

CHAPTER 4

CO-OPERATIVE GOVERNANCE AND INTERGOVERNMENTAL RELATIONS

4.1 INTRODUCTION

The spirit of the 1996 Constitution on spirit of 'co-operative governance' is reflected in its reference to 'spheres', rather than 'tiers of government'. In the system of co-operative governance the three kinds of government are not stacked on one another in hierarchical fashion, as the term tier suggests. South Africa's constitutional system is characterised by its integrated and cooperative nature, in contrast to the competitive federal system which exists in countries such as Canada and the United States. Based on the principle of *Bundestreue* (federal loyalty and trust) found in the German constitutional system, a specific chapter (Chapter 3) on cooperative government was included in the South African Constitution. The clear allocation of responsibilities between national, provincial and local governments is an important prerequisite for successful decentralisation that facilitates development driven at the local sphere. Decentralisation can address poverty, gender inequality, environmental concerns, the improvement of healthcare, education and access to technology.

National government is tasked to develop a sound intergovernmental relations system that is conducive to socio-economic transformation and through which it can provide a range of support mechanisms to assist municipalities in effecting fundamental change at grassroots level. Political leadership, with certain noticeable exceptions, in both provincial and local government do not sufficiently assert their powers and the capacity to exercise such powers is lacking. Both the national and the provincial governments have the legislative authority to see to effective performance by municipalities of their functions by regulating their executive authority.

The division of powers and functions between provincial and local government in schedule 4 and 5 lacks clarity and precision. Fiscal decentralisation is the most

comprehensive and possibly traceable degree of decentralisation since it is directly linked to budgetary practices. This chapter seeks to outline the concepts of intergovernmental relations and co-operative governance and their relevance with regard to environmental issues.

4.2 OVERVIEW OF INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA

According to Levy and Tapscott (2001:5) the adoption of an Interim Constitution in 1994 and a Final Constitution in late 1996 represented the formal and final repudiation of apartheid rule. Significantly, the new Constitution also specified the configuration of the state and stipulated that there be "national, provincial and local spheres of government" and that these be "distinctive, interdependent and interrelated". The decision to describe the different levels of government as "spheres" rather than "tiers" was a conscious attempt to move away from the notion of a hierarchy with all the connotations of subordination. In practice this has not generally proven to be the case, as the essence of hierarchy remains prevalent in the "distinctiveness" (the relative powers) of the different spheres of government, however much they may be mediated by the principles which the Constitution requires for the conduct of intergovernmental relations. They further observe that one of the most controversial issues in the debate that preceded the drafting of the Interim Constitution was whether the South African State should be unitary or federal in nature. This reflected a tension between the need to devolve power to the provinces and the need to maintain central control. While the devolution of power was seen by the African National Congress (ANC) alliance as being of importance in taking democracy to the people, there was also an expressed fear that the devolution of too much authority to the provinces could lead to a situation of too much authority to the provinces could lead to a situation where the national government's efforts to overcome the legacy of apartheid to build a new national identity would be thwarted by political intransigence at lower levels (Levy and Tapscott 2001:5).

According to Van Zyl (2003: 23), all spheres are seen as equal partners in the system of co-operative government. The national government will, for example, no longer 'grant'

funds to lower tiers of government, but merely 'transfer' the constitutional share of revenue of another sphere to it. Haysom (2001:44) observes that from 1990, as a broad consensus began to emerge on the most difficult issues of the constitutional process, (non-racial majoritarian democracy and the protection of cultural, religious, language and political rights through a Bill of Rights), the differences in approach to provincial autonomy and functions became sharper. The initial federalism debates were unhelpful with respectively the African National Congress (ANC), on the other hand, and the federalists, on the other, talking past each other. The advantages and disadvantages of federalism, eloquently set out in the various documents, were simply repeated. Federalism became a byword for obstructing majoritarian democracy, for a costly, corrupt and inefficient system of government of which apartheid's Bantustans had been demonstrable proof. At a time when South Africa was attempting to heal the racial and ethnic divisions created by a violent past and nurtured under apartheid, federalism would serve only to create a centrifugal dynamic at the heart of its political system. It would also become a vehicle for secessionist and even insurrectionary forces. It was in this context that federalism became pejoratively associated with apartheid. Those who advocated federalism were seen as promoting a system that would frustrate majoritarian democracy and reduce the capacity of national government to effect the necessary transformation. And yet, on the other hand, the demands by the federalists for the construction of a system of government that would promote accountability and democracy, and allow for diversity and difference could not be adequately met within the traditional unitarian response. Those parties that opposed federalism were seen to be promoting intrusive government, and to be opposed any checks on the exercise of national power, and were considered insensitive to regional and cultural difference.

Chapter 3 of the 1996 Constitution analyses the political origins of the Constitution and the nature of the particular form of the constitutional division of powers. It discusses the constitutional context of intergovernmental relations and its implications for co-operative government. All law-making power in South Africa is vested in the national legislature unless it has been expressly granted to provincial and local government. This distinguishes South Africa from, for example, the United States which came together to

form a single country, and gave to their national (federal) government only those powers that they thought a national government should have. All remaining powers remained with the states, although subsequently, as the role of the national state expanded, this in itself was not unproblematic. It also distinguishes South Africa from Canada, where there are separate lists of federal and provincial powers.

A second distinguishing feature of the intergovernmental arrangements in the South African Constitution is the status of local government. Few constitutions deal with local government matters at all, but local government is central to the scheme of division of powers in the South African Constitution. Local government is not only established as a separate sphere of government alongside the provinces and national government, but the Constitution also anticipates that local government will develop into a strong and important sphere carrying substantial responsibility for the delivery of services and the development of the country (Murray 2001: 68). According to Brand (2007: 5), South Africa's constitutional system is characterised by its integrated and cooperative nature, in contrast to the competitive federal system which exists in countries such as Canada and the United States. Based on the principle of *Bundestreue* (federal loyalty and trust) found in the German constitutional system, a specific chapter (i.e Chapter 3) on cooperative government was included in the South African Constitution.

The Constitution provides for both concurrent and exclusive powers in schedules 4 and 5 respectively. This gives rise to an authentic quasifederal system, rather than one that is purely unitary or federal, in the strict sense of the word. The Constitution provides for three spheres of government, namely national, provincial and local. The powers of these three spheres are entrenched in the Constitution and they thereby contribute to the overall federal character of the Constitution, involving not merely double government, but triple government, which is not static but dynamic in operation. The financial viability of each of the spheres also influences the nature of the federal model that emerges from the Constitution, as it operates in practice (Devenish 2006: 129). The political challenge to national government was thus to control these 'necessary evils' created by an unwanted political compromise. The formulation of the policy of 'co-

operative governance' was a response to this challenge. In its chapter on co-operative governance, the Constitution merely states that spheres can only use legal action against one another as a last resort and lists a set of principles by which all spheres of government should abide. The ANC's submission to the Constitutional Assembly in this regard is much more revealing. It presents co-operative governance as a middle path between a unitary and a federal state: 'Provinces should become an important component of central government and national policy making itself'. Co-operative governance would meet the challenge of establishing a system of provincial government 'to provide for legitimate regional aspirations and needs without denying the context of overall national imperative. This would be effected by 'an integrating and co-operative mechanism which encourages provincial governments to work with each other and the national government'. The reconstituted Senate or 'National Council of Provinces' (NCOP) was intended to be the integrating mechanism between provincial and national government. The NCOP would allow provinces greater say in national decision-making, but also co-opt them and force them to consider the impact of their decisions on national imperatives (Van Zyl 2003: 33).

The evolving of the principle of co-operative governance is based on the international experience, but what is more important is that it is based on a political compromise.

4.3 DECENTRALISATION

According to Reddy and Sabelo (1997: 576), the word "decentralization" is indicative of the presence of something at the centre, from which it may be dispersed. Most individuals and governments favour the concept of decentralization as it implies the hope of cracking open the blockages of an inert central bureaucracy, curing managerial constipation, giving more direct access for the people to the government and the government to the people, and stimulating the whole nation to participate in national development plans. Reddy and Sabelo (1997: 577) assert there are four arguments in favour of decentralisation, viz, the first is based on the assumption that the demand for local public services varies from place to place. Only decentralized provision of local

services will adjust to the multifaceted demands. The second is efficiency. It can be argued that locally financed and produced services will cost less. The third is of a political nature. Local government is an important training ground for democracy. Stronger regional or local governments can control the tendency of central government to become all powerful. The fourth and last could be called institutional. Co-ordination at the local level is necessary and local public services cannot and would not be treated independently. Local government can co-ordinate these services much more easily than a national government would.

De Visser (2002: 2) submits that another important prerequisite for successful decentralisation that facilitates development driven at local level is the clear allocation of responsibilities between national, provincial and local governments. Uncertainty over who does what often leads to inadequate governance and will stifle the development mandate of local government. Clarity over assignments, the procedures, their content and impact is therefore of paramount importance. Reddy and Sabelo (1997: 579) cite a Commonwealth round table on Democratization and Decentralization for Senior Local Government Policymakers in Africa, where the following programme of action was endorsed relative to governance and the promotion of democratic local government on the continent:

- adherence to the Commonwealth principles of democratization and decentralization entailing a commitment to democracy, fundamental human rights, the rule of law, the independence of the judiciary and just and honest government including the empowerment of people at local level, unrestricted political activity and organizing of fair and free elections at local level;
- allocation of the necessary resources and technical expertise by central governments as well as the international donor community, to ensure the successful preparation and implementation of the democratic agenda, including support for civic education programmes;

- recognition of the role that participatory local government can play in support of the consolidation of democracy and development objectives;
- the promotion of a co-operative policy and institutional framework for intergovernmental relations in the area of local government;
- an adequate enabling environment for local government, including the necessary constitutional, legislative and financial safeguards and allocations;
- effective devolution of power to ensure that local government is recognized by central government as a distinct sphere of government and a partner in development;
- restructuring of ministerial organizations and decentralization of the national administrative machinery in response to public sector reform and support for good governance;
- consolidation of the democratic process by support for post-election capacity building and induction/training programmes for elected local representatives;
- recognition of the need for close links between local democracy and parliamentary democracy at national level;
- effective implementation of the International Union of Local Authorities (IULA) Toronto Declaration on the Worldwide Declaration of Local Self-Government (adopted in June 1993) as a valuable guideline for the promotion and strengthening of local government;
- recognition that traditional leadership is afforded considerable credibility and functions in many local communities and that with the creation of appropriate

mechanisms for their involvement, such leadership can assist in the realization of development goals;

- full and active participation of women in local government;
- full participation of local communities in the decision-making process, especially with regard to project identification and implementation; and
- democratization and decentralization strategies must not compromise the integrity of the country concerned

Hoffschulte (2008: 110) writes that since then the promotion of efficient decentralisation has been both a core concern in the UN debate and a major element of the good governance strategy during the past ten years. Especially the UN Habitat Department has worked in active partnership with 'national and local governments' – to use the UN terminology – to strengthen local authorities simply with the aim of implementing UN goals, and in particular the Habitat Agenda of 1996. This fundamental text outlining the 'goals and principles, commitments and the global plan of action' dedicates a whole chapter to issues of 'Decentralization and the strengthening of local authorities and their associations/networks'. Hoffsculte (2008: 123) further observes that cities and local authorities have never before been so much in the focus of the UN. This is mainly the result of the tireless efforts of local politicians in international associations. The Council of European Municipalities and Regions (CEMR) as the European section of the largest international organisation, the United Cities and Local Governments (UCLG), performed pioneering work in this respect. The examples of the implementation of Agenda 21 and the Millennium Goals – the broad and hopeful goals set by the UN – make it increasingly clear to many governments of UN member states that decentralisation and the strengthening of local authorities will be of vital importance also in other fields now and then addressed by UN resolutions. Sustainable successes cannot be achieved by sidelining local authorities, but only in cooperation with them.

Work (2002:2) argues cogently that decentralisation is a complex process that reaches beyond structural reforms proposed in institutional frameworks. Decentralisation can address poverty, gender inequality, environmental concerns, the improvement of healthcare, education and access to technology. Moreover, decentralisation does not only affect government and civil service, but is conditional on the involvement of community organisations, stakeholders in the private sector, international aid organisations and citizens. Decentralisation brings decision-making closer to the people and therefore yields programmes and services that better address local needs. The challenge is to ensure that all stakeholders can, and will voice their opinions. As part of the decentralisation process, policy makers and politicians are integrating programmes to address citizen participation, promote advocacy groups, incorporate women and the poor in policy decisions, aid in poverty reduction and environmental initiatives at the local level, and encourage subnational autonomy and creativity in addressing local needs.

Work (2002:18) is of the view that while decentralisation is primarily a political process, it will not be successful unless adequate provision is made to finance the devolved or deconcentrated responsibilities. As is evident from the few case studies presented above, a large impediment to local service provision is lack of resources. More capacity and technical expertise needs to be provided in the areas of local revenue generation and financial assistance from the centre. While the decentralisation process in South Africa is far from complete, the comprehensive vision of South African policy makers is remarkable. The design of the political, fiscal and institutional changes is being managed simultaneously and in different ways for different jurisdictions. Bekink (2006: 109) echoed same sentiments, he writes that although decentralization of functions is often desirable to improve effectiveness, it must be thoroughly investigated and considered. Without proper financial and administrative support the devolution of functions to local government can easily cause more damage than good. Devolution without such support is often referred to as an "unfunded mandate", which usually puts more strain on the already limited resources of municipalities and can finally result in a lack of proper delivery. In order to avoid unfunded mandates, it is suggested that all

legislation or executive actions that deal with the decentralization or assignment of powers are timeously referred to the Organised Local Government structures for discussion and comment.

4.4 CONSTITUTIONAL PROVISIONS OF THE CO-OPERATIVE GOVERNANCE

Chapter 3 of the 1996 Constitution deals with Co-operative Governance. It provides that government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. 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. Section 41 of the Constitution provides that all spheres of government and all organs of state within each sphere must:

- preserve the peace, the national unity and the indivisibility of the Republic,
- secure the well-being of the people of the Republic,
- provide effective, transparent, accountable and coherent government for the Republic as a whole,
- be loyal to the Constitution, the republic and its people,
- respect the Constitution status, institutions, powers and functions of government in the spheres,
- not assume any power or function except those conferred on them in the terms of the Constitution,
- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institution integrity of government in another sphere; and
- co-operate with one another in mutual trust and good faith by-
 - fostering friendly relations,
 - assisting and supporting one another,
 - informing one another of and consulting one another on matters of common interest,

- co-ordinating their actions and legislation with one another,
- adhering to agreed procedures; and
- avoiding legal proceedings against one another.

Steytler (2005: 204) submits that South Africa's system of decentralization is conceptualized as a three-cornered hat- the three spheres of government are 'distinctive' in their powers, 'interrelated' in a hierarchy of supervisory powers, and 'interdependent' to perform the task of government in a cooperative manner. Indeed, within the system of cooperative government prescribed in the Constitution, local government is reserved a place in both national and provincial decision-making. To function effectively, local government, consisting of numerous municipalities, is required to act as a collective. Organized local government has thus been institutionalized in the Constitution and legislation. Section 154(1) of the Constitution provides that the national government, 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. Section 154(2) further provides that draft national and provincial legislation that affect the status, institutions, powers or functions of local government must be published for public comment before or is introduced in Parliament or a provincial legislature, in a manner that allows organized local government, municipalities and other interested persons an opportunity to make representation with regard to the draft legislation. Williams (2001: 212) observes that this stipulation is in keeping with the concept of co-operative government and considered essential for the proper functioning of democratic institutions.

Carpenter (1999: 51) perceptively observes that provision in the Constitution contains both "hard" and "soft" phrases. Among the "soft" phrases are the ones that refer to friendly relations, assistance and support, consultation and information, and avoiding legal proceedings. Among the "hard" phrases are those enjoining spheres of government not to arrogate the powers of other spheres to themselves, not to impinge on the geographical, functional and institutional integrity of other spheres, and so on. Of course, the word "integrity" is used here in its original sense of "wholeness" and not in

the modern acquired sense of "honesty" or "probity". Subsection 1(h)(vi) is further shored up by subsection (3), which provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all of the remedies before it approaches a court to resolve that dispute. All of these provisions are part of the objective of ensuring effective, transparent, accountable and coherent government of the Republic as a whole. These objectives may seem to be value-free at first glance; in truth they represent the profoundest values of the democratic state.

In terms of the constitutional provisions, national government is tasked to develop a sound intergovernmental relations system that is conducive to socio-economic transformation and through which it can provide a range of support mechanisms to assist municipalities in effecting fundamental change at grassroots level. However, in terms of the constitutional provisions, transformation ultimately rests in the hands of each municipality. This means, amongst other things, that municipalities must consider critically about how they operate and relate to local communities; they must develop their own strategies for meeting local needs and also promote the social and economic development of communities. The basis of an effective and transparent intergovernmental relations system is predicated on the stipulation in the Constitution that government comprises national, provincial and local sphere, which are distinctive though interdependent and interrelated. This specifically means that each sphere has its own powers and functions, yet requires the assistance and support of the other sphere to effectively render service to the public. Thus conceived, section 41 on co-operative government is an affirmation of the integrity of the three spheres of government and their mutual interdependence and interrelatedness. Accordingly, section 40(2) stipulates that all spheres of government must observe the principles of co-operative government and intergovernmental relations and conduct their activities with their pre-defined parameters (Williams 2001:211).

Devenish (2006:136) avers that in section 40 of the Constitution provision is made for "national, provincial and local spheres of government, which are distinctive, interdependent and interrelated". The term "level" of government is no longer used. The latter created the impression of a hierarchy, with the national government at the top and local government at the bottom of the hierarchy. The term "sphere" creates the impression that we are dealing with co-ordinate as opposed to subordinate, aspects of government. Therefore there has been a discernable move away from the idea that provincial and local government are subordinate to national government. The former must now be viewed as co-ordinate with national government. It is important to stress that in theory this reflects a federal philosophy which is in accordance with the critical test for federal government referred to above in which each sphere is "coordinate with the others and independent in their respective spheres". What is interesting and possibly unique about the South African model is that this aspect of federal government relates not only to provincial government, but also to local government as well. However, this philosophy of federal government, involving genuine co-ordination and co-operation, must, however, be put into practice. This requires that the political leaders in provincial and local government must assert their autonomy, since in practice it appears that far too much power is concentrated in central government and in general. It is submitted that political leadership, with certain noticeable exceptions, in both provincial and local government do not sufficiently assert their powers and the capacity to exercise such powers is lacking.

Steytler (2003:7) submits that in South Africa the constitution provides that national and provincial government may regulate the exercise by municipalities of their powers in the listed functional areas. Both the national and the provincial governments have the legislative authority to see to effective performance by municipalities of their functions by regulating their executive authority. However, such regulation is subject to an override test; not compromise or impede a municipality's ability to govern. Edwards (2008: 68) avers that the system of cooperative governance is a philosophy that governs all aspects and activities of government. Cooperative government is a partnership between the three spheres of government, where each sphere is distinctive

and has a specific role to fulfil. On the other hand, intergovernmental relations are concerned with the political, financial and institutional arrangements regarding interactions between the different spheres of government and organs of state within each sphere. Intergovernmental relations is one of the means through which the values of cooperative government may be given institutional expression. Murray (2001:67) is of the view that the intricacies of intergovernmental arrangements and the political complexity of managing relationships amongst governments make it easy to lose sight of the constitutional goal of better society for all. This is probably so now as institutions are young and in the early stages of defining their roles and their relationships to another. The real difficulties encountered in developing the structures and processes that are needed for proper intergovernmental communication tends to obscure their goal. At the same time, a failure to keep the constitutional goal of intergovernmental processes may compound difficulties as co-operation becomes viewed as the end rather than as a means to an end.

4.5 THE ROLE OF NATIONAL GOVERNMENT IN CO-OPERATIVE GOVERNANCE

The White Paper on Local Government (1998:59) provides that all spheres of government are obliged to observe the principles of co-operative government put forward in the Constitution. Co-operative government assumes the integrity of each sphere of government. But it also recognizes the complex nature of government in modern society. No country today can effectively meet its challenges unless the components function as a comprehensive whole. This involves:

- Collectively harnessing all public resources behind common goals and within a framework of mutual support.
- Developing a comprehensive, multi-sectoral perspective on the interests of the country as a whole, and respecting the discipline of national goals, policies and operating principles.
- Co-ordinating their activities to avoid wasteful competition and costly duplication.
- Utilizing human resources effectively.

- Setting disputes constructively without resorting to costly and time-consuming litigation.
- Rationally and clearly dividing between them the roles and responsibilities of government, so as to minimize confusion and maximize effectiveness.

National government has a number of roles and responsibilities with respect to local government, including:

- A strategic role: national government is responsible for setting the overall strategic framework for the economic and social development of the nation, and for all spheres of government. It should ensure that local government operates within an enabling framework and is structured and capacitated in a way that best enables it to promote the development of citizens, local communities and the nation.
- National government must provide an overall legislative framework for local government within the general framework set out in the Constitution. This includes:
 - Establishing the criteria for the demarcation of municipal boundaries, the definition of categories of municipalities and types within the categories.
 - Making provision for an appropriate division of powers and functions between Categories (C) and Categories (B) municipalities and municipal electoral systems and administrative matters.
 - Ensuring that provincial legislation with respect to local government is formulated within a national legislative framework.
 - Providing a framework for intergovernmental relations, including the structures, procedures and mechanisms to promote and facilitate positive intergovernmental disputes within and between the spheres of government.

According to De Villiers (2007: 11) each sphere has constitutionally guaranteed powers and functions, although the national parliament is empowered to legislate to set minimum norms and standards applicable to the entire nation. The power of the national

sphere to ensure that minimum standards of services are provided to all individuals regardless of where they reside, is therefore recognised and guaranteed.

4.6 THE ROLE OF PROVINCIAL GOVERNMENT IN CO-OPERATIVE GOVERNANCE

The White Paper on Local Government (1998:61) provides that provincial government has a number of roles and responsibilities with respect to local government, including:

- A strategic role: with respect to developing a vision and framework for integrated economic, social and community development in the province through the Provincial Growth and Development Strategy.
- A developmental role: provincial government should ensure that municipal Integrated Development Plans (IDP's) combine to form a viable developmental framework across the province, and are vertically integrated with the Provincial Growth and Development Strategy. Provincial government is also responsible for processing grants to municipalities for bulk infrastructure, housing, public works and so forth. Provincial government should ensure that municipal planning and budgeting processes give priority to the basic needs of the community and promote the social and economic development of the community as required by Section 153 of the Constitution.
- An Intergovernmental role: provincial government has an intergovernmental role to play with respect to local government. It should establish forums and processes for the purpose of including local government in decision-making processes which affect it. Provincial government can also promote horizontal co-operation and co-ordination between municipalities in the province.
- Regulatory role: section 155(7) of the Constitution gives national and provincial government the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority with respect to the matters listed in Part B of Schedule s 4 and 5, and any other matter assigned to local government by legislation.

Provincial governments have an important role to play in respect of local government. In order for local government to take part in decision making process that affect them, provincial governments need to establish forums and processes to ensure their involvement. By establishing forums and processes, provincial governments can promote horizontal co-operation and co-ordination between municipalities within their jurisdiction. A province needs to promote the development of local governments capacity to enable them to perform their functions and manage their own affairs. Although the responsibility of capacity building and training is not the sole responsibility of provinces, provinces can play a vital co-ordinating role. Provinces can build the capacity of municipalities in various ways, such as facilitating or funding training programmes, and providing technical assistance with municipal Integrated Development Plans (IDPs) (Smith 2002:10).

De Villiers (2007: 11) writes that the system of intergovernmental relations is a practical recognition that the powers and functions of provincial and local governments cannot be defined in terms of watertight compartments, and that coordination must take place to ensure the best possible outcomes and the most effective use of resources. Mettler (2000: 13) adds that in terms of the current division of powers between categories of municipalities, these two categories of municipalities will be the driving engines of delivery within a province. The purpose of the relations between the province and these municipalities, beside the monitoring, support, regulation and supervision purposes, must be to coordinate and facilitate the alignment and implementation of provincial development plans and strategies within these municipalities. These plans and strategies would have been identified in the integrated development planning processes between the province and municipalities.

Section 139 of the 1996 Constitution provides that when a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation including –

- Issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligation and stating any steps required to meet its obligations;
 - Assuming responsibility for the relevant obligation in that municipality to the extent necessary to –
 - Maintain essential national standards or meet established minimum standards for the rendering of a service;
 - Prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - Maintain economic unity; or
 - Dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.
- If a provincial executive intervenes in a municipality–
 - It must submit a written notice of the intervention to –
 - The cabinet members responsible for the local government affairs; and
 - The relevant provincial legislature and the national Council of Provinces, within 14 days after the intervention began;
 - The intervention must end if –
 - The Cabinet member responsible for the local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

- The Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
- The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
- If a Municipal Council is dissolved –
 - The provincial executive must immediately submit a written notice of the dissolution to –
 - The Cabinet member responsible for local government affairs; and
 - The relevant provincial legislature and the national Council of provinces; and
 - The dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.
- If a municipality cannot or does not fulfill an obligation in terms of the Constitution or legislation to approve a budget or any revenue- raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and –
 - Appointing an administrator until a newly elected Municipal Council has been declared elected; and
 - Approving the temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

- If a municipality, as a result of a crisis in its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must –
 - Impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which –
 - Is to be prepared in accordance with national legislation; and
 - Binds the municipality in the exercise of its legislative and execution authority, but only the extent necessary to solve the crisis in its financial affairs and
 - Dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and –
 - Appoint an administrator until a newly elected Municipal Council has been declared elected; and
 - Approve a temporary budget-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or
 - If the Municipal Council is not dissolved, assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.
- If a provincial executive intervenes in the municipality, it must submit a written notice of the intervention to –
 - The Cabinet member responsible for local government affairs; and

- The relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.
- If a provincial executive cannot or does not or does not adequately exercise the powers or perform the function in the stead of the relevant provincial executive.
- National legislation may regulate the implementation of this section, including the processes established by the section

According to De Visser *et al* (2000:19) section 139 does not require a total collapse of service delivery. Authors draw their conclusion on the basis of the text of section 139 where section 139(1)(b) speaks of assuming responsibility 'for the relevant obligation'. Failure in only one particular functional area can merit intervention. De Visser (1999: 9) writes that there can be little doubt that a general utterance of discomfort or dissatisfaction by the residents of the municipality does not suffice. When defending the intervention, the province must point at objective factors. Examples are records of electricity or water supply, photographic material of, for instance, municipal roads, statements made (under oath) by high officials and any other evidence that can prove the existence of objective facts that made the province resort to intervention.

De Visser (1999:10) argues that it would be unfair and subversive to the idea of co-operative governance if a province would fail to fulfil that constitutional duty of providing the necessary support and subsequently assume responsibility for that municipality. The result of this would be that a province could be in the position to promote the usurping of power of a municipality by withholding the necessary support which would result in the collapse of the municipality. This is an extreme position and would constitute 'bad faith' on the part of the province. But then again, disputes and arguments between provinces and municipalities are not uncommon. On the other hand, it does not seem to make sense to prohibit a province from intervening, and to allow the situation in the municipality to get worse, simply because of inaction by the province in the past. This would result in an untenable situation.

4.7 INTERGOVERNMENTAL FISCAL RELATIONS

In contrast with political science and constitutional law, the generic meaning of the term “federalism” in economics is decentralization, and the fiscal federalism literature deals with the fiscal implications of a decentralized system of multi-level government. The prime economic justification for the role of subnational governments within fiscally decentralized systems is the potential to improve allocative efficiency. Allocative efficiency in the public sector is concerned with whether, subject to budget constraints, the public sector produces the level and mix of public services (public expenditures) which citizens demand and which correspond with their preferences. In other words, instead of a single central government providing uniform goods and services to all its citizens in a “one size fit all” approach, subnational governments are more easily able to tailor the local costs of inputs which may differ from location to location (Ajam 2001: 126).

Although the actual equitable share to a particular province according to “objective criteria” is justiciable, the provisions of section 41 requiring the “principles of co-operative government and intergovernmental relations” must be complied with. What emerges from this is undoubtedly a form of federal government, but one that is different and weaker in character, than for instance American federalism, where the States have formidable powers and are not inhibited from litigating in relation to these. However, the shares allocated to the provinces must take into account provincial fiscal capacities, needs, and disparities, thereby building in the principle of inter-provincial revenue equalisation, which is an important feature of both German and Canadian fiscal federalism. Notwithstanding, the process is controlled by the centre because national legislation, according to section 215, determines the form and timing of the budgets in all three spheres of government, and is authorised to set out the rules to ensure “both transparency and expenditure control” as required by section 216 (Devenish 2006: 140).

The key issue confronting local governments is sustainability. A culture of non-payment has led to the accumulation of arrears and squeezed the revenue side of municipal budgets. One of the challenges of the newly demarcated local governments is to improve financial management to ensure that budgets are adhered to (Ajam 2001:141). The Intergovernmental Framework Relations Act (IFRA) No. 13 of 2005 established a consultative forum, the Budget Council –which includes the provincial Members of Executive Council (MECs) responsible for finance as well as relevant central government officials to coordinate financial relations between national and provincial government. Its role is to make recommendations on the horizontal division of the provincial equitable share of revenue before the division is finalised by the Cabinet (Van Zyl 2003: 26).

The Division of Revenue Act determines the equitable shares of each sphere of government as well as the conditional grants transferred from national to provincial and local governments. The Intergovernmental Framework Act requires that the Treasury table an explanatory memorandum with the Division of Revenue Act. This memorandum is intended to give further information on the vertical (i.e. between the national, provincial and local spheres of government) and the horizontal (between the nine provinces) division of revenue. It covers the formula that is used and gives the data on which the formula was based. This formula is also subjected to extensive debate and negotiation in the Budget Council. But the Budget Council does not discuss the vertical split that determines the total amount of money to be divided between the provinces. Neither does the explanatory memorandum to the Division of Revenue Act give any real basis for this allocation. It merely lists the constitutional criteria taken into account by this split and then claims that the vertical split is the result of a 'political decision'. No details are given as to what political considerations presented themselves or how choices were made between different available scenarios. In this way Parliament and the provinces are not given the information necessary for meaningful interaction with the division of revenue between the three spheres of government. The Division of Revenue Act has also been used to set conditions on certain categories of provincial revenue and expenditure. A good example is the 'supplementary allocation' that is transferred to

provinces on condition that they submit their reports to national government on time, spend 85 per cent of their budgets on social services and pay off their debt (Van Zyl 2003: 27).

Brand (2007: 4) submits that the Budget Council, which comprises the minister of finance as its chairperson and the nine provincial members of the executive council (MEC) responsible for finance, is perhaps the most important intergovernmental structure. This consultative body meets frequently to discuss matters pertaining to intergovernmental financial and fiscal relations. Although the Budget Council is seen as an effective intergovernmental forum, it is increasingly utilised as a 'management tool' for the minister of finance to ensure that national policies are carried out effectively in the provinces, and it is less of a consultative forum where provinces' views are accommodated.

According to Fjeldstad (2001: 5), without transparency and an appropriate regulatory framework, there can be no accountability. South Africa in the late 1990s provides an illustrative example: The national government and the provinces have joint responsibilities for health and education, but the exact responsibilities of each are not defined. The result is that provinces receive transfers to fund these services but may use them for other purposes, knowing well that the national government will intervene to provide the needed service. Fjeldstad (2001:13) further submits that intergovernmental fiscal systems should be approached in the specific circumstances of each country in a manner that is consistent with achieving the relevant policy objectives. These objectives include efficient allocation of resources, income distribution and macroeconomic stabilisation. Furthermore, they may include objectives such as achieving 'regional balance' in the country. Often, there will be conflicts not only between these objectives, but also between local and central perceptions on the weights to be attached to them. Moreover, like all public policies, intergovernmental fiscal policies must take into account both the political constraints facing policy makers, such as the strength of different provinces and groups in political decisions, and economic constraints such as the stage of development of financial markets. Finally, all policy changes proposed must

start from the given set of initial conditions: every country has a history, and the current state of its fiscal institutions in large part reflects the product of an evolutionary process of policy change over time.

Brand (2007: 4) writes that in federal or multilevel systems of government one finds varying degrees of fiscal decentralisation or centralisation depending on the way one looks at it. Fiscal decentralisation has the potential to strengthen good governance values such as accountability and public participation, and to accommodate diversity if the respective provinces have sufficient administrative capacity to educate the citizens about their developmental needs and their preferences regarding the delivery of services. In a country such as South Africa with diverse needs in the various provinces and local communities, fiscal decentralisation could be quite beneficial, but it is dependent on the development of sufficient and appropriate administrative skills at provincial and local government level.

Fiscal decentralisation is the most comprehensive and possibly traceable degree of decentralisation since it is directly linked to budgetary practices. Fiscal decentralization refers to the resource reallocation to sub-national levels of government. Arrangements for resource allocation are often negotiated between the central and local authorities based on several factors including interregional equity, availability of resources at all levels of government and local fiscal management capacity. Experience in fiscal decentralisation has led to capacity building in expenditure and revenue assignment as well as the design of fiscal transfer formulas and sub-national borrowing (Work 2002: 6).

4.8 INTERGOVERNMENTAL STRUCTURES

Du Plessis (2008: 109) advises that for cooperative environmental governance to succeed, political buy-in and leadership are still needed. A policy or working document should be formulated with the participation of all role players. To succeed in the implementation of the policy, the necessary human, financial and technical resources should be provided. Good use can be made of the structures in the Intergovernmental

Relations Framework Act. These structures should be established on all governance levels and technical committees should be appointed, especially pertaining to environmental matters. However, it must be ensured that there is buy in of all politicians and officials at all levels of government.

According to Kirkby *et al* (2007: 160), many local municipalities have questioned their district's ability or capacity to provide leadership, in policy or action. In some districts, one or more strong local municipalities are wealthier and have more capacity than their districts. The strong local is then in the paradoxical position of helping the district to fulfil its duties, particularly in relation to other, less capable local municipalities. In this case, intergovernmental forums should recognise the actual capacity of municipalities and let the most capable municipalities have a bigger role to benefit all municipalities in the district. In cases where a district insists on taking a leadership role it is ill-equipped to play, more competent local municipalities have simply ignored the intergovernmental forums. Kirkby *et al* (2007: 164) further submit that many municipalities are unclear over the division of powers and functions between districts and locals. The related conflicts arose over misunderstandings about where a district's powers end and a local municipality's powers begin, and not because no forum existed to mediate disputes. Confusion over district-local functions will continue to hamper intergovernmental relations, despite the District Intergovernmental Forums (DIFs), until guidelines are in place and municipal officials accept the limits of their powers. Then the forums will provide a valued space for districts and locals to fine tune the practical details of their respective functions.

Malan (2009: 1145) warns that the mere existence of structures and mechanisms for intergovernmental relations and co-operative government pertaining to the environment may not guarantee that the principles for co-operative environmental management will be adhered to. It is the effective and efficient functioning of these structures and their commitment to developing a mindset of co-operation that may promote sound intergovernmental relations. According to Baartjies (2009:12), the first term of formal Intergovernmental Relations (IGR) has been characterised by a plethora of IGR forums

and structures, cross sphere task teams, working groups and the like, all in the name of cooperative governance. There has also been erratic and unfocused participation in coordination structures, with limited or no information shared, particularly around planning, and specifically IDP and provincial planning. A narrow structural approach has also resulted in the collapse of structures as soon as difficulties are experienced, manifested in the number of IGR forums which are periodically dysfunctional where tensions exist.

According to Kalema (2000: 34) attempts to codify IGR, while they might bring greater legal precision to the process, will not necessarily relieve intergovernmental tensions and may, in practice, aggravate them. This is because the most contentious issues in IGR as indicated are generally of a political, not a technical nature. Policy framed to support IGR should therefore take cognisance of the need to maintain a flexible framework for promoting greater cooperation between the different spheres of government. In the final analysis, it must also be borne in mind that neither a constitution nor an effective system of IGR can guarantee political stability in a country. These sentiments were also echoed by De Visser (2005:212) that intergovernmental structures should be afforded the opportunity to evolve informally before institutionalization stifles natural development. They should not be too formal and their procedures too legalistic in order to retain the elements of open communication and creativity. Yonatan and Steytler (2006: 5) submit that the Act, by institutionalizing intergovernmental relations, seeks to address the shortcomings of the existing intergovernmental structures. Formalizing intergovernmental structures and assisting the structures in facilitating viable and effective intergovernmental relations are the major objectives of the IRFA.

4.8.1 Intergovernmental Relations Dispute

Section 40 of the Intergovernmental Relations Framework Act provides that all organs of state must make every reasonable effort:

- to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions: and
- to settle intergovernmental disputes without resorting to judicial proceedings.

The Constitution embodies principles of cooperative government. The principles are based on the belief that government is more effective, efficient and responsive to community needs when the individuals and organs responsible for exercising state power act in collaborative and cooperative ways. Intergovernmental collaboration and cooperation require procedures, institutions and expertise to deal with disputes first through the political process. The Constitution, IRFA and other legislation establish the structural foundations for collaboration and cooperation. They are designed to achieve positive outcomes in policy-making and decision-making. An important part of cooperative government is the avoidance of conflict and dealing with disputes constructively when they arise. Here the focus is on preventing or minimising the negative consequences of badly-managed conflict. This is recognised by constitutional provisions and by the principles, objectives, preamble and provisions of the Intergovernmental Relations Framework Act 2005 (Steytler and Boule 2006: 5). Steytler and Boule (2006:3) are of the view that whereas adversarial litigation is rule-based, politics deals with interests and the accommodation of diverse interests – the very purpose of co-operative government. Political settlement through compromise and accommodation, which lies at the heart of non-judicial dispute resolution, reflects the letter and spirit of co-operative government. Political energy should be harnessed towards co-operative governance rather than be dissipated and wasted in conflictual relations.

In *Uthukela District Municipality and others V The President of the Republic of South Africa* the Constitutional Court held that in view of the important requirements of co-operative government, a court, including this Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level. When exercising discretion whether to deal with confirmation proceedings, this Court must thus bear in mind that

Chapter 3 of the Constitution contemplates that organs of state must make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts.

4.9 COOPERATIVE GOVERNANCE WITH REFERENCE TO ENVIRONMENTAL MANDATE

The Constitution provides a framework for intergovernmental relations that are value driven and flexible. It is sensitive to the complex needs of the highly integrated system as adopted, which has few clear boundaries between the spheres of government and which requires governments to act in partnership rather than in competition. Many different systems of intergovernmental relations could be developed within the constitutional framework, and systems should be able to develop and change over time, as needs change. Whatever systems are developed, the broad goals of the Constitution enshrined in the Preamble must be kept in mind, and intergovernmental relations must contribute to the establishment of a "society based on democratic values, social justice and fundamental human rights" (Murray2001: 81). Bosman *et al* (2004: 418) are of the view that some of the services rendered by local government are directly dependent upon, and affected by, the integrity or quality of natural resources, such as the provision of potable water supply services. However, local government has a specific dual role to play in this regard, both as frontline regulator of certain environmental aspects, as well as a provider of basic services with potential impacts (for example the disposal of sewage effluent, which is regulated by other spheres of government). It seems, in addition to the above, that Schedules 4 and 5 do not provide guidance to local government in distinguishing between its roles as regulator and regulated. For example, it lists 'refuse removal, refuse dumps and solid waste disposal' as exclusive local government competencies, but does not indicate if this competency only relates to the provision of a waste management service. It is also not indicated in which sphere of government the control over waste disposal facilities is to be performed. National government may furthermore not pass legislation with regard to a matter within a

functional area listed in Schedule 5, even though such matters may impact upon the resource, such as water, over which it has exclusive authority.

Steytler (2005: 196) argues cogently that the division of powers and functions between provincial and local government in schedule 4 and 5 lacks clarity and precision. The distribution of powers and functions is done in broad strokes with no neat separation of powers. To a large extent there is concurrency of powers in respect of most areas of governance. In a number of functional areas the only distinction lies in (Schedule 4A matter) and “municipal health service” (Schedule 4B matter). In some instances the overlap is not explicit but inherent in the nature of the functional areas. For example, the exercise of the provincial competence relating to liquor licenses (Schedule 5A matter) will inevitably overlap with a municipality’s power to control undertakings that sell liquor to the public (Schedule 5B matter).

Section 156(4) of the Constitution adds a significant dimension to the issue around assignments. It entrenches the principle of subsidiarity, which says that responsibilities should be allocated to the lowest level of government possible. Section 156(4) makes assignment by agreement of the administration of a Schedule 4A or 5A matter to a municipality by national and provincial government compulsory if –

- the matter would be most effectively administered locally; and
- the municipality has the capacity to administer it.

According to (Steytler 2003: 1), common competencies occur where more than one level of government (usually state and local, but not infrequently federal as well), share authority (be it legislative or executive or both) over the same functional area. The area may be education, health, housing or the environment. The questions that then arise are how effective governance can be delivered in these common functional areas, because, as the old saying goes, too many cooks spoil the broth.

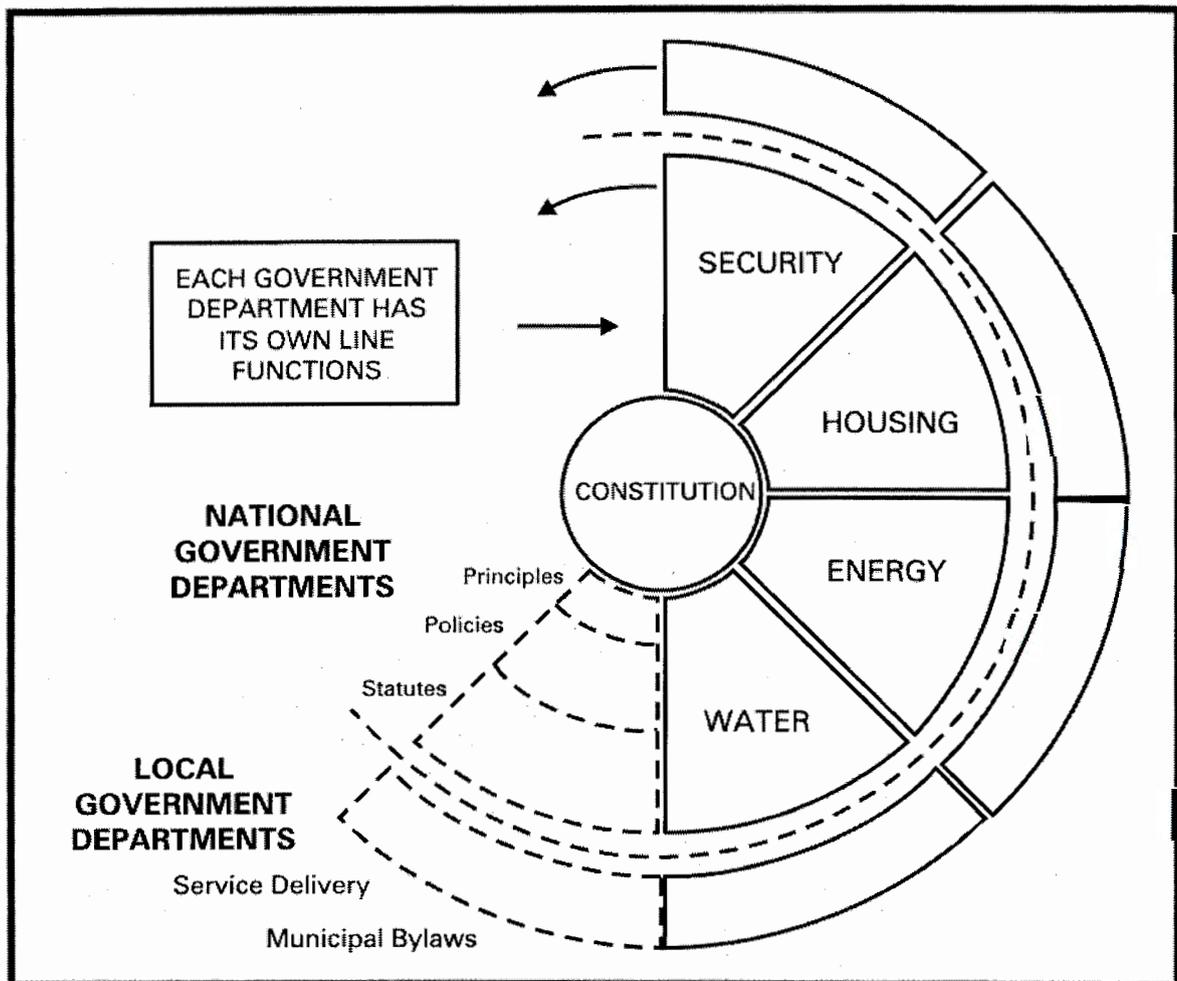
The environmental principles set out in section 2 of National Environmental Management Act 107 of 1998 (herein after referred to as "NEMA") are made directly applicable to prospecting and mining operations and it is stated specifically that the principles serve as guidelines in the interpretation, administration and implementation of the environmental requirements of the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA). The incorporation of the sustainability and the general integrated environmental management principles into the MPRDA will, it is hoped, ensure the same level of decision-making. The MPRDA, however, ensures that the mining industry is 'subject to the same norms, standards and requirements that are applicable to the rest of South African industry' (Du Plessis 2008: 99). Malan (2009: 1139) is of the view that the interdependent and –connected nature of the components of sustainable environmental management renders unilateral methods of governance ineffective. As a result, governments are impelled towards collective action and co-operative behaviour, in which mechanisms for national, provincial and local environmental management are constructed.

Section 35 of NEMA makes provision for environmental management co-operative agreements among organs of state and any person, legal entity or community to improve standards, set targets for fulfilling their undertaking, to provide for monitoring and measures to be taken in the event of non-compliance – herewith bringing in a new element to co-operative government and public participation. Intergovernmental relations and co-operative government principles are also found in other legislation guiding decision-making pertaining to the environment, minerals and petroleum development, renewable energy, nuclear regulation and biodiversity management, but are not discussed in detail (Malan 2009:1145). According to Mackay and Ashton (2004:3) the complex process of sectoral reform is still in progress; whilst some key sectors (e.g. water) have recently completed substantial reforms of policy and legislation, others have yet to finalise this process. At the level of national Government, the new principles, policies and legislative instruments in each sector appear to be aligned closely with, and fully support, the key principles embodied in the Constitution. However, the clear separation of line functions between different Government

departments (e.g. water, agriculture, housing, etc.) makes it difficult to attain proper levels of alignment and coherence between these different functions, as each department operates independently within its area of mandate. The core vision encapsulated in the Constitution becomes more “fuzzy” as the level of implementation is moved outwards from principles through policy, legislation and regulation to the lowest levels of governance, making co-operation and alignment across sectors at the lower (local) levels that much more difficult.

Therefore, whilst the principles and policies derived from the Constitution are to a large extent complementary or supportive, there are several instances where specific legislative or regulatory components are at worst contradictory or, at best, do not complement each other. In some cases, such as issues associated with mining activities, there is also a lack of clarity as to which statutory requirements take precedence, or are more important, than others. Malan (2009:1144) agrees with Mackay and Ashton in his submission that even though the previous Department of Environmental Affairs and Tourism strove to regain decision-making on matters regarding the environment, intergovernmental co-ordination and harmonisation of policies, principles and actions were lacking. Table 4.1 below illustrates the relationships between the national Constitution, functions of national-level line departments and local Government. The separate identity and functions of each line department complicate alignment of national policy and statutes with service delivery processes.

Figure 4.1 Interrelationship between National Departments and Local Government



Source: MacKay and Ashton (2004:4)

Bosman *et al* (2004: 414) write that although the provisions on environmental governance may seem quite straightforward, many still need to be formalised in legislative arrangements. In the political decision-making arena, discussions still continue with a view to adjust levels of responsibility for several areas where competencies overlap. However, because day-to-day functions still need to be performed, government officials often have to take decisions and co-operate in areas of overlapping or shared responsibility that are not always sufficiently clear. Bosman *et al* (2004:415) further submit that the Constitution recognises the principle of co-operative

governance and has assigned key executive, regulatory, administrative and service provision roles, responsibilities and functions to national, provincial and local government that relate to different components of the environment. In accordance with this, section 44 of the Constitution assigns national government the power to pass legislation on any matter, including a matter within a functional area listed in Schedule 4, but excluding a matter within a functional area listed in Schedule 5. On the other hand, section 104 of the Constitution assigns provincial government the power to pass legislation for its province regarding any matter within a functional area listed in both Schedules 4 and 5. A municipality has executive authority in respect of, and has the right to administer local government matters listed in Part B of Schedules 4 and 5.

Commenting on the environment governance of the World Heritage Site (herein after referred to as "WHS"), Kotze and De La Harpe (2008: 31) assume that the legislature recognises fragmentation of the environmental governance effort relating to WHS because of certain legislative mechanisms to achieve a more aligned and integrated regime. The primary and least intrusive mechanism available for integration and alignment is arguably that of cooperative governance. Cooperative governance is an acknowledged governance model to align fragmented governance processes in South Africa and is also applicable to the fragmented environment governance regime. Cooperative governance in this context is referred to as cooperative environmental governance which may be defined:

The integration of the different spheres of government and line functionaries at international, intra-regional and intra-governmental level; co-operation between individual government officials in each sphere/line functionary; co-operation between government officials in different spheres/line functionaries; integration of policy, regulation methods and tools, service provision and scrutiny; and co-operation with industry and the public in order to achieve the principles of sustainability.

The Local Government Indaba on Environment held on 22-23 July 2009 in Johannesburg, noted *inter alia*:

- *Concerned* that if left unattended, unintegrated planning practices, lack of cooperation between the spheres of government and inconsistent priority setting will lead to an increased impacts on local level ecosystems and reduced service delivery;
- *Emphasizing* the importance of commitments and principles enshrined in Agenda 21, the Johannesburg Plan of Implementation, the Millennium Development Goals; our national Constitution and national environmental policy and legislative framework;
- *Acknowledging* individual and collective rights and responsibilities towards sustainable development and notwithstanding previous efforts, a strong need remains for a more empowered and effective system of environmental cooperative governance, a new paradigm that includes values and ethics in our governance and lifestyles;
- *Being Mindful* that climate change is one of the most serious threats to sustainable development, with adverse impacts expected on the environment and natural resources, human health, food security, economic activities and investment, natural resources and physical infrastructure. The poor and the most vulnerable communities are the least equipped to be able to adapt to the potential effects of climate change.
- *Realising* that the three categories of municipalities have different environmental management responsibilities and functions, it is imperative to ensure that these are implemented in the most integrated manner aligned with both provincial and national priorities and programmes.

- Calling on National Treasury to engage with Local Government and the environment sector in reviewing the fiscal framework for the environment mandate.
- Committing to promote longer term sustainable socio-economic development planning beyond a 5-year time horizon but which informs municipalities' medium term (5-year) plans.

A more fundamental problem is the perceived absence of a common approach to local government and the supporting processes that seek to minimise contradictions at national level. A good example is the Health Act of 2003, where the definition of "municipal health services" and the allocation of this function to district municipalities contradict the department of provincial and local government's approach to local government powers in general and district-local municipal relations in particular. In an over-inclusive definition, "municipal health services" are defined as: (a) water quality monitoring; (b) food control; (c) waste management; (d) control premises; (e) communicable disease control; (f) vector control; (g) environmental pollution control; (h) disposal of the dead; and (i) chemical safety, but excludes port health, malaria control and control of hazardous substances. This definition conflicts with the allocation of functions between district and local municipalities. While the "municipal health services" function is a district function in terms of section 84 of the Municipal Structures Act, the "licensing and control of undertakings that sell food to the public" and "air pollution" are local functions. The problem with the definition of "municipal health services" is symptomatic of a larger problem, namely the lack of integration and coordination at national level. The lack of a coherent set of guidelines on the meaning of the functional areas of local government means that inconsistencies are likely to occur. The absence of a clearing house for local government legislation in the department of provincial and local government as the department responsible for local government will inevitably result in an uncoordinated approach to local government (Steytler 2008:527). Mahlatsi (2009) observes that environmental planning is not a separate or another processes of municipal planning. It is an integral part of municipal planning. Co-operative governance

plays an important role in realizing challenges of environmental planning and sustainable development.

4.10 CHALLENGES FACING COOPERATIVE GOVERNANCE

According to Bosman *et al* (2004: 420), the architects of the Constitution should have foreseen the inevitable uncertainty that might arise where more than one sphere of government is required to perform similar tasks. Authors argue that the designation of the different roles and responsibilities by the drafters was premeditated, since the principles on co-operative governance may be employed to preclude any confusion and resultant poor regulation, administration, and governance of environmental matters. It seems furthermore that the drafters of Schedules 4 and 5 of the 1996 Constitution did not have the same concept in mind as the drafters of the definition of 'environment' as outlined in section 1 of the NEMA. This, as well as the manner in which the competences of the different spheres of government are assigned under Schedules 4 and 5, negate co-operation, harmonisation, and integration and actually leads to confusion and even conflict. Unless some of these discrepancies are addressed and rectified, Integrated Environmental Management (IEM), as understood in its broadest sense, will not become a reality in South Africa. Although Schedules 4 and 5 are currently under investigation for the purpose of revision, it will take some time before the 1996 Constitution is amended. Any proposed amendment to Schedules 4 and 5 will give rise to turf wars between the different spheres of government. However, in the long term, the 1996 Constitution will have to be amended to provide clarity not only on the role and responsibilities of the different spheres of government, but also within specific spheres.

Edwards (2008: 75) submits that the lack of cooperative governance at the different spheres has been attributed to the fact that the three spheres had to deal with issues such as bureaucracy, and a lack of:

- properly coordinated and structured information systems to facilitate provincial

- monitoring;
- effective communication between different role players;
- capacity to implement policies and programmes;
- trained personnel;
- financial resources;
- commitment to cooperate (mandates of the different government departments in
- legislation contradict one another);
- efficiency and effectiveness of decision-making; and
- alignment of policies between local and provincial government

Kirkby *et al* (2007: 162) avers that lack of capacity is the Achilles heel of intergovernmental relations between district and local municipalities. There is a dearth of comprehensive data on local government intergovernmental structures as surveys and reports are either qualitative or lacking empirical rigour. The reasons for this are two-fold. First, the relative capacity across municipalities is highly variable. Some function quite well, but over half of all municipalities are subject to a *de facto* intervention by national government through 'Project Consolidate'. Under such circumstances, it is not surprising that intergovernmental relations become secondary priorities in many municipalities who cannot provide even basic services to their constituents. A second result of under-capacity is empty-shell intergovernmental forums that exist on paper but not in practice. This is a symptom of incompetent or overburdened municipal officials who try to comply with the letter, if not the spirit, of the laws affecting them. Thus, capable – trained, knowledgeable and experienced – mayors and councillors are a necessary precondition to successful district-local relations.

Poor intergovernmental co-ordination is frequently a problem of capacity and management rather than purely one of procedure. Therefore capacity-building, training, the installation of appropriate systems and rigorous monitoring are all essential for a viable intergovernmental relations system. While attempts to regulate the framework might bring greater legal clarity to the process, it may not necessarily relieve intergovernmental tensions (Levy 2001: 85). Kotze and De La Harpe (2008: 32) submit

that Cooperative Environmental Governance (CEG) is provided for in various acts, including, amongst others: the Constitution, NEMA, the Intergovernmental Relations Framework Act, and numerous sectoral environmental acts such as the Water Services Act, the National Water Act, the National Heritage Resources Act, the National Nuclear Regulator Act, Local Government: Municipal Systems Act, the MPRDA, the National Environmental Management: Protected Areas Act (NEM:PAA), National Environmental Management: Biodiversity Act (NEM:BA), and National Environmental Management Air Quality Act (NEM:AQA). Despite this comprehensive legal framework and potential utility of CEG as an integration mechanism, evidence suggests that CEG is not very successful in practice. Reasons for lack of implementation, or minor success in implementing CEG, may be ascribed to, *inter alia*: lack of political commitment and commitment at the operational level of government; intensifying turf wars between government officials, spheres and departments of government; lack of human and financial resources to implement CEG and other governance priorities taking precedence over CEG. Despite these 'failures' in implementing CEG, it is believed that CEG is still the best basis from which to proceed to achieve a more integrated EG regime. It is possible under the existing legislation and opportunities for CEG, to address many of the problems and put in place a system which will encourage cooperative governance which will lead to better governance of WHS.

From the point of view of the Constitution, the system of intergovernmental relations in South Africa faces a number of challenges. Most importantly, it must demonstrate that it allows the kind of co-ordination and co-operation amongst governments in every sphere that ensures the provision of basic human services to all South Africans and is effective in redressing the imbalances that are the legacy of apartheid. And it must do this in a way that strengthens democratic government (Murray 2001:81). The strategy that should be implemented is the strengthening of coordination. All planning, policy activities and budgets should be coordinated in such a way as to promote effective intergovernmental relations, and to prevent the duplication and overlapping of functions between the three spheres of government. In order to ensure long-term and effective interaction between the spheres of government, mechanisms should be in place to

measure the effect and performance of intergovernmental relations forums. The challenge remains to increase the competency level and skills of staff in order to ensure effectiveness, efficiency and accountability at provincial and local spheres in all administrative and financial aspects. The poor attendance and especially the attendance by low-ranking officials who cannot make decisions at intergovernmental relation forum meetings (at provincial and local sphere) need urgent attention. Strengthening the capacity of institutions through the systematic and continuous training of officials to promote effective intergovernmental relations at the different spheres of government also requires attention (Edwards 2008: 82).

4.11 CONCLUSION

National government is tasked to develop a sound intergovernmental relations system that is conducive to socio-economic transformation and through which it can provide a range of support mechanisms to assist municipalities in effecting fundamental change at grassroots level. Intergovernmental relations are concerned with the political, financial and institutional arrangements regarding interactions between the different spheres of government and organs of state within each sphere. Intergovernmental relations is one of the means through which the values of cooperative government may be given institutional expression. The real difficulties encountered in developing the structures and processes that are needed for proper intergovernmental communication tends to obscure their goal. The mere existence of structures and mechanisms for intergovernmental relations and co-operative government pertaining to the environment may not guarantee that the principles for co-operative environmental management will be adhered to. It is the effective and efficient functioning of these structures and their commitment to developing a mindset of co-operation that may promote sound intergovernmental relations. Political buy-in and leadership are still needed are important for the successful implementation of Intergovernmental relations. Co-operative governance plays an important role in realizing challenges of environmental planning and sustainable development. The next chapter will focus on the role of local government in promoting environmental rights.