Intergovernmental Dispute Resolution in Focus: The Cape Storm[1]

1. Introduction:

The principles of co-operative governance are entrenched in Chapter 3 of the Constitution of the Republic of South Africa (the Constitution).[2] These principles are not only key to intergovernmental relations, but also reflect the underlying values of 'ubuntu and batho phele"[3], the values on which our Constitution and the vision of a new South Africa is based.[4] The Intergovernmental Relations Framework Act[5] (IGR Framework Act) enacted in accordance with section 41(2) of the Constitution[6] attempts to not only concretise the principles of co-operative governance in a "general legislative framework applicable to all spheres and in all sectors of government" but "ensure(s) the conduct of intergovernmental relations in the spirit of the Constitution".[7]

In this paper we provide an analysis of the dispute resolution mechanism in the IGR Framework Act. We are particularly interested in the way these mechanisms assist in resolving disputes in which local government is a party, given its relatively new status as an autonomous sphere of government.[8] In the first part of this paper, we describe the constitutional framework that underpins the IGR Framework Act and assess how the provisions of the Act give effect to the constitutional imperative on which it is based. Secondly, we identify and assess the different stages in the dispute resolution process and the steps that characterise each stage. Drawing on practice we identify the tensions that arise through the stages and also the thresholds that are developing through a review of the judicial decisions on intergovernmental dispute resolution.

The recent dispute over a proposed change in the system of governance in the City of Cape Town, and the processes surrounding that dispute resolution, provide us with a good illustrative tool of how the IGR Framework Act operates in practice. To this end, in addition to identifying the stakeholders who participated in the dispute resolution process, we assess the roles of the parties to that dispute and the various factors which fed into the

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[2] The Constitution of the Republic of South Africa, 1996.

[3] The concept of "ubuntu" was included in the post-amble to the Interim Constitution of the Republic of South Africa, Act 200 of 1993. Making reference to the divisions of our past, Chapter 15 of the Interim Constitution provides that "there is a need for understanding and not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation". "Ubuntu" has subsequently been defined by the Constitutional Court in different contexts, and is often used as a generic term encapsulating the traditional values of African society such as communalism, human solidarity and mutual respect. In the context of intergovernmental relations it arguably takes on the form of the duty on organs of State to respect each other and work together towards a shared goal. "Bhato phele" refers to the governance philosophy adopted by government in the principle of "people first" as the impetus of all government action.

[4] Constitution, 1996.

[5] Act 13 of 2005. The IGR Framework Act came into effect on 15 August 2005.

[6] S 41 (2) Constitution provides that "An Act of Parliament must - establish or provide for structures and institutions to promote and facilitate intergovernmental relations".

[7] Preamble, IGR Framework Act.

[8] S 41(1) (c) Constitution. See para 2 below for further discussion.

dynamics of this dispute. We also interrogate the procedural overlaps that existed between the provisions of the Local Government: Municipal Structures Act (the Structures Act)[9] and the IGR Framework Act.

2. Constitutional Framework

While section 1 of the Constitution establishes the Republic of South Africa as one sovereign democratic state, government in South Africa is comprised of three different spheres, namely the national, provincial and local spheres of government.[10] In the context of the unique challenges inherited from our apartheid past, the drafters of the Constitution envisioned that the best vehicle for accountable and democratic governance was that of "co-operative government" as outlined in Chapter 3 of the Constitution. In the *First Certification* judgment the Constitutional Court elaborated on the significance of this decision, holding that a choice was made not to opt for "competitive federalism" but for "co-operative government".[11]

Section 40 (1) of the Constitution therefore aptly describes the spheres of government as "distinctive, inter-dependent and interrelated". "Distinctiveness" relates to the autonomy which each sphere has in respect of powers and functions.[12] The Constitution delineates specific powers and functions to the national, provincial and local spheres of government, as equal partners in governance.[13] In exercising these powers and functions however, the spheres remain subject and accountable to the Constitution which creates a system of "checks and balances" to ensure compliance with this standard.[14] "Interrelatedness" therefore describes the regulatory relationship between the spheres, as manifested in the national and provincial governments' supervisory powers of regulation, monitoring and intervention.[15]

"Inter-dependence" in turn relates to the fact that the spheres are dependent on one another "to secure the well-being of the people of the Republic".[16] The impetus of all

[9] Act 117 of 1998.
[10] S 40 (1) Constitution.
[11] *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 287.
[12] Levy and Tapscott 2001, 11.
[13] In this regard the final Constitution saw a change in the status and role of local government within the decentralised governance model adopted by the new South African government. In the *City of Cape Town and Another v Robertson and Another 2005 (3) BCLR 199 (CC)* at para 60 the Court held that:

> "A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws."

[14] S 41(1)(d) Constitution.
[15] Levy and Tapscott 2001, 11.
[16] S 41(1)(b) Constitution.

governmental action and the exercise of all the powers and functions assigned to each sphere must be informed by this principle objective.

As appropriate as such a vehicle for governance may seem within a democratic context, Steytler (2005) observes that "having three spheres of government operating each with a degree of autonomy makes for complex relationships [which] may also impact on the effectiveness and efficiency of government".

Chapter 3 of the Constitution, in defining the nature of co-operative governance, delineates the parameters within which spheres must exercise their powers and perform their functions. Spheres are enjoined to "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere". [17] They are also duty-bound to "co-operate with one another in mutual trust and good faith", the foundation for which, is outlined in section 41(1)(h) of the Constitution .[18]

While certain of the principles outlined in Chapter 3 inform the normative content of co-operative governance, other duties, such as that of organs of state to "avoid legal proceedings against one another" have been defined by judicial interpretation and, as such, have been concretised through practice.[19]

Duty to avoid litigation

Section 41(3) of the Constitution 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 other remedies before it approaches a court to resolve the dispute."

In the *First Certification* case, the Constitutional Court held that, this provision not only binds spheres of governments but "binds all departments of state and administrations in the national, provincial or local spheres of government". Importantly the Court held that its implications are that "disputes should where possible be resolved at a political level rather than through adversarial litigation.[20]

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[17] S 41(1)(g) Constitution.

[18] S 41(1)(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting with one another on matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal procedures against one another.

[19] S 41 (1)(h)(vi) Constitution.

[20] In re: Certification of the Constitution of the Republic of South Africa, 1996 [1996] (10) BCLR 1253 (CC) at para 291.

In *Uthukele District Municipality and Others v President of the Republic and Others 2003 (1) SA678 (CC)*, the Court commented on the stringency with which it views the efforts by organs of state to avoid litigation, in that,

> "The obligation to settle disputes is an important aspect of co-operative government, which lies at the heart of chapter 3 of the Constitution. If this court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of State involved in litigation with one another."[21]

In *National Gambling Board v Premier, KwaZulu-Natal and Others 2002 (2) SA 715 (CC)*, the Court commented on the obligation which it places on parties to proactively engage creative solutions to settle a dispute in that,

> "…organs of State's obligations to avoid litigation entails much more than an effort to settle a pending court case. It requires of the organ of State to re-evaluate the need …to consider alternative possibilities and compromises and to do so with the regard to the expert advice the other organs of State have obtained."[22]

The Constitution and the Intergovernmental-Relations Framework Act

While providing a normative framework for co-operative governance, adhering to the principles outlined in Chapter 3 of the Constitution will not automatically indemnify organs of state from conflict situations or disputes. The drafters of the Constitution recognised that if these principles were not institutionalised, there was a danger, that they would only constitute a theoretical framework of no practical value or impact on governance.

Section 41 (2) of the Constitution therefore provides that an-

> "Act of Parliament-
> (a) must establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and
> (b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes".

Implicit in section 41(2) of the Constitution is a two-fold approach to intergovernmental relations within the broader context of co-operative governance. In establishing structures and institutions "to promote and facilitate inter-governmental relations" formal channels of communication are established, which not only facilitates the building of intergovernmental relations, but also creates criteria against which the efforts of organs of state to co-operate, may be evaluated.

[21] *Uthukele District Municipality and Others v President of the Republic and Others* 2003 (1) SA678 (CC) at para 33.
[22] *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 36.

The second provision, which constitutes the focus of this paper, is as essential. By providing "appropriate mechanisms and procedures to facilitate the settlement of inter-governmental disputes", there is a move away from a reactive approach to dispute resolution, which often results in wasted costs and broken relationships between disputing organs of state.[23] These consequences make it difficult for organs of state to, in the aftermath of a dispute, provide "effective, transparent, accountable and coherent" government. The High Court, in *Ngqushwa Local Municipality v MEC for Housing, Local Government & Traditional Affairs*, commenting on the consequences of "rushing" into litigation and the wasted costs of such actions, held that:

> "The injunction against rushing off to court is aimed at ensuring the effective flow of communication and co-operation between the different spheres of government in order to enhance service delivery and to prevent the squandering of taxpayers' money on avoidable litigation".[24]

In keeping with the constitutional directive to create an Act of Parliament that provided for the institutionalisation of intergovernmental relations, various pieces of legislation were promulgated in respect of certain aspects of governance.[25] This resulted in a piece-meal establishment of institutions and processes to deal with certain aspects of governance. While not derogating from the successful implementation of these different Acts, the imperative to create an Act of Parliament that dealt holistically with intergovernmental relations went unfulfilled until the enactment of the IGR Framework Act.

The preamble to the IGR Framework Act, referring to the "pervasive challenges facing our developmental state", recognises that these challenges "[are] best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country".[26]

Of particular significance in the context of this paper, is the dispute resolution mechanisms outlined in the IGR Framework Act, and the extent to which it minimises the debilitating effect of intergovernmental conflict on governance.

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[23] In *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 45, the court held that:

> "All the organs of state ought to have attempted to avoid this litigation. Not one of them performed that obligation… These are powerful considerations for ordering each party to pay its own costs."

[24] *Ngqushwa Local Municipality v MEC for Housing, Local Government & Traditional Affairs* [2005] JOL 14776 (Ck).

[25] For example, the Intergovernmental Fiscal Relations Act 97 of 1997 created the Budget Council and the Local Government Budge Forum for consultation on the allocation of revenue raised nationally, while the Local Government: Municipal Finance Management Act 56 of 2003, regulated certain aspects of the supportive and supervisory relationship between provinces and municipalities in respect of financial matters.

[26] Preamble, IGR Framework Act of 13 2005.

3. Intergovernmental Relations Framework Act: The Scope, Provisions and Limitations

Structure of the Act

The structure of the Act broadly reflects the different approaches contemplated by the legislature to best facilitate co-operative governance between autonomous organs of state. The first chapter deals with the interpretation of the Act and the second deals with the establishment of intergovernmental structures to facilitate cooperative governance, including the ongoing intergovernmental forums aimed at formalising channels of communication between organs of state[27]. The third chapter deals generally with the conduct of intergovernmental relations while the fourth chapter establishes the framework for dealing with intergovernmental disputes. Chapter 5 addresses the miscellaneous matters such as general reporting requirements. The structures established in the second and third chapters are aimed at reducing the possibility for conflict and contribute to the fulfilment of Parliament's obligations under section 41(2)(a) of the Constitution. However, given the complex relationships between the different spheres of government, the fourth chapter addresses itself to the reality that disputes between organs of state are unavoidable.

In fulfilling its constitutional mandate under section 41(2)(b), Parliament was faced with the challenge of enacting legislation that recognises existing mechanisms for dispute resolution and encouraging substantive compliance with the letter and spirit of the Constitution. In enacting the IGR Framework Act, Parliament met this challenge in several notable ways. Firstly, the Act expressly states that parties should first attempt to resolve conflicts in the manner envisioned in any existing agreements between the parties. Further, in certain cases, it makes the provisions of the Act subordinate to other legislation that deals more directly with the subject of the dispute. In that context, the IGR Framework Act is a default provision.

Secondly, the IGR Framework Act is facilitative and not compulsive in nature. The focus is on creating the opportunities for substantive dialogue rather than establishing a set of formal requirements that parties must comply with. It does not prescribe any particular mechanism and it affords the parties control over the process. Finally, the IGR Framework Act creates an important role for intermediaries, recognising that parties may require assistance in reaching an agreement. As such, the parties are permitted to request the assistance of intermediaries who may assist them in reaching a compromise. This limits the influence that parties outside of the dispute have on the process, with the exception of when such parties are expressly invited by one or more parties to the dispute. The IGR Framework Act is an important mechanism to promote conciliatory relations between the parties and to avoid an adversarial process.

[27] See Fessha and Steytler (2006), and Baatjies and Steytler (2006) for a general analysis of the intergovernmental forums established by the IGR Framework Act.

In reviewing the provisions of the IGR Framework Act below we analyse the ways in which it promotes the principles of co-operative governance while at the same time highlighting its limitations.

3. 1 Chapter 4 of the IGR Framework Act

3.1.1 *Scope*

Section 2 of the Act lists the parties to which the Act as a whole applies namely, "(a) the national government; (b) all provincial governments; and (c) all local governments. However, the Act specifically excludes the legislature,[28] the judiciary[29] and certain independent bodies[30] from its application.

Section 42(2) of the Constitution requires that an Act of Parliament be enacted to provide an appropriate mechanism to facilitate the settlement of intergovernmental disputes. However, there is nothing in the Constitution that requires that such Act, when passed, must take precedence over all other dispute resolution mechanisms already in existence. Accordingly, the IGR Framework Act recognises the various other statutes and mechanisms that regulate intergovernmental relations generally, and dispute resolution specifically.

Where a provision of the IGR Framework Act conflicts with a provision of another Act of Parliament, the provision of the other Act prevails.[31] Conflicts with provincial legislation are resolved "in terms of section 146 of the Constitution."[32] However, the provisions of the IGR Framework Act prevail over conflicting municipal by-laws.[33]

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[28] S 2(2)(a) and (b) IGR Framework Act. The exclusion of the legislature from the ambit of the Act has been the subject of some analysis. In the Constitutional Court's ruling in *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*, 2006 (5) BCLR 622 (CC), the Court declined to express a view on whether Parliament can constitutionally exclude the legislature from the ambit of the IGR Framework Act. The issue was not argued before the Court in the case. It may well be argued at a later stage, at which time the definition of "intergovernmental dispute" in the Act must also be considered. This exclusion is understandable based on the IGR Framework Act's focus on executive intergovernmental relations. However, the exclusion does not exempt the legislature from the constitutional obligation to avoid disputes.

[29] S 2(2)(c) IGR Framework Act.

[30] S 2(2)of the IGR Framework Act excludes:

> (d) any independent and impartial tribunal or forum contemplated in section 34 of the Constitution and any officer conducting proceedings in such a tribunal or forum;
> (e) any institution established by Chapter 9 of the Constitution;
> (f) any other constitutionally independent institution; and
> (g) any public institution that does not fall within the national, provincial or local sphere of government.

[31] S 3(1) IGR Framework Act.

[32] S 3(2)(a) IGR Framework Act.

[33] S 3(2)(b) IGR Framework Act.

Following from this general principle, chapter four of the IGR Framework Act begins with a similar limitation on the scope of the dispute resolution provisions. Section 39 states that the chapter does not apply "(a) to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms or procedures; (b) to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution." Besides recognising existing mechanisms, the IGR Framework Act also provides Parliament with the opportunity to develop other mechanisms that may be better tailored to particular types of disputes.[34]

Further limitations on the application of the IGR Framework Act are contained in the definition of intergovernmental disputes. Section 1 of the Act defines an intergovernmental dispute as:

> (1) a dispute between different governments or between organs of state from different governments concerning a matter-
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> (a) arising from –
> (i) a statutory power or function assigned to any of the parties; or
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> (ii) an agreement between the parties regarding the implementation of a statutory power or function; and
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> (b) which is justiciable in a court of law,
>
> and includes any dispute between parties regarding a related matter.

Section 1 of the IGR Framework Act incorporates the definition of organs of state contained in section 239 of the Constitution, but excludes those organs of state listed in section 2(2). Section 239 defines organ of state as:

> (a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution –
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

[34] For example, section 44 of the *Municipal Finance Management Act 56 of 2003* (the "MFMA"), provides a mechanism for resolving disputes that arise from the application of that statute. The section recognises the role of the National Treasury as an appropriate mediator for disputes of a financial nature. However, the IGR Framework Act would remain the default for resolving intergovernmental disputes which fall outside the scope of the dispute resolution provisions of the MFMA. For instance, section 44 only applies to disputes where the National Treasury is not a party and where at least one of the organs of state involved in a municipality or municipal entity. Generally speaking, disputes that fall outside those parameters will be subject to the IGR Framework Act.

This definition is subject to the restrictions described above, such as excluding the legislature and Chapter 9 institutions.

For a dispute to fall within the ambit of the IGR Framework Act it must fulfil four basic requirements.[35] Firstly, the dispute must involve a "specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with a refusal, counter-claim or denial by another."[36] Secondly the dispute must be of a legal nature. That is, it must be a dispute that is capable of being the subject of judicial proceedings. The IGR Framework Act does not apply to disputes of a purely political nature.[37] Thirdly, the dispute must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.[38] Finally, the dispute may not be subject to any of the previously enumerated exceptions.

It is clear from these limitations on the applicability of the IGR Framework Act, that the preference would be for disputes to be resolved either on the basis of an Act of Parliament that is more directly related to the subject matter of the particular dispute or by means which are agreed upon by the parties, such as in an implementation protocol.[39] The IGR Framework Act is thus conceptualised as a default or stop gap legislation to ensure that organs of state are still able to fulfil their constitutional obligation even in the absence of specific legislation or agreement on the particular dispute.

3.1.2 *Obligations*

Section 40 of the IGR Framework Act incorporates the obligations imposed by section 41 of the Constitution. Subsection 40(1) of the IGR Framework Act implores all organs of state to "avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions." In essence, organs of state are required to take a proactive approach by conducting their affairs in a manner that avoids or discourages disputes. This obligation gives effect to the spirit and text of section 41(1) of the Constitution relating to co-operative governance. This section also implicitly encourages compliance with the other structures established by the IGR Framework Act, which have the goal of facilitating cooperative governance.

Likewise, section 40(2) of the IGR Framework Act restates the obligation contained in section 41(3) of the Constitution, requiring organs of state to make all reasonable effort to settle disputes before approaching a court.

The mechanism contained in the sections that follow section 40 are designed to allow the parties to comply with this obligation. However, the Constitution is ultimately the source

[35] *Government Gazette* 29422 (2006: 20).
[36] Merrills 1991, 1.
[37] *Government Gazette* 29422 (2006: 20).
[38] *Government Gazette* 29422 (2006: 20).
[39] S 41(2) of the IGR Framework Act.

of the obligation and these particular provisions must be interpreted in light of that overarching constitutional obligation.

3.2 Dispute Resolution Process

Sections 41 through 45 of the IGR Framework Act detail the specific steps that organs of state are required to follow in settling disputes. For the purposes of this paper, these steps will be described in two stages. The first stage is the process that precedes the declaration of the disputes. The second stage is that which follows the declaration of the dispute. This delineation is instructive as it allows for a full appreciation of the significance of the declaration of a formal dispute and the obligations that follow such a declaration.

3.2.1 *First Stage: Before the Declaration of a Formal Dispute* (section 41)

This first stage of the dispute resolution mechanism is detailed in section 41 of the Act. Section 41 states:

> (1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.
>
> (2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.

The parties are presumed to be in a dispute prior to the declaration of a formal intergovernmental dispute. However, the Act provides no guidance on when exactly the dispute is considered to have begun such that the obligation to attempt to resolve said dispute is engaged. When does a disagreement move from being a "broad and general disagreement about a problem"[40] to being an intergovernmental dispute? Does the dispute begin as soon as one organ of state challenges an exercise of a power or function by another organ of state? Or, must the parties have conducted themselves in an adversarial manner before the obligation to attempt to resolve the dispute is engaged? Steytler describes this conundrum:

> When two organs of state "negotiate", it may denote healthy intergovernmental relations – a process by which they move towards an agreement. Where there is no immediate meeting of minds between two organs of state, it does not constitute a dispute. On the other hand, "negotiation" may also denote a procedure to settle a dispute. It is important to distinguish with some precision between the two forms of negotiation. Where it involves settling a dispute,

[40] *Government Gazette* 29422 (2006: 20).

> the constitutional obligation to apply non-judicial dispute settlement procedures kicks in and that may entail more formal, prescribed procedures to be followed and time-frames observed.[41]

While it remains important to identify the point at which a disagreement between organs of state becomes an intergovernmental dispute, identifying the precise point is not as critical under the IGR Framework Act as it might otherwise be. As indicated, organs of state have an ongoing obligation to avoid intergovernmental disputes. This obligation applies as much to ordinary negotiations in the course of intergovernmental relations as it does to negotiations pursuant to a dispute. Essentially, the obligation to avoid disputes and the obligation to make reasonable efforts to settle disputes are two points on the same continuum. The obligations apply simultaneously and concurrently. It is therefore clear that the parties are required to act proactively and must make every effort to resolve the dispute as soon as they realise the real potential for a dispute.

Practically speaking, this means that there may well be overlaps between the application of the IGR Framework Act and provisions in other statutes. For instance, it may become evident during a statutorily prescribed consultation between different organs of state that there is a disagreement relating to the exercise of a statutory or constitutional power. Pursuant to the obligation to avoid disputes, the parties may begin a process of negotiations as part of the consultation period. To the extent that the parties reach an impasse during the consultation, the subsequent negotiation will fall within the ambit of the IGR Framework Act, notwithstanding the fact that the negotiations are proceeding during the statutorily prescribed consultation period. Statutory provisions regarding consultation processes and periods are part and parcel of the dispute avoidance obligation. As such, they may often be the point at which an impasse is reached, thereby activating the duty to settle the dispute.[42]

Following from that analysis of the relationship between the obligations in subsections 40(1)(a) and 40(1)(b) of the IGR Framework Act, it is curious that section 41 of the IGR Framework Act, which describes the informal stage of the dispute resolution process, places the onus to make reasonable efforts to settle the dispute and initiate negotiations on the party seeking to declare a dispute.

This is in contrast with Section 41(3) of the Constitution and section 40 of the IGR Framework Act which place the obligation to both avoid and settle the dispute on all parties. This apparent conflict must be resolved by reference to the constitutional obligation that underpins the IGR Framework Act. The IGR Framework was enacted pursuant to Parliament's obligation under section 41(2) of the Constitution. It does not absolve organs of state from compliance with their section 41(3) constitutional obligation. It is to the Constitution that the organs of state are ultimately accountable. As such, even though section 41(2) of the IGR Framework Act places the onus on the party

[41] Steytler 2001, 183.

[42] This point will be illustrated in the Cape Town case study in the last section of this paper. In that case, this is precisely what occurred. It became quite evident early on in the consultation period that the parties were engaged in a legal dispute.

wishing to declare the dispute, the wording of section 41(3) of the Constitution imposes a reciprocal obligation on the other parties. At the very least, the constitutional obligation requires that the other party to the dispute cooperate in the efforts being made to settle the dispute. Generally, this will mean attending convened meetings and cooperating with any intermediary who intervenes to assist with the dispute resolution process. In the spirit of cooperative governance, there is also no bar on the other parties initiating the negotiations.

In fact, one may argue that settling the dispute at this informal stage is most consistent with the principle of cooperative governance and the structure of the IGR Framework Act. As previously discussed, the limitations imposed on the application of the IGR Framework Act suggest a preference for dispute resolution mechanisms that result from agreement between the parties. As we will see, once a formal intergovernmental dispute is declared within the terms of the IGR Framework Act, the parties are bound to follow specific steps. In the post-declaration stage of the dispute, there are defined roles for intermediaries and reporting obligations are engaged. The parties have more flexibility in brokering a resolution during the informal stage. Arguably, resolving the dispute at this stage is also more cost effective as the parties avoid the costs related to compliance with the various steps in the formal stage, including engaging a facilitator who is required to submit certain reports.[43]

Rather than absolving the other organ of state of the obligation to make reasonable efforts to settle the dispute, section 41 of the Act should be seen as placing a higher onus on the party wishing to declare the dispute to take the lead on attempts at resolution. The party wishing to declare the dispute is likely to be the aggrieved party and will probably have more of an incentive to seek resolution to the dispute to prevent whatever deleterious effect it is seeking to avoid by declaring the dispute. As such, the section may simply be allocating the primary responsibility to the party who will be more motivated to comply with the obligation.

Another important feature of the informal stage of dispute resolution is the ability of parties to seek the assistance of an "intermediary." Subsequent sections of the Act conceive of parties enlisting the assistance of facilitators, mediators**,** the Cabinet Minister responsible for provincial and local government, the MEC for local government (the MEC**)** and other government officials in the formal stage of the dispute.[44] However, in each case the assisting party is given a specific mandate, such as to facilitate meetings. There are specific criteria on when the Minister or the MEC or other government official may intervene in the process. However, the role of the intermediary in the informal stage is clearly more robust and open ended. The intermediary could be any party that can assist the parties in settling the dispute. The intermediary could even be a party who later plays a more formal role in the formal stage of the dispute, such as the relevant Minister or MEC. However, when such a party is acting in the role of "intermediary" they are not subject to the restrictions to which they would be bound if acting in the formal stage of

[43] The specific requirements of this stage will be discussed in the following section of this paper.
[44] These provisions will be reviewed in the following section of this paper.

the dispute. The role is of a more informal nature[45] and the party can only exercise such powers as are conceded to it by the parties to the dispute. The intermediary has no statutory power to bind or compel the parties to agree to a settlement. The role of the intermediary is to generally stimulate negotiations. An intermediary may be described as "a person or institution with experience, stature and status, and with the skills and resources to open channels of communication and overcome misunderstandings between disputing parties."[46] To be effective in this role, the intermediary must be acceptable to all parties to the dispute.

3.2.2 What *Constitutes "Reasonable Effort"?*

The IGR Framework Act has only been in existence for a year. As such, there is no case law yet applying its provisions. However, the cases that exist indicate that the courts do not hesitate to exercise the authority granted to them under subsection 41(4) of the Constitution, which states that "If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state."[47]

Although the *National Gambling Board case* was decided before the enactment of the IGR Framework Act, the reasoning provides some guidance on the kind of effort that the court considered to meet the constitutional threshold in subsection 41(3) of the Constitution. In that case, the dispute was between the national government and the KwaZulu-Natal province regarding the establishment of a central electronic monitoring system (CEM) for gambling machines. The idea of establishing a single national central monitoring system for gambling machines had been canvassed at various meetings between the national Minister of Trade and Industry and members of the various provincial executive councils. Representatives of KwaZulu-Natal were present at such meetings, including the meeting at which it was agreed that the Minister would issue a tender regarding the establishment of such a single CEM. The representatives of KwaZulu-Natal did not declare dissent at any of the meetings. However, subsequent to the call for tenders, the Minister became aware of KwaZulu-Natal's opposition to the concept and also of the fact the government of KwaZulu-Natal had passed legislation providing for a regional CEM and had issued a call for tenders. The Minister sought an undertaking from KZN that they would halt the call for proposals, failing which an urgent action was launched before the Constitutional Court seeking, *inter alia*, that there could be only one CEM throughout the country.

The Court found that the parties had failed to comply with their obligations under the Constitution. The Court found that,

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[45] *Government Gazette* 29422 (2006: 22).
[46] *Government Gazette* 29422 (2006: 21).
[47] In *Uthukela District Municipality and Others v President of The Republic of South Africa and Others* (2003) (1) SA 678 (CC), although the Constitutional Court acknowledged that there was an important legal issue to be decided, it determined that "in the interest of cooperative government, this Court should not exercise its discretion to decide the confirmation issue. It must first be left to the organs of state to endeavour to resolve at a political issue such issues as there may still be" at para 23.

> The parties have made no meaningful effort to comply with their constitutional obligation of cooperative government. The dispute primarily raises questions of interpretation. Such disputes can be resolved amicably, however. Moreover, organs of state's obligation to avoid litigation entails more than an effort to settle a pending court case. It requires of each organ of state to re-evaluate its position fundamentally. In the present context, it requires each of the organs of State to re-evaluate the need or otherwise of a single CEM, to consider alternative possibilities and compromises and to do so with regard to the expert advice the other organs of State have obtained.
>
> The parties' failure to comply with the obligations of Chapter 3 is sufficient ground for refusing direct access.

Similarly in *Western Cape Province v George Municipality,*[48] the Court found that the premier had failed to make reasonable efforts to settle the dispute as the premier had given the municipality no warning regarding the legal suit. Secondly, the premier had failed to comply with the constitutional obligation by not clearly stating its issues with reasons sufficient to permit the municipality to reconsider its decision.[49]

Both cases were decided prior to the enactment of the IGR Framework Act, so the courts were not addressing themselves to the two-stage process provided by the IGR Framework Act. As such, one could argue that the parties are simply required to meet that threshold before going to court and that the definition of issues and exploration of compromises need not happen at the informal stage. While this may be true, technically speaking, the IGR Framework Act does require that the parties commence negotiations in the informal stage to attempt to settle the disputes. To make this legal obligation a reality, the parties would need to have identified the issues, albeit informally, in order to be able to productively negotiate at this stage. The spirit of cooperative governance requires that the parties attempt to resolve the dispute at the earliest opportunity which in the context of the IGR Framework Act is in the informal stage. Organs of state would miss the opportunity provided at this stage if they choose to delay constructive negotiations until after a formal dispute is declared. It is clear that the intention of section 41 is to avoid the declaration of the dispute by encouraging negotiations beforehand. There would have been no reason to require pre-declaration negotiations if Parliament intended that the parties delay meeting the "reasonable effort" threshold until after the dispute is declared.

In practical terms, section 41 requires the parties "to be prepared, to have authority to settle, to participate properly in the negotiations and to give consideration to making and responding to offers."[50]

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[48] *Western Cape Province v George Municipality* unreported decision of the Cape High Court, case no 8030/2003.
[49] *Western Cape Province v George Municipality*.
[50] *Government Gazette* 29422 (2006: 30).

Section 45 disallows the parties from resorting to judicial proceedings during the informal stage of the dispute resolution process. It prohibits government or organs of state from instituting judicial proceedings "unless the dispute has been declared a formal intergovernmental dispute". While there is an argument that disputes are best resolved during this informal stage, the nature and urgency of the matter are factors that would be considered in assessing whether organs of state have met their obligations under section 41. For instance, where a matter is urgent and time is of the essence, providing the other party with a statement of the issues in dispute and one's position on them may be sufficient as a "reasonable effort" to settle the dispute in this stage. Because the obligation to participate in negotiations carries over into the formal stage of the dispute, in such circumstances of urgency, the parties may wish to declare the dispute early on in the process to preserve their right to bring legal action.[51] By so doing, the parties will be able to proceed to the judicial process if one of the parties proceeds to exercise the power or function in the manner that gives rise to the dispute.

Although the obligation to participate in negotiations carries over into the formal stage of the dispute, section 41 of the Act makes it imperative on the parties to begin that process informally before they declare the process. It will be in the exceptional case where the parties will be able to satisfy their obligation under section 41 of the Act, without having made attempts to negotiate at this stage. As the courts have indicated, the obligation to resolve disputes is a core part of the principle of cooperative governance. The obligation is substantive and requires best efforts. The courts have indicated a willingness to deny parties access to judicial remedies where they have only made a perfunctory effort to settle the dispute. However, these two stage process is a creature of statute, it is not prescribed by the Constitution. As such, courts may consider the entire pre-litigation process rather than assessing the obligations on a stage-by-stage basis. That is, a court is unlikely to refer a case back to the parties for failure to begin negotiations before declaring the dispute, where there is evidence that the parties engaged in substantive negotiations in the formal stage. However, this does not absolve organs of state of their obligation to make "reasonable efforts" in the informal stage. Making a practice of declaring a formal dispute first and then commencing negotiations undermines the process and prevents the parties from taking advantage of the more informal opportunity afforded to them under section 41.[52] Organs of state should attempt to avoid unnecessarily drawing out the dispute resolution process and incurring the associated costs to the public. The longer the dispute the greater the resources expended.

3.3 Transitioning from the Informal to the Formal Stage: The Declaration

Subsection 41(1) of the IGR Framework Act permits an organ of state which has made "reasonable efforts" to settle a dispute to declare a formal dispute where such efforts have failed. The party must inform the other party of the declaration in writing.

[51] As we will discuss in the last part of this paper, the declaration of dispute may have the effect of suspending the action.

[52] The case study in the final part of this paper illustrates the advantages of making the best efforts to settle the dispute at the informal stage.

Subsection 41(1) of the IGR Framework Act does not confer on any organ of state the authority to declare disputes. An organ of state must seek its authority from other legislation relating to its jurisdiction, including the Constitution. It is incumbent on the organ of state to ensure that it has the necessary jurisdiction to declare the dispute. For instance, while the executive mayor of a municipality may, as an "organ of state" under section 239 of the Constitution, declare a dispute in his or her own capacity, the mayor must seek a resolution from the municipal council in order to declare a dispute in the name of the municipality.

Subsection 41(1) of the Act does not list any criteria for the contents of the written notification.[53] It simply requires a notice sufficient to alert the other party to the declaration of the dispute. However, given the significant legal consequences that follow the declaration, organs of state should use the notice as an opportunity to state the efforts that have been made to date to settle the dispute and any outstanding issues, as a means to kick start the second stage of negotiations. In the notice, the party may even propose a time for the initial meeting.

3.4 Second Stage: After the Declaration of a Formal Dispute (Section 42-44)

The declaration of a formal intergovernmental dispute marks the beginning of a more formalised dispute resolution process. In contrast to the informal stage, which is characterised by a general obligation to attempt, in good faith, to settle the dispute, the formal stage is characterised by formalised steps, which the parties are mandated to follow. In some cases, the Act provides guidelines on when a step in the process must be completed. There are also more formalised roles contemplated for non-parties to the dispute who are required by law, or requested by the parties, to assist in the dispute resolution process.

Section 42 of the IGR Framework Act states the legal consequences that follow a declaration of a dispute.

3.4.1 *Convening the Meeting*

Sections 42(1) makes it mandatory for the parties to convene an initial meeting regarding the dispute. The meeting must be convened "promptly" following the declaration of the dispute.[54] The obligation to call such a meeting is imposed on all parties, making all parties equally responsible for ensuring that the meeting occurs within a reasonable time after the declaration is made. Should the parties fail to convene the meeting as required, either the MEC[55] or the Minister[56]is, depending on the organs of state involved, empowered to convene such meeting.

[53] See *Government Gazette* 29422 for guidelines on what the notice should contain.
[54] S 42(1) IGR Framework Act.
[55] S 42(4) IGR Framework Act.
[56] S 42(3) IGR Framework Act.

Where the dispute is between "a provincial organ of state and a local government or a municipal organ of state in the province;" or between local governments or municipal organs of state from different local governments in the province" the MEC for local government is authorised to convene the initial meeting.[57] The Minister for Provincial and Local Government is empowered to convene the meeting where a national organ of state is involved or where the dispute is inter-provincial or between "provincial organs of state from different provinces."[58] The Minister is also designated as the convener for inter-governmental disputes that do not fall into any of the other categories[59].

The parties to the dispute are obliged to attend the meeting, whether convened by them or by the intervention of the Minister or the MEC. Should they fail to attend a meeting convened by the Minister or the MEC or fail to appoint the facilitator as they are statutorily bound to do, the MEC or Minister may designate a facilitator on their behalf.[60]

It is worth noting that the role of the Minister or MEC in this scenario is very limited. The Minister or MEC may not intervene in the substance of the dispute. Their role is limited to convening the meeting and, if necessary, appointing the facilitator.

3.4.2 *Agenda for the First Meeting*

Subsections 42(1) and (2) state:

> (1) Once a formal intergovernmental dispute has been declared, the parties to the dispute must promptly convene a meeting between themselves, or their representatives –
>
> (a) to determine the nature of the dispute, including –
>
> (i) the precise issues that are in dispute; and
> (ii) any material issues which are not in dispute;
>
> (b) to identify any mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist them in settling the dispute, including any mechanism or procedure provided for in legislation or any agreement between the parties;
>
> (c) to agree on an appropriate mechanism or procedure to settle the dispute, subject to subsection (2); and
>
> (d) to designate a person to act as facilitator.

[57] S 42(4)(a) and (b) IGR Framework Act.
[58] S 42(3)(a) and (b) IGR Framework Act.
[59] S 42(3)(c) IGR Framework Act
[60] S 42(5) IGR Framework Act

> (2) Where a mechanism or procedure is specifically provided for in other legislation or in an agreement between the parties, the parties must make every reasonable effort to settle the dispute in terms of such mechanism or procedure.

In essence, section 42(1) prescribes the agenda for the first meeting. The purpose of which is for the parties to decide how the dispute resolution process will proceed, to determine the issues under dispute and to get clarity on each party's position. However, it is likely that some of the requirements for this first meeting will have been accomplished during the informal stage of the dispute resolution. For instance, if the parties did in fact make a reasonable effort to resolve the dispute, one would expect that they would have previously identified the "precise issues that are in dispute and any material issues which are not in dispute". Therefore, section 42(1) is a means of ensuring that the parties do such analysis where they have failed to do so previously. However, where the parties have made a good faith and thorough effort to settle the dispute in the informal stage and, by so doing, they have defined the nature of the dispute, they will not be required to re-do the analysis at this stage. They may simply proceed to build on the efforts that have previously been made. It may also be possible that some of the issues that gave rise to the dispute have been settled through the informal process. In that case, the parties may use this initial meeting to narrow down the issues and gain clarity on the precise issues that remain in dispute.

In fact, this first meeting may be viewed as an opportunity for the parties to review the past efforts and identify the reasons why those efforts have failed and use that knowledge in designing the mechanism or procedures that will assist them in going forward.

Section 42(1)(b) requires that the parties consider the various dispute resolution mechanisms or procedures that are available to them. And, section 42(1)(c) requires that they agree on "an appropriate mechanism or procedure to settle the dispute."

In *The Settlement of Intergovernmental Disputes*[61] Nico Steytler outlines some of the various mechanisms that would be available to parties to a dispute. These options include negotiation, mediation, conciliation, inquiry and arbitration.[62] The options vary in the amount of control the parties retain in the process. For instance, with negotiation, the parties retain full control over the process while parties involved in arbitration voluntarily concede control over the substance of the matter to an arbitrator selected by both parties and agree to be bound by the arbitrators decision.

> The nature of the dispute usually determines the choice of dispute settlement method [.] A commission of inquiry is preferable where there is a dispute of fact. Conciliation is concerned with the future rather than with the unravelling of the past and is therefore appropriate for accommodating differences in policy. Arbitration and adjudication are again more suitable for disputes involving legal questions. However, disputes often involve questions of fact, policy and law, requiring either a combination of methods or one method that must perform more

[61] Steytler 2001, 175.
[62] Steytler 2001, 186-188.

> than one function. A single mechanism may be used to resolve a dispute, but often a combination of mechanisms is required to achieve success. Negotiation could be coupled with mediation which, in turn, could be followed by arbitration.[63]

The IGR Framework Act provides parties to an intergovernmental dispute with the latitude to select any one of these options or a combination thereof. However, they are not restricted to these methods. They may design a completely different option that seems appropriate given the situation and the efforts that have previously been made. The primary constraint on their options is where there is an alternative mechanism or procedure provided in other legislation or in an agreement.[64] Where that is the case, they are bound to "make every reasonable effort" to resolve the dispute in terms of such mechanism or procedure.

Regardless of the mechanism or procedure selected by the parties, section 42(1)(d) requires that they designate a facilitator. The primary role of the facilitator is to assist the parties to settle the dispute.[65] The facilitator is also required to fulfil reporting requirements. The initial report, which must be provided subsequent to the initial meeting, will describe the nature of the dispute[66] and the mechanism or procedure chosen by the parties.[67] The report shall also include any other matter prescribed by regulation.[68] The Act also provides for progress reports.[69] For matters in which the MEC is permitted to intervene under section 42(4), the initial and subsequent reports are provided to the MEC.[70] The Minister in turn receives the reports for matters for which the Minister is permitted to intervene under section 42(3).[71] However, the Minister may also request a report from the facilitator in a dispute in which the Minister is not permitted to intervene where the matter "affects the national interest."[72]

It is important to note that the facilitator is not provided with any statutory powers of compulsion. In line with the general tendency of the IGR Framework Act to allow the parties to control and determine the process, the function of the facilitator will be determined by the parties to the dispute and will be dependent on the method of dispute resolution chosen by the parties. Should the parties select arbitration as the method of dispute resolution, they may grant the facilitator with the power to so bind them.

The IGR Framework Act does not specifically state that the parties are bound to abide by the terms of the mechanism or procedure which they agree on pursuant to section 42(1)(c). However, it is implicit in the subsection and, derivative of the parties'

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[63] Steytler 2001, 188.
[64] S 42(3) IGR Framework Act.
[65] S 43(1)(a) IGR Framework Act.
[66] S 43(1)(b)(aa) IGR Framework Act.
[67] S 43(1)(b)(cc) IGR Framework Act.
[68] S 43(1)(i)(cc) IGR Framework Act.
[69] S 43(1)(b)(ii) IGR Framework Act.
[70] S 43(2)(b) IGR Framework Act.
[71] S 43(2)(a) IGR Framework Act.
[72] S 43(3) IGR Framework Act.

constitutional obligation to make reasonable efforts to settle intergovernmental disputes. Failure to comply with the terms of such agreement will be an issue that a court, which subsequently hears such a dispute will consider. Failure to make reasonable efforts to comply with such agreement may result in the court exercising its authority under section 41(4) of the Constitution by refusing to hear the application. The court may refer the dispute back to the organs of state. As previously stated, the parties are ultimately accountable to the Constitution. The IGR Framework Act is simply a framework for fulfilling that obligation. Gaps or omissions in the terms of the legislation must be interpreted by reference to the underlying constitutional obligation.

There is no obligation, constitutional or otherwise, for the parties to settle the dispute, however, they must, and must be seen to have, made all reasonable efforts to settle the dispute before resorting to judicial proceedings.

3.4.3 *Assistance by the Minister or MEC*

One of the primary features of the informal stage of the dispute resolution process is the latitude the parties have to enlist the assistance of an "intermediary" to assist them with the negotiations. In the formal stage the roles of "intermediaries" are more defined. In contrast with the tendency of the legislation to favour resolution by agreement, section 44 allows "a party to a formal intergovernmental dispute" to request the assistance of the Minister or MEC in the settlement of the dispute.[73]

> 44(2) On receipt of a request in terms of subsection (1) the Minister or MEC may take any appropriate steps to assist the parties in settling the dispute, including the designation of an official in the public service or other person to act as facilitator between the parties.
> (3) a facilitator designated in terms of subsection 2 acts on the instruction of the Minister or the MEC, as the case may be.

In essence, the Minister or MEC acquires significant authority to intervene when asked by either party to the dispute. This results in a significant shift in control over the dispute resolution process. In addition to being able to decide how to assist the parties, the Minister or MEC also becomes responsible for instructing the facilitator. While such a provision may have been necessary to avoid deadlock in the dispute resolution process, it is remarkable that such a change in control over the process could be instituted by the request of one party. All other steps in the formal dispute resolution process require agreement by the parties. Permitting one party to request such assistance may, however, be necessary to prevent a party from holding the process hostage.

It may also be a necessary safeguard to ensure that neither party manipulates the process or unnecessarily stalls in fulfilling its obligations. However, there are no criteria set for when such request may be made. There is no statutory threshold. The party wishing the MEC or Minister to intervene is not required to show that such intervention is necessitated by the failure of the parties to resolve the dispute on their own. There is also

[73] S 44(2) IGR Framework Act.

no time limitation on such requests, a party may request the Minister or MEC's assistance before they have even had an opportunity to meet or attempted to resolve the dispute on their own or with the assistance of another intermediary. However, it is incumbent on the Minister or MEC to safeguard against abuse of the provision.

3.4.4 *Litigation Privilege*

In order to facilitate open and honest discussion of each parties position and the possibilities for compromise, section 45(2) provides that all "negotiations in terms of section 41, discussions in terms of section 42 and reports in terms of section 43 are privileged and may not be used in any judicial proceedings as evidence by or against any of the parties to an intergovernmental dispute."[74]

4. Local government as a party to intergovernmental disputes: the Cape Town dispute

4.1 Local government as a party to intergovernmental disputes

Local government, as a newly autonomous sphere of government and the sphere which is most accessible to the people, is also arguably, the most politicised sphere of government.[75] This is due in part, to the challenges facing local government. Scarce resources and what the Constitutional Court has described as "the degrading realities inherited from an apartheid history" have impacted very practically on the ability of certain municipalities to meet even the most basic obligations of service-delivery.[76] In addition, municipalities have the complex task of trying to fulfil the imperative of institutional transformation from that of racially-based, unrepresentative governance structures, to that of institutional structures embracive of the constitutional ideals for local government, in both form and function.[77]

There are differing conceptions on what constitutes the best vehicle for governance in the local sphere.[78] Section 154 (1) of the Constitution however enjoins national and provincial governments to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions".

[74] S 45(2) IGR Framework Act.
[75]See Steytler 2005, 183-185 for the history of local government and the challenges of providing services in municipalities that were delineated along racial lines. An example of one of the numerous tensions which emerged from this context was the attack on municipal council policies pertaining to the cross-subsidisation of services between constituents from affluent areas and constituents from sub-economic areas within a newly amalgamated municipal area. The selective prosecution of affluent defaulters, who refused to pay for services on the basis of being unfairly discriminated against, was the subject of constitutional litigation in the case of *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).
[76]*IMATU v Minister Pierre Uys* (2001) JOL 8451 (C) at para 30.
[77]See Steytler 2005, 183-185 for a history of local government in South Africa.
[78]An example is found in the provisions of the Structures Act which provides a choice for local government in respect of whether to pursue a collective executive committee system or an executive mayoral system. Certain metropolitan and local municipalities may also elect whether to have a system of subcouncils and ward councils. Ss 42; 54; 61 and 72 Structures Act.

Section 151 (4) of the Constitution furthermore directs that "the national or a provincial government may not compromise or impede a municipality's ability to exercise its powers or perform its functions". Problems encountered in the implementation of legislation giving effect to these directives, are often related to the dichotomy which exists between formal compliance with the requirements of an Act, and the substantive implementation of the "spirit" of the legislation. Intergovernmental relations in all spheres of government, including the exercise of supervisory powers by national and provincial governments over the local sphere, are therefore not immune to political considerations.[79]

An examination of the recent dispute relating to a proposal by the MEC for local government and housing, Richard Dyantyi, to change the system of governance in Cape Town from an executive mayoral system to an executive committee system, provides a good example of how the IGR Framework Act works in practice in respect of both the formal and substantive implementation of the Act. It also highlights the potential which the Act has to mitigate the harmful impact of conflict situations on governance.

4.2 Background to the Cape Town Dispute

The context surrounding the proposed change in governance in the City of Cape Town generated much debate. This is attributable in part, to the highly politicised history of governance in the City. What distinguishes the Western Cape from other provinces is that it is the only province in South Africa where the African National Congress (ANC) government has been unable to consistently maintain its majority rule at local government level. As such, local government elections, and indeed, the political landscape of municipal governance in the province, has been characterised by the formation of alliances between political parties (and in some cases even staunch political rivals) in order to constitute the majority necessary to govern.

The municipal elections in 2000 saw the Democratic Alliance (DA) obtain 52.3% of the vote in Cape Town, sufficient to form the municipal government of the city, which was at that stage, modelled on the executive committee system.[80] The DA was comprised of the former Democratic Party, the New National Party (NNP) and the Federal Alliance. The "floor-crossing" legislation promulgated by parliament in 2002 however, saw the end of this tenuous alliance.[81] The NNP left the DA to form the unlikely partner of the ANC.

[79]See Fessha and Steytler 2006, 25. They argue that, "The practice of intergovernmental relations does not, always reflect this principle of "negotiated, non-hierarchic" interaction. In fact the contrary holds true for some provinces. Although this is open for discussion, a close look at some of the agendas and those who make the presentation in most provincial forums leaves the impression that the forums are used as a platform where the provincial government and its officials present their policies without equal involvement from the side of the municipalities."

[80]See <http://www.da.org.za/da/Site/Eng/About/History.doc> accessed on 14 December 2006, for a history of the DA.

[81]The four Acts which constitute the body of the "floor crossing legislation" enabling members of national, provincial and local legislatures to "cross the floor" to another party in certain circumstances, are:
The Constitution of South Africa Amendment Act 18 of 002, the Local Government: Municipal Structures Amendment Act 20 of 2002, The Constitution of the Republic of South Africa Second Amendment Act 21 of 2002, and the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

This alliance however provided the ANC with the necessary majority to unseat the DA government in the City of Cape Town.

In 2002, the provincial ANC government pursuant to its authority in terms of section 155(5) of the Consitution to "determine the different types of municipality to be established in the province", promulgated the Western Cape Determination of Types of Municipalities Amendment Act,[82] which provided for a mayoral executive system. It was however only in 2003 that the ANC government opted to change the type of governance in the city from that of an executive committee system to the executive mayoral system.[83]

The 2006 election resulted in yet another change in government. In what was hailed as a victory for the DA and its alliance, it gained 51 percent of the votes in the municipal elections held on 1 March 2006. On 15 March 2006 Helen Zille was appointed as the executive mayor of the City Of Cape Town.

Shortly after coming into power, the DA coalition government drew scathing criticism in respect of the demarcation of subcouncil boundaries within the City.[84] The ANC criticised the DA's delineation of subcouncils on the basis that it made "no geographical sense, are divisive and based upon old apartheid racial boundaries".[85] What afforded credence to these claims was that the Municipal Demarcation Board issued similar criticisms in an official letter addressed to the City of Cape Town. The Demarcation Board expressed concern that some "subcouncil areas tend to create pockets of poverty and inclusion along racial lines, which may be to the detriment of building a cohesive and integrated metropolitan area." The Demarcation Board further criticised the processes undertaken by the City in determining the boundaries for these subcouncils, including the inadequate time-frame allowing for public participation.[86] A further bone of contention between the ANC and the DA was that there was no system of ward committees in place in the City.

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[82]Western Cape Determination of Types of Municipalities Amendment Act No. 4 of 2002. The purpose of the Act is "To amend the Western Cape Determination of Types of Municipalities Act, 2000 (Act No. 9 of 2000) to provide for a mayoral executive system; and to provide for matters incidental thereto".

[83]Minutes of a meeting of Council of the City of Cape Town held on Thursday, 26 June 2003, at 3 accessed at <http://www.capetown.gov.za/council/calendar >on 14 December 2006.

[84]Cape Town Subcouncil Amendment By-Law 2006. See: Minutes of a Special Meeting of the Executive Committee and Members of the Mayoral Committee of the City of Cape Town, held in Cape Town on Tuesday, 30 May 2006 accessed at <http://www.capetown.gov.za> on 14 December 2006, at 4.

[85]Anél Powell "ANC and ID slam DA 'bantustan' submission" *The Cape Times* 18 May 2006 at 6. See a statement issued by the ANC-Western Cape "DA Backtracks on Sub-Council Boundaries- Thursday 17 August 2006" accessed at <http://www.anc.org.za/ancdocs/> on 26 September 2006.

[86]The DA in turn criticised a proposal published by the Demarcation Board to extend the boundaries of the Cape Town metropolitan municipality to include three of the biggest municipalities in the Western Cape. Responding to this proposal and speculating as to the political motivation behind the proposal, Mayor Zille was quoted as saying that "there will be a lot of suspicion that that which the ANC could not win through the ballot box they will attempt to take through boundary changes". This, they argued was an attempt by the ANC to broaden its electoral base with a view to winning the next elections. See: Murray Williams "Plan for megacity is a bolt form the blue – Zille" *The Cape Argus* 21 August 2006 at 1.

4.2.1 *The proposal*

Given this historical tension between the ANC and the DA, the MEC Dyantyi's announcement on 19 September 2006 that he intended to change the type of governance in City of Cape Town attracted significant media attention and sparked a highly politicised debate. Shortly after this announcement, the MEC provided written notice to the Executive Mayor of Cape Town, Mayor Helen Zille, and organised local government (SALGA Western Cape) as required by section 16(3)(b) of the Structures Act. The MEC stated that he was motivated by, among other things, "a desire to have an inclusive government in the city of Cape Town...[and] a stable government that is representative of about 91% of the electorate as compared to the current 51%".[87] Provincial deputy secretary for the ANC, Max Ozinsky, commenting on the proposal, stated that "the recent local government election did not produce a clear winner and at the moment only half of the voters are represented in the mayoral committee, leaving the other half outside…[what is needed] is a system that is inclusive, allows for broad-based representivity and can bring about a government model that encourages unity in a fractured city".[88]

Responding to the proposal, Mayor Helen Zille, was quoted as saying that the proposal was indicative of a failure on the part of the ANC to respect the outcome of the recent elections which placed the Democratic Alliance (DA) and its coalition government in power.[89] The DA, despite itself advocating for a change from the executive mayoral system to an executive committee system in the run-up to the elections, expressed the view that the MEC's exercise of power in this context, would be a blatant abuse of power.[90] The DA furthermore stated that this proposal formed part of a broader political strategy on the part of the ANC to regain control of the City.[91]

One of Mayor Zille's many concerns was that she had first become aware of this proposal from the media reports. Although there is no statutory provision requiring the MEC to discuss the proposal with the Mayor before commencing the section 16 process in terms of the Structures Act, given the effect that the proposal would have on the City, it would have been prudent for MEC Dyantyi to have discussed the proposal with Mayor Zille prior to announcing it in the media. This may not have elicited consensus from Mayor Zille in respect of the content of the proposal, but it may arguably have averted some of the feelings of mistrust that was evident between the parties.

[87] Anél Powell "Bid to change mayoral rule 'not clear-cut'" *The Cape Times*, 21 September 2006 at 3.
[88] Ben Maclennan "Govt plan for Cape Town a blatant abuse, says Zille" *Sapa* accessed at <http://www.news24.com" on 19 September 2006.
[89] Editorial "Zille decries alleged attempt to change mayoral system" *Mail & Guardian* accessed at < http://www.mg.co.za/article> on 20 September 2006.
[90] Pearlie Joubert "An executive decision" *Mail & Guardian* October 20 to 26 2006, at 20.
[91] Editorial "Zille: ANC is harming SA" accessed at <http://www.news24.com> on 25 October 2006.

4.2.2 *Section 16 of the Structures Act*

In proposing to change the type of governance of the City of Cape Town, MEC Dyantyi acted pursuant to section 16(1)(a) of the Structures Act which confers the power on the MEC for local government to "change the municipality from its existing type to another type.[92] The change would have a profound impact on the powers which Mayor Zille currently exercises in her capacity as executive mayor. Under an executive committee system of government, all executive powers will be derived from or exercised by the executive committee (EXCO).[93] The non-executive mayor will only be able to exercise powers which are delegated to her by the governing executive committee.[94] Although the non-executive mayor will remain a member of the executive committee, all decisions, resolutions and/or delegation of powers, functions or duties must be supported by the majority of the members of the executive committee.[95] Should MEC Dyantyi's proposal succeed, Mayor Zille would be stripped of the authority to govern the City.

Following the MEC's announcement, several interested parties, including Mayor Zille,[96] assumed that the MEC's proposal would, in addition to stripping Mayor Zille of her executive powers, also afford the ANC and its alliance greater influence in the City's governance. There was a general assumption that the EXCO would have to be constituted based on proportional representation.[97] One of the interesting dimensions of this dispute is that the proposed change would likely have had little practical effect on the power balance in light of a 2002 decision of the High Court interpreting section 43 of the Structures Act.[98]

Section 43(2) of the Structures Act requires that an "executive committee must be composed in such a way that parties and interests in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council." However, subsection 43(3) stipulates that a "municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution."[99]

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[92] S 16 Structures Act:
"Amendment of section 12 notices- (1) The MEC for local government in a province, by notice in the *Provincial Gazette*, may amend a section 12 notice-
(a) to change the municipality from its existing type to another type.

[93] Section 44 of the Structures Act.

[94] Section 49 of the Structures Act.

[95] For a further discussion on the requirement of proportionality in executive committees in local government see, Omolabake Akintan and Jaap de Visser in "Executive Committees: Proportional or 'fair' representation?" *Local Government Bulletin* Vol (8) 5 November 2006, at 12.

[96] Editorial "Zille: ANC is harming SA" accessed at <http://www.news24.com> on 25 October 2006.

[97] Editorial "ANC Power Grab Must be Stopped – De Lille" accessed at <<http://www.citizen.co.za>> on 14 December 2006.

[98] *Democratic Alliance v. ANC & Others* [2002] JOL 10389.

[99] Section 160(8) requires that parties and interests on council must be "fairly represented". In *Democratic Alliance v. ANC & Others* [2002] JOL 10389, the High Court determined that fair representation under section 160(8) did not mean proportional representation.

Since its first meeting on 15 December 2000, the City of Cape Town Council had availed itself of the option provided for in subsection 43(3). The Council adopted an alternative mechanism for establishing its executive committee. "The mechanism provided that council would elect the first eight members of the EXCO. If, after such election, certain parties were not fairly represented as required by section 160(8) of the Constitution, the remaining two seats would be reserved for such parties."[100] In 2002, the DA challenged the application of this mechanism.[101] The application was dismissed by the High Court. The Court held that the alternative mechanism was valid under section 43(3) of the Structures Act, as proportional representation was only required under section 43(2). An "alternative mechanism" adopted under section 43(3) need not result in a proportionally representative EXCO.[102] The Court determined that fair representation, as stipulated in section 160(8) of the Constitution, does not mean proportional representation.

Given this, should MEC Dyantyi succeed in changing the system of governance although Mayor Zille would no longer have the authority to act as executive mayor, the DA and its alliance could adopt the previously existing alternative mechanism for electing the new Cape Town EXCO. Consequently, the DA and its alliance would retain the majority of the seats on the new EXCO. Should they so desire, they would be in a position to delegate significant authority to Mayor Zille or, in any event, they would still direct the governance of the City.

4.2.3 *The authority of the MEC*

Mayor Zille, commenting on the authority of the MEC to exercise this power and the constitutional questions which it raises, stated that "though the Act did "purport" to give the provincial minister the power to change the system in any municipality, it had never been done other than at the request of the municipality, and never to effectively overturn an election result…so those are major issues that bring constitutional issues into play, and that is what we want tested."[103]

Section 16 of the Structures Act designates the authority to change the system of governance in a municipality to the MEC. A contextual reading of the Structures Act however clearly delineates a role for the municipal council in constituting such a committee, and therefore implies a relationship of co-operation between the MEC and the municipal council in order to make the system practicable.[104]In addition, as is the case

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[100] Omolabake Akintan and Jaap de Visser in "Executive Committees: Proportional or 'fair' representation?" *Local Government Bulletin* Vol (8) 5 November 2006, at 12.

[101] This was notwithstanding the fact that the mechanism was first adopted in 2000 when the DA controlled the council and the same mechanism had been used by the DA controlled Council between 2000 and October 2002 when the ANC alliance took control of the Council.

[102] *Democratic Alliance v. ANC & Others* [2002] JOL 10389

[103]Ben Maclennan "Govt plan for Cape Town a blatant abuse, says Zille" *Sapa* accessed at <http://www.news24.com" on 19 September 2006.

[104]S 43 (1) Structures Act provides:

> "If the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government…"

with the exercise of power by any organ of state, the MEC is constrained by the principles of co-operative governance entrenched in the Constitution and the IGR Framework Act.

4.2.4 *Overlapping application of the Structures Act and IGR Framework Act*

An interesting dimension of this dispute, which informed the actions of both the MEC and Mayor throughout, is the overlapping application of the Structures and IGR Framework Acts. Pursuant to exercising his powers in terms of section 16(1)(b) of the Structures Act, MEC Dyantyi was compelled to follow the consultation process outlined in subsection (3) in order to legitimately exercise this power. Section 16(3)(b) of the Structures Act provides that:

> "The MEC for local government must-
>
> (a) at the commencement of the process to amend a section 12 notice, give written notice of the proposed amendment to organised local government in the province and any existing municipalities that may be affected by this amendment;
>
> (b) before publishing the amendment notice consult-
>
> (i) organised local government in the province
>
> (ii) the existing municipalities affected by the amendment; and
>
> (iii) after such consultation publish particulars of the proposed notice for public comment."

4.3 Process

4.3.1 *Notice*

In the written notice provided, MEC Dyantyi stipulated a 30-day consultation period within which, the City and organised local government in the province (SALGA Western Cape), could provide in-put on the decision.[105] The original consultation period was to end on 26 October 2006. Both SALGA(Western Cape) and Mayor Zille questioned the MEC's authority to set the consultation period. However they both sought a 14 day extension.[106] On 19 October 2006, MEC Dyantyi granted the extension of the consultation period.

4.3.2 *When did the dispute begin?*

In the days that followed the MEC's announcement, media reports detailed the unfolding debate between the MEC and the Mayor. As discussed above, it is difficult to determine the precise moment when dissent between parties morphs into an intergovernmental dispute which engages the dispute resolution mechanisms of the IGR Framework Act. In this case, it became clear fairly early on in the process, when Mayor Zille expressed concern about the exercise of the MEC's public power and furthermore indicated her

[105]Section 16(3)(b)of the Structures Act

[106]Editorial "Dyantyi turns down invite to meet Cape Town councillors" *Mail and Guardian Online* accessed at <http:/www.mg.co.za/article> on 24 October 2006.

intention to seek a mandate from the council to have recourse to the courts to contest this exercise of power, if necessary.[107] As such, the informal stage of the dispute mechanism of the IGR Framework Act had been engaged.

The notice provided by MEC Dyantyi commenced the consultation period prescribed by section 16(3)(b) of the Structures Act. It was during this period that the dispute between the parties arguably began, thereby engaging the IGR Framework Act and the obligation to "in good faith, make every reasonable effort to settle the dispute.[108] This resulted in the overlapping application of these Acts, with the consultation period under the Structures Act and the negotiation or informal stage prescribed by section 41(2) of the IGR Framework Act, running concurrently.

It is worth noting that the Structures Act does not provide a mechanism for resolving disputes arising out of the application of section 16. Had such mechanism existed, it would have taken precedence over the IGR Framework Act and the parties would have been bound to resolve their dispute according to that process.

MEC Dyantyi embarked on a consultation process to legitimise his exercise of power in terms of section 16 (1)(a) of the Structures Act. As previously discussed, it soon became apparent that Mayor Zille questioned the legitimacy of this consultation process, and as such, refused to engage the MEC in that context. Mayor Zille did not however exempt herself from participating in processes aimed at resolving the dispute within the ambit of the dispute resolution mechanisms contained in the IGR Framework Act. Both MEC Dyantyi and Mayor Helen Zille were therefore required to simultaneously engage with the processes of both these Acts, as the application of one Act did not obviate the process of the other.

4.4 Role of Minister Mufamadi as Intermediary

Following the MEC's announcement, Mayor Zille made public requests for MEC Dyantyi to provide the City with the basis for his proposal and accused him of political manipulation. MEC Dyantyi and members of the ANC repeatedly denied the allegations and reasserted that the proposal was intended to provide for more representative governance. It was apparent that the parties were making little progress in resolving their dispute on their own initiative.

On 12 October 2006 Minister Mufamadi, national Minister for Provincial and Local Government, of his own volition, announced his intention to facilitate meetings with Mayor Zille and MEC Dyatyi, citing the IGR Framework Act and the "duty to avoid litigation" as his motivation.[109] By so doing, he appointed himself as an intermediary as

[107] Anel Powell "ANC bid to topple my administration is a "blatant abuse if power', says Zille" accessed at <http://www.capetimes.co.za> on 20 September 2006.
[108] S 41(2) IGR Framework Act.
[109] Media statement by the Minister for Provincial and Local Government Sydney Mufamadi regarding intergovernmental relations between the Western Cape Provincial Government and the City of Cape Town Metropolitan Municipality 12 October 2006, accessed at <http://www.dplg.co.za >on 14 October 2006.

envisioned by section 41(2) of the IGR Framework Act. Minister Mufamadi, because he intervened during the "informal stage" of the dispute had no control over the process or substance of the dispute resolution process. Both Mayor Zille and Dyantyi were however respectful of his intervention. They attended meetings with him when requested to do so.

Minister Mufamadi acted in a manner typical of mediators. He facilitated a joint meeting with Mayor Zille and MEC Dyantyi on 18 October 2006, after which he scheduled separate meetings with the parties to provide them with an opportunity to state their concerns. On 26 October 2006 he met separately with MEC Dyantyi. The following day he met with Mayor Zille. During this process, Minister Mufamadi commented that he was encouraged by the positive attitude of both parties in that "it is clear that a solution will not elude us because all of us are determined to find it."[110] On 31 October 2006, in a joint press conference, the parties announced that they had reached an agreement.

The fact that Minister Mufamadi was only acting as an intermediary in the informal stage of the dispute resolution mechanism of the IGR Framework Act was evidenced by the fact that Mayor Zille stated "that while she accepted the minister's intervention, this did not stop the council from taking steps to prevent Dyantyi's plan from coming to fruition".[111]

This was arguably motivated by the fact that the processes pursuant to section 16 of the Structures Act were still ongoing. As such, Mayor Zille needed to obtain council authorisation so that she could respond if MEC Dyantyi attempted to proceed to change the governance structure. Without council authorisation, she would have been unable to declare a formal intergovernmental dispute, and thereby move the resolution process into the formal stage. Secondly, should that process fail, she needed Council authorisation in order to bring a legal application before the courts. Accordingly on 25 October 2006, Mayor Zille sought a mandate from Council to declare an intergovernmental dispute and to if necessary to bring legal action. On 27 October 2006 she received a mandate to do so by majority vote in Council.

[110]Editorial "Zille gets mandate on formal dispute" accessed at <http://www.mg.co.za> on 27 October 2006.
[111]Lindsay Dentlinger 'Mufamadi seeks harmony in Cape Council" *The Cape Argus*, 19 October 2006 at 5.

4.5 "The Negotiations"

In keeping with the requirements of the IGR Framework Act, the parties exchanged correspondence in an attempt to find common ground around the proposal. As discussed above, parallel processes in respect of the consultation procedures in terms of the Structures Act, and those contemplated in the context of the dispute resolution mechanism of the IGR Framework Act, emerged. In this regard Zille held that it was impossible to "consult in good faith" in the absence of reasons for the proposed change in governance, and called for a 14-day extension of the consultation period outlined in the original notice.[112] This call for an extension was re-iterated by organised local government in the province. Media reports quoting excerpts from a telefax addressed to MEC Dyantyi from Mayor Zille on 19 October 2006, demonstrated the difficulty which Mayor Zille had in obtaining information concerning the basis of the proposal:

> "Receipt is acknowledged of your telefax of October 19 2006. It is with dismay that I note that your latest telefax still does not provide the municipality with adequate reasons for your motivation for the proposed change in type of municipality, despite my previous telefaxes to you of September 22 2006 and September 29 2006. In these circumstances, I am once again obliged to point out that, without in any way conceding that you are entitled to determine a priori, a limit on the time to be afforded for the process of consultation, such period cannot, even on the proposed extended basis, be regarded as having commenced until, at the very least, you equip the municipality with the basis upon which you considered your proposed change of municipality." [113]

The conduct of both parties to the dispute during this stage, fell short of the requirements of "reasonable effort" as contemplated by the Court in the *National Gambling Board v Premier, KwaZulu-Natal and Others,* as both parties refused invitations to consult on at least two occasions.[114]

On the part of the DA, this manifested itself in the boycott of a meeting called by MEC Dyantyi with the purpose of informing all councillors of the reasons for the proposed change to the governance of City and inviting councillors to make presentations to him in this regard in allocated time slots on the 17 October 2006. Only ANC and Independent Democrat councillors participated in this forum. Mayor Zille stated that her reasons for not attending were that she was seeking advice on whether to consult with MEC Dyantyi, as "we don't think that he is following the rules and we do not legitimise it…I am waiting for the MEC's reasons".[115]

From their early correspondence, it is clear that Mayor Zille felt that the identification of the issues in dispute was inadequate. In view of the fact that substantive reasons for the

[112]Lindsay Dentlinger 'Dyantyi extends council's consultation period" *The Cape Argus* 20 October at 3
[113]Editorial "Dyantyi turns down invite to meet Cape Town councillors" *Mail and Guardian Online* accessed at <http:/www.mg.co.za/article> on 24 October 2006.
[114]*National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 36.
[115]Anel Powell "Truce Looms as "big three" enter final hurdle" *The Cape Times* 19 October 2006, page 1.

proposal were not forthcoming and the consultation procedure in terms of the Structures Act continued, Mayor Zille continued to express doubt about the legitimacy of the consultation process.

The MEC, in turn, declined an invitation by Mayor Zille to explain the reasons for the proposal to a meeting of the full municipal council on 25 October 2006.[116]

Suspension or Moratorium Pending the IGR Framework Process?

This situation raises important questions about the limitations of the IGR Framework Act. In attempting to be non-prescriptive and providing parties with the latitude to find their own solutions to intergovernmental disputes, the Act makes no provision for the stay of proceedings or a moratorium on the action which constitutes the subject of the dispute. It may be argued that a stay or moratorium is a necessary corollary to the duty of parties to, "in good faith, make every reasonable effort to settle the dispute" before declaring a formal intergovernmental dispute.[117] The impetus of reaching a suitable compromise should be the driving force of negotiations between parties. It is difficult to conceive of parties being able to freely negotiate in good faith if, as the negotiations are proceeding, one party proceeds to implement the proposal or exercise the power or function that forms the basis of the dispute. This takes on particular significance in the context of the Cape Town dispute, where the highly politicised context within which the dispute unravelled, contributed to the degree of mistrust between the parties.

In the event that the negotiations between the parties had continued beyond the consultation period stipulated by MEC Dyantyi, he would then have had the authority in terms of the Structures Act, following public consultations, to implement the change in the system of government in the City of Cape Town. By so doing, he would have circumvented the IGR Framework Act process by implementing his position.

Although this result is legally tenable based on the text of the Structures Act, it is nonetheless a perverse result given the intention and spirit of the IGR Framework Act and the constitutional obligation which underlies it. Good faith in the context of co-operative governance must mean that in the ordinary course parties temporarily surrender their rights to unilaterally exercise the power or function that is the subject of the dispute during a reasonable period of negotiations pursuant to the IGR Framework Act. In essence, for the IGR Framework Act's intention of promoting non-litigious settlement of intergovernmental disputes to be realised, a suspension or moratorium of sorts must be implicit in its provisions and should be expressed by agreement between the parties. In the absence of an express provision in the IGR Framework Act, it would be prudent for parties to such disputes to agree on such a suspension at their first meeting. A court would likely view such agreement and compliance with it as an indication of good faith. There may however be cases where such a moratorium is not necessary, such as where

[116]Editorial "Dyantyi turns down invite to meet Cape Town councillors" *Mail and Guardian Online* accessed at <http:/www.mg.co.za/article> on 24 October 2006
[117]S 41(2) IGR Framework Act.

the subject of the dispute is not urgent, where it may create an undue burden on the administration of government or where a blatant manipulation of process is evident.

As such, except in exceptional cases, the parties must be assumed to retain the status quo pending the outcome of the IGR Framework Act processes. The moratorium is especially necessary in cases such as the Cape Town dispute where the legal consequences of the exercise of the power which forms the basis of the dispute are so significant. The fact that there was no such agreement in this case added a level of uncertainty to the process. Even though all the parties acknowledged that the ongoing negotiations were promising, the fact that the clock continued to run in terms of the consultation process in the Structures Act, motivated the Mayor to take a number of pre-emptive steps to guard against being caught unawares. For example she proceeded to obtain council resolution to bring legal action. She also organised a public march in protest against what she perceived to be an attack on democracy.[118] Both actions further politicised the process and polarised the parties, undermining the on-going dispute resolution process in terms of the IGR Framework Act.

4.6 The "Agreement"

On 31 October 2006, in a statement to the media, Minister Mufamadi announced that, by agreement, "the MEC for Local Government will not proceed with the intended change in the type of government in the City of Cape Town." As part of the agreement the DA conceded that "the City of Cape Town will establish another two sub-councils in a manner that would deepen democracy in the City…[and] will facilitate the rapid establishment of ward committees and ward participatory mechanisms in all wards throughout the City with a view to empowering the local community of Cape Town to participate in matters of government."[119]

While this agreement was largely hailed as a victory for the DA, particularly in light of the negative media attention attracted by this dispute, the ANC, whether intentionally or by default, has benefited from this exercise. The ANC has succeeded in its attempts to have the delineation of sub-councils in the City re-viewed, with the additional benefit of ward committees being instituted in the City.

Media reports have indicated however that this multi-faceted dispute is not over.[120] There appears to be debate about whether the agreement contemplates that the drawing of the boundaries for sub-councils will be re-visited in its entirety, or whether existing ANC sub- councils will be divided to accommodate the agreement brokered between the ANC and DA. Such an arrangement would arguably not inform the concerns raised by the

[118]See media announcement "Press Conference: March for Democracy in Cape Town" accessed at <http://www.capetown.gov.za/press> on 26 October 2006.
[119]Media statement by the Minister for Provincial and Local Government Sydney Mufamadi regarding intergovernmental relations between the Western Cape Provincial Government and the City of Cape Town Metropolitan Municipality 31 October 2006 accessed at <http://www.dplg.gov.za >on 31 October 2006.
[120]Babalo Ndenze "Meeting over sub-council borders postponed" *The Cape Times* 14 November 2006, at 5.

ANC relating to representivity and what it perceives as the racially drawn lines of sub-councils.[121]

It is an anomaly of this dispute and the processes followed in its resolution, that the agreement brokered between MEC Dyantyi and Mayor Zille came hot on the heels of a mandate by the municipal council authorising Mayor Zille to challenge the exercise of power by the MEC in court when necessary. This anomaly may however be illustrative of the importance of the consultation process which informed this dispute throughout and how it acted as the catalyst for avoiding an impasse between the parties.

4.7 The Formal Stage

As indicated, the Cape Town dispute was resolved very shortly after the Council provided Mayor Zille with the authorisation to declare a formal intergovernmental dispute pursuant to section 41 of the IGR Framework Act. Accordingly, this dispute was resolved in the informal stage and the parties avoided compliance with the formal requirements of sections 42 to 44 of the IGR Framework Act. However, a few remarks are warranted on what might have occurred in the formal stage in this dispute.

Firstly, in the formal stage, the IGR Framework Act does not provide any role for the "intermediary" who acted in the negotiation stage. However, the parties may retain the intermediary in the formal stage by designating the individual as the facilitator. Where, as in the Cape Town dispute, the Minister is the intermediary, the parties may permit him to continue in this role by requesting his assistance pursuant to section 44(2) of the IGR Framework Act. As previously indicated, inviting the Minister to assist in this way, grants the Minister significant powers over the dispute resolution process. He may choose to appoint a facilitator and if he so chooses, the facilitator would report to him rather than to the parties. Although we have argued that it is ideal for both parties to consent to the Minister's assistance, the Minister would have such authority even on the request of one party. Due to the fact that the Minister's involvement had been so positively received by both parties and that he had successfully facilitated meetings between them, this would have been an ideal case in terms of which requesting the Minister's assistance, rather than a handing-over of control, would have allowed continuity in the negotiation process.

Throughout the dispute, Mayor Zille made repeated requests for the MEC to provide the City with the reason for his proposal. She took the position that the City required further information in order to respond constructively. Without taking a position on whether or not further reasons were required, it is worth noting that both parties are required to, at the first meeting, engage in a process to determine "the precise issues that are in dispute."[122]

In the previously quoted *Western Cape Province v George Municipality* case, the Court held that the premier had failed to comply with this constitutional obligation by not clearly stating the issues with reasons sufficient to permit the municipality to reconsider

[121] Theuns van der Westhuizen "ANC take Zille opnuut oor subrade" *Die Burgher* 13 November 2006, at 4.
[122] S 42(1)(a)(i) IGR Framework Act.

its decision.[123]It is therefore clear, that providing the reasons for one's position is part and parcel of the constitutional obligation to avoid disputes. Such disclosure, if not provided at the informal stage, should be provided as part of the process of determining the "precise issues" that are in dispute. As such, it should be done at the initial meeting of the parties following the declaration of a formal intergovernmental dispute. Moving beyond the parties' stated positions and addressing the reasons and motivations behind those positions allows parties to come up with more creative solutions.

This is particularly evident in the compromise that was reached in Cape Town. Although the MEC's position was that he wanted a change in the system of governance in Cape Town, the motivation behind it was to achieve more representative governance. By focussing on that goal the parties were able to come up with a more mutually agreeable way to reach that goal.

The further along a dispute progresses, the more costs are associated with it and the greater the acrimony between the disputing parties. Accordingly, it is in the public's interest to have disputes resolved at the earliest stage, the informal stage. Notwithstanding the fact that Mayor Zille did in fact seek and receive council resolution, the parties succeeded in avoiding the more formal steps and the related costs of the formal stage of the dispute resolution. This is arguably the intent of the IGR Framework Act in prescribing these different procedures.

4.8 Recourse to the courts

While it was not necessary in this case (by virtue of the agreement brokered between the disputing parties) for the parties to seek recourse to the courts, our discussion would not be replete without a brief examination of what may have transpired if the dispute resolution process in terms of the IGR Framework Act failed to yield a resolution. We therefore briefly examine whether these disputing parties have the option of recourse to the courts, the appropriate timing of such an application and the court's attitude towards disputing organs of state given the application of the IGR Framework Act and the constitutional imperative of section 41(3) on organs of state involved intergovernmental disputes to "avoid litigation".

4.8.1 *The courts and the IGR Framework Act*

In examining the obligations which section 41(3) of the Constitution imposes on disputing organs of state the Constitutional Court in the *First Certification* case held that "where possible [disputes] should be resolved at a political level rather than through adversarial litigation." [124] At the same time, the existence of section 41(3) of the Constitution by no means ousts the jurisdiction of the courts.

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[123]*Western Cape Province v George Municipality* unreported decision of the Cape High Court, case no 8030/2003.

[124] *In re: Certification of the Constitution of the Republic of South Africa, 1996* [1996] (10) BCLR 1253 (CC).

The Constitutional Court in examining its exclusive jurisdiction of the Constitutional Court to preside over disputes between organs of state held that:

> "It is consistent with the system of cooperative government which has been established and does not oust the jurisdiction of the courts or deprive any organ of government of the powers vested in it under the NT. The contention advanced on behalf of one of the objectors that litigation between organs of state is not competent under the NT is clearly wrong. Specific provision for such litigation is made in NT 167(4)(a)."[125]

As discussed above in the cases of *Uthukele* and *National Gambling Board*, the courts will only entertain applications by disputing organs of state where they have made every effort to settle the dispute. In this case, the fact that the parties met with Minister Mufamadi and each other on various occasions during the informal stage of the dispute, and appeared to have given due consideration to the various options for compromise would likely convince a court that they have satisfied their constitutional obligation in terms of section 41(3) of the Constitution.[126]

4.8.2 *Ripeness of the Dispute*

In the current case, Mayor Zille, at the informal stage of the dispute, even before the formal dispute mechanism was engaged, obtained a mandate from the municipal council to oppose the exercise of power by the MEC, and to take the matter to the Constitutional Court if necessary. That notwithstanding, there remains a question as to when would be the appropriate time for her to bring the application. It would arguably be premature for Mayor Zille to object to the exercise of power by the MEC before he proceeds to do so. By the same token, if Mayor Zille waits until after the MEC exercises his authority to change the type of governance in the City, she would no longer have the authority to bring the application in her capacity as executive mayor.

In the recent case of *Doctors for Life v The Speaker of Parliament and Others* the Court held that

> **"**The basic position appears to be that, as a general matter, where the flaw in the law-making process will result in the resulting law being invalid, courts take the view that the appropriate time to intervene is after the completion of the legislative process. The appropriate remedy is to have the resulting law declared invalid".[127]

Similarly, it is arguable that a court would be reluctant to intervene before there has been an exercise of executive authority by the MEC. This could arguably be construed as

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[125] *In re: Certification of the Constitution of the Republic of South Africa*, at para 291.
[126] *Uthukele District Municipality and Others v President of the Republic and Others* 2003 (1) SA678 (CC) at para 33 and *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at para 36.
[127] *Doctors for Life v The Speaker of Parliament and Others* case number CCT 12/05, at para 66 to 69.

infringing on the separation of powers doctrine.[128] However in that case the Court went on to recognise exceptions to that general rule:

> "there are exceptions to this judicially developed rule or "settled practice". Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process has been completed because the underlying conduct would have achieved its object".

In this case it cannot be argued that there will be irreversible harm once the MEC exercises his powers pursuant to section 16(1) of the Structures Act as Mayor Zille and the City would still have recourse to the courts. Accordingly, it would have been appropriate for Mayor Zille to wait for the public consultation processes in terms of the Structures Act to be completed. The MEC would then have been authorised to exercise his power to amend the section 12 notice, thereby changing the type of governance in the City. At this stage the matter would have been ripe for judicial intervention. Recourse to the court prior to this point would have been premature.

5. Conclusion

At a recent conference, centred on the IGR Framework Act and evaluating the efficacy of the Act one year after its enactment, an official from the Department of Provincial and Local Government commented that beyond forums and mechanisms for dispute resolution, the Act is people-centred, and builds on the relationships created amongst those holding public office.

While it is true that the IGR Framework Act is premised on the normative framework of co-operative governance which often takes on a meaning relative to the context in which it is applied, our courts have begun to substantively define these concepts. The courts have defined what constitutes "reasonable efforts" by parties to intergovernmental disputes to settle disputes. In so-doing, it has set the bar to include creativity and lateral thinking as part of the efforts to resolve disputes.

The Constitutional Court recently defined the content of the "duty to consult" and "public participation" in a landmark judgment, giving content to what could previously have been interpreted as an amorphous duty, the fulfilment of which could not be practically measured.[129] In the same way, as the IGR Framework Act is applied and principles are distilled from case law, concrete indicators and minimum threshold standards will evolve within the context of dispute resolution. These standards will not only be justiciable and act as a deterrent to intergovernmental disputes, but would arguably, go a long way towards making co-operative governance a tangible concept which impacts positively on

[128] *Doctors for Life v The Speaker of Parliament and Others* at para 70.
[129] *Doctors for Life v The Speaker of Parliament and Others*.

the ability of organs of state to work together in fulfilling the ideals of the Constitution to "improve the quality of life of all persons".

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