

CHAPTER 3

3. HISTORICAL DEVELOPMENT OF INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA

3.1 INTRODUCTION

Owing to varying experiences and attitudes, the approach to intergovernmental relations has been received with mixed feelings by South Africans. Some reasons for these often-contradictory approaches may be found in the constitutional history of South Africa, which made intergovernmental relations (IGR) the subject of the unitarist/federalist debate (Mathebula, 1992:12). The unfortunate result of this approach has been the difficulty of depoliticising IGR as it has become synonymous with federalism.

The IGR environment in South Africa has as its roots the various federal government experiments that were pioneered during the British colonial administration era from 1806 until 1910 then through to 1961 (Van Jaarsveld, 1976:149-180). The Crown Colony government has for years seen as an ideal solution to the South African problem, a federal type of government that would co-ordinate the “frontier” policies of various states, disarm the Afrikaner challenge to British supremacy by absorption thereby securing British interests and neutralise the native majority threat (Barnard, 1992:1). The success of the Crown to create the Australian and Canadian federations during the early colonial South Africa, justified the need to create an IGR system modelled along these federations (Kriek *et al.*, 1992:123-125). The growth of Afrikaner nationalism in South Africa during the second half of the 19th century

Intergovernmental Relations Reform in a Newly Emerging South African Policy

as well as the concomitant rise of African nationalism hindered the federalist ambitions of the Crown Colony government and therefore impacted on the yet to evolve IGR system. Both these movements were anti-colonial although they had divergent views on the form of state and/or dispensation that would follow.

The British government's conquests were accelerated by the discoveries of diamonds and gold in the Transvaal Republic. The result of the strife to control South Africa's mineral wealth was a South African War, also known as the Anglo Boer War, which resulted in the 1902 Peace Treaty of Vereeniging that placed the Boer Republics firmly under the British Crown (Cloete, 2000:33). The ambition of the Crown government to unite into one, British Colonies and Boer republics, was driven by their need to share the railway and harbour infrastructure, the communications infrastructure, to have common policies for natives and other non-white groupings, to control land and property ownership rights, and to have control over the diamond and gold production as well as their markets (Cloete, 2000:10; 27).

A legislative vacuum therefore, would characterize that period between 1902 (end of the South African war) and 1910, as most laws were passed by the British Parliament accordingly advised by a resident Governor-General. The regional economic imperatives as manifest in the transport, communication, agriculture and growing manufacturing industries necessitated a re-look at the form of State a "new" South Africa should take. Therefore, this triggered the constitutionalisation of South Africa and subsequently a National Convention was held in 1909. At the convention, most delegates wanted substantial autonomy for their provinces/states. The divergent views of delegates were influenced, in the main, by General Jan Smuts who indicated a need for a strong and supreme parliament to draw together and

Intergovernmental Relations Reform in a Newly Emerging South African Policy

to unite white groups; equally important was a requirement to adopt a uniform policy on the native question in the country (Kriek *et al.*, 1992:140).

The Convention adopted a working document that was later enacted as the South African Constitution Act. The negotiations settlement began a constitutional hybridisation process that was to result in the current quasi-federal constitution. The organization of the Union into four provinces, with four provincial councils, with appointed administrators and a British-appointed Governor-General put on the governance agenda the questions of policy co-ordination, devolution and decentralization of powers, interactive and transactional relations between and amongst organs, levels of state and officials. These all form the faculty of IGR.

The period between 1910 and 1961 was essentially a Crown driven era in the constitutional history of South Africa. Constitutional politics, during this period, had been characterized by an ideal of establishing one decolonised South African Republic. This ideal was to be accelerated after the election to victory of the National Party in 1948. The events leading up to the 1961 Republican constitution illustrated the type of IGR system South Africa was to inherit throughout the process of its constitutional history (Adam and Giliomee, 1979:114).

It is the submission of the author that a Constitution of a state or country represents the collective political will and emotion of a nation at a particular historical period. The test of such a constitution is fundamentally embedded in the wisdom, anger, joy, mood and attitudes of the constitution drafters at a given time. The time lapse of a constitution does not only represent the demise and/or dysfunctionalities of the politicians of that time but also that of the society for which the constitution has been designed.

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The author observes that successive South African Constitutions (from the unconstitutionally era of Jan van Riebeeck to the constitutionalised Nelson Mandela era) have overtly defined their respective political moods at the time of drafting. In each instance they laid the basis for IGR design and practice, hence the author argues that such a system of IGR is a function of the political dynamics as well as the practical approaches of those charged with the policy implementation. The author, therefore, suggests that the nature, form and ideology of the dominant ruling party, in all probability, would dictate the direction and culture of the IGR.

As suggested by the working definition of this study - that IGR are all the actions and transactions conducted by executives (in a constitutional sense) and officials between and amongst governments in a country - this research submits that these actions and transactions are carried out by a variety of political and executive institutions. The co-ordination of these structures, therefore, becomes imperative. The study distinguishes these structures into two broad categories: those that are established in terms of the Constitution and/or other legislation and those that are voluntarily established by a decision of an executive authority or institution (Thornhill *et al.*, 2002:1). The categories mentioned assume that officials, and therefore administrative structures, provide a bureaucracy for the functioning of such structures. The above distinctions will be inform the analytical framework for the historical overview.

3.2 THE STATE OF IGR STRUCTURES WITHIN THE 1961 CONSTITUTIONAL DISPENSATION

The 1961 Constitution represented an anti-colonial victory for South Africa as a country. It came after twelve years of Afrikaner Nationalist rule and eleven years after the youth of the African Nationalist movement adopted a militant programme of action to undo the apartheid system of government. The 1961 Constitution declared South Africa to be a Republic consisting of four provinces under a State President (formerly the Governor-General) and an Executive consisting of a Prime Minister and Cabinet (Constitution Act 32, 1961:s1-3). The supremacy of Parliament was assured, accompanied by a clear separation of powers, respect of the rule of law and regular elections. At the adoption of the 1961 Constitution, the political demography of South Africa included a predominantly Afrikaner white-male ruling party, the National Party, a White liberal opposition, two technically banned liberation movements, the ANC (African National Congress) and PAC (Pan African Congress), as well as a number of Indian and Coloured political formations (Walshe, 1987:419-420).

The Republic as it was formed, consisted of diverse groupings of people classified according to their race and access to political and economic power. On the one hand there was a whites-only constitutionalised democracy with four provinces, often referred to as “White South Africa” and on the other there was a tribally proclaimed “Native” government system. In addition to the two distinct groupings, there were also Indian, Coloured and the Urban Black peoples spread all over the country. The above demographic background informs the IGR structures that were established. The 1961 Constitution established a Parliament, which had legislative power over the Republic, and consisted of the State President, a Senate and a House of Assembly (Constitution Act 32, 1961:s24). Parliament was to become the sovereign

Intergovernmental Relations Reform in a Newly Emerging South African Policy

legislative authority in and over the Republic, and had the power to make laws, which could not be questioned or pronounced upon in terms of the validity of any organ of state, including the judiciary (Constitution Act 32, 1961:s59).

The Constitution further declared all pre-Republican laws to have specific interpretations: reference to the Union of South Africa would be construed to be referring to the Republic; and reference to the Crown or the King or the Queen or the Governor-General, would be construed as a reference to the Republic or the State President as the circumstances would require (Constitution Act 32 of 1961:s3). The above clauses provide us with a framework that can be used in order to understand that switch in power relations from a remote colonial legislative centre to a localized, though not wholly inclusive, and circumstantially democratic legislative centre. Elsewhere in this study the author mentions the roles played by the resident Governor-General in the co-ordination of relations amongst the four provinces of the Union.

The author contends strongly that the shift of power to the Republican State Presidency and Parliament created a balance in the governance of the state. Legislative IGR arrangements of the period under review are captured in the structure of Parliament as well as in the powers given to the two legislative centres, the National Parliament and the Provincial Councils. The study, therefore, observes that an effective structural governmental arrangement creates systems that allow for various spheres of government to succeed in a well-defined structure.

3.2.1 Structure of the Legislatures

The National Parliament consisted of the Senate and a House of Assembly where the latter was composed of a set number of directly elected persons, including those elected in terms of the South West Africa (now Namibia) Affairs Amendment Act (Constitution Act 32 of 1961:s40). At a legislative level of government the institutionalisation of IGR is reflected in the composition of the second chamber, the Senate as indicated below.

- The President nominates eight senators of whom two will be from each province. In nominating these persons the President is required by law to take due regard of their:
 - knowledge of matters affecting the various interests of the inhabitants of the Republic;
 - thorough acquaintance, by official experience or otherwise, with the interests of the Coloured population in their resident province; and
 - capability to serve as a channel through which the interests of the said Coloured population may be promoted.

- The number of senators, but not less than eight in the case of each province, will be equal to one-tenth of the number of the divisions into which that province has at its last delimitation (Constitution Act 32 of 1961:s28-29).

The composition of Senate and its capacity to make contributions and have a say in the legislative process lends credibility to the provincial representative nature of the National Parliament. The assumption flowing through this arrangement is that senators, composed as per the delimitation composition structure of Provincial Councils as well as Coloured

Intergovernmental Relations Reform in a Newly Emerging South African Policy

community representation, are the voices of Provincial Government in the national law making process, and thus IGR practitioners in a legislative sense.

Section 31 of the 1961 Constitution Act further empowers the Senate to establish from time to time, standing committees that may investigate matters referred to it by the executive and subsequently make recommendations for legislation and/or non-legislation (Constitution Act 32 of 1961:s31). The Committee, by default or other means, was responsible for the exposition, management and advocating of provincial affairs and local communities' affairs. At every sitting of Parliament, the then Prime Minister was obligated to make known what bills were to be introduced in the Senate during that session (Constitution Act 32 of 1961:s32). This arrangement would afford senators an opportunity to become a legislating voice of Provinces since they would raise the need, should it be non-existent, for Provincial matters to be given Prime Ministerial priority.

3.2.2 The Powers of the Legislatures

The constitutional growth of South Africa has been characterized since the 1909 Constitution Act by a deliberate drive to incrementally centralize only those powers that affect economic unity, Native affairs, national unity as well as the safety and security of the inhabitants. This drive was sustained in the 1961 Constitution, where the powers of the National Parliament, in most cases, were oversight in nature and minimalist regarding its control. Parliament was allocated the power of being the sovereign legislative authority in and over the Republic (Constitution Act 32 of 1961:s59). This power meant that any law passed by Parliament should take precedence over sub-national law.

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The provincial legislatures, also called provincial councils, by nature, were legislative bodies created by a statute of the Republic that also outlined the powers of provincial legislatures. In the analysis of provincial legislatures as it pertains to the legislative powers they possess, the study will look at a number of elements. These provide a basis upon which the functioning of the then sub-national jurisdictions relates to their IGR importance.

Firstly, since *Provincial Councils were originally legislative bodies* they could make laws and thus assist in defining the IGR infrastructure, particularly at sub-national level. This status of provincial councils as legislative bodies originated in their statutory authority drawn from the Constitution Act of 1961 (Act 32, 1961:s68). The Constitution mentions a number of areas where provincial councils might make ordinances, within their right to govern, on their own initiative (Act 32, 1961:s68). The Ordinances passed by provincial councils were laws - and not by-laws - of a body having delegated powers (Bristowe, 1915:108). The legal impact of these ordinances was equal to that of acts of Parliament. This defined the importance of the provincial level of government in the future governing of South Africa.

Secondly, the fact that *the powers of councils were positive, defined, precise and limited* made them a critical building block in multi-level government and thus in IGR. The 1961 Constitution defined in clear terms the legislative parameters of provincial councils and further imposed the authority of the President and other national legislation on their ability to legislate. Although the provincial councils had legislative power, they were in a sub-ordinate relationship structure with national Parliament. Provincial councils were not equal to Parliament but were in a relationship analogous to that of principal and of agent (Kennedy

Intergovernmental Relations Reform in a Newly Emerging South African Policy

and Schlosberg, 1935:268-69). The powers of provincial councils, therefore, were structured in a tiered relationship, where there was dependence of one tier on the permissiveness of a super-ordinate tier, hence the legislative authority of provincial councils was confined to specified areas of competence, though subject to varying degrees of exclusivity (Constitution Act 32, 1961:s84).

Thirdly, *since the powers of provincial councils were within jurisdictional limits as plenary, absolute and discretionary as those of the Republican Parliament*, the 1961 Constitution gave Parliament sovereign legislative authority in and over the Republic, and this was despite the fact that provincial councils retained equal authority within the limits imposed (Constitution Act 32, 1961:s84). The provincial councils had an added jurisdiction over other matters not mentioned as powers of provincial councils, provided that the intention was to empower them to deal fully with Section 84 matters and that the contrary had not been indicated.

Fourthly, *the Republican Parliament may repeal powers of provincial councils that were not immutably fixed, but may at any time alter them*. The absolute, plenary and discretionary nature of powers of provincial councils was kept in constant check by Section 85 of the 1961 Constitution which provided for provincial statutes to have force and effect so long as they were not repugnant to an act of Parliament (Constitution Act 32 of 1961:s85). The perceived wisdom of Section 85 matters, whereby the task of making laws was, in practice, devolved to the councils, was to ensure that national priorities constantly instruct provincial law making.

Lastly, *provincial councils are legislatively controlled by Parliament*. Nathan, cited in Kennedy and Schlosberg, writes that a province cannot be regarded as a separate entity for

Intergovernmental Relations Reform in a Newly Emerging South African Policy

administrative or legislative purposes, so far as all its internal affairs are concerned (Kennedy and Schlosberg, 1935:269). The control over provincial councils had been legislated to the effect that it reflected a dual control by both the legislature and the executive. Executively, Section 89 of the Constitution Act, Act 32 of 1961, required the administrator to present an ordinance for Presidential assent, and enforcement would be dependent on proclamation in the Gazette by the President (Constitution Act 32 of 1961:s89). The legislature controlled provincial councils through Sections 85 and 86 of the 1932 Constitution Act, that deals with the repugnancy of statutes as well as the role that provincial councils could play in matters outside their competence as jurisdictional law makers (Constitution Act 32 of 1961:s85-86).

The above explanation of the National-Provincial legislative IGR and interface reflects that in 1961 the Republic was already hybridising the form of state through a mixture of federal and unitary constitutional forms. The original legislative powers given to provinces with the accompanying overriding powers of Parliament indicate an inherent trait of the geo-political landscape of South Africa informing the build-up towards the South African War of the 1800s up until the adoption of the 1961 Constitution. The distinctiveness of the four provinces was to be institutionalised by allowing provincial councils to pass jurisdictional statutes in an asymmetrical manner whereby national uniformity was entrusted to Parliament through the repugnancy clause. The legislative IGR structures during this constitutional period were to evolve over a period with incremental empowering of Senate to deal with those matters that were referred to it at the sole discretion of the Prime Minister.

The legislative powers of provinces did not include legislating over the affairs of the indigenous communities who, at the adoption of the 1961 Constitution, were referred to as the

Intergovernmental Relations Reform in a Newly Emerging South African Policy

Bantu. The Constitution conferred this responsibility to the State President as a successor in-law of the Governor-General-in-Council of the Union of South Africa, and this was despite the fact that the “Bantu” constituted over 87% of the Republic’s population (Leach, 1989:33). The establishment of a Cabinet position for the Department of Bantu Administration and Development and for Education marked the start of a predominately race based balkanisation process that would impact on IGR in South Africa.

The inception of an administrative and/or control mechanism for the Bantu people was thought of, initially, as an executive function of government until after it introduced to Parliament the possibility of granting self-government to the Bantu people in their ethnically demarcated territories (Leach, 1989:204-208). The process of ethnic demarcation was a function of the 1913 Land Act that restricted land ownership for indigenous communities with a resultant 87:13 ratio of White to Black land ownership and occupancy (Boulle, 1984:89).

Various acts on the administration and government of Africans were passed before the 1961 Constitution was adopted. A quasi-IGR intensive legislation was the Promotion of Bantu-self government Act, which abolished the representation of Africans in Parliament and recognized the different “homelands” as “national” residences for Black African ethnic groups. This act gradually granted comprehensive self-governing powers to homeland authorities and the appointment of a commissioner for every homeland (Cloete, 1973:190). Subsequent to the 1959 Act the self-governing *territories* for the various African ethnic groups was enacted whereby each territory had an Executive-Committee that mirrored a state cabinet, because the committee was organized into “state” departments with a seconded director from the White Parliament (Cloete, 1973:192).

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The homeland governing system, under the watchful eye of the “main” South African parliament, developed into semi-autonomous legislative entities capable of passing original laws and making regulations with a similar force of law as that of provincial ordinances. The legislative status of self-governing territories implied a flow-out of legislation from these territories. The granting of “independence” to the artificially created self-governing enclaves of the erstwhile apartheid government of the TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states, re-established a legislative IGR landscape with constitutional implications set to impact on the constitutional life of South Africa. The legislative powers of the “independent” states were limited by a repugnancy clause in the Bantu self-government Act as well as the consent and assent authority of the Prime Minister (and later the Executive State President).

The administration of Blacks was to be relegated to being a local government matter. The existence of tribally concentrated areas for the Black people provided an infrastructure to declare some as homeland areas and proved a great challenge to government on how to deal with urban Blacks who were to be later organized into a “virtual” and ethnically heterogeneous homeland. The political future of the Coloured people, however, was placed on another track, as they were destined to develop parallel to but separate from the White people. The Coloured Representative Council Act of 1968 provided for the creation of a representative council to legislate matters such as local government, finance, education and social welfare (Cloete, 1988:40).

Intergovernmental Relations Reform in a Newly Emerging South African Policy

Rural urban migration among Africans started after the First World War with the result that those areas, otherwise known as locations, were set aside for occupation by Bantu persons. The general trend outlined here affected the participation of non-whites in the mainstream of government and was to shape the nature of IGR in South Africa. The unequal development of the Black people and the Non-Black people as well as the growing pressure for government to enfranchise all South Africans, necessitated a need for government to rethink and reform the Black people's representation dispensation. The instituting of the Theron Commission, was to examine the position of the Coloured people and the plight of the urban Black people (Boulle, 1984:129-131). The impact of this Commission led to the establishment of the Bantu Affairs Administration Boards and ultimately the Black Local Authorities Act in 1982. The IGR process, therefore, was controlled from the office of the State President in so far as it pertained to the Black and the Coloured people. The relationship between provincial councils and Parliament was regulated in the Constitution and remained within the legislative domain of relations (Boulle, 1984:129-131).

Legislatively, the South African IGR practice, with its racially discriminatory overtones and undertones, was by far a relatively stable setting because the various legislatures were in a position to pass legislation and to make regulations on positively defined and clearly demarcated jurisdictional matters. The 1961 Constitution and the subsequent pieces of legislation, up to the adoption of the 1983 Constitution, interfered with provincial powers on legislative issues. Needless to say, the implementing arm of government was to be hindered by a number of executive intricacies. The next section of this chapter deals with that scenario.

3.3 THE NATIONAL-PROVINCIAL IGR STRUCTURES: 1983 – 1993

The 1983 Constitution became the most IGR-intensive Constitution ever to be promulgated in South Africa. It provided for the establishment of a Parliament consisting of virtually 3 houses, namely, the House of Assembly, the House of Representatives and the House of Delegates. The three Houses would connect with one another through joint sittings of Parliament and through the President's Council (Constitution Act 110, 1983:s37). In addition to the constitutionally created Houses there were a number of pieces of legislation that, outside the tri-cameral Parliament, established a series of legislatures with a relative degree of primary legislature power.

The Black Authorities Act provided for the establishment of certain Black Authorities. It defined their functions, abolished the Black Representative Council, amended the Black Affairs Act of 1920 and the Representation of Blacks Act of 1936 and provided for certain incidental matters (Black Local Authorities Act 68, 1951:1). This Act also provided authorities with legislative powers over matters that were considered to be Black affairs. The various authorities graduated into self-governing territories and independent homelands. The focus of this Act was on rural and deliberately and/or naturally tribalised Black communities. The result of this tribalisation was the creation of concentrated settlements of Black people in essentially non-arable and labour reserve type settlements. These grew into miniature states that required a constellation policy and an IGR management system.

The Black Authorities Act, [Act 68 of 1951] became a prelude to the Transkei Act of 1965, the Republic of Bophuthatswana Act 23 of 1978 as amended, the Republic of Venda Act 15 of

Intergovernmental Relations Reform in a Newly Emerging South African Policy

1986, and the Republic of Ciskei Act 37 of 1984. These Acts provided for the variation of powers, authorities and functions by tribal and regional authorities. They also established a local government bureau to provide voluntary levies. In addition the Acts defined the duties, powers, authorities and functions of and provided a code of discipline for paramount chiefs and headmen and defined constitutions of these “Republics” (Government Working Group on TBVC Legislation Report, September 1987:2).

The marginalisation of the Black people to tribal lands with an accompanying industrialization programme at the periphery of the mainstream economy did not attract the urban Black people. The urban Black people who now were aliens in a Whites-only South Africa rejected the homeland and/or Bantustan system. In response to this rejection, in 1982 government amended the Black Local Authorities Act of 1951, to make provision for the urban Black ‘democratic’ representation (Boulle, 1984:132).

The process of creating self government was institutionalised by the National States Constitution Act (Act 21 of 1971), which authorised the Minister of Co-operation and Development, after consultation with the territorial authority, to request the State President to establish by proclamation in the Government Gazette, a legislative assembly to replace the territorial authority (Cloete, 1988:284). The Act provided for the territory to have an executive council (which mirrored, in operation, the National non-Black Cabinet, except in those matters that were under the State departments that provided goods and services for all population groups), a revenue fund (essentially budgeted for as an intergovernmental grant as well as being resourced by a relatively small tax base) and a public service commission (Cloete, 1988:284).

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The Act further provided that the Minister could request the State President to declare (by Proclamation in the Government Gazette) a territory to be self-governing, thereby entitling it to have its executive council replaced by a full cabinet consisting of ministers and a chief minister as well as having its own flag and national anthem (Cloete, 1988:284). Territories that were granted a legislative assembly had the makings of a full state, as they could make laws on scheduled matters, they had an executive institution, a revenue fund, courts of law and a public service with a public service commission (Cloete, 1988:284).

Self-governing states graduated into independent states with their own Constitution, which defined the executive, legislature, judiciary as well as other expanded services such as police, defence, intelligence and foreign relations (in case of non-independence, this was presided over by the President of Republic of South Africa). The attainment of independence altered the IGR systems between territories, “countries” and the government of the Republic of South Africa (RSA). The independent states were connected to the RSA through the Department of Foreign Affairs and had their commissioners elevated to ambassador status (Cloete, 1988:286). Aid was to be channelled to independent states through economic co-operation Acts that was like a home brewed foreign relations policy of the RSA government.

The Black Local Authorities Act (Act 102 of 1982) created a plethora of local government legislative units adjacent to almost all South African cities (Boullé, 1984:132). This creation of yet other homelands, though without physical borders, was virtual, tribally heterogeneous and in some instances alienated from the mainstream political life. The author contends that the management of such a “virtual homeland” required a legislature of some kind and the ministry

Intergovernmental Relations Reform in a Newly Emerging South African Policy

of Constitutional Development and Planning presided over Black Local Authorities affairs and used black organized local government as *de facto* urban legislature, albeit illegitimate.

The IGR “web” created by the establishment of self-governing territories, independent states as well as the Black Local Authorities for urban Black people, was further compounded by the existence of a second tier of government with colonial origins, that is, a Provincial Government. South Africa remained a three-tiered state consisting of the provinces of Transvaal, Free State, Natal and Cape Province (Constitution Act 110 of 1983:s1 and 49). The 1983 Constitution did not make any reference to a change of provincial government, which implied that provisions of the 1961 Constitution Act (Act 32 of 1961) were still in force. The Provincial Government Act of 1986 repealed the provincial government provisions of the 1961 Constitution, which provided in its totality for the continued existence of the four provinces.

The Provincial Government Act of 1986 (Provincial Government Act 69 of 1986) provided for the dissolution of provincial councils and for the administration of provincial matters by administrators and other members of the executive committees appointed by the State President, as well as for related matters. The dissolution of provincial councils removed the second tier legislatures of the previous Constitutions and signified the arrival of White South Africa to the Smuts ideal. General Smuts, arguing for a unitary state at the 1909 national convention, said:

“I cannot conceive how it could be possible for us (Whites) in the years to come to deal with this whole question that centres around this dark continent

Intergovernmental Relations Reform in a Newly Emerging South African Policy

of Coloured and Black peoples unless there is one supreme Parliament to deal with the situation. If you enter into a struggle with a problem of that kind you cannot enter it with your forces divided. You cannot enter it upon the beautifully balanced plan of a federal system. You must have a strong power which is supreme and which will draw to itself whatever strength there is in the public spirit of South Africa, and you must apply that power to the solution of these questions” (Smuts, The Star, 3 March 1903:12).

At this period of history in 1986, the South African Government was facing a mass insurrection of unparalleled proportions from opponents of its apartheid system. Maximum centralization of power seemed a viable option for the then State President, PW Botha, who had just been empowered by the 1983 Constitution to virtually rule by decree at the “advice” and “direction” of the President’s Council (Constitution Act 110,1983:s78). The Provincial Government Act 69 of 1986 was one of the securocratic reform instruments that was introduced. It is worth noting that the anti-Apartheid mass insurrection of the 1980s was treated as an “emergency” and, therefore, dictated centralization of power to the highest Executive office (The Presidency). The correctness of this approach, as argued in the definition of federalism, remains academic.

The design of the Provincial Government Act, (Act 69; 1986) acknowledged the potential jurisdictional conflicts that might arise between and amongst the Independent States (TBVC States), the self-governing territories and provincial administrations. The Act already provided for a possible re-demarcation of South Africa into additional Provinces [Act 69, 1986:s5]. The Act provided the President, after consultation with the administrators concerned, and by

Intergovernmental Relations Reform in a Newly Emerging South African Policy

proclamation in the Gazette, with wide-reaching powers to declare a new province, to divide an existing province, to determine new provincial boundaries, to amalgamate provinces, to include into a province a particular territory (including self governing territories) as well as to provide for transitional arrangements (Act 69; 1986:s5). The above provisions created legislative space for multi-racial second tier governments, within the separate but equal philosophy of that government. In tandem with the recognition of the existence of sub-national government, provincial government was delegated to provincial administration and became primarily concerned with the implementation of Acts passed by Parliament on general affairs.

The Provincial Government Act became a pioneer Act in respect of regulating in deliberate terms IGR between and amongst tiers of government. It made provision in Chapter 3 of the Act for co-operation arrangements and it provided for joint executive action by the provincial executive authority concerned and the government or governments of the self-governing territories (Act 69; 1986:s5). It also provided for the performing of provincial functions outside the province that would encompass a “foreign state”, another province and any other territory established in terms of the National States Constitution Act (Act 69; 1986). However, it should be noted that these reforms were instituted at a time when the ruling National Party, was considering power sharing options with an inevitable Black majority government. This possibility was articulated by Dr Stoffel van der Merwe, the erstwhile Minister of Communications, when he declared that:

“Unions, federations, confederations and even consociations are all types of political systems which were developed in the western world for western

Intergovernmental Relations Reform in a Newly Emerging South African Policy

circumstances. The circumstances in South Africa are so different from typical western circumstances that none of those systems can successfully be transplanted to these “parts” of the world without major adaptations. Because of this fact we are in the process of designing and developing our own particular system in South Africa – a system which will in no doubt have some features of one or all of those systems, but would not answer to the description of any particular one of them. We will develop our own system according to the requirements of our own circumstances, and then we shall leave it to theoreticians to dream up a name for it” (Van der Merwe, in NP Position Paper No 1, Power-sharing, July 1986:4).

The sum of these reforms implied an elevation to second tier status of provincial administrations, self-governing territories, the TBVC states, the three Houses of Parliament for own affairs and organized Black local government as an urban Black voice. The manner of operation for these structures was formalized through the legislation referred to above. In essence, the picture of government between 1983 and 1993 represented an array of relationships that were particularly used as mechanisms of social control and controlled separate development, informed by the apartheid philosophy of that government.

The interconnections between the racially determined governance structures represented a series of relationships between organs, levels and institutions of government. The intensity of these relations was both to ensure and to instruct the smooth transition to democracy of the South African state. Ironically, the existence of a plethora of structures in government created an atmosphere and a training ground for the constitutional negotiations process that

Intergovernmental Relations Reform in a Newly Emerging South African Policy

liquidated the 1983 Constitution. (This was the last of the Constitutions to be drafted by an exclusively white Parliament.)

It is worth mentioning that the 1983 to 1993 era, despite its IGR intensive character, was driven from the office of the Executive State President with the assistance of the President's Council. The office of the President, with the provincial government act and other Apartheid reversing acts being the most notable, drove the restructuring of relations. The various departments dealing with provincial, self governing territories, own and general affairs, urban Black as well as independent states matters would have not been able to co-ordinate at such a high level the inter-relationships between these organs and their levels. The Presidency did not only co-ordinate those structures where politicians were involved; it also ensured that the service delivery obligations of Parastatals and other organs of state supported this intergovernmental machinery.

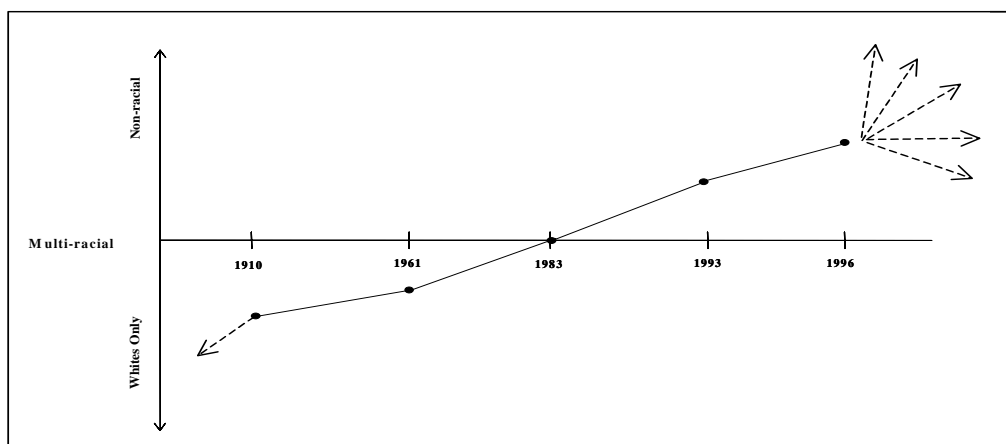
The most celebrated of these efforts was the reported results of the Development Bank of South Africa on the nine economic development nodal areas, which was to be used as a critical criterion in effecting a provincial government system for the new dispensation (DBSA, 1992). This Report, and particularly, its scientific nature and racial neutrality, brought together opposing parties to the 1990-1994 Constitutional negotiation table, in terms of the future state, economic modalities and the rationale used to determine the jurisdictions of South Africa. The Report represented one of the few areas where there was almost immediate consensus and it formed the basis for the present provincial system and the later local government system, in so far as determining metropolises was concerned.

3.4 THE NATIONAL-PROVINCIAL IGR STRUCTURES: 1993-1996

The period between 1983 and 1993 represents a transition phase from Apartheid rule to non-racial democratic rule. Contrary to the dominant view that describes the South African transition phase to have started in 1993 and ended in 1996, this study submits that the passing of the Provincial Government Act (Act 69 of 1986), marked a decisive move by that government to seriously restructure rather than to reform. The restructuring, particularly of the second tier of government, would not have been possible without an acknowledgement of the franchise rights of “non-white” South Africans, particularly native Africans.

The adoption of the 1993 Interim Constitution marked a fourth point in the constitutional history of South Africa (see Figure 1).

Figure 1: Constitutional Phases



As configured by the Author, FM Mathebula 2002

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The graph indicates the fact that South African constitutional development has never been a static process, particularly as it relates to its movement towards non-racialism. Clearly, the 1910 Constitution catered for the interests of White South Africa. Although the 1961 Constitution confirmed the most horrendous system of institutionalising White supremacy, it began to move closer to multi-racialism through its recognition of the Bantu tribal authorities and the need to review the position of the Coloured and the Indian people, notwithstanding the enforced separate development environment. The upward curve from 1961 to 1983 represents the many pieces of legislation that were passed up until the adoption of the tri-cameral system of government. The curve from 1983 to 1993 includes the abolishing of pass laws, sections of the Group Areas Act and other such legislations. The 1983 to 1993 curves represent a de-facto - though minimalist in character - non-racial South Africa minus any political or economic equality or equal voting rights for all. The 1993 to 1996 period represented an acceleration of non-racialism and the institutionalisation of the long held view that South Africa belongs to all who live in it. The fact that the 1996 Constitution did not reach the apex of the non-racial axis, is a function of the historical reality that continues to define resource allocation and general economic access. An improvisation of other curves such as economic control of the commanding heights, the skills acquisition curve and many others should see such curves below the multi-racial cut-off point. The dotted and multi-directional lines represent possibilities on the non-racial growth rate that further research may clarify.

The circumstances leading to the adoption of the 1993 Constitution were indicators of the type of emergent IGR system. The 1983 Constitution and the Provincial Government Act, Act 69 of 1986, increased the IGR intensity over the period demarcated by the study. The context within which the 1993 Constitution was adopted deserves mention in order to contextualise

Intergovernmental Relations Reform in a Newly Emerging South African Policy

this IGR system. South Africa was divided along tribal, racial, urban and rural lines. The 1983 Constitution gave impetus to the realignment of anti-apartheid reform forces to an extent that the privileged White section of the South African community became divided regarding their future in South Africa. The formation of the United Democratic Front, the Congress of South African Trade Unions and the South African National Civic Organisation in the second half of the 1980s, intensified the need for democratic change (ANC Anniversary Statement, January 08, 1984:1). On the international front, the African National Congress (ANC) had also intensified its efforts to deepen the crisis of isolation for South Africa to a level where, multi-lateral bodies such as the United Nations, Commonwealth of Nations and the Non-aligned movement became unanimous in declaring that the solution to South Africa's problems lay in a settlement between the National Party and the ANC as the liberation movement of the time (Harare Declaration, 1989:1).

The internal turmoil and uprisings resulted in the institution of successive states of emergency and the centralization of government power into the hands of the State President of the time, PW Botha. There was an increased focus on liberation politics through the apartheid state securocrats, the militarisation of South African Society through the proliferation of right wing "self defence units", and the growth in underground ANC military activities (ANC Anniversary Statement, January 08, 1986:1). The crisis was to be starkly visible in the arming of homeland vigilante groupings, dissent by certain homeland defence forces and police forces, and an increase in urban terror against Black communities that aligned themselves with the liberation movements, particularly with the ANC. These conditions were aggravated by a business reality that South Africa could not have its products competing on an international market as a result of the strengthened economic sanctions. Internally organized business began to put

Intergovernmental Relations Reform in a Newly Emerging South African Policy

pressure on government not only to reform but also to start negotiating with the ANC. It is the contention of the author that the involvement of business in facilitating political governance solutions, was informed by their need to access international financial markets, to expand their domestic markets to include more Black consumers as well as to annexe the African continental market. The above scenario presents a country in crisis yet searching for its socio-economic and political soul.

The crisis period of 1985 to 1990 placed the question of negotiating with the ANC on the agenda of the ruling class and the ruling party. The parameters of negotiations included the definition of the type of state that South Africa would become, minority rights and self-determination issues, the suspension of the armed struggle by liberation movements, the position of the judiciary including the separation of powers and the position of traditional leaders. The above matters became critical determinants of the 1993 Constitution and its subsequent amendments. The ruling party's intention to negotiate was confirmed by their making contact with Mr Nelson Mandela in prison. That contact initiated the exploratory moves towards a settlement, thereby salvaging the country out of its potential chaos and destruction. Simultaneously, a number of constitutional negotiations options arose from political parties, academia, research institutions, as well as the business community. Such constitutional options started to shape the future of South Africa and, subsequently, the type of IGR system that was to emerge.

It should be noted that the tri-cameral system of government, the homeland system, as well as the Black Local Authorities municipal government system created within the South African community, a specific group of persons. Such a group was likely to defend the perpetuation of

Intergovernmental Relations Reform in a Newly Emerging South African Policy

the separate but equal local governance system, modified slightly to include Black people at the decision making core. This grouping argued strongly for sustaining the acquired ruling class privilege. It is the author's opinion that the Bantustan leadership who assumed they had the right to join the negotiations table, notwithstanding their blackness, sounded like cloned separate development social scientists of the 1950s.

The growth in momentum of the negotiations option, sounded alarm bells for banned liberation movements outside South Africa and a team of exiled constitutional experts, led by, amongst others, the current constitutional court judge Albie Sachs, began smuggling constitutional options into the country. The most significant document to emerge during this period was the Harare declaration that became a well-orchestrated diplomatic coup by the ANC on the ruling National Party government. The declaration galvanized international support for a negotiations process directed by South Africans. The declaration also marked one of the last diplomatic masterpieces to be presided over by Oliver Tambo, the then ANC president. Not only did he preside over a process that ensured the declaration of Apartheid as a crime against humanity, but built the ANC in exile into a South African government in waiting.

The Harare declaration acknowledged the readiness of the then government to engage in genuine negotiations, and encouraged all peoples of South Africa to rally behind this historical call to duty (Harare Declaration, 1989:1). Those constitutional principles put in place to direct the outcome of such negotiations therefore spawned both the 1993 and the 1996 constitutions. The Harare Declaration (1989:1-2) contained the broad principles listed below.

Intergovernmental Relations Reform in a Newly Emerging South African Policy

- South Africa shall become a united, democratic and non-racial state.
- Its entire people shall enjoy common and equal citizenship and nationality regardless of race, colour, sex or creed.
- Its entire people have the right to participate in the government and administration of the country on the basis of a universal suffrage exercised through one person one vote, under a common voters' roll.
- All shall have the right to form and join any political party of their choice provided that this is not in furtherance of racism.
- All shall enjoy universally recognized human rights, freedoms and civil liberties, protected under an entrenched Bill of Rights.
- South Africa shall have a new legal system, which shall guarantee equality of all before the law.
- South Africa shall have an independent and non-racial judiciary.
- There shall be created an economic order, which shall promote and advance the well being of all South Africans.
- A democratic South Africa shall respect the rights, sovereignty and territorial integrity of all countries and pursue a policy of peace, friendship and mutually beneficial co-operation with all people (The Harare Declaration, 1989:1-2).

The ANC's constitutional principles were adopted by the Organisation of African Unity, the Non-Aligned Movement and the United Nations as a foundation for an internationally acceptable solution which would enable South Africa to take its rightful place as an equal partner amongst an African and the world community of nations (Harare Declaration, 1989:1).

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The circumstances around a possible negotiated settlement liquidated the moral reservoir of the National Party in its attempt to continue ruling South Africa. First there was the removal from office of State President PW Botha with FW De Klerk sworn in as President of South Africa. He immediately seized the historical opportunity to preside over South Africa's transition to a non-racial democracy, thus completing the assignment half-done by HF Verwoerd who only decolonised South Africa. President De Klerk, mandated by a Whites - only referendum of 1989 to reform, implemented the conditions set out in the Harare declaration to create a climate conducive to negotiations by releasing Nelson Mandela as an indication of his commitment to negotiations (Sunday Times, 1990, Feb 4:1). In fulfilling the guidelines of the Harare Declaration, a Convention for a Democratic South Africa (CODESA) was convened and the Harare Declaration formed the basis of a declaration of intent by all parties represented at that Convention (CD: 91/DEC/21). The various administrations and executives of the self-governing territories and homelands were given participant status at the Convention, an action that acknowledged the existence of a government infrastructure in those territories.

The CODESA negotiations resulted in the adoption of an interim Constitution, which reflected deeply held positions on IGR. Initially, the Convention was divided into two groups, both informed by historical experience and mistrust in terms of establishing a future government. It is the author's contention that there was a group which propagated a Unitary state with a top-down system of decentralization while on the other hand, there was a Federalist to Confederalist grouping that wanted to dismember and balkanise the country into as many fiefdoms as possible. The nature of any negotiation process dictates that participants should

Intergovernmental Relations Reform in a Newly Emerging South African Policy

find middle ground. As it was characterized by points of agreement, this found resonance with the South African constitutional negotiation process. In relation to the structure of government, a determinant of an IGR system, CODESA adopted a set of guiding principles for the drafting of new constitutions. The guiding principles made it obligatory for the constitution making body to ensure that a new constitution for South Africa recognises, in an IGR setting that:

- legislative organs at all levels of government adhere to formal legislative procedures;
- government shall be structured at national, provincial and local levels;
- at each level of government there shall be democratic representation;
- the powers and functions of the national and provincial government shall be defined in the constitution;
- powers and functions of the province defined in the Constitution, shall not be substantially inferior to those provided for in the 1993 Constitution;
- a special majority of legislatures should be determined to amend or alter the powers, boundaries and functions of provinces;
- exclusive and concurrent powers of the national and provincial spheres be defined in the constitution;
- each level of government shall have legislative and executive powers and functions, although this will be instructed by financial viability and the need to facilitate effectual functioning of government; and
- provisions should be made to minimise national encroachment whilst protecting sub-national repugnancy (Constitution Act 200, 1993:Schedule 4).

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The challenge facing CODESA and the new Constitution was to rationalize the governing structures created by the tri-cameral Parliament and all preceding Constitutions. As a response to this challenge, the 1993 Constitution provided for a National Parliament consisting of the National Assembly and Senate, whereby the Senate would be constituted of ten representatives from each of the nine provinces. The joint sitting of the National Assembly and Senate would also constitute a constitution making body, which was tasked with the drawing up of a “final” Constitution over a five-year period (Constitution Act 200, 1993:s68). The Senate became the official structure that represented provincial interests in Parliament.

In rationalizing the various states, the Constitution followed the Development Bank of South Africa’s nine-development region demarcation and defined the nine regions to be the nine provinces of South Africa; however, there were disputed areas that were recorded as such (Constitution Act 200, 1993:Schedule 1). The establishment of nine provinces created a quasi-stable second sphere of government for the country. The relationship between the provincial and the national spheres was regulated through Section 126 of the 1993 Interim Constitution (Constitution Act 200, 1993:s126). The constitution provided for the legislative competence of provinces as well as for the popular repugnancy clause carried over from previous constitutions (Constitution Act 200, 1993:Schedule 6). The question of provincial competencies was informed by party positions on the subject of a federal or unitary state. The Interim Constitution only provided a framework within which South Africa was to steer its transition from its apartheid past into a non-racial democratic future. The 1996 Constitution was to be a key determinant in the constitutional future of South Africa.

Intergovernmental Relations Reform in a Newly Emerging South African Policy

The various constitutional structures of government and legislatively created organs of state had to be co-ordinated in order to ensure uninterrupted service delivery to its citizenry. The co-ordination of such structures would be a responsibility of officials, executive office bearers and political office bearers within government. In the 1993 Constitution, most of the structures that co-ordinated the work of government between the National and Provincial spheres remained intact with slight modifications. The interaction between National Ministers and their Provincial counterparts have continued to exist; these structures were informal in nature and could only make recommendations to the National executive on matters such as budget allocations, service delivery priorities and policy co-ordination matters (IGR Audit Report, 1999:15). A number of multi-lateral treaties signed with self-governing territories and independent states were maintained during the transition period to enable government to rationalize them into either statutory or non-statutory bodies still to evolve with and within the final Constitution. The interactions and transactions that characterize these structures constitute the core of IGR.

3.5 THE NATIONAL-PROVINCIAL IGR STRUCTURES: 1996 – 2000

The circumstances surrounding the adoption of the 1996 Constitution were a continuation of events that lead to the 1993 Constitution. The Constitution drafting process revealed to South Africa a deep-seated mistrust within and amongst the country's political leadership, despite the fact that those individuals had committed themselves to a South Africa that belongs to all who live in it. The drafting process exposed a number of contentious issues that needed smoothing over by the insertion of certain clauses in the Constitution, the most visible of

Intergovernmental Relations Reform in a Newly Emerging South African Policy

which were secessionist tendencies disguised as federalist ones by the non-ANC controlled provinces.

The fiercest of the debates in the Constituent Assembly raged around the allocation of powers to provinces and the regulation of IGR. The author observes that the debate was such that IGR and federalism could not be distinguished, for IGR is a means to an end whereas federalism has developed into an end itself. IGR therefore, was inserted into the Constitution and the compromise terminology of “co-operative government” that represented a system of government between a unitary state and a federal state was devised. The 1996 Constitution provides for the establishment of South Africa as one sovereign democratic state constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated (Constitution Act 108, 1996:s41).

In institutionalising this co-operative government the Constitution provides for “must” principles to be adhered to by all organs of state. These principles are based on the three ground rules, identified during the constitution making process, as loyalty to the Constitution, the Republic and its people; respect for each other’s constitutional status, institutions, powers and functions, and, non-encroachment into geographical, functional and institutional integrity of another sphere (Discussion Document, Sub-Committee 2, Constituent Assembly, 1996:1-2). In a study on IGR, the Department of Provincial and Local Government identifies the principles in the following broad categories: national unity, decentralization, co-operation, fostering friendly relations, informing and consulting one another on matters of common interest, co-ordinating actions and legislation with one another, assisting and supporting one another, adhering to agreed procedures and avoiding legal proceedings (IGR Audit Report,

Intergovernmental Relations Reform in a Newly Emerging South African Policy

2000:9-12). The Constitution made further provision for legislation to regulate IGR, the merits of which shall receive attention in subsequent chapters of this study.

The implementation process of Chapter Three of the 1996 Constitution required a review of the IGR mechanisms (structures) in existence and an evaluation of whether there was a need to establish new ones. The structures or mechanisms that existed, as a cut-off point of this study, will be categorized into broad categories, that is, into the statutory and the non-statutory (formal and informal). The statutory structures or mechanisms include, for example:

- the Budget Council established in terms of the Intergovernmental Fiscal Relations Act, [Act 97 of 1997];
- The Council of Education Ministers and the Heads of Education Department Committee established by the National Education Policy Act [Act 27 of 1996];
- The Financial and Fiscal Commission [Act 99 of 1997];
- The Loan Co-ordinating Committee [Act 48 of 1996];
- The Local Government Budget Forum [Act 97 of 1997]; and
- The National Council of Provinces [Act 108 of 1996].

The non-statutory structures or mechanisms included those created by executive order or decision and aimed at co-ordinating the activities of National and Provincial government. These included the following: an Intergovernmental Forum (established by President Mandela) that promoted “dialogue” between national and provincial governments; the President’s Co-ordinating Council (established by President Mbeki) consisting of the President and Premiers with a “strategic” dialogue focus; and IGR Committees of Ministers

Intergovernmental Relations Reform in a Newly Emerging South African Policy

and Members of provincial Executive Councils (MinMecs), established for those areas where provincial and national government competencies are concurrent matters. In those areas where there is a national competency a number of *ad hoc* structures emerged as partner institutions. Also, the forum for South African Directors-General was established by cabinet to help co-ordinate policy and to facilitate intergovernmental co-operation at the horizontal and vertical level of government (Thornhill *et al.*, 2002:21).

3.6 CONCLUSION

The historical development of IGR in South Africa has been driven mainly by the prevalent constitutional dispensation. By creating four provincial governments with substantial autonomous legislative and executive powers, the 1910 Constitution triggered a contestation of powers for provinces that was to bedevil subsequent constitutions. In both Constitutions, from 1910 to 1996 the position of the Executive head of government as being pivotal to IGR was an unwavering one.

The nature of IGR as the interactions and transactions conducted by executives (in the constitutional sense) between and amongst governments in a country, underwent a number of cyclical journeys. In the early constitutional days it was given recognition through the trust displayed by the Union government with respect to provinces, through to the 1961 dispensation which left such powers untouched. The 1983 Constitution and a number of pieces of Black self-government legislation further recognized the relative importance of co-ordination. It was actually during this period that most powers were decentralized and devolved, though racially, to sub-national units of government. The National government

Intergovernmental Relations Reform in a Newly Emerging South African Policy

relied heavily on the goodwill, the attitude and the commitment of sub-national units to coordinate its service delivery drive. The principles of asymmetry and subsidiarity enjoyed prominence during the 1983-1993 era where sub-national units were allocated powers based on their capacities.

It is the author's submission that the adoption of the last two constitutions saw a movement towards centralization of decision making, thereby ignoring the potential of interactive and transactional governance amongst spheres. The IGR structures or mechanisms established from May 2000 began to signal a movement towards a centrally driven IGR. The Presidential co-ordinating Committee and cabinet cluster initiatives are just a few examples of the pivotal role that a central office such as that of the Presidency can play in co-ordinating IGR. The evaluation of the IGR structures established and disestablished, especially in terms of their efficiency and effectiveness, will be handled in the ensuing chapters. Such evaluations will be based on an understanding of the nature of IGR, its origins and other theoretical underpinnings of IGR including forms of government.