²⁴ An equivalent right in South Africa may help to improve intergovernmental relations if section 5 of the *IRFA* is properly interpreted and applied.

vii. Local government at sub-provincial level

Sub-provincial or secondary levels of local government co-ordinate activities of local authorities and facilitate their initiation of policy and administration of legislation. Municipalities are consolidated into sub-*Land* units called *Kreise*, organised under *Länder* legislation, and recognised by the federal constitution. Although the *Kreise* have their own institutions and functions, they are not a fourth tier, being a part of local government. The role of these ‘regional’ institutions is essentially to co-ordinate those functions between municipalities which, due to their nature, cannot be managed by them individually. Such activities can best be explained by the principle of subsidiarity, that is, they administer matters which require wider areas of control and larger resources than what the *Gemeinde* possess. All *Länder* have legislation enabling municipalities to co-operate with each other in areas of mutual concern, while the national constitution protects the rights of local authorities to form *Gemeindeverbaende* (associations). These provisions create a legal basis for local government to establish *ad hoc* associations (*Zweckverbaende*) or to conclude agreements to render services on a joint basis. Such institutions can be constituted as separate public law organisations or within the framework of common law companies or associations. Various forms of inter-municipal bodies, such as planning associations, have been established to deal with specific or sectoral issues.¹²⁵ While *Kreise* (sub-*Land* geographical unit or ‘county’) are territorially fixed and have permanent members, these associations are functionally driven, meaning that membership may change and one municipality may be a member of several such organisations. Due to pooling of resources and a common or shared vision, inter-municipal co-operation often obtains better results than where a local authority goes it alone.¹²⁶

¹²⁴ De Villiers (1997), *op cit*, 9-10.

¹²⁵ De Villiers (1997), *op cit*, 13-14.

¹²⁶ *Ibid.*

viii. Local government cross-border co-operation

No constitutional or other legal provision is made for local government to create formal structures across *Land* boundaries since the province's jurisdictional competence is territorially limited. While no cross-border public law institution can be created and no *Kreis* can cut across a *Land* boundary, there is nothing precluding municipalities in different, particularly adjoining, *Länder* from co-operating on a voluntary and informal basis.¹²⁷

ix. International interaction between local governments

Germany has made no provision for municipalities to co-operate with governments in other countries. While a *Land* may itself engage in cross-border activities with an adjoining province or one that is not contiguous, it may make no legal provision for international links. A *Land* could permit a local authority within its jurisdiction to enter into a relationship with one or more municipalities in other German states. A *Land* has the right to conclude treaties with other countries and provinces; this privilege does not extend to municipalities.¹²⁸

Sub-national governments in Germany and in the European Community participate in national policy formulation and in their implementation. Joint decision-making in Germany is a general feature of its political system, given the powerful position of the *Bundesrat*. Where the federal and *Land* governments engage in joint planning and financing in particular policy areas, these 'joint tasks' require unanimity. Since 1992 the *Bundesrat* has the constitutional right to participate in legislation and administration concerning European Union matters.¹²⁹

From the foregoing, one can ascertain that democratic local self-government is guaranteed both by Article 28 of the *Grundgesetz* and the constitution of the *Land* it falls within. Germany is characterised by co-operative and joint decision-making in the *Bundesrat* by the federal and the *Länder* governments. Veto power vested in the *Bundesrat* gives it a strategic role in lawmaking, unlike the NCoP. The *Länder* have considerable power in the *Bundesrat* where it effectively represents the interests of its constituent municipalities. Government functions in accordance with the subsidiarity principle and this gives local authorities a high degree of autonomy.

¹²⁷ De Villiers (1997), *op cit*, 16.

¹²⁸ De Villiers (1997), *op cit*, 17.

¹²⁹ Blom-Hansen (1999), *op cit*, 37-39.

However, what makes the German governmental system workable is *Bundestreue*, a legal obligation on the federation and *Länder* governments to assist each other. Section 154(1) of the South African *Constitution* imposes a similar obligation on national and provincial governments to support and strengthen the capacity of municipalities. Alas, this duty appears to have been largely neglected. The German governmental system is currently undergoing reform. It is a model worth researching for possible amendments to the powers of provinces, the NCoP, and local government.

6.4.4 CO-OPERATIVE GOVERNANCE IN AUSTRIA

i. Responsibility for organisation of local government

Austria is divided into 9 *Länder* incorporating 2 102 *gemeinden* (local authorities).¹³⁰ The federal constitution establishes and defines the powers and functions and protects the institution of *Gemeinden*. It also defines the institutions of the lowest tier (unlike in Germany, where this is the responsibility of the *Land*) as *Gemeinderat* (council of a local community), *Stadtrat* (assembly of a city), and *Bürgermeister* (mayor with executive authority). Any provisions in a constitution or statute of the *Land* relating to local authorities must comply with that of the federal constitution. The powers and functions of local self-administration are defined in terms of the principle of subsidiarity, meaning that functions are only transferred to a higher tier of government if the lower level cannot exercise them effectively.¹³¹ Municipalities, therefore, have the sole responsibility of dealing with all matters within their domain, if they have the capacity. Each *Land* has a statute depicting the organisation of local government, with its functions managed by a department of local government affairs.¹³²

Municipal law is set out in articles 115-120 of the Austrian constitution and these do not require statutory elaboration or confirmation. Where the jurisdiction of the Federal Government pertaining to local authorities is not explicitly stated, *Land* legislation stipulates the manner of implementation, in keeping with constitutional principles. *Länder* comprise communities, the lowest level of a territorial state structure, grouped to form municipalities, which, in turn may be consolidated or amalgamated into regional municipalities, not into associations of local

¹³⁰ Austrian Association of Communities (2003) *Strong Municipalities – Europe’s driving force: Association of Municipalities in Austria and in Europe*, 35. Updated by <https://portal.cor.europa/austria>, accessed 6/06/2016.

¹³¹ Blom-Hansen (1999), *op cit*.

¹³² *Ibid*.

authorities, as in Germany. ‘Uniform municipalities’ refer to the symmetrical allocation of powers and functions. Towns may formulate their own constitutions. As legal persona, municipalities have the right to self-administration, freedom of association, and freedom from intervention by higher level government, unless done in accordance with the constitution. The principle of subsidiarity is supplemented by devolution of powers by assignment. However, where the municipality is unable to exercise such powers, they may be reassigned to the *Land*. Hence, provision is also made for the asymmetrical allocation of powers and functions. The Fiscal Equalisation Law of 1948 is an example of a “sunset law”, in that it is in force only for a few years, like South Africa’s annual *Division of Revenue Act*. In the case of discrimination or unfair treatment, a municipality has the right to sue in the Constitutional Court. To avoid financial burdens, the Fiscal Equalisation Law allows inter-government contracts justiciable in the Constitutional Court. However, it must be objectively shown that there was full exchange of information and sound communication by the parties, and that they have consulted and been advised by experts in the particular financial and fiscal fields.¹³³

It is stated that –

The Federal Government of Austria is committed to a lasting consolidation of public budgets in order to reduce the tax burden on households and businesses and the obligations of future generations.¹³⁴

The Austrian Internal Stability Pact 2001¹³⁵ and subsequent agreements set out clearly the obligations of each level of government in financial and fiscal matters through sound intergovernmental co-operation and budgetary co-ordination.¹³⁶

ii. Provincial-local government interaction

No formal forums exist, but there is considerable informal consultation between the different levels of government. The right of municipalities to *Stellungnahme* (a hearing) is entrenched in both the federal and *Land* constitutions in matters affecting them before legislation is passed. Although local authorities are consulted, their inputs are, however, not binding. Local government also has a *Volksbegehrens* (right to initiative), that is, they can by popular demand initiate legislation, which must be submitted to and debated by the *Land* legislature.

¹³³ Austrian Association of Communities (2003), *op cit*, 35-41, 43-47, 55-57.

¹³⁴ Austrian Association of Communities (2003), *op cit*, 70.

¹³⁵ From www.parliament.gv.at/ZUSD/.../Fiscal_Governance_in_Austria_20130620.pdf, accessed 6/06/2016, the latest Austrian Internal Stability Pact was in 2013.

¹³⁶ Austrian Association of Communities, *op cit*, 71-73.

Municipalities cannot engage with the federal and *Länder* governments individually on matters of mutual concern, given the large number of institutions involved and the expertise required. Two bodies have been established in terms of private law as non-profit companies to deal with such matters, namely the *Gemeindeverband* (local government association for villages and small towns) and for cities, the *Staedtebund*, of which most local authorities are members. These bodies are recognised by the *Länder* constitutions as voluntary, non-political representative organs of local government, and are directly represented on the EU's Committee for Regions set up to accommodate views of regional and local governments.¹³⁷ While the local government associations are constitutionally "recognised", as is the case with SALGA, these institutions are constituted by the local authorities themselves, consolidated or amalgamated to work jointly on matters of mutual interest, and are not separate bodies as SALGA is. Austria follows the German model of *Kreisetag* (league of counties), *Staedtebund* (league of towns) and *Gemeindebund* (league of local authorities).

iii. Local government at sub-provincial level

The federal constitution provides for the formal establishment of inter-municipal co-operative structures. A *Gemeindeverband* can be created (as opposed to "recognised" by the South African *Constitution*) by federal or *Land* legislation. Whilst membership is voluntary, a *Land* enactment may also compel a municipality to formally be a participant of a particular association. Two or more municipalities may also create an association, subject to acquiring *Land* permission, as in Germany. In terms of their rights as legal *personae*, they may conclude a contract to co-operate on certain matters, such as joint administration or the delivery of services. *Gemeindeverbaende* have their own statutes by which they are established and their aims defined. Unlike the erstwhile Regional Services Councils in South Africa, they may not be general-purpose co-operative associations in any area of local government, but must be constituted for co-operation in a specific field of government. Hence, a municipality may be a member of various associations simultaneously. The life span of an association may be limited by function or time. *Gemeindeverbaende* are not a fourth tier of government but a horizontal extension of the local level. Provision also exists for municipal co-operation in *Verwaltungsgemeinschaften* or administrative associations, where local governments share administrative responsibilities concerning particular functions.¹³⁸

¹³⁷ *Ibid.*

¹³⁸ De Villiers (1997), *op cit*, 14-15.

iv. Local government cross-border co-operation

The Austrian constitution makes no theoretical or practical provision for cross- *Länder* co-operation between local authorities. This may be so because the *Land* enjoys jurisdiction only over its own territory and the municipalities located therein; and secondly, the *Gemeindevorstände* are partly responsible only for administration of federal and territory-specific *Land* legislation.¹³⁹

v. International interaction between local governments

The situation is the same as in most countries and in Germany.¹⁴⁰

vi. The Austrian Association of Cities and Towns

Der Österreichische Städtebund (The Austrian Association of Cities and Towns) currently represents 248 members, including settlements of more than a thousand residents and all towns with more than 10 000 inhabitants. The association was founded in 1915. Its primary responsibility is to represent the interests of local government in negotiations over the sharing of budgetary funds and taxing rights between the federal government, the provinces, and local authorities. It also assists with the preparation of legislation and serves as advisors on some environmental and welfare bodies. The association is assisted by approximately 40 technical committees.¹⁴¹

The Austrian Association of Municipalities (AAM), represents the interests collectively of 99 per cent of Austrian local authorities by way of associations of its *Länder*. Membership is voluntary. The AAM was one of the first members of the Council of European Municipalities and Regions (CEMR) established in 1951. Strong representation is facilitated by a stability pact and use of milestones in the consultation mechanism. Within the scope of the European Council, the Permanent Conference of the Municipalities and Regions in Europe was constituted in 1957 as an advisory body, succeeded by the Congress of Local and Regional Authorities of Europe (CLRAE) as a counselling organisation. Both municipalities and regions of member states have a seat and a vote. The more recent Committee of Regions (CoR) is an advisory body to the European Union operating through the European Commission and the European Council, using

¹³⁹ De Villiers (1997), *op cit*, 7.

¹⁴⁰ De Villiers (1997), *op cit*, 17-18.

¹⁴¹ www.staedtebund.gv.at, accessed 6/06/2016.

specialist committees. The CoR may be heard by the European Parliament and bring a case before the European Court of Justice, particularly to maintain the principle of subsidiarity. The AAM initiated the International Communal Network to facilitate municipal international relations generally and a unified Europe in particular.¹⁴²

The Austrian Municipal Book of Statutes (1962) contributed to the development in the 1980s of the *European Charter of Local Administration* of the European Council. The federal parliaments of Luxembourg and Austria resolved in 1987 to be bound to the *Charter*. The principle of self-administration gained international law status for the first time with this charter, thus strengthening the *de jure* status of municipalities.¹⁴³

The position of sub-national governments was strengthened by the *Austrian Stability Pact*, an agreement between the federal government, the *Länder*, and municipalities on financial management co-ordination, the consolidation of public funds, and fulfilment of the Maastricht criteria. This pact incorporates a consultation mechanism which ensures that regional authorities by means of laws and directives may not burden municipalities financially without the latter's consent. It has resulted in greater budgetary discipline by *Länder* and municipalities.¹⁴⁴

Of interest in the Austrian governmental model especially insofar as it relates to local authorities is *Stellungnahme* and *Volksbegehrens*, which gives them considerable power in the legislative field. Also of interest is the *Gemeindeverband* and *Staedtebund*, voluntary, non-political local government associations, which could be a workable model as alternative to SALGA.

6.4.5 CO-OPERATIVE GOVERNANCE IN BELGIUM

i. Responsibility for organisation of local government

Belgium has over three decades, starting in the 1970s, transformed from a unitary to a federal state whence constitutionalism within a federal context established very strong *Geweste* (provinces), incorporating *Gemeentes* (communes or municipalities). There are several *Intercommunales* (associations) where local authorities interact in functional areas to co-

¹⁴² Austrian Association of Municipalities (2003), *op cit*, 5-7, 17-19.

¹⁴³ *Ibid.*

¹⁴⁴ Austrian Association of Municipalities (2003), *op cit*, 35-37.

ordinate and harmonise their activities. Belgian ‘provinces’ are the equivalent of the German and Austrian *Kreise* (counties) and have similar powers and functions.¹⁴⁵

ii. Provincial-local government interaction

No formal institutions exist where provincial and local governments meet, but there are forums for informal interaction. These have no legal basis, and engagement is *ad hoc* and sporadic. Members of municipalities may serve on *Geweste* assemblies, thus enhancing close co-operation and understanding, but at the same time also leading to heightened conflict of interests. As in Germany and Austria, each *Gewest* has an association of towns and cities of which membership is voluntary, but in which most local authorities participate because it is beneficial.¹⁴⁶

iii. Local government at sub-provincial level

Belgium’s constitution provides that local authorities and provinces may create *Intercommunales* with directly-elected governing councils. They are distinctive legal *persona* with own organs and budgets. Nevertheless, they are not a separate tier of government but a horizontal extension of municipalities. Local authorities are not obliged to belong to an association, nor are they precluded from membership of several at the same time, since participation is determined by functional rather than spatial considerations. *Intercommunales* and similar such public law associations can be established between municipalities on a voluntary basis, with the objective of facilitating co-operation in a particular field of common concern. Federal legislation provides that municipalities and *Intercommunales* have the right to engage each other in any matter of mutual interest. The precise nature and purpose of each *Intercommunale* is determined by its member local authorities, but in essence it strives towards solidarity and co-operation between municipalities. Sometimes such co-operation is limited to a single function while in others there are multifunctional *Intercommunales*. Membership is voluntary and not restricted to formal local authorities, as private sector organisations, such as service providers, may also participate. However, all members in an *Intercommunale*, as a distinctive legal entity, are bound by its decisions, even where they disagree: This heightens conflict.¹⁴⁷

¹⁴⁵ De Villiers (1997), *op cit*, 8.

¹⁴⁶ De Villiers (1997), *op cit*, 12.

¹⁴⁷ De Villiers (1997), *op cit*, 15-16.

iv. Local government cross-border co-operation

No provision is made for formal co-operation between *Geweste*. Cross-border co-operation is limited also because of the country's language differences. While mayors of adjacent local authorities do meet informally to discuss issues of mutual concern, there is no constitutional or legal basis for doing so, and such interaction is scarce, complicated, sporadic, and *ad hoc*.¹⁴⁸

v. International interaction between local governments

The situation is the same as in most countries and in Germany.¹⁴⁹

6.4.6 CO-OPERATIVE GOVERNANCE IN FRANCE

The French believed in the motto 'unity in diversity', one that South Africa could profitably follow. During the historical formal policy of centralisation, a parallel system of negotiation between the state and *notables* (local politicians) existed. There was also a preference for the concept of a local politico-administration system, a term highlighting the sociological aspects of the relationship between central and local authorities, to that of 'local government'. It also incorporated the notion that rules and their enforcement, as well as the policies that affected sub-national governments, were subject to an ongoing process of negotiation. This arrangement was based on a simple political exchange which guaranteed central government the capacity to maintain and extend social and political consensus, while permitting elected representatives to obtain a greater share of resources from the state, as well as both the legitimacy and respect of the local populace. Furthermore, it allowed *notables* to have an influence and also facilitated the resolution of internal communications problems between state administrative services. This combination of a hierarchy of problems or challenges and the informal resolution of bureaucratic blockages was named 'cross-regulation'.¹⁵⁰

The politico-administrative system did not simply destroy the 'local' or the 'periphery', but incorporated them into the centre through the *notabiliaire* system with its *cumul des mandats* (holding of multiple offices) and representation of localities in the Senate, a system dubbed *le pouvoir peripherique*. As a result of the *cumul des mandats*, local government had a significant influence at the national level, and there was a high degree of interdependence and co-operation

¹⁴⁸ *Ibid.*

¹⁴⁹ De Villiers (1997), *op cit.*, 18.

¹⁵⁰ Negrier, Emmanuel (1999) 'The Changing Role of French Local Government', 22(4) *West European Politics*, 120-140, 120-121.

among the various tiers of local governments and the central authority. There was also considerable co-operation between local government and the private sector, with many municipalities and communes contracting out services to commercial firms.¹⁵¹ The *cumul des mandats* enabled many mayors to hold other positions at Prefectoral, regional and national levels, and some were members of the government; while usually the president and the prime minister were sometimes mayors of tiny villages. Additionally, many national political figures have been, and are, identified as mayors of large cities.¹⁵²

Several attempts had been made to reduce the number of offices that any one politician may hold but these have been unsuccessful. This type of political network and connectivity ensured that local needs were quickly communicated to and rapidly addressed at the highest level. The system was so effective that there was no need to formalise intergovernmental relations. Nevertheless, a problem arose from the ‘*eparpillement communale*’, the fragmentation resulting from the large number of communes,¹⁵³ but the French system proved resilient and manageable such that rationalisation and consolidation of the communities was not necessary, as in South Africa and many other countries.

France represents what is called the Napoleonic system of intergovernmental relations applied in southern Europe and characterised by strong central rule and often highly politicised administrative interrelationship. It also exhibits a tradition of individualised, formal, and fairly ‘hands on’ intergovernmental management system with direct involvement of higher authority in local affairs.¹⁵⁴ Recent reform appears to be toward decentralisation, but is in reality a transfer of tasks rather than powers. Devolution since the 1980s have seen many functions delegated to the lowest tiers but the central state has still retained executive machinery at local level. The subsidiarity principle is not practised in the conventional sense as sub-national authorities have the power to make local regulations, but this entitlement excludes the right of initiative and is therefore derivative, residual, and subordinate. “The field of local authority action is wide, vague and often the source of conflicts.”¹⁵⁵

¹⁵¹ European Commission (1995) *Towards democratic decentralisation: Transforming regional and local government in the new Europe*, 25-26.

¹⁵² Negrier (1999), *op cit*, 130-134.

¹⁵³ *Ibid.*

¹⁵⁴ Toonen *et al* (2007), *op cit*, 16.

¹⁵⁵ Toonen *et al* (2007), *op cit*, 21.

While there is extensive and varied co-operation between the various local government levels with a continuous loop of engagement and co-decision, there is also “frequent interference by the State in local prerogatives.”¹⁵⁶ However, there exist various forms of co-operation: inter-communal, inter-regional, and mixed, with the *Établissements Publics de Co-operation Intercommunale* (EPCIS) being an important inter-local co-operation mechanism that is empowered to levy local taxes. Tasks may be transferred to a variety of formal organisational structures while municipalities contract with or outsource service delivery to departments. Channels exist for linking regional and local authorities to central government and representatives in Parliament. An additional resource for this purpose is the Prefect. Co-operation between the state and sub-national governments is formalised by a *contract de plan* which details the requirements and manner of intergovernmental relations and the principle objectives of the plan. Notwithstanding such instruments, the complexity of co-operative governance and particularly the local financial system is enormous. Fortunately, transfer of funds accompanied devolution, with sub-national governments having legal provision for equal distribution with equality between territorial authorities guaranteed. Additionally, shares of national tax yields are now regarded as own sources of income.¹⁵⁷

According to Blom-Hansen (1999), in France, the classic unitary state, intergovernmental relations are not as centrally controlled as commonly understood. Joint-decision traps “seem to be at work” here because local institutional interests have veto rights over public policy. Relations between central and local governments are managed through two channels, political and administrative. Both “operate in a subtle, informal and fragmented way.” A crucial political role is played by the *notables* who due to their *cumul des mandats* operate at several levels in the public sector at the same time. Without their consent public policy is difficult to develop and if enacted, not easily implemented. Given that most national politicians are simultaneously important local politicians, means that the locale has an informal institutionalised representation on policy formulation in Parliament. The joint-decision trap is explained thus:¹⁵⁸

Because French mayors have successfully resisted every effort to reorganize what is now clearly an archaic and inefficient system, France is left with one of Europe’s most fragmented municipal structures numbering 36 000 entities, of which 80 percent have less than 1 000 inhabitants. Similarly, the numerous attempts in the post-war period to reorganize *regional* levels have been largely unsuccessful because it has not been possible to obtain the consent of local *notables*.

¹⁵⁶ Allegri, G (2004) *Strengthening regional and local democracy in the European Union*, Volume 1: France, COR Studies, E-1/2004, Brussels, 273-354, quoted by Toonen *et al* (2007), *op cit*, 21.

¹⁵⁷ Toonen *et al* (2007), *op cit*, 22.

¹⁵⁸ Blom-Hansen (1999), *op cit*, 40-41.

Central-local relations in the administrative channel are unique, due to the political role played by the Prefect and by field officers of the central ministries. Different levels of administration in France, unlike most countries, have not traditionally had their own administrative services. The Prefect co-ordinates local field offices and supervises municipalities. Despite an extremely centralised administrative organisation, the relationship between the Prefect, the field services of the central ministries, and the local authorities have “in reality been a complex symbiotic system of bargaining and mutual dependence.”¹⁵⁹ Such an arrangement is highly dependent on the maintenance of good relations with local *notables* who in turn are allies of the local offices in their dealings with the Prefect. As policy changes have to be based on consensus, the most pressing problems of French local government have been neglected. Local veto rights and the intricate, mostly informal, workings of the central-local relations result in policy-making becoming inefficient and difficult, with policy programmes being expensive. If local authorities reject a central government policy proposal, that initiative is dead. Despite the complexity and apparent inefficiency, the “workings of the French intergovernmental relations have proven extremely robust.”¹⁶⁰

The efficiency and efficacy of the French system of local government may need to be examined further as it is alien to South Africa, but one that seems to work and has stood the test of time. The majority of local authorities would today be too small to be viable in terms of economies of scale and efficient service delivery. The existence of both the department and the region could mean one layer of government too much, as may be the case in South Africa with the unanswered question being the need for and role of provinces. Hence, the French governmental system cannot be incorporated under the South African *Constitution*.

6.4.7 CO-OPERATIVE GOVERNANCE IN SCANDINAVIA

Since the state and its intergovernmental relations systems are somewhat similar in Norway, Denmark and Sweden, one country is analysed and where differences are significant they are mentioned in passing.

i. Sweden

The country is currently divided into 290 municipalities, 21 counties, and two regions, but there is no hierarchical relation among their governments. This is because, as in Germany, all these

¹⁵⁹ Blom-Hansen, *op cit*, 42.

¹⁶⁰ Blom-Hansen (1999), *op cit*, 42, 44, 46.

territories have their own self-governing local authorities empowered for different activities. Municipalities are responsible for a larger share of public services in comparison with most other countries. Practical application of the principle of subsidiarity has enabled a broad mandate for local government, but this approach has not given rise to ambiguity or concurrency and similar such problems, even when stipulated thus:¹⁶¹

- (a) Municipalities are responsible for matters relating to inhabitants of the municipality and their immediate environment; and
- (b) The main task of the county councils and regions is health care.

The Swedish Parliament (*Riksdag*) is the supreme political decision-making body. According to the principle of representative democracy, there was a demarcation line between political and administrative functions. A fundamental principle of Swedish local administration was that it is supervised by directly-elected representatives, the council of the local authority, as the highest executive body. Hence, there was need for them to be fully informed of activities in the communes and sub-communes through their representative executive organs. Each commune is statutorily bound to establish special committees for particular tasks.¹⁶²

Unlike in South Africa,

Local government in Sweden is distinguished by the fact that the elected representatives participate directly in the handling of a matter at all levels, from drafting to decision-making and implementation, which means that their tasks include those which in the national administration are the sole concern of salaried officials.¹⁶³

This indicates that municipalities have changed from administration by laypersons to management by professionals, both politicians and officials, and increased bureaucratisation. In having two tiers of government, local politicians represented their constituencies directly in the national assembly. With the quality of local government thus enhanced, municipalities have become significant players in the process of policy formulation. This convergence is not applicable to South Africa where, although the political-administrative line, more blurred now than in the apartheid past, is nevertheless still to be maintained, as in the English model. The Swedish situation highlights the relations, on the one hand, between political control and responsibility, and, on the other, administrative autonomy. In several communes a new structure

¹⁶¹ *Local Government Act*, 1992, updated by www.government.se/government-policy/municipalities-and-county-councils, accessed 6/06/2016.

¹⁶² Elander, Ingemar and Stig Montin (1990) 'Decentralisation and control: Central-local government relations in Sweden, 18(3) *Policy and Politics*, 165-180, 165.

¹⁶³ Elander and Montin (1990), *op cit*, 166.

of formal relationship between the political and executive structure, called ‘ordering and performing organisations’, have been introduced and have since become established. Like in the German and French systems, the strength and autonomy of local authorities in the Swedish model is to some extent reliant on direct representation in and connectivity with central government.¹⁶⁴ This is, sadly, lacking in South Africa.

In 1988 Sharpf argued that the quality of public service deteriorates when lower levels of governments have a decisive say in national policy-making, and that if sub-national authorities have “acquired veto positions, then sclerosis is likely to set in.” Sharpf’s main contribution lies in studying the institutional effects on public policy through highlighting the importance of analysing relations between different tiers of government, rather than concentrating only on the central level.¹⁶⁵ Blom-Hansen acknowledges that intergovernmental relations are “critical” to central government’s policy-making capacity, but agrees that “joint-decision traps are not inherent to joint-decision systems.” However, the functioning of the system could be adversely affected if central government threatens to exit, but this scenario has limited likelihood. The exit option lies in central government choosing to pursue policy goals via “intergovernmental corporatism,” that is, by co-operating with the associations of sub-national governments. Alternatively, they may be bypassed by going straight to Parliament. Blom-Hansen suggests that the existence of these institutional mechanisms is likely to increase the quality of public policy. He points out that in central government’s financial control of sub-national governments, the system in Denmark is most effective, although it has none of the “impressive formal control instruments” available to Sweden and Norway. The Danish central government is successful because it “consciously uses parliamentarism and intergovernmental corporatism as interchangeable arenas for policy-making.”¹⁶⁶

Blom-Hansen (1999) argues that the numerous threads of policy interdependence mean that central governments can proceed only interdependently, making intergovernmental co-operation a necessity. “Federal systems seem to be moving closer to the joint-decision model, the extreme version of which is found in Germany.” In unitary states, central governments do not need to take the views of sub-national authorities into consideration as all that is required to enact policy is a parliamentary majority. It should be noted that informal institutional

¹⁶⁴ *Ibid.*

¹⁶⁵ Blom-Hansen (1999), *op cit*, 35-67, 36.

¹⁶⁶ Blom-Hansen (1999), *op cit*, 36-37.

structures and processes may be involved in policy formulation as do the formal mechanisms in federal states.¹⁶⁷ Politically strong sub-national governments have influenced and impacted upon the nature and processes of intergovernmental relations in Scandinavia. A strong role is played by associations for local and regional authorities which organise all municipalities and counties in Norway, Denmark and Sweden, even though membership is voluntary. The associations hold a strategic position due to local government being responsible for a larger share of the public sector than in other countries. Most importantly, the associations traditionally participate in the formulation of legislation and administrative regulation that affect their members. Hence, they play a similar political role to Germany's *Länder* without having the formidable formal powers of the latter. Such status may be unnecessary as post-World War II Scandinavian intergovernmental relations have shown "none of the rigidities and stalemates found in Germany and France."¹⁶⁸

Unlike in France, Scandinavian governments addressed the problem of a large number of small local authorities by amalgamation. Such consolidation was followed by a massive transfer of powers, with the accompanying financial resources, to municipalities and counties. Local authorities account for 60-70 per cent of total public consumption and are the most important service delivery and policy implementation agencies of the welfare state. "A bewildering array of special grants and reimburse systems have been abolished in favour of block grants, which together with local income tax give local authorities considerable economic latitude." Local government associations have played a major role in such reforms.¹⁶⁹

The two arenas, represented by the corporatist sector and Parliament, are part of the institutional environment facing central governments and are often complementary. They may also represent alternative ways of pursuing policy objectives. An example of the corporatist approach is central government engaging both trade unions and employers' associations "to make 'moderate' collective agreements as an alternative to legislating tough fiscal policy measures." Alternatively, government could negotiate with organised interests before tabling its policy in Parliament, possibly only for ratification. Hence, corporatist decision-making becomes 'co-operation in the shadow of parliamentarism'. Likewise, parliamentary decision-making may be

¹⁶⁷ Blom-Hansen (1999), *op cit*, 39-40.

¹⁶⁸ Blom-Hansen (1999), *op cit*, 43-44.

¹⁶⁹ Blom-Hansen (1999), *op cit*, 45.

in the shadow of corporatism. These alternatives may result in more effective intergovernmental relations and hence better public policies, at the same time giving central government both ‘voice’ and ‘exit’ options.¹⁷⁰

The mere availability to central government of an exit option serves as an incentive to local government representatives for entering into constructive co-operation and also consider compromises. Such engagement and support serve to increase the state’s information and knowledge of sub-national affairs, thereby contributing to more effective and practical policies. Associations could be seen as ‘private interest governments’ if members delegate their powers to them. They would then assume public responsibilities through self-regulation. The danger of them ‘capturing’ central government makes the state’s use of the exit option crucial. Constructive co-operation could increase state capacity on a given set of issues addressed through a joint problem-solving style.¹⁷¹

While in some areas, such as policy on the labour market, corporatist solutions may carry greater legitimacy and effectiveness, there is need for caution if central government is weak and open for exploitation by the associations. However, the *raison d’être* of these organisations is not to pursue party political gains, but rather the institutional interests of their member sub-national governments. While party political and institutional interests may overlap, they are not identical. The availability of two arenas capable of being used interchangeably makes it difficult for actors to veto policy proposals. “Thus, a skilful manipulation of the arenas as voice and exit options may give the whole system a dynamic trait.”¹⁷² Insofar as financial and fiscal relations are concerned; the following quote is informative:

Effective fiscal policy in Scandinavia is simply not possible without some kind of co-ordination between national and sub-national expenditure and revenue policies. At the same time, local self-government is a widely cherished value in all three countries.¹⁷³

Apart from the conventional functions of municipalities, Scandinavian sub-national governments in a welfare state are also responsible for social affairs, education, health care, culture, public transportation, administration, and other functions. According to Blom-Hansen (1999), subnational governments’ share of total public consumption currently is approximately

¹⁷⁰ Blom-Hansen (1999), *op cit*, 45.

¹⁷¹ Blom-Hansen (1999), *op cit*, 46.

¹⁷² Blom-Hansen (1999), *op cit*, 47.

¹⁷³ Blom-Hansen (1999), *op cit*, 48-49.

70 per cent in Sweden, 69 per cent in Denmark and 60 per cent in Norway. Notwithstanding such high expenditure at local level, all three countries have, “with few exceptions, refrained from pursuing control through simply legislating spending limits.” Rather, they have relied on financial incentives, that is, control through manipulation of the economic incentive structure available to sub-national decision-makers. This approach is also informed by the value placed on local self-government, a political fact of life. Other macro-economic controls have been pursued in an indirect way, using policies reached through consensus and heavily reliant on sound intergovernmental relations and co-operation.¹⁷⁴

While intergovernmental relations in Scandinavia do have its problems, it appears to be working reasonably well in today’s complex globalised local government environment. In conclusion, it could be said that –

Political systems characterised by institutional pluralism where public policy is made by partly overlapping and partly competing institutions may be more effective than systems where public policy is made by monopoly institutions.¹⁷⁵

The Swedish model of systemic, organised, decentralised, strong, and highly autonomous local authorities working on a consensual basis in a unitary state is alien to both pre-and post-apartheid South Africa. However, the attractiveness of the Scandinavian model justifies a further look into the system, especially in the following areas:¹⁷⁶

- (a) a clear dividing line between the political and administrative functions;
- (b) use of professionally-qualified politicians as administrators;
- (c) laws regulating the relationship between central and local governments;
- (d) absence or very limited role of regional authorities;
- (e) local politicians representing municipalities directly in the national assembly rather than indirectly through an unelected body like SALGA; and
- (f) direct democracy through use of referenda on major issues.

ii. Denmark

Denmark is a unitary state with a “long-standing tradition of a decentralised public sector where the majority of welfare tasks are dealt with by local government.”¹⁷⁷ Reforms commencing in

¹⁷⁴ Blom-Hansen (1999), *op cit*, 49-50.

¹⁷⁵ Blom-Hansen (1999), *op cit*, 51.

¹⁷⁶ Blom-Hansen (1999), *op cit*, 61.

¹⁷⁷ Toonen *et al* (2007), *op cit*, 18-19. Updated by www.oecd.library.org/Denmark: The Local Government Reform, accessed 6/06/2016.

2007 fundamentally changed the country's local government structure by strengthening them through mergers and task redistribution. Thirteen counties were replaced by five regions and 271 municipalities were amalgamated into 98, of which only seven have less than 20 000 inhabitants. Through co-operation agreements with neighbouring municipalities, the now enlarged ones have taken over several tasks hitherto carried out by counties, as is contemplated in the Gauteng Global City Region. The reforms resulted in a decrease in the level of responsibility of mid-level administration and a concomitant increase in municipalities' responsibilities to handle most of the citizen-related functions. Local authorities have a general competence laid down by law but most of the tasks they perform are mandatory. Regions have a limited scope of responsibilities. The Constitution empowers local authorities to take independent control of their own affairs, subject to supervision by central government, although they still retain a considerable degree of autonomy. Since tax-levying was traditionally extensively decentralised, Danish local authorities rely heavily on local sources of income. Reforms gave additional revenue sources to municipalities, previously held by counties. Now local government also receives substantial grants, distributed according to population size.¹⁷⁸

Central – local government relationship is a mixture of “control, negotiation and autonomy, but detailed involvement is being avoided.” The National Association of Local Authorities and the Association of County Councils have an annual economic agreement with central government. These organisations are involved in national policy-making at an early stage. Local authorities have recently moved towards greater co-operation with each other. Denmark uses a combination of formal and informal structures with the latter recently changing shape from centrist-corporatist arrangements to a more network-based pattern.¹⁷⁹

6.4.8 CO-OPERATIVE GOVERNANCE IN CANADA

i. Allocation of powers and functions

Canada's federalism functions alongside a Westminster style parliamentary system in terms of which executives are accountable to their legislatures. There is relative 'equality between federal and provincial governments largely because of the extensive powers, resources, and political clout of the latter. Provinces use a well-developed network of IGR mechanisms for engagement, on the understanding that executives at forums cannot make binding decisions.¹⁸⁰

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Chattopadhyay (2016) *op cit*, 3,9,13.

According to Beaudoin (2012), intergovernmental relations especially with respect to local authorities have to be seen within the context of their position *vis-à-vis* the federal and provincial governments. Their respective legislative powers were set out in the *Constitution Act* of 1867. Hence, their permanence and autonomous jurisdiction are constitutionally guaranteed. Executive power is theoretically similarly distributed. From 1949, judicial power resided with the Supreme Court. Jurisdiction over matters of national interest is vested in Parliament, while those of particular interest in provinces. All matters not assigned exclusively to the legislatures of the provinces reside with federal government. Provincial legislatures have exclusive jurisdiction over local governments, including municipalities, as provided for in the Constitution. The province has the right to change municipal boundaries, to alter their financial resources, to withdraw old powers, and to grant new ones. “The power to spend money remains an extremely vague and contentious area.”¹⁸¹ The Constitution recognises federal and provincial governments as fairly independent entities with jurisdiction over their respective spatial and functional areas. Such powers and functions cannot be altered without their consent.¹⁸²

ii. Local government

“Canada’s first uniform municipal system was established in 1849”.¹⁸³ The approximately 3 700 municipalities do not cover the entire country, but where they do exist, community participation is a priority. They raise more than eighty per cent of revenue from own sources.¹⁸⁴

Magnusson (2012) states that local authorities in Canada are creatures of statute, applicable to all municipalities within each province. Such an enactment can be changed by majority vote of the provincial legislature. Municipalities can usually exercise only those powers delegated to them by a Municipal Act, Local Government Act, Cities and Towns Act, or similar such statutes. Some powers and functions are mandatory while others are permissive. The *raison d’être* of municipalities is to provide services that can be more effectively handled under local control. A municipality acts *ultra vires* if it undertakes work outside of those explicitly set out

¹⁸¹ Beaudoin, Gerald A (2012) *Distribution of Powers*, www.thecanadianencyclopedia.com, accessed 20/12/2015.

¹⁸² Makarenko, Jay (2007) *Local Government in Canada: Organisation and Basic Institutions*, 29/11/2007, from <http://www.mapleleafweb.com/features/local-government-canada-organisation-basic-institutions.html>, accessed 16/12/2015.

¹⁸³ <https://thecanadianencyclopedia.ca/en/article/local-government>, accessed 24/05/2017.

¹⁸⁴ *Ibid.*

in the Act or permitted by the province. Municipal governments are empowered to make policy, raise revenue, and ensure the implementation of policy. Administration is handled by the municipal public service. Local government is constituted by municipalities, local administrative bodies, public utilities commissions, parks boards, and other special-purpose agencies, all chosen by and held accountable to the local community that elects these bodies. Hence, the municipal council is not the only elective local government in most Canadian communities. This situation is further complicated by the existence of local administration offices established by the provinces and many more or less autonomous local agencies such as harbour commissions, library boards, and police commissions. Toronto, for example, has more than 100 authorities that could be classified as ‘local governments’.¹⁸⁵

Chattopadhyay¹⁸⁶ asserts that “provinces have tenaciously guarded their jurisdiction over local government, and have strongly discouraged the development of direct federal-local linkages.”

Municipalities, however, are the only general-purpose governments at the local level and the municipal council is usually the focus of attention in local politics. They are the repositories for local government functions not assigned to other agencies. There are many different classes of municipalities, the most important distinction being urban and rural, the latter having the most limited functions. Urban areas are classified by size as villages, towns, and cities, the largest designated metropolitan areas. Municipal councils and other elective local authorities are small (5–15 members) and since most councillors are, theoretically, nonpartisan, collegial decision-making is possible. Their delegation of duties to semi-autonomous agencies further reduces the scope of municipal accountability. The dispersal of municipal responsibilities and the problem of lay participation in administration have recently led to efforts in professionalisation (as in Sweden) and to centralise managerial control. However, municipalities are still viewed as mere administrative agencies of the province and subjected by them to tight controls. This occurs even when they act independently, using self-generated revenues for their own purposes. While critics have argued that local government could be strengthened by consolidating existing authorities into larger units with wider responsibilities, the provinces have little incentive to allow this as they could then be rivalled for power and prestige. Thus, ‘reform’ has been limited

¹⁸⁵ Magnusson, Warren (2012) *Local Government*; Plunkett, TJ (2012) *Municipal Government*; O’Brien, Allan (2012) *Municipal-Provincial Relations*, www.thecanadianencyclopedia.com, accessed 15/12/2015; Makarenko (2007), *op cit*.

¹⁸⁶ (2016), *op cit*, 14.

to minor adjustments. Traditionally, county councils provided services over larger, consolidated rural areas. A double-tiering of municipal government and joint action for urban areas was adopted in 1953, with the establishment of metropolitan Toronto, in effect a county council. Additional powers were delegated to the city and its success led to other similar initiatives, resulting in most major cities becoming metropolitan or regional governments, with recent enlargement of the scale of local administration. However, there are still some 5 600 municipalities in Canada, with new ones continuing to be formed. Thus, fragmentation due to the still large number of small local governments and numerous special-purpose bodies remain a cause for concern.¹⁸⁷

iii. Federal-provincial relations

Federal-provincial relations are the “complex and multi-faceted networks of influence”¹⁸⁸ which have developed in the engagements between the two top levels of government. The characteristic Canadian interdependence of these governments is defined by a pattern of “shared and overlapping responsibilities, shared authority, and shared funding in many if not most areas of public policy.”¹⁸⁹ National objectives can often only be achieved with provincial co-operation and conversely, the achievement of provincial goals usually requires federal assistance, hence ‘co-operative federalism’. Federal-provincial engagement takes place in many arenas, from a multitude of informal day-to-day contacts between bureaucrats, to more formal ‘set-piece meetings’ between federal and provincial ministers. Most attention is focused on multilateral meetings of representatives from all eleven governments, but there are also smaller, bilateral meetings. The exchanges among ministers and bureaucrats have been termed “executive federalism,” with “no complete inventory” of such interactions, and the “intensity and subject matter has varied over time.”¹⁹⁰ In the 1960s and 1970s intergovernmental forums were seen “less as an arena for harmony and co-operation and more as one for exacerbating disagreement.”¹⁹¹ The Liberal Party of 1980-1984 attempted to govern without going through the intermediary of the provinces. The most important federal-provincial forum is the First Minister’s Conference chaired by the Prime Minister although much of the hard bargaining takes place in closed sessions and in back-room meetings. Reporting to the First Minister’s

¹⁸⁷ *Ibid.*

¹⁸⁸ Simeon, Richard (2012) *Federal-Provincial Relations*, www.thecanadianencyclopedia.com, accessed 15/12/2015.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

Conference are many ministerial conferences, some held regularly while others meet on an *ad hoc* basis, with varying degrees of success.¹⁹²

Although annual meetings of premiers have been held since 1960, co-operation on many issues is “limited by divergent political orientations and regional interests.”¹⁹³ Provinces have established several interprovincial ministerial bodies. Whilst important and essential for joint public policy-making, the federal-provincial and inter-provincial relations are not mentioned in the Constitution and most meetings are informal and *ad hoc*. Many have been criticised as forums that exacerbate conflict as they compete for resources and public support. It has been said that too great an emphasis on intergovernmental consensus leads to “excessive delay and a subordination of policy to the lowest common denominator.”¹⁹⁴ While some supporters of strong federal government believe provincial participation undermines federal authority, others argue that secrecy and closed-door federal-provincial engagement diminishes citizen participation and reduces the ability to consult effectively with interest groups representing non-territorial interests. Intergovernmental relations are thus seen as a process that undermines responsible government and legislative sovereignty as well as governmental accountability. The contrary view is for placing less stress on extensive intergovernmental co-operation with more emphasis on each government acting independently within its area of jurisdiction. This model of ‘competitive federalism’ argues that government responsiveness and policy effectiveness may be enhanced through competition rather than in intergovernmental relations for its own sake.¹⁹⁵

“Intergovernmental relations in Canada focus on the relations among federal and provincial/territorial executives”.¹⁹⁶ Intergovernmental structures and processes are informal and as such not incorporated in the Constitution. Neither do they have a basis in law or any statutes. They develop on an *ad hoc* basis in response to needs of the time and are “forums for the exchange of information, and for negotiation and persuasion.”¹⁹⁷

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Intergovernmental Relations in the Canadian Context* (2002), from <http://www.pco-bcp.gc.ca/aia>, accessed 25/05/2017.

¹⁹⁷ *Ibid.*

The contrary view, of collaboration and partnerships, emphasises the cost of competition, holding that with two powerful and equal orders of government, co-operation is seen as essential. Both sides agree on the importance of federal-provincial relations, but are unsure whether it should be elevated to a third order of government with real decision-making power, or that it should be seen merely as opportunities for consultation and debate.¹⁹⁸ In conclusion, the comment below may be illustrative:

Those advocating a more competitive model call for “disentanglement” and a clarification of powers of each level and argue for reforms in the central government which will make it more regionally responsive, and therefore more able to bypass provinces. Advocates of collaborative federalism call for a more formalised network of intergovernmental machinery designed to make co-operation more effective.¹⁹⁹

iv. Provincial-municipal relations

According to O’Brien (2012), relations between provinces and municipalities are shaped by the stronger position of the former. The autonomy of municipalities is severely restricted. For example, municipal by-laws require provincial approval; municipal borrowing for capital projects are strictly controlled by the provincial Department of Municipal Affairs or by a municipal board appointed by the province; planning decisions can be appealed to a provincial agency; and many local powers apply only to a shared provincial-municipal jurisdiction, for example, the environment. Limited autonomy raises questions about the democratic accountability of local authorities. Municipalities may co-operate with others in voluntary associations to support their interest in provincial policymaking. A major concern of these (voluntary) associations is to improve the financial arrangement of municipalities. Local revenue derives from property taxes and provincial grants, of which eighty per cent are conditional. The conditions are such as to induce municipalities to make choices that meet provincial policy goals at the expense of municipal priorities. In some provinces delegating or downloading of functions and financial burdens to municipalities became rampant in the 1990s. “The relationship between municipalities and their respective provincial governments is not an easy one.”²⁰⁰

The relationship between a province and its municipalities is one of superior and subordinates and not of equals; that between municipalities and the federal government is ‘relatively unimportant’. Federal programmes that affect municipalities are generally handled through

¹⁹⁸ O’Brien, Allan (2012) *Municipal-Provincial Relations*, www.thecanadianencyclopedia.com, accessed 16/12/2015.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

federal-provincial agreements. Small, separate or freestanding local government jurisdictions make for inefficient service delivery. To cater for a larger area taking advantage of economies of scale requires amalgamation or consolidation into a single entity, the decision on which rests solely with the provincial government.²⁰¹

Provincial governments have recently acknowledged the benefits of amalgamation into “regional governments” which saw the establishment of the Greater Vancouver Regional District comprising 21 municipalities, and of “county governments” in rural areas, such as in Atlantic Canada, Ontario, Quebec, and Alberta.²⁰²

The Federation of Canadian Municipalities (FCM) represents 2 000 voluntary members from all of Canada’s provinces and territories, representing 90 per cent of the country’s population. It has a 75-member Board of Directors, operating through its Annual Conference, committees, policy forums, and programmes. It seeks to influence public policy and programmes at the federal level through policy statements on priority areas and through advocacy. It shares experiences with local governments abroad.²⁰³ The FCM does not have the status of municipal associations in Scandinavia and Europe and little information is available of achievements since establishment in 1976. The adversarial style of intergovernmental relations practised in Canada is in contrast with the collaborative mode of co-operative governance in Germany.

The Canadian constitution established a framework wherein “different kinds of working rules apply in particular areas of joint action”.²⁰⁴ Hence, the principles underlying the division of powers are based on functional distinctions instead of spatial jurisdictions. This results in parallel rather than interlocking governments. In such a system, each authority would assert its right to separate action in its own jurisdictional area. This approach heightens conflict and competition, to the detriment of benefits that could arise from co-operation. Whilst interdependencies and joint action between federal and provincial governments may be many, the advantages of practice in Germany are absent. With institutional arrangements being rigid and legalistic, bilateral co-operation would be restrained further if such approaches were foisted

²⁰¹ Plunkett, TJ (2012) *Municipal Government*, www.thecanadianencyclopedia.com, accessed 16/12/2015.

²⁰² Makarenko (2007), *op cit*.

²⁰³ www.fcm.ca, accessed 16/05/2016.

²⁰⁴ Trench, Alan (2003) *Intergovernmental Relations in Canada: Lessons for the UK?* Paper: The Constitutional Unit, School of Public Policy, University College London.

on intergovernmental relations. Competitive federalism employed in Canada will have to be reformed through constitutional provisions that consider the need for sound intergovernmental relations through collaborative federalism as undertaken in Germany, but mindful of the realities in Canada.²⁰⁵ The FCM is an external agency, similar to SALGA and the UK's Local Government Association.

Canada has a "highly developed system of intergovernmental relations" and engagement between governments accorded considerable importance, with the federal government playing a dominant role. Intergovernmental relations "appear to be highly formal and formalised, at least compared with the UK," using a proliferation of agreements of two main types, bilateral and multilateral. Such instruments and structures for facilitating co-operation, as in the UK, have no constitutional and legal basis. Forums are used for information exchange, bargaining, persuasion, negotiation and consensus-building.²⁰⁶

Canada's First Ministers' Conference succeeded the Dominion-Provincial Conference which first met in 1867. Since 1991 the long-standing ceremonious conferences have been replaced by simpler First Ministers' Meetings, less formal and transparent and sometimes without any public agenda circulated. Below this is the family of ministerial meetings (of which twenty have been institutionalised), deputy minister committees, assistant deputy minister committees, and technical subcommittees. The outcome of the numerous dialogues would ideally be intergovernmental agreements, vertical and horizontal, of which there were 1 000 to 1 500 in force as at 2004. The objective of such agreements is to "reach some general and indispensable aims, recognisable as harmonising policy, solving problems that require joint initiative, and minimising duplication and overlapping in order to achieve greater efficiency and cost saving." Another type of written consensus is partnership agreements depicting shared objectives, decision-making, and costs in shared policy areas.²⁰⁷

In issue may be the juridical status of intergovernmental agreements, accords, and declarations as these are deemed by the contracting parties as not legally-binding instruments but merely political accommodation of interests which are not legally binding and as such frequently breached. A legally-binding contract would have to be presented to both the federal and

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Mazzarella (2009), *op cit*, 11-13; Trench (2003), *op cit*, 7-10.

provincial legislatures which can amend the agreement partially or in whole. Such formality has been deemed undesirable as the instrument is not an ordinary contract but an agreement between governments, based on its binding effect or mutuality. However, the Supreme Court ruled in *Finlay v Canada (Minister of Finance)* in 1986 and 1993 that in federal, territorial and provincial relations questions usually involve matters not appropriate for judicial adjudication. However, provincial non-compliance are questions of law and therefore justiciable. Up to this stage the vertical separation of powers was not a reason to apply the *pacta sunt servanda* principle. The Supreme Court confirmed this position in 1991 when it declared that the “Federation can legitimately breach an intergovernmental agreement in force by deciding unilaterally because Parliamentary sovereignty cannot be bound” by any previous compact signed among the Executive branch.²⁰⁸

The Annual Premiers’ Conference founded in 1960 turned itself into the Council of the Federation (CoF), in 2003 becoming a somewhat more permanent and more institutionalised version of the old forum, with a Secretariat for Information and Co-operation on Fiscal Imbalance. This institution was more inclined to allocating itself some decision-making rules ‘authority’. Horizontal relations are maintained to search for solutions capable of avoiding federal intervention. Intergovernmental negotiation, supplemented by multilateral and bilateral agreements, is used extensively to help resolve political differences and thus obviate unilateral federal initiative.²⁰⁹

The Canadian system of IGR manifests numerous informal vertical and horizontal relations with the latter an instrument to the former, in a both ways. This approach is characterised by a strong institutional path dependency, resulting in a low level of general innovation and some unsatisfactory performance, with the CoF being an exception in this context. The outcome is a large number of multilateral and bilateral agreements, which, being informal, falls far short of what may have been appropriate for a country functioning under a (written) constitution. This long-standing practice has shown the impossibility of modifying political accommodation techniques which have held it up in good stead and been the pillar of the evolution of the Canadian Federal fiscal system. The growing fiscal strength of the Federation may be seen as

²⁰⁸ Mazzearella (2009), *op cit*, 15-16.

²⁰⁹ Mazzearella (2009), *op cit*, 19-21.

a shift from a co-determination pattern to a more coercive form of intergovernmental relations.²¹⁰

In the financial and fiscal sphere, especially, the lack of formalisation of the negotiating process and the absence of any legal status of the intergovernmental agreements, as accepted by the Supreme Court, leave parties freer to use their “respective political autonomies to build a more and more efficient network of *Politikverflechtung*.”²¹¹ The public cannot tolerate “such an incoherent configuration of the Parliament” whose “formal centrality of its sovereignty is solemnly reaffirmed, as a legal limit to intergovernmental omnipotence.” The situation is exacerbated by the tendency to leave out the Assemblies from concrete decision forums. This attitude is a consequence of political incentives arising from both the Federal and provincial/territorial forms of government. There is also a low level of formalisation of relations between government and citizens who have limited legal guarantees.²¹²

Intergovernmental relations are not provided for nor protected by the Constitution, with Parliament as the final source of empowerment for co-operative governance mechanisms in the Executive realm. The intergovernmental agreement is the only instrument known to Canadian negotiators. The state has not given consideration to a Second Chamber²¹³ for territorial representation. This is because much of the intergovernmental interactions are “non-vertically oriented horizontal relations”; secondly, many political decisions would escape the Second Chamber; thirdly, Second Chambers tend to work on the basis of the majority principle and thus would not be suitable for ensuring strong guarantees to each single province or territory; fourthly, the nationalisation of the approach to any issue by Parliament would lead to politicisation within the Second Chamber, overshadowing territorial issues; and finally, a Second Chamber would ideally bring territorial interests within the central legislative process, whereas the objective of intergovernmental relations is to co-ordinate powers assigned to different levels, a task that can only indirectly and minimally be undertaken by a Second Chamber.²¹⁴ These arguments against a second chamber could apply equally to the NCoP.

²¹⁰ Mazzearella (2009), *op cit*, 47-50; Trench (2003), *op cit*, 11-14.

²¹¹ *Politikverflechtung* focuses on the institutional analysis of vertical and horizontal policy integration, as well as on their effects on the policy process, on policy design, implementation and outcomes, www.linguee.com, accessed 16/12/2015; Mazzearella (2009), *op cit*, 50.

²¹² Mazzearella (2009), *op cit*, 50-51.

²¹³ Such as South Africa’s National Council of Provinces.

²¹⁴ Mazzearella (2009), *op cit*, 54-57.

The Canadian governmental model is reminiscent of that of the UK and of South Africa's colonial and apartheid era systems. Emulating it would be a step backwards.

6.4.9 CO-OPERATIVE GOVERNANCE IN THE UNITED STATES OF AMERICA

Most literature here is again on federal-state relations, although there are some case studies detailing practical examples of inter-local co-operation. What may be of interest are the types of agreements entered into by governments for joint exercise of an undertaking or project. While it has been stated that development of local government in South Africa has been based largely on British Commonwealth models and as such distinctive from the American system, policies and implementation thereof, particularly those relating to joint planning and municipal service delivery in the US, may hold valuable lessons for the Republic, especially insofar as intergovernmental relations are concerned. In the US at the local sphere, quite unlike the situation in South Africa, governmental role players are counties, municipalities, townships, independent school districts, and special districts. By 1997 all states had granted local governments the type of broad latitude and authority to make mutual intergovernmental agreements with peers and other entities attractive and efficient. A large variety and number have since been concluded so as to provide sufficient practical information to formulate good practices. The approach here is based on the philosophy of a burden shared is one lessened, using the benefits of agglomeration or economies of scale. Hence, state authorities have used law as an instrument for development and regulation in a way that facilitates innovation without being overly prescriptive. It sees the following benefits deriving from intergovernmental agreements:²¹⁵

- (a) distribution or sharing of costs, especially where one local authority would not have been able to bear such expenditure on its own;
- (b) notwithstanding a joint operation, individual authorities have local control and direct oversight in their respective jurisdictions;
- (c) can address a single purpose, especially a functional one spread over more than one spatial jurisdiction;
- (d) allows a wide range of flexibilities, such as role-players or partners, subject matter, duration of undertaking, cost, and so on;
- (e) can deal with extraterritorial needs impacting on a particular jurisdiction; and

²¹⁵ Atkins, Patricia S (1997) 'Local Intergovernmental Relations: Strategies for Co-operation' 29(7) *Management Information Service: International City/County Management Association*, 1-11, 1.

- (f) does not require time-consuming institutional restructuring, that is, each local authority remains intact.

Since the legislation promulgated by the state is broad and enabling, the regional authority does not itself get involved in detail and allows for much informality among the contracting parties. A heavy involvement by the state would be counterproductive, especially since it would not have the requisite knowledge of local intricacies and idiosyncrasies to negotiate and manage a joint legal agreement. Moreover, inter-local co-operative actions are varied, happen frequently, and are a grassroots phenomenon. As such, they are not amenable to rigid and legalistic provisions and excessive high-level supervision. Their variety, and therefore the complexity, also do not allow for standardisation even within a state, let alone at federal level. Such agreements, therefore, have moved from recording and implementing merely what is permissible, to allowing for the incorporation of innovation and expansiveness.²¹⁶ An intergovernmental agreement has been defined as:

A legal pact authorised by state law between two or more units of government, in which the parties contract for or agree on the performance of a specific activity through either mutual or delegated provision. In their most common forms, these agreements are often called ‘joint exercise of service agreements’, ‘joint powers agreements’, or ‘mutual aid agreements’.²¹⁷

Based on the above definition, and from among a diversity of arrangements, two categories of contracts may emerge, namely:

- i. intergovernmental agreement – that is, formal local co-operation in terms of a legal agreement sanctioned by a statute of the state; or
- ii. co-operative intergovernmental venture, or effort, or endeavour, and so on, not constituting a legal agreement, but based on *bona fide* of the contracting parties and reflected in a memorandum of understanding or similar such instrument.

One must be mindful that unlike in South Africa, local authorities in the US acquire the power to enter into intergovernmental agreements from state constitutions, supplemented by statutes that vary widely across the country. However, most are permissive in that they allow jurisdictions to undertake any activity jointly that they were empowered to do individually.

There are generally only two types of enabling legislation:²¹⁸

²¹⁶ Atkins (1997), *op cit*, 2.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

- (a) those that are broad, covering any power, function or responsibility that the individual municipality may have, and allows it to undertake them jointly; and
- (b) those that set state constitutional and statutory requirements which any intergovernmental agreement must comply with.

In any case, intergovernmental co-operation falls within and support the concept of shared rule, a cornerstone of the US federal system. Within such wide parameters, state ground rules vary but all allow ‘joint powers agreements’, wherein two local authorities permit each other concurrent powers in parts of each other’s spatial jurisdiction or for a specific period. Such arrangements are also called ‘mutual aid agreements’. Most states also authorise ‘inter-local service agreements’ and contractual intergovernmental service agreements with the private sector.²¹⁹ The various types of arrangements are depicted in Table 6.2 below.

From the 1960s the federal government mandated states to participate in its programmes. These imposed numerous rules, many with cost implications that had adverse impact on the states (the ‘unfunded mandate’). This is an instance where law was used as a regulatory or ‘coercive’ mechanism rather than as a developmental one. Finding the situation untenable, the federal government enacted a statute to provide funding to states where federal laws impose duties on them and their constituent local authorities. The *Unfunded Mandate Reform Act* defines a federal intergovernmental mandate, in part, as: Any [involuntary] provision in legislation, statute, or regulation that ... would impose an enforceable duty upon State, local, or tribal governments or that would reduce funding for a previously imposed mandate.²²⁰

Federal agencies are required to consult with state and local authorities before implementing any such mandate, while the Congress Budget Office must evaluate any bill that incorporates intergovernmental or private sector mandates to determine their cost. Section 2(1) of the *Unfunded Mandates Reform Act* of 1995 states that the purposes of this Act are, *inter alia*, to strengthen the partnership between the Federal Government and State, local, and tribal governments.²²¹ Here one sees law as an instrument for development, not only in easing the financial burden of provincial and local authorities, but also in encouraging intergovernmental co-operation. A positive, practical example of law facilitating development is state legislation

²¹⁹ Atkins (1997), *op cit*, 3.

²²⁰ *Unfunded Mandates Reform Act* of 1995; see 1996 (109) *Harvard Law Review* 1469-1474, 1469.

²²¹ *Unfunded Mandates Reform Act* of 1995; *Harvard Law Review*, *op cit*, 1470-1471.

enabling counties and local authorities to take “more control over their destiny by planning together for development and conservation of resources”.²²²

Such instruments permit the joint planning and implementation of initiatives affecting an entire county or two or more contiguous municipalities within a county or counties, such that the outcomes are consistent and harmonised ordinances and actions. Previously, a municipal planning code required local authorities to provide for all uses within their respective spatial jurisdictions, unless they established a joint planning commission and adopted a joint zoning ordinance in order to distribute uses over a broader region. Now, an amended municipal planning commission (MPC) allows a multi-municipal approach to formulating joint comprehensive plans regionally, while retaining local control to ensure consistent implementation, through its own administrative structures, as well as governing and advisory bodies.²²³ This consolidated, co-ordinated and integrated approach holds many advantages, especially in being more economically efficient. In the process, integrated development plans produced by each municipality could be consolidated within a state or even across state boundaries. This approach would minimise conflict between local authorities and states, for ultimate resolution by a court of law. This happens when the two work independently, with the state overriding provisions of a city’s spatial development framework.²²⁴

In 1996, the American Council on Intergovernmental Relations (ACIR) was established as a federalism clearing house, a nonpartisan research entity, and a policy forum. The Council’s primary focus was on relations between federal, state and local governments in the US, with its mission accomplished through four programmes:²²⁵

- i. monitoring of intergovernmental relations and partnerships between organs of government;
- ii. tracking emerging and ongoing issues;
- iii. conducting targeted investigations into means of improving intergovernmental relations; and
- iv. fostering education on federalism among the public and in schools.

²²² Denworth, Joanne R (2001) ‘Growing Smarter Legislation: New Options for Multi-Municipal Planning and Implementation’ 72(3) *Pennsylvania Bar Association Quarterly*, 132-138, 132.

²²³ For example, Pennsylvania’s MPC, incorporated in Acts 67 and 68 of 2000, promulgated within the scope of that state’s Intergovernmental Cooperative Law – see Denworth (2001), *op cit*, 132.

²²⁴ See the conflict between the City of Johannesburg and the Gauteng Government over planning approvals: Keryn Brews: ‘Council fed up with development’, *Sandton Chronicle*, week ending 1/10/2004.

²²⁵ <http://govinfo.library.unt.edu/amcouncil.html>, accessed 4/10/2015.

NAME OF AGREEMENT	TYPE	WHAT AGREEMENT ENTAILS
Standard	Legal	Specific activity; mutual/delegated service provision
Joint exercise of services or joint powers	Legal	Mutually exercise a specific power or mutually deliver a specific service or activity
Delegated services	Legal	Permits the payment to another authority or some other organisation for delivery of a service or activity
Transfer of functions	Legal	Permanently transfers one or more activities from one local authority to another
Special purpose services district or authority	Legal	Single purpose district or authority established by two or more municipalities to handle one activity – not restricted to boundaries of one authority
Regional services authority	Legal	Multipurpose district or authority handling a variety of specified, often interrelated activities
City/county consolidation	Legal	All functions of two or more local authorities merged under one administration
Mutual aid	Informal	Resource sharing, usually in an emergency; could be unwritten agreement

Table 6.2: Types of intergovernmental inter-local agreements
(Adapted from Atkins, 1997, *op cit.*)

Programme activities are organised into projects, each with a white paper framing general issues.²²⁶

The American Political Science Association (APSA) has a section called ‘Federalism and Intergovernmental Relations’, which plans, develops and implements professional activities for the Association’s members.²²⁷ In 1974 President Gerald Ford formalised the Office of Public Liaison, charged with the task of communicating and interacting with various interest groups. In 2009, President Obama changed its name to the Office of Public Engagement, mandated to allow the views of ordinary American citizens to be more readily heard within the administration, mostly through presidential ‘town hall’ meetings and having administrators

²²⁶ *Ibid.*

²²⁷ www.apsanet.org, accessed 4/10/2015.

make more and better contact with members of the public. This unit functions alongside the Office of Intergovernmental Affairs that plans, co-ordinates and monitors work of elected officials in federal, state and local governments.²²⁸

The Office of the United States Trade Representative (USTR) working under the motto 'United We Serve', engages in international trade promotion. It incorporates the Office of Intergovernmental Affairs and Public Engagement (IGPE) that leads a public outreach programme for state and local governments as well as both small and large businesses, agricultural communities, labour, environmental, and consumer groups, The USTR functions under the guidance of eight advisory committees.²²⁹

In the US, intergovernmental relations and several legal and informal agreements have been used to develop small impoverished communities by listening to and acting on their complaints. There are 107 federally-recognised Native American tribes in California, more than any other state. They have a current total population of approximately 40 000. Since 1999, some 20 new and renegotiated compacts have been strengthened by becoming local agreements capable of being judicially enforced and also subject to binding arbitration, mostly relating to crime, traffic, environment, public services, and income from gaming establishments.²³⁰ While the US has the resources to establish and maintain several organisations for intergovernmental relations, there is need for such resources more so in a federal system. The importance of co-operative governance is such that it is located in the Office of the President, with the incumbent taking a direct interest and urging his staff to also do so. The various mechanisms, both formal and informal, can be used for the betterment of the poor in South Africa, such as rural communities under traditional leadership.

The federal-based US governmental system is different from that of Germany's. It is a model foreign to South Africa and incapable of implementation here.

²²⁸ http://en.wikipedia.org/wiki/White_House_Office_of_Public_Engagement, accessed 4/10/2015.

²²⁹ www.ustr.gov/intergovernmental affairs, accessed 5/06/2016.

²³⁰ <http://wordpress.com>, 3/09/2010, accessed 5/06/2016.

6.4.10 CO-OPERATIVE GOVERNANCE IN THE DEVELOPING WORLD

Whatever little information is available on intergovernmental relations in developing states again is mostly confined to federations, as the study undertaken to inform South Africa on this subject for its *White Paper on Local Government* revealed.²³¹ In analysing Argentina, Brazil, India, Mexico and Spain, it became clear that there is a dearth of literature on the practice and processes in this field at the local government level or has not been implemented sufficiently long enough to draw lessons of experience. Furthermore, South Africa's co-operative governance system is different from those is available, it often relates to relationships between the centre and the states or regions.²³² in almost all other countries. Where information

The study of co-operative governance in more countries would make this research large and possibly also too generalised to be of much assistance for informing municipal representation. Most of the case studies were descriptive and dealt largely with the constitutional structure and general context for intergovernmental relations in the specific country. There was little discussion on intergovernmental practice, and the informal structures and processes employed in these countries. Insofar as research on co-operative governance in these states is concerned, the study revealed the following:

- i. importance of the political aspect;
- ii. national governments have used their strong overriding powers to impose co-ordinated solutions; and
- iii. the Supreme Court or the Constitutional Court has ultimately played a role in defining the constitutional context of intergovernmental relations and in conflict resolution.²³³

Steytler (2006) shows that a process similar to the local government reforms prescribed in the German Basic Law of 1949 and in the Spanish Constitution of 1978 was adopted in the Brazilian Constitution of 1988, Argentina's revised Constitution of 1994, and Mexico's amended Constitution of 1999. Nigeria's Federal Constitution of 1999, returning the country to civilian rule, reasserted the role of local government in the federal structure.²³⁴ Kenya's *Intergovernmental Relations Framework Act, 2* of 2012, makes no mention of local government. Notwithstanding this, it may be useful to review the approach to co-operative

²³¹ Department of Constitutional Development and Provincial Affairs (1998) *Intergovernmental relations: An international comparative study*, 3-4, 6-8.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Steytler (2006), *op cit*, 3.

governance and intergovernmental relations in some African countries for comparative purposes.

6.4.11 CO-OPERATIVE GOVERNANCE IN AFRICA

This section briefly reviews the approach to co-operative governance and intergovernmental relations in the Southern African Development Community (SADC) region, Zimbabwe, Nigeria, and Kenya, as a means to compare with the South African approach.

(a) Southern African Development Community

Chikulo (2010) argues that Since the 1990s, a critical objective of governance reform has been the strengthening of local government by the decentralisation of powers, resources and responsibilities to local authorities and other locally administered bodies.²³⁵

Although well-intentioned and with considerable progress attained, the devolution of power and its implementation have encountered many challenges over two decades. The following emerging issues and challenges, *inter alia*, were identified: ²³⁶

- “Lack of political will or authority;
- Absence of a holistic developmental framework;
- Ineffective institutionalisation of local participation committees;
- Management capacity constraints and deficits;
- Fiscal crisis;
- Role of traditional authorities;
- Weak links [with] civil society organisations; and
- Undemocratic behaviour by ruling regimes.”

A major and common problem in most SADC countries is “foot-dragging or a lack of co-operation from central ministries”. There is reluctance to devolve sufficient powers and functions and powers to local government because this would reduce their own power. Local authorities lack the political power to overcome such obstruction, which results in “misdirected or incomplete implementation of decentralisation policies”.²³⁷ This leaves them as little more

²³⁵ Chikulo, Bornwell (2010) *Democratic local governance in the Southern African Development Community region: Some emerging issues and challenges*, Special Issue, March 2010, *Commonwealth Journal of Local Governance*, 145-157, 145.

²³⁶ Chikulo (2010), *op cit*, 146.

²³⁷ Chikulo (2010), *op cit*, 147.

than mere local agents of the centre, thus stifling local participatory democracy and limiting socio-economic development.

Generally, there is a “lack of holistic, integrated planning and management at district level”, a situation exacerbated by local authorities having no direct control in its co-ordination. This may be due to decentralised sector ministries providing local services reporting upwardly to their parent ministries, given that political and institutional power, policy responsibilities, and resources reside at the centre. This problem is also experienced with South Africa’s integrated development plans (IDPs) of municipalities which are “supposed to be a “bottom-up” participatory process”. Because such plans must align with those of national and provincial governments, it means that they would be approved only if they comply. Given that planning is a “top-down” process, there is little transfer of skills and resources to municipalities, and “token community participation”.²³⁸

In most countries studied, community committees have not been effectively institutionalised. Although in South Africa wards have been formally created for community engagement with municipalities, many communities, according to Atkinson (2007), still choose to take their grievances to the streets in protests, some of which turn violent.²³⁹ In many countries, most community development committees are not active, and “in some cases, exist only on paper”, resulting in limited public participation in development management. In most cases there is “insufficient human resources capacity to cope with the multiplicity of mandates which have to be carried out more or less simultaneously”. The scarcity, especially professional and technical staff, has been a “major constraint for most of the local authorities in the region”. Lack of capacity has been exacerbated by appointments based on political patronage rather than skills and expertise. The situation was “exacerbated by appointments based on political patronage rather than skills and expertise”.²⁴⁰

²³⁸ Chikulo (2010), *op cit*, 148.

²³⁹ Chikulo (2010), *op cit*, 149, quoting Atkinson, Doreen (2007) ‘Taking to the streets: Has Developmental Local Government Failed in South Africa?’, in Bulungu, S, J Daniel, R Southall and J Lutchmann, eds. *State of the Nation South Africa 2007*, Cape Town: HSRC.

²⁴⁰ Chikulo (2010), *op cit*, 149-150.

Another fundamental and common problem has been the “gap between financial resources and municipal expenditure needs”. Even if adequate financial resources were provided, the situation would be worsened by poor financial management systems of most local authorities.²⁴¹

In the SADC region, the participation of CBOs and NGOs in local governance remains minimal. They still find it difficult to engage and partner with local government and are “unable to influence local governance in a manner that would effectively benefit their communities.” On the other hand, most local authorities are reluctant to “embrace and engage civil society, NGOs and CBOs and to give effect to principles of participatory governance”.²⁴² Development at the local level will continue to suffer given that recently many of them would be neglected by the elites who give priority to pursuing their party-political agenda.²⁴³ The following quotation sums up the *status quo* in the SADC region:

However, although significant progress has been made in establishing the institutional structure and policy framework to facilitate and anchor effective delivery of public services and socio-economic development, key issues and challenges persist that are unlikely to be resolved in the near future.²⁴⁴

(b) Zimbabwe

The Monomotapa domain rose around 1200 and fell in the 1600s. It established Great Zimbabwe, and introduced agriculture, gold mining and international trade. In the 1830s, Ndebele people fled Zulu violence and Boer migration in South Africa to settle in Matabeleland. In 1889, Cecil John Rhodes of the British South Africa (BSA) Company was mandated to colonise what came to be known as Southern Rhodesia. At the end of the BSA administration in 1922, the white minority opted for self-government.²⁴⁵

Before independence, most of Zimbabwe’s wealth was owned by the white minority. The colonial period was characterised, *inter alia*, by:

- White occupation of land owned by locals and the relocation of black people to unproductive outlying communal land. ‘Expropriation’ was without compensation;
- Blacks were excluded from the political process; and

²⁴¹ Chikulo (2010), *op cit*, 152.

²⁴² Chikulo (2010), *op cit*, 153.

²⁴³ Chikulo (2010), *op cit*, 154.

²⁴⁴ Chikulo (2010), *op cit*, 155.

²⁴⁵ Zimbabwe profile – timeline – BBC News (9 May 2017), <http://www.bbc.co.uk/news/world-africa-14113618>, accessed 3/06/2017 (“BBC Zimbabwe Profile 2017”).

- Black Zimbabweans were forbidden from the best schools and residential areas in Rhodesia.²⁴⁶

In 1930, the *Land Apportionment Act* restricted black access to land, whereafter many were forced into wage labour. In 1953, Britain created the Central African Federation, constituted by Southern Rhodesia (Zimbabwe), Northern Rhodesia (Zambia), and Nyasaland (Malawi). Between 1930 and 1960, black opposition to colonial rule grew, leading to the emergence in the 1960s of nationalist groups, Zimbabwe African Peoples' Union (ZAPU) and the Zimbabwe African National Union (ZANU). The federation was dissolved in 1963 when Zambia and Malawi gained independence.²⁴⁷ In 1965, the UK adopted a policy of "No Independence Before Majority Rule (NIBMAR)". The Rhodesian Front rejected this and in that year Prime Minister, Ian Smith, unilaterally declared independence under white minority rule. This action was declared illegal by the United Nations (UN) and sparked international outrage, resulting in economic sanctions being imposed. The first war by black Zimbabweans against white rule, the *Chimurenga*, in 1896-1897, was lost by the locals. The second *Chimurenga*, the "Rhodesian Bush War", from 1964 to 1979, was the struggle for liberation.²⁴⁸ From 1972, the guerrilla war by ZANU and ZAPU intensified, leading to the British-brokered all-party talks at Lancaster House in London culminating in a peace agreement, a new constitution, and guarantee of minority rights.²⁴⁹

On 18 April 1980, Zimbabwe gained independence that was internationally recognised. Robert Mugabe was named Prime Minister. In the first decade following independence, the new government's command economy introduced programmes focused on building the health and education sectors, with the state playing a major role in the country's economic and social development, based on its "Growth with Equity" policy. "Zimbabwe's growth rate during the eighties was higher than that of sub-Saharan Africa as a whole," strongly boosted by farming output, but in the 1980s, drought began to have a devastating impact on the economy.²⁵⁰ It began failing rapidly, as indicated by the "rise in total debt from US\$786 million at

²⁴⁶ Munangagwa, Chidochashe L (2009) *The Economic Decline of Zimbabwe*, 3 (2009) *Gettysburg Economic Review*, 108-129, 111.

²⁴⁷ BBC Zimbabwe Profile 2017, *op cit*.

²⁴⁸ BBC Zimbabwe Profile 2017, *op cit*; Munangagwa (2009), *op cit*, 111-112.

²⁴⁹ *Ibid*.

²⁵⁰ Munangagwa (2009), *op cit*, 112.

independence to 2.3 billion in 1983”. Unemployment and population grew substantially from the time of independence.²⁵¹

Since independence, Mugabe established and maintained a one-party state, holding control of the main governing bodies, including the Reserve Bank of Zimbabwe. The country’s economic decline since 1997 led to a hyperinflationary environment.²⁵²

In 1987, the two political parties merged to form ZANU-PF; Mugabe changed the constitution and makes himself Executive President. This was the beginning of Zimbabwe’s demise.²⁵³

From 1990, Zimbabwe sought to liberalise its economic system through the Economic Structural Adjustment Programme (ESAP); however, under this new macroeconomic policy in the 1990s, “growth was a disaster” and had an adverse effect on the manufacturing industry. ESAP became impossible to implement due largely to the “government’s failure to control public expenditure and financing of the programme through borrowing from domestic banks”. The next phase of economic recovery, the Zimbabwe Programme for Economic and Social Transformation (ZIMPREST), from 1996 to 2000, also ended in failure, as did the World Bank and International Monetary Fund’s (IMF’s) Structural Adjust Programmes, with the result that “by 2003, Zimbabwe’s economy was the fastest shrinking in the world, at 18 per cent per year”.²⁵⁴

Land occupations had been taking place since the 1980s. Vusani (2015) asserts –

At independence about 6 000 white commercial farmers owned 15 million hectares of land while 8 500 small-scale African farmers had 1.4 million. The rest, an estimated 700 000 communal farming households, subsisted on 16.4 million hectares...less than 50 per cent of all agricultural land, of which 75 per cent was in the drier, less fertile agro-ecological regions.²⁵⁵

In 2000, squatters seized hundreds of white-owned farms, starting a violent and ongoing campaign to reclaim what was “stolen” by settlers. Zimbabwe for the first time publicly acknowledges an economic crisis when foreign reserves have run out, and warning of serious food shortages. The World Bank and the IMF as well as most western donors have cut aid

²⁵¹ BBC Zimbabwe Profile 2017, *op cit*; Vusani, Michael (2015) *Economic downfall of Zimbabwe from 1980 to 2008*, 8 November 2015, 1-23, 4, <https://linkedin.com/pulse/economic-downfall-zimbabwe-from-1980-2008-michael-vusani>, accessed 3/06/2017.

²⁵² Munangagwa (2009), *op cit*, 110.

²⁵³ BBC Zimbabwe Profile 2017, *op cit*.

²⁵⁴ Munangagwa (2009), *op cit*, 112-113, 116.

²⁵⁵ Vusani (2015), *op cit*, 11.

because of Mugabe's land seizure programme. On 13 February 2000, the new constitution was rejected by 55 per cent of Zimbabwe's voting population, a first major 'defeat' of the ruling party. Following worsening food crises that threatened famine, in April 2002 a state of disaster was declared. A land acquisition law passed in May saw the departure of 2 900 white commercial farmers. A widely-observed strike in 2003 resulted in arrests and beatings. Zimbabwe pulled out of the British Commonwealth.²⁵⁶

In 2005, tens of thousands of shanty dwellings and illegal street stalls in urban areas were destroyed as part of a "clean up" programme. The United Nations (UN) estimated that such action left 700 000 people homeless. In May 2006, year-on-year inflation exceeded 1 000 per cent. Rallies, protests, and demonstrations become a familiar sight, as does police brutality. In 2006, the Zimbabwean economy "spiralled rapidly into a world record decline ...[when] GDP per capita was 47 per cent lower than it was in 1980".²⁵⁷ One of Zimbabwe's major economic errors was its land 'reform' which involved large-scale transfer of land. A shortcoming was the absence of skills transfer in farm management. Failure of local farmers may have contributed to the growth of the informal sector, accounting, in 2007, for eighty per cent of the country's economic activity, eighty per cent of which used foreign currency. In this year the annual inflation rate, at 1 729.9 per cent, was the highest in the world.²⁵⁸ By the end of 2008, hyperinflation reached an 'official' level of 230 million per cent, with catastrophic effect on incomes and savings.²⁵⁹

In 2010, a new "indigenisation" law forced foreign-owned businesses to sell majority shareholding to locals. In 2011, Prime Minister Morgan Tsvangirai said that the unity government has been rendered "impotent" by ZANU-PF violence and disregard of the power-sharing agreement. In March 2013, a new constitution was approved by an overwhelming majority in a referendum, a significant provision was that future presidents would be limited to two five-year terms. In the July presidential and parliamentary elections, ZANU-PF 'won' three-quarters of the seats in parliament and Mugabe gained a seventh term in office. The opposition leader dismissed the polls as a "fraud". Demonstrations calling for Mugabe to stand

²⁵⁶ BBC Zimbabwe Profile 2017, *op cit*.

²⁵⁷ Vusani (2015), *op cit*, 15.

²⁵⁸ Munangagwa (2009), *op cit*, 118, 120, 121, 124.

²⁵⁹ Vusani (2015), *op cit*, 15.

down increased in 2016, but were dealt with brutally by the police. The next elections are scheduled for 2018.²⁶⁰

Although the Zimbabwean Constitution²⁶¹ established a three-tier governmental system with each sphere having its powers and functions prescribed, there was no “clear regulatory framework for management” of IGR. Furthermore, any legal basis for this lacked clarity, transparency, and consistency, while being “subject to political manipulation”.²⁶² Within this vague, confusing, and ambivalent milieu, the “predatory” centre had hijacked authority to “advance political and personal interests”. The concentration of discretionary power at the centre negatively affected sub-national governments.²⁶³ Chakunda argues that:²⁶⁴

There is lack of comprehensive policy commitment to developing regulatory effective diffusion of authority to enhance not only autonomy of different levels of government but also limit notable problems such as how central government, local government and strategic actors and institutional arrangements interact.

Differences in political ideologies and philosophies and biases in their favour puts into question the “objectivity of central government intervention in local government affairs” as happens quite often. While such actions undermine local authorities, it may be that they have limited capacity to undertake their functions effectively, especially where they are based on the principle of subsidiarity. With Zimbabwe being a unitary state, there is “only one source of state authority, with local government being mere agents of the centre. The local power drain is evident from “an increased propensity towards recentralisation”. This is possible because local authorities are creatures of statute with no constitutional protection. ²⁶⁵

Chakunda asserts:²⁶⁶ The Minister retains the overall supervisory, coordination and control authority on the behaviour of local authorities. However, local authorities at provincial and district levels are accountable to the Minister via the Provincial Administrator (PA) and District Administrator (DA) respectively.

²⁶⁰ *Ibid.*

²⁶¹ Constitution of Zimbabwe, Amendment 20 of 2013.

²⁶² Chakunda, Vincent (2015) *Towards Intergovernmental Balance of Power in Zimbabwe: Opportunities, Challenges and Critical Success Factors*, 20(1) (2015) *Journal of Humanities and Social Sciences*, 42-48, 46 (“Chakunda 2015 – 1”).

²⁶³ *Ibid.*

²⁶⁴ Chakunda (2015 – 1), *op cit*, 47.

²⁶⁵ Chakunda, Vincent (2015) *Central-Local Government Relations: Implications on Autonomy and Discretion of Zimbabwe’s Local Government*, 3(1) (2015) *Journal of Political Sciences & Public Affairs*, 1-4, 1-3 (“Chakunda 2015 – 2”).

²⁶⁶ Chakunda (2015 – 2), *op cit*, 3.

As creatures of statute, local government exercises delegated authority only. The Minister has extensive powers, including, *inter alia*, that of supervision, intervention, appointment and suspension of officials, limiting sources of revenue, and nullifying decisions of local government. The Rural District Council Act lists more than 250 instances where the Minister can intervene in the day-to-day running of such councils. The Minister has been quoted as saying in public that since “local councils enjoyed delegated authority and thus should follow government, and by extension, ZANU-PF policies”.²⁶⁷

Vusani (2015) argues that during the first decade following independence, Zimbabwe made “real and positive” progress with free health care and education increasing standards of living. However, its focus was then a moral and political issue, but “not an economically wise thing to do. This socialist concept was unsustainable, especially in the absence of means to generate income. The situation was worsened since the introduction of ESAP.²⁶⁸ Manangagwa (2009) asserts that Zimbabwe’s policies were ineffective as these “target the effects and not the causes”. Although formulated for the public good, while ignoring the associated social costs. Furthermore, policies were not implemented in the “most efficient, transparent manner. He is of the opinion that the state’s first priority is to reassess its political condition before any long-term “stabilisation effort can be put in place”.²⁶⁹

(c) Nigeria

Regionalism was introduced to Nigeria from the beginning of formal British Indirect Rule in 1901. This was done to maintain a “continued manipulation of the system” by keeping the centre strong and the states weak and divided so that the country could be governed effectively from the centre.²⁷⁰ Olaiya (2016) quotes Rothermund who pointed out that the British colonial power was short of sincerity when putting down the structure of federalism, *ab initio*.²⁷¹ Bello (2014) asserts that, “Although intergovernmental relations originated from the United States of America in the 1930s, it was the British colonial masters who brought the idea to Nigeria.”²⁷²

²⁶⁷ Chakunda (2015 – 2), *op cit*, 4, quoting Ignatius Chombo, Minister of Local Government, Public Works and National Housing.

²⁶⁸ Vusani (2015), *op cit*, 18.

²⁶⁹ Munangagwa (2009), *op cit*, 124, 128.

²⁷⁰ Olaiya, Taiwo Akanbi (2016) *Federalism and Intergovernmental relations in Africa: Retrospect and Prospects from Nigeria*, 5(2) (2016) *Public Administration Research*, 87-98, 94.

²⁷¹ Olaiya (2016), *op cit*, 95, quoting Rothermund, Dietmar (2006) ‘Constitution Making and Decolonisation’, 53(9) *Diogenes*, 9-17.

²⁷² Bello, ML (2014) *Intergovernmental Relations in Nigeria: An Assessment of its Practice at the Local Government Level*, 4 (2014) *Journal of Poverty, Investment and Development*, 66-76, 71.

It has been said that the “festering crisis of contentious intergovernmental relations in Nigeria” could be attributed to policies adopted during the colonisation period. During this period, regions functioned as “administrative and political constituencies and mobilisation of resources”. The effects of centralisation resulting from both colonisation and long period of military rule that followed “still linger on”.²⁷³ Of the 1999 constitution, it has been said that –

One is the legacy of centralisation imported into the Nigerian political life by the advent of military rule, its longevity, and most importantly, its involvement in the drafting of the Nigerian Constitutions successively from 1979.²⁷⁴

The Nigerian constitution of 1979 was the “first in modern history to expressly prescribe the existence and functioning of local government”.²⁷⁵ It provided for a three-tiered federal structure in which each would have a considerable measure of independence, although the balance of power was tilted in favour of the centre.²⁷⁶ While the exclusive powers held by the centre in a federation is quite clear, the “concurrent legislative list is a minefield of potential conflicts” where each tier of government is given power over the same subjects. This situation is exacerbated in federations since they do not appear to have “definitive” and “necessary inherent values”.²⁷⁷

Section 7(6) of the 1999 constitution provides:

- (a) The National Assembly shall make provision for statutory allocation of the public revenue to local government councils in the federation; and
- (b) The House of Assembly of a State shall make provisions for statutory allocation of public revenue to local government councils within the state.

These provisions appear ambiguous and contradictory and have not yet been amended. They make local authorities dependent on the federal and state governments for their financial survival.

Section 2(2) provides that “Nigeria shall be a federation consisting of States and the federal Capital Territory. This means there are only two constitutionally-established levels of government. However, section 7(1) guaranteed a “system of Local Government by

²⁷³ Olaiya (2016), *op cit*, 88-89.

²⁷⁴ Olaiya (2016), *op cit*, 95.

²⁷⁵ *The Concept of Inter-Governmental Relations in Nigeria's Democratic Federalism* (2013) <http://www.articlesng.com/concept-intergovernmental-relations-nigeria-democratic-federalism>, accessed 15/05/2017.

²⁷⁶ Usman, Abu Tom and Canice Esidene Erunke (2014) *State-Local Government relations in Nigeria's Fourth Republic: An Assessment of the (1999-2010) Experience*, 8(20) (2014) *European Scientific Journal*, 162-175, 168.

²⁷⁷ Olaiya (2016), *op cit*, 88, 93.

democratically elected Local Government Councils.” It goes on to say that the “Government of every state shall ...ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such Councils.” These provisions appear contradictory. On the one hand, it is unclear what is to be made of the constitutional ‘guarantee’ of local councils, and on the other, that they are creatures of statute promulgated by the states.

Olaiya (2016) identifies further problem in that any state law inconsistent with validly passed national assembly laws would be declared invalid, although on the Concurrent List, the “compliant requirement was not made as a condition precedent or subsequent”.²⁷⁸ The federal government has the power to “intervene in any matter of public importance if it chooses to do so”.²⁷⁹ Both the National Assembly and the State House of Assemblies have legislative powers over local government. Where a function is specifically allocated to any level of government it must be executed by that authority. This implies that local authorities are “supposedly autonomous with respect to their functional competence as enunciated in the Fourth Schedule of the Constitution”. In practice, this is not so as local authorities are seen “much more as an agent rather than a tier of government. This is due to the tendency in federal states of centralisation and overdominance in the centre, in Nigeria, a result of long military rule and its role in the drafting of the country’s constitutions. This results in states’ and local governments’ dependency, with promotion of a principal/agent or master/servant relationship.²⁸⁰

Another issue of concern is the allocation or assignment by the federal and state governments to local authorities of centrally-allocated functions, especially those of social development responsibilities.²⁸¹ Adedire (2014) states that intergovernmental relations in the Fourth Republic (1999-2014) was in “disarray due to conflicts over issues of tax jurisdiction, revenue allocation, fund transfers...and illegal removal of local government officials”, unhealthy rivalry among governments, and “reluctant co-operation and competition”. There appears to be a “seemingly universal tension between tiers of government” in Nigeria.²⁸² This resulted in some states taking the federal government to Court to challenge its constitutional jurisdiction.²⁸³

²⁷⁸ Olaiya (2016), *op cit*, 88.

²⁷⁹ Abidoeye, Sheu Habeeb (2015) *The Nature of Governmental relationship (Inter and Intra) in Nigeria’s Fifteen-Year-Old Democratisation*, 20(7) (2015) *Journal of Humanities and Social Sciences*, 54-58, 55.

²⁸⁰ Bello, ML (2014), *op cit*, 66, 71, 72, 75; Olaiya (2016), *op cit*, 98; Abidoeye (2015), *op cit*, 54; Adedire (2014), *op cit*, 58, 60, 70.

²⁸¹ Bello (2014), *op cit*, 74.

²⁸² Adedire (2014), *op cit*, 58, 60; Olaiya (2016), *op cit*, 98.

²⁸³ Abidoeye (2015), *op cit*, 54.

Inyang (2014) argues that the Nigerian democratic dispensation is a quasi-federation, the equivalent of a constitutional dictatorship, a “unitary country in a federal disguise”.²⁸⁴ Some of the problems were created by the 1999 constitution which “had some confusion, lapses, loopholes, ambiguities and intrigues which directly and indirectly affect the performance of local government”.²⁸⁵

The following quote succinctly sums up the situation regarding Nigeria’s constitutional democracy and intergovernmental relations therein:

If the administration of the Nigerian government in the recent past had been a failure, the blame does not belong to the local un-regenerated, crude politicians, whose main goals and aspirations are to control power and authority at all cost; nor does the blame belong to the innocent, uneducated, uninformed citizens who do not know their left from right and position in the society. The blame and failure belong to the educated, political and social elites, who have been carried away by their own egocentric ideas and have turned their backs on their obligations as leaders.²⁸⁶

(c) Kenya

Kempe (2014)²⁸⁷ argues that “during the colonial era, local governments in Kenya were considered fairly autonomous and had significant sources of revenue”. After attaining independence on 12 December 1963,²⁸⁸ “local authorities were weakened and simultaneously developed a bad reputation for incompetence”.²⁸⁹ Political leaders began a process of recentralisation that, unfortunately, undermined the link and relationship between local authorities and the people. A dual central-local administrative structure evolved, with the latter enjoying a strong revenue base and support from national government through grants. However, local authorities provided only a small number of services and essential programmes.²⁹⁰

The state contemplating devolution, formulated two programme to facilitate it: The Kenya Local Government Reform Programme (KLGRP) was established in 1998 to spearhead local government reforms for good governance, efficient service delivery and local economic

²⁸⁴ Inyang, Bassey (2014) *Contending Issues in the Management of Intergovernmental Relations in the Nigerian Federal Administrative System*, 5(3) (2014) *Mediterranean Journal of Social Sciences*, 226-233, 232.

²⁸⁵ *The Concept of Inter-Governmental Relations in Nigeria’s Democratic Federalism* (2013), *op cit*, <http://www.articlesng.com/concept-intergovernmental-relations-nigeria-democratic-federalism>, accessed 15/05/2017.

²⁸⁶ Inyang (2014), *op cit*, 232.

²⁸⁷ Kempe, Ronald Hope (2014) *Devolved Government and Local Governance in Kenya*, 13 (2014) *African and Asian Studies*, 338-358, 340.

²⁸⁸ <https://learning.blogs.nytimes.com>, accessed 3/06/2017.

²⁸⁹ Kempe (2014), *op cit*, 340.

²⁹⁰ Kempe (2014), *op cit*, 340-341.

development.²⁹¹ The second was the Local Government Reform Strategy (2008-2012) aimed to put in place ‘a democratic and responsive system of Local Government that delivers quality, effective and efficient services to Kenyans.²⁹² The KLGRP in 2010 identified the following challenges to participatory local governance at local level:

- Weak local authorities incapable of delivering effective and efficient services;
- Lack of capacity (human and financial) to effectively undertake reforms; and
- Licences used as revenue source rather than for regulation.

Commenting on the Kenya government’s 2010 initiatives, the World Bank stated that –

Kenya’s devolution is to a very large extent a response to distributional grievances, which in turn have contributed to the political strife. Thus it is absolutely critical that devolution delivers on the promises of a more equitable distribution of public resources in the first instance, as well as developmental outcomes.²⁹³

The World Bank cautioned further that Kenya’s decentralisation “is a massive undertaking...and the transition will inevitably encounter teething problems. Since independence, Kenya’s leaders have held diverging views about devolution...”²⁹⁴

Post-election riots rocked Kenya in 2007-2008, giving rise to the development of a new Constitution, adopted in 2010.²⁹⁵ The Constitution is wide-ranging, detailed, and liberal, perhaps fashioned on the South African *Constitution*. Article 1 of the Kenya Constitution provides (quote) –

- (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
- (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
- (3) Sovereign power under this Constitution is delegated to the following state organs which shall perform their functions in accordance with this Constitution –
 - (a) Parliament and the legislative assemblies of the county governments;
 - (b) The national executive and the executive structures of the county governments...
- (4) The sovereign power of the people is exercised at –
 - (a) the national level; and
 - (b) the county level.

²⁹¹ Kenya Participatory Local Democracy, (KLGRP, 2010 – *Promoting Regulatory Reform at Local Government Level in Kenya*) <https://localdemocracy.net/countries/Africa-east/kenya>, accessed 15/05/2017.

²⁹² *Ibid.*

²⁹³ World Bank (2010) *Decentralisation in Kenya: Background Note*, <https://localdemocracy.net/countries/Africa-east/kenya>, accessed 15/05/2017.

²⁹⁴ World Bank (2012) *Devolution Without Disruption – Pathways to a Successful New Kenya*, <https://localdemocracy.net/countries/Africa-east/kenya>, accessed 15/05/2017.

²⁹⁵ Aboum, Agnes (2014) *Kenya: The new tier of government*, <https://www.dandc.eu/en/article/kenyas-new-counties-give-people-more-say>, accessed 15/05/2017.

The following articles of the Constitution provide the foundation and framework for devolution of power to county governments that incorporate local authorities, urban development, funding of subnational governments and socio-economic development, intergovernmental relations, local participatory democracy and have particular significance for this thesis:

- Article 2(1) reads: “This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government”;
- Article 10 is headed “National values and principles of government”;
- Chapter 4 is the Bill of Rights (articles 19-57);
- Section 59 establishes the Kenya National Human Rights and Equality Commission;
- Chapter 11 is headed “Devolved Government”;
- Article 174: “Objects of devolution”;
- Article 175: “Principles of devolved government”;
- Articles 176-188 deals with devolution, and allocation of power to county governments;
- Articles 189-200 is fall under the heading “Cooperation between national and county governments”;
- Article 232: “Values and principles of public service”; and
- Articles 233-236 establishes and provides for the operation of the Public Service Commission.

In terms of Article 174 of the Constitution, the Objectives of Devolution are:

- (a) To promote democratic and accountable exercise of power;
- (b) To foster national unity by recognising diversity;
- (c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) To recognise the right of communities to manage their own affairs and to further their development;
- (e) To protect and promote the interests and rights of minorities and marginalised communities;
- (f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) To ensure equitable sharing of national and local resources throughout Kenya;
- (h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

- (i) To enhance checks and balances and the separation of powers.

A major feature is devolution of power and local participatory democracy. It prescribed that statutes be developed to give effect to its provisions, a number of which of relevance to the thesis topic, is briefly reviewed below.

i. *Urban Areas and Cities Act*, 13 of 2011

This enactment to establish a legislative framework for:

- Classification of areas as urban areas or cities;
- Governance and management of urban areas and cities; and
- Participation by residents in the governance of urban areas and cities.

ii. *Transition to Devolved Government Act*, 1 of 2012

This statute was passed, *inter alia*, to provide for:

- a legal and institutional framework for a coordinated transition to the devolved system of government, while ensuring continued delivery of services to citizens;
- the transfer of powers and functions to the National and County governments;
- mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government; and
- a mechanism for capacity building requirements of the National government and County governments, and make proposals for the gaps to be addressed.

iii. The *County Government Act*, 17 of 2012

This *Act* came into operation upon the final announcement of the March 4th general election. Its purpose and objectives are among others to:

- Give effect to devolution under Chapter 11 of the Constitution...;
- Provide for public participation in the conduct of the activities of the County Assembly as required by Article 196 of the Constitution; and
- Prescribe mechanisms to protect minorities within counties pursuant to Article 197 of the Constitution.

iv. *Intergovernmental Relations Act*, 2 of 2012

This statute appears to be informed largely by South Africa's *IRFA* by attempting to formalise co-operative governance and intergovernmental relations. Section 3 sets out the objects of the *Act*, section 4 depicts the principles of IGR, and section 5 the objects of intergovernmental structures. Part II relates to the establishment of IGR structures. Unlike the *IRFA*, the *IRA* in Part III provides for the "transfer and delegation of powers, functions, and competencies". Perhaps the Kenyan government learned some lessons from South Africa's experiences with delegated authority and assignment of powers and functions, particularly the dangers of unfunded mandates. It may be too soon to tell whether harmonious and mutually-beneficial IGR has been successfully practiced and become institutionalised in Kenya after the Constitution mandated it in 2010.

v. *Public Finance Management Act*, 18 of 2012

This is similar to South Africa's *PFMA*.

vi. *National Government Co-ordination Act*, 1 of 2013

This statute was passed, *inter alia*, to:

- Facilitate the exercise of Executive authority;
- Provide for the effective co-ordination and administration of the National government functions prescribed in the Constitution, this *Act*, or any other written law; and
- Provide for the establishment of an administrative and institutional framework at the National, County and decentralised units to ensure access to National government services to all parts of the Republic.

vii. *Transition County Appropriation Act*, 7 of 2013

This statute authorises the issue of funds out of the relevant County Revenue Funds, and application of those funds towards the service of a particular financial period for specified public services (salaries and other expenses).

viii. *Constituencies Development Fund Act*, 30 of 2013

This enactment seeks to ensure, *inter alia*, that a specific portion of the national annual budget is devoted to Constituencies for infrastructural development, wealth creation and in the fight against poverty at the Constituency level.

ix. *Devolution Handbook, 2014*

This manual, by Transparency International, Kenya, interprets in detail the Constitution and its devolution provisions. Some issues pertinent to this thesis are reviewed briefly:

- i. The devolved system of governance allows for the citizens to exercise their sovereign power. It has also allowed for transfer of powers to the 47 county governments. (p5)
- ii. Article 176 of the Constitution provides that County governments are allowed to decentralise their functions to the extent that is feasible. (p13)
- iii. A city must have institutionalised active participation by residents in management of its affairs. (p22)
- iv. Each County Assembly must enact legislation that provides for the division and establishment of villages. Article 50 of the *County Government Act* establishes and sets out the functions of the sub-county administrator. (p24)
- v. One of the roles of the sub-county administrator is the facilitation and coordination of citizen participation in the development of policies and plans and the delivery of services. It is stipulated that wards shall be run by a ward administrator who has the proper professional qualifications and technical knowledge in administration. The ward administrator answers to the sub-county administrator. One of the duties of the ward administrator is the coordination and facilitation of citizen participation in the development of policies and plans and the delivery of services. (p25)
- vi. The office of the village administrator has been set up for the coordination, management and supervision of general administrative functions in the village, which includes:
 - a. Ensuring and coordinating participation of the village unit in governance; and
 - b. Assisting the village to develop the administrative capacity for the effective exercise of the functions and powers and participation in government at the local level.

Each village shall have a council which shall consist of the village administrator as the chairperson and not less than three and not more than five village elders who have been competitively admitted. (p25) This is similar to the *panchayat* (five-person council) in small Indian villages.

- vii. According to Article 187 of the Constitution and notwithstanding Schedule Four, a function or power of government at one level may be transferred to another if the other could perform it more effectively and it isn't prohibited by legislation. Upon transfer of a function, arrangements shall be put in place to ensure there are necessary resources for performance. (p27) This is provision for assignment and safeguard against 'unfunded mandates', as South African municipal practitioners understand it.
- viii. Section 87 of the *County Government Act* provides for citizen participation in County governments, based on seven principles. (p40)
- ix. The government has set up a toll-free number and four Advocacy and Legal Advisory Centres for advice and reporting on corruption. (p44)

Less than five years after the coming into operation of the *Intergovernmental Relations Framework Act*, it would appear that problems are surfacing in its implementation. The Ministry of Devolution and Planning has called for a review. The State Department of Devolution stated that notwithstanding the Constitution and the *Intergovernmental Relations Framework Act* establishing a legal framework, the relationship among institutions implementing devolution "remains strained".²⁹⁶ The Ministry's problem statement reads –

...consultative mechanisms set out to address intergovernmental issues lack the force of law; legal provisions for settlement of intergovernmental [disputes?] are deliberately ignored; the provision for the communication, implementation, monitoring and reporting of Summit decisions is ineffective and prone to conflicting interpretations.²⁹⁷

The objectives of the assignment are to:

- i. "Harmonise the *IGRA* 2012 with the Constitution and all other statutes;
- ii. Review the *IRGA* 2012 to identify and address gaps, ambiguities, inconsistencies, overlaps and duplicity [duplication] of functions of institutions created under the *Act*; and
- iii. Apply lessons learned by the pioneer implementers of devolution to enhance and harmonise intergovernmental relations."

²⁹⁶ Ministry of Devolution and Planning: state Department of Devolution (2017) *Terms of Reference: Consultancy Review of Intergovernmental Relations Act, 2 of 2012*, closing date 30 January 2017.

²⁹⁷ *Ibid.*

It would appear that having followed South Africa's example in formalising and prescribing for co-operative governance and IGR, the Kenyan government may have found that it was not working as contemplated. While it is relatively easy on paper to use law to guide and regulate, one is dealing with people's behaviours, something not readily amenable to command. The state is to be congratulated, though, in identifying problems and challenges in a short time and taking rapid action to resolve them.

Aboum (2014) argues that the initial experience of devolution was generally positive, but serious challenges remain. A major devolution advantage is that county administrations are politically accountable to the new electorate. This had not been the case before when the central government retained excessive power and controlled resources. Another innovation is that minority parties have been given an opportunity to exercise influence at the local level where previously they had been basically marginalised from policy development. Furthermore, devolution has improved the governance framework for pro-poor policies. She adds that the new sense of competition reduces opportunities for bribery and rent seeking, while stimulating innovation. However, despite many achievements, county governance is still struggling with several challenges.²⁹⁸

The Kenyan *Ethics and Anti-Corruption Commission* conducted a survey after media reports suggested corruption and unethical practices were spreading alongside that of devolved local services, particularly in procurement. One of the reasons for Kenya's political and fiscal devolution was the expectation that "localism would remedy the inefficiency, economic stagnation and corruption inflicting the central government". Corruption at county level was "moderately high".²⁹⁹

Acknowledging some of the challenges surfacing from the implementation of devolution, the Ministry of Devolution and Planning has developed a policy to address them. The Cabinet Secretary stated that "Devolution is one of the most transformative changes to Kenya's governance brought about by the Constitution of Kenya, 2010". He said that the intention of Article 174 is to promote social and economic development and provide proximate, easily

²⁹⁸ Aboum (2014), *op cit*.

²⁹⁹ Churchill, Francis (2016) 'Corruption in Kenyan local government "moderately high": *Ethics, Law Procurement, Public sector*, 1 September 2016, <https://www.cips.org/supply-management/news/2016>, accessed 15/05/2017.

accessible services throughout Kenya”.³⁰⁰ He added that during the first three years of implementation of the devolved system, several successes were achieved while a number of problems were identified. They largely related institutional, intergovernmental and resource related challenges. The policy aims to address these emerging issues with a view to improving the implementation of the devolved system of government and to achieve optimal service delivery. An intention is that both levels of government align their respective devolution policies of the devolved system of government. This policy introduces the “next phase of consolidating devolution, clarifying and strengthening roles and responsibilities of both the National and County Governments...”³⁰¹

The Policy requires counties to decentralise to the smallest feasible units. A problem in many counties is that the decentralisation process has not been fully operationalised because of “inadequate resources, capacity infrastructure and system of delegation from county government to the decentralised units”. The absence of a mechanism to harmonise national-county operations within the decentralised units causes problems, as does implementation of the *Urban Areas and Cities Act*.³⁰² The Policy has identified and articulated several IGR challenges and has developed twelve objectives to address them.³⁰³ It has also developed an IGR Implementation Framework that includes a monitoring and evaluation system.³⁰⁴

Kenya appears to have ‘copied’ the South African system of co-operative governance and IGR by formalising them and establishing the requisite structures and processes for their implementation. Whether prescribing for and regulating what is largely human engagement and relationships is debateable. What is required also is a willingness and commitment to decentralisation by the ruling elites, that is, inclusive socio-economic development through pro-poor policies. The Kenyan system may have learned from that of South Africa and appear to be addressing gaps and shortcomings rapidly. The government is to be commended on its devolution developmental intentions that may be a model for other African countries to emulate.

³⁰⁰ Ministry of Devolution and Planning, Kenya (2016) Foreword to the *Policy on Devolved System of Government*, iii.

³⁰¹ *Ibid.*

³⁰² Ministry of Devolution and Planning, Kenya (2016) *Policy on Devolved System of Government*, 12.

³⁰³ Kenya (2016) *Policy on Devolved System of Government*, *op cit*, 17-24.

³⁰⁴ Kenya (2016) *Policy on Devolved System of Government*, *op cit*, 24-25.

6.5 LESSONS OF EXPERIENCE FROM COUNTRIES RESEARCHED

In Germany, Austria and Belgium, local authorities are protected as a separate level of government. Federalism restricts the powers and functions of provincial governments to its own demarcated spatial territory and to local authorities situated therein. Hence, municipalities are subjected to the rule of provincial authorities in a hierarchical relationship that affects their power and functions, that is, their status. Given the dynamic and process-related nature, wide range of problems, and differing political cultures, it is difficult to legislate for formulaic or standardised frameworks for intergovernmental co-operation.

In Germany, more concentrated efforts are being made to increasingly and more effectively involve municipalities in federal and *Land* policy formulation. This change of heart is predicated upon the acknowledgement that governmental processes have become so complex that it is almost impossible to adhere to rigid structures and procedures or watertight division of powers and functions. At the same time, complete informality based on goodwill and trust institutionalised through centuries of interaction by politicians from different parties, as in the UK, may not be able to cope or continue effectively in a globally-competitive environment. Hence, formal co-operation is becoming increasingly important. Such an approach, particularly local government participation in national policy development, is sadly lacking in South Africa.

In Austria, a political accord has been concluded to involve municipalities closely, particularly where their resources are affected through delegation of federal and *Land* responsibilities. This arrangement is premised on it being mandatory for both federal and *Land* governments having to consult with municipalities. The trend in Germany, Austria and Belgium is for associations of local government to represent the interests of municipalities on the *Land* and federal levels, as they individually lack the capacity and resources, especially to comment on new policy initiatives. Thus, the municipalities act jointly in their individual and aggregated interests, a system perhaps better than that in South Africa where SALGA, as an external agent, provides indirect representation that is weaker than desired. This may not be a structural or system problem as the constitutional-statutory framework enables use of both formal and informal, internal and external structures and processes. However, SALGA, not being the equivalent of Scandinavian associations for local authorities, does not have their corporate strength and ability to directly contract with the national government as agent for its members. A further problem is one of capacity and capability: In all three countries, provision is made for

municipalities to co-operate with each other in areas of mutual concern, by means of three models within an enabling statutory framework:

- i. establishment of sub-provincial counties wherein local authorities in a specific spatial area co-operate on certain matters;
- ii. creation of local government forums in the domain of public law for municipalities to co-operate on functional matters; and
- iii. as legal *personae*, local authorities may conclude contracts under private law to co-operate in certain fields.

It is of interest to note that attention is being paid to formalise relationships between *Länder* and local authorities so as to provide a firmer basis for co-operation, as is the case with the UK with its too-high level of informality. South Africa may already have taken a lead in such formalisation through the provisions of the *Constitution*. However, making prescriptions is one thing, having the “Bundestreue” to implement them is quite another.

South Africa could consider the above approaches, noting the equivalent of *Kreise* or ‘counties’ do not constitute a separate sphere of government. In all three countries, little attention has been paid to co-operation between municipalities situated in different provinces, whereas there is statutory provision for regions to engage with their cross-border counterparts and with those in other countries. Theoretically or in principle, there is no reason why local authorities cannot do so. Municipalities are, however, informally linking with counterparts in other countries.³⁰⁵

It has been acknowledged, as in Germany and in the UK, that with “relationships becoming more complex,” and a trend towards trilateral and multilateral ties with long term relations becoming more desirable, there was a “need for appropriate and enabling legislation”.³⁰⁶

In most European states, a local government representative organisation is an institution whereby municipalities agree with others to work jointly to achieve goals that may be difficult to undertake individually. Hence, such an organisation is more like a co-operative, with no constitutional or legal basis, but permitted under the state’s laws. Therefore, their status and functions are very different from that of SALGA’s.

³⁰⁵ De Villiers (1997), *op cit*, 19-20.

³⁰⁶ Ortengren, Johan (2006) *International cooperation between local authorities*, paper presented at the Nordic and Baltic States’ Conference 12/06/2006: Laulasmaa, Estonia.

In Sweden, a country with a two-tier government, professionally-qualified mayors and councillors are responsible for city administration and they represent their localities directly in Parliament. This cannot be considered in South Africa's present governmental system.

In the African countries studied, including South Africa, the status, powers and functions as well as intergovernmental relations were largely shaped by the British colonial model of administration. This is to pursue the ideal of centralisation as a means of wealth accumulation and the divide and rule philosophy of ensuring people are not united to form a threat and for controlling a large country. While most countries welcomed the No Independence Before Majority Rule, after independence many resorted to old British practices of centralisation and later re-centralisation. Many countries did not have the requisite commitment to inclusive socio-economic development and wealth-sharing but to accumulate wealth and power among the few ruling political elites, as evinced in Zimbabwe and currently in South Africa. It is, therefore, questionable whether or harmonious and cordial IGR would be possible in Africa – it does not seem to be a question of 'when'.

Some broad and general statements could be made on lessons derived from countries researched. It should be noted that co-operative governance and intergovernmental relations is a wide field and the systems of only a few countries have been reviewed. This is for the purpose of locating municipal representation in a wider foundation and context. The choice may appear arbitrary but serves to provide some lessons gained from experience in these states. It has not been possible to make in-depth analyses and therefore precise suggestions or recommendations cannot be made in this study.

- (a) Democracy is essential for local participatory self-governance, as propounded by the European Union, practised in Scandinavia and Germany, and recently acknowledged by the UK House of Commons.
- (b) The Anglo-Saxon incremental, non-constitutional governmental system evolved over centuries, with friendly relations among bureaucrats employing a high level of informality, but this may not work in the present political environment, and a framework together with more use of formal instruments has been recommended by the House of Lords, perhaps taking its cue from South Africa's approach.

- (c) Local government for largely homogeneous communities developed organically over a long period, with changing and increasing status and responsibilities, but their generally small size makes efficient service delivery and governance problematical.
- (d) The Germanic and Scandinavian traditions are characterised by a system that is organised, systematic, professional, co-ordinated, consensual, co-operative, integrated, and an organic whole, with local authorities having a high degree of autonomy.
- (e) The French model is highly centralised and authoritarian, but politically and administratively integrated to an extent that local views are acted upon at the highest level, but unworkable in South Africa at present.
- (f) Using the principle of subsidiarity, allocation of powers and functions is more asymmetrical or differentiated in states where co-operative governance works reasonably well, with the state providing the requisite resources.
- (g) Land ownership was an important determinant of a person's standing and development in the local community.
- (h) Local government was linked to a system of land law, where property taxes were used for development.
- (i) Law, without excessive prescription and regulation, is used as a basis for the establishment of local authorities and the allocation of powers and functions thereto.
- (j) Governmental systems are hierarchical but with clear demarcation of powers and functions making for a system that operates effectively.
- (k) Service provision and economic development is on an equitable basis.
- (l) Local government revenue, where inadequate, is supplemented by government grants.
- (m) Local authorities are comparatively small in many countries such as France and Spain, although it is acknowledged that many have been amalgamated and consolidated to form large cities or metropolitan and county governments, such as Mexico City, Mumbai, Delhi, New York City, London, Berlin, Paris, Madrid, and many others.

- (n) Lack of the strategic role for regional authorities, with them becoming service delivery agencies without legislative powers.
- (o) Systems that work better maintain a political/administrative dichotomy.
- (p) In most countries, co-operative government is practiced largely informally, but reforms are underway to formally recognise autonomous self-governing local authorities with some level of formality in intergovernmental relations.
- (q) Associations for local authorities are sub-national governments formally or informally agreeing to work co-operatively generally or for specific purposes; they are not represented by a separate organisation, like SALGA, although in Scandinavia they are professional organisations that can enter into contracts with central government.
- (r) While in Germany, Austria, and Belgium as well as in Scandinavia, association of local authorities are a consolidation or amalgamation of local authorities, of the countries researched only those in the UK (Local Government Association), the Netherlands (International Co-operation Agency of Netherlands Municipalities – VNG), Canada, Botswana, and South Africa are external agencies funded by membership subscriptions.

Apart from the VNG, none of the external bodies appear to have a track record of significant achievements, perhaps indicating their low status, commensurate with local authorities in these countries.

- (s) There can be no single or ideal model for co-operative governance/IGR. The system would be designed on the basis of the country's history and respond to its particular circumstances that face each country. It is not prudent to slavishly follow or adopt a country's model as the system should be based on several design variables peculiar to a country. Hence, there cannot and should not be a template.

Having reviewed national intergovernmental relations, that is, co-operative governance within a state, the study now turns to local government cross-border or municipal international relations.

6.6 MUNICIPAL INTERNATIONAL CO-OPERATION

6.6.1 BACKGROUND

In 1971, the United Nations (UN) General Assembly stated, *inter alia*, that:

International co-operation among communities is a natural complement to the co-operation of states ... The General Assembly ... invites the Secretary-General ... to study ... the means by which the United Nations and its specialized agencies can contribute effectively to the development of international co-operation between municipalities.³⁰⁷

Unfortunately, over the subsequent three decades the above resolution led to many ceremonial ties, most of which achieved little, beyond the numerous junkets undertaken at ratepayers' expense.³⁰⁸ Belatedly in 2000, the UN indicated that it will –

Pursue, in collaboration with interested bilateral and multilateral donor colleagues, ways and means to support the growth of linking and help ensure that the challenges of linking are met.³⁰⁹

This pronouncement, again, did not result in many resources being put into development through municipal international relations.³¹⁰ The United Nations Development Programme (UNDP) acknowledged that if one couples the global trend to decentralise and empower with substantial levels of urbanisation and the need for cities and towns to address the crucial issue of poverty in their localities, then it has to support city-to-city ('C2C') and community-to-community co-operation as a development modality. It stated that municipal international co-operative relationships are a means to build bridges across ethnic, religious, cultural, racial, material, and other divides, indicating that this form of partnership has joined the mainstream of development and makes an important contribution to greater understanding and peace. The UNDP is of the view that C2C partnerships that are well-thought through, are systematic and managed sensitively, can effectively address issues commonly arising and thereby deepen cross-cultural understanding.³¹¹

³⁰⁷ Resolution 2861, dated 20 December 1971.

³⁰⁸ Singh, Anirood (2002) 'Municipal International Relations: Promoting Good Governance and Socio-Economic Development' in 18(2) *Unisa Latin American Report*, 15-23.

³⁰⁹ United Nations Development Programme (2000) *The Challenge of Linking*, 24.

³¹⁰ Chapisa, Faral G (2011) *Transnational City-to-City Partnerships as Strategic Tools for Sustainable Urban Development – Case of the Haarlem-Mutare City Link*, MSc Dissertation, Erasmus School of Economics, Rotterdam, The Netherlands, 23-24, 66-68; Breeman, Iris Christine (2012) *Municipal International Cooperation in Botswana: Development Strategy of Social Activity*, Master of Economic dissertation, Universitet Utrecht, The Netherlands, 18-19, 25-26, 68-69.

³¹¹ *The Challenges of Linking* (2000), *op cit*, 27-30.

The UN Resolution and a municipality's priorities and policy on international relations provide the mandate and prescription for a municipality engaging in international relationships. International linking took on new dimensions and urgency as a developmental modality after the 1996 *Istanbul Conference* where the UN's *Habitat Agenda* was adopted. Cities have been increasingly recognised as strategic players in a globalising world economy where decentralisation has heightened their profile and importance.

These trends are changing approaches to national and international cooperation which now include the adoption of broad-based participatory planning and management, networking and the horizontal exchange of knowledge, expertise and experience.³¹²

While municipal international relations can incorporate any role players in the partner cities and is thus wider than intergovernmental relations, it may still be narrower in scope than decentralised co-operation but need not be so, provided it is practical, focused, project or knowledge exchange-based, driven and managed by the respective partners.³¹³

“Strengthening the capacity of cities to deal with their own problems is now acknowledged as an international policy goal.” With adequate capacity municipalities are now accepted as direct participants in international programmes addressing global challenges.³¹⁴

6.6.2 DEFINITION OF MUNICIPAL INTERNATIONAL CO-OPERATION

International local government relations is simply ‘strategic’ (to use a cliché) alliances, collaborations, partnerships or merely links between the communities of two or more cities or towns or villages, and such-like settlements, or provinces or regions in different countries. The ideal is that people of such defined spatial areas, particularly the poor or disadvantaged resident therein, gain benefits. Although governments may be the signatories to an arrangement or agreement, any organised group or institution that can add value to the relationship should be welcome to join. However, an international relation or ‘friendship’ agreement should not be entered into without an objective conviction that it would be truly beneficial to the people living in the jurisdiction of the contracting parties. Hence, a preliminary assessment should precede formal conclusion of any international relations agreement.³¹⁵

³¹² UN-HABITAT (2002) ‘City to City Cooperation’ 8(3) *Habitat Debate*: 1, 3.

³¹³ City of Johannesburg (2001) *Municipal International Relations Policy*.

³¹⁴ UN-HABITAT (2002) ‘City to City Cooperation’, *op cit*.

³¹⁵ Singh (2002) *op cit*.

6.6.3 RATIONALE FOR MUNICIPAL INTERNATIONAL CO-OPERATION

Globalisation and rapid urbanisation, coupled with unprecedented advances in information and communications technology (ICT), as well as in medical and other sciences, create an environment where common challenges throughout the world can be tackled on a joint and consolidated basis. Politicians, bureaucrats, experts and communities from different countries, cultures and backgrounds can combine their diverse knowledge and ‘sweat equity’ to address shared problems, using local, indigenous, and ‘best practice’ technologies and approaches. What would have appeared to be daunting challenges to sub-national governments if tackled on their own could be resolved in a cost-efficient manner using municipal international relations. Hence, domestic and international partnerships through intergovernmental co-operation could be the answer. Several developments affecting sub-national governance have taken place over the past four decades. Rather than going it alone or ‘reinventing the wheel’, knowledge-sharing through international relations could be a way to address a variety of common challenges manifest where resources are limited. However, for its success, municipal representatives and administrators must have the requisite diplomatic and technical skills. Municipal international relations can be based on one or many reasons, best debated and prioritised jointly by the parties contemplating a sisterhood or similar such agreement. Sub-national governments can contribute to shared developmental objectives by exchanging knowledge through establishing partnerships with both developing and developed provinces and cities, without being paternalistic or authoritarian.³¹⁶ Here one needs to be mindful of two statements of wisdom:

- (a) *Local knowledge provides a foundation for global understanding* (National Geographic Society slogan); and
- (b) *Never underestimate the importance of local knowledge* (Hong Kong Shanghai Banking Corporation slogan).

Municipal international relations are about partnerships or links between communities. When one understands and appreciates the problems or challenges confronting people in a locality, there will be a better design fit between the need and the solution. Globalisation, information and communications technology, and other innovations have made communications easier, faster and cheaper. After 1994, the Republic became part of the global economy, no longer a *laager* at the southern tip of Africa. The young democracy has much to offer and to learn from

³¹⁶ City of Johannesburg (2001) *Municipal International Relations Policy*, *op cit*; Singh (2002) *op cit*.

the world. Poverty and the lack of resources necessitate sharing and co-operation. A problem shared is a burden lessened; hence governmental co-operation should be a development modality, not something done unwillingly because it is a statutory imposition.³¹⁷

6.7 MUNICIPAL REPRESENTATION IMPLICATIONS FOR SOUTH AFRICA

The above discussion has shown South Africa's need for a unique model for intergovernmental relations designed from the strengths of the approaches used in the countries studied. This would be based largely on the prescripts in Chapter 3 of the *Constitution* and designed on the unique three-sphere governmental system. Absent co-operation and commitment thereto by all spheres, the model would fail. Of course, workable 'best practices' have evolved over considerable time in mature democracies, by leaders committed to the ideals espoused. In "one sovereign democratic state", such as South Africa, where the governing political party controls eight of the nine provinces, there would, *prima facie*, appear to be little use for legislation to prescribe and monitor co-operative governance. Relations between central and regional authorities are and will continue to be established and managed informally, by leading politicians and civil servants, behind the scenes. Hence, there would be no need to resort to the courts for dispute resolution. Any 'mischief' or maladministration would most likely be identified and publicised by the media, and articulated as well as manipulated by the opposition political parties. These may give rise to some healthy and unhealthy debates, resulting in corrective and/or remedial actions. For the moment that may be adequate. In such a context, without debating the need and desirability of regional governments, provincial constitutions would be superfluous. This would be particularly so where the provinces see themselves as regional agencies of the state, or where the sole subject matter is so mundane as intergovernmental relations.

A strategy that harnesses and consolidates the strengths and essential resources of both provincial and local actors would be best. A good example of this unity in diversity approach could be the Gauteng Global City Region.³¹⁸ This would be a concrete case of a province, some

³¹⁷ Singh (2002) *op cit.*

³¹⁸ Gauteng Global City Region Comparative Studies, First Draft Report, 3 September 2004, Johannesburg: Gauteng Provincial Government; *Building Gauteng as a globally competitive city region*, PowerPoint presentation to and adopted by the Gauteng Premier's Co-ordinating Forum, 2008; Organisation for Economic Co-operation and Development (2011) *Territorial Review of the Gauteng City-Region*, www.joburg.org.za, accessed 7/06/2016.

of its constituent municipalities, and an organisation promoting co-operative governance among municipalities forming an alliance to jointly and severally develop an entire provincial spatial area.³¹⁹ The idea is not unique, as it has been practised by regions that have grown and reached large global city status (determined by select criteria and measured over the last three decades).³²⁰

The democratic government in South Africa, while often falling back on its ‘big brother’ attitude, nevertheless has given municipalities a comparatively high level of ‘autonomy’ amongst local authorities in the world. It has also created the space for them to be innovative, without requiring excessive guidance from national or provincial governments, or statutory approval for its plans and contemplated actions. In this sense, therefore, there are no constitutional and legislative barriers to innovation or to co-operation between provinces *inter se*; among local authorities within a province; or with municipalities in other regions. Chapter 3 of the *Constitution* and the *IRFA* provide the foundation and framework for sound co-operative governance using both formal and informal structures and processes. This approach has been advocated by the UK’s House of Lords and has been followed in the *Draft Code for central and local government* for England and in Kenya’s *Intergovernmental Relations Act, 2 of 2012*. These initiatives appear to vindicate South Africa’s approach.

From a summary of the literature several approaches to beneficial intergovernmental relations may be formulated for use in South Africa from the following observations:

In the German, Austrian and Belgian federal systems local authorities have consolidated to form associations to undertake work that an individual municipality may not be capable of. Such an organisation is not a tier of government but having been instituted according to legal provision they may be able to ‘directly’, that is not through a third-party equivalent like SALGA, contract with central government on behalf of members. In Scandinavia, professional associations also serve to facilitate relations between national, regional or provincial and local governments. These structures could be strengthened by the existence and operation of certain entrenched concepts, such as *Mitwirkungsrecht* (German: right of co-operation); *Stellungnahme* (Austrian:

³¹⁹ Such as the South African Cities Network.

³²⁰ Such as, for example, Greater London, Ile de France, Greater Los Angeles, the Dutch Randstad, Rhine-Ruhr, Istanbul, Pearl River Delta, Metro Manila, New York City, Mexico City, Sao Paulo, and the Delhi city-state. Allen J. Scott, John Agnew, Edward W. Soja, and Michael Storper (2001) *Global City-Regions: An Overview*, www.lse.ac.uk, accessed 7/06/2016.

right to a hearing); *Volksbegerens* (Austrian: right to initiative); and perhaps, the referendum on strategic, clear, specific issues. It should be borne in mind that the German model is somewhat unique and bonded together by the glue that is *Bundestreue*. Without such an essential ingredient, that is, a deeply embedded and internalised or institutionalised sense of values and commitment in the Republic, emulating such an approach may well result in frustration and failure. Whilst the South African *Constitution* has set out the values underlying our democracy, how it will be operationalised to function effectively may take some time. However, it should be noted that South Africa is an emerging democracy. Furthermore, the country at this stage lacks experience and in the progress of time, the system and processes set out in Chapter 3 of the *Constitution* and in the *IRFA* may settle to work efficiently. Co-operative governance is not an event; it is a process. It is one that facilitates municipal representation, but alas, the mechanisms and processes do not appear to be working in a manner envisaged in the *Constitution*.

The South African co-operative governance framework and system is flexible and accommodative enough to adapt the various instruments used in the Scandinavian countries, European states, the US, and the UK. One that may be helpful is an expert and independent advisory board for co-operative governance that would also co-ordinate, monitor, and report on intergovernmental relations being fully informed on international good practices. Such a permanent commission cannot be located in CoGTA or in SALGA. This suggestion is also endorsed by recent research.³²¹

The need and desirability of provinces and the NCoP should be seriously debated urgently, as elimination of regional government, or amending their role to be administrative organs ought to simplify intergovernmental relations whilst saving much cost and reducing pain. Alternatively, Germany's *Bundesrat* ought to be studied more closely to determine how the NCoP could be restructured to operate more efficiently in representing both provincial and local government interests.

6.8 CONCLUSION

The change from co-operative governance being based on rigid, legalistic and formulaic prescriptions and practices, as prescribed by the *IRFA*, to one that is –

³²¹ De Villiers and Sindane (2011), *op cit*, 15.

... more negotiated, contextually defined system of institutional exchange changes to some extent the zero-sum game of intergovernmental relationships,³²²

may be preferred. However, as shown in the context of England, both formal and informal systems and processes can work alongside each other.

The zero-sum metaphor was characteristic of competitive behaviour where the gain of one was at the expense of another. The drafters of the South African *Constitution* must have been mindful of such problems, especially in an unequal society with serious resource scarcities.

In many countries, sub-national authorities and particularly local governments generally have low status and esteem.³²³ This is more so because the latter's level of autonomy, functions, and health are determined almost exclusively by the provincial or regional or county government wherein they are located. However, the role of local governments and cities are being recognised, and in many countries reviewed hereunder, reforms are underway to decentralise and to strengthen municipalities.

At the local sphere, horizontal institutional capacity could be built, strengthened and maintained by co-operation and sharing. This would facilitate democratic municipal representation and public participation. The country's cultural diversity could in itself enhance capacity where various strengths of different communities are harnessed and used collectively. In South Africa particularly, notwithstanding constitutional and statutory prescriptions, co-operative governance was perhaps an inevitable consequence of decentralisation and the move to participatory democracy. The relative autonomy granted local government combined with the 'hollowing out' of the state created unique challenges, enabling municipalities to be more innovative.

In a society deeply divided for over three centuries, it is still early days yet insofar as co-operative governance goes. However, the state has created the framework for such approach and it is up to the various role players to commit and dedicate themselves to work truly in a spirit of co-operation and camaraderie, for the common good.

³²² Peters, B Guy and Jon Pierre (2001) 'Developments in intergovernmental relations: Towards multi-level governance' 29(2) *Policy and Politics*, 131, 133.

³²³ Examples from countries reviewed are the United Kingdom, United States, Canada, and France.

The UK has been advised to shift towards greater formality while still using existing, non-legal instruments, Sweden in looking to the future may also legalise intergovernmental relations, most likely to only a limited extent. In a sense, the current and proposed approach to intergovernmental relations in Germany both vindicates the stance of the South African government and perhaps acknowledges that this country was on the correct path when prescribing Chapter 3 of the *Constitution*. One needs to be mindful of the difficulty of predicting the future in a complex and rapidly-changing local and global environment. Chapter 3 of the *Constitution* supplemented and complemented by the *IRFA* as well as sections of a number of other statutes collectively provide the necessary foundation, framework and guidelines that are flexible enough to accommodate many foreign and local innovative approaches. Intergovernmental relations by their very nature are dynamic and there is no way to plan it for a medium term or prescribe its *modus operandi* in minutiae. Furthermore, South Africa is a fledgling democracy, with much to learn through practical implementation and monitoring of intergovernmental relations, as well as from the successes and failures of other countries. The co-operative governance process may have to endure several growing pains before it can function with reasonable efficiency.

In a globalising and rapidly urbanising world, municipalities can grow to become metropolises. As such, they can become leaders in innovation, which alongside national governments, can co-operate to build a better world for future generations. Within such a milieu, it is essential that municipal representatives be professional and well-versed in municipal governance and administration, as in Sweden. They would thus be effective in provincial, national and international policy debates and better able to serve their councils and communities.³²⁴ However, there does not appear in most of the literature an outcomes-based monitoring, evaluation and impact assessment or social cost-benefit and risk analyses to show that overall municipal international relations are beneficial.

The following statement succinctly encapsulates the idea of co-operative governance:

‘The oil in the engine’ describes the role of intergovernmental relations within a multi-tiered system... It is the lubricant that allows friction to be channelled into positive energy and movement; it is the unseen layer that allows the various parts of government to operate, to reach their potential and to serve the interests of the whole.³²⁵

³²⁴ City of Johannesburg: Strategy and Relations Unit (2016) *Presentation on International Relations*, 12 February 2016.

³²⁵ De Villiers and Sindane (2011), *op cit*, 15.

This chapter reviewed and compared the approach to co-operative governance and intergovernmental relations as well as the nature of municipal representation by associations for local authorities in certain select countries. Given their longer history of democratic development, this provides the necessary background and context to examine municipal representation within the framework and context of co-operative governance by an association for local authorities, namely SALGA. This is done in the next chapter.

CHAPTER 7

MUNICIPAL REPRESENTATION IN SOUTH AFRICA

7.1 INTRODUCTION

This chapter reviews the constitutional-statutory provisions forming the foundation and framework for municipal representation in South Africa, through organised local government being represented by the South African local Government Association (SALGA). It then examines this institution's establishment mandate, role, structures, and processes. Having been operational for almost two decades, it is possible to review its achievements insofar as it relates to municipal representation. However, there is little literature on this subject. SALGA has acknowledged its challenges and has made plans to address them. Hence, an analysis of its new objectives and strategies is undertaken. SALGA's role in the context of 'developmental' local government is assessed. As a summarised case study, SALGA'S role in commenting on draft legislation is examined. Finally, the need and desirability of a local government association is analysed. The above is in the search for an effective model for municipal representation in South Africa.

7.2 FORMAL FRAMEWORK FOR 'ORGANISED LOCAL GOVERNMENT' IN SOUTH AFRICA

A general discussion of 'organised local government' is followed by an analysis of SALGA.

7.2.1 CONSTITUTIONAL PROVISIONS

The *Constitution* provides for the recognition, not the establishment by statute, of a national and nine provincial organisations representing municipalities, and prescribes that an Act of Parliament must determine the procedure by which local government may consult with the other two spheres, designate representatives to participate in the National Council of Provinces (NCoP); and nominate persons to the Financial and Fiscal Commission (FFC).¹ As such, the constitutional provisions are of limited scope and application. The issue of capacity of a representative body could be appreciated when the prescriptions of the *Constitution* on organised local government are considered:

¹ Sections 163(a) and (b)(i), (ii) and (iii) of the *Constitution*.

- (a) commenting on draft national and provincial legislation that affects the status, institutions, powers or functions of local authorities (legal expertise);²
- (b) participation in the NCoP (albeit at present with a plaintive voice and no vote). This requires knowledge of the three-sphere governmental system and particularly of local government; legal expertise, advocacy and lobbying ability);³
- (c) participation in the FFC (financial expertise, advocacy and lobbying ability);⁴
- (d) discussion on equitable shares of national income (financial expertise, advocacy and lobbying ability);⁵
- (e) discussion on national legislation affecting municipal fiscal powers and functions before any statutes thereon are enacted (legal and financial expertise as well as advocacy and lobbying ability);⁶ and
- (f) discussion on specific local government parliamentary legislation before their finalisation (law-making expertise, advocacy, and lobbying ability);⁷ and for undertaking the role and functions SALGA has identified for itself and for its provincial local government associations (PLGAs).⁸

To make meaningful input that will be given serious consideration by policy-makers, local government representatives must at least have legal and financial skills as well as the ability to advocate and lobby the position of municipalities. Representation is meaningless unless local government delegates have persuasive authority. Management and administrative skills would also be helpful to effective representation.

The *Constitution* makes a peremptory provision for the recognition of national and provincial associations representing municipalities, but is silent on local organisation. Hence, SALGA is a self-regulating institution that develops organically and not in accordance with a statute which

² Section 154(2) of the *Constitution*.

³ Section 163, read with section 67 of the *Constitution*.

⁴ Section 163, read with section 221 of the *Constitution*.

⁵ Sections 214(1) and (2) of the *Constitution*.

⁶ Section 229(5) of the *Constitution*.

⁷ Section 163 of the *Constitution*.

⁸ *SALGA Strategic Plan 2012-2017*, adopted at its National Executive Committee meeting on 11 September 2012.

may have resulted in better accountability.⁹ It should further be demonstrated that the body has been chosen democratically at least, by fifty per cent plus one of municipalities in the province, and that it is a balanced selection, meaning it caters for the diversity or range of municipalities, such as metros, cities, towns, district as well as traditional authorities, where applicable. Moreover, the views of communities within the spatial jurisdiction of the municipalities must have been canvassed.¹⁰

The term ‘recognise’ is not defined in the *Constitution* or in the *Organised Local Government Act (OLGA)*.¹¹ It means to identify something already known or acknowledge the existence of something. Hence, the national and provincial bodies wanting to become associations representing municipalities must establish themselves in the absence of any prescribed framework, guidelines or criteria for subsequent recognition as legitimate organisations. In the absence of such requirements, SALGA ‘national’¹² has determined and undertaken to give meaning to the term ‘recognition’. The process does not appear to be democratic and gives rise to the following questions:

- (a) The definition of ‘recognition’, that is, whether a recognised body has any legal status that protects it from, say, some provincial affiliates being dissolved by MECs.
- (b) The entitlement or power given to organised local government by ‘recognition.
- (c) What is an association for local authorities precluded from doing, given that it is merely ‘recognised’ without its status, role, and functions being stipulated in legislation.

7.2.2 STATUTORY PROVISIONS

Pursuant to the constitutional mandate, provision was made for ‘recognition’¹³ by the Minister of Co-operative Government and Traditional Affairs (CoGTA) of a national and one organisation in each province representing the majority of municipalities therein, as institutions of ‘organised local government’.¹⁴ The statute and the accompanying notice complied strictly with the constitutional prescripts, that is, they merely ‘recognised’ the local government

⁹ Section 163(a) of the *Constitution*.

¹⁰ See section 152(i) of the *Constitution* on the objects of local government and sections 16-21A of the *Local Government: Municipal Systems Act*, 32 of 2000 (“*Systems Act*”) on community participation.

¹¹ *Organized Local Government Act*, 52 of 1997 (“*OLGA*”); *Organized Local Government Act: Recognition of Organized Local Government*, Government Notice R175, *Government Gazette* 19465, dated 30 January 1998.

¹² SALGA has affiliates in all nine provinces.

¹³ This term is not defined in the *Constitution* or in subsequent relevant statutes.

¹⁴ Sections 2(1)(a) and (b), respectively of *OLGA*. Thus, SALGA and its nine affiliates were recognised by the Executive and not in accordance with a statute establishing them.

representative institutions, and made provisions for the national organ to participate in the NCoP and the Financial and Fiscal Commission (FFC). The enactment did not prescribe the structures and processes, as well as the funding of organised local government. This is because the representative organ established, SALGA, is a voluntary association, not reliant on an equitable share of revenue collected nationally by the state. Hence, these bodies exist ‘at the pleasure’ of the Minister or the MEC for local government,¹⁵ if established in terms of the *OLGA* and not set up outside of legislation, like the South African Cities Network (SACN). The nature, design and processes of SALGA are decided by its membership, that is, the political leadership. The shortcomings of the *OLGA* may be one of the root causes of inadequate representation of local government in the NCoP.¹⁶ Steytler and De Visser (2014) add:

SALGA is not a statutory body, but has official status through the executive act of recognition. It has a number of statutory and constitutional duties which it executes with varying degrees of success.¹⁷

The potential for sound municipal representation is weakened further by the *Intergovernmental Relations Framework Act*¹⁸ and by amendments to representation on the FFC.¹⁹ The *OLGA* provides that each PLGA may nominate not more than six persons²⁰ from which 10 out of the maximum 54 will be selected by SALGA to participate in the NCoP.

‘Participate’ means to take part in something. The role of any organised government representative on the NCoP and the FFC has not been explicitly spelt out, thus placing municipalities in an uncertain position and therefore unable to hold SALGA to account. Since they do not have voting rights and only observer status unless permitted to voice their opinions, all that is required of organised local government, both in the NCoP and the FFC, is mere attendance.

¹⁵ Section 2(2)(a) of *OLGA*.

¹⁶ See Chapter 5 of this thesis: Municipal representation on the NCoP.

¹⁷ Steytler, Nico and Jaap de Visser ‘Local Government’ in Woolman, Stuart and Michael Bishop (2014) *Constitutional Law of South Africa*, Second Edition, Cape Town: Juta, 22 – 128.

¹⁸ 13 of 2005 (*IRFA*). In terms of this enactment, for example, Organised Local Government can participate in the work of intergovernmental structures only by invitation or by it being a member of a particular intergovernmental structure. See Chapter 4 of this thesis.

¹⁹ Refer section 5(1)(c) of the *Financial and Fiscal Commission Amendment Act, 25 of 2003* and Chapter 5:5.3.1.i of this thesis.

²⁰ *OLGA*, sections 4(1)-(5).

The dictionary definition of the noun “procedure” is ‘an established or official way of doing something or a series of actions conducted in a certain order or manner.’ The *OLGA* simply states that the “consultation procedure” consists in the national organisation and a national and a provincial government taking place at a meeting convened by the Minister.²¹ “Consultation” is not defined.²² The Minister may invite any provincial organisation to such meeting, and that SALGA national “may” consult any Minister at any time.²³ Furthermore, a PLGA may only consult a provincial government through a meeting convened by the MEC for local government.²⁴ These provisions imply a subordinate status of local government and its representative organ. Whether the Minister or a MEC will agree to a meeting or the agenda thereof is not up to SALGA.

While one can surmise that the onus on consultation lies with a local government representative body, the *Act* is silent on the procedure. Hence, national and provincial governments could be little more than passive hosts or ‘visitors’, not having to initiate dialogue or consultation, or being proactive and making any recommendations. Nor do they have to undertake any follow up action. Local government representatives have therefore need to plan carefully if they seek any approvals from the other two spheres of government, or else any meeting may be nothing more than a chat.

After setting down the strict requirements for consultation, the *OLGA* nullifies them by stating that the (undefined) organised local government may consult with any organ of state,²⁵ without setting down how this can be done. Whether any organ of state would consult with SALGA is not determined by the latter.

The *OLGA* is an unsatisfactory enactment, *inter alia*, because it –

...contained no description of the roles and responsibilities for organised local government. Rather, this information on roles and responsibilities has been spread across a wide range of legislation...²⁶

The *IRFA* has ‘compensated’ for *OLGA*’s shortcomings, although in so doing made the process for efficient municipal representation even less effective. The *IRFA* states that where an

²¹ Section 3(1) of *OLGA*.

²² For a discussion of the definition in the *IRFA*, see Chapter 4 of this thesis.

²³ Section 4(1) of *OLGA*.

²⁴ Sections 4(2) and (3) of *OLGA*.

²⁵ Section 4(8) of *OLGA*.

²⁶ SALGA (2015) *15 Years Review of Local Government: Celebrating Achievements Whilst Acknowledging Challenges*, 38.

obligation, not a need, for consultation with SALGA is required, this must be “through an appropriate intergovernmental structure,” and not directly.²⁷ The *Review of IGR*²⁸ highlighted many shortcomings and may have motivated the need for a statute to regulate and guide co-operative governance. It has been shown that the constitutional-statutory framework provides ample opportunity for municipal representation. The question may be SALGA’s ability to do so effectively or in conjunction with other organisations, such as the SACN.

Each provincial local government association (PLGA) may designate one person to the FFC. The nomination of two persons for appointment by the President takes place after a meeting of SALGA’s national executive.²⁹ The *Financial and Fiscal Commission Act* has been amended such that the national organised local government body no longer nominates two delegates, but that the FFC selects them after consultation with SALGA.³⁰ This provision appears more obscure than the previous, and may be open to easier political manipulation.

For the above consultative purposes and operational responsibilities, SALGA and the PLGAs must have the requisite skills to submit quality and objective inputs, derived from municipalities which must, in turn, have the capacity to provide primary intelligence in digestible format. There is, therefore, need to forge strategic alliances, collaborations and partnerships with the private sector, non-governmental-organisations (NGOs), community-based-organisations (CBOs), foreign governments, banks, and donor/grant agencies to attain a better level of capacity. SALGA’s inputs may only be considered after it has objectively been shown that the association –

- (a) can add value to development and co-operative governance at the local sphere;
- (b) would not duplicate work of any organ of state, including municipalities; and
- (c) will aid, rather than frustrate, intergovernmental relations.

The question of status and consideration of recommendations are strongly influenced by the proper establishment; recognition based on some norms and standards; operations that are transparent and actions measurable; accountability to Parliament at least annually; and the

²⁷ Section 31(1) of the *IRFA*.

²⁸ See generally Department of Provincial and Local Government (2008) *15 Year Review Report on the State of Intergovernmental Relations in South Africa*.

²⁹ Section 5(1) of *OLGA*.

³⁰ Section 5(1)(c) of the *Financial and Fiscal Commission Amendment Act, 25 of 2003*.

quality of inputs. Most of these requirements have a direct correlation with SALGA's capacity. Therefore, an objectively-proven track record of strategic achievements measured against objectives and outcomes endorsed by CoGTA may be necessary.

7.3 THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

7.3.1 BACKGROUND

No mention was made of organised local government or associations for local authorities in the *Local Government Transition Act*³¹ and amendments thereto. The motivation for the establishment of a national body representing local government may have been the provision in the Interim Constitution,³² that “proposed legislation that materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless ... organised local government ... has been given a reasonable opportunity to make written representations in regard thereto.”³³ The Interim Constitution did not define or make any provision for organised local government. Neither the *Constitution* (nor *OLGA*) prescribes the establishment, nature, role, powers and functions, processes, source and application of funds, management, accountability, responsibility, monitoring and evaluation, as well as other *essentialia* and *incidentalia* of organised local government or any institution undertaking this function. SALGA therefore has a wide and ‘open’ mandate (see below) wherein it could determine its own mechanisms and style of operations. SALGA was launched at a summit of local government councillors and administrators, as well as national ministers, MECs, and other prominent politicians, in November 1996. What was said at the conference encapsulates the rationale for the institution:

Local government in South Africa is currently undergoing a crucial transformation process ... This new vision for development brings with it enormous challenges for municipalities. It enhances the role of municipalities in policy making and implementation within the framework of co-operative governance. Municipalities now must focus on maximising economic growth and the social development of the local community; integrate and co-ordinate activities of various agents within municipal boundaries; and ensure community participation. ... These new challenges come at a time when local government is still grappling to find solutions to complex and intractable problems affecting communities in the aftermath of the apartheid regime. They must function within the context of shrinking resources, rising unemployment and greater demand for municipal services. ... SALGA should therefore be seen as the only organisation that can truly represent the interest of local government in the new post-apartheid South Africa. ... SALGA's role in the development of local government goes beyond that of its predecessors and counterparts elsewhere in the world.³⁴

³¹ 209 of 1993, repealed by the (1996) *Constitution*.

³² Act 200 of 1993, repealed by the (1996) *Constitution*.

³³ Section 174(5) of Act 200 of 1993.

³⁴ *Foreword* by the first chairperson of SALGA, Councillor Collin Matjila, in Khoza, Vusi F (1998): *Completing the Circle of Democracy*, Durban: Butterworths, v-vi (a collection of papers presented at the launch of SALGA in Durban, November 1996).

At that time, South Africa had approximately 1 100 local authorities,³⁵ later consolidated into 843. It was obvious that they could not ‘speak with one voice’: This is what SALGA was required to do. Further consolidation resulted in reduction to 284 municipalities.³⁶ It has been said that the “local government transformative processes have been lengthy and with unpredictable teething issues.”³⁷

7.3.3 SALGA’S MANDATE, ROLE, STRUCTURES AND PROCESSES

The information below has been gleaned largely from the SALGA Constitution (2012), *SALGA Strategic Plan 2012-2017* and its *Annual Report 2014-2015*. For the purpose of comparison, to show how the institution has changed its approach, its *Annual Performance Plan 2012-2013 (APP)* is also briefly reviewed. It should be noted that these documents serve to provide information and are not any analytical or critical review of work done by the institution. Moreover, they are largely inward-focused and written more in the nature of description that reads like advertorial and promotional material. Only certain activities relating to co-operative governance and of relevance to municipal representation are addressed, and where appropriate comments made largely to highlight shortcomings, omissions and incongruities.

(a) Mandate

SALGA’s Constitution³⁸ prescribes fifteen functions and responsibilities making up its “role and mandate”. Being a constitution, the list is somewhat vague and ambiguous; however, it is up to the institution to transcribe these into practical and implementable actions. This it does by interpreting its mission as to “Transform local government to enable it to fulfil its developmental mandate” by undertaking the following activities:³⁹

- i. Lobby, Advocate and Represent;
- ii. Employer Body;
- iii. Capacity Building;
- iv. Support and Advice;

³⁵ Thornhill, Chris ‘Local Government after Fifteen Years: Issues and Challenges’, in De Villiers, Bertus (2008) *Review of provinces and local government in South Africa: Constitutional foundations and practice*, occasional papers, Johannesburg: Konrad Adenauer Stiftung, 59-82, 60.

³⁶ SALGA (2015) *15 Years Review of Local Government: Celebrating the Achievements Whilst Acknowledging the Challenges*, 13.

³⁷ *15 Years Review of Local Government* (2015), *op cit*, 14.

³⁸ Adopted 11 September 2012, clauses 3.1 – 3.15.

³⁹ *SALGA Annual Report 2014/15*, 17.

- v. Strategic Profiling; and
- vi. Knowledge and Information Sharing.

The above objectives have been consolidated into six focus areas:⁴⁰

- (a) Represent, promote and protect the interests of local government;
- (b) Transform local government to enable it to fulfil its developmental role;
- (c) Raise the profile of local government;
- (d) Perform its role as employer body;
- (e) Develop capacity within municipalities; and
- (f) Provide legal assistance to its members.

According to its *Strategic Plan 2012-2017*, SALGA has four main functions:

- (g) Strategic profiling – building the profile and image of local government locally, regionally and internationally;
- (h) Support and advice – including policy analysis, research, monitoring, knowledge sharing, and support to members;
- (i) Representation – stakeholder engagement, lobbying on behalf of local government in relation to national policies and legislation; and
- (j) Act as an employer body – collective bargaining on behalf of members; capacity building, and municipal human resource management.

In accordance with its *Strategic Plan 2012-2017*, SALGA provides “hands-on support to municipalities”: In its day-to-day operations, the organisation initiates and participates in several practical exercises to enhance the capabilities of municipalities. These, *inter alia*, are:

- 1) provide legal advice and opinions;
- 2) convene and facilitate workshops and seminars;
- 3) facilitate and participate in learning networks; and
- 4) serve on the Legislative Review Committee of CoGTA.

SALGA was an active partner with CoGTA in the implementation of the Local Government Turnaround Strategy (LGTAS), undertaking or promoting the following:⁴¹

- a. professionalisation of local government;

⁴⁰ SALGA *Strategic Plan 2012-2017*, adopted 11 September 2012.

⁴¹ SALGA *Annual Report 2013/14*, 23.

- b. review of public participation mechanisms;
- c. guidelines on roles and responsibilities on political/administrative interface;
- d. separation of powers at local government level;
- e. councillor support and remuneration; and
- f. develop methodology to support restructuring of municipalities.

The above lists show a wide range of activities some of which may be difficult to fulfil. They indicate a lack of focus and absence of prioritisation.

(b) Status and governance

According to its Constitution, SALGA is an association not for gain, a juristic person recognised (not established) in terms of section 2(1)(4) of the *OLGA*.⁴² SALGA has been described as a Schedule 3A public entity in terms of the *PFMA*, reporting to the Minister of CoGTA.⁴³ Such reference is not made in its new (2012) Constitution. This definition, notwithstanding the new Constitution, was repeated in 2015 where it was said that the definition [of a national public entity] “does not include voluntary associations, the current nature and form of SALGA... [which is] presently considering de-listing as a public entity and to report directly to Parliament.”⁴⁴ It is not clear what the advantages of this move would be. Hence, it may be of assistance for SALGA to study recent Court judgments.

Finn (2016) in commenting on a recent Constitutional Court judgment,⁴⁵ said:

When an entity – even a private one – performs a function that is fundamentally public in nature, it can be regarded as an organ of state and thus is unable to ‘walk away’ from its constitutional duties. The Court thus affirmed a broad understanding of organs of state based on the definition in section 239.⁴⁶

The above unanimous judgement confirms that by a broad interpretation of section 239, an organ of state could include “entities other than those strictly in government” and thus “accountable to the public”.⁴⁷ It would appear that SALGA is desirous of attaining more freedom in financial compliance, a situation that could be detrimental to its member

⁴² SALGA (2012) Constitution, clause 2.2.

⁴³ In its pre-2012 Constitution and in the *SALGA Strategic Plan 2012 – 2017*, adopted by the NEC on 11 September 2012.

⁴⁴ In *15 Years Review of Local Government* (2015), *op cit*, 41.

⁴⁵ *AllPay Consolidated Investment Holdings (Pt) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 SA 179 (CC), 2014 (6) BCLR 641 (CC).

⁴⁶ Finn, Meghan ‘*AllPay Remedy: Dissecting the Constitutional Court’s Approach to Organs of State*’ (2016) *Constitutional Court Review Vol VI*, 258-272, 258.

⁴⁷ Finn (2016), *op cit*, 264, 266.

municipalities. SALGA exists to support municipalities and not being an organ of state, in the conventional sense, does not have any authority over them. There is no indication that the institution's designed was based on any researched model or existing organisation.

SALGA is a politically-led and driven institution. Its leadership, the national and provincial executive committees, are elected during their respective conferences, which take place after every local government election. Thirteen members at national level and one from each province make up the National Executive Committee (NEC) of twenty-two. The organisation has nine working groups. These structures are duplicated in the provincial sphere.⁴⁸

(c) Operations

SALGA's work is undertaken by 7 directorates:⁴⁹

- i. Governance, Intergovernmental Relations (IGR) and International Relations;
- ii. Municipal Institutional Development;
- iii. Municipal Infrastructure and Services;
- iv. Community Development;
- v. Economic Development and Management Planning;
- vi. Corporate Strategy and Research; and
- vii. Finance and Corporate Services.

(d) Funding

SALGA is funded by a combination of sources: membership fees (making up 88 per cent of total revenue in 2014-2015); national government grant; and donor grants for projects.⁵⁰

Municipalities pay membership fees to the national body and not to PLGAs.⁵¹ It has been said:

SALGA is increasingly becoming dependent on membership levies as its core source of revenue with approximately 90% from this source in the 2011/12 financial year. Given the voluntary nature of the organisation and the financial challenges faced by many municipalities, this places SALGA at a significant financial risk.⁵²

⁴⁸ SALGA Annual Report 2014/15, 22-23.

⁴⁹ SALGA Annual Report 2014/15, 19.

⁵⁰ SALGA Annual Report 2014/15, 118.

⁵¹ SALGA Annual Performance Plan and Strategic Plan, *op cit.*

⁵² 15 Years Review of Local Government (2015), *op cit.*, 41.

SALGA has asked that it and the National Treasury jointly evaluate the current financial model for Organised Local Government in South Africa. This is because there is need to “build certainty into the financial model to ensure the long term financial sustainability of the organisation.”⁵³

By contrast, the Netherlands Association for Local Authorities (VNG), “sources the majority of its revenue (more than 70%) from: funding by municipalities, subsidies, membership fees and other revenue.”⁵⁴

7.3.3 SALGA’s CHALLENGES

Reflecting on the 15-year period from 2000 when democratic local government was established, SALGA states that while several local government challenges have been overcome, “many municipalities are struggling to get the basics right.” Further, that “democratising local government has been an extremely challenging process.”⁵⁵ One of the major obstacles and frustrations has been the speed at which legislative drafting has taken place, requiring many amendments to “stabilise the legal framework, structures and system at the local level.”⁵⁶ Much legislation is aimed largely at regulation of and compliance by local government.

Capacity-building has been a top priority of SALGA and as a result thereof, some 17 000 officials benefited from training up to the 2011/12 financial year. Notwithstanding this achievement, “questions remain as to whether the training programmes are delivering the desired outcomes.”⁵⁷ This situation arises because the nature, location, duration, and specifics of training vary considerably across the country and various municipalities therein, taking into account their previous roles and functions under the apartheid regime, and the availability of skilled and experienced staff. SALGA sometimes has to tailor-make its training programmes. For example, it recently implemented a skills development programme for district councillors Xhariep, in collaboration with the University of Fort Hare.⁵⁸ An exacerbating factor for skills

⁵³ *Ibid.*

⁵⁴ Response by VNG by email dated 12/07/2016 to an email query by the writer.

⁵⁵ *15 Years Review of Local Government* (2015), *op cit*, 5, 17.

⁵⁶ *15 Years Review of Local Government* (2015), *op cit*, 25.

⁵⁷ *15 Years Review of Local Government* (2015), *op cit*, 40, 42.

⁵⁸ Bolowana, Grace (2017) ‘Project aims at developing councillors skills’, Johannesburg: *The New Age*, 17/05/2017.

development is high turnover and growth in the number of political office bearers after every election. Given such a complex scenario,⁵⁹

Capacity building and training needs to be differentiated in nature and some of which needs to be based on a cyclical ‘must know’ principle... it is necessary for the organisation to re-evaluate current approaches to capacity building programmes in the sector and to drive a more coherent high impact programme whose outcomes are measurable over time.

SALGA points out that the absence of a clear articulation of its mandate has the result that municipalities have expectations of the institution that go beyond its role and responsibilities. In the absence of a statute establishing it, *OLGA* is largely to blame as it does not specify to an acceptable level such an organisations status, role, powers and functions, especially vis-à-vis local government as a collective and municipalities as distinct organs of state. A consequence of this lack of clarity has led to “members’ expectations of SALGA conflating with those of the National Department of Co-operative Governance.”⁶⁰

SALGA has “argued for some time that rolling extension of its responsibilities has also not been coupled with a review of the funding model adopted” for it.⁶¹ It is unclear how SALGA’s responsibilities have increased, unless it assumes to be concomitant with that of local government itself. Government grants and subsidies, by CoGTA, constitutes only 5.8 per cent of SALGA’s revenue.⁶² In its 2016/17 financial year, CoGTA has budgeted R567 611 for the following outputs from SALGA:⁶³

- “Access to sustainable infrastructure and services;
- Effective IGR support and international relations; and
- Strengthening community participation in municipal governance.”

Increased government financial support may constitute double funding as, being a membership-based institution, it could get additional funding through municipalities. This could be possible if members see SALGA’s services being substantially beneficial. The institution may be wrong in requesting additional resources from CoGTA when “responsibilities have increased without any concomitant increase for the resourcing of activities.”⁶⁴ These would be reference to municipalities, and not SALGA itself.

⁵⁹ *15 Years Review of Local Government* (2015), *op cit*.

⁶⁰ *15 Years Review of Local Government* (2015), *op cit*, 40.

⁶¹ *Ibid*.

⁶² *SALGA Annual Report 2014/15*, 233.

⁶³ *CoGTA Annual Performance Plan 2016/17*, 43.

⁶⁴ *15 Years Review of Local Government* (2015), *op cit*, 40.

Another challenge SALGA says it faces is that “municipal membership remains voluntary” and such a situation poses financial risk. It calls for “an investigation into the implications of a mandatory affiliation” to it and thereafter amending its governing legislation.⁶⁵ Such an amendment may be unconstitutional as municipalities have autonomy as a sphere of government and national cannot dictate to local government. Secondly, municipalities would not accept mandatory (compulsory) membership if dissatisfied with SALGA’s performance over two decades. The question arises as to whether an institution of such a nature can do more insofar as the core responsibilities of local government is concerned.

Unclear and onerous legislation on local government has resulted in municipal structures experiencing “a degree of instability, particularly due to the settling of powers and functions between all spheres of government,”⁶⁶ according to SALGA. It says that provinces have added to the complexity of governance in the local sphere by not delineating specifically the respective roles and responsibilities of provincial and local governments. The situation has been exacerbated by –

the historical division of powers and functions between local authorities that serviced formerly all white communities and a process of mandate assignments without supporting resources that has generally ignored subsidiarity and consultation.⁶⁷

The designers of the three-sphere governmental system may not have anticipated the challenges and unintended consequences arising from implementation of such an unprecedented model when powers and functions have not been clearly delineated. SALGA argues that this has allowed for a “number of distortions or problems to creep into the system.”⁶⁸ It is questionable whether strict or rigid functional and spatial demarcation of powers and functions is possible, or even desirable, particularly within the context of co-operative governance.

Another problem has been the inability of provinces to “provincialise” or regionalise “many of these functions.” The consequence is that municipalities cross-subsidise provinces by inevitably assuming their functions. In some instances, this is by design in that notwithstanding the constitutional status of local government, in practice the hierarchical system is still operational. An example of this phenomenon is where use is made of assignment by legislation, particularly

⁶⁵ *15 Years Review of Local Government* (2015), *op cit*, 41.

⁶⁶ *15 Years Review of Local Government* (2015), *op cit*, 44.

⁶⁷ *Ibid.*

⁶⁸ *15 Years Review of Local Government* (2015), *op cit*, 49-50.

where it is ‘imposed’, that is, undertaken on an *ad hoc* basis, without consultation, and the adequate resources.⁶⁹

SALGA asserts that –

the clustering of functions indicate the extent to which it is commonplace for municipalities to be performing functions for which they do not have constitutional responsibility and how, in many instances, it has been difficult to undo the historical legacy of practice.⁷⁰

Given that some “functions span all three spheres of government”, there inevitably are “overlaps and duplication in service provision” due to lack of clarity on functional and spatial responsibilities. This situation is exacerbated by some powers and functions, such as housing, that are allocated to national and provincial government but should be located in the local sphere, especially to large cities and metropolitan municipalities. This situation prevails because the principle of subsidiarity is not being practised as it should.⁷¹ It again raises the question of need and desirability of provinces, and that they “should be replaced by metros and stronger district municipalities.”⁷²

7.3.4 ACKNOWLEDGING AND MEETING THE CHALLENGES

SALGA proposes dealing with the following acknowledged challenges:⁷³

- i. Role of rural municipalities;
- ii. Question of municipal viability;
- iii. Growing concerns with respect to corruption;
- iv. Need to rethink powers and functions;
- v. Need to review local government legislation;
- vi. The role of traditional authorities; and
- vii. Considering municipal differentiation.

In response to the challenge posed by hastily-promulgated legislation and compliance therewith, SALGA sought to “influence the legislation and policy review process for local government” by lobbying against those that have an undesirable impact on municipalities, and making concrete proposals which will contribute to a functional local government. It has

⁶⁹ *15 Years Review of Local Government* (2015), *op cit*, 51.

⁷⁰ *Ibid.*

⁷¹ *15 Years Review of Local Government* (2015), *op cit*, 52.

⁷² Molatlhwa, Olebogeng, ‘Replace provinces with big metros,’ Johannesburg: *The Times*, 4/07/2016, comments by the then current Chairperson of SALGA.

⁷³ *15 Years Review of Local Government* (2015), *op cit*, 110-116.

deployed additional part-time representatives to the NCoP to advocate and lobby for local government interests. It says, “Accountability within local government is a key success factor.”⁷⁴

Another of SALGA’s (many) priorities to meet its challenges was professionalisation of the Local Government sector: This approach was incorporated in the Local Government Turnaround Strategy (LGTAS) in 2009 as one of the key strategic objectives to improve performance and professionalisation in municipalities. SALGA and CoGTA resolved in 2010 to “embark on active measures to contribute to the professionalisation of the sector” and adopted The Professionalisation Framework for Local Government in 2013.⁷⁵

It has been said that the pillars of Professionalisation “pertain to service orientation, leadership and management, technical and institutional professionalisation”, including the roles of professional bodies and institutions of learning.⁷⁶

Another body that will advise and assist SALGA is the National Municipal Managers Forum.⁷⁷ A further initiative is the establishment of the SALGA Centre for Leadership and Governance.⁷⁸

It is unclear as to what has been achieved by such initiatives since 2010 as SALGA’s documents make no mention of a monitoring and evaluation system to record and report on progress.

7.4 REVIEW OF SALGA’S MANDATE, STRATEGY AND OBJECTIVES

The review below is based on documents in the public domain, SALGA’s Constitution, *15 Years Review of Local Government (2015)*, *SALGA Annual Report 2013-2014*, *SALGA Annual Report 2014/15*, and on SALGA’s website. Hence, this section is largely descriptive.

⁷⁴ Foreword in the *SALGA Annual Report 2014/15* by Chairperson, Cllr Thabo Manyoni, 6.

⁷⁵ SALGA ‘Professionalisation of the local government sector’, in *in.KNOW.vation*, March 2015, 31-35, 31.

⁷⁶ ‘Professionalisation of the local government sector’ (2015), *op cit*, 34.

⁷⁷ Kemp, Charne ‘NMMF gives insight into achievements and challenges’, *SALGA Voice of Local Government 15* (2015), 52-53.

⁷⁸ Gqubule, Duma ‘Launch of SALGA Centre for Leadership and Governance’, *SALGA Voice of Local Government 15* (2015), 54-55.

The objectives and functions are informed by the “recently developed Five-Year Strategic Agenda” formulated by CoGTA as the central policy thrust for local government. This document does not appear to be in the public domain but this may be due to change in name of the department and its political leadership. What is available is the erstwhile DPLG’s *Strategic Plan 2007-2012*. This, most likely, in turn gave rise to SALGA’s five key performance areas (KPA’s), which cover almost a third of the organisation’s five-year *Strategic Plan*. These KPA’s relate largely to internal workings of the association which when completed would enable it to better serve its members. However, SALGA has been on annual restructuring since inception and it is not clear whether the time, effort and money spent on these exercises really benefit municipalities. There is need for more quantitative information, perhaps through an external, objective agency, as much of the strategic plan, annual reports, conference reports, and other publications contain numerous statements of intent that are somewhat philosophical, aspirational, not easily quantifiable, and much of these exhibit an internal focus. This is evinced by SALGA having:⁷⁹

- i. Five ‘core’ areas, each having several components;
- ii. Five objectives in its (internal) change agenda;
- iii. Six broad revised strategic objectives;
- iv. Five ‘key imperatives’ where it will play a representative, advisory and support role;
- v. Five aims in its municipal support programme;
- vi. Ten (internal) organisational functions;
- vii. Five key issues for the National Executive Committee during its term of office; and
- viii. Six working groups to address key areas.

Some of the very broad and open-ended objectives and the difficulty of translating or interpreting them into concrete, measurable activities and beneficial outcomes are reflected in the KPA’s. It is indicative of an organisation trying to be involved in too many fields and attempting to do something at least in each. This shows a lack of focus and prioritisation.

There appears to be some duplication in roles with CoGTA and possibly those that should be or are undertaken by municipalities, whilst some are too broad and vague. SALGA is not the sole organisation undertaking some of the tasks depicted and not being an organ of state in the conventional sense, should preface its functions with words such as ‘to assist ...’, as does most

⁷⁹ *Strategic Plan 2007-2012*, 11-12, 16, 18-19.

associations for local authorities in the developed world. It is not up to SALGA, nor can it alone, “transform local government.”

Since the annual National Conference reviews, the business and approach set out in the five-year *Strategic Plan*, it is understandable that the association has undergone numerous restructuring and organisational transformation exercises since its inception. The fruit of these piecemeal, supposedly beneficial changes, have not been disclosed in a manner that enables one to undertake a social cost-benefit analysis. One of the most serious challenges of municipalities, and consequently of their representative bodies, is capacity: technical, intellectual, and leadership. Associations for local authorities draw their funding and expertise from member municipalities, most of which, as it is, have very limited capability. Both these bodies are also institutionally too weak or divided to lobby successfully other spheres of government and the private sector for resources to fund demonstrably innovative projects that would fulfil a specific purpose or to demand their equitable share of national revenue. This is also an issue of status and ability.

The *Constitution* provides for freedom of association. Membership of organised local government is voluntary. It cannot be compulsory, unless a statute compels affiliation. Such a situation cannot be envisaged now or in the future. This is because municipalities collectively constitute a sphere of government which is autonomous. Municipal councils would join if the benefits of membership far outweigh the cost. This cannot be said to be the current situation, given that most municipalities, apparently, themselves do not have the capacity for sustained participation and meaningful contribution. It is essential to enhance the status and contribution to municipal development by provincial associations. This, in turn would be dependent on the formalisation of the role and functions of SALGA, and its acceptance by national government departments and the NCoP as a major actor in the field of local participatory democracy and socio-economic development. SALGA’s status and its efficacy and efficiency, as well as the respect it could command, in turn, depend on the status and efficiency of the NCoP. Hence, the lobbying and advocacy roles, especially, of local government, SALGA and the NCoP, which are ‘status-dependent’, is crucial because both national and provincial governments, all things considered, have not done enough to capacitate municipalities and indirectly strengthen SALGA.

While municipal support and capacitation is constitutionally prescribed,⁸⁰ there is no constitutional, statutory, or moral obligation to do so in the case of local government associations. The counter argument, by national and provincial authorities, could be: ‘Capacitate for what?’ This implies that municipalities, and concomitantly, organised local government, must have clear and unambiguous initiatives, plans, programmes and projects that demonstrate their ability to enhance and promote institutional and socio-economic development by municipalities through co-operative governance. This is because the state, as well as donor and grant agencies, are unlikely to fund capacitation where this relates largely to increasing the size of the bureaucracy, that is, sponsoring of operational costs. This is a ‘chicken and egg’ situation that can be resolved by providing at least minimal capacitation to ensure basic service delivery and incremental capacity building municipalities mature.

The present-day position of SALGA can be gleaned from its policy deliberations on migration, gender, legislature and governance, municipal infrastructure services, climate change, labour relations, and local economic development.⁸¹ The 123 proposals, suggestions and recommendations indicate that SALGA has or is or wants to be involved in all manner of activities, without adequate focus and prioritisation, using logical sequencing and the critical path approach. This does not augur well for municipalities, as clearer and firmer recommendations are required and formally submitted to CoGTA and thereafter followed up. However, the *Strategic Plan 2012-2017* (compared with the one for the period 2007-2012) appears to have consolidated and integrated several fragmented and diverse objectives, showing that the organisation has been using experience and lessons learned over the past years to consolidate, integrate, and focus its tasks. This is a positive approach for the future, but a joint co-operative effort is required, alongside CoGTA, the Planning Commission, the FFC, the SACN, government departments, and other organisations to minimise duplication and use resources more effectively. The SALGA Communications Strategy may now need review.

7.5 REVIEW OF SALGA’S PERFORMANCE

Apart from its Annual Report and performance contracts of key personnel, SALGA has not shown progressive achievement of predetermined objectives articulated at its launch. Little

⁸⁰ In terms of section 154(1) of the *Constitution*.

⁸¹ Summarised in a document titled ‘Outcomes of the SALGA NEC Policy Workshop, held 23-24 August 2010, www.salga.org.za, accessed 20/10/2015.

empirical evidence is available on the performance of local government associations throughout the world. This may be because most are informal institutions, funded minimally by central governments, to the end that many do not function with strict business plans, key performance areas (KPAs) and key performance indicators (KPIs), or management systems, and such-like to account to higher authority or donors. The performance of SALGA has been assessed by itself and found to be wanting. This has been confirmed by *The Intergovernmental Relations Audit*.⁸² In fairness, at this stage SALGA had been operational for a short time.

The perception and insider's views of SALGA appear to contradict the impressive information on its website. It has "highlighted" its performance in respect of the following goals:⁸³

- i. Local government delivering equitable and sustainable services;
- ii. Safe and healthy environments and communities;
- iii. Planning and economic development at a local level;
- iv. Effective, responsive and accountable local government for communities;
- v. Human capital development in local government;
- vi. Financially and organisationally capacitated municipalities; and
- vii. Effective and efficient administration.

The performance report is based on KPAs, KPIs, and outcomes on predetermined objectives. That SALGA has such a high achievement level either indicates that it is an extremely efficient organisation or that its objectives were easy to attain. It achieved, coincidentally, 84 of 86 of its mandate objectives; 84 of 86 of its three "apex" priorities; and 84 out of 86 of its strategic goals.⁸⁴ However, the reality may be different, also when seen through the eyes of provincial and local government practitioners who have been involved with the organisation and its affiliates. The list of roles and functions, programmes, initiatives, and so on, do not correlate with what has been achieved. In fairness, it should be remembered that the perceptions of someone in a well-functioning municipality that does not have much need for an organisation like SALGA would be different from those of a functionary in a weak municipality that would benefit from that institution's intervention and assistance. In other words, SALGA has undoubtedly achieved much over the past years, especially when comparing the 'before' and

⁸² Department of Provincial and Local Government (1999) *Final Report on the Intergovernmental Relations Audit*.

⁸³ SALGA Annual Report 2014/15, 52-103.

⁸⁴ SALGA Annual Report 2014/15, 51.

‘after’ situation of smaller or less well-endowed municipalities. Under such circumstances, it would definitely have added value in that the particular municipality may have improved its efficiency and thereby benefiting its communities.

It is unfortunate that little or no social cost-benefit analyses or comprehensive and in-depth reviews have been done by or on organs of state at the local sphere. Performance management systems tell one story, the integrated development plan, another. What is required is a tool to measure efficiency of an institution, with its achievements (outcomes) over the medium term measured against costs, predetermined objectives, KPA, KPIs, and so on. Hence, a monitoring, evaluation and impact assessment (MEIA) system proposed by national government in 2010 needs to be established by SALGA, perhaps in line with that undertaken by the SACN.⁸⁵ Such a mechanism could objectively indicate whether an organisation is functioning or not, and why. A detailed evaluation or audit has not been done on SALGA, not even by the *Intergovernmental Relations Audit* and subsequent reviews. An independent, objective review and analysis by an external expert, perhaps commissioned by member municipalities or CoGTA, given that SALGA has been operational for two decades, may present a truer picture of its achievements and the cost thereof. It is also necessary to distinguish between SALGA’s claimed achievements and those of capacitated municipalities and to what extent their status has been attained through the intervention and assistance of the institution.

In a parliamentary debate on local government it was said that hundreds of millions (R132 million in 2009) in membership contributions to SALGA could “rather be used for much needed service delivery.”⁸⁶ On the same occasion, it was stated that:

The term ‘lack of capacity’ has become an excuse for inefficiency and laziness in various municipalities. ... [and, later] The role of SALGA must be reviewed to ensure implementation of national programmes.⁸⁷

On several occasions, it has been mentioned by parliamentary committees that SALGA does not attend their meetings, or its chairperson delegates responsibility, and that its reports do not give a clear indication of what the organisation does. At SALGA’s Budget Review, the Chairperson (Minister of CoGTA) expressed concern on the organisation’s absence. In

⁸⁵ The *Strategic Plan 2011-2016* of the SACN was designed on an outcomes-based approach where a monitoring, evaluation and impact assessment system (formulated by the author and a colleague) will measure organisational and programme/project performance, alongside a performance management system for employees. This mechanism would be used as a marketing tool and for reporting to CoGTA, members, and donors.

⁸⁶ Marti Wenger, member of the opposition Democratic Alliance, 20/08/2009, from polity.org.za.

⁸⁷ Joe Mcgluwa, of the opposition Independent Democrats, 20/08/2009, from polity.org.za.

addition, a member stated that there “was a tendency for SALGA to undermine the work of the Committee” as it had “not appeared in front of the Committee for four years.” Another Committee member said that “SALGA was an embarrassment”, and that “they should get their house in order.”⁸⁸ Similar views were repeated by several other Committee members. The Chairperson of the Finance Select Committee at a meeting to discuss SALGA expressed “general concern that an entity which was supposed to assist distressed municipalities was itself in a poor financial position.” There was consensus that this body should appear before the Committee and that research be done to ascertain the organisation’s true “state of affairs.”⁸⁹ These views sum up the status of SALGA seven to eight years ago, and are still valid today. However, this organisation is not the only one to be blamed for the present situation regarding service delivery by the three spheres of government. Given that one third of municipalities are currently not functioning, one questions SALGA’s role in this situation or ask whether it could have done better sixteen years after the establishment of municipalities in a democratic state.⁹⁰

Comments made at the National Assembly and NCoP meetings⁹¹ indicate that the organisation is reactionary rather than proactive; agrees to do things it should not be doing; is largely politically-driven; and may be duplicating work of the CoGTA. At this juncture, some searching questions need to be asked, perhaps by an independent organisation undertaking an audit of accomplishments balanced against the cost, to determine what structures post-*IRFA* should be strengthened or dissolved. In such study, a need and desirability analysis of a local government association may be necessary.

The current state of local government may be an indirect indicator of SALGA’s status and effectiveness. While CoGTA sees the merger of some municipalities as a means to enhance financial viability,⁹² local government and its representative organ sometimes disagree or appear confused with respect to national government’s ‘interference’ in the (relatively)

⁸⁸ Views of Mr A Manyosi and Mr F le Roux, at the (SALGA) Budget Review Meeting of 25/06/2008.

⁸⁹ Minutes of the meeting of the Finance Select Committee: Discussion on South African Local Government Association, held on 16 April 2010.

⁹⁰ Ndenze, Babalo: ‘Municipalities: one third not functioning,’ Johannesburg: *The Star*, 3/03/2015

⁹¹ Indicated in various places in this study, particularly in Chapter 4.

⁹² Ndaba, Baldwin: ‘More municipalities to merge into metros,’ Johannesburg: *The Star*, 2/02/2015; Molatlhwa, Olebogeng: ‘Mayors rubbish Zuma’s blueprint,’ Johannesburg: *The Times*, 30/03/2015; Molatlhwa, Olebogeng: ‘Merging municipalities a financial burden,’ Johannesburg: *The Times*, 17/06/2015; Thakali, Thabiso: ‘Municipal mergers will change the landscape,’ Johannesburg: *The Star*, 6/06/2015.

autonomous local government sphere.⁹³ SALGA could do better in establishing and maintaining sound national-local government relations.

In response to recent, more frequent and often violent service delivery protests at many municipalities, SALGA is currently developing a smart communication tool that will enable councillors and ratepayers to access information “at the click of a button”. This would allow councillors to respond quickly to issues raised by residents.⁹⁴

7.6 SALGA IN CONTEXT OF ‘DEVELOPMENTAL’ LOCAL GOVERNMENT

The above review and analysis indicates that SALGA has a wide, deep, and complex mandate, much of which it has set for itself. Consequently, it is a relatively large structure, especially when the provincial local government associations are included. A concern for SALGA is that its funding is not guaranteed; this is a problem particularly where it sets out to do more than it practically can achieve. It was evident in the *Intergovernmental Relations Audit* that all is not well with SALGA.⁹⁵ Hence, this organisation has had to undertake several restructuring exercises. Being aware that it has undergone frequent changes, one needs to be mindful that:

Probably the most difficult tasks in the creation of socially integrated democracy in South Africa are those which must be undertaken by local government, for it is over the local allocation of resources that the material conflicts between South Africa’s different communities are most evident.⁹⁶

Modernisation theories have been flawed by their over-emphasis on economic aspects, by the false dichotomy between ‘traditional’ and ‘modern’ societies, and by what has been called the “unreconstructed notions of evolutionism.”⁹⁷

The importation and uncritical implementation of foreign, developed-world models at the local sphere may set back social development rather than advance it. However, certain foreign approaches could be studied and adapted for domestic use, under the guidance of experts,

⁹³ Molatlhwa, Olebogeng: ‘Council’s wings clipped,’ Johannesburg: *The Times* 13/06/2016; Molatlhwa, Olebogeng: ‘Municipalities wary of government meddling,’ Johannesburg: *The Times* 28/06/2016; Molatlhwa, Olebogeng: ‘Salga head calls for review of municipal mergers,’ Johannesburg: *The Star* 14/07/2016.

⁹⁴ Molatlhwa, Olebogeng (2016) ‘SALGA developing a smart communication tool’, Johannesburg: *The Times*, 6/09/2016.

⁹⁵ Department of Provincial and Local Government (1999) *Final Report on the Intergovernmental Relations Audit*.

⁹⁶ Lodge, Tom (1999) *South African Politics Since 1994*, Cape Town: David Philip, 40.

⁹⁷ *Ibid.*

through municipal international relations. There is greater need for endogenous strategies, with the intended beneficiaries as main protagonists. For this, SALGA must know more about community organisation and mobilisation. Local government associations can and have played a useful role in promoting co-operative governance, including national-provincial and local intergovernmental relations. However, where deemed successful, their contribution to development at the local sphere is not significant, when judged holistically. This is partly because associations are not statutory bodies with guaranteed resources; rather, they may have been operating as advisory and co-ordinating organisations, without usurping the functions of state organs. With limited resources, they have generally been good value for money, and, where tolerated by central and local authorities, have been given space to show their worth. They have, wisely, not been confrontational, a style that has allowed some to survive for a comparatively long time. Given the advances in information and communications technology, it is today comparatively easy for reasonably-endowed municipalities to co-operate among themselves locally, regionally and internationally: They do not need associations for local authorities to fulfil their core responsibilities; rather organised local government can coexist and thrive where they have a role that is unique, in the sense that they can assist municipalities and not do their work.⁹⁸ A local example of such an institution is the SACN. The SALGA chairperson's articulation of its lofty ideals and intentions are a constant refrain ever since the establishment of the institution. Such statements are made annually and in most of its publications. These are often not translated into concrete programmes and projects. Campaigns may have some uses, but the questions are whether they really contribute to sustainable socio-economic development that is measurable.

The vague and ambiguous statements on several contemplated actions do not indicate that SALGA practised any introspection to determine its unique role in development and co-operative government; they belie an organisation that is largely inward-focused and conflictual; still struggling to find its real identity and purpose, while events are passing it by. This association has had its opportunity and failed; it is doubtful that any restructuring will set it on its correct path. This view is reinforced by SALGA's *Cape Town Declaration*.⁹⁹ It contains eighteen ambiguous resolutions that again would be difficult to quantify and monitor, let alone implement, even if it were sufficiently capacitated, managed, and led. Under the circumstances,

⁹⁸ See Chapter 6 of this thesis

⁹⁹ Emanating from the Conference, and dated 30 September 2004, depicted in the *SALGA Newsletter*.

objective empirical research should be undertaken on co-operative governance and associations for local authorities in this function, and in promoting socio-economic development.

From the study of foreign associations for local authorities,¹⁰⁰ there is a definite need for local government to be represented by a professional organisation. The current constitutional-statutory framework allows SALGA to do this. Recently, this institution has perhaps recognised certain shortcomings and has therefore resolved to lobby for a review of local government powers which may influence it to assess its ability to better serve its members. Following the outcomes-based approach advocated by the President and the 2011 local government elections, SALGA has updated its strategy to be in line with the country's challenges and local government's approach thereto.¹⁰¹ Thus, this institution may be on its way to working more smartly than in the past. Whether SALGA will undergo yet another major restructuring and change of approach following the 2016 local government elections, only time and senior councillors can tell.

Poor municipal representation – a case study

A major shortcoming of SALGA evinced recently is its lack of ability to challenge legislation by national government, and in this instance, the Disaster Management Amendment Bill of 2015 (DMAB), amending the *Disaster Management Act, 57 of 2002 (DMA)*.¹⁰² The *DMA* was one of a plethora of legislation passed by Parliament with what appears unseemly haste but understandably so, given the constitutional objective of establishing a democratic society. Law, *per se*, cannot achieve this – it should be implemented by competent and committed officials. The need for speed in promulgating legislation has resulted in several of them, or parts thereof, not being fit for purpose. Almost all statutes, regulations, assignments, authorisations, and directives influence and impact on local government. Municipalities are seen and appear to operate as the *de facto* lowest tier in a hierarchy. It is unclear, to what extent they can influence national policies affecting them. This relates to capacity and competency, but more importantly to whether lawmakers pay heed to their inputs and consult them adequately through SALGA, as envisaged in section 154 of the *Constitution*.

¹⁰⁰ In Chapter 6 of this thesis.

¹⁰¹ *SALGA Strategic Plan 2012-2017*.

¹⁰² The writer was appointed as Policy/Legal Advisor to the Community Development Directorate of SALGA on 15 September 2015. His first assignment was to provide legal opinion on the Disaster Management Amendment Bill and the *Disaster Management Act, 57 of 2002*. What follows above is a summary of his inputs to SALGA.

There were many ambiguities, gaps, and other inconsistencies in the *DMA* and the amending Bill. Some of these may potentially have disastrous consequences for and adverse impacts on municipalities. The problem is that South Africa, a developing country, has signed several international treaties and thereafter copied some of the (foreign) statutes for application in the Republic. Two problems arise from this action: firstly, the legislation may have been formulated mechanistically as a set of generic rules that may not be appropriate domestically. Secondly, law should be formulated on the (social) problem-solving basis. This means the real problem or challenge must be identified and broken down to its (related) constituent parts.

The *DMA* may have borrowed extensively from foreign, disaster-prone countries, which have of necessity to take serious measures to reduce disasters and the risks thereof. National government must make adequate budgetary provision. It is unclear to what extent municipalities in South Africa were engaged with¹⁰³ for the assessment of disaster risks, capacity of the municipality to manage them (alongside their numerous core responsibilities) through having the requisite expertise, budgets, etc. This entails institutional assessments of the entire municipality and its capability in service delivery and sound management. In 2002 municipalities were (and still are) a 'work-in-progress' as was SALGA. Under the circumstances the question is whether they were adequately consulted, but more importantly, could they have made sound, practical inputs in the development of a law that will affect them.

The problem is that South Africa, a developing country, has signed several international treaties and thereafter copied some of the (foreign) statutes for application in the Republic. Two problems arise from this action: firstly, the legislation may have been formulated mechanistically as a set of generic rules that may not be appropriate domestically. Secondly, law should be formulated on the (social) problem-solving basis. This means the *real* problem or challenge should be identified and broken down to its (related) constituent parts.

In perusing *A Policy Framework for Disaster Management* (2005), again several shortcomings, ambiguities, and uncertainties become apparent. These will, particularly, affect municipalities, mostly adversely. It is unclear what the national Disaster Management Centre (NDMC) has achieved over the past decade and whether it has analysed, with CoGTA, the achievements of municipalities, particularly those that have in the past suffered disasters. Form follows function.

¹⁰³ In terms of section 154(2) of the *Constitution*.

It is essential to identify and then define the functions of role-players in disaster management and disaster risk reduction. While a framework type of legislation would serve as a guide, each municipality is somewhat unique, as would be its plan and the size of the department responsible for this function. The *DMA* proposed “uniformity” but whether this is appropriate in the formulation of plans and establishment of capacity is moot. The plan of Mangaung would be vastly different from that of eThekweni municipality which would not look like that of Tshwane.

The Disaster Management Amendment Bill 2015 (DMAB) has significantly expanded the role of local government rather than provided clarity and covered gaps in the *DMA* of 2002. The Preamble list ten objectives which if they are to be implemented adequately places considerable burdens on municipalities in the mapping, design, implementation, management, monitoring and reporting on disaster management which now incorporates disaster risk reduction. While it is relatively easy to set down the principles, procedures and structures to be established, there is need for assessment of how existing forums, advisory bodies have performed over the past five years before allocating them additional work.

Disaster management is not one of the many constitutionally-entrenched and prescribed (original) powers of local government. It is a Schedule 4, Part A function, of concurrent national and provincial legislative competence. Where this function is statutorily assigned to municipalities, it must be done in strict compliance with section 156(4) of the *Constitution*. This reads: “The national government and provincial governments *must* assign to a municipality, by *agreement...*” A prerequisite would be the capacitation of the municipality by provincial and national government, in accordance with section 154(1) of the *Constitution*. Use of the modal verb “must” signifies that national and provincial government are duty-bound to assign a function only if it “necessarily relates to local government” and that there is compliance with section 156(4) of the *Constitution*.

The above sections appear to assume that prior institutional assessment had been completed confirming a particular municipality’s capacity, competency or capability of administering disaster management effectively. A study was done in 2011 but this assessment is generic and somewhat technical.¹⁰⁴ Rather, each metropolitan and district municipality must do extensive

¹⁰⁴ Botha, Doret *et al* (2011) *Disaster Risk Management Status Assessment at Municipalities in South Africa*, African Centre for Disaster Studies, North West University.

research and studies of its geographical area to inform its planning. A further one, from a reading of section 156(4) is that these stipulations are for a particular municipality and not for classes of municipalities. The assignment would be based on an agreement with the municipality concerned. However, there is no problem in the passing of a framework-type statute to serve as a guideline. But thereafter, each metropolitan and district municipality should undergo the assessments to determine capacity before the assignment is confirmed.

Reference to “a municipality” implies that a blanket or generic assignment is not allowed by the *Constitution*. Hence, the constitutionality of the DMA and the Bill is questioned. This requires further research and analysis. Based on this interpretation, the constitutionality of section 9(1) of the *Municipal Systems Act* is also questioned since it, in contradistinction, refers to “municipalities in general, or any category of municipalities...”

The *DMA* and the *DMAB* may have been based largely on models formulated by foreign disaster-prone countries. As such these enactments may not be appropriate for South Africa which is generally of moderate risk with identified types of disasters. The *Act* and the Bill appear to be concentrating on (foreign) good practices, requiring several structures, much planning and assuming that co-operative governance mechanisms would be able to manage disasters and disaster risk management. A major concern with the nature and tone of the *DMA* and the *DMAB* with its ‘framework’ and “generic” type approach, as opposed to agreements with specific municipalities, is that they dump this power/function on local government. Consequently, municipalities would have to implement often in the absence of support and guidance. There may be an opportunity cost if this function is not financed by Treasury. A major concern was the limited time SALGA allowed for the consultant to review the draft Bill and for the public to submit comments and engage with Parliament, particularly the NCoP. Hence the question of constitutionality of the *Act* based on recent Court judgments.¹⁰⁵

¹⁰⁵ *Doctors for Life International v Speaker of the National Assembly and Others* CCT12/05 [2006] ZACC 11; 2006(12) BCLR 1399 (CC); 2006 (6) SA416 (CC) (17 August 2006), paragraphs 209, 211, 213. See also Czapanskiy, Karen Syma and Rashida Manjoo (2008) *The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right*, 19(1) (2008) *Duke Journal of Comparative and International Law*, 1-40, 2-6, 9; *King and Others v Attorneys Fidelity Fund Board of Control and Another* (561/2004) [2005] ZASCA 96; [2006] 1 All SA 458 (SCA); 2006 (4) BCLR 462 (SCA) (29 September 2005), paragraphs 1-2, 9, 11-12, 17, and 22; *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50 (26 April 2017), paragraphs 1, 18, 23, 28, 34, 58, 93, 98, and 142. Refer Chapter 5 of this thesis – 5.2.3(iv) Public Participation, and 5.2.4 The NCoP.

There is need for clarity on roles, funding, capacity-building, etc, on a differentiated basis. Municipalities should not be funding this function because the opportunity cost may have a negative effect on their (numerous) other responsibilities. The *Disaster Management Amendment Act* should not set a precedent for the dumping of national and provincial government functions on a blanket or generic approach to municipalities.

The *DMA*, the *DMAB*, and the consequent *Disaster Management Amendment Act (DMAA)* may have been based largely on models formulated by foreign disaster-prone countries. As such these enactments may not be appropriate for South Africa which is generally of moderate risk with identified types of disasters. Both statutes (2002 and 2015) and the Bill appear to be concentrating on (foreign) good practices, requiring several structures, much planning and assuming that co-operative governance mechanisms would be able to manage disasters and risks associated therewith. A major concern with the nature and tone of the *DMA*, the *DMAB*, and the resultant *Amendment Act* with their ‘framework’ and “generic” type approach, as opposed to agreements with specific municipalities, is that they dump this power/function on local government. Consequently, municipalities would have to implement often in the absence of support and guidance. There may be an opportunity cost if this function is not financed by Treasury. A major concern is the constitutionality of the *Amendment Act* and parts of the *Systems Act* pertaining to disaster management. This is despite CoGTA and SALGA, amongst others, undertaking a clause-by-clause analysis of the *DMAB*.¹⁰⁶

Notwithstanding the writer’s reservations, it would appear that SALGA and CoGTA have accepted that the Bill will be signed into law shortly and therefore there is need to ascertain how the new *Act* will be implemented. This was the subject of a circular by SALGA to all municipalities despite the lack of clarity on roles, funding, capacity-building, etc on a differentiated basis. Municipalities should not be funding this function because the opportunity cost and that of unintended consequences may have a negative effect on their (numerous) other responsibilities.

While it may be prudent to establish structures and processes for the implementation of the *DMAA*, a second, parallel, exercise should be research and analyses of it should be undertaken to make it clear, and to determine its constitutionality. This could be done through an

¹⁰⁶ National Disaster Management Centre (2015) Disaster Management Amendment Bill 2015: Clause-by-Clause response on the provincial negotiating mandate presented to the National Council of Provinces.

amendment of the *Act* and to ensure that it is not a precedent for the dumping of national and provincial government functions on a blanket or generic approach. In the process, SALGA has failed to act in the interests of municipalities. When the *DMA* was promulgated in 2002, SALGA was a fledgling institution and may not have been able to represent local government effectively, given that democratic municipalities were established in 2000. However, SALGA has been operational for twenty years and it should take its role seriously, as advised by many court judgements on local participatory democracy and the role of parliament therein.

7.7 NEED AND DESIRABILITY OF ORGANISED LOCAL GOVERNMENT

i. Generally

No independent and objective analysis has to date been done on the need and desirability of a local government association in South Africa, particularly an institution like SALGA. Studies have shown that an advisory and co-ordinating body could well work alongside the three spheres of government, particularly with municipalities, without conflict or confrontation or duplication, as have associations in other countries. South Africa's constitutional-statutory framework for co-operative governance is flexible enough for SALGA, or some other, perhaps permanent commission of experts, to undertake this. Properly structured, organised, and managed, such an institution, operating like the reconstituted Advisory Commission on Intergovernmental Relations (ACIR), the International City/County Management Association (ICMA), and the SACN, could add value at little cost, while working co-operatively with municipalities. Hence, fundamental questions and introspection is required by and about SALGA – one does not need be a slave to the constitutional and legislative provisions: If an organisation is dysfunctional or moribund, disestablish it – this body may not be missed and therefore forgotten after a (short) while.

There may be two issues involved here. The one is the constitutional requirement contained in section 163 for organised local government, read with section 67 (participation in the NCoP); the other is the way this has been given effect to. What could be needed is that the latter be reconsidered in some detail and a more nuanced approach be developed, considering the evolving nature of local government in South Africa.

Effective representation of municipalities would also require amendments to certain statutes, particularly the *IRFA*. However, legislative provisions, *per se*, are a necessary but insufficient

approach. Some of the projects that SALGA has been engaged in have been the review of local government powers, with a view towards asymmetrical allocation and the development of a methodology for restructuring of municipalities. Moreover, the issue of provinces and their capacitation of municipalities must take priority. Finally, the approach to municipal and community representation and mechanisms to achieve this needs review.

SALGA may not be on its own when criticised for poor performance. Like 165 out of 256 organs of state, it also failed to get a clean audit in 2009, when more complex institutions like the City of Johannesburg and the City of Ekurhuleni, did. However, with the revenue and financial inefficiencies of these cities being a matter of public knowledge and a source of much irritation to ratepayers and residents, one questions the basis of auditing.¹⁰⁷

There is need for a system that goes beyond the purely financial and incorporates review of accountability, the fulfilment of statutory obligations, commitments made to communities, penalties for non-compliance, and so on, as are available in Sweden. Moreover, the need and desirability of SALGA should be assessed against existing local government associations, both to determine its unique function or niche, and to ensure that it does not duplicate work of existing representative bodies and municipalities themselves.

ii. The South African Cities Network

Unlike SALGA, established pursuant to constitutional and legislative prescripts before (perhaps) there was sufficient clarity on its role and functions, the South African Cities Network (SACN), for example, was set up without fanfare and not in accordance with a policy or legislative mandate. The creation of this organisation was motivated by the then Minister of Provincial and Local Government due to certain gaps in support to local government that SALGA did not cover or did not cater for adequately or cost-efficiently. Whilst the SACN was registered on 9 December 2002 as an association incorporated under section 21 of the South African *Companies Act*, 1973, it was established for a trial period of three years. It has done well enough to be still operating today, achieving much in just under ten years at comparatively

¹⁰⁷ Boyle, Brendan (2010) 'Audit disaster', Johannesburg: *The Times*, 27/01/2010; 'Joburg finances given thumbs up', Johannesburg: *The Star*, 28/01/2010; Maphumulo, Solly (2010) 'Soweto delivery protest turns violent', Johannesburg: *The Star*, 28/01/2010; 'Ekurhuleni gets first clean bill of health', Johannesburg: *The Star*, 29/01/2010; Mkhwanazi, Siyabonga (2010) 'Growing service delivery protests lead to hearings', Johannesburg: *The Star*, 1/02/2010.

lower cost than SALGA.¹⁰⁸ Herein lies a lesson for ‘organised local government’. The network or association was created because of the commonality of challenges faced by the nine largest cities in this country, and an acknowledgement that partners can and should work co-operatively, so that the achievement of the whole is greater than the sum of the parts. This organisation is not operating with huge financial resources; rather the sharing of workloads among the nine participating cities lowers overall costs. Donors to a large extent fund research, publications, conferences, workshops, and training programmes. The SACN is a non-profit company headed by a board of directors which includes the Deputy Minister of the CoGTA, a representative of SALGA, and mayors of the member cities. Its *Strategic Plan 2011-2016* is underpinned by an outcomes-based monitoring and evaluation system used to measure performance against clear objectives set, and serves as a marketing tool to acquire funding based on results achieved. Person-cost per project is benchmarked and tracked to enhance efficiency and donors’ value for money.¹⁰⁹ Common and unique challenges faced by municipalities, as well as certain themes critical to local government, are published as case studies and made available to cities within the Southern African Development Community (SADC). Were SALGA or any institution seeking to promote local government interests modelled on that of the SACN, much progress could be made in relatively short time, and lower cost. Almost without exception, where they exist, associations for local authorities in most countries are voluntary, part time organisations; often minimally funded by government and to a lesser extent by the donor community; and are informal.¹¹⁰ They have not operated in a conflictual or confrontational environment, nor duplicated work of statutory councils. With comparatively meagre means, they have made limited though positive contributions to local government development generally, and to improved intergovernmental relations in particular.

7.8 CONCLUSION

The *Constitution* is the *fons et origo* from which should flow the structures and procedures necessary to plan, implement, and monitor transformation and transition. It provides adequately for the substantive requirements and, quite correctly, for details to be set out in individual

¹⁰⁸ Singh, Anirood and Mary Cole (2012) *Formative Evaluation of the South African Cities Network*, www.sacities.net.

¹⁰⁹ *Ibid.*

¹¹⁰ The external local government agency, such as that in the UK and Canada, should be distinguished from associations established by the municipalities themselves for working co-operatively. They provide the requisite expertise or the personnel are expert volunteers. See Chapter 6 of this thesis.

statutes. Where the latter are required, they must be practical and implementable, as well as in keeping with contemporary reality.

Co-operative governance is the *conditio sine qua non* for sound socio-economic development: It is a means, not an end, a process to the attainment of clear development objectives. An examination of associations for local authorities in developed countries highlighted that organised local government in South Africa and SALGA as the national representative have been placed by the *Constitution* and the applicable legislation in a unique position. Notwithstanding this unprecedented and elevated status, the instrument of organised local government appears to have failed to fulfil its envisaged mandate adequately or innovatively, given the shortcomings of its governing statute. *OLGA* merely “recognises” a national and nine provincial associations to represent the interests of local government. Unlike most statutes of the democratic era, it does not prescribe in detail how these organs should be constituted or established, their roles, powers or functions, management, financing, accountability, monitoring, and reporting. Perhaps this is a shortcoming, or the drafters may have prudently let this institution evolve and develop organically, with any modifications or amendments being introduced only after a sufficiently long period and bedding down of operations.

However, unlike intergovernmental relations which has to do with human interaction and as such may not be amenable to rigidity and prescription, the organisation and representation of local government can be undertaken with a prescriptive type of plan for its systemisation, a term meaning ‘to give an orderly structure to’. The nature and functions of associations for local authorities in other countries may suggest that SALGA should work alongside role players in the three spheres, but undertaking a unique function. A less ambitious approach and an institution that operates differently from that functioning currently can add value by co-operating with organisations both within and outside government thus making for better co-operative governance and thereby more rapid and sustainable development.

In fairness, SALGA is not the only institution that has not operated per expectations; many others are known more for their pronouncements than their achievements. SALGA needs to take cognisance of the National Planning Commission and the Department of Performance Monitoring and Evaluation (DPME), not only to be guided by them but also to ensure there is no duplication and wastage. SALGA and CoGTA need to compare their objectives and business plans to ensure complementarity and minimise duplication. The national department should

also move towards a pragmatic and measured approach, rather than being reactive and thereby attempting to do too much and in the process losing focus.

SALGA should also reduce campaigning and posturing and become more firm and decisive and ensure sustainability of its programmes, projects, and other initiatives. It should complete its work on powers and functions as well as that on provinces and their cost. A leaner, more simplified governance system may be required – the political fallout resulting must be accepted as good for the country, if not for the ruling party also. Given current lack of leadership in South Africa,¹¹¹ the difficulty of implementing several complex national policies without clear direction, especially on the nature and responsibilities of the envisaged or putative developmental state, limited resources, lack of or inappropriate skills,¹¹² and a clear understanding of the root causes of service delivery protests, SALGA should not embark on yet another ‘restructuring’ at this stage but implement and monitor its *Strategic Plan 2012-2017*.

The following media statement by the Executive Mayor of the City of Johannesburg Metropolitan municipality, Herman Mashaba, regarding its intention to withdraw membership fees, could reflect many of SALGA’s members’ views:

Over the years, SALGA has, in my view, strayed from its mandate. It has become bloated and top-heavy. It has spent too much money on nice-to-haves and on projects of dubious utility.¹¹³

SALGA was quick to defend itself and its work.

It would assist SALGA to develop and use an outcomes-based monitoring, evaluation and impact assessment system to show its effectiveness. This approach could be informed by an independent review of its functioning and achievements since establishment, including a strengths, weakness, opportunities and threats (SWOT), social cost-benefit, risk, and gap analyses. Such a study could provide some indicators as to how best municipal representation could be undertaken in South Africa, an issue addressed in the next chapter.

¹¹¹ Refer to quotes and comments in Chapter 1: 1.1 of this thesis.

¹¹² *MPs demand training to tackle new law* (referring to the new *Money Bills Amendment Act*), Polity.org.za, 27/01/2010.

¹¹³ Media statement on 13/10/2016, with SALGA’s response posted on its website, www.salga.org.za.

CHAPTER 8

CONCLUSION

8.1 INTRODUCTION

In South Africa, local authorities ‘evolved’ since the establishment of the first one in the seventeenth century, to functioning as the lowest tier under provincial ordinances from Union in 1910 as agents of the state, providing basic municipal services based on race and affordability, to democratically-elected municipalities from 2000. Municipalities’ long history of deliberate underdevelopment manifests itself today in the form of community protests against poor service delivery.

Local government is established and given powers and functions by the *Constitution* and subsequent statutes. It today works as a sphere of government alongside the national and provincial spheres in a distinctive, non-hierarchical governmental system operating co-operatively. This was the constitutional ideal.

Local authorities have moved from about 1 100 in the apartheid area serving select localities, to the present 257 “wall-to-wall” municipalities, thereby ensuring that every resident falls within the jurisdiction of one. Such consolidation has resulted in spatially and demographically large municipalities. With its constitutionally-prescribed powers, functions, status and autonomy, it was expected that local government would be a participant in national policy-making. However, given their high number, municipalities cannot engage in such exercise. This necessitated the establishment of organised local government, a representative institution, comprising a national organisation, the South African Local Government Association (SALGA) and its nine provincial affiliates.

This thesis analyses municipal representation as a mechanism for socio-economic development through service delivery. It examines such representation, particularly by SALGA, to determine whether this organisation, operational since 1996, has been effective. It compares the South African approach to those in select countries to identify good practices. These are largely based on municipal powers and functions, with the institution working co-operatively with provinces or states and the national government, in any governmental system. Findings and

recommendations are made on key issues of municipal representation, with the aim of finding a suitable model for consideration in South Africa.

8.2 FINDINGS

- 8.2.1 Local administration preceded national governments. Traditional societies in Europe lived in villages similar to the Zulu kraal. A typical Greek city-state like Athens between 508 BC and 338 BC did not have any special class of people whose work was government. Civics was defined then as the rights and duties of human beings in a political society, such as a city, province or state.¹
- 8.2.2 South Africa's first 'formal' local authority was established in 1682 at Eerste River, an area later incorporated into Cape Town. Subsequent history was confined almost wholly to the Cape of Good Hope until the *Natal Ordinance* of 1845, whereafter Dutch *placaaten* were repealed by the *Statute Law of the Cape of Good Hope* in 1862. Similar laws were followed by the Transvaal and Orange Free State provinces, until Union in 1910.²
- 8.2.3 Government in South Africa was characterised by a high level of centralisation of decision-making since Union, continued in the 1961 constitution, with attempted 'reform' in the 1983 constitution. This failed and led to community protests largely against local authorities, leading to the Congress for a Democratic South Africa (CODESA) deliberations, and the *Local Government Transition Act*, 1993.
- 8.2.4 The present governmental system is not operating optimally, notwithstanding its constitutional basis. This is because constitutions that are not already deeply rooted are no guarantee of democracy. Such an enactment has to be sustained by a democratic culture with a supportive political, social and economic environment. South Africa has not yet reached this status.

¹ Hall, RJJ (1928) *An Historical Introduction to Civics*, London: Longmans, 41-44.

² Green, LP (1957) *History of local government in South Africa: An introduction*, Cape Town: Juta, 1; Cloete, JNN (1982) *Central, provincial and Municipal Institutions in South Africa*, Pretoria: Van Schaik, 1-2.

- 8.2.5 Local authorities' limited capacity has been a problem since historical times, when they were implementing agencies of national policies and programmes, dealing with 'bricks and mortar' issues. Notwithstanding the obligation in section 154(1) of the *Constitution* on national and provincial governments to strengthen and support the capacity of municipalities, this has not been filled adequately over the last two decades. This is a *conditio sine qua non* for municipalities to carry out their extensive and daunting service delivery and socio-economic developmental mandates effectively.
- 8.2.6 A contributory factor to systemic failure is the capabilities, competences, and commitment of municipalities, with councillors and administrators at the coal face. The human dimension in the governmental machinery does not appear to have been given sufficient attention in attempts to improve the quality of municipal management and administration.
- 8.2.7 Government's approach to development is the five-year State of the Nation (SoNA) with promises, repeated annually, to entice and reward voters, rather than following a long-term and sustainable socio-economic development strategy under the guidance of the *National Development Plan (NDP)*. This is a piecemeal, partial, reactionary, and political approach, consisting in restatements of intent, not based on empirical evidence of the real and actual needs, demands and challenges. Such policy uncertainty and lack of continuity are inimical to development and sustainability of local government. Promises in the SoNA of capacitation of and support to local government have not materialised and SALGA has been unable to leverage this on behalf of deserving municipalities
- 8.2.8 The *Intergovernmental Relations Framework Act, (IRFA)*, was enacted over ten years after the Bill was gazetted. The wisdom of codifying what is essentially human relations and engagement is questioned. The *IRFA* mandates the establishment of several structures and processes without prescribing how the role-players in several institutions would use them efficiently. Excessive statutory regulation indicates that the state used a hybrid approach incorporating the democratic, constitutional, financial, normative operational, and regulatory dimensions in the conceptualisation and design of the governmental system. This may have been necessary given the need to move away from

the apartheid system rapidly. However, the result is a governmental system that may be more readily usable by a country with a long constitutional and democratic history.

8.2.9 Many of the numerous constitutional, statutory, and regulatory provisions pertaining to local government have not been fully and appropriately implemented. The extent and cost of failure is unknown given that many municipalities' performance management systems are not based on outcomes-based monitoring and evaluation, and no impact assessments appear to have been done and reported on.

8.2.10 Municipal demarcation and consolidation based on (largely financial) capacity assessments by the Municipal Demarcation Board appear not to have been helpful in making municipalities more efficient.

8.2.11 Apart from the reports of the Auditor-General, there are few sources available for residents and communities to measure municipal performance objectively. It is not known on what basis a mayor or a committee undertakes and reports on annually from an assessment of communities' needs.

8.2.12 Government has chosen law as an instrument of development but more for regulation of and compliance by local government. Some of them, such as the *Municipal Systems Act (Systems Act)* and the *Municipal Finance Management Act (MFMA)* are overly-prescriptive and not developmental. It is unclear how Treasury and CoGTA measures municipal performance and what follow-up actions are taken. Punitive actions could be seen as interference in a sphere of government.

8.2.13 The *NDP* did not undertake a full analysis of the governmental system, especially insofar as it relates to the provinces, perhaps due to political sensitivity.

8.2.14 South Africa does not have an urban and/or rural development ministry. CoGTA is not the answer. Each Minister appears to have different ideas of the challenges faced by local government and answers thereto, despite the problems being deep-rooted and multifaceted. The current governmental system is innovative and without precedent, as with the role-players therein. Hence, it is experimental, as is participatory and representative democracy.

- 8.2.15 The *Constitution* went beyond the norm in most developed countries by provision for the recognition of organised local government as well as its participation in the NCoP and the Financial and Fiscal Commission. It is questioned whether this requirement and the *Organised Local Government Act* was necessary, or municipal representation should have been allowed to develop organically.
- 8.2.16 Municipalities are obliged to deliver on the Bill of Rights. The *Systems Act* gives effect to many of the recommendations in the White Paper on Local Government, requiring them to be developmental. While residents can enforce their rights against a municipality, they also have civic duties. In such engagement and interaction, municipal representatives can play a leadership and facilitation role.
- 8.2.17 Provinces are quick to intervene in failing or apparently dysfunctional municipalities without first taking positive or proactive measures to capacitate them, as they are constitutionally-bound to do. Neither municipal councillors nor SALGA has taken national and provincial government to task for non-fulfilment of their constitutional duties to support and strengthen the capacity of municipalities.
- 8.2.18 Formalism is defined as ‘excessive adherence to prescribed forms; excessive concern with form rather than content’. South Africa has followed this approach, alongside the SoNA, using law more for regulation and compliance than being developmental. Form follows function: The overly prescriptive formal approach can at best be part of a more comprehensive development strategy and form of government. A case in point is the numerous structures and processes established by the *IRFA*, without estimate of resources and monitoring of progress. Formalism incorporates technocratic managerialism, as practised particularly by CoGTA and the Treasury. Thus, the treatment is meted out without adequate diagnosis and prognosis of the malaise, and possible preventive measures. The formal technocratic managerialism approach comes at high opportunity cost. The result is persistent and chronic service delivery problems with attendant community protests measured only from around 2004. Regarding the viability of many municipalities, CoGTA’s approach is two-pronged: A persistent drive to continuously tighten the legislative framework of municipalities, and secondly, a series of support programmes. This is based on CoGTA’s erroneous belief that systemic problems could be legislated out of existence. This is no solution as over-regulation

leads to greater lawlessness. This approach, over two decades, have not left any development footprint nor capacitated municipalities.

8.2.19 Sound co-operative governance and intergovernmental relations are necessary preconditions for efficient municipal representation. This is based, *inter alia*, on section 41(1)(h)(ii) which states: “All spheres of government and all organs of state within each sphere must co-operate in mutual trust and good faith by assisting and supporting one another.” However, as with the trend in African countries, centralisation would be resorted to given local government’s lack of capacity. The prescribed solution is capacitation by the other two spheres of government. Municipalities need the support of civil society organisations and residents to build and maintain state-society synergy. This requires a high level of social capital, governmental capacity, and a supportive political regime.

8.2.20 Another *condition sine qua non* of efficient municipal representation is local government’s constitutionally-prescribed powers, functions, ‘autonomy’, and status. The Constitutional Court affirmed that local government is as important a tier of public administration as any. In this sense, the term “distinctive” in section 40(1) of the *Constitution* has been interpreted to refer to autonomy. This means that each sphere is a final decision-maker in a matter falling within its own area of competence. This implies that one sphere’s decision is not subject to the discretion of another’s.

8.2.21 Section 3(3) of the *Systems Act* on co-operative governance requires organised local government to: “(a) develop common approaches for local government as a distinct sphere of government; (b) enhance co-operation, mutual assistance and sharing of resources among municipalities; find solutions to problems relating to local government generally; and (d) facilitate compliance with the principles of co-operative government and intergovernmental relations.” This is a broad and generic mandate. It is not clear who will assist in developing programmes and projects therefor and monitor SALGA’s compliance therewith.

8.2.22 SALGA has complained that often much time and energy go into drafting of new constitutionally-prescribed legislation without considering their practicalities as well as how they would be implemented by all three spheres of government working co-

operatively, harmoniously, and in an integrated fashion. The implication is that legislative drafting is done in a rush and as a result thereof, implementation by local government is difficult.

8.2.23 Section 42(1)(b) of the *Constitution* provides for participation by “not more than ten part-time representatives designated by organised local government...to represent the different categories of municipalities.” These representatives participate “when necessary” and “may not vote.” This constitutional provision that local government “may designate representatives to participate” in the NCoP, has been watered down by the *IRFA*. It is not clear when a Premier’s “obligation ... to consult organised local government on any matter” arises and how this duty will be met in the Premier’s Intergovernmental Committee. If there is such lack of clarity, SALGA may effectively be marginalised through non-consultation. A qualifier or delimiting factor is that such interaction must be “conducted [only] through an appropriate intergovernmental structure” and not directly. This is cumbersome and may delay development, especially if a matter is urgent. However, there are many opportunities, particularly within the political realm, for an executive mayor or MEC to bring important and urgent matters to the attention of decision makers either through an intergovernmental relations (IGR) structure or by appropriate communication outside of formal mechanisms. A further limitation is that if SALGA or one of its provincial affiliates is not a member of a forum, a representative may only have “full speaking rights.” There is no guarantee that organised local government is or will be a member of any intergovernmental structure. Furthermore, a ‘speaking right’ amounts to nothing of substance. Although the *Act* provides inadequate opportunities for representation, the onus is on SALGA to make best use of these structures to advance the interests of local government. By proving its effectiveness, albeit on a limited number of forums, it can request greater representation. However, most of the structures established by the *IRFA* are forums with no decision-making mechanisms that can influence law-making in the National Assembly or the NCoP. These structures lack powers to enforce ‘decisions’

8.2.24 Municipal autonomy in its clearest sense is depicted in the allocation of powers and functions in Schedule 4B and Schedule 5B of the *Constitution*, with legal personality bestowed upon municipalities by the *Systems Act*.

- 8.2.25 Local government's legislative and executive powers, as well the "right" to govern on its "own initiative" is conditional in the sense that its powers and functions are "subject to national and provincial legislation." Hence, local government has 'relative' or limited autonomy. However, these spheres "may (not 'must') compromise or impede" local government's ability or right to function effectively. Local government autonomy is not comparable with that of the national and provincial spheres because a municipality is subject to intervention by them. The Constitutional Court ruled otherwise.
- 8.2.26 National government departments, that is, the executive, almost exclusively formulate policies impacting on municipalities without allowing much participation by them, at least through SALGA. This confirms a perceived low status of local government and its representative organ.
- 8.2.27 "On its own initiative" indicates autonomy in that municipalities do not have to await instructions from national and provincial spheres before using their legislative, executive, and administrative authority. The (original) powers listed in Schedule 4B and Schedule 5B of the *Constitution* cannot be changed or repealed by national or provincial legislation, but only by constitutional amendment. A municipality's original powers have been confirmed in several High Court and Constitutional Court cases. The judiciary would likely use a purposive approach to interpret local government powers and functions broadly to give as much scope as possible to them.
- 8.2.28 Statutes, regulations, directives, and rules aimed at compliance make for compliance fatigue with concomitant lawlessness. Furthermore, they threaten to undermine municipalities' constitutionally-entrenched independence and authority over their own affairs.
- 8.2.29 The comparatively large size of many municipalities both spatially and demographically make governance and representation difficult.
- 8.2.30 Assigned powers refer to authority over matters delegated to municipalities by national and provincial governments, most often on the basis of subsidiarity. However, it is necessary to ensure that in such assignment all legal provisions are complied with strictly to obviate unfunded mandates. SALGA should be equipped with the requisite

expertise or else municipalities would be saddled with additional responsibilities as in the case with the *Disaster Management Act and the Disaster Management Amendment Act* where SALGA was unable to make forceful representations through CoGTA to the NCoP and the *Act* was passed in haste.

8.2.31 Local government functions as currently constituted do not enable municipalities to effectively promote socio-economic development. Hence, there is a mismatch between the objective of ‘developmental’ local government and its powers and functions to be so.

8.2.32 Some legal provisions if not contradictory are confusing. The *Constitution* explicitly provides powers and functions of local government. It does not pronounce on the rights and duties of municipalities. The *Systems Act* does so in sections 4(1)(a)-(c). Section 152(2) of the *Constitution* constitutes a qualifier of the objects of local government set out in section 152(1)(a)-(e) in that it states a municipality has to “strive, within its financial and administrative capacity” to achieve them. Absent this capability, community members’ rights may be unfulfilled. Under such circumstances, it is incumbent upon national and provincial government to “support and strengthen the capacity of municipalities” until they can meet their obligations. Section 4(2) of the *Systems Act* reinforces this constitutional qualifier by stipulating that the duty applies, provided it is undertaken “within the municipality’s financial and administrative capacity and having regard to practical considerations.” An apparently contradictory provision is that the municipality must act “in the best interests of the community” when exercising its legislative and executive authority and using resources. It is unclear whether this stipulation overrides section 4(2) of the *Systems Act* where obligations are to be met to the extent that a municipality’s financial and administrative capacity permits them. Sections 4(2)(b)-(j) reaffirm and expand on the constitutional obligations and particularly on the rights to the environment; property; housing; health care, food, water, and social security; and education. These provisions have implications for municipal representatives in that a council must operate optimally within a context of limited resources. In such a situation, intellectual capital can play a major role.

8.2.33 In advocating a rights-based approach to service delivery and a generic right to adequate water and sanitation, the South African Human Rights Commission (SAHRC) takes as

a point of departure the rights to dignity, privacy, and a clean and healthy environment. It considers meaningful public participation an essential component in fulfilment of such entitlements. Provincial and national government should be held accountable where municipalities fail. In attempting to fulfil these rights through service delivery, the *Systems Act* requires that municipalities must have regard to the key principles of active participation, social cohesion and community empowerment. They have to provide evidence that effective and interactive community participation with active communication and proactive information sharing that took place in the planning, implementation and evaluation of a project. This requirement is based on the belief that adequate consultation in conceptualisation would provide local government clear insight of the community's needs and its own capacity to respond accordingly. In terms of the *Municipal Finance Management Act (MFMA)*, it is incumbent on the municipality to consult communities on the budget for specific projects within the context of the Medium-Term Expenditure Framework (MTEF), especially regarding a municipality's plan to deal with water shortages. The SAHRC contends that access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives.

8.2.34 *Joseph v City of Johannesburg*³ confirmed that the public has a constitutional and public law right to basic municipal services and the municipality is duty-bound to deliver them in a way that that does not infringe a resident's right to privacy and dignity.

8.2.35 Chapter 4 of the *Systems Act* addresses community participation. The corollary of citizens' rights are the duties imposed on them by section 5(2)(a)-(e) of the *Act*. The large number of duties and responsibilities posited by the *Systems Act* in a context of resource constraints means that municipalities must find innovative ways of promoting socio-economic development and attracting investment for this purpose. It would also be necessary to work in partnership with a competent, accountable, committed, ethical and enlightened leadership, both in the council and within local communities. A municipality would need effective internal and external communications and knowledge sharing, raising awareness of human rights and obligations related thereto, and efficient municipal and ward councillors. One of the main objectives of local democracy is to

³ *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 455 (CC) (9 October 2009).

ensure public involvement and participation. The leadership must be capable of motivating, encouraging, and sustaining community participation. Social inclusion is therefore an obligation on municipalities as is citizen participation on residents. Public participation within all spheres of government is a constitutional prerequisite. The *Systems Act* concretises this directive and that of accountability, responsiveness, and openness, insofar as local government is concerned. The structures and processes of securing participation and accountability is a daunting challenge for most municipalities. Many poor residents do not have the opportunities to express themselves persuasively. Lack of education and other resources serve to exclude many people from democratic participatory processes.

8.2.36 Chapter 6 of the *Systems Act* deals with performance management. Sections 38-49 detail what municipalities must do to establish, maintain, and monitor performance. Section 42 of the *Act* provides for community involvement in a municipality's performance management system (PMS).

8.2.37 Section 50 of the *Systems Act* provides that the basic values and principles governing local public administration are as enumerated under section 195(1) of the *Constitution*. Section 51(a) reiterates that a municipality must "be responsive to the needs of the local community."

8.2.38 The *Systems Act* is considerably long and detailed on the 'whats', but short on the 'hows' and the resources to achieve its admirable, pro-poor objectives. In practice, alongside other new legislation, it creates numerous onerous obligations on local government, whilst not considering adequately their resource and capacity constraints. This is mentioned in passing in section 10A, but only on assigned powers and functions. The extensive detail in the *Act* (and the *MFMA*) serve to highlight the complexity of the current local government system and what councillors and technocrats must deal with.

8.2.39 The *Structures Act* reiterates that municipal councils must strive to achieve the objectives stipulated in section 152 of the *Constitution*. It furthermore stipulates that a municipal council must annually review, *inter alia*, community needs, priorities to meet those needs, processes for involving the community, organisational and delivery mechanisms for meeting community needs, and overall performance in meeting the

constitutionally-prescribed objectives. A municipality is duty-bound to develop mechanisms for community consultation in performing its functions and exercising its powers. Section 74 depicts the functions and powers of ward committees.

8.2.40 In the *Land Access Movement* case⁴, the Constitutional Court held that South Africa's democracy has both representative and participatory elements which are not mutually exclusive. Thus, public participation in the National Assembly and the NCoP is constitutionally-prescribed.

8.2.41 Although statutes promulgated by the post-apartheid government are reasonably clear and explicit, they have to some extent been ignored or circumvented following the 2000 local government elections when senior administrative appointments became based largely on political affiliations and connections, rather than on merit or competency ("cadre deployment"). This compounded the problem of capacity and commitment.

8.2.42 The *Structures Act* makes it obligatory for the mayor to take several steps to identify and meet priority needs of the community in an economically efficient manner, mostly through the municipality's integrated development plan (IDP), to monitor progress with implementation, and to report annually thereon. Such requirements for performance management and engagement with local communities are echoed throughout the *Structures Act* and the *Systems Act* but do not appear to be working well due to many objectives, outputs and outcomes not being precisely defined and thus difficult to quantify and measure.

8.2.43 Section 42(3) of the *Constitution* reads: "The National Assembly is elected to represent the people and to ensure government by the people under the *Constitution*. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action." This provision forms the basis of municipal representation by providing for democratic participatory governance and safeguarding the public interest through law-making and oversight over the executive.

⁴ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT 40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

- 8.2.44 Parliament's Speakers' Forum established the High-Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change. The Panel has eighteen months, commencing January 2016, to complete its work. The first hearings were on 16-17 August 2016. The Chairperson of the Panel said: "There are more than 1 000 new laws aimed at supporting our democracy...It is all very well to pass laws and to have facilitated public participation in their making. But what effect have these laws had on our lives and our aim of building a new society?"
- 8.2.45 The National Assembly is mandated to "ensure government by the people...by providing a national forum for public consideration of issues." The Panel for Assessment of Parliament (PAP) recommended in its Report (2009) that "Parliament should take steps to improve the quality and substance" of its debates and should debate current matters of public concern timeously. Parliament acknowledged that it has an obligation to involve the public in its lawmaking processes and "failure to comply with this obligation rendered the resulting legislation constitutionally invalid." This was confirmed by the Constitutional Court in *Doctors for Life International* and subsequent cases.
- 8.2.46 Many commentators and politicians have expressed the view that even twenty years after its establishment, the NCoP has not been a success. It often emphasises its role but is silent on its contribution to the development of this country. The current Minister of Finance said in 2010 that the second house is a "product of political negotiations and compromises" during the constitutional negotiations.
- 8.2.47 The NCoP's pre-eminent role is to pass bills affecting the provinces, and concomitantly, municipalities therein. It has authority to be involved in certain important legislative matters in the national sphere. However, in following the dictates of lawmaking executives of the ruling party, the interests of local government have not been safeguarded or promoted by the NCoP.
- 8.2.48 The NCoP does not currently appear to be appropriately structured to play the intergovernmental role meaningfully, that is, represent the people and the local sphere of government. Representation by SALGA is limited and qualified. On the other hand, municipal representatives must be of the calibre that can make a positive difference on

the few platforms available to them. The NCoP's legislative contribution thus far has been insubstantial. Furthermore, up to now there appears to have been no major conflict between it and the National Assembly. The NCoP adds little value to the legislative process and that the need for such an institution, especially in this field, is questionable.

8.2.49 The NCoP's failure could also be partly attributed to lack of precise definition of the powers and functions of provinces and their general ineffectiveness.

8.2.50 Provision is made for participation by local government as observers in provincial legislatures, either by organised local government or municipalities or both. Other structures provided for are provincial and district advisory forums, as well as provincial intergovernmental forums and premier's co-ordinating forums. While structures and processes have been established, there is little to indicate their implementation and monitoring, including their successes and failures. There appears to be little concrete co-operative governance beyond that needed for integrated development plans of municipalities. Legislatures' reports have little concrete evidence of provincial laws passed. There is also little substance in their progress reports of parliamentary Bills. Notwithstanding the constitutional power of the NCoP on legislation affecting provinces, the PAP observed in 2009 that 99 per cent of it emanates from the National Assembly. This may be due to the weakness of provincial legislatures to project and promote their perspectives into national policy.

8.2.51 The NCoP's review function, if carried out efficiently, could indirectly affect local government beneficially in that the NCoP could veto national and provincial executives when they intervene in the integrity of a province or a municipality by taking up their responsibility for fulfilment of executive statutory duties.

8.2.52 In terms of section 66(2) of the *Constitution*, the NCoP may call the executive to account in the same way the National Assembly does. The overwhelming view appears to be that the NCoP since its inception had not carried out this responsibility.

8.2.53 The NCoP has almost usurped the duties and responsibilities of the provinces in their intervention in an erring municipality in terms of section 139 of the *Constitution*. This is inimical to both local and provincial governments, and results in overlapping and

duplication. It also deviates from the Council's core functions. The NCoP's "Provincial Week" to ascertain the status of service delivery has not yielded positive results or assisted the municipalities visited.

8.2.54 Representation of local government on the NCoP has not been well-conceived and knowing this to be so, it has not been redesigned so as to be fit for purpose. Representation is by organised local government. There is an assumption that SALGA has the capability to represent municipalities efficiently. On the other hand, the nature of representation and the perceived unimportance of local government results in a situation where organised local government does not feel it is taken seriously, and secondly that the Council is ineffectual and cannot effectively promote local government interests. A second problem is that participation occurs only "when necessary". Hence, it is a privilege, not a right. If the NCoP decides the matter does not affect local government (when just about everything has an impact on the ground), there will be no representation. A third problem is that local government representatives have no voting rights.

8.2.55 Local government can have five representatives on the Budget Council nominated by SALGA and one by each provincial affiliate. While such provision is laudable, the problem is that SALGA and her affiliates do not appear to have the capacity to effectively represent the country's 267 municipalities. A strong voice is essential, as the forum deals with certain matters essential to the health and wellbeing of municipalities, especially the process of revenue sharing.

8.2.56 The Committee of Chairpersons of the NCoP in their meeting with PAP on 22 October 2007 admitted that "involvement of the local government sphere in the lawmaking process was erratic and inconsistent." Deliberations on Bills were short compared to that in the National Assembly. This situation "reinforced the view that the NCoP was merely a process that needed to be followed." It was stated that the NCoP's engagement with provinces was problematic as it only did so on section 76 matters. In its defence, the NCoP argued that it is the "only arena in which all three spheres of government could engage on matters" as it was the custodian of intergovernmental relations, but admitted that "this did not function well." The Assessment Panel questioned the necessity of the NCoP within Parliament as well as its representation. The representative

function of this institution was also queried as was “whether the will of those represented were properly represented.”⁵

8.2.57 The PAP queried whether the NCoP represented the view of the people or that of provincial legislatures. In this regard, one needs to consider whether and how provincial legislatures take in the views of municipal councils’ legislatures that should be considering the views of their residents.

8.2.58 The NCoP is a political institution designed to represent the provincial legislatures and to articulate political positions. A contrary view was expressed in the *Land Access Movement* case where the Constitutional Court held that the NCoP’s public participation process was unreasonable and thus constitutionally invalid. Failure by one of the houses of Parliament to comply with a constitutional obligation amounts to failure by Parliament as a whole, tainting the entire legislative process.

8.2.59 Adequate provisions have been made for local government representation on the Financial and Fiscal Commission and on the mechanism deliberating on the (annual) *Division of Revenue Act*. Effectiveness would be dependent on the calibre of SALGA’s delegates.

8.2.60 The only constitutionally-mandated opportunity for municipalities to engage directly with national government is through participation in national development programmes, although how this would be undertaken is unclear. Another way of direct engagement is with certain ministries that do not have provincial counterparts. Some statutes require inter-departmental co-operation for them to function effectively. However, in all other cases contact is by remote control, through SALGA, a situation not ideal but practical. The health and wellbeing of local government depend largely on how its representative organ participates and makes the voice of municipalities heard.

8.2.61 The *Constitution* recognises the “institution, status and role of traditional leadership” as well as traditional authorities and customary law practised by them. The *Constitution*

⁵ Minutes of the meeting between Committee of Chairpersons of the NCoP and the Panel for Assessment of Parliament, dated 22 October 2007, www.pmg.org.za, accessed 25/04/2015. See Chapter 5, 5.2.4(vii) Current status of the NCoP.

makes provision for legislation to give effect to the role of traditional leaders. This results in an increased the number of role players at the local government sphere in rural areas and thus the potential of increasing conflict showing how complex and confusing the local government operating environment is. While the *Constitution* and its supplementary and complementary statutes set out how the governmental system is structured and to be operated, the situation on the ground may be different and could be attested to by residents of rural areas under traditional leadership. This has implications for effective municipal representation.

8.2.62 CoGTA plays a largely regulatory role to ensure compliance by municipalities. Furthermore, it is mostly process-oriented, rather than an institution contributing to development through capital projects. CoGTA also does not seem to have held provincial government to account, particularly with respect to its obligation to strengthen and support the capacitation of municipalities, in terms of section 154(1) of the *Constitution*. CoGTA is not a significant player in the development of South Africa. There appears to be no mechanisms or opportunities for municipal representation. However, one of CoGTA's strategic objectives, "deepening the relationship between citizens and local government through improved citizen engagements by March 2019", could be used to leverage it.

8.2.63 CoGTA's numerous, unfocused, and apparently unprioritized initiatives and legislative interventions in municipalities' human resource practices result in over-regulation, overreach, and a lack of coordination. These 'interventions' threaten to stifle local government and may be contrary to the rule of law.

8.2.64 The *Constitution* provides only eight opportunities for national – local government and its communities' interaction: (i) Election of members of Parliament; (ii) By way of petitions, representations or submissions to the National Assembly; (iii) Public involvement in the legislative and other processes of the National Assembly; (iv) Local government representation on the NCoP; (v) By way of petitions, representations or submissions to the NCoP; (vi) Public involvement in the legislative and other processes of the NCoP; (vii) Local government participation in national development programmes; and (viii) Commenting on draft legislation. This appears to be limitations

on local government's participation in formulating national policies that would be implemented in its localities.

8.2.65 The *Constitution* and the *IRFA* are by far the most elaborate and detailed intergovernmental legal framework in the world, showing that co-operative governance is a wide, deep and complex field. In issue is whether a detailed, formalised intergovernmental relations system is appropriate for an emerging democracy.

8.2.66 In reviewing foreign good practices with respect to government powers, functions, status, and municipal representation, many observations were made that could inform the redesign of South Africa's governmental system, particularly insofar as they relate to municipalities:

In Germany, Austria and Belgium, local authorities are protected as a separate level or tier of government. Federalism restricts the powers and functions of *Länder* (provincial) governments to its own demarcated spatial territory and to local authorities situated therein. Hence, local authorities are subjected to the rule of a *Land* in a hierarchical relationship that affects their power and functions, that is, their status.

In Germany, more concentrated efforts are being made to increasingly and more effectively involve municipalities in federal and *Land* policy formulation. This change of heart is predicated upon the acknowledgement that governmental processes have become so complex that it is almost impossible to adhere to rigid structures and procedures or watertight division of powers and functions.

In Austria, it is mandatory for both federal and *Land* governments to consult with municipalities.

The trend in Germany, Austria and Belgium is for associations of local government to represent the interests of municipalities on the *Land* and federal levels. Thus, the municipalities act jointly in their individual and aggregated interests. In these countries, provision is made for municipalities to co-operate with each other in areas of mutual concern, by means of three models within an enabling statutory framework

In Germany, attention is being paid to formalise relationships between *Länder* and local authorities so as to provide a firmer basis for co-operation.

In most European countries, a local government representative organisation is an institution whereby municipalities agree with others to work jointly to achieve goals that may be difficult to undertake individually. It is an association or grouping of municipalities themselves. They do not constitute an additional tier of government. Hence, such an organisation is more like a co-operative, with no constitutional or legal basis, but permitted under the state's laws. Therefore, their status and functions are very different from that of SALGA's, an 'external' agency, similar to the UK Local Government Association.

In Sweden, a country with a two-tier government, professionally-qualified mayors and councillors are responsible for city administration and they represent their localities directly in Parliament. The Germanic and Scandinavian traditions are characterised by a system that is organised, systematic, professional, co-ordinated, consensual, co-operative, integrated, and an organic whole, with local authorities having a high degree of autonomy.

Since *Länder* operate according to the subsidiarity principle, local authorities have, through long German tradition, a high degree of autonomy and responsibility. They have a dual role: functioning as independent governments competent to take any necessary action in their community's interest, and operating as agents of both federal and *Land* governments.

Unlike the federal system in the United States of America, the German governmental model avoided a dual political structure with state systems working in parallel, preferring a model of interlinked competences with a specific division of labour and responsibilities between the two levels of government. The relationship of the Federal authority with the *Länder* and between the latter *inter se* are central to the functioning of the political system, permeating all aspects of German political life. Detailed prescriptions of powers and functions and the clear allocation thereof have the advantage of providing certainty and protection of the various role players. Germany follows a dual approach to local government. The federal constitution, on the one hand,

establishes and protects local authorities as the third tier of government, while details of its organisation, powers and functions are determined by the respective *Länder* as one of their 'exclusive' powers, subject to adherence to any conditions imposed by the *Grundgesetz* (German Basic Law or Constitution). Local authorities function under the constitution of the particular *Land* which clearly sets out their responsibilities. Therefore, there is no ambiguity as with South Africa's concurrent powers. Furthermore, effective functioning is facilitated by good *Land*-local authority relations promoted and managed by the *Bundesrat* (the second chamber of Parliament) itself. There was, therefore, no need to formalise intergovernmental relations by means of a statute.

The strong position of the *Land* in the *Bundesrat* functions well to serve the interests of its local authorities. This is particularly so since *Länder* have considerable influence over national legislation, especially because of the trend in the *Bundesrat* towards joint policy-making, unlike the case of South Africa's NCoP. The German intergovernmental system lays more emphasis on vertical and horizontal sharing of powers, responsibilities and resources, than their rigid separation, as in Canada. This approach gave rise to a constitutional practice called the *Verbundsystem*, resulting in collaboration, co-operation and co-ordination in all stages of the policy-making process. This became a central characteristic of the federal system. Such policy-interlocking mode of operation is a decision-making mechanism that served to institutionalise the need for broad consensus and thus entrenched intergovernmental relations. This democratic, inclusive, and facilitative practice has, in turn, enabled a high degree of legal standardisation.

The Teutonic level of efficiency, supplemented and complemented by the practice of *Bundestreue*, have consolidated to provide Germany with a very workable intergovernmental relations system and practice. *Bundestreue* in German constitutional theory and practice entails a legal obligation on the federation and *Länder* governments to assist each other, to integrate efforts to serve the people and to share capacity and information where and when required. It has, over time, become unambiguous, universally accepted, and institutionalised. Hence, it is more than a moral and social obligation, as is *ubuntu/Batho Pele*. *Bundestreue* is a guiding light for co-operative federalism in modern federal theory and has been recognised as a binding legal principle by the German Constitutional Court.

Organised local government in the form of *Kreisetag* (league of counties), and *Staedtebund* and *Gemeindebund* (league of towns and local authorities, respectively) facilitate and manage relations between municipalities, the *Land*, and the federal government. They do not constitute a hierarchy of government. *Mitwirkungsrecht* or right of co-operation ensures that local authorities are informed by the federal and *Länder* governments on matters affecting them.

Municipalities are consolidated into sub-*Land* units called *Kreise*, organised under *Länder* legislation, and recognised by the federal constitution. Although the *Kreise* have their own institutions and functions, they are not a fourth tier, being a part of local government. The role of these ‘regional’ institutions is essentially to co-ordinate those functions between municipalities which, due to their nature, cannot be managed by them individually. Such activities can best be explained by the principle of subsidiarity, that is, they administer matters which require wider areas of control and larger resources than what the *Gemeinde* possess. All *Länder* have legislation enabling municipalities to co-operate with each other in areas of mutual concern, while the national constitution protects the rights of local authorities to form *Gemeindeverbaende* (associations). These provisions create a legal basis for local government to establish *ad hoc* associations (*Zweckverbaende*) or to conclude agreements to render services jointly. While *Kreise* (sub-*Land* geographical unit or ‘county’) are territorially fixed and have permanent members, these associations are functionally-driven, meaning that membership may change and one municipality may be a member of several such organisations. Due to pooling of resources and a common or shared vision, inter-municipal co-operation often obtains better results than where a local authority goes it alone.

Democratic local self-government is guaranteed both by Article 28 of the *Grundgesetz* and the constitution of the *Land* it falls within. Germany is characterised by co-operative and joint decision-making in the *Bundesrat* by the federal and the *Länder* governments. Veto power vested in the *Bundesrat* gives it a strategic role in lawmaking, unlike the NCoP. The *Länder* effectively represent the interests of constituent municipalities, in the *Bundesrat*, unlike the NCoP.

The governmental system in Austria is similar to that in Germany. Each *Land* has a statute depicting the organisation of local government, with its functions managed by a

department of local government affairs. The life of a local government association may be limited by function or time. As in Germany, a municipality may be a member of more than one association. Cities and towns may formulate their own constitutions. Provision exists for municipal co-operation in *Verwaltungsgemeinschaften* or administrative associations, where local governments share administrative responsibilities concerning particular functions.

Der Österreichische Städtebund (The Austrian Association of Cities and Towns) represents the interests of local government in negotiations over the sharing of budgetary funds and taxing rights between the federal government, the *Länder*, and local authorities. It also assists with the preparation of legislation and serves as advisors on some environmental and welfare bodies. The association is assisted by approximately 40 technical committees.

The Austrian Association of Municipalities (AAM), represents the interests collectively of 99 per cent of local authorities by way of associations of its *Länder*. Membership is voluntary. The position of sub-national governments was strengthened by the *Austrian Stability Pact*, an agreement between the federal government, the *Länder*, and municipalities on financial management co-ordination, the consolidation of public funds. Of interest in the Austrian government model insofar as it relates to local authorities is *Stellungnahme* (right to a hearing) and *Volksbegehrens* (right to initiative), which give them considerable power in the legislative field.

Starting in the 1970s, Belgium transformed from a unitary to a federal state whence constitutionalism within a federal context established very strong *Geweste* (provinces), incorporating *Gemeentes* (communes or municipalities). There are several *Intercommunales* (associations) where local authorities interact in functional areas to co-ordinate and harmonise their activities. No formal institutions exist where *Geweste* and local governments meet, but there are forums for informal interaction. Each *Gewest* has an association of towns and cities of which membership is voluntary but in which most local authorities participate because it is beneficial. Belgium's constitution provides that local authorities and *Geweste* may create *Intercommunales* with directly-elected governing councils. They are distinctive legal *persona* with own organs and budgets. Nevertheless, they are not a separate tier of government but a horizontal

extension of municipalities. Local authorities are not obliged to belong to an association nor are they precluded from membership of several at the same time, since participation is determined by functional rather than spatial considerations. *Intercommunales* and similar such public law associations can be established between municipalities on a voluntary basis, with the objective of facilitating co-operation in a particular field of common concern. Federal legislation provides that municipalities and *Intercommunales* have the right to engage each other in any matter of mutual interest. The precise nature and purpose of each *Intercommunale* is determined by its member local authorities, but in essence it strives towards solidarity and co-operation between municipalities. All members in an *Intercommunale*, as a distinctive legal entity, are bound by its decisions, even where they disagree: This heightens conflict.

8.2.67 The *Constitution* makes a peremptory provision for the recognition of national and nine provincial associations representing municipalities, but is silent on local organisation. In other words, it does not prescribe that a statute must provide for the establishment, composition, powers and functions, status, accountability, and so on with respect to organised local government or associations for local authorities.

8.2.68 While one can surmise that the onus on consultation lies with a local government representative body, the *Organised Local Government Act (OLGA)* is silent on the procedure, leaving SALGA in a quandary.

8.2.69 After setting down the strict requirements for consultation, the *OLGA* nullifies them by stating that the (undefined) organised local government may consult with any organ of state, without setting down how this can be done. Whether any organ of state would consult with SALGA is not determined by the latter. The *OLGA* is an unsatisfactory enactment, *inter alia*, because it contains no description of the roles and responsibilities for organised local government. Rather, this information on roles and responsibilities has been spread across a wide range of legislation. The *IRFA* has ‘compensated’ for *OLGA*’s shortcomings, although in so doing made the process for efficient municipal representation even less effective. The *IRFA* states that where an obligation, not a need, for consultation with SALGA is required, this must be “through an appropriate intergovernmental structure,” and not directly.

- 8.2.70 The shortcomings of the *OLGA* may be one of the root causes of inadequate representation of local government in the NCoP.
- 8.2.71 Neither the *Constitution* (nor *OLGA*) prescribes the establishment, nature, role, powers and functions, processes, source and application of funds, management, accountability, responsibility, monitoring and evaluation as well as other *essentialia* and *incidentalialia* of organised local government or any institution undertaking this function. SALGA therefore has a wide and ‘open’ mandate (see below) wherein it could determine its own mechanisms and style of operations.
- 8.2.72 SALGA was an active partner with CoGTA in the implementation of the Local Government Turnaround Strategy (LGTAS) with six vague objectives that lack focus and prioritisation based on logical sequencing and the critical path. They did not appear to benefit municipalities nor SALGA.
- 8.2.73 SALGA complained that one of the major obstacles and frustrations for local government has been the speed at which legislative drafting has taken place, requiring many amendments to stabilise the legal framework, structures and system at the local level.
- 8.2.74 SALGA is considering mandatory membership, but this is not possible given the autonomy of municipalities.
- 8.2.75 SALGA’s objectives and functions are informed by the recently developed Five-Year Strategic Agenda formulated by CoGTA as the central policy thrust for local government. However, key performance areas (KPAs) relate largely to internal workings of the association which when completed would enable it to better serve its members. Unfortunately, SALGA has been on annual restructuring since inception and it is not clear whether the time, effort and money spent on these exercises really benefit municipalities.
- 8.2.76 Almost without exception, where they exist, associations for local authorities in most countries are voluntary, part time organisations; often minimally-funded by government and to a lesser extent by the donor community; and are informal. They have not operated

in a conflictual or confrontational environment, nor duplicated work of statutory councils. With comparatively meagre means, they have made limited though positive contributions to local government development generally, and to improved intergovernmental relations in particular. The external local government agency, such as that in the UK and Canada, should be distinguished from associations established by the municipalities themselves for working co-operatively. They provide the requisite expertise or the personnel are expert volunteers.

8.3 RECOMMENDATIONS

- 8.3.1 Government has been operational in South Africa for over two decades. While a major overhaul of the governmental system is not recommended, there is need for a long term and sustainable approach to socio-economic development, guided by the *National Development Plan*, with local government playing a major role. At this juncture, a review of what plans and institutions are working, and what's not, is necessary. Institutional assessments are required, especially the efficiency, efficacy, and role of some ministries, as well as of the *IRFA*, *CoGTA*, the *NCoP*, and *SALGA*. It may be an opportune time to do this, considering the 2019 national and provincial elections.
- 8.3.2 Spheres of government have the obligation to consult each other and co-operate. This provides the opportunity for municipal representatives to demand that they be involved in policy matters affecting local government. The *Systems Act* operationalises many of the constitutional provisions to facilitate this.
- 8.3.3 Investigations of human rights violations by municipalities highlights the need for the poor to be represented so their plight can be brought to the attention of decision-makers.
- 8.3.4 Development is more than just economic growth but include life and death issues such as poverty, distributive equity, social justice, and environmental sustainability. The list of duties and responsibilities for local government is long and many municipalities would not be able to manage without assistance. Where it can be shown that a municipality did not give priority to the needs of a community and promote socio-economic development within its jurisdiction, its actions or programmes would conflict with its constitutional obligations and could be declared unconstitutional and invalid. In

such a situation, judicial intervention is permissible. Municipal officials need be mindful of this.

- 8.3.5 Municipalities need to form pacts with their communities and other parties to jointly plan and implement initiatives that contribute to fulfilling or meeting the developmental objectives of local government. Hence, sound leadership and civic responsibility are necessary. Municipalities must create an environment conducive to socio-economic development and social inclusion.
- 8.3.6 The NCoP is not akin to the *Bundesrat*, but a review of both these institutions may help in determining how the former can function more effectively, especially in facilitating better municipal relations therein.
- 8.3.7 Municipalities have sufficient autonomy to be a (potentially) major player in national policy-making through SALGA. However, this requires leadership and capability of the highest calibre.
- 8.3.8 It is necessary to evaluate whether local government powers and functions enable it to meet its developmental mandate because of shortcomings in the interpretation of the laws and many are not developmental but rather overly prescriptive, regulatory, and compliance-related.
- 8.3.9 It has been suggested that a special Cabinet Committee on provincial and local government be established to discuss and scrutinise all policy and legislation on sub-national government before they go to Cabinet for decision. This is what the NCoP is supposed to do, but is evidently failing in its task. It is also essential to attempt to make laws more developmental than they currently are.
- 8.3.10 Councillors and municipal representatives (SALGA) must be equipped to demand what has been promised in the *Constitution* and those commitments made in the SoNA, especially for capacity-building, in terms of section 154(1) of the *Constitution*, to enable municipalities to fulfil its objects and be developmental.

- 8.3.11 The Report by the Panel for Assessment of Parliament (PAP) recommended that the criteria by which any discretionary power is exercised should be set out. An impact assessment of legislation should be undertaken that incorporates the unintended consequences of statutes, regulations, directives, and assignments; failure by the Executive or other organs of state to take required actions in response to legislation; and the extent to which the objectives and implementation targets of legislation are achieved.
- 8.3.12 Another of the PAP's recommendation to Parliament was of engaging with local government on legislation that could result in unfunded mandates. Municipal representatives must have the requisite ability to analyse Bills and make inputs to ensure interests of the public and municipalities are protected and promoted, for example, by rejecting 'unfunded mandates' imposed through assignment.
- 8.3.13 The *Constitution* provides the opportunity for local government and its representative organisations to influence legislation that may affect them by means of comment on draft enactments. These bodies, however, must themselves have the requisite intellectual capacity to make meaningful input and also to engage with their constituents to be able to gather sufficient intelligence from the 'grassroots'. Such experiential knowledge can be invaluable in ensuring a better fit between need and aspirations, on the one hand, and the policies, programmes and projects designed to deliver them, on the other. Municipalities must be capacitated through development of leaders and technocrats of the highest calibre to undertake this role efficiently in the interests of the country and especially of its poor.
- 8.3.14 It is imperative that the institutional capacity of local government is enhanced by the other two spheres of government to, *inter alia*, facilitate better quality municipal representation. A further mechanism to foster provincial-local government relations is for SALGA to be accorded observer status in provincial legislatures. This would aid transparency of provincial decision-making; will keep provincial legislatures informed of local government developments within the province concerned; and help align policies, plans, and programmes between the two spheres of government. While the Gauteng Legislature has put this proposal into practice, it is unclear as to whether organised local government has been able to make much meaningful contribution. The

question arises as to whether SALGA is to be strengthened to play this role or whether municipalities alone, or with the Premier's Intergovernmental Forum (PIF), should be accorded observer status.

8.3.15 Even where there is strong municipal representation, the limited effectiveness of the NCoP may nullify gains or retard progress. Secondly, the Council was established for the express purpose of representing the provinces to ensure their "interests are taken into account in the national sphere of government." There is no equivalent institution for local government. The hierarchical nature of the spheres prevails in practice, with local government's engagement in legislation being merely consultative. The 'distinctive' three-sphere governmental system means that one sphere cannot represent another. Hence, provincial legislatures cannot, and will not, effectively represent the interests of municipalities within their jurisdictions. The limitation implied by the term 'when necessary' in section 67 of the *Constitution* should be generously interpreted, considering that any legislation that affects local government triggers the participation right of SALGA. This also applies to the review by the NCoP of a provincial intervention in a municipality, and to its oversight function. However, there is a fundamental flaw in the design and operation of the NCoP that will not be remedied by more effective local government representation. If provinces and the NCoP are to be retained, the Council must be redesigned to be the National Council of Provinces and Local Government. An alternative is a careful study of the German governmental system wherein the powers and functions of the *Länder* are precisely defined; each *Land* has its own constitution protected by the *Grundgesetz*, and the *Bundesrat* has veto power. Under such a system, local government's powers, functions, autonomy, status, and rights are protected and promoted. In South Africa, constitutional amendment would be required to restructure the NCoP. Given its poor performance, it is suggested that it is an opportune time to undertake an in-depth analysis of this institution, especially its contribution as one of the houses of Parliament. It may be helpful to study the working of the German *Bundesrat* alongside the *Bundestag* and the *Länder* as well as their relationship *inter se* to either improve the role and efficiency of the NCoP or agree that it is not salvageable and should be dissolved. The NCoP's failure could also be partly attributed to lack of precise definition of the powers and functions of provinces and their general ineffectiveness. The German governmental system is currently undergoing reform. It is a model worth researching for possible amendments to the

powers of provinces, the NCoP, and local government. The Austrian practice of *Stellungnahme* (right to a hearing) and *Mitwirkungsrecht* or right of co-operation ensures that local authorities are informed by the federal and *Länder* governments on matters affecting them. Equivalent rights in South Africa may help to improve intergovernmental relations if section 5 of the *IRFA* is properly interpreted and applied. The German practice of *Bundestreue* is also worth researching.

- 8.3.16 Absent a track record of achievements since its inauguration almost two decades ago, it is doubtful whether stronger and increased local government representation on the NCoP will achieve any useful purpose. The Council's indirect representation of municipalities via their respective provincial legislatures does not disclose any benefits for local government. Whether there is a need for provinces and their representative organ in "one sovereign democratic state" has been asked since Union in 1910, but remains unanswered. The question, then, is how best can local government be represented in the legislature.
- 8.3.17 Mechanisms for municipal representation or promotion of local government interests are submissions, petitions to the National Assembly, the NCoP, provincial legislatures, and municipal councils. More use should be made of them by municipal representatives.
- 8.3.18 In a municipal council, there are opportunities for councillors to represent residents on the council itself, the mayoral committee, standing committees, section 79 committees, and ward committees. These mechanisms should be used effectively by municipal representatives.
- 8.3.19 Local government representation through SALGA is inadequate but the major flaw is in the design of the NCoP. As it is currently designed and operates, the NCoP will not do much for socio-economic development and local participatory and representative democracy. This is because the NCoP has been designed not on an objective or scientific basis but on political considerations to represent and promote the interests of provinces and not those of the local government sphere. If provinces and the NCoP are to be retained, the Council should be redesigned through constitutional amendment to incorporate representing the interests of local government and be named the 'National Council of Provinces and Local Government.' Alternatively, a new equivalent or similar

institution is required for local government, alongside a Ministry of Local Government. This is because provincial legislatures cannot represent a ‘distinctive’ sphere of government. SALGA is ‘recognised’ but is not a statutory body in the conventional sense. Being a voluntary organisation, it cannot effectively represent government even where it has been given the space to do so.

8.3.20 SALGA and the PLGAs must have the requisite skills to submit quality and objective inputs, derived from municipalities which must, in turn, have the capacity to provide primary intelligence in digestible format. There is need for more quantitative information, perhaps through an external, objective agency, as much of the strategic plan, annual reports, conference reports, and other publications contain numerous statements of intent that are somewhat philosophical, aspirational, not easily quantifiable, and much of these exhibit an internal focus.

8.3.21 Apart from the Auditor-General’s audit outcomes reports, very few publications are in the public domain to objectively show the state of local government. SALGA and CoGTA need to undergo social cost-benefit, risk and gap analyses or comprehensive and in-depth reviews. Performance management systems tell one story, the integrated development plan, another. What is required is a tool to measure efficiency of an institution, with its achievements (outcomes) over the medium term measured against costs, predetermined objectives, key performance areas (KPA’s), key performance indicators (KPI’s), Hence an outcomes-based monitoring, evaluation, and impact assessment (MEIA) system is necessary to objectively determine the achievement or otherwise of specific (or simple, sensible, significant); measurable (or meaningful, motivating); achievable (or agreed, attainable); relevant (or reasonable, realistic, resourced, results-based); and time-bound (or time-based, time limited, time-cost limited, timely, time-sensitive), that is, S.M.A.R.T. goals, is required. Such a mechanism could objectively indicate whether an organisation and its functionaries are functioning or not, and why. A performance management system (PMS) is a useful tool to gauge individuals’ and the institutions’ achievements and failures. The latter is dependent and is the aggregate of councillors’ and technocrats’ performance. If not properly devised, the PMS would be little more than financial compliance, particularly spending the allocated capital and operating budgets. A system that measures or quantifies inputs and outputs is not an appropriate indicator of achievements in social

and economic development through service delivery. A detailed evaluation or audit has not been done on SALGA, not even by the *Intergovernmental Relations Audit* and subsequent reviews. Nor has one been undertaken on CoGTA and the NCoP. An independent, objective review and analysis by an external expert team of independent evaluators, perhaps commissioned by member municipalities or CoGTA, given that SALGA has been operational for two decades, may present a truer picture of its achievements and the cost thereof. It is also necessary to distinguish between SALGA's claimed achievements and those of capacitated municipalities and to what extent their status has been attained through the intervention and assistance of the institution. This is because many publications tend to be inward-focused and self-congratulatory, littered with statements of intent and articulation of long-standing challenges. The MEIA would be used, along with the PMS to reward and sanction functionaries, and would be the tools to determine how and to what extent communities, especially the poor, benefited over a particular period.

8.3.22 A comprehensive need and desirability assessment of 'organised local government' ought to also be undertaken.

8.3.23 SALGA has a wide, deep, and complex mandate which it has set for itself. This needs to be reviewed with priorities prioritised using the critical path and logical sequencing approach and the Pareto principle. There is need for focus and concentration on development needs of municipalities, especially the weaker ones.

8.3.24 The *IRFA* and its accomplishments to date also need review by independent evaluators.

8.2.25 Given the advances in information and communications technology, it is today comparatively easy for reasonably-endowed municipalities to co-operate among themselves locally, regionally and internationally: They do not need associations for local authorities to fulfil their core responsibilities; rather organised local government can coexist and thrive where they have a role that is unique, in the sense that they can assist municipalities and not do their work, such as associations for local authorities in Germany, Austria, Belgium, in the Scandinavian countries, and the Gauteng Global City Region. A local example of such an institution is the SACN. The numerous annual statements of intent by the SALGA chairman are often not translated into concrete

programmes and projects. Campaigns may have some uses, but the questions are whether they really contribute to sustainable socio-economic development that is measurable.

8.3.26 A major shortcoming of SALGA is its inability to make meaningful inputs into draft legislation, as evinced by its management of the legislative process of the *Disaster Management Amendment Act* of 2015. This is a major shortcoming that can impact negatively on metropolitan and district municipalities. The *DMA* of 2002 was one of a plethora of legislation passed by Parliament with what appears unseemly haste but understandably so, given the constitutional objective of establishing a democratic society. Law, *per se*, cannot achieve this – it should be implemented by competent and committed officials. The need for speed in promulgating legislation has resulted in several of them, or parts thereof, not being fit for purpose. Almost all statutes, regulations, assignments, authorisations, and directives influence and impact on local government.

8.3.27 No independent and objective analysis have to date been done on the need and desirability of a local government association in South Africa. This is apart from a review of SALGA and its achievements since its establishment in 1996. Studies have shown that an advisory and co-ordinating body could well work alongside the three spheres of government, particularly with municipalities, without conflict or confrontation or duplication, as have associations in other countries. South Africa's constitutional-statutory framework for co-operative governance is flexible enough for SALGA, or some other, perhaps permanent commission of experts, to undertake this. The need and desirability of SALGA, apart from that of organised local government, should be assessed against existing local government associations, both to determine its unique function or niche, and to ensure that it does not duplicate work of existing representative bodies and municipalities themselves.

8.3.28 The plethora of statutes, regulations, and directives applicable to local government needs to be reviewed and analysed to eliminate or minimise duplication, overlaps, and redundancies, while ensuring legislation is development-oriented. Effective representation of municipalities would also require amendments to certain statutes, particularly the *IRFA*. A legislative review that 'cleans up statutes and regulations

pertaining to local government and that would facilitate socio-economic development through service delivery would help. The issue of provinces and their capacitation of municipalities must take priority. If they are to be retained, the issue of their powers that are concurrent with local government should be analysed so as to minimise duplication, overlaps, and ‘unfunded mandates’. The approach to municipal and community representation and mechanisms to achieve this needs review. Finally, after adequate research on municipal representation or local government associations, the *OLGA* should be repealed by a local government statute that sets up the desired, developmental type of municipal representation. It may be opportune, two decades after democracy, to undertake a social cost-benefits, risk and gap analysis and MEIA of post-1994 statutes and regulations. Such analysis may highlight existing or dormant problems within the three-sphere governmental enterprise and with co-operative governance. There is need for a legislative system that goes beyond the purely financial, largely regulatory and compliance-oriented. Legislation should also incorporate review of accountability, fulfilment of statutory obligations, commitments made to communities, penalties for non-compliance, and so on, as are available in Sweden. Law-making should be undertaken after in-depth analysis of the problem it is based on. A social cost-benefit, risk, gap, strengths-weaknesses-opportunities-threats should be done, as well as an outcomes-based MEIA. Potential unintended consequences arising from legislation must be analysed, quantified, and considered when drafting bills.

8.3.29 Organised local government in South Africa and SALGA as the national representative have been placed by the *Constitution* and the applicable legislation in a unique position. Notwithstanding this unprecedented and elevated status, the instrument of organised local government appears to have failed to fulfil its envisaged mandate adequately or innovatively, given the shortcomings of its governing statute. *OLGA* merely “recognises” a national and nine provincial associations to represent the interests of local government. Unlike most statutes of the democratic era, it does not prescribe in detail how these organs should be constituted or established, their roles, powers or functions, management, financing, accountability, monitoring, and reporting.

8.3.30 SALGA needs to take cognisance of the National Planning Commission and the Department of Performance Monitoring and Evaluation (DPME), not only to be guided by them but also to ensure there is no duplication and wastage. SALGA and CoGTA

should compare their objectives and business plans to ensure complementarity and minimise duplication. The national department should also move towards a pragmatic and measured approach, rather than being reactive and thereby attempting to do too much and in the process losing focus.

- 8.3.31 SALGA should also reduce campaigning and posturing and become more firm and decisive and ensure sustainability of its programmes, projects, and other initiatives. It should complete its work on powers and functions as well as that on provinces and their cost. SALGA should not embark on yet another ‘restructuring’ at this stage, but implement and monitor its *Strategic Plan 2012-2017*.
- 8.3.32 SALGA should develop and use an outcomes-based monitoring, evaluation and impact assessment system to show its effectiveness. This approach could be informed by an independent review of its functioning and achievements since establishment, including a strengths, weakness, opportunities and threats (SWOT), social cost-benefit, risk, and gap analyses. Such a study could provide some indicators as to how best municipal representation could be undertaken in South Africa.
- 8.3.33 There is need for more quantitative information, perhaps through an external, objective agency, as much of the strategic plan, annual reports, conference reports, and other publications contain numerous statements of intent that are somewhat philosophical, aspirational, not easily quantifiable, and much of these exhibit an internal focus.
- 8.3.34 Residents, community leaders, and councillors should be educated in governance and civic responsibilities. Representatives require commitment, courage, and intellect to present a strong case. Hence, appropriate capacitation and education of councillors is necessary. Strong and committed municipal leadership and representation are necessary to claim the resources and support required for municipalities to fulfil their constitutional and statutory obligations. A solution to make local government more developmental and efficient can best be designed through social inclusion, with advice from a “mobilised, active and responsible citizenry” (*NDP*) where residents articulate their real needs, using municipal representatives to assist in widening and deepening local participatory democracy. Effect must be given to the ‘human-centred’ and people-driven approach envisaged in the Freedom Charter and the Reconstruction and

Development Programme, as well as human dignity, equality and human rights, as exhorted in the *Constitution*. The approach by Treasury, CoGTA, and SALGA do not pay heed to such directives. The *NDP* focused on the need for a “capable state”. For individuals to be capable, they need, *inter alia*, education and skills. It stated: “Between now [2013] and 2030, we need to move towards a state that is more capable, more professional and more responsive to the needs of citizens.”

8.3.35 *Joseph v City of Johannesburg*⁶ confirmed that the public has a constitutional and public law right to basic municipal services and the municipality is duty-bound to deliver them in a way that that does not infringe a resident’s right to privacy and dignity. Given such onerous and extensive list of rights to deliver to its communities, municipalities are entitled to be assisted by national and provincial governments. Since councillors, administrators, and municipal representatives are obliged to deliver on the municipal mandates, education and training to develop competent or capable persons are necessary

8.3.36 The numerous rights, duties, obligations, responsibilities, and accountabilities create challenges but also opportunities for representation of local communities within municipalities and on institutions in the other spheres of government. To do justice, the quality and commitment of representatives must be of the highest order. To achieve this, capacitation of municipalities by qualified top management and their monitoring and evaluation are required. More than going “back to basics” is necessary as it has been shown that both national and provincial governments have failed in their duty to support and strengthen municipalities in the past fifteen years. The problems emanating from an extended local government mandate in a context of limited and shrinking resources is that the ‘lowest’ sphere has to compete with the other two spheres of government, that decentralisation may result in more powers and responsibilities devolving to them without guarantee of the accompanying resources. Hence, municipal leadership and representatives must be alert to these challenges and be capable of negotiating in the best interest of their residents.

⁶ *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 455 (CC) (9 October 2009).

8.4 CONCLUSION

The term 'glocal' implies a connection or link between the global and the local. In this rapidly changing, highly competitive and knowledge-based society enjoying unprecedented technological advances, local governments have been accepted as a strategic player able to address common or shared global issues and challenges. This will take time, political commitment, a developmental and productive culture, and many resources.

The local government operating environment is very complex, and likely to become even more so. Given South Africa's history generally, but particularly of municipalities, especially in the light of their constitutional status and wide mandate, there are no quick and easy solutions to the challenges at the local sphere. It is also not prudent to rush into anything new: Hence, co-operative governance properly planned and genuinely engaged in, can do much to promote and enhance equality and socio-economic development, and thus contributes to the attainment of national goals and priorities.

This study has looked at one of several role players that can make a positive difference to development in South Africa through service delivery by strengthening the status and responsibilities of local government and by representing the interests of municipalities effectively. Municipal representation is necessary where local authorities are formally part of an integrated governmental system. Representation has not been effective over the past twenty-two years due to inherent weaknesses and defects in the governmental system.

Given the time elapsed since commencement of transformation, it may be opportune to review and renovate that part of the governmental system that, objectively assessed, have been shown to be inefficient. This is because to a large extent, especially in the local government sphere, the constitutional prescripts have not been implemented in the spirit and letter of the *Constitution*. This pertains more to local government appearing to be seen *de facto* as the lowest tier in a hierarchy, more so considering its status as a sphere of government. The lack of support and strengthening of the capacity of municipalities, particularly by provinces and the inappropriateness of programmes by CoGTA, manifests itself today in the form of community protests (largely) on the basis of poor service delivery. The aim of this study is not to single out who is responsible for the current situation facing local government, but to point out that while much has been done by government to assist the poor in the two decades since the dawn of

democracy, much still needs to be done. It can, if planned and implemented properly and co-operatively, under the guidance and according to the values enshrined in the *Constitution*.

There is no one model that would guarantee success as, given South Africa's history and a lack of democratic culture, wholesale transformation may not be prudent. However, trends and patterns have been discerned to enable the redesign of the dysfunctional or poorly performing parts of the system, as most of the challenges are related not to the blueprint or the design, but in implementation thereof. The state has to undertake certain actions rapidly before the situation degenerates into anarchy.

This research has pointed out what needs to be done in the field of co-operative governance and how service delivery could be enhanced by effective municipal representation – what is clear is that much work and action is required; and less promises and sugar-coated rhetoric on the part of decision-makers, as in the SoNA approach.

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