



South Africa

Jaap de Visser

Since the year 2000, local government has entered South Africa's system of intergovernmental relations with a new institutional appearance and has been granted constitutional protection. Intergovernmental relations among municipalities, provinces, and the national government have thus become more dynamic yet also more complex and demanding. This chapter analyses the constitutional and policy frameworks for those relations, and provides insight into current debates and the dynamics related to them. The legal and constitutional recognition of local government is impressive and propels it to a status that at times equals or surpasses that of provincial government. Yet this constitutional status provides no guarantee of strong local government. In reality, many municipalities are incapable of asserting their financial and political autonomy for reasons both within and beyond their control.

J. de Visser (✉)
University of the Western Cape, Cape Town, South Africa
e-mail: jdevisser@uwc.ac.za

1 COUNTRY OVERVIEW

Located at the southern tip of Africa, South Africa shares borders with Namibia, Botswana, Zimbabwe, Swaziland, and Mozambique, while Lesotho is locked within its borders. Its land mass spans 1,220,813 km², and, by 2021, the country had a population of more than 60 million people.¹

South Africa's remarkable emergence from centuries of racial and colonial domination surprised many who believed the country was heading for disaster during the violence of the late 1980s and early 1990s. Now, some 25 years after the advent of democracy in 1994, South Africa boasts a relatively stable constitutional framework, an independent and functioning judiciary, as well as a human-rights-centred approach to basic service delivery.

During the first 15 years of democracy, South Africa's macroeconomic policy appeared to succeed in balancing financial austerity, inflation control, and trade liberalisation with expanding social investments and the pursuit of infrastructure-led economic growth. However, the subsequent 10 years brought economic mismanagement, corruption at an unfathomable scale, a series of recessions, and then devastation as a result of the Covid-19 pandemic.

For the financial year of 2020–2021, gross debt stood at 80.3 per cent of gross domestic product (GDP), and debt-service costs were expected to average 20.9 per cent of gross tax revenue.² The economy contracted by 7.2 per cent in 2020, but was expected to grow by a modest 3.3 and 2.2 per cent in 2021 and 2022, respectively.³ In the third quarter of 2020, the official unemployment rate rose to 30.8 per cent.⁴ Youth unemployment is extremely high, having reached 63.3 per cent for those aged 15–24 years in the first quarter of 2021.⁵

¹ Statistics South Africa, Statistical Release P0302, *Mid-Year Population Estimates 2021* (July 2021) table 1.

² National Treasury RSA, *Budget 2021 Highlights* (National Treasury, 2021) www.treasury.gov.za (accessed 29 July 2021).

³ National Treasury, *2021 Budget Review* (National Treasury, 2007) 11.

⁴ *Ibid.*, 19.

⁵ Statistics South Africa, *Quarterly Labour Force Survey Quarter 1: 2021* (Statistics South Africa, 2021) 30.

South Africa faces the major socioeconomic challenges of persistent high unemployment, poverty, large wealth disparities (a Gini coefficient of 0.60),⁶ and the impact of both the Covid-19 and HIV/AIDS pandemics. South Africa's racial divisions,⁷ created and exploited under apartheid, continue to have a significant influence on income, education levels, and life expectancy.

Central to South Africa's strategy to erase these bleak figures is its insistence that local government is key to the development and delivery of basic public services. This insistence is in part dictated by the inevitability of urbanisation. In 1994, 53 per cent of the population lived in urban areas, while in 2011 this had risen to 63 per cent, with just four city-regions accounting for 42 per cent of this population.⁸ It is expected that, by 2030, 71.3 per cent of the South African population will live in urban areas. This is expected to rise to 80 per cent by 2050.⁹ The four city-regions 'dominate the economy, accounting for more than half the national gross value added (GVA). When other cities and large towns are included, the share rises to 81.4 per cent of the country's GVA, up from 79.4 per cent in 1996'.¹⁰

These cities are confronted with the challenges of urbanisation, which require innovative and complex responses. For example, cities need to devise approaches to address the pernicious legacy of spatial segregation. Similarly, a new approach is required to tap into the informal employment found in unregulated small businesses and microenterprises. Successful urban and local governments are thus recognised as immediately benefiting both economic growth and poverty alleviation.

South Africa's newly established constitutional democracy, overseen by a new Constitutional Court, managed to deal with the innumerable

⁶ Statistics South Africa, *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (Statistics South Africa, 2019) 5.

⁷ For a breakdown of the South Africa population in racial and religious terms, see Nico Steytler, 'Republic of South Africa', in John Kincaid and G. Alan Tarr (eds) *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, 2005) 312–346.

⁸ Department of Cooperative Governance and Traditional Affairs, *Integrated Urban Development Framework* (Department of Cooperative Governance and Traditional Affairs, 2016) 15.

⁹ *Ibid.*, 25.

¹⁰ *Ibid.*, 17.

challenges and tensions that came with the transition to democracy. The Constitution itself is the final product of a series of events and processes that took place while the apartheid government and liberation movements negotiated the country out of crisis. The result was an interim constitution that paved the way for the first democratic elections in 1994, the establishment of Parliament as a constitutional assembly, and the adoption of the final Constitution of 1996.¹¹

The Constitution vests national legislative authority in Parliament, which consists of the National Assembly and the National Council of Provinces (NCOP).¹² The 400 National Assembly members are directly elected, while the NCOP, modelled on the German *Bundesrat*, comprises delegations from each province as well as a non-voting local government delegation. National executive authority is vested in the President, elected by the National Assembly, who exercises this authority together with the other members of the cabinet. Cabinet members, appointed by the President, are accountable collectively and individually to Parliament.

The Constitution also establishes and demarcates nine provinces, each with a provincial legislature and a provincial executive. Provincial legislative authority is vested in the provincial legislature. Provincial legislatures range from 30 to 80 directly elected members. A province's executive authority is exercised by a premier, who is elected by the provincial legislature. The premier exercises this authority together with the other members of the Executive Council. They are accountable collectively and individually to their provincial legislature.

There is one judiciary, with the Constitutional Court at the apex as the highest court on all matters. Disputes between spheres of government are decided by the Constitutional Court. The Constitutional Court also has the final say on the constitutionality of national and provincial legislation, and resolves conflicts between validly passed legislation of the three spheres.

¹¹ See, for example, Janis Van der Westhuizen, 'South Africa (Republic of South Africa)', in Ann L. Griffiths and Karl Nerenberg (eds) *Handbook of Federal Countries* (McGill-Queen's University Press, 2002) 282–295, 284–285.

¹² Sections 42–46.

2 HISTORY, STRUCTURES, AND INSTITUTIONS OF LOCAL GOVERNMENT

South Africa's experience with local and provincial government started in 1910 with the unification of South Africa, which transformed four British colonies into provinces. Local government was introduced as a responsibility of the provinces and no single uniform system of local government existed for the country. Local government was subservient, racist, and consequently illegitimate. The subservience of local government was manifest in that local authorities existed in terms of provincial laws, and their powers and functions were dependent on, and curtailed by, these provincial laws.

After winning the landmark elections of 1948, the National Party (NP) government intensified institutional segregation by providing for the development of separate local authorities for each of the four major racial groups. The leading theme was the principle of 'own management for own areas'. However, in areas outside the black homelands, black local authorities operated under the authority of white municipalities until 1971.¹³ Given that black local authorities governed dormitory townships where no commercial activity was permitted, there was no commercial base on which to raise property rates or other income. Even after the government devolved more powers to the black local authorities, they remained illegitimate. The fiscal inadequacy created by the fallacy of self-sufficiency rendered them empty shells that produced nothing but conflict. They became the target of rent boycotts and large-scale popular mobilisation in the mid-1980s.¹⁴

Separate local government structures were also created for the coloured and Indian populations. These were expected to develop from advisory bodies into fully fledged municipalities equivalent to the white local authorities. However, they suffered the same fate as the black local authorities. Without exception, the well-resourced commercial centres with their viable revenue bases were reserved as white areas. The outlying and poor areas, without meaningful formal economies, were reserved for black

¹³ Nazeem Ismail and Chisepo J.J. Mphaisha, *The Final Constitution of South Africa: Local Government Provisions and Their Implications* (Konrad Adenauer Stiftung, 1997) 7.

¹⁴ Department of Constitutional Development, *White Paper on Local Government* (Government Printers, 1998) 2.

people. Following the format of the colonial state, traditional authorities in the homeland areas were tasked with performing local government functions, such as land allocation, agricultural affairs, road infrastructure, and the suppression of cattle diseases.¹⁵

The transformation of local government into a fully fledged institution of non-racial governance was thus impelled by this legacy of an ‘urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas’.¹⁶

Negotiations between the apartheid government and the liberation movements on local government commenced in earnest at the beginning of the 1990s. One of the critical features was the adoption of the principle of ‘one city, one tax base’, which had become the slogan with which the grossly inequitable distribution of resources was opposed by the liberation movements.¹⁷ The emergence of constitutional protection for local government was informed by three main developments. First, most liberation movements had an aversion to federalism because the apartheid policies on territories set aside for black inhabitants had a ‘federal’ slant to them.¹⁸ The dispute over a federal or unitary South Africa drove a deep wedge between the ANC and the Inkatha Freedom Party, which argued for the recognition of an autonomous Zulu kingdom. Secondly, the liberation movements sought to consolidate and find a constitutional space for the grassroots civic movements that helped overturn the apartheid government. Thirdly, for its part, the NP insisted on the inclusion of checks on the power of an almighty ANC government and became a convert to decentralisation and federalism.

¹⁵ Sam Rugege, ‘Traditional Leadership and Its Future Role in Local Governance’ (2003) 7(2) *Law, Democracy & Development* 171–200, 173.

¹⁶ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (2) BCLR 1458 (CC) para 122.

¹⁷ Gideon Pimstone, ‘Local Government’, in Matthew Chaskalson et al. (eds) *Constitutional Law of South Africa* (Juta, 1999) 5A1–5A42 at 5A3.

¹⁸ Nicolas Haysom, ‘The Origins of Co-operative Governance: The “Federal” Debates in the Constitution-Making Process’, in Norman Levy and Christopher Tapscott (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (IDASA and School of Government, University of the Western Cape, 2001) 43–65, 45. See also Nico Steytler and Johann Mettler, ‘Federal Arrangements as a Peacemaking Device during South Africa’s Transition to Democracy’ (Fall 2001) 31 *Publius: The Journal of Federalism* 93–106.

The 1993 Constitution¹⁹ set the scene for the first democratic elections in 1994 and the formulation of a final Constitution by the newly elected Parliament. It ushered in constitutional recognition for local government and paved the way for the amalgamation of more than a thousand disparate, racially defined local government structures into 842 transitional local authorities.²⁰

The 1996 Constitution goes further, and envisages local government as a mature sphere of government. It set the scene for two forms of local government, namely metropolitan local government and non-metropolitan local government. There are eight areas with metropolitan local government—single-tiered metropolitan municipalities that have exclusive municipal authority over their area of jurisdiction.²¹ What made these areas ‘metropolitan’ is defined in legislation with reference to indicators such as population density, movement of people, goods and services, diverse economic activity, and desirability of integrated development planning. The rest of the country is divided into 44 district municipalities. Each district municipality, in turn, is divided into a number of local municipalities, varying from two to eight in number. The total number of local municipalities in the country is 205. The district and local municipalities share authority over their respective jurisdictions and rely on a statutorily defined division of authority. This division is a point of contestation. Local municipalities are the interface with communities and generally perform community services, but the role of district municipalities is less clear. They were initially conceptualised as responsible for regional planning, redistribution between rich and poor municipalities, and providing support to weaker local municipalities, but they have struggled to adapt to these roles.

Deciding on metropolitan or non-metropolitan local governance for a specific municipal area is the prerogative of the independent Municipal Demarcation Board (discussed below).

¹⁹ Constitution of the Republic of South Africa of 1993.

²⁰ Nico Steytler, ‘Local Government in South Africa: Entrenching Decentralised Government’, in Nico Steytler (ed) *The Place and Role of Local Government in Federal Systems* (Konrad Adenauer Stiftung, 2006) 183–212, 187.

²¹ The eight areas are Johannesburg, Cape Town, eThekweni (Durban), Tshwane (Pretoria), Nelson Mandela Bay (Gqeberga), Ekurhuleni (East Rand), Buffalo City (East London) and Mangaung (Bloemfontein).

Municipalities must be established ‘for the whole of the territory of the Republic’.²² This principle does away with the phenomenon where certain rural areas were governed, not by any form of democratically elected municipal government, but by either a traditional authority or a government official.

Municipal boundaries are determined by the Municipal Demarcation Board. In 1999 and 2000, it demarcated the country into 284 municipalities and paved the way for the first municipal elections on 5 December 2000.²³ On that day, the first generation of municipal councils took over the reins of these newly demarcated areas in terms of a new local government dispensation.

Given South Africa’s land mass and population size, it has some of the biggest municipalities in the world. The 284 municipalities established in 2000 were reduced through successive amalgamations to 257 in 2016. Legislation instructs the Municipal Demarcation Board to create local authorities that are financially viable. In addition, they need to be able to redistribute resources from rural to urban areas and from rich towns to outlying poor black areas.

The twin principles of ‘wall-to-wall’, and democratic, local government meant that the institution of traditional leadership changed dramatically. Rural areas previously under traditional authorities’ rule were absorbed into the constitutional system of local government. Traditional authorities were afforded non-voting seats on the municipal council in their area. This relegation to an advisory status continues to anger many traditional leaders.

The concept of a single, unified metropolitan municipality was a new feature in the local government design. It was borne out of the experience of fragmented service delivery and lack of redistribution that resulted from the pre-1994 arrangements, where multiple small local authorities governed a metropolis that, for all intents and purposes, comprised one integrated metropolitan area. For example, the metropolitan area that became the City of Cape Town in 2000 consisted of 60 local authorities in 1994.²⁴ A new form of metropolitan government was needed

²² Constitution, section 151(1).

²³ This was later reduced to 283 municipalities and, in 2016, to 257.

²⁴ See *City of Cape Town and Another v Robertson and Another* 2005 (3) BCLR 199 (CC) para 9.

to facilitate citywide development, integrated infrastructure planning, and redistribution of resources within these large cities.²⁵

3 CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

The rationale for the constitutional recognition of local government was that South Africa could have a strong agent for development in local government if the latter were afforded a measure of autonomy.

This constitutional recognition is manifested in a number of ways. First, local government is one of the three ‘spheres’ of government, which are ‘distinct’, ‘interdependent’, and ‘interrelated’.²⁶ Secondly, local government is afforded ‘the right to govern, on its own initiative, the local government affairs of its community’.²⁷ To this end, it is given constitutionally recognised and protected powers, with national and provincial governments prohibited from exercising undue interference in it. Thirdly, municipalities enjoy constitutionally guaranteed revenue-raising powers as well as a constitutionally guaranteed entitlement to an ‘equitable share’ of nationally generated revenue.²⁸ Fourthly, the Constitution establishes a principle akin to subsidiarity, by providing that certain national and provincial functions that are more effectively exercised by municipalities must be assigned to local government.²⁹ Fifthly, organised local government is afforded non-voting seats in the NCOP.³⁰ Lastly, national and provincial parliaments are obliged by the Constitution to consult organised local government on legislation that affects the institutions or functions of local government.³¹

The legal value of this constitutional recognition is significant. The Constitutional Court has, on various occasions, stressed that the new local government order is fundamentally different from the old, in that

²⁵ Department of Constitutional Development (n 14) 59.

²⁶ Constitution, section 40(1).

²⁷ Constitution, section 151(3).

²⁸ Constitution, section 229.

²⁹ Constitution, section 156(4).

³⁰ Constitution, sections 67 and 221(1).

³¹ Constitution, section 154(2).

local government now derives powers from the Constitution.³² It has also established a firm jurisprudential trend, invalidating national and provincial laws and decisions that usurp local government's constitutional powers.³³ However, the practical value of the constitutional recognition is arguably mitigated by capacity problems in local government and the centralised tendencies of major political parties.

One-party dominance across the three spheres of government has enabled the ANC to iron out, within party structures, many tensions and disagreements between organs of state. However, in a number of cases, local government autonomy was upheld and the constitutional protection proved to be of real value.³⁴ Furthermore, the constitutional protection of local government is a pertinent factor in the development of policies that have an impact on local government. Local government's constitutional right to reticulate electricity and to appoint its own staff, for example, stood tall against government's plans to rescale the electricity function to a regional level and to absorb municipal staff into a single public service.

The extent to which municipalities assert their autonomy varies with the 'political colour' of the municipality. However, it is clear that the urban constituency is asserting this autonomy. Repeated calls have been made by this constituency to the national government to distinguish

³² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC); and *City of Cape Town and Another v Robertson and Another* 2005 (3) BCLR 199 (CC) para 9.

³³ Jaap de Visser, 'Food Security, Urban Governance and Multilevel Government in Africa', in Robert Home (ed) *Land Issues for Urban Governance in Sub-Saharan Africa* (Springer, 2021) 269–280, 275.

³⁴ See, for example, *CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) para 41. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC); *City of Cape Town and Another v Robertson and Another* 2005 (3) BCLR 199 (CC); *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (8) BCLR 881 (CC); *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2013] ZASCA 13; *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); *Pieterse NO v Lephalale Local Municipality* 2017 (2) BCLR 233 (CC); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC).

between the unique challenges that exist in the various spaces governed by local governments.

This diversity manifests itself in two arguments. The first argument is for a reduction of provincial government interference in the affairs of big cities. Whereas small towns may indeed need considerable support from provincial government, well-capacitated municipalities in the bigger cities might best be left to manage their own affairs, so it is argued.³⁵ The second argument is for more powers. Most of the eight metropolitan municipalities have undergone tremendous growth in resources, capacity, and institutional profile since 2000. In 2019, nine of the biggest municipalities accounted for about 57 per cent of national economic output and 53 per cent of national employment.³⁶ Their financial self-sufficiency also speaks volumes. For 2014–2015, the eight metropolitan municipalities' budgets relied for 17 per cent of their revenue on nationally raised revenue. In contrast, in the same year, the 70 most rural local municipalities relied for 73 per cent of their budgets on national transfers.³⁷

They have outgrown the straitjacket of their constitutional powers (see below) and stand ready to exercise more powers, which often still reside with national or provincial government. A strong argument is being made to afford metropolitan municipalities authority over housing, transport, and electricity generation.³⁸

4 GOVERNANCE ROLE OF LOCAL GOVERNMENT

The Constitution equips local government with original powers by providing that a municipality has authority over the 39 matters listed in Schedules 4B and 5B of the Constitution. These functional areas can be grouped into the following six themes:

³⁵ South African Cities Network, *State of the Cities Report 2006*, 5–22.

³⁶ South African Cities Network, *State of the Cities Report 2020*, 6.

³⁷ National Treasury, *2014 Budget* (National Treasury, 2014) 100.

³⁸ Jaap de Visser and Anél du Plessis, 'Climate Governance and the Practice of Federalism: South Africa', in Sébastien Jodoin (ed) *Climate Change & Federal Governance* (Forum of Federations, forthcoming).

1. built environment (for example, electricity and water reticulation, sewage, refuse removal, building regulations, planning, storm-water management, noise pollution, cleansing, street lighting, and fencing);
2. social and emergency services (for example, child-care facilities, firefighting, local recreation, sport facilities, and dog licences);
3. health (for example, municipal health care and air pollution);
4. transport (for example, public transport, traffic, parking, municipal roads, municipal airports, and ferries);
5. economy (for example, trading regulations, markets, abattoirs, local tourism, billboards, and liquor and food outlets); and
6. amenities (for example, cemeteries, public spaces, and parks).

However, there often is uncertainty with regard to the cut-off points between municipal competences and those of the national and provincial spheres.³⁹

By providing for original taxing powers for municipalities, the Constitution establishes a degree of fiscal autonomy for local government. It grants local government the exclusive right to levy property rates and to impose surcharges on fees for services it provides.⁴⁰

These powers, however, are not exclusive to local government, given that they can be regulated by the national and provincial governments through framework legislation.⁴¹ Such legislation may set the parameters for local by-laws in the form of minimum-standards and monitoring procedures, but may not ‘compromise or impede’ the ability of local government to perform its functions.⁴² If such legislation extends to the detail of local policy-making or usurps municipal executive authority, it violates municipal autonomy.

National and provincial governments may assign or delegate further powers to local government in general or to individual municipalities. The

³⁹ For a discussion of the challenges of concurrent and overlapping powers, see Nico Steytler and Yonatan Fessha, ‘Defining Provincial and Local Government Powers and Functions’ (2007) 124 *South African Law Journal* 320–338.

⁴⁰ Constitution, section 229.

⁴¹ Certain matters, namely those mentioned in Schedule 5B of the Constitution, can be regulated only by provincial governments. The national government can legislate on those matters only in specific circumstances, as per section 44(2) of the Constitution.

⁴² Constitution, section 151(4).

instrument of assignment is a form of devolution. It entails the transfer of discretion over functions and financial risk as well as entitlement to intergovernmental funding. Importantly, as noted above, the Constitution makes the assignment of matters listed as concurrent national and/or provincial competences compulsory if they would be administered most effectively at a local level and if the municipality has the capacity to administer them. Statutes provide for procedures and criteria aimed at preventing unfunded mandates and ensuring that the assigned function will be performed.

However, the instrument of assignment—in the form and procedure envisaged by the Constitution and legislation—is something of an enigma. National and provincial sector departments have used a variety of other instruments to increase local government’s involvement in governance. Some of these instruments would qualify as assignments, albeit not following the prescripts of the Constitution. As a result, municipalities are involved in a range of public services without always having sufficient authority or resources. Examples of functions that have been transferred to local government through a variety of (sometimes constitutionally suspect) constructions are primary health care and libraries. In addition, court jurisprudence on socioeconomic rights has resulted in the devolution of new functions to local government. For example, the enforcement of the right of access to housing by the courts has resulted in municipalities being held responsible for providing alternative accommodation to persons who are rendered homeless as a result of evictions or other crises.⁴³

The delivery of basic services, such as water, sanitation, electricity, and refuse removal, is the main activity of municipalities.⁴⁴ Municipalities spend the majority of their budgets on these four services. An important aspect of the mandate of municipalities is their responsibility to ensure the extension of free basic services. This policy entails the provision, free of charge, of a basic component of water (namely, 25 litres per person per day, or 6 kilolitres per household per month) and a basic component of electricity (namely, 5kWh/50kWh per household per month).

⁴³ De Visser (n 33) 270.

⁴⁴ National Treasury RSA, *Budget 2021* (National Treasury, 2021), www.treasury.gov.za (accessed 29 July 2021) 76.

This mandate was imposed by the national government, and municipalities are expected to fund it by using their equitable share, which is an unconditional grant.

One of the key elements of the vision of developmental local government is the reversal of the inequities of apartheid planning. However, for at least a decade, there was confusion over local government's role in land-use management (town planning), a situation that paralysed efforts in addressing the consequences of apartheid spatial planning.⁴⁵ In the end, the Constitutional Court came to the rescue and clarified local government's constitutional power over 'municipal planning'. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*, the City of Johannesburg asked the Constitutional Court to declare parts of the Development Facilitation Act 67 of 1995 (DFA) unconstitutional. The DFA empowered provincial planning tribunals to take land-use decisions, something that, so the City argued, the Constitution reserves for municipalities. The Constitutional Court agreed with the City and declared the DFA unconstitutional.

The judgement underscored the central role that municipalities play in land-use management. It located municipalities at the centre of the land-use management framework. In subsequent years, six similar cases concerning municipal planning powers reached the Constitutional Court, all of which were decided in favour of local government.⁴⁶

4.1 Governance Institutions

Both legislative and executive authority is vested in the municipal council. The council may delegate executive authority either to an indirectly elected executive committee or to an indirectly elected executive mayor, depending on the institutional configuration imposed on it by its provincial government. An executive committee, headed by a mayor, broadly represents the composition of the council. An executive mayor exercises executive authority, assisted by a mayoral committee, which is a cabinet of councillors handpicked by the executive mayor.

⁴⁵ S Berrisford, 'Unravelling Apartheid Planning Legislation in South Africa: A Case Study' (2011) *Urban Forum* 247–263.

⁴⁶ De Visser (n 33) 270.

Most councillors are part-time. Office bearers such as mayors, speakers, and members of executive structures are full-time. Both part-time and full-time councillors are remunerated and may receive pension benefits. The remuneration of councillors in view of their full- or part-time status is regulated in a national framework, based on factors such as municipal income and population.⁴⁷ For example, a metropolitan municipality may award its mayor an annual package of not more than ZAR 1,404,260 (USD 97,000) and its ordinary part-time members, not more than ZAR 525,904 (USD 36,000).⁴⁸ For the smallest rural municipality, these amounts would be ZAR 782,582 (USD 54,000) and ZAR 247,360 (USD 19,000), respectively.

However, the reality for many part-time councillors is that their councillor remuneration is their key source of income. In addition to the community calling, the prospect of having a political career and receiving a regular income is an important motivation for someone to stand as a candidate. The fact that 47 per cent of councillors have not completed a high school qualification is a significant consideration in this regard.⁴⁹ It suggests that, for many councillors, there are limited options for well-paid remuneration outside of politics.

Although the public service in provinces is regulated by a National Public Service Act,⁵⁰ municipalities have discretion over their municipal administrations. Salaries are thus negotiated between organised local government and labour unions in a Local Government Bargaining Chamber. The discretion over their administration enables municipalities to determine salaries and performance bonuses of the two highest levels of municipal officialdom, as these salaries are not negotiated in the Local Government Bargaining Chamber. The nationally prescribed upper limits must be adhered to, though.

⁴⁷ See Determination of Upper Limits of Salaries, Allowance and Benefits of Different Members of Municipal Councils, 2020, GN 43246, *Government Gazette* 475 (24 April 2020).

⁴⁸ Exchange rate on 31 July 2021: USD 1 = ZAR 14.45.

⁴⁹ Evan Lieberman, Philip Martin and Nina McMurry, 'Voice and Accountability: Evidence from a Survey of South African Local Councillors', *Making All Voices Count Research Report* (IDS, 2017) 9.

⁵⁰ Public Service Act 104 of 1994.

The transformation of municipalities from non-representative, non-responsive bureaucracies into representative and responsive administrations is a key challenge for all municipalities. This is compounded by an acute shortage of skills, particularly in engineering and financial management, as well as by a high turnover in managerial positions.⁵¹

With limited resources and skills, the constitutional goal of developmental local government is not achieved easily. A 2018 survey revealed that levels of trust in local government are not particularly high (65 per cent). However, they are still higher than trust in the provincial premier (56 per cent) and the national President (57 per cent), and equal to trust in Parliament (65 per cent).⁵² The incomplete and imperfect nature of local government transformation is evidenced by the civic protests that emerged from 2005 onwards and which have continued to flare up ever since.⁵³ Protests revolve around poor records of service delivery and corruption, and were initially aimed mostly at local government.⁵⁴ However, civic protest in South Africa has increasingly become a vehicle for discontent and despair and often turns disruptive or violent. This is also partly the background to the violent looting spree that erupted in July 2021 in KwaZulu-Natal and parts of Gauteng.

During the second decade of democratic local government, corruption painfully emerged as its Achilles heel. Across the many municipalities that it governs, the ruling ANC appeared to be devouring itself, torn apart by factions that compete for access to the two key levers for self-enrichment, namely municipal procurement and human resources. The Auditor-General, tasked with auditing municipal books, has produced report after report bemoaning the poor state of municipal finances. According to the report covering the 2019–2020 financial year, only 27 municipalities received a ‘clean audit’ and 96, an ‘unqualified audit

⁵¹ Municipal Demarcation Board, *Municipal Powers and Functions Capacity Assessment 2018* (Municipal Demarcation Board, 2018) 73.

⁵² Andrew Faul, ‘When Corruption Stops, Trust in Government Can Start’ *ISS Today* (12 March 2019) <https://issafrica.org/iss-today/when-corruption-stops-trust-in-government-can-start> (accessed 30 July 2021).

⁵³ Tinashe Chigwata, Michael O’Donovan and DM Powell, *Civic Protests and Local Government in South Africa: The Civic Protests Barometer 2007–2016* (Dullah Omar Institute), www.dullahomarinate.org.za (accessed 30 July 2021).

⁵⁴ Applied Constitutional Studies Laboratory, *Civic Protest Barometer 2018 Fact Sheet #4 (Grievances of Protesters)*, www.dullahomarinate.org.za (accessed 30 July 2021).

with findings’, both of which signal decent financial management. The remaining 134 municipalities all attracted problematic findings, ranging from ‘qualified’ (80), ‘adverse’ (seven), ‘disclaimed’ (22) to the most dismal category, namely ‘outstanding’ (25), which means the audit could not be finalised due to lack of information.⁵⁵

The national and provincial governments have been seized with attempts to improve local government capacity. In two decades, the sector has been the target of many policies and programmes to that effect.⁵⁶

5 FINANCING LOCAL GOVERNMENT

The aggregate size of the overall local government budget in South Africa increased dramatically from ZAR 64 billion (about USD 4.4 billion) in 2001–2002 to ZAR 490 billion (about USD 33.7 billion) in 2020–21,⁵⁷ which is evidence of an upward trend in the devolution of expenditure. An assessment of how these budgets are raised is at the heart of any appraisal of the status and function of local government in federal systems. In this regard, local government in South Africa again enjoys an impressive constitutional status, but one that does not tell the full story. This constitutional status is not matched by financial buoyancy in many municipal areas, and is under pressure from centralising tendencies.

Local government revenue comprises own revenue, intergovernmental allocations, and borrowing. Property rates and user charges on services, such as water, electricity, and refuse removal, provide local government with a firm base for generating revenue. However, electricity sales as a source of revenue are under significant threat due to the transformation of the electricity industry into micro-grids and off-grid solutions. Still, these revenue-generating powers afford local government significant discretion over taxing policies. National legislation can authorise local government

⁵⁵ Auditor-General, *Consolidated General Report on the Local Government Audit Outcomes MFMA 2019–20* (Auditor-General, 2021) 9.

⁵⁶ Phindile Ntliziywana, ‘The Professionalisation of Local Government Management in South Africa’, in Tinashe Chigwata, Jaap de Visser, and Lungelwa Kaywood (eds) *The Journey to Transform Local Government* (Juta, 2019) 60–63.

⁵⁷ National Treasury (n 44) 8; National Treasury, *Release of the Local Government Revenue and Expenditure Report for the Second Quarter of 2020/21* (3 March 2021), <https://bit.ly/3M9ujAt> (accessed 4 August 2021).

to impose other taxes, levies and duties, but this has not happened on any significant scale.

In addition to their own revenue, municipalities are entitled to an equitable share of nationally collected revenue. Local government's equitable share is determined in a Division of Revenue Act of Parliament, which annually appropriates a split among national, provincial, and local governments.⁵⁸ The individual allocations to municipalities are determined through a formula which is a composite of factors that look at the number of poor households in each municipality, the cost of providing free basic services to poor households, the cost of running a municipal administration, and the municipality's tax capacity.⁵⁹ The equitable share is an unconditional operating grant. The variations in allocations between municipalities are considerable, reflecting the equalising nature of the formula.

Municipalities also receive a number of conditional grants tied to specific purposes and to be spent subject to national norms. An important example is the Municipal Infrastructure Grant (MIG), which municipalities must use to fund new municipal infrastructure and upgrade existing infrastructure, primarily with the aim of benefiting poor households. The grant is funded by the budgets of various national departments. Most grants flow directly from the national government to municipalities.

Intergovernmental allocations to municipalities are embedded in a national Medium Term Expenditure Framework, a three-year rolling budget that contains the entirety of the government's revenue and expenditure plans and serves to ensure predictability of grant income for municipalities.

A final source of financing is borrowing. Because municipalities raise much of their own revenue, they have more scope to borrow than provinces. The Constitution permits municipalities to borrow funds

⁵⁸ Local government's share of nationally raised revenue was stable at 8.9% during 2017/18 and 2018/19. It fell sharply to 8.3% in the 2019/20 budget and rose back to 8.8% in the 2020/21 budget. It is predicted to rise towards 9.0, 9.6 and 9.7% for the 2021/22, 2022/23 and 2023/24 budget. National Treasury RSA, *Budget 2021 Highlights* (National Treasury, 2021), www.treasury.gov.za (accessed 29 July 2021).

⁵⁹ Division of Revenue Act 9 of 2021 Explanatory Memorandum 35.

within a national legislative framework. Municipal borrowing has developed slowly as a source of revenue for municipal capital expenditure,⁶⁰ with metropolitan municipalities taking the lead.⁶¹ In 2020, it was reported that Johannesburg, Cape Town, and Ekurhuleni issued bonds and that Cape Town, furthermore, issued a ‘Green Bond’ to finance climate change adaptation and mitigation projects.⁶² The main reasons why the capital market is not warming up to local government are to do with the weak economic climate, uncertainties in the legal framework, and the lack of proper financial management in local governments.

Additional revenue raised by municipalities may not be deducted from their share of revenue raised nationally or from other allocations. Equally, there is no obligation on the national government to compensate municipalities that do not raise revenue commensurate with their fiscal capacity and tax base. Various provisions in the legal framework for local government make it clear that a municipality’s financial good health is primarily the responsibility of the municipality itself. There is thus also no obligation on the national or provincial government to bail out municipalities that run into financial difficulties.

Financial management by municipalities must be conducted in terms of national legislation. This legislation has been put in place in the form of a Municipal Finance Management Act,⁶³ which is augmented by a series of regulations. The legislation tightly regulates municipal budgeting, revenue and expenditure management, borrowing, accounting, and reporting. It also establishes an elaborate scheme of provincial and national monitoring of local government finances, and enables provincial and national powers to intervene in the financial affairs of municipalities.

As regards the position of municipalities in intergovernmental relations, the revenue-raising capacity of municipalities, compared to that of

⁶⁰ Bongani Khumalo, Ghalieb Dawood, and Jugal Mahabir, ‘South Africa’s Intergovernmental Fiscal Relations System’, in Nico Steytler and Yash Ghai (eds) *Devolution in Kenya and South Africa* (Juta, 2015) 217.

⁶¹ South African Cities Network, *State of the City Finances 2020* (SACN, 2020) 32.

⁶² *Ibid.*, 33.

⁶³ Act 56 of 2003.

provincial governments, is a critical factor.⁶⁴ On average, local government raises about 73 per cent of its total revenue through local taxes and user charges, whereas provinces raise a mere 3 per cent of their income through own revenue.⁶⁵ This adds an important dynamic to the relationship between, on the one hand, those municipalities, particularly the larger and metropolitan municipalities, that raise more than 95 per cent of their current expenditure budgets and, on the other hand, their provincial counterparts, entrusted with supervision over them. Smaller rural municipalities with less robust tax bases are in a completely different position: their dependence on transfers from the national government renders them weak participants in intergovernmental discussions.

Early on in the lifespan of the current local government system, the administration of infrastructure grants was relocated from provincial governments to national governments. This significantly reduced provincial leverage over local governments, as provinces have no control over the disbursement of infrastructure grants.

Of the overall budget of municipalities, capital expenditure on aggregate represents 14.3 per cent in 2020–2021, 13.3 per cent in 2021–2022, and 13.1 per cent in 2022–2023.⁶⁶ The fact that a large portion of capital expenditure is funded by grants (mostly conditional) raises concerns about the effect of the grant system on local government infrastructure planning. It is argued that municipalities are increasingly planning around government grants, a situation which tends to impair the local setting of priorities.

6 SUPERVISING LOCAL GOVERNMENT

The supervisory role of national and provincial governments over local government is an essential component of South Africa's local government dispensation. First, the national and provincial governments play a supervisory role in establishing local government institutions and in regulating

⁶⁴ On intergovernmental fiscal relations, see Bongani Khumalo and Renosi Mokate, 'Republic of South Africa', in Anwar Shah (ed) *The Practice of Fiscal Federalism: Comparative Perspectives* (McGill-Queen's University Press, 2007) 263–286.

⁶⁵ National Treasury, *2014 Budget Review*, 93.

⁶⁶ National Treasury, *National Treasury on Operating and Capital Budgets of Municipalities for 2020/21 2 Dec 2020*, <https://bit.ly/2TZ8zRS> (accessed 4 August 2021).

their institutional framework. The legal framework for local government institutions is predominantly national with provincial governments playing a very modest role in defining local government institutions. This has resulted in a uniform system of local government throughout the country, with little variation between provinces.⁶⁷

The second manifestation of supervision of local government is regulatory supervision by the national and provincial governments. The national government has rapidly produced legislation regulating the exercise of local government functions. For example, the Water Services Act 108 of 1997 regulates local government's exercise of its power regarding potable water supply, while the National Health Act 61 of 2003 deals with local government's powers over municipal health services.

Due to the rapid production of national legislation and slow production of provincial legislation on concurrent competences,⁶⁸ there is little variation on this score, too. Greater variations between provinces, however, are starting to emerge slowly, with the Western Cape, Gauteng, and KwaZulu-Natal provinces producing legislation that regulates some local government functions.⁶⁹

The fragmentation of approaches to local government among sector departments is cause for concern. Sector departments dealing with transport, water, health, and other areas that intersect with local government's original powers have often sponsored legislation on those original powers that exhibits a variety of interpretations of the scope for regulatory supervision. Some of these interpretations are tenable and others are not.⁷⁰ In addition, some sectors still operate on the basis of regulatory schemes that predate the current local government dispensation and which are therefore premised on the pre-constitutional notion of a subservient municipality. The result is an inconsistent and contradictory approach

⁶⁷ One exception perhaps is that the Province of KwaZulu-Natal has opted to exclude the executive-mayor system and operate only with executive-committee systems.

⁶⁸ Steytler (n 7) 327.

⁶⁹ For example, the Western Cape provincial government adopted regulations on noise pollution in terms of the Environment Conservation Act 73 of 1989. The KwaZulu-Natal government adopted the KwaZulu-Natal Road Traffic Act 7 of 1997, KwaZulu-Natal Health Act 4 of 2000, and KwaZulu-Natal Cemeteries and Crematoria Act 12 of 1996, all of which regulate local government functions.

⁷⁰ For examples of the variety of approaches, see Jaap de Visser, *Developmental Local Government: A Case Study of South Africa* (Intersentia, 2005) 174.

to supervisory regulation. For example, municipalities in KwaZulu-Natal have to obtain prior approval for their by-laws on road traffic,⁷¹ whereas their by-laws on municipal health require no such approval.⁷² Similarly, the national Department of Trade and Industry requires all municipalities to obtain prior approval for their by-laws on building regulations,⁷³ whereas the national Department of Forestry and Water Affairs imposes no such requirement on by-laws on water reticulation.⁷⁴

The third manifestation of supervision over local government is monitoring. Both the provincial and national governments can monitor local government's performance. Generic legislation provides for specific national and provincial monitoring powers. The overall scheme is that provincial departments responsible for local government engage in hands-on monitoring, in that they establish a general monitoring system and can request information from municipalities as well as launch investigations into corruption.⁷⁵ The monitoring powers of the national government act at more of an arm's length, in that this level of government relies on provincial reports and may launch investigations only if provincial governments fail to do so. In practice, however, municipalities are indeed monitored directly by national departments in terms of sector legislation and conditional grants, a factor which tends to disrupt the balance struck in the generic legislation.⁷⁶

A fourth, and increasingly dominant, manifestation of monitoring local government has arisen with the adoption of the Municipal Finance Management Act. The Act imposes a detailed system of financial management dealing with, among other things, the budget process, revenue management, expenditure control, accounting, and supply-chain management.

Integral to the financial management entailed by the Act is a system of regular reporting to provincial treasuries and (to a lesser extent) the

⁷¹ See KwaZulu-Natal Road Traffic Act 7 of 1997, section 26.

⁷² See KwaZulu-Natal Health Act 4 of 2000, section 4.

⁷³ See National Building Regulations and Building Standards Act 103 of 1977, section 29(8)(a).

⁷⁴ See Water Services Act 108 of 1997, section 21.

⁷⁵ Municipal Systems Act 32 of 2000, sections 106–108.

⁷⁶ For examples of various monitoring schemes that are at odds with the Municipal Systems Act and the Constitution, see de Visser (n 70) 183.

National Treasury. This system enables the national and provincial treasuries to regularly monitor the activities of every municipality. The need for oversight of this kind is apparent. What is more, the continuous interaction between municipalities and national and provincial treasuries on the basis of the various reports stimulates intergovernmental cooperation, sharing of information, joint planning, and integration. However, it may result in municipalities' developing an increasing sense of upward accountability at the cost of local accountability.

A fifth, and essential, part of supervision over local government is the constitutional power that provincial governments have to intervene in municipalities if monitoring activities reveal severe and persistent problems in a municipality.⁷⁷ In principle, intervention is a power reserved for provincial governments. Provincial governments may intervene when there are general failures on the part of a municipality to fulfil executive obligations. For example, the provincial government can intervene when a municipality fails to provide basic water supplies or adequate sanitation. The Constitution provides an elaborate menu of interventions, ranging from the take-over of functions to the dissolution of the council and the imposition of a budget. If the province fails to discharge its duty to intervene in critical financial crises, the national government must do so.

Checks and balances are built into the framework for interventions, in that the national minister responsible for local government must approve interventions. The National Council of Provinces also oversees the intervention through an approval power and a power to regularly review the implementation of the intervention. However, in the case of financial interventions, these intergovernmental checks and balances are reduced to a notification.

Provincial interventions in municipalities are a regular occurrence. The mere fact that so many municipalities have experienced two or more interventions⁷⁸ indicates that interventions are not working as intended. A key problem is the legal uncertainty surrounding the implementation of interventions—and the inadequacy of the approaches that

⁷⁷ Constitution, section 139.

⁷⁸ Tracy Ledger and Mahlatse Rampedi, *Mind the Gap: Section 139 Interventions in Theory and Practice* (Public Affairs Research Institute, 2019) 7.

provinces take in response to it.⁷⁹ These legal woes have made provinces wary of interventions, with soft, supportive interventions being deemed safer. However, this approach is leading to exactly the opposite result. Provincial governments are now facing resistance, not from municipalities but from communities and local businesses who—exasperated by their collapsing municipalities and the lack of provincial action—are suing them, successfully, for not intervening and thereby forcing them to use their intervention powers.⁸⁰ Indeed, in 2021, the national government began to ‘leapfrog’ over provinces that are unable or unwilling to intervene.⁸¹

All of this is an indictment of provincial oversight of municipalities. While additional pressure from litigious communities may prompt more interventions, it will not solve an equally stubborn problem, namely that provinces tend to lack the capacity and neutrality that are necessary for conducting interventions. The concept of intervention assumes, after all, the existence of a provincial government capable of overseeing the turnaround of a failing municipality and neutral in the face of the intra- and inter-party tension that underlies the collapse of a municipality. Too often, though, provincial governments fail on either, or sometimes even both, counts: this foredooms their interventions to failure. The root cause of most of South Africa’s abject municipal failures is political in nature—they are due, in other words, to internal factional battles or bitter inter-party-political battles that spill over into municipal administrations and paralyse them.⁸² At times, the intervention by a province which is, or is perceived to be, favourable to one or other of the warring parties or factions simply compounds that political tension rather than moderating it.

⁷⁹ Ibid., 22.

⁸⁰ Tinashe Chigwata, ‘Courts as a Check on Provincial Interventions: The Makana and Tshwane Interventions’ (2020) 15(2) *Local Government Bulletin*.

⁸¹ Government Communications, *Statement on the Cabinet Meeting of 21 May 2021* (2021), www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-12-may-2021 (accessed 28 May 2021).

⁸² Ledger and Rampedi (n 78) 1.

7 INTERGOVERNMENTAL RELATIONS

Intergovernmental relations are guided by a conceptual framework provided in the Constitution and entitled 'co-operative government'. These principles give expression to the attributes of 'distinctiveness, inter-relatedness and interdependence' granted by the Constitution to the three spheres.⁸³ For example, in section 41(1), the three spheres are enjoined to respect each other's institutional integrity, cooperate with each other, assist and support each other, consult each other on matters of common interest, and avoid legal proceedings against one another.

The constitutional recognition of organised local government positions local government as a negotiating partner for national and provincial governments and as support structures for municipalities. The Constitution requires national legislation to recognise national and provincial organisations representing municipalities. In addition, it requires legislation determining consultation procedures with organised local government and procedures for organised local government to designate representatives to participate in two significant institutions, the NCOP and the Financial and Fiscal Commission.

In terms of this scheme, the South African Local Government Association (SALGA) has been accredited. SALGA may designate up to ten representatives to participate in the parliamentary proceedings of the NCOP, but they may not vote.⁸⁴ However, SALGA's participation in the NCOP has not yet produced the type of intergovernmental engagement envisaged by the Constitution. Representatives are serving councillors who are thus in a 'continuous flux',⁸⁵ having to juggle their mandate to their municipality with their duties in Parliament. Another challenge to SALGA's effectiveness is that local government comprises a great variety of municipalities that range from severely under-resourced rural municipalities to metropolitan giants.

South Africa's commitment to containing the centrifugal dynamics of decentralisation has resulted in comprehensive legal and policy frameworks for intergovernmental planning and budgeting. The Integrated

⁸³ Constitution, section 40(1).

⁸⁴ Constitution, section 67.

⁸⁵ Norman Levy, Chris Tapscott, Nico Steytler, et al., *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (Department of Provincial and Local Government, 1999) 134.

Development Plan (IDP) stands at the centre of this. Legislation instructs municipalities to adopt and annually review IDPs and base their budgeting on the IDP, rendering it the prime policy document for municipalities. The IDP has three critical features in the context of intergovernmental relations. First, it must be formulated after extensive public participation and therefore contain the local articulation of service delivery and development needs. These needs may fall within or outside a municipality's competency, which relates to the second and third features. The second feature is that IDPs must be aligned with the development plans and strategies of other affected municipalities and the national and provincial governments. Thirdly, this alignment is expected to be a two-way process. IDPs must complement and influence the development plans and strategies of other affected municipalities and the national and provincial governments. The rationale for this scheme is that all service delivery and development efforts by any sphere of government eventually take place within a municipal jurisdiction—hence the IDP as the focal point of coordination and alignment of service delivery.

The implementation of the grand approach to the IDP is hampered by a number of factors. First, participatory processes are often flawed and artificial, compromising the quality of IDP documents. Secondly, too many municipalities fail to filter and prioritise needs in line with realistic budgetary and competency parameters, thus compromising the credibility of IDPs. Thirdly, the engagement of national and provincial sector departments with the IDP, essential for the success of intergovernmental coordination through the IDP, is often inadequate.

The Intergovernmental Relations Framework Act 13 of 2005 is a key piece of legislation for intergovernmental relations. Chapter 3 of the Constitution sketches only principles for intergovernmental relations—this lack of detail reflects an understanding that the development of an efficient framework for relations between governments is best left to the practice of intergovernmental relations. The Act is thus based on the first results of the 'organic growth' of intergovernmental relations.

A significant best practice that developed after 1994 was the emergence of executive intergovernmental relations and intergovernmental forums (IGR forums). The regular meetings of a national minister with his or her nine provincial counterparts—members of the executive councils (MECs) in so-called MinMECs—grew into strong policy-making structures. Except for the MinMECs on education and finance, these were non-statutory. Even though the practice of executive intergovernmental

relations developed most prominently in national-provincial relations against the background of the two levels holding powers concurrently, the practice attracted notice and was replicated in the provincial-local arena. The Intergovernmental Relations Framework Act subsequently provided an overall framework for IGR forums. In the national arena, the President convenes the President's Coordinating Council, comprising key cabinet members, the nine premiers, and a representative of organised local government. The above-mentioned MinMECs continue to convene in terms of the Act, with organised local government represented at MinMECs that deal with local government's constitutional functions. Provincially, the premier convenes a Premier's Intergovernmental Forum, comprising key provincial MECs and mayors of district and metropolitan municipalities; at the district level, the district mayor convenes a District Intergovernmental Forum, comprising all the local mayors in the district.

Apart from capturing best practice, the Act gave new impetus to intergovernmental relations by formalising IGR forums for local government and by securing local government representation on key national IGR forums.

The question is whether these IGR forums contribute to healthier intergovernmental relations, particularly for the sake of local government. The success of local government's representation on the national IGR forums depends on the quality of organised local government's input in these structures, which is an uncertain variable at best. All too often, SALGA has insufficient resources, capacity, or time to provide adequate input at such IGR forums. Powell argues that IGR forums enjoy legitimacy but tend to reinforce hierarchy rather than equal participation.⁸⁶ For example, the President's Coordinating Council (PCC) seems to be a body to which local government accounts, rather than one serving as an opportunity for it to participate in national decision-making. A key concern about the composition of the PCC is that metropolitan municipalities have no direct representation on it. The government's

⁸⁶ Derek Powell, 'Constructing a Development State in South Africa: The Corporatization of Intergovernmental Relations', in Johanne Poirier, Cheryl Saunders, and John Kincaid (eds) *Intergovernmental Relations in Federal Systems* (Oxford University Press, 2015) 329.

own Integrated Urban Development Framework remarks that ‘[n]ational-city intergovernmental relations should be strengthened’.⁸⁷ However, the composition of the PCC, with metropolitan concerns channelled through one representative of the entire local government sector, is out of sync with the critical importance that metropolitan municipalities have in South Africa.

8 POLITICAL CULTURE OF LOCAL GOVERNANCE

Local government is dominated by the same political parties that operate nationally and provincially. This pattern is informed by a strong party-political culture in local government, as well as by the electoral system, which is a mixture of constituency and party-list elections. 50 per cent of councillors are elected in wards in terms of a first-past-the-post system, with the remaining 50 per cent elected via a closed party-list PR system—an arrangement that, overall, ensures a high degree of proportionality between votes cast and seats obtained. Voter participation in local government elections first increased from 48 per cent in 2000 to 56 per cent and 58 per cent in the 2011 and 2016 general elections, respectively, but fell to 43 per cent in the 2021 general elections.⁸⁸ National and provincial elections (held on the same day) fall in the middle of the local government term and consistently record a higher turnout, namely 77 per cent in 2009, 73 per cent in 2014, and 66 per cent in 2019.⁸⁹

The political landscape is dominated by the African National Congress (ANC), which has secured outright majorities in national elections ever since 1994. In 2021, the ANC controlled the central government and eight of the nine provinces with outright majorities. In most of the country’s municipalities, it commands outright majorities. However, both the 2016 and 2021 local government elections saw a considerable loss of

⁸⁷ Department of Cooperative Governance and Traditional Affairs, *Integrated Urban Development Framework* (Government Printer, 2016) 101.

⁸⁸ Thembani Mkhize, Laven Naidoo, Graeme Götz, Rashid Seedat, *Voting patterns in the 2021 local government elections Gauteng* City Region Observatory <https://www.gcro.ac.za/outputs/map-of-the-month/detail/voting-patterns-2021-local-government-elections/> (accessed 6 April 2022).

⁸⁹ Independent Electoral Commission, *2006 Municipal Elections Report* (Independent Electoral Commission, 2006) 55; Independent Electoral Commission, *2016 Local Government Elections Report* (Independent Electoral Commission, 2016) vii.

support for the ANC local government elections. In 2016, the ANC lost its outright majority in the City of Johannesburg, City of Tshwane, and Nelson Mandela Bay Municipality, which have been governed by unstable coalitions since then. The 2021 saw a further loss of support for the ANC in local government. Its overall support fell to 45.6 per cent, with the party controlling only 122 of the 257 municipalities and leading in 167 municipalities.⁹⁰

The highly centralised party hierarchy that obtains in both the ANC and opposition parties stands in sharp contrast to the decentralised nature of the state. The fielding of candidates in local government elections is determined at regional levels and, in the case of mayoral positions in metropolitan municipalities, at the highest political level. Furthermore, it is common for all political parties, where they are able, to exercise considerable influence and oversight over the appointment of senior municipal administrative officers in councils.⁹¹

It is a statutory goal that all political parties should seek 50/50 representation of men and women on party lists. In the 2016 general local government elections, the gender split of PR list candidates was indeed almost equal. However, two-thirds of ward candidates were male, and the gender imbalance was even more pronounced among independent ward candidates, where males dominated at 86 per cent compared with 14 per cent female candidates.⁹² Women accounted for 58 per cent of voters in the 2016 local government elections.⁹³ In 2018, the Demarcation Board reported that 40 per cent of mayors were women. Women are even more under-represented at senior management level, where only 20 per cent of municipal managers and 30 per cent of chief financial officers were female.⁹⁴

⁹⁰ Independent Electoral Commission, *Municipal Election Results*, <https://results.elections.org.za/dashboards/lge/> (accessed 5 April 2022).

⁹¹ Robert Cameron, 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 97–118.

⁹² Independent Electoral Commission, *2016 Local Government Elections Report* (Pretoria, Independent Electoral Commission, 2016) 58.

⁹³ *Ibid.*, 73.

⁹⁴ Municipal Demarcation Board, *Municipal Powers and Functions Capacity Assessment 2018* (Municipal Demarcation Board, 2018) 72–73.

9 COVID-19'S IMPACT ON THE ROLE OF LOCAL GOVERNMENT

The Covid-19 crisis intensified the need for intergovernmental collaboration and was thus an important test for the IGR forums. The PCC ordinarily meets twice a year and is a somewhat low-key event. However, in the early phases of the crisis it met weekly and coordinated the national-provincial response at a political level with local government representation.⁹⁵ It seems that even metropolitan mayors were invited to some PCC meetings.

During the pandemic, new intergovernmental coordinating platforms were established at provincial and local levels. Provincial governments convened 'provincial command councils', to which local government was sometimes, but not always, invited. At an administrative level, there was close interaction between local and provincial governments. At the height of the crisis they met almost daily, and the general sentiment was that they functioned reasonably well. A golden thread throughout the crisis was that direct representation of the metros was tenuous, despite their crucial role in combatting the spread of the pandemic and absorbing its economic impact.

10 EMERGING ISSUES AND TRENDS

There are a number of significant trends that relate to the autonomy of local government. First, for many of South Africa's 257 municipalities, their constitutional status is one of 'paper autonomy'. This is due to the absence of political and administrative capacity to assert and exploit this autonomy; to financial dependence on intergovernmental transfers (in the case of rural municipalities); to the over-regulation of local government; and to the dominance of centrally directed party politics.

Secondly, horizontal intergovernmental relations among local governments, and the formation of strong regional structures with provinces, remain underdeveloped. For example, Gauteng, the smallest province, is undoubtedly the nation's economic powerhouse. Three of the eight metropolitan municipalities, namely Johannesburg, Tshwane, and

⁹⁵ Nico Steytler, Jaap de Visser, and Tinashe Chigwata, 'South Africa: Surfing towards Centralisation on the Covid-19 Wave', in Nico Steytler (ed) *Comparative Federalism and Covid-19: Combatting the Pandemic* (Routledge, 2022) 336–354.

Ekurhuleni, are in this province, together with two district municipalities. The geographical and functional interlinkages between these municipalities and the province are obvious and strongly suggest regionalisation. The provincial government made attempts in that respect, but ran into the stubborn reality of overly complex intergovernmental relations and cities that are only mildly interested in intergovernmental collaboration.⁹⁶

Thirdly, the trajectory of local government is awkwardly linked to the trajectory of provincial government. Provincial government is the sphere of government with which the ANC, which controls the national government and thus the narrative on potential constitutional change, is the least comfortable.⁹⁷ The irony is that the ANC's internal organisation is its biggest obstacle in dealing with provinces decisively. Whatever the ANC's ambivalence is towards provinces as governments, its party-political structure is deeply 'federal', with provincial structures playing a dominant role. These provincial political structures require access to the levers of (provincial) governments. Therefore, for as long as the 'unitarist' ANC remains in power nationally, the debate about the future of provincial governments is likely to remain unresolved. The debate on the future role of provincial governments is informed by the rise of a strong sphere of local government. The financial, political, and economic clout of metropolitan municipalities almost equals that of provinces. However, there are many municipalities whose performance is dismal, and this is likely to counter any trend towards greater devolution of functions to local government.

Local government's relationship with provincial governments is therefore rife with contradictions. On the one hand, provincial governments have little leverage over local government, particularly the larger cities and metropolitan municipalities; they are also often dependent on municipalities for the performance of their own provincial functions. On the other hand, provinces perform strong monitoring and supporting functions vis-à-vis municipalities, particularly those that are struggling to perform their functions. To complicate the relationship even further, provincial governments themselves often lack the capacity, or the political neutrality, to do so effectively.

⁹⁶ Jaap de Visser 'City Regions in Pursuit of SDG 11: Institutionalising Multilevel Cooperation in Gauteng, South Africa', in Helmut Aust and Anél Du Plessis (eds) *The Globalisation of Urban Governance: Legal Perspectives on Sustainable Development Goal 11* (Routledge, 2019) 186–207.

⁹⁷ Steytler (n 7) 316, 323.

The intergovernmental context within which municipalities operate thus remains unsettled. At the same time, there is little doubt that local government's role in South Africa's decentralised system of government is growing in importance at the expense of the role of provincial governments.

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