

Chapter 22

Local Government

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22.1 Introduction¹

Local government as an identifiable institution of government has been in existence from at least 1836 when an ordinance of the Cape Colony provided for municipal boards in towns and villages. Until the new dispensation, local authorities were termed "creatures of statute", wholly subject to the direction and control of central and, subsequently, provincial governments. Upon commencement of the Interim Constitution² and then the Final Constitution,³ however, local government has undergone a formal and substantive revolution. It is now recognized as a distinct sphere of government existing alongside the national and provincial governments:⁴ a

1 This chapter draws substantially on the loose-leaf work of the authors: Nico Steyler & Jaap de Visser *Local Government Law of South Africa* (2007).

2 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

3 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

4 FC s 40(1).

municipality, as the constituent unit of this sphere of government, 'has the right to govern, on its own initiative, the local government affairs of its community'.⁵

While no longer the handmaiden of the national or provincial governments, local government autonomy remains a relative matter. It is to be exercised 'subject to national and provincial legislation, as provided in the Constitution.'⁶ This limitation on local government autonomy is, itself, subject to three conditions. First, this national and provincial legislation must be provided for in the Final Constitution: thus setting the parameters of legislative oversight. Second, the nature and the quality of such intervention is subject to an inner core of local autonomy. FC s 151(4) reads as follows: 'The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.' Third, the local government's 'right to govern' imposes a duty on the other two spheres of government to allow a municipality to govern within its demarcated space.

(a) History

The constitutional history of local government is short but not sweet.⁷ During the colonial era, municipalities were creatures of colonial laws. An exception was the 1889 Grondwet of the Zuid Afrikaansche Republiek ('ZAR').⁸ The Grondwet granted the white population the power to establish district councils and town or

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village management structures where they so desired.⁹ When the Union of South Africa was formed in 1910, a very attenuated form of decentralized government was established. Four provinces possessed limited legislative authority: one area of such authority was over local government.

This arrangement followed the pattern established in several other British dominions. The Canadian Constitution Act of 1867 listed municipal institutions as falling within exclusive provincial competencies.¹⁰ The federal constitution of Australia of 1901 followed a different route but with the same effect. As the

5 FC s 151(3).

6 FC s 151(3).

7 See Steytler & De Visser (supra) at 1-3.

8 19 November 1889.

9 Art 140. The district council was to be elected by the burghers of the district but headed by the landdrost *ex officio*. Some basic principles resonate with today's debates on local government. Self-sufficiency was an objective and all expenses of the district council (except salaries determined by law) were to be borne by the district itself (art 142). The supervision by the central government was, however, paramount. The annual budget, adopted by the district council, had to be approved by the central Executive Council. The annual financial statements had also to be submitted to the Executive Council. For the levying of taxes a district council had to obtain the approval of the *Volksraad* (art 142). The same principles applied to town and village managements (art 143).

10 See Harvey Lazar & Aron Seal 'Local Government: Still a Junior Government? The Place of Municipalities in the Canadian Federation' in Nico Steytler (ed) *The Place and Role of Local Government in Federal Systems* (2005) 28.

constitution made no mention of local government, the matter was deemed to fall squarely within the states' residual powers.¹¹ Following the Canadian model of the allocation of competencies, s 85(vi) of the South Africa Act of 1909 empowered provincial legislatures to make ordinances on 'municipal institutions, divisional councils, and other local institutions of a similar nature'. Given South Africa's centralized form of government, the assent by the Governor-General-in-Council was required for the validity of any ordinance. Moreover, in any conflict between an ordinance and a national law, the latter prevailed. Following the model of the Cape local government laws, the provinces in due course passed ordinances regulating almost all aspects of local government.¹²

All local government institutions were creatures of statute, possessing such rights and powers as were expressly or impliedly granted to them by the ordinances. It also rendered all their actions, including the passing of by-laws, administrative in nature and thus subject to review.

Because the national government could legislate on all matters, it could also do so in the area of local government — even though such legislation was, ostensibly, a provincial competence. The national government increasingly asserted its authority over local government in order to realize the broad and brutal constitutional architecture of apartheid. The entrenchment of apartheid at the level of local government meant that the vast majority of South Africans — black, coloured, Indian and others, could be moved about and displaced by an array of ignominious national acts and policies (eg, the Group Areas Act of 1950.)

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The 1961 Constitution, while heralding a republican form of government for the white minority, reaffirmed in identical language the position of local government as a subject of provincial governance.¹³ However, this arrangement was restricted to 'white' local government. The governance of the majority of South Africans — coloureds, Indian and blacks — remained subject to the central government.

Despite the ideology of 'separate development' and the creation of black ethnic homelands, the governance of blacks in white urban areas proved the Achilles heel of apartheid. In response to the 1976 uprisings, elected community councils with limited powers were introduced in 1977. By 1982 black local authorities had powers similar to white municipal bodies. However, they lacked any sustainable funding base or legitimacy. In the homelands, tribal authorities, under the leadership of traditional leaders, provided some local services.

The 1983 Constitution¹⁴ employed a new divide and conquer strategy in order to further entrench the division between white, coloured, and Indian South Africans, on the one hand, and black South Africans, on the other. The white, coloured and Indian

11 See Cheryl Saunders 'Constitutional Recognition of Local Government in Australia' in Steytler *The Place and Role* (supra) at 48.

12 Local Government Ordinance 10 of 1912 (Cape); Local Government Ordinance 9 of 1912 (Transvaal); Local Government Ordinance 4 of 1913 (Orange Free State); and Municipal Ordinance 11 of 1918 (Natal).

13 Constitution Act 32 of 1961 s 84(1)(f)(i).

14 Constitution of the Republic of South Africa Act 110 of 1983.

groups were represented in their own legislative chamber to deal with their 'own affairs', namely 'matters which specially or differentially affect a population group in relation to maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs'.¹⁵ As the provision of sewage, water and electricity was conceived of as essential to maintain group identity if not the furtherance of culture, traditions and customs, 'local government' appears on the list of 'own affairs'. As before, all matters dealing with black South Africans, including local government, were 'general affairs'. The 1983 Constitution further galvanized black opposition to urban apartheid. Much of the open rebellion in the 1980s was focused on black local authorities. The declaration of successive states of emergency rendered inert most of those local authorities.

The only move towards a non-racial form of local government was the establishment of regional services councils and joint services boards in Natal and KwaZulu. These councils and boards provided bulk services to municipalities and assistance to black local authorities. The councils, consisting of representatives of the various race-based local authorities, were the first, faltering step towards an inclusive local authority.

During the early days of multi-party constitutional democracy and a universal franchise in 1994, a wide variety of race-based local authorities covering mainly the urban and built-up areas remained in place. However, virtually no local institutions existed in rural areas. Cameron JA describes existing local authorities thus:

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Under the pre-constitutional dispensation, municipalities owed their existence to and derived their powers from provincial ordinances. Those ordinances were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation. Parliament's law-making power was untrammled, and it could determine how much legislative power provinces exercised. The provinces in turn could largely determine the powers and capacities of local authorities. Municipalities were therefore at the bottom of a hierarchy of law-making power: constitutionally unrecognised and unprotected, they were by their very nature 'subordinate members of the government vested with prescribed, controlled governmental powers'.¹⁶

As a result, all municipal actions, including the passing of by-laws, were subject to administrative law review.

These creatures of statute reflected the inequities of a prolonged and pernicious period of discrimination. In the words of the Constitutional Court:

Those in historically "White" areas were characterized by developed infrastructure, thriving business districts and valuable rateable property. Those in so-called "Black", "Coloured" and "Indian" areas, by contrast, were plagued by underdevelopment, poor services and vastly inferior rates bases.¹⁷

15 Ibid at s 14(1).

16 *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) at para 33 (footnotes omitted).

17 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('Fedsure') at para 2 (Chaskalson P, Goldstone & O'Regan JJ). See also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 19 and 46.

The consequences of apartheid at local level were profound:

The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The result are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia. How did it happen? Quite simply: ' . . . in reality the economic relationship between the white and black (African, coloured and Indian) halves of the city was similar to a colonial relationship of exploitation and unequal exchange'.¹⁸

The de-racialization of local government was one of the more important consequences of the process of democratization ushered in by the Interim Constitution. In reconstructing these institutions from the ruins of apartheid, the participation of local communities was of the utmost concern. From the liberation movement side, the Freedom Charter spoke of institutions of self government.¹⁹ The critical role that community organizations in the townships played in the struggle against apartheid demanded that the entrenchment of democracy occur from the bottom up.

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(b) Comparative constitutional recognition of local government

The constitutional recognition of local government as an order of government in federal or decentralized systems of government is a modern phenomenon. The first federal constitutions of the modern era did not mention local government as a sphere of government. The Constitution of the United States, from 1791, is silent on the matter. Local government thus falls under the residual powers of the states. They are 'creatures of the state' and in terms of the so-called *Dillon-rule*, formulated in the 19th Century,²⁰ municipal corporations have and can exercise only those powers expressly granted, those powers necessarily or fairly implied there from, and those powers that are essential and indispensable to their corporate status.²¹ As noted above, the Canadian Constitution of 1867 mentioned local government only as a field of competence of the provinces. The Australian federal constitution of 1901 was entirely silent on the matter. Only after the Second World War did the importance of local government as an institution of state come to the fore. And it was primarily motivated by the desire to deepen democracy.

Although the constitution of the Weimar Republic of 1919 guaranteed local government the right of self-government within the limits of the law, only the post-war Basic Law of 1949 guaranteed a meaningful measure of local autonomy. Article 28(2) reads:

18 *Fedsure* (supra) at para 122 (footnotes omitted)(Kriegler J).

19 See Rudolf Mastenbroek & Nico Steytler 'Local Government and Development: The New Constitutional Enterprise' (1997) 1(2) *Law, Democracy and Development* 233.

20 *City of Clinton v Cedar Rapids and Missouri River RR Co* 24 Iowa 455 (1868).

21 Ronald K Vogel 'Multilevel Governance in the United States' in Harvey Lazar & Christian Leuprecht (eds) *Spheres of Government: Comparative Studies of Cities in Multilevel Governance Systems* (2007) 258.

The Municipality shall be guaranteed the right to manage all the affairs of the local community of their own responsibility within the limits set by law. Within the framework of their statutory functions the association of municipalities likewise has the right of self-government in accordance with the law. The right of self-government shall include responsibility for financial matters. The municipalities have the power to levy trade taxes according to the rates for assessment determined by them.

The second wave of federal constitutions confirming local self-government also coincided with the return to democracy. The Spanish Constitution of 1978 focused on the creation of the 'Autonomous Community'. In art 137 the general principle concerning the territorial organization of Spain is stated as follows:

The state is organized territorially into municipalities, provinces and any Autonomous Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests.

Article 140 also provides that 'the Constitution guarantees the autonomy of the municipalities, which shall enjoy full legal personality.' Further regulation may occur, through law, at both the state and the regional level.

Although the Nigerian Constitution of 1979, reintroducing democracy after years of military rule, was short lived (1978-1981), the local government provisions, entrenching it as an order of government, was faithfully reproduced twenty

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years later in the 1999 constitution. The position of local government independent, but still subordinate is expressed in section 7(1) as follows:

The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall . . . ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.

Brazil's return to civilian rule was also marked by the extensive protection of local self-government in the Constitution of 1988. Article 1 proclaims that the Federal Republic of Brazil is 'formed by the indissoluble union of States, municipalities (*municípios*), as well as the federal district'. The elevation of municipalities as a constituent element of the state is reiterated in article 18: 'The political and administrative organization of the Federal Republic of Brazil includes the Federal Government (*União*), States, Federal District and Municipalities, all autonomous, in terms of this Constitution.'

In India, democracy from the bottom up through local government structures, called *panchayats*, was an article of faith of the independence movement. The Constitution of 1947, however, ineffectually reflected this principle. One of the 'Directive Principles of State Policy', section 40, provides: 'The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.' The 1993 constitutional amendments, prompted by development concerns, constitutionalized the system of *panchayat* — defined as 'institutions of self-government'.²² The 73rd Amendment dealt with rural local government. The 74th Amendment was concerned with urban municipalities. The structures created by the two amendments are, however, very similar: they provide an outline of the general form and the election of local authorities, but leave the range and substance of their powers to state legislation.

The common themes in the more modern constitutions are decentralized local governance driven by local participatory democratic institutions that aim at the realization of an array of developmental concerns. That said, nowhere are the institutions of local government given the same level of autonomy as states or provinces. They generally continue to operate within the framework set by provinces or states.²³ However subservient they are to states or provinces, their recognition has redefined multi-level government functions. The constitutional recognition of local government has opened the space for two new sets of emerging relationships: local-provincial; and local-central. The result has been that it has made governance more complex but also more inclusive.

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In comparison to other multi-level governments, the Final Constitution has taken the recognition of local government a step forward. The Final Constitution has entrenched local autonomy by listing the powers of municipalities, limiting the oversight powers of the other spheres of government and, most importantly, securing a stable base for municipal revenue. These features were the key issues during the process of constitution making.

(c) Process of constitutionalization²⁴

Local government was never at the heart of the constitutional negotiations during the early 1990s. Other structures of state captured the attention of the political parties. Yet local government authority ultimately proved to be the most difficult to negotiate. It not only generated the majority of changes during the drafting of and the certification process of the Final Constitution: it has also undergone a radical transformation, through constitutional amendments, over the past decade.

A National Local Government Negotiating Forum (NLGNF) was established in March 1993. It was composed of representatives of the main stakeholders — half of them drawn from statutory bodies (the then existing municipal authorities) and the other half from non-statutory bodies (the civic movements in the townships).²⁵ Functioning alongside the Multi-Party Negotiating Forum that produced the Interim Constitution, it delivered, among others things, the Local Government Transition Act (LGTA)²⁶ and the provisions of IC Chapter 10 — "Local Government". The LGTA, adopted by the tri-cameral Parliament, came into operation on 2 February 1994, with the aim of providing the mechanisms of moving from a race-based system of local government to a non-racial system.²⁷ This initial transformation would occur in three phases. The first, the pre-interim phase, commenced with the coming into operation

23 See Christian Leuprecht & Harvey Lazar 'From Multilevel to 'Multi-order' Governance?' in Lazar & Leuprecht (supra) (2007) 18.

24 See further Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 1-10ff.

25 See further Fanie Cloete 'Local Government Transformation in South Africa' in Bertus de Villiers (ed) *Birth of a Constitution* (1994); Gideon Pimstone 'Local Government' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz & Stu Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS 5, 1998) 5A-2; Mirjam van Donk & Edgar Pieterse 'Reflections on the Design of a Post-apartheid System of (Urban) Local Government' in Udesch Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 107, 112.

26 Act 209 of 1993.

of the LGTA and the establishment of the negotiating forums in local authorities pending the first local government election. The second phase was the first local government elections: these elections established integrated, although not yet fully democratically elected, municipalities. The third, and final, phase would commence with the local government election in terms of the Final Constitution.²⁸

The Interim Constitution set the scene for placing local government on an entirely different constitutional footing.²⁹ First and foremost, IC s 174(1) provided that local government received constitutional recognition: 'Local government shall be established for the residents of areas demarcated by law of a competent authority.'³⁰ More importantly, IC s 174(3) provided that '[a] local government shall be autonomous and, within the limits prescribed by or under the law, shall be entitled to regulate its affairs.'³¹ Such autonomy was, however, subject to national and provincial regulation in that '[t]he powers, functions and structures of local government shall be determined by law of a competent authority.'³² However, the essential content of the autonomy should remain untrammelled: 'Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.'³³ One method of guarding against such an encroachment was the duty of the superior legislatures, before enacting legislation affecting the status, powers, functions or boundaries of local governments, to provide local government, including organized local government, with a reasonable opportunity to comment thereon.³⁴

The purpose of local government was focused on service delivery. Given the regulation of local government powers, the two superior legislatures were under an obligation to assign 'such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.'³⁵ Within the framework of enabling national or provincial legislation, local government had to make provision for access by all persons within

27 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) ('*Executive Council Western Cape*') at para 6 (Chaskalson P).

28 See *Executive Council Western Cape* (supra) at paras 162(e) and (f) (Kriegler J).

29 *Executive Council Western Cape* (supra) at para 153 (Ackermann & O'Regan JJ).

30 IC s 174(1).

31 See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 359; *Fedsure* (supra) at paras 35-37.

32 IC s 175(1). See Pimstone (supra) at 5A-21; Jaap de Visser *Developmental Local Government* (2005) 63.

33 IC s 174(4).

34 IC s 174(5).

its jurisdiction 'to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.'³⁶

To finance its service mandate, local government was competent to levy property rates, levies, fees and taxes and tariffs, 'based on a uniform structure for its area of jurisdiction'.³⁷ Such self-generated revenue was to be supplemented by unconditional grants by the provincial governments.³⁸

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Local governments were to be elected democratically. They were to use an electoral system which included both proportional and ward representation.³⁹ Traditional leaders in the homelands were not excluded from the system and were given *ex officio* membership of municipal councils established in their area of jurisdiction.⁴⁰

In the same manner as the executives at national and provincial level, inclusive decision-making was also the objective in municipal councils. The budget was to be adopted by a council with the support of two-thirds of all its members.⁴¹ Councils had to elect, on the basis of proportional representation, an executive committee.⁴² This committee, in turn, had to 'endeavour to exercise its powers and perform its functions on the basis of consensus among its members.'⁴³

While the Interim Constitution gave direction to the transformation process, the restructuring of the local government would primarily occur in terms of the LGTA.⁴⁴ After the first elections, transformation could proceed in terms of legislation that complied with the principles embodied in the Interim Constitution.⁴⁵ For the first election forty percent of the councillors were to be elected on a proportional basis

35 IC s 175(2).

36 IC s 175(3).

37 IC s 178(2).

38 IC s 178(2).

39 IC s 179(2).

40 IC s 182.

41 IC s 176(a).

42 IC s 177.

43 IC s 177(b).

44 IC s 245(1); *Executive Council Western Cape* (supra) at para 162 (Kriegler J); *First Certification Judgment* (supra) at para 356.

and the remaining 60 percent in wards.⁴⁶ Of the ward councillors, 50 percent had to be elected in areas that fell under the jurisdiction of the abolished three Houses of the tri-cameral Parliament (white, coloured and Indian local government authorities). The remaining 50 percent would be elected from all other areas (Black administration areas).⁴⁷ The two areas were referred to as 'statutory' and 'non-statutory' areas respectively.

As the precursor to the Final Constitution, the Constitutional Principles in the Interim Constitution also contained a broad framework for local government. First of all the status of local government as a constitutionally recognized level of government was to be entrenched: 'Government shall be structured at national, provincial and local levels.'⁴⁸ The most pertinent provision was Constitutional Principle XXIV:

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in the provincial legislation or both.

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This framework had to make provision 'for appropriate fiscal powers and functions for different categories of local government.'⁴⁹ A further source of local government revenue was the entitlement to national transfers.⁵⁰ A final principle that became relevant in the certification process was Constitutional Principle X: 'Formal legislative procedures shall be adhered to by legislative organs at all levels of government.'

The text adopted on 8 May 1996 rang in significant changes to the position of local government. The most important change was that local government was removed as a functional area of competence of the provinces.⁵¹ Moreover, the status

45 IC s 245(2).

46 IC s 245(3)(b).

47 IC s 245(3)(b).

48 IC sch 4 CP XVI.

49 IC sch 4 CP XXV.

50 IC sch 4 CP XXVI.

51 On the political reasons for the change in approach to local government, see Rudolf Mastenbroek & Nico Steytler 'Local Government: The New Constitutional Enterprise' (1997) 1(2) *Law, Democracy and Development* 233, 238; De Visser (supra) at 66-68. Robert Cameron advances a number of reasons why local government was promoted in the FC, including the following: First, the ANC fears that white dominated local authorities would become the last bulwark of apartheid largely dissipated with the creation of non-racial integrated municipalities after 1995/6 and ANC victories in most of the major municipalities. Second, cities became to be seen as dynamic arenas for economic, social and cultural development, participating in the global marketplace. Third, strong local government was seen as a way of empowering people. Fourth, given that some provinces were struggling to find their feet, local government was generally in a better state than provincial administrations. 'The Upliftment of South African Local Government?' (2001) 27(3) *Local Government Studies* 97, 110-111.

of local government was enhanced and placed alongside national and governments as a 'distinctive' sphere of government that was 'interdependent and interrelated' to the other two.⁵² Of the word 'sphere of government', the Natal High Court commented:

[It] is suggestive of an equality as between the concepts of national, provincial and local governmental structures, as opposed to the more traditional hierarchical levels of power and importance.⁵³

The autonomy of local government was dramatically increased. A municipality 'has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.'⁵⁴ In view of local government's self-governing status, the national and provincial government must respect this right and 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.'⁵⁵ This new form of democratic local government was extended to the entire country.⁵⁶ This change effectively excluded the possibility of full-membership of traditional leaders in democratically elected municipal councils.⁵⁷

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When the May 1996 text was reviewed by the Constitutional Court for compliance with the Constitutional Principles,⁵⁸ the local government provisions raised three issues.⁵⁹ The most important was that the enhanced status of local government ostensibly meant a diminution of provincial powers. Second, there was, allegedly, a failure to set up an adequate framework for local government powers, functions and structures. Third, the provision that municipalities could impose 'excise taxes' was challenged on the ground that such powers of taxation were not an 'appropriate fiscal power' for municipalities

On the question of an appropriate framework, further discussed below,⁶⁰ the Court faulted the text for not providing an adequate one. On the third issue regarding

52 FC s 40(1).

53 *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2002 (5) BCLR 479, 485G-H (N). See further De Visser (supra) at 65-66.

54 FC s 151(3).

55 FC s 151(4).

56 FC s 151.

57 See Tom Bennett & Christina Murray 'Traditional Leadership' in S Woolman, T Roux, M Chaskalson, J Klaaren, A Stein & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26.

58 IC s 71(1).

59 *First Certification Judgment* (supra) at para 299. See also Steytler & De Visser (supra) at 1-16.

60 See § 22.2(a) infra.

'excise taxes', the Court found that the ordinary meaning of 'excise taxes' usually entails a retail tax targeted at specific commodities such as alcohol, tobacco and fuel. This understanding of excise taxes made these commodities inappropriate vehicles for municipal taxation.⁶¹ The main complaint that the powers of provinces were substantially diminished through, among other provisions, the removal of local government as a competency of provinces, placed the new status of local government in dispute. The Constitutional Court agreed that 'LG structures are given more autonomy in the NT than they are in the IC' but that this autonomy was at the expense of both Parliament and provincial legislatures. The effect of the new text is that 'the ambit of provincial powers and functions in respect of [local government] is largely confined to the supervision, monitoring and support of municipalities.'⁶² Although the Court found that these powers were not insubstantial, they still constituted a diminution of provincial powers and functions.⁶³ Furthermore, the national government was also given regulatory powers over local government, thereby precluding or circumscribing provincial powers.⁶⁴ When the Court weighed up all the instances where there was a diminution of provincial powers, it reached the conclusion that provincial powers were substantially less than those powers found in the Interim Constitution and thus refused to certify the new text also on this ground.

In response to the Court's critique of the local government provisions, the Constitutional Assembly effected three changes in the amended text. First, a framework for the establishment of three categories of municipalities was provided. While Category A was a self-standing municipality, 'shared' local authority was created for Category B and C municipalities.⁶⁵ Second, the framework for the

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functioning of municipal councils was considerably expanded. Third, the levying of 'excise taxes' was replaced by the power to impose 'surcharges on fees for services provided by or on behalf of a municipality'.⁶⁶ Of great significance for local government was the fact that the Constitutional Assembly, in addressing the complaint that provincial powers were significantly diminished, did not change the status of local government. It merely effected a few minor adjustments to the relationship between the provinces and the national government. When the Constitutional Court reviewed the amended text,⁶⁷ it concluded that there was no change in the powers of provinces in respect of local government. The amended text

61 *First Certification Judgment* (supra) at para 305.

62 *Ibid* at para 367.

63 *Ibid* at para 374.

64 *Ibid* at para 380.

65 FC s 155(1)(c).

66 FC s 229(1)(a).

67 *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997* (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) ('*Second Certification Judgment*').

constituted the same degree of diminution of provincial powers as before.⁶⁸ However, because of other changes to provincial powers unrelated to local government, the Court certified the amended text.⁶⁹

The Final Constitution provided that key sections relating to the establishment, powers and functioning of municipalities⁷⁰ were subject to the LGTA. Under the Final Constitution, the LGTA would remain in force until 30 April 1999:⁷¹ the date for municipal elections.⁷²

(d) Statutory framework

The slow process of constructing a new system of local government commenced with the White Paper on Local Government of 1998. The paper charted a new course for 'developmental local government'.⁷³ This constitutional goal was defined as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'⁷⁴ This policy goal was grounded on four premises.⁷⁵ First, the municipal powers and functions should be exercised to ensure social development by meeting basic needs through the provision of government services and the promotion of economic development. Second, development can only be effected through the integrated and coordinated effort of all role players (both public and private) in local governance, notably through integrated development planning. Third, while municipal councils play a central role in promoting local democracy, they must involve citizens and community groups in the design and delivery of municipal programmes. Finally, in playing a strategic policy-making and visionary role, the developmental municipality must mobilize a range of resources to meet the basic needs of the community.

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The White Paper laid the policy framework for the laws that followed shortly afterwards. First came the Local Government: Municipal Demarcation Act of 1998.⁷⁶

68 *Second Certification Judgment* (supra) at paras 171, 172 and 175.

69 *Ibid* at paras 203-204.

70 FC ss 151, 155, 156 and 157.

71 FC sch 6 item 26(1)(a).

72 The Constitutional Court found that the transition period was reasonable to ensure the orderly transition to the new dispensation. *Second Certification Judgment* (supra) at paras 85-87.

73 On the drafting of the White Paper on Local Government, see Van Donk & Pieterse (supra) at 114-117.

74 *White Paper on Local Government* (1998) 17.

75 *Ibid* at 18-22.

76 Act 27 of 1998.

It established the Municipal Demarcation Board — which was tasked with drawing municipal boundaries. The Local Government: Municipal Structures Act⁷⁷ set out the details of the categories of municipalities, the criteria for their demarcation and internal governance structures. In preparation for the election scheduled for 2000,⁷⁸ the Local Government: Municipal Electoral Act⁷⁹ was passed in 2000. Barely a month before the 5 December 2000 elections, the Local Government: Municipal Systems Act (Systems Act)⁸⁰ came into being. The final phase of the local government transition commenced with the election of 284 councils on 5 December 2000. The statutory framework was, however, still incomplete. The Local Government: Municipal Finance Management Act (MFMA)⁸¹ was only adopted in 2003 and the Local Government: Municipal Property Rates Act in 2004.⁸² Completing the suite of new legislation was the Local Government: Municipal Fiscal Powers and Functions Act of 2007.⁸³ During this time, the constitutional framework for local government was also in flux. Of all the subject matter covered by the Final Constitution, local government has been subject to the most amendments. Some of these amendments shrink the constitutional space for local self-government.

(e) Constitutional amendments

The first amendment of 1998 was inauspicious. It indirectly provided for the dissolution of a municipal council:⁸⁴ by providing that if a municipal council is dissolved in terms of national legislation, an election must be held within 90 days.⁸⁵

In a second constitutional amendment of that year, the functionality of municipalities was asserted. By entrenching the provincial boundaries of the Interim Constitution, the Final Constitution had thwarted the creation of functional municipalities in a number of places. Using the magisterial districts as the building blocks of the provinces, apartheid spacial configurations were used in a manner that separated black townships from white town centres. Moreover, to establish functional municipalities, several municipalities had to cross provincial boundaries. A

77 Act 117 of 1998.

78 In 1998, the life of the LGTA was extended to 30 April 2000 (Constitution Second Amendment Act of 1998).

79 Act 27 of 2000.

80 Act 32 of 2000.

81 Act 56 of 2000.

82 Act 6 of 2004.

83 Act 12 of 2007.

84 Constitution Amendment Act 65 of 1998.

85 FC s 159(2). Section 34(3) of the Structure Act 117 of 1998 provided for the dissolution of a municipality.

provision was thus added to the Final Constitution.⁸⁶ It permitted a municipal boundary to extend across a provincial boundary if

that is the only way to fulfil the criteria for demarcating municipal boundaries.⁸⁷ The boundary could only be determined with the concurrence of the provinces concerned and after national legislation has authorized the provincial executives to establish a municipality in that municipal area.⁸⁸ Such national legislation would provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned.⁸⁹ It could also provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality.⁹⁰ It might finally provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of the municipal boundary.⁹¹ This constitutional framework proved to be a totally unworkable solution. FC s 155(6A) was repealed in 2005.⁹²

The constitutional amendments of 2001 were a mixed bag. On the one hand, they extended a municipality's borrowing power by enabling a council to bind itself and future councils in order to secure long term loans and investment.⁹³ The same amendment, however, gave the national government a freer hand to regulate the raising of loans. The amendment removed the limitation that national legislation may impose only 'reasonable conditions' on the raising of loans by municipalities.⁹⁴ In a second amendment, in the same year, the power of organized local government to 'nominate' persons to the Financial and Fiscal Commission, was watered down; the President now selected two persons from a list compiled by organized local government.⁹⁵

86 Constitution Amendment Act 87 of 1998.

87 FC s 155(6A).

88 FC s 155(6A)(a).

89 FC s 155(6A)(b)(i).

90 FC s 155(6A)(b)(ii).

91 FC s 155(6A)(b)(iii).

92 Constitution Twelfth Amendment Act of 2005 and Cross-boundary Municipalities Law Repeal and Related Matters Act 23 of 2005. See further *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC)(On the constitutionality of the adoption of the Amendment Act.)

93 Constitutional Amendment Act 34 of 2001 s 17, inserting FC s 230A. See further § 22.5(h) *infra*.

94 See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, M Bishop, M Chaskalson, A Stein & J Klaaren (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

Unlike the attempt to permit the crossing of the floor in the National Assembly and provincial legislatures through ordinary legislation,⁹⁶ the creation of two window periods in which councillors could change party allegiance was effected through a constitutional amendment.⁹⁷ The most far reaching amendment affecting local government was the amendment of FC s 139 in 2003.⁹⁸ First, the dissolution of councils was placed on a more secure footing. Second, it watered

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down the two-fold review process by the Minister responsible for local government and by the NCOP that occurs when a provincial executive assumes the responsibility for an unfulfilled executive obligation. Third, it excluded the review process altogether when drastic measures are adopted in times of a financial crisis.⁹⁹

(f) Local self-government

Despite the slow narrowing of constitutional space over the past decade, the constitutional recognition of local autonomy is one of the central innovative aspects of the Final Constitution. Kriegler J had — prior to the certification of the Final Constitution — already remarked that 'for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.'¹⁰⁰ He described the new status of local government as follows:

The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.¹⁰¹

95 Constitutional Amendment Act 61 of 2001 s 7, amending FC s 221(1) and (1A). See further De Visser (*supra*) at 243.

96 *United Democratic Party v President of the Republic of South Africa & Others* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC).

97 Schedule 6A was added by s 2 of Constitutional Amendment Act 18 of 2002. The following year, when a constitutional amendment authorised the crossing of the floor in the national and provincial legislatures, the Schedule was renumbered as 6B by s 6 of Constitutional Amendment Act 2 of 2003.

98 Constitutional Amendment Act 3 of 2003 s 4.

99 See further §§ 22.6(e) and (f) *infra*.

100 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 126.

101 *Ibid* at para 38.

While the Interim Constitution materially changed the nature of local government, the Final Constitution consolidated that status.¹⁰² The result was that '[t]he Constitution has moved away from a hierarchical division of government power in favour of a new vision, in which local government is interdependent, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character.'¹⁰³

22.2 Municipal governance

(a) Establishment of municipalities¹⁰⁴

FC s 151(1) provides that the local sphere of government consists of municipalities that must be established for the whole of the territory of the Republic. The Final Constitution thereby establishes the notion of 'wall-to-wall' local government. With regard to the establishment of municipalities, the Final Constitution performs a two-fold function. First, it provides for a division of responsibilities between the national and provincial sphere with regard to the establishment process. Second, the Final Constitution outlines the parameters for the determination of certain municipal features, namely the municipal boundary, the municipal category, the municipal type and the official languages. The establishment process has mainly been regulated in the Local Government: Municipal Demarcation Act¹⁰⁵ ('Demarcation Act') and in the Local Government: Municipal Structures Act ('Structures Act').¹⁰⁶

The Final Constitution sets out the responsibilities of national and provincial governments as regard the establishment process. In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional*

102 *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) ('CDA Boerdery') at para 38.

103 *Ibid.* In constitutional theory a major shift has taken place. However, the statutory framework giving effect to the constitutional mandate and the policies that breathe life into local government may hark back to the pre-constitutional paradigm of central control and direction. David Schmidt argues that there has been an ambivalent acceptance by national government of the concept of 'spheres of government'. In reality they are still cling to the hierarchical notion of 'tiers of government'. 'From Spheres to Tiers — Conceptions of Local Government in South Africa in the period 1994-2006' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Panell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 109. He argues that the Final Constitution is an expression of the so-called 'network governance' model, a model in competition with the earlier models of the traditional public administration approach and the 'new' public management. The traditional public management paradigm which emphasised hierarchy, rules and procedures, was complemented by the 'new' public management emerging in the 1970s which sought to introduce private sector management practice and private involvement in the provision of services. In reviewing the way the national government has regulated local government, Schmidt argues that the traditional public administration approach still prevails. While the Systems Act may reflect the new public management ethos with an emphasis on public-private partnerships, the MFMA is pure old-style bureaucracy.

104 See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) Chapter 2.

105 Act 27 of 1998.

106 Act 117 of 1998.

Development,¹⁰⁷ it was argued, on the basis of FC s 44(1)(a)(ii), that national government has concurrent powers with provincial and local government with regard to all powers dealt with in FC Chapter 7. This conclusion would have entitled national government to deal with all matters related to the establishment of municipalities. The Constitutional Court dismissed the national government's argument with reference to FC s 164 — this provision empowers national government to deal with matters 'untouched' in FC Chapter 7. This provision would serve no purpose in the context of concurrent powers over Chapter 7. The Court's holding underscores the importance of a division of responsibilities between national and provincial governments as regards the establishment process.

The ultimate executive act of establishing a municipality is a provincial responsibility. FC s 155(6) instructs each provincial government to 'establish municipalities in its province'. However, provinces must operate in terms of the national legislation that regulates the boundaries, categories and types of municipalities, as well as the division of powers between district and local municipalities.¹⁰⁸

National legislation must establish criteria and procedures for the determination of municipal boundaries and ward boundaries through an independent authority.¹⁰⁹ The Constitutional Court expressed the rationale for an independent authority as follows:

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The purpose of section 155(3)(b) is 'to guard against political interference in the process of creating new municipalities.' For, if municipalities were to be established along party lines or if there was to be political interference in their establishment, this would undermine our multi-party system of democratic government. A deliberate decision was therefore made to confer the power to establish municipal areas upon an independent authority.¹¹⁰

The Final Constitution itself introduces three municipal categories.¹¹¹ FC s 155(3)(a) requires national legislation to establish criteria for determining whether an area should have a single category A (metropolitan) municipality or when it should have municipalities of both category B (local municipalities) and C (district municipality). FC s 155(3)(c) requires national legislation to make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C.

107 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) ('*Executive Council Western Cape*') at paras 34-59.

108 FC s 155(6).

109 FC s 155(3)(b).

110 *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) ('*Matatiele I*') at para 41 (footnotes omitted) as discussed in Steytler & De Visser (supra) at 2-3. See O'Regan J's dissenting opinion in *Executive Council Western Cape* (supra) at paras 164-169 where she downplays the need for an independent arbiter in boundary determinations. See also Rob Cameron 'Local Government Boundary Reorganisation' in Udesh Pillay, Richard Tomlinson & Jacques du Toit (eds) *Democracy and Delivery Urban Policy in South Africa* (2006) 84 (Cameron indicates that independent boundary arbiters are a rarity in Africa.)

111 FC s 151(1).

National legislation must define the different types of municipality that may be established within each category.¹¹² Provincial legislation must define the types of municipality that may be established in the province.¹¹³

National legislation may provide criteria for determining the size of a municipal council.¹¹⁴ As a result of the electoral system of ward and proportional representation, an important 'knock-on effect' of determining the size of the municipal council is that it determines the number of wards that must be delimited in a municipality.

The above scheme puts beyond doubt that local governments are established in terms of a national constitutional and statutory framework. Provincial governments primarily play an implementation role. Provincial legislation on typology remains the only area where provincial governments exercise legislative authority.¹¹⁵

(i) Boundaries

An essential feature of the transformation of local government was the demarcation of municipal boundaries. Local government boundaries needed to be demarcated afresh in order to ensure redistribution of wealth and financially viable and accountable municipalities.¹¹⁶ The Final Constitution thus required the

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establishment of an independent authority that demarcates municipal boundaries. It establishes criteria and procedures for this process.¹¹⁷ An independent authority is also required to delimit the wards within a municipality.¹¹⁸ The Demarcation Act provides for a Municipal Demarcation Board. The independence of the institution is secured through the appointment procedure for its members,¹¹⁹ the limited grounds for removal from office,¹²⁰ the criminalization of any efforts to improperly influence

112 FC s 155(2).

113 FC s 155(5).

114 FC s 160(5)(a).

115 See *Executive Council Western Cape* (supra) at paras 39-43, 70-76 and 82.

116 For an analysis of the Municipal Demarcation Board's first term of office, including the demarcation of 843 interim local government structures into 284 new municipal areas, see Cameron 'Boundary Reorganisation' (supra) at 84ff.

117 FC s 155(3)(b).

118 FC s 157(4).

119 Demarcation Act s 8.

120 Demarcation Act s 13(4).

its decision making¹²¹ and the fact that it is accountable to Parliament and not to the national executive.¹²²

In *Matatiele*, the Constitutional Court dealt with aspects related to the limits on the Demarcation Board's powers. When a constitutional amendment was passed altering provincial boundaries in a way that affected municipal boundaries, it was argued that Parliament had usurped the powers of the Board to determine municipal boundaries. The Constitutional Court disagreed. It ruled that the Board's powers to demarcate municipal boundaries are limited by Parliament's authority to establish provincial boundaries.¹²³ The Court found that 'once provincial boundaries have been redefined, it is the task of the Board to demarcate municipal boundaries in terms of the Demarcation Act'.¹²⁴

Because the Municipal Demarcation Board is an independent organ of state, it is in a similar position to the IEC, in respect of which the Constitutional Court held that it does not fall within the purview of FC Chapter 3.¹²⁵ Consequently, the Municipal Demarcation Board, like the IEC and other Chapter 9 Institutions, is not bound by the obligation of cooperative government set out in FC Chapter 3. Where there is a dispute between a municipality and the Demarcation Board, there is no need to avoid disputes being settled in court.

(ii) Categories of municipalities

FC s 155(1) establishes three categories of municipalities:

- (a) Category A: metropolitan municipalities that have exclusive authority over their jurisdiction;
- (b) Category B: local municipalities that share authority with district municipalities; and
- (c) Category C: district municipalities that share authority with local municipalities.

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The original text of FC s 155(1) submitted for certification by the Constitutional Court did not make reference to any categories of municipalities. Instead, the issue of categories was relegated to statutory legislation.¹²⁶ The Court reviewed this delineation of responsibility in *First Certification Judgment*.¹²⁷ CP XXIV required a framework for local government powers, functions and structures be set out in the

121 Demarcation Act s 42.

122 Demarcation Act s 39.

123 *Matatiele I* (supra) at para 49.

124 Ibid at para 51. Steytler & De Visser (supra) at 2-4.

125 See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('Langeberg') at para 22.

126 See Steytler & De Visser (supra) at 2-19.

Constitution.¹²⁸ In addition, CP XXV required that this framework make provision for appropriate fiscal powers and functions for different categories of local government. The Court held that the requirement of a framework for local government structures necessitated 'at the very least' the setting out in the Final Constitution of the different categories of local government that can be established by the provinces, as well as a framework for their structures.¹²⁹ This requirement had not been met.¹³⁰ The requirement of appropriate fiscal powers and functions for different categories had also not been met. No such provision appeared in the text. The Constitutional Assembly then amended FC 155(1) to provide for the above three categories. In *Second Certification Judgment*,¹³¹ the Court reviewed and approved the amended text. In this judgment, the Constitutional Court labeled the three categories as follows:

- (a) self-standing municipalities,
- (b) municipalities that form part of a comprehensive co-ordinating structure, and
- (c) municipalities that perform co-ordinating functions.¹³²

Municipal governance in a specific area is thus provided either by a metropolitan municipality¹³³ or by a combination of district and local municipalities. The choice between these two modes of municipal governance is governed by FC s 155(4). This provision requires national legislation to establish criteria in terms of which the choice is made. Furthermore, the Final Constitution requires an

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appropriate division of powers and functions between the two tiers of local government that operate outside of metropolitan areas. The need to provide municipal services in an equitable and sustainable manner must be taken into account by this legislation.¹³⁴

127 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 301.

128 IC sch 4 CP XXIV provided: 'A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.'

129 *First Certification Judgment* (supra) at para 301.

130 *Ibid.* See Nico Steytler 'District Municipalities: Giving Effect to Shared Authority in Local Government' (2003) 7(2) *Law, Democracy and Development* 228.

131 *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) ('*Second Certification Judgment*') at paras 73–82.

132 *Ibid* at para 77.

133 For a discussion of the objectives of introducing the unitary metropolitan system, see Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 105.

134 FC s 155(4). See Steytler & De Visser (supra) at 2-20.

Section 2 of the Structures Act provides that an area must be regarded a metropolitan municipality if it can reasonably be regarded as a conurbation featuring areas of high population density, intense movement of people, goods and services, extensive development, multiple business districts and a number of industrial areas. An integrated development plan for the entire single area must also be desirable. Finally, the social and economic linkages between the constituent units should be strong. An area that does not comply with these requirements must, instead, be regarded as a combination of district and local municipalities.¹³⁵

The question as to who decides which category applies to a specific municipal areas became an area of contestation soon after the promulgation of the Structures Act. In its original iteration, the Act provided that the national Minister for local government was vested with the power to declare metropolitan municipalities. This scheme was deemed unconstitutional by the Constitutional Court.¹³⁶ The Court held that the Minister should not be vested with the power to determine municipal categories because such a power interfered with the power of the independent Demarcation Board. The Court remarked that 'the Demarcation Board can only determine boundaries if it knows what it is determining boundaries for.'¹³⁷ The Structures Act was amended to locate the power to decide on the appropriate municipal category in the Municipal Demarcation Board.¹³⁸

The Structures Act provides for a division of powers and functions between district municipalities and local municipalities as required by FC s 155(3)(c).¹³⁹ This division will be further discussed below.¹⁴⁰

(iii) Types

The Final Constitution requires national legislation to define the different types of municipalities that may be established within each category.¹⁴¹ In *Second Certification Judgment*, the Constitutional Court dismissed the argument that Constitutional Principle XXIV required the Final Constitution to describe the types of municipalities. The Court held that this reading of CP XXIV was only one of many possible readings of the phrase 'framework for local government . . . structures'.¹⁴² The types of municipalities are thus described in the Structures Act.

135 Structures Act s 3. See Steytler & De Visser (supra) at 2-20.

136 *Executive Council Western Cape* (supra) at paras 34-59.

137 Ibid at para 51.

138 See Structures Act s 4; Steytler & De Visser (supra) at 2-20; Cameron 'Boundary Reorganisation' (supra) at 86.

139 See Chapter 2 of the Municipal Structures Amendment Act 33 of 2000.

140 See § 22.3 (d) infra.

141 FC s 155(2).

142 *Second Certification Judgment* (supra) at para 82.

Whereas the category of municipality determines whether or not powers and functions will be shared, the type of municipality determines three other issues, namely:¹⁴³

- (a) the institutional relationship between the municipality's executive and its legislative function. This relates to whether the municipality's council must exercise municipal executive authority itself (plenary executive system), whether it may elect an executive committee (collective executive system) or whether it may elect an executive mayor (mayoral executive system);¹⁴⁴
- (b) whether a metropolitan or local municipality is permitted to establish ward committees,¹⁴⁵ and
- (c) whether a metropolitan municipality is permitted to establish subcouncils that exercise delegated powers for parts of the municipality.¹⁴⁶

The content given by national legislation to the typology means that it also responds to FC s 160(5). FC s 160(5) envisages national legislation that will provide criteria for determining, amongst other things, whether a municipal council may elect an executive committee.

FC s 155(5) (and section 12 of the Structures Act) instructs provinces to produce legislation to 'determine the different types of municipality to be established in the province'. These sections confer both the legislative and executive power to establish types of municipality upon the provincial government. In an earlier version of the Structures Act, the national Minister for local government could promulgate guidelines to assist MECs for local government in selecting a type of municipality for a municipal area. The MEC was obliged to take them into account. When this provision was challenged before the Constitutional Court,¹⁴⁷ the Court observed that it 'tells the provinces how they must set about exercising a power in respect of a matter which falls outside the competence of the national government'.¹⁴⁸ The fact that the guidelines were not binding was not important, according to the Court: national government had legislated on a matter which fell outside of its jurisdiction and the provision was declared unconstitutional.

National limits on provincial decision-making with regard to typology are thus to be found only in the national law envisaged in FC s 155(2). Are there, however, implicit limits informed by the notion of local government autonomy? When the constitutional scheme for selecting the municipal typology was challenged in the Constitutional Court, the Court wrote:

143 See Steytler & De Visser (*supra*) at 2-24.

144 Structures Act s 7(a), (b) and (c).

145 Structures Act s 7(e).

146 Structures Act s 7(d). See also Bernard Bekink *Principles of South African Local Government Law* (2006) 126-135.

147 *Executive Council Western Cape* (*supra*) at paras 77-84.

148 *Ibid* at para 83.

The provisions to which objection is taken are those dealing with typology and they are sanctioned by section 155(2). The municipal power to elect executive or other committees is therefore subordinate to these provisions and to the provincial power to select types of municipalities. If this has the effect of precluding particular municipalities from electing executive or other committees, that results from the provisions of the Constitution itself and cannot be challenged as being a breach of section 160(5)(b).¹⁴⁹

From this remark of the Constitutional Court, it could be deduced that the determination of a municipality's executive structure is indeed within the provincial executive's discretion.¹⁵⁰ However, the challenge to which the Court responded was not directed at the power of the MEC to determine the typology but at sections 7, 10 and 33 of the Structures Act. These sections provide a national menu of types and criteria for the establishment of committees. The MEC's decision on the municipal typology takes place in the context of a different provision: FC s 155(6). FC s 155(6) engages the establishment of municipalities.

Another significant dimension to the discussion of the provincial power to determine municipal executive structures vis-à-vis municipal autonomy is the fact that the proclamation of a municipal type does not necessarily determine the executive structure. The effect of the provincial decision on a type for a municipality is that it permits that municipality to decide to establish a particular structure.¹⁵¹ This decision-making power is particularly relevant with regard to ward committees and subcouncils. In the absence of a municipal decision, no ward committees or subcouncils will be established in the municipality, regardless of the fact that the type permits their establishment. With regard to the executive structure, the typology may be 'open-ended' in theory but not in practice: in reality, a municipality that is permitted to establish an executive committee does not have a choice but to establish an executive committee. Similarly, a municipality that is permitted to elect an executive mayor cannot but elect an executive mayor.¹⁵² Not to follow the provincial suggestion on the executive structure, embedded in the typology, would be tantamount to the absence of an executive structure. That is not an option. Nevertheless, the scheme set out by the Act is clearly premised on the notion that the municipal type does not become a reality without the concurrence of the municipality. This balance of powers must be interpreted to mean that the Act calls for a relationship of co-operation between the provincial government and the municipality when it comes to determining the executive structure. An MEC, in exercising this power, is subject to the principles of co-operative government. These principles require respect for the institutional integrity of local government.¹⁵³ This provision, read together with

149 *Executive Council Western Cape* (supra) at para 87. As discussed in Steytler & De Visser (supra) at 2-26.

150 See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 2-26.

151 See Structures Act ss 43(1), 55(1), 61(2) and 72(2).

152 That said, a municipality may forego such an election, if its council is small enough to operate as an executive structure.

153 See Stu Woolman, Theunis Roux & Bernard Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

the message sent out by the balance of powers set forth in the Act, should prevent an MEC from exercising this power unilaterally without the concurrence of the municipality.¹⁵⁴

(iv) Official languages

The choice of official languages is a critical aspect of the establishment of a municipality's presence in a particular area.¹⁵⁵ The Final Constitution lists the official languages of the Republic and instructs the state to take practical and positive measures to elevate the status and advance the use of these languages.¹⁵⁶ The Final Constitution does not state explicitly, in the same way as it does for national and provincial governments,¹⁵⁷ that a municipality may use any of the 11 official languages 'for the purposes of government'.¹⁵⁸ However, section 21(2) of the Systems Act, in dealing with communication with the local community, provides that the municipal council must determine the official languages of the municipality. It is suggested that these official languages must be used 'for the purposes of government', that is for both internal and external communication. The Final Constitution provides two criteria that municipalities must take into account when dealing with the issue of official languages. The first is a demographic criterion, namely the language usage of the residents of the municipality. The second is an attitudinal criterion, namely the preferences of their residents.¹⁵⁹ In dealing with national and provincial governments, the Final Constitution lists more criteria, such as practicality and expense. The question then arises whether the absence of those factors in FC s 6(3)(b) removes them from the ambit of municipal decision making on the issue. Strijdom argues for an integrated reading of FC s 6. He argues that the effect of this reading is that factors such as practicality, expense, parity of esteem and equitable treatment must be taken into account by municipalities. This view appears correct, especially in relation to the integrated reading of FC ss 6(3)(a) and 6(3)(b). FC s 6(3)(a) provides that national and provincial governments may use any two official languages. Although it further provides that municipalities must take certain criteria into account, it still follows that municipalities have some degree of choice — even though the extent of this discretion is not made explicit.¹⁶⁰ An important question is whether the integrated reading also applies to the requirement

154 See Steytler & De Visser (supra) at 2-26.

155 Ibid at 2-28.

156 FC s 6(1) and (2).

157 FC s 6(3)(a).

158 FC s 6(3)(a).

159 FC s 6(3)(b).

160 For a different view, see Iain Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

of a minimum of two official languages that applies to national and provincial governments.¹⁶¹ While the two languages requirement

makes sense for national and provincial governments, its rationale is not so compelling with regard to municipalities. One language may be so dominant in a municipality that it merits a single language policy. However, we believe that a municipality may not employ only one official language. The integrated reading, as well as the fact that section 21(2) of the Systems Act refers to 'official languages' (plural), indicates that at least two languages must be identified and used.¹⁶²

(b) Municipal elections

The Final Constitution was adopted so as to lay the foundations for a democratic and open society in which government is based on the will of the people.¹⁶³ Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government are foundational values underpinning the functioning of the state at all three levels.¹⁶⁴ FC s 152(1) specifically commits local government to transparency and accountability. The right to vote in local government elections is extended to all who are registered on the municipality's segment of the national common voters roll.¹⁶⁵

(i) Term of office of municipal councils

National legislation determines the term of office of a municipal council. However, the Final Constitution sets the limit at five years.¹⁶⁶ When an earlier version of the Structures Act empowered the Minister to determine the term of office of municipal councils by notice in the *Government Gazette*, the Constitutional Court ruled that Parliament could not have delegated such power to the Minister.¹⁶⁷ General elections must be held within 90 days of the expiry of a council's term.¹⁶⁸ If a council is dissolved,¹⁶⁹ an election must be held for that council within 90 days of the date that the council was dissolved.¹⁷⁰

(ii) Electoral system

161 FC s 6(3)(a).

162 Once again, Iain Currie demurs from this interpretation.

163 FC Preamble.

164 See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; Chris Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

165 FC s 157(5).

166 FC s 159(1) as amended by Constitution Second Amendment Act, 1998 and Structures Act s 24(1).

167 *Executive Council Western Cape* (supra) at paras 120-127.

168 FC s 159(2).

FC s 157(1) states that a municipal council must consist of elected members, appointed members or a combination of elected and appointed members.

FC s 157(2) provides that the system for electing members of municipal councils must be based on proportional representation (PR) elections or on PR elections combined with constituency (ward) elections. PR elections must be based on that municipality's segment of the national common voters roll and provide for the election of members from lists of party candidates drawn up in a party's order of preference.¹⁷¹ A choice to combine PR with ward representation is subject to the requirement of general proportionality found in FC s 157(3). FC s 157(3) requires that the electoral system 'must result, in general, in proportional representation'.¹⁷² If the system includes ward representation, then an independent authority must delimit the wards in terms of procedures and criteria prescribed by national legislation.¹⁷³

The Structures Act determines the percentages for ward and PR elections: 50 percent of councillors are elected from party lists on a proportional basis¹⁷⁴ and 50 percent of ward councillors are elected in a 'winner-takes-all' system in Category A (metropolitan) council and Category B (local) councils.¹⁷⁵ Candidates for a ward election can be independent or nominated by a political party.¹⁷⁶

The provision for appointed members enables Parliament to regulate the composition of Category C municipalities. Category C municipalities encompass more than one local municipality.¹⁷⁷ Whether or not the council of a Category C municipality is made up of only appointed members or of a combination of

169 A council may dissolve itself, as long as it has been in office for a minimum of two years. Structures Act s 34(1)-(2). A council can also be dissolved by the provincial executive in terms of an intervention. FC s 139. See further § 22.6(d)(v) *infra*.

170 FC s 159(2).

171 FC s 157(2)(a).

172 Before it was amended in 2002, FC s 157(3) required that the electoral system ensure 'that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties'. The principle of proportionality was thus relaxed to accommodate changes in the electoral system that would allow party representatives to 'cross the floor'.

173 FC s 157(4)(a).

174 Structures Act item 6(b) sch 1.

175 Most local municipalities comprise wards. According to s 22(4) of the Structures Act, a municipality that has a council of fewer than seven members has no wards. These municipal councils consist of PR councillors only. See also Structures Act sch 1 item 7. Structures Act s 22(1)-(3) and sch 1 item 6(a). See Steytler & De Visser (*supra*) at 4-10-4-13 for the calculation of seats.

176 Municipal Electoral Act s 16(1).

177 FC s 155(1).

appointed and directly elected members is left for legislative determination. The Final Constitution does provide that the latter category of councillors must be appointed 'by other municipal Councils',¹⁷⁸ which presupposes an appointment procedure that entails decision making by the full council. Furthermore, these councillors 'must represent those other councils',¹⁷⁹ indicating that the appointees do not enjoy a free mandate. Finally, any legislation dealing with the appointed councillors must ensure that parties and interests reflected within the council that makes the appointment are fairly represented on the council to which the appointment is made.¹⁸⁰ This provision rules out the appointment of officials to the other council

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and makes the appointments by the council subject to the principle of 'fairness'. The constitutional principle of fairness demands more than simple majority rule; a procedure that allows a council majority to determine the appointment is thus not in keeping with the Final Constitution. At the same time, following the holding adopted in *Democratic Alliance v ANC*,¹⁸¹ fairness does not necessarily demand proportionality¹⁸² but connotes a notion of meaningful participation.

The Structures Act provides for the system envisaged in FC s 157(1)(b)(ii), i.e., a combination of appointed and directly elected members of a district council. Voters in the district elect 40 percent of the district council according to a party list system.¹⁸³ The remaining 60 percent is made up of representatives of local municipalities¹⁸⁴ and, if applicable, district management areas (DMA).¹⁸⁵ The number of district council seats to which a local council or a DMA is entitled, depends on the number of registered voters that reside in that particular area.¹⁸⁶

In dealing with the system for appointing representatives, the Structures Act stays well within the limits set by FC s 157(6). It establishes a system that is based on proportionality: an internal election based on lists of candidates submitted by

178 FC s 157(1)(b)(i).

179 FC s 157(1)(b)(i).

180 FC s 157(1)(b) and (6).

181 2003 (1) BCLR 25 (C).

182 The general principle of proportionality, put forward in FC s 157(3), does not apply to the system of appointments.

183 Structures Act s 23(1)(a) read with s 23(3).

184 Structures Act s 23(1)(b).

185 Structures Act s 23(1)(c). District Management Areas are sparsely populated areas in which the establishment of a local municipality is not viable. Structures Act s 6. See Steytler & De Visser (supra) at 4-13-4-16 for the calculation of seats.

186 Structures Act item 15 sch 2.

parties or individuals represented on the council determines the composition of the delegation of appointees.¹⁸⁷ The composition of a local council's delegation to the district council will thus reflect the composition of the local council. The system of proportionality in district representation is important when it comes to dealing with the 'recall' of a district representative by a local municipality. According to section 27(e) of the Structures Act, the local council can, by majority decision, 'replace' a district representative. When this occurs, a vacancy arises on the district council. The term 'replace' in the Structures Act could be interpreted to mean that the local council can appoint its new representative in the same resolution as the one that recalls its existing representative. Such an interpretation would, however, result in proportionality being replaced by majority rule — and that interpretation runs counter to the intention of the Structures Act. Therefore, the process outlined in the Structures Act for the filling of district council vacancies should be used.¹⁸⁸ This means that the new district representative must be selected from the candidate list that produced the district representative that was recalled. This method preserves the degree of proportionality envisaged by the Structures Act. The fact that the Structures

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Act goes beyond the constitutional instruction of 'fairness' and demands such proportionality ought not to be viewed as constitutionally suspect. The Structures Act does not violate FC s 157(6) by providing greater protection for minorities than the constitutional provision requires.

(iii) Membership

Anyone who is registered on a municipality's segment of the national common voters' roll is eligible to be a member of that council.¹⁸⁹ The exceptions are listed in subsections 158(1) of the Final Constitution.¹⁹⁰ They concern:

- (a) Paid municipal staff members.¹⁹¹
- (b) Paid provincial or national government staff members who have been disqualified in terms of national legislation.¹⁹²
- (c) Members of the National Assembly, National Council of Provinces or any of the provincial legislatures.¹⁹³

187 See Structures Act part 2 sch 2.

188 Structures Act sch 2 items 11 and 23.

189 FC s 158(1) read with s 157(5).

190 See Steytler & De Visser (supra) at 4-8.

191 FC s 158(1)(a).

192 FC s 158(1)(b).

193 FC s 158(1)(d). This disqualification does not apply to members of a municipal council representing organised local government in the National Council of Provinces.

- (d) Members of another municipal council.¹⁹⁴
- (e) Anyone who is disqualified from voting for the National Assembly.¹⁹⁵
- (f) Unrehabilitated insolvents, persons declared to be of unsound mind and persons convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine.¹⁹⁶

Despite these disqualifications, anyone who is registered on a municipality's segment of the national common voters' roll can be a candidate, with the exception of the categories referred to under (e) and (f) above.¹⁹⁷

A PR councillor also vacates his or her office if he or she ceases to be a member of the political party. Of course, floor-crossing is an obvious exception to that rule.¹⁹⁸ The same applies to ward councillors. Party-aligned ward councillors vacate office if they lose party membership outside of the scheme for floor-crossing.¹⁹⁹ Independent ward councillors vacate office if they become members of a political party

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outside of the scheme for floor crossing.²⁰⁰ The Structures Act provides for other instances where a councillor vacates office.²⁰¹

Whether or not councillors should have the ability to change party allegiance without losing their seats has long been a contentious issue.²⁰² Generally, the ability

194 FC s 158(1)(e). This disqualification does not apply to appointed council members.

195 FC s 158(1)(c).

196 FC s 158(1)(c) read with s 47(1)(c), (d) and (e). The latter disqualification applies only to people convicted after the 1996 Constitution took effect (7 February 1998) and lapses five years after the sentence has been completed. Section 119(4) of the Systems Act seeks to reiterate the disqualification mentioned under FC s 158(1)(c) read with FC s 47(1)(e). However, it contradicts the Final Constitution by providing that the disqualification is applicable 'during a period of five years *as from the conviction*' (emphasis added). Therefore, not only is section 119(4) of the Systems Act superfluous (as the issue is fully governed by the Constitution), it is also unconstitutional. See Steytler & De Visser (supra) at 4-8 n 47.

197 FC s 158(2) read with Structures Act s 21(1)(a).

198 FC item 1(1) sch 6B.

199 FC item 1(2)(a) sch 6B.

200 FC sch 6B item 1(2)(b).

201 Structures Act s 27.

202 See Steytler & De Visser (supra) at 4-21. It is important to note that, at its latest Conference, the African National Congress adopted a resolution that floor-crossing be abolished. The discussion of the legal framework for crossing of the floor is thus discussed against the backdrop of this intention to remove it. At the time of writing, the Constitution Fourteenth Amendment Bill 2008 and the Constitutional Fifteenth Amendment Bill 2008 were under discussion in Parliament. They seek to abolish floor-crossing in all three spheres of government.

to cross the floor creates tension with the general principle of proportionality.²⁰³ National and provincial parliamentarians were not permitted to cross the floor in terms of the Interim Constitution.²⁰⁴ The same principle obtained under the Local Government Transition Act;²⁰⁵ on losing party membership, a councillor lost his or her seat.²⁰⁶ The principle of an imperative mandate still applied in an unmitigated way until 2002.²⁰⁷ In 2002 amendments to both the Final Constitution and the Structures Act, permitting floor-crossing, were passed. The principle of proportionality in FC s 157(3) was reworded to state that the electoral system 'must result, *in general*, in proportional representation'.²⁰⁸ A new schedule 6A²⁰⁹ was inserted in the Final Constitution to deal with changes in party membership in between general elections.²¹⁰ The significance of the opening up of the ability to cross the floor in the context of the overall proportionality requirement lies in the fact that crossing of the floor inevitably results in a degree of disproportionality.

In *United Democratic Movement v President of the Republic of South Africa (1)* the United Democratic Movement (UDM) challenged the floor crossing legislation.²¹¹ The UDM argued that the amendments affected the basic values of the Final Constitution contained in FC 1 and that the amendments should therefore have been passed in terms of FC s 74(1)²¹² instead of FC s 74(3).²¹³ In its substantive argument, the UDM put forward the proposition that proportional representation

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is protected by the anti-defection clause, and that it is a fundamental element of South Africa's multi-party democracy. The party — not the member — is entitled to

203 See also Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 29, 29-12.

204 See IC ss 43(b), 51(1)(b) and 133(1)(b).

205 Act 209 of 1993.

206 See, for example, s 82(1) of the Election Regulations (Western Cape), referred to in *Villiers v Munisipaliteit van Beaufort-Wes* 1998 (9) BCLR 1060 (C).

207 Structures Act s 27(c) and (f) provided that ward or PR councillors who changed party allegiance have to vacate office.

208 Emphasis added.

209 Later amended into schedule 6B by Constitution Amendment Act 2 of 2003.

210 Originally, the schedule could be amended by ordinary legislation passed in accordance with FC s 76(1). This provision was repealed by s 5 of Constitution Amendment Act 2 of 2003.

211 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('UDM').

212 FC s 74(1) requires a 75 percent majority in the National Assembly and the support of at least six provinces in the NCOP.

213 FC s 74(3) requires a two-thirds majority (66 percent) in the National Assembly and the support of

the seat. If a member is allowed to defect, then the proportionality of the elected body is distorted. The challenge was directed at the entire suite of legislation on floor-crossing at national, provincial and municipal level. A distinction can be made, and was made, between local government and the other two spheres of government. National and provincial elections are based on a closed list PR system while municipal elections have, in the words of Glenda Fick, 'a majoritarian element which more readily accommodate[s] floor crossing'.²¹⁴ Nevertheless, the Final Constitution makes no distinction between PR councillors and ward councillors in setting out the possibilities and criteria for floor-crossing. Neither the Constitutional Court nor the parties before it in *UDM* sought to make the distinction.²¹⁵

In *UDM*, the Constitutional Court disagreed with most of the arguments leveled against the floor-crossing legislation. It held that the changes do not affect the founding values of the Final Constitution and concluded that multi-party democracy, as required by FC s 1(d), is not the same as proportional representation.²¹⁶ Furthermore, the Court observed that the system of proportional representation as envisaged by the Final Constitution does not necessarily require a prohibition on floor-crossing.²¹⁷ An important consideration for the Court in this respect was the notion that voters, in any jurisdiction, have no control over the conduct of their representatives once they have been elected: 'The fact that political representatives may act inconsistently with their mandates is a risk in all electoral systems.'²¹⁸ When the argument was raised that the 10 per cent formula benefited larger parties, the Court observed that the fact that an electoral system works in favour of particular parties does not necessarily make it unconstitutional.²¹⁹ The Court also dismissed the argument that schedule 6B (formerly schedule 6A) was inconsistent with FC s 157(3)'s 'general' requirement of proportionality.

Item 2(1)(b) of schedule 6B provides that a party-aligned ward councillor can change party membership or become independent without losing his or her seat. It also provides that an independent ward councillor can join a party without losing his or her seat. Item 2(1)(a) stipulates that a PR councillor can change party membership without losing his or her seat.

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The Final Constitution does place restrictions on floor crossings.²²⁰ Firstly, councillors may only change party membership (or become independent) if 10

214 Fick (supra) at 29-16 and 29-25. For a fine-grained reading of *UDM*, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

215 Fick (supra) at 29-16-29-18 (criticises the absence of the distinction and argues that the Court should have addressed the tension between a closed-list PR system and floor-crossing.)

216 See Christopher Roederer 'Founding Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13, 13-23.

217 *UDM* (supra) at para 53. See also Fick (supra) at 29-16.

218 *UDM* (supra) at para 50.

219 See Roederer (supra) at 13-23.

percent of their party's total members in the council simultaneously cease to be members.²²¹ This percentage prevents, as far as possible, individual defections and the instability and possibility of political corruption that attach to such individual defections.²²² Secondly, a councillor may only cross the floor during a so-called 'window period'. These 'window periods' are:

- (a) from 1–15 September of the second year after a general election; and
- (b) from 1–15 September of the fourth year after a general election.²²³

Thirdly, a councillor may only change party membership, become a party member or cease to be a party member once during such a 'window period'.²²⁴

In *Julies v Speaker of the National Assembly*, the High Court dealt with the matter of the 10 percent requirement, albeit in the context of the National Assembly.²²⁵ The court held that compliance with this requirement is to be determined immediately prior to the commencement of the relevant window period. The outcome of that assessment remains static throughout the window period, notwithstanding any floor-crossing during that window period. The rationale for the window period is 'to freeze membership of the National Assembly for a period of 15 days, during which a member who wishes to change his party allegiance would nevertheless retain his seat in the Legislature'.²²⁶ It is suggested that the same principles apply to municipal councils.

During a window period, a party is prevented from suspending or terminating a councillor's membership without the written consent of the councillor. Similarly, a party may not do anything that may cause a councillor to be disqualified from holding office without such written consent.²²⁷

The fact that a councillor enjoys 'immunity' only during the window period begs the question as to what may happen if a political party becomes aware of a councillor's intention to resign prior to the start of the window period. Expulsion

220 See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 4-23.

221 FC sch 6B item 2(1)(b)(ii). The 10 percent-rule naturally cannot be applied to an independent ward councillor who joins a party. It also did not apply for the first round of floor-crossing immediately after the constitutional amendments came into effect (item 18 Constitution Amendment Act 18 of 2002).

222 It is suggested that, in the translation of the 10 percent into actual members, fractions must be rounded upwards. For example, if a party has 15 members on a council, the 10 percent requirement would mean that two members must cross together. To disregard fractions would not be in keeping with the intention of the requirement, which is to restrict floor crossing.

223 FC sch 6B item 4(1)(a).

224 FC sch 6B item 4(2)(a).

225 2006 (4) SA 13 (C), [2006] 4 All SA 457 (C).

226 *Ibid* at para 14.

227 FC item 4(2)(c) sch 6B. Steytler & De Visser (*supra*) at 4-24.

before the window period is clearly possible. But what happens if the councillor appeals against the party's decision, by using internal party appeal procedures or by resorting to the courts when internal means have been exhausted? Such an

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appeal procedure generally suspends the expulsion and may very well last until the window period has ended. The councillor may then still cross the floor without losing his or her seat. The importance of 'timing' the crossing in the context of a pending appeal came to the fore in *Mathew Shunmugam & Others v Newcastle Local Municipality & Others*.²²⁸ If the councillor crosses the floor prior to the conclusion of the appeal, the seat is lost to the party from which he or she resigned. In *Shunmugam*, eighteen councillors, who were members of NADECO, had been expelled prior to the window period. They challenged this expulsion in court and obtained interim relief that set aside the expulsion. NADECO then sought an application reconsidering the interim relief. As the matter could not be finalized before the commencement of the window period, the court set aside the interim order and ruled that, pending the final outcome, the members remained suspended and that NADECO would not replace them before the commencement of the window period. The matter was set down for argument on a date within the window period so as to enable the Court to finalize the matter before the end of that period. During the window period and before the matter could be finalized before the court, the chickens flew the coop and joined other parties. The central question was thus whether they were members of NADECO on the eve of the window period. Rall AJ decided that they were not. They had abandoned their right to challenge their expulsion by joining other parties. In the words of the learned judge:

To me there can be no clearer and more unequivocal statement by conduct of a wish to no longer have anything more to do with their political home, NADECO, than their joining other political parties. If they were still members of NADECO, then this amounted to a resignation from that party and if they were no longer members this was a statement that they had no intention of regaining their membership. This conduct is plainly inconsistent with an intention to enforce the right to set aside their expulsion from the party and hence regain membership thereof.²²⁹

If the councillors had waited for the finalization of the court proceedings and had obtained an order setting aside the expulsion, then they could have crossed without losing their seats. By jumping the gun they effectively waived their right to challenge the expulsion and rendered the argument about their expulsion moot.

The somewhat unfortunate wording of the order, referring to the continued 'suspension' of the councillors pending final outcome, was the subject of another argument. A suspended member of a party remains a member of it and is capable of resigning from that party (and if this is done in a window period, to carry the seat along). However, the court interpreted the word 'suspended' to be a synonym

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for 'expelled': it did so mainly because of the *quid pro quo* arrangement. The 'suspension' continued and NADECO, in turn, was not able to replace the 'suspended' councillors. Clearly, it is only an 'expelled' councillor who requires protection against replacement.

228 [2007] ZAKZHC 16 (4 December 2007).

229 Ibid at para 19.

The question arises as to whether expulsion is permissible during the window period if the transgression of the councillor was detected before the window period commenced. A remark in passing of Davis J in *Diko v Nobongoza*²³⁰ appears to deal with this issue. The High Court stated that immunity 'in respect of offences genuinely raised before the window period' may 'not be correct'. Even though the judgment deals with members of Parliament and members of provincial legislatures, it found that a party may expel a councillor during the window period, but only if the offence was 'genuinely raised' before the window period. For an offence to be 'genuinely raised' it requires clear evidence of the offence. This evidence must be dated before the commencement of the window period. It is not sufficient to use the benefit of hindsight and link a manifestation of disloyalty during the window period with acts or omissions that took place before the window period began.

Finally, is expulsion or termination of party membership completely ruled out during the window period? Does it apply to the termination of membership for reasons that have nothing to do with party allegiance? Schedule 6B suggests otherwise: the title of the schedule is 'Loss or Retention of Membership of Municipal Councils after a change of Party Membership'. It follows that the immunity is intended to prevent political parties from undermining a councillor's (relatively) free mandate during the window period. Its intention is *not* to prevent political parties from exercising 'normal' disciplinary oversight over councillors. A party may thus still expel or suspend its members for offences that are manifestly unrelated to party allegiance (e.g., corruption, sexual harassment).

(c) Political structures and procedures

(i) Constitutional development

The Final Constitution provides a broad framework for a municipal council's political structures and procedures. Much of what councils do is left to national legislation.

CPs X and XXIV form the background for this framework. CP XXIV demanded that the Constitution deals with a framework for local government powers and functions. CP X demanded that 'Formal legislative procedures shall be adhered to by legislative organs at all levels of government'.

When the Constitutional Court first measured the original text of the Final Constitution against these principles, it concluded that they were not met.²³¹ In *First Certification Judgment*,²³² the Court held that the Principles required the Final

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Constitution to indicate how local government executives are to be appointed, how local governments are to take decisions, and the formal legislative procedures that have to be followed. The amended text, which was subsequently submitted by the Constitutional Assembly, was approved by the Court in *Second Certification Judgment*.²³³

230 2006 (3) SA 126 (C), 137A-B.

231 Steytler & De Visser (supra) at 3-7.

232 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 301.

A variety of provisions in the Final Constitution — and an entire chapter, Chapter 7 — establish the necessary framework for local government. For example, FC s 160(6) provides that a municipal council may make by-laws which prescribe rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees. In interpreting the scope of FC s 160(6), the Constitutional Court compared FC s 160(6) with FC s 57. FC s 57 deals with Parliament's powers to determine its 'rules and orders'.²³⁴ The comparison produced a number of important limits on the scope of councils to determine 'rules and orders'. Firstly, the power of the council to regulate the internal proceedings of its committees does not relate to the power to regulate the establishment or the functioning of the executive of municipal councils.²³⁵ Secondly, it naturally excludes the structural components of the council: these components are fully regulated by the Final Constitution. Instead, it extends only to those working committees which the council may decide to establish, and also disestablish, from time to time.²³⁶ Thirdly, it does not relate to the power to regulate the office of the speaker.²³⁷ Fourthly, it does not regulate the legislative process. That process is detailed elsewhere in the Final Constitution.²³⁸ The *DA v ANC* Court therefore concluded with regard to FC s 160(6) that

its scope is relatively narrow and does not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive may take, or any other committee of the municipality which is a key part of its democratic structure. It relates only to task and working committees which may be established and disestablished from time to time.²³⁹

However, it is clear that national or provincial legislation, detailing the manner in which a municipal council must conduct its meetings or establish its working committees (in the way the pre-1994 local government ordinances did) is no longer permitted. There is, therefore, no support for Bekink's contention that municipal rules and orders 'may [not] be different from provisions regarding such aspects that have been determined in the legislation of the two higher spheres of government'.²⁴⁰

233 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 73-82.*

234 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) ('Executive Council Western Cape') at para 99.

235 *Ibid* at para 100.

236 *Ibid* at para 100.

237 *Ibid* at para 110.

238 *Ibid* at para 111.

239 *Ibid* at para 101.

240 Bernard Bekink *Principles of South African Local Government Law* (2006) 266.

Such legislation is required by the Final Constitution to respect a municipality's rights in terms of FC s 160(6).

An essential part of the framework set forth in the Final Constitution can be found in FC s 160(8). This section provides that members of the council are entitled to participate in its proceedings and those of its committees in a manner that allows fair representation of all parties and interests reflected in the council. In *Democratic Alliance v ANC & Others*²⁴¹ the Cape High Court sought to give meaning to the phrases 'fairly represented' and 'consistent with democracy'.²⁴² It accepted that, in the context of the composition and the functioning of council committees, the latter requirement can be equated with majority rule.²⁴³ However, the principle of fairness is more elusive. Our interest in fairness may not necessarily accord with the principle of proportionality that underpins local government electoral systems. The potential for a conflict between these two principles yields an interesting question: do minority parties have the right to a certain minimum level of participation on council committees?²⁴⁴ The High Court accepted that fairness does not entail an entitlement to a specific number of seats. It does not even demand a rational connection between a party's representation in the council and the number of seats it is afforded on a particular committee. The High Court did not proffer a definition of fairness. It limited itself to the proposition that the principle of fairness 'can be met by a system of representation other than proportional representation or a system approximating one of proportional representation'.²⁴⁵ An important consideration for the High Court was the notion that fairness generates a right to participate as opposed to a right to a particular composition.²⁴⁶ Textually at least, this approach does not dovetail neatly with the requirements of FC s 160(8).

In *Democratic Alliance v Masondo*,²⁴⁷ the Constitutional Court determined that the requirements of democracy and fairness in FC s 160(8) 'finds expression in the municipal council and those committees elected by it'.²⁴⁸ Other committees, not established and elected by the municipal council, but that may still exist within a

241 2003 (1) BCLR 25 (C) ('*DA v ANC*').

242 See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10, 10-40.

243 *DA v ANC* (supra) at 11. In this context, Roux warns that the term 'democracy' will be understood as a reference to majority-rule, rather than the deeper principle of democracy. He also argues that this case highlights the court's reluctance to super-impose its own conception of democracy and (therefore) the limited normative effect of unqualified references to 'democracy' in the Constitution. Roux (supra) at 10-40.

244 See FC s 157(3).

245 *DA v ANC* (supra) at 27.

246 *Ibid* at 25.

247 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) ('*DA v Masondo*').

248 *Ibid* at para 18.

municipality are not subject to this principle. Examples of such committees are the mayoral committee,²⁴⁹ a ward committee²⁵⁰ or an audit committee.²⁵¹ The primary focus

of those committees is *not* the deliberative process that characterizes the municipal council and its committees.²⁵²

(ii) Municipal Council

The Final Constitution does not separate legislative and executive roles at local government level: FC s 151(2) vests both the executive and legislative authority of a municipality in its municipal council. The Constitutional Court has described local government as 'a hybrid' system'.²⁵³ Consequently, the council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.²⁵⁴ In *Democratic Alliance v Masondo*, two different interpretations of the absence of a constitutional separation of powers at local government level were offered.²⁵⁵ O'Regan J, in her dissenting judgment, explained the difference between local government and the other spheres of government (as regards the separation of powers) in the light of the nature of the functions of local government:

They are not the high affairs of state — defence, foreign affairs, justice and security, but matters concerning delivery of services and facilities to local communities: power, water, waste management, parks and recreation and decisions concerning the development and planning of the municipal area. Thus executive decisions of municipal councils will ordinarily be decisions which have direct effect on the lives and opportunities of those living in the area.²⁵⁶

O'Regan J further elaborates on her view of the exclusive nature of the executive mayoral committee when she writes:

Those tasks involve primarily municipal planning as well as the provision of services such as power, water, waste removal, municipal clinics and fire-fighting services and the provision of amenities such as sports grounds, parks, libraries, markets and municipal transport. Without doubt, these are important services and facilities relied upon by all members of the community. They are not areas of executive authority which

249 Structures Act s 60.

250 Structures Act ss 72-78.

251 Municipal Finance Management Act 56 of 2000 s 166.

252 *DA v Masondo* (supra) at paras 19-33. See also Roux (supra) at 10-40 and Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 3-40.

253 *DA v Masondo* (supra) at para 21.

254 FC s 160 (1).

255 *Ibid.*

256 *Ibid* at para 60.

require the confidentiality and political cohesion of an exclusive executive team modelled on the cabinet for national government.²⁵⁷

Sachs J, in his concurring judgment, took a more pragmatic approach and observed that '[b]ecause the Constitution is silent on the question of the kind of executive leadership that councils may have, I regard it as one of the areas not dealt with in the Constitution and accordingly left for legislative determination.'²⁵⁸

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Justice Sachs' interpretation is to be preferred, particularly in light of the variety of local governments that exist in terms of the Final Constitution. Firstly, all but one of Justice O'Regan's examples of 'high affairs' are exclusive national government functions. That they are exclusive national powers undercuts the juxtaposition of local government and provincial governments. Furthermore, the emergence of metropolitan municipalities with more autonomy, the responsibility to oversee the lion's share of national economic activity and bigger budgets than some provinces, suggests a somewhat different landscape than the community services view espoused by Justice O'Regan.

The consolidation of both legislative and executive roles in the council does not mean that the council takes all decisions.²⁵⁹ Decision-making powers may be delegated to other structures and office-bearers within the municipality.²⁶⁰ However, the council makes decisions concerning the exercise of all powers and the delegation of powers does not divest the council of any of its responsibilities. The Final Constitution provides that certain functions may not be delegated by the council. They are —

- (a) the passing of by-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.²⁶¹

The absence of a constitutionally determined separation of powers at municipal level should be viewed in light of a municipality's specific developmental mandate. The Final Constitution charges a municipality with the duty to provide 'democratic development' in its area of jurisdiction.²⁶² The objects of local government, as provided in FC s 152, are useful in the interpretation of this mandate. The Final

257 Ibid at para 77.

258 Ibid at para 48.

259 We believe that Bekink is wrong on this point. See Bekink (supra) at 229 n 73.

260 See also *DA v Masondo* (supra) at para 21.

261 FC s 160(2).

262 As Cameron puts it, '[t]he role of local government has to shift from traditional local service delivery and administration to local socio-economic development'. Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 104.

Constitution not only formally instructs a municipality, in FC 152(1)(b),(c) and (d) to guarantee adequate service delivery, social and economic development and a safe and healthy environment — it provides some substantive guidelines as to how a municipality should go about fulfilling these responsibilities. FC s 152(1)(a) and (e) make it clear that a municipality should do so in a manner that not only enhances and nurtures democracy, but in a fashion that also promotes participation and inclusiveness. Consistent with these desiderata is the notion that the municipal council, where a variety of parties, interests and views prevalent in the municipality are present, is the organ that 'makes decisions concerning the exercise of all powers'. The Final Constitution's intention here is not to limit the imperative of open debate in a transparent setting only to legislative decisions. Instead, the

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Final Constitution sought to extend this imperative to all council decisions. The fact that a council may delegate powers to organs within the municipality does not undermine this duty to provide open, accountable and transparent government. The ultimate responsibility for decisions taken in terms of delegated authority remains with the council. In the same vein, the council has the ability to revisit any decision taken in terms of delegated authority²⁶³ or revisit the delegation of authority.

The Final Constitution provides that national legislation may provide criteria for determining the size of a municipal council.²⁶⁴ The Structures Act provides that the councils of local and district municipalities may not be bigger than 90 members.²⁶⁵ Metropolitan councils may not be bigger than 270 members.²⁶⁶ The Act²⁶⁷ instructs the Minister for local government to promulgate a formula, based on the number of voters in the municipal area, which produces the size of a particular municipal council.²⁶⁸ The MEC for local government eventually determines the size of the council when he or she establishes the municipality.²⁶⁹ Under certain circumstances, the MEC can deviate from the Minister's formula.²⁷⁰

A majority of the members of a council must be present at a meeting of the council before a vote may be taken on any matter.²⁷¹ The question arises as to

263 The principle of inclusivity has found further expression in s 59(3)(a) of the Municipal Systems Act 32 of 2000 which provides that a quarter of the municipal council can demand a review of a decision taken in terms of delegated authority.

264 FC s 160(5)(a).

265 Structures Act 20(1)(b).

266 Structures Act 20(1)(c).

267 Structures Act 20(1)(a).

268 See *Executive Council Western Cape* (supra) at paras 89-95 (Constitutional Court dismissed a claim that this section is unconstitutional because it encroaches on provincial powers by providing a 'mandatory formula' instead of criteria to be taken into account.)

269 Structures Acts 18(3).

270 See further Steytler & De Visser (supra) at 3-2.

271 FC s 160(3)(a); Structures Act s 30(1). See also Steytler & De Visser (supra) at 3-12.

whether the phrase 'a majority of the members of a Council' refers to a majority of council seats or to a majority of councillors. In other words, does the meaning of 'a majority of the members of a Council' change when the total number of councillors is (temporarily) reduced due to a vacancy? In *Oelofse v Sutherland*, the High Court interpreted the quorum requirement as set out in FC s 160(3)(a) as follows: '[A] municipal council must have at least one half plus one of the number of potential council seats, allocated to the particular council by the MEC for local government, to be filled by incumbents before the council can function.'²⁷² The quorum therefore does not change when the total number of councillors is reduced due to a vacancy.²⁷³

Council decisions are taken by a majority of the votes cast.²⁷⁴ That means that a majority of the councillors present in a (quorate) council meeting must vote in

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favour of a particular proposal before a decision can be taken. The Structures Act provides for a solution in the event of an equality of votes, namely that the presiding councillor casts an extra vote.²⁷⁵ Certain matters can only be determined by a majority vote of the councillors. With regard to those matters, a majority of all the councillors must vote in favour of a particular proposal before a decision can be taken. All those matters are listed in FC s 160(2):

- (a) passing of by-laws;
- (b) approving the budget;
- (c) imposing rates and other taxes, levies and duties; and
- (d) raising loans.²⁷⁶

In line with the interpretation of FC s 160(3)(a) offered above, FC s 160(2) must refer to a majority of seats and not councillors.

FC s 160(1)(b) provides that a municipal council must elect its chairperson. The implementation of this provision in the Structures Act has resulted in a separation of the chairperson of the council (speaker) from the mayor.²⁷⁷ In nearly all municipalities,²⁷⁸ the chairperson is called a speaker and is not the same person as the mayor. This is not the inevitable consequence of the Final Constitution's requirement that each municipal council elects a chairperson. The legislator can still

272 *Oelofse & Others v Sutherland & Others* 2001 (4) SA 748 (T), 751.

273 See Steytler & De Visser (supra) at 3-12. See also Bekink (supra) at 264.

274 FC s 160(3)(b).

275 Structures Act s 30(4).

276 FC s 160(3)(b).

277 Structures Act s 36.

278 Municipalities of the plenary type are not included. See § 22.2 (a)(iv) supra. See also Structures Act ss 9(c) and 36(5).

opt to collapse the chairperson and the mayor into one office — as often occurred prior to the Structures Act. The fact that, in some limited instances (the so-called 'plenary-type' municipalities) the two offices are occupied by one office-bearer bears out this thesis.

The Final Constitution provides two important principles that support open and transparent debate at council meetings. Firstly, it provides for the privileges and immunity of councillors. Secondly, it provides that council meetings must be open to the public.

FC s 161 provides that national legislation can determine a framework for provincial legislation on the privileges and immunity of municipal councils and their members.²⁷⁹ Section 28 of the Structures Act provides this national framework. It states that this provincial legislation must provide at least:

- (a) that councillors have freedom of speech in a municipal council and in its committees, subject to the rules and orders;²⁸⁰ and

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- (b) that councillors are not civilly or criminally liable for anything that they have said in, produced before or submitted to the council or any of its committees or for anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.²⁸¹

In provinces where this provincial legislation has not (yet) been enacted, section 28(1) applies as the basis for privileges and immunities of councils and councillors.²⁸²

Can a councillor be held personally liable for a vote he or she cast in a council meeting or for statements made during a council meeting? *Swartbooï v Brink* dealt with an appeal against a High Court ruling, setting aside an unlawful council resolution and holding all councillors who voted in favour of the resolution personally liable for damage caused by the resolution.²⁸³ On appeal, the councillors invoked FC s 161 (and Structures Act s 28). The Constitutional Court had to consider a number of arguments. The first contention was that these provisions protect legislative functions (i.e., deliberations on a proposed by-law) only and do not extend to executive and administrative functions. The Court disagreed and held that the protection offered by said provisions is not dependent on whether the councillor

279 See Steytler & De Visser (supra) at 3-15.

280 Structures Act s 28(1)(a). Cf Bekink (supra) at 270. Bekink appears to suggest that the freedom of speech does not exist if not provided for in a municipality's rules of order when he advises councils to make provision for privileges and immunities in view of the phrase 'subject to the rules and orders'. This view cannot be supported: (the absence of) a by-law cannot trump a constitutional right or some other constitutional protection. The phrase 'subject to the rules and orders' refers to the limits on freedom of speech imposed by such rules and not to the granting of freedom of speech.

281 Structures Act s 28(1)(b).

282 Structures Act s 28(2).

283 *Swartbooï & Others v Brink & Another (2)* 2006 (1) SA 203 (CC), 2003 (5) BCLR 502 (CC).

participated in legislative, executive or administrative activities.²⁸⁴ It was also argued that section 28 of the Structures Act exceeds the parameters set by the Final Constitution because it includes conduct in committees, while FC s 161 makes no mention of committees. As the conduct in question took place in full council, the Court did not need to address this issue. However, it hinted that the function or the purpose of the committee may be relevant to the question as to whether a participating councillor is exempted from liability for anything said or done in that committee.²⁸⁵ The third argument was that immunity could not apply to conduct in support of acts later set aside. This argument, too, was dismissed by the Court: protection of lawful acts only would be too limited to fulfil the provision's purpose of encouraging open debate.²⁸⁶ Importantly, the Court ruled that the statements made by the mayor outside the council meeting fell outside of the immunity protection offered by the Final Constitution and the Structures Act. Conduct is protected if it is related to the council: statements or submissions must be made to the council or things must be produced before the council.²⁸⁷

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The municipal council must conduct its business in an open manner, and may close its sittings only when it is reasonable to do²⁸⁸. The same principle applies to its committees.²⁸⁹ Not all committees provided for in the Structures Act are subject to this principle. Whether or not a committee is a committee 'of the council' is the deciding criterion. In *Democratic Alliance v Masondo*, Langa DCJ, writing for the Court, investigated the various provisions in the Constitution that refer to committees of the council.²⁹⁰ He concluded that 'the committees referred to in sections 160(6)(c) and 160(8) (the committees of a municipal council) are the same committees that are referred to in sections 160(1)(c) and 160(5)(b), namely, committees which are elected by the municipal council.'²⁹¹ For example, the mayoral committee, established for the purpose of assisting the executive mayor, and made up of councillors selected by the executive mayor, is not a committee 'of the council'. It is therefore not bound by FC s 160(7).²⁹² The executive committee, however, is constituted by councillors elected by the council, and is bound by FC s 160(7).

284 Ibid at paras 13-16.

285 Ibid at para 17.

286 Ibid at paras 19-20.

287 See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) (Constitutional Court held that a councillor's immunity does not extend to his or her appearance in the provincial legislature, pursuant to FC 115.)

288 FC s 160(7).

289 FC s 160(7).

290 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) ('*DA v Masondo*').

291 Ibid at para 20.

292 See, for example, Bernard Bekink *Principles of South African Government Law* (2006) 268.

(iii) Executive

As discussed earlier, the Final Constitution does not deal elaborately with executive leadership at local government level. As Sachs J noted in *Democratic Alliance v ANC*,²⁹³ the exact contours of executive leadership was left for legislative determination. Only three provisions make direct reference to executive leadership. FC s 160(1)(c) provides that a municipal council may elect an executive committee (and other committees) subject to national legislation. FC ss 160(5)(b) and (c) state that national legislation may provide criteria for determining (a) whether municipal councils may elect an executive committee, and (b) what the size of the executive committee may be. The national legislation, envisaged by all three provisions, is the Structures Act. This Act entitles only a municipality of the 'collective executive type' to elect an executive committee. In *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development*, it was argued that FC s 160(5)(b) limits section FC s 160(1)(c).²⁹⁴ That is, the applicant contended that national legislation on executive committees may only deal with the size of executive committees and may not preclude municipalities from electing an executive committee. The Constitutional Court dismissed this argument by pointing out that FC s 160(1)(c) clearly conveys the message that 'the right of municipalities to elect committees will *not* prevail where there is national legislation to the contrary'.²⁹⁵

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(iv) Traditional leaders

Since the adoption of the Interim Constitution, there has been considerable contestation in local government about the role of traditional leadership.²⁹⁶ The undisputable trend, however, is that the transformation of local government has resulted in a progressive curtailment of traditional authority in local government matters.²⁹⁷

Prior to the Local Government Transition Act (LGTA),²⁹⁸ traditional authorities often performed local government functions in the former 'homelands'.²⁹⁹ When Interim

293 *DA v Masondo* (supra) at para 48.

294 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 86-88.

295 *Ibid* at para 87 (emphasis added).

296 See Bekink (supra) at 195-211.

297 After the writing of this chapter, the Constitutional Court considered the role of traditional leaders in *Shilubona & Others v Nwamitwa* [2008] ZACC 9 (4 June 2008).

298 Act 209 of 1993.

299 See Tom Bennet & Christina Murray 'Traditional Leadership' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26, 26-39.

Constitution s 179(1) stipulated that 'a local government shall be elected democratically', the writing appeared on the wall for the role of traditional authorities in local government. However, two aspects of the transitional system for local government offered practical solutions that served to maintain much of the status quo. Firstly, the LGTA provided for the possibility that traditional authorities could be recognized as local government bodies.³⁰⁰ Secondly, Interim Constitution s 182 afforded traditional leaders the right to be *ex officio* members of the municipal council in their area (with full voting rights).³⁰¹

The Final Constitution limited the official role of traditional authorities by providing that municipal councils be elected and by requiring the establishment of democratic local government for all parts of South Africa.³⁰² However, the delay associated with many of the Final Constitution's provisions on local government postponed, temporarily, the traditional authorities' fate. The provision in FC Chapter 12 that national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities did little to clarify the status of traditional authorities.³⁰³

The demarcation of 'wall-to-wall' municipalities in 2000, pursuant to the instruction in the Constitution, did away with the recognition of traditional authorities as local government bodies. The simultaneous coming into operation of the Structures Act closed the chapter on the voting rights of traditional leaders by reducing the role of traditional authorities in municipal councils to an advisory capacity.

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Traditional leaders, identified by the MEC for local government,³⁰⁴ may participate in the proceedings of the municipal council in the municipal area where they 'traditionally observe a system of customary law'.³⁰⁵ That said, they possess no right to vote. In addition, before a municipal council takes a decision affecting the area of a traditional authority, it must give the relevant traditional leader an opportunity to express a view on the matter.³⁰⁶ This right exists independently of the rights of selected traditional leaders to participate in the council.

22.3 Municipal powers and functions

300 LGTA s 1(2).

301 See Bennet & Murray (*supra*) at 26-35 fn 4.

302 *Ibid* at 26-36.

303 FC s 212(1).

304 See Bennet & Murray (*supra*) at 26-37 (The authors seem to suggest that the local House of Traditional Leaders has the power to identify the traditional leader eligible for participation. We would argue that the Act places that authority with the MEC for local government with an advisory role for the local House.)

305 Structures Act s 81(1).

306 Structures Act s 81(3).

(a) Introduction

The Final Constitution repositions local government in the intergovernmental arena. It does so by not only introducing local government as one of the three 'spheres' of government but also by investing local government with constitutionally protected powers.

Before the constitutional scheme for these powers is examined, it is necessary to consider the judgment of the Constitutional Court in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*.³⁰⁷ Even though the matter was decided in terms of the Interim Constitution³⁰⁸, the judgment is important because of the statement made by the Constitutional Court about the status of local government in the post-1994 constitutional framework.

The parties in the conflict were the insurance company Fedsure and the four metropolitan substructures and the metropolitan council of Johannesburg. Fedsure agitated against revenue raising measures imposed by one of Johannesburg's substructures. It argued, amongst other things, that the municipality's decisions were *ultra vires*.³⁰⁹ Alternatively, Fedsure argued, the budgets of two of the four substructures of the metropolitan area had been approved in an irregular manner. On appeal, the Constitutional Court had to determine whether or not the above resolutions constituted 'administrative action' and were therefore subject to IC s 24 — the right to just administrative action. The relevant municipal councils contended that the resolutions constituted *legislative* rather than *administrative* action, and accordingly were not subject to IC s 24.

The Court agreed with the councils and held that the power of a municipal council to set taxes or rates or make an appropriation out of public funds 'is a

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power peculiar to elected legislative bodies'.³¹⁰ This finding prompted the Court to examine the status of municipal legislation. Prior to 1994, the principle of parliamentary sovereignty rendered legislation duly enacted by Parliament immune from any form of judicial review. 'Subordinate legislation', however, was subject to judicial review. In terms of such review, a court would establish whether the subordinate legislature had exceeded its powers or whether it had exercised them 'in a manner inconsistent with the limitations ordinarily attaching to the delegation of legislative power'.³¹¹ Municipal legislative powers were delegated powers, and by-laws were subject to judicial review on the basis of reasonableness and the rules of natural justice. Moreover, they were treated as if they were executive acts.³¹²

307 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('Fedsure').

308 At the time when the proceedings were instituted, the Interim Constitution was in force.

309 Jonathan Klaaren 'Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council; Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*' (1999) 15 SAJHR 200, 211.

310 *Fedsure* (supra) at paras 44-46.

311 *Ibid* at para 29.

The Interim Constitution did away with the supremacy of Parliament. Parliament's legislation and every exercise of public power is now subject to constitutional control. The Interim Constitution further recognized and made provision for three levels of government. Thus, as the *Fedsure* Court stated, the constitutional status of a municipality is materially different from what it was when Parliament was supreme. The *Fedsure* Court made it clear that 'local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself'.³¹³ Thus, the Court concluded that the enactment of legislation by an elected local council acting in accordance with the Constitution is a legislative and not an administrative act, and is therefore not subject to challenge by 'every person' affected by it on the grounds of administrative justice.³¹⁴

In sum, the Court made two things clear.³¹⁵ Firstly, the institution of local government as a sphere of government and the powers of municipalities are now recognized and protected by the Final Constitution. Secondly, the exercise of municipal legislative power is no longer a delegated function subject to administrative review, but a political process that represents the will of the municipal residents.

(b) FC section 151(3)

(i) 'Right to govern'

A municipality has the right to govern. Two observations can be made with regard to this phrase. Firstly, the Final Constitution does not employ a 'rights

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terminology' with reference to national or provincial government authority but uses the word 'right' in FC s 151(3) and (4). The Final Constitution thus emphasizes the existence of a municipal entitlement to govern that can be legitimately claimed and defended in terms of the Final Constitution. Secondly, the use of the verb 'govern', which again does not appear elsewhere in the Constitution, connotes a regulatory and policy making role. The two most appropriate dictionary meanings given to the word 'govern' are 'to conduct the policy and affairs' and to 'constitute a rule, standard, or principle'.³¹⁶ Both suggest that a municipality's right to govern is more than the right to implement or to administer laws.

The Final Constitution gives further content to a municipality's right to govern by presenting three instruments that a municipality may employ. Firstly, FC s 156(1) provides that a municipality has 'executive authority', which, in the case of a

312 'The rules of administrative justice are of cardinal importance in matters affecting local government. These are the rules which determine the validity of *both the legislative* and the executive acts of local bodies'. Gretchen Carpenter *Introduction to South African Constitutional Law* (1998) 433 (emphasis added).

313 *Fedsure* (supra) at para 26.

314 See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) at 5-10ff.

315 *Ibid* at 5-11.

316 *South African Concise Oxford Dictionary* (2002).

municipality can be defined as the authority to implement national, provincial and municipal laws. Secondly, the same provision affords municipalities 'the right to administer', which connotes the daily running and management through planning and decision-making of a particular public service or matter. Finally, FC s 156(2) complements the executive authority and the administrative authority with the authority to 'make and administer by-laws'. In somewhat circular reasoning, the Final Constitution affords the municipality the authority to administer by-laws for the effective administration of the matter which it may administer. The emphasis on administration in FC s 156(2) is sometimes interpreted as an indication that the legislative role of municipalities is subservient to its administrative role.³¹⁷ However, in *Fedsure*, the Constitutional Court made it clear that municipal councils are deliberative legislative assemblies with legislative powers that are guaranteed in the Final Constitution. The linking of municipal legislative powers to the administration of various matters does not limit local government's legislative power.³¹⁸ The phrase 'matters which the municipality may administer' is aimed at delineating the functional scope of municipal legislative authority rather than inserting an inherent qualification into a municipality's power to legislate within that functional scope. In addition, an inferior legislative role for municipalities cannot be reconciled with FC s 43. This provision vests the Republic's legislative authority in Parliament, provincial legislatures and municipal councils. In doing so, it does not treat a municipal council differently from its provincial or national counterparts.

The Final Constitution contains a number of provisions that relate to the 'manner and form' of municipal law making. As explained earlier, the first text

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that was submitted for certification to the Constitutional Court did not comply with CP X.³¹⁹ CP X demanded that '[f]ormal legislative procedures shall be adhered to by legislative organs at all levels of government'. In the *Second Certification Judgment*, the Court was satisfied that the amended text met the demands of CP X.³²⁰ The Final Constitution demands due process during the law making process by, firstly, providing that, before the adoption of a by-law, members of the Council must be given reasonable notice.³²¹ A municipality's internal rules should give precise content to the term 'reasonable notice'. Bekink contends that national legislation should prescribe a minimum notice period.³²² However, we suggest that this falls within municipal autonomy. Municipalities have the discretion to determine a notice period,

317 See Christina Murray 'The Constitutional Context of Intergovernmental Relations in South Africa' in Norman Levy & Chris Tapscott (ed) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 66, 71. See also Bernard Bekink *Principles of South African Local Government Law* (2006) 216 and 229 (Bekink even goes so far as argue that 'the authority to exercise legislative authority follows from the authority to exercise executive authority'.)

318 See further Jaap de Visser *Developmental Local Government — A Case Study of South Africa* (2005) 114.

319 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 301.

320 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 73-82.

321 FC s 160(4).

provided that the period satisfies the reasonableness requirement of FC s 160 (4) in the Final Constitution. This requirement governs both the time period for councillors to familiarize themselves with the draft before the relevant council meeting and the manner in which councillors are given access to the draft by-law. In addition, the Final Constitution places a high premium on transparency and consultation before and after the adoption of a by-law. A proposed by-law must be published for public comment³²³ and, once it is in force, it must be accessible to the public.³²⁴ A by-law may be enforced only after it has been published in the official gazette of the relevant province.³²⁵ The provincial authorities that manage a provincial gazette must publish a municipal by-law upon request by the municipality.³²⁶

(ii) 'On its own initiative'

When the Final Constitution provides, in FC s 151(3), that a municipality may govern 'on its own initiative', it marks the end of the era when municipalities were the implementers of national and provincial legislation and had no policy making authority of their own. Under the Final Constitution, municipalities do not have to await legislative or executive instruction before using their legislative, executive and administrative authority.

When Bekink contends that 'the detailed powers and functions of local governments have to be determined by laws of a competent authority', he assumes

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that such detail in statutory law is required before a municipality may exercise any of its original powers. This assumption is not correct: it constricts a municipality in its right to exercise powers 'on its own initiative'. This view is supported by the jurisprudence of the Constitutional Court on the meaning of 'original powers'. In *Robertson*, for example, the Constitutional Court made it clear that the original power to levy rates is not dependent on enabling national legislation.³²⁷

Original powers are not boundless. A municipality must exercise its legislative, executive and administrative authority within the parameters set by national and/or provincial law. An important consequence of the constitutional encouragement to municipalities to govern on their own initiative is that, should there be no national or provincial law on an original local government matter, there is no limit on the municipality's scope to determine the content of its legislative, executive or administrative decisions. The only limits are those limits imposed by the Final Constitution itself. That said, limits on municipal powers may still be imposed after

322 Bekink (supra) at 231. The author seems to contradict himself when he suggests that municipal rules and orders should address issues such as 'reasonable notice'. Ibid at 232.

323 FC s 160(4).

324 FC s 162(3).

325 FC s 162(1).

326 FC s 162(2).

327 *City of Cape Town v Robertson* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) ('*Robertson*') at para 60. See § 22.5(c)(i) infra.

the exercise of original municipal powers by national legislation and/or provincial legislation.

(iii) 'Local government affairs of its community'

A municipality's right to govern, using its own initiative and employing the governance instruments available to it, extends to the 'local government affairs of its community'. It could be argued that this phrase in FC s 151(3) suggests that municipalities possess plenary powers over local government affairs. On such a reading, a municipality would then have authority over any matter that concerns the local affairs of its community. The granting of autonomous plenary powers to local government in the Final Constitution is not out of step with international practice. The Constitution of the Netherlands, for example, grants municipalities the authority 'to regulate and administer their domestic affairs'.³²⁸ This phrase refers to local matters that have not attracted any provincial or national regulation.³²⁹ However, we would contend that FC s 151(3) does not contain a separate description of the functional scope of municipal powers. Such a residual or plenary power interpretation would not accord with the structure of the Final Constitution. The Final Constitution allocates plenary, residual powers to the national government alone. It limits provincial and municipal authority to matters listed in schedules 4 and 5. The phrase 'local government affairs of its community' must, therefore, be read to refer to the functional scope of municipal authority as defined in the relevant sections of the Final Constitution.

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FC s 156(1) defines the functional scope of municipal authority by linking the governance instruments (i.e., legislative, executive and administrative authority) to the local government matters listed in schedule 4B and 5B of the Final Constitution and any other matter assigned to a municipality by national or provincial legislation. These provisions make clear the distinction and the difference between original powers and assigned powers. The Constitutional Court has stated that: '[A municipality's] power may derive from the Constitution or from legislation of a competent authority or from its own laws'.³³⁰ The Final Constitution allocates a further set of original powers in the form of fiscal authority. A municipality's right to impose rates on property and surcharges on fees for services rendered is constitutionally guaranteed.³³¹ This provides local government with a firm base for generating revenue from property rates and charges on user fees (especially electricity). National legislation can authorize local government to impose other taxes, levies and duties.³³² The obvious significance of the notion of original powers lies in the fact that these powers of local government cannot be removed or amended by national or provincial legislation. They cannot be changed other than by an amendment to the Final Constitution itself. Moseneke J recognizes the import of these original constitutional powers for local government's institutional integrity when he writes:

328 Constitution of the Kingdom of the Netherlands art 124(1) translated in Leonard Besselink *Kingdom of the Netherlands Charter and Constitution* (2004).

329 E Brederveld *Gemeenterecht* (7th Edition, 2005) 9.

330 *Robertson* (supra) at para 60.

331 FC s 229(1). See also *Robertson* (supra) at para 61.

332 FC s 229(1)(b).

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 that the Constitution permits.³³³

Whereas the Final Constitution protects these original local government powers, it does not define them. There is considerable overlap between the functional areas, mentioned in schedules 4B and 5B and the functional areas mentioned in schedules 4A and 5A. Often, the Final Constitution distinguishes a local government competency from a national and/or provincial competency by the mere addition of the word 'municipal' — schedule 4A's 'health services' and schedule 4B's 'municipal health services' being a case in point. Another phenomenon is the appearance of national and/or provincial competencies that are inclusive of a local government competency. For example, schedule 4A's 'pollution control' is inclusive of schedule 4B's 'air pollution'. The Final Constitution itself does not offer clear solutions for the uncertainty created by these overlapping powers.³³⁴

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FC s 156(5) affords local government 'incidental' powers: 'A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions'.³³⁵ This section should not be interpreted in a narrow or literal sense.³³⁶ Instead, local government's developmental mandate should be broadly construed.³³⁷

The incidental power doctrine was applied in *Ex parte Western Cape Provincial Government and Others: In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another*³³⁸— albeit in respect of provincial powers. In *DVB Behuising*, the Constitutional Court concluded that certain tenure and deeds registration provisions in a provincial proclamation, although strictly falling within a national competence, were within the competence of the provincial government. It arrived at this conclusion on the basis of the fact that these provisions were 'inextricably linked to the other provisions of the Proclamation and were foundational to' the planning, regulation and control of settlements, which the Court had already held to be of provincial competence.

333 *Robertson* (supra) at para 60.

334 Cf *Bekink* (supra) at 216 (*Bekink* suggests that the Constitution provides 'an exact indication of such powers and functions'. He appears to underestimate the difficulties surrounding the interpretation of the Schedules.) For a discussion of the type of solutions for overlap between competencies, see Nico Steytler & Yonatan Fessha 'Defining Provincial and Local Government Powers and Functions' (2007) 124 *SALJ* 320.

335 See also Municipal Systems Act 32 of 2000 s 8(2).

336 Victoria Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15, 15-20.

337 See Steytler & De Visser (supra) at 5-6ff.

338 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) ('*DVB Behuising*').

The incidental powers may include legislative powers.³³⁹ The only requirement would be that the by-law is promulgated in terms of FC s 156(5) and is therefore 'reasonably necessary for, or incidental to the effective performance of its functions'. Some incidental matters, when subject to a literal interpretation, fall outside local government's core competencies. They remain, however, critical to the success of the administration of a particular matter. For example, while the Final Constitution does not explicitly grant local government criminal jurisdiction, the ability to impose penalties for transgressing a by-law may be enforced by the courts. Few would argue that this power is not 'incidental to the effective performance' of a local government function.³⁴¹ FC s 156(5) is not intended to increase the number of functional areas upon which local government can legislate.³⁴² It serves rather as an instruction to the courts to adopt a purposive approach to interpreting local government powers.

The interpretation of FC s 156(5) should be informed by two principles. Firstly, the purposive interpretation should clearly be linked to local government's developmental mandate. When plumbing the depths and limits of a municipal power, the constitutional promise of a local government that is equipped to initiate and to facilitate development should always be on the horizon. Secondly, FC s 156(5) should not be used to increase the functional ambit of local government's powers but rather to enhance the efficacy of administering an existing functional area.

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The authority of a municipality to establish and to direct municipal administration is an area that may be regarded as incidental to the performance of its functions. It is nevertheless afforded specific attention in the Final Constitution. The Final Constitution stipulates that a municipal council makes decisions concerning the exercise of all the powers and functions of the municipality.³⁴³ In the same vein, it provides that the municipal council may employ the personnel it needs for the effective performance of its functions.³⁴⁴ The municipality's autonomous authority over personnel affairs sets it apart from provincial government. Both national and provincial administrations are part of a single public service 'which must function, and be structured, in terms of national legislation'.³⁴⁵ This requirement embraces the terms and conditions of employment in the public service. Even though provincial governments are responsible for the recruitment, appointment, promotion, transfer

339 See Steytler & De Visser (supra) at 5-7 ff.

340 Ibid at para 96. See also Bronstein (supra) at 15-14.

341 See, for example, Bekink (supra) at 235 fn 105.

342 See, generally, Jaap de Visser *Developmental Local Government — A Case Study of South Africa* (2005).

343 FC s 160(1)(a).

344 FC 160(1)(d).

345 FC s 197(1).

and dismissal of members of the public service in their administrations, such actions must occur within a uniform national framework.³⁴⁶ This unique aspect of municipal autonomy is unlikely to be long-lived. At the time of writing, legislative amendments designed to realize a single public service, including local government, are on the cards.

(iv) 'Subject to national and provincial legislation'³⁴⁷

FC s 151(3) also makes it clear that municipal authority is not boundless; the right to govern is subject to national and provincial legislation. With respect to assigned powers, it follows from the nature of the power that the legislative or executive act of assignment may place parameters on the exercise of municipal authority. These parameters determine the scope of the assigned authority. With respect to local government's original powers, it is important to note that these powers are not only constrained by the Final Constitution itself (e.g. by the Bill of Rights) but may also be constrained by national government and the provincial governments. As noted above, local government has authority over schedule 4B and 5B matters. However, the Final Constitution does not allocate the matters in schedule 4B and 5B exclusively to local government. National government and provincial government may still regulate those matters.³⁴⁸ The local government matters listed in schedule 4B are part of the concurrent provincial and national legislative competence 'to the extent set out in section 155(6)(a) and (7)'.³⁴⁹ Similarly, the local government matters listed in schedule 5B are part of the exclusive provincial competence 'to the extent set out for provinces in section 155(6)(a) and (7)'.³⁵⁰

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Furthermore, national government and provincial governments have the authority to ensure that municipalities adequately perform in respect of these matters.³⁵¹ FC s 156(3) provides that, subject to FC s 151(4), a by-law that conflicts with national or provincial legislation is invalid.³⁵² Thus 'interference' by national government and provincial government in terms of schedule 4B and 5B matters is not only constitutionally permitted — it is required by their oversight responsibilities. In the words of the Constitutional Court:

The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to

346 FC s 197(4).

347 See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 5-1.4 and 3.3.

348 See *ibid* at 5-16ff.

349 FC schedule 4.

350 FC schedule 5.

351 *White Paper on Local Government* (1998) 30.

352 FC s 156(3).

'compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.³⁵³

(v) 'As provided for in the Constitution'

When FC s 151(3) subjects local government authority to national legislation and provincial legislation, it immediately continues by emphasising that these limits on local government authority must be 'provided for in the Constitution'. A similar approach is followed in FC s 156(3). FC s 156(3) establishes precedence of national legislation and provincial legislation over municipal legislation, provided that this legislation, in turn, does not contradict FC s 151(4). It is argued that the phrase 'as provided for in the Constitution' in FC s 151(3) refers to the constitutional basis and reach of national and provincial authority over local government.³⁵⁴ The Final Constitution provides a general principle for determining the reach (and overreach) of national authority and provincial authority by providing that the national government and provincial governments 'may not compromise or impede a municipality's ability or right to exercise its power or perform its functions.'

This principle applies to both assigned and original powers. The reach of national or provincial authority over assigned powers may be contained in the legislative or executive act of assignment. However, the authority of the national or provincial government to set parameters on an assigned power is not unfettered. For example, the assignment of a power without ensuring the necessary resources would fall foul of FC s 151(4). Similarly, the assignment of a power that is made subject to unduly restrictive or burdensome criteria, conditions or monitoring requirements would constitute a breach of FC s 151(4).

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The reach of national or provincial authority over original powers requires careful examination and is considered in detail below.³⁵⁵ This discussion of the validity of provincial and national legislation concerning original local government power differs from the debate on the concurrency of powers between provincial and national spheres on schedule 4A matters.³⁵⁶ The concurrency of powers between provincial and national spheres means that both spheres share the same legislative competency. The override provisions found in FC ss 146, 148-150 determine which law prevails in a case of conflict. National and provincial authority over schedules 4B and 5B is not held concurrently with local government. National government and provincial governments are afforded certain legislative powers over local government. But these powers are themselves constrained,³⁵⁷ as will be explained below. These powers and the concomittant constraints explain why Gideon Pimstone remarks that local government powers 'cannot in truth be termed concurrent with other spheres'.³⁵⁸

353 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 29.

354 This combination is not, as Bekink argues, a *contradictio in terminis*. There is no contradiction in the constitutional imposition of limits on how far national and/or provincial governments may go in circumscribing local government powers. Bekink (supra) at 220.

355 See § 22.3.6 (vi) infra.

356 See Steytler & De Visser (supra) at 5-17.

At times, national and provincial law-makers interpret their supervisory powers to mean that their legislation always prevails over municipal law. They err in this regard. For example, s 29(1) of the National Building Regulations and Building Standards Act³⁵⁹ provides that 'the provisions of any law applicable to any local authority are hereby repealed in so far as they confer a power to make building regulations or by-laws regarding any matter provided for in this Act'. The provision aimed at 'sweeping up' any authority over building regulations that had been conferred on local government by any law in order to relocate that authority within national government. It is very hard to reconcile this intention with the Final Constitution's express grant of original legislative and executive authority to local government over 'Building Regulations' in schedule 4B. The Final Constitution does not give blanket regulatory power concerning schedule 4B and 5B matters to national and provincial government. National legislation or provincial legislation on local government matters must be enacted within, and are limited by, their respective FC Chapter 7 competencies.³⁶⁰

(vi) National and provincial powers over original local government matters

FC s 151(3) both sanctions and limits the national and provincial constraints on original local government matters. What follows is an analysis of the provisions in

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the Final Constitution that inform these constraints. In our analysis, the location of a matter in either schedule 4B or schedule 5B of the Final Constitution has important consequences for the extent to which national or provincial governments can regulate that particular matter.

National government derives law-making powers over local government matters from two sources, namely FC ss 155(7)³⁶¹ and 44(1)(a)(ii). FC s 155(7) affords national government the power to 'regulate' the exercise by municipalities of their executive authority. This power is circumscribed by the qualification that it may be used to 'see to the effective performance by municipalities of their functions in terms of schedule 4 and 5' and by the use of the term 'regulating'. The legislative authority to regulate schedule 4B and 5B matters refers to the power of Parliament and provincial legislatures to enact legislation. The executive authority to regulate schedule 4B and 5B matters refers to the power of national and provincial executives to enact subordinate legislation. The executive authority to regulate schedule 4B and 5B matters should not be read so as to enable national executives and

357 See *Basson & Others v City of Johannesburg Metropolitan Municipality & Others and Eskom Pension and Provident Fund v City Of Johannesburg Metropolitan Municipality & Others* 2005 JDR 1273 (T) at paras 40–42. The Development Facilitation Act 67 of 1995 was challenged as a violation of local government's power over 'municipal planning' (a schedule 4B competency). The Court rejected the argument with, amongst others, an interpretation that incorrectly assumes that local government powers are held concurrently with other spheres of government.

358 Pimstone (*supra*) at 5A-28.

359 103 of 1977.

360 See further Steytler & De Visser (*supra*) at 5-17.

361 See the heading of FC sch 4B.

provincial executives to enact subordinate legislation without any empowering provisions in a national law or provincial law. The term 'regulating' in the context of FC s 155(7) has been held by the Constitutional Court to connote 'a broad managing or controlling rather than direct authorization function'.³⁶² The fact that it may be used only to see to the effective performance of functions reinforces this qualification. Thus, in terms of FC s 155(7), the powers of national government and provincial government are not meant to extend to the detail of schedule 4B matters, but rather envisage a framework within which local government is to exercise these powers. In other words, the regulatory power enables national government and provincial government to set essential national standards, minimum requirements, monitoring procedures, etc.³⁶³

National government may also legislate on schedule 4B matters on the basis of FC s 44(1)(a)(ii). The fact that there is no limitation in this provision could be construed as meaning that the national government possesses a broad legislative power that encompasses every aspect of the schedule's matters. However, the introduction to schedule 4B stipulates that the schedule contains local government matters that are of concurrent national and provincial legislative competence 'to the extent set out in section 155(6)(a) and (7)'. This raises two questions: does this qualification also apply to Parliament's legislative power in terms of s FC s 44(1)? Does FC s 155(7) qualify FC s 44(1) or is FC s 44(1) limited only by the general principles of FC ss 151(4) and 41(g)?

One might, on the text also, be inclined to argue that FC s 155(7) does not qualify FC s 44(1). Schedule 4B limits the competence of national government to FC s 155(7). However, FC s 155(7) in turn makes its application 'subject to section 44'. FC s 44 forms the bedrock of national law-making and it mentions the power of Parliament to legislate on schedule 4B immediately after the power to

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amend the Final Constitution itself. The argument that FC s 155(7) qualifies FC s 44(1) would not be consistent with the critical position FC s 44 occupies in the Final Constitution.

However, in *Premier of the Province of the Western Cape v President of the RSA & Others*,³⁶⁴ the Constitutional Court made a remark that implies that Parliament's powers over schedule 4B are limited. The Court stated that '[l]ocal governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences (. . .) for *overseeing* its functioning'.³⁶⁵ The use of the term *overseeing* is important — as is the reference to FC s 155(7) in the footnote. It would appear that the Court views national government's role in schedule 4B matters as regulatory rather than determinative and that the source for this limitation is FC s 155(7). In *Langeberg*, the Constitutional Court confirmed this view:

362 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 377.

363 Steytler & De Visser (supra) at 5-21.

364 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

365 *Ibid* at para 51 (emphasis added).

[N]ational legislative authority includes the power to make laws for the country concerning all matters *except the functional areas described in Part 2 (sic) of Schedule 4 and Part 2 (sic) of Schedule 5*. In these areas, Parliament has *limited* legislative authority.³⁶⁶

These hints as to Constitutional Court's position can be supplemented by an argument based on the mandate of developmental local government. This mandate guides the interpretation of local government powers in a manner that recognizes the need for sufficient municipal discretion in regulating these matters while simultaneously maintaining the need for national oversight and regulation. Therefore, the answer to the question of whether or not FC s 155(7) qualifies FC s 44(1)(a)(ii) must be that *it does*. In sum, national government's legislative power concerning schedule 4B matters does not extend to the detail of schedule 4B matters. Rather, it is limited to the setting of a legal framework, including minimum standards and monitoring requirements.³⁶⁷

Not all national legislation on schedule 4B matters meets this standard. Provisions that offend the allocation of powers and functions set forth in the Final Constitution can, for example, be found in statutes that predate the Final Constitution. Section 29(8)(a) of the National Building Regulations Act is a case in point.³⁶⁸ It provides that '[a] local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister for approval.' Section 29(8)(b) of the Act makes the consequences of non-approval clear by providing that '[a] regulation or by-law referred to in paragraph (a) which is promulgated without the Minister previously having approved of it shall, notwithstanding the fact that the promulgation is effected in accordance with all other legislative provisions relating to the making and promulgation of the regulation or by-law, be void'.

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In a recent decision, the Supreme Court of Appeal was asked to assess the requirement in the Cape Ordinance 20 of 1974 that a municipality obtain the Premier's approval for the imposition of property rates.³⁶⁹ The imposition of property rates is another original competency of local government: it is conferred on municipalities in FC s 229 but subject to national regulation. The *CDA Boerdery* Court concluded that the requirement of prior approval did not survive the radical change to local governments powers brought about by the Final Constitution. The *CDA Boerdery* Court held that said provisions were 'impliedly repealed'. The Court made it clear that its judgment does not render unconstitutional all provisions that require provincial approval of municipal legislative acts. Its judgment 'does not pre-judge the different question whether the enactment of such a requirement within the new constitutional framework would be constitutionally valid'.³⁷⁰ Therefore, even if it were assumed that a requirement of national approval would receive the same treatment

366 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 25 (emphasis added).

367 See further Steytler & De Visser (*supra*) at 5-22ff.

368 Act 103 of 1977.

369 *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA).

as a requirement of provincial approval, the judgment does not provide finality on the question as to whether section 29(8) of the National Building Regulations is constitutional. However, the judgment is instructive, particularly in light of the pre-constitutional rationale and spirit of the National Building Regulations Act described above. The *CDA Boerdery* Court reached its conclusion by comparing the local government context that prevailed during the enactment of the approval requirement with the vastly different local government context that prevails now. With regard to the now impugned role for the Premier in the Cape Ordinance, the Court stated that

the Administrator's role in approving or disapproving rates must be understood in that specific pre-constitutional setting. . . . The approval requirement was a specific product of the old-order constitutional scheme, tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them.³⁷¹

The requirement of prior approval of building regulations in terms of the National Building Regulations Act must be interpreted, and set off against the new constitutional dispensation for local government, in much the same way. It is a product of the pre-constitutional era. It must be modified or tailored to meet the new local government dispensation. In terms of this new dispensation, the operation of FC s 156(3) would render a by-law on building regulations that has not been approved invalid unless the National Building Regulations Act violates FC s 151(4). The National Building Regulations Act would appear to offend FC s 151(4). To require the national approval of or concurrence with a municipal by-law goes much further than regulation. National government is permitted by the Final Constitution to regulate the municipal exercise of its functions related to building regulations with a view to seeing to the effective performance of it. As outlined above, the Constitutional Court has described this power as 'a broad

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managing or controlling rather than direct authorisation function'. It is hard to see the requirement of prior approval of all municipal by-laws on a particular original competency as anything other than direct authorization. It replaces a municipal decision with a national decision. That arrangement is inconsistent with the express wording of the Final Constitution and its scheme of co-operative government.

The sources of provincial power to legislate on schedule 4B and 5B matters can be found in two provisions: FC ss 155(6)(a) and 155(7).³⁷² In terms of FC s 155(7), provincial government has a regulatory power. The same considerations that apply to national government's powers under FC s 155(7) apply here: provincial legislation on schedule 4B and 5B matters must be limited to framework legislation that does not extend to the detail of these local government matters. Section 26 of the KwaZulu-Natal Road Traffic Act³⁷³ is an example of provincial legislation that exceeds the limits set by section 155(7). It states that local authorities can only make by-laws 'with the concurrence of the MEC for Transport'. For the same reasons as outlined

370 Ibid at para 41.

371 Ibid at paras 34-35.

372 See the heading of FC sch 4B.

373 Act 7 of 1997.

above with regard to the National Building Regulations Act, this provision is unconstitutional. Similarly, any provision whereby automatic provincial 'overrides' are built into the regulatory framework, or any provision that permits the provincial government to ignore municipal law, would go further than the Final Constitution currently permits.³⁷⁴

FC s 155(6)(a) states that provincial government has a duty to monitor and support local government in its jurisdiction. This responsibility can entail legislative measures that are aimed at either establishing a monitoring framework or influencing the manner in which local government administers such matters. The Constitutional Court has held that:

the legislative and executive powers to support [local government] are . . . not insubstantial. Such powers can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions.³⁷⁵

The *First Certification Judgment* Court held further that this power is to be understood in conjunction with the legislative and executive role granted to provincial government in FC ss 155(6)(b) and 155(7). In terms of these sections, the provinces must assert legislative and executive power in order to promote the development of local government's capacity to perform its functions and to manage its affairs. They may do so by regulating municipal executive authority, thus ensuring the municipalities' effective performance of their functions in respect of listed local government matters:

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Taken together, these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in part B of [Schedules] 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administering local government matters.³⁷⁶

The word 'monitor' (used in FC s 155(6)) was not interpreted by the Court as bestowing additional or residual powers of provincial intrusion on the domain of local government. 'Monitor' should be read as the power to measure or test, at intervals, its compliance with national and provincial legislative directives or with the Constitution itself.

Schedule 5 matters are of 'exclusive provincial legislative competence'. The heading of schedule 5B bears testimony to this when it includes local government matters 'to the extent set out *for provinces* in section 155(6)(a) and (7)'.³⁷⁷ This exclusivity is, however, subject to FC s 44(2). FC s 44(2) enables national government to make laws on schedule 5B matters when it is necessary for one of the grounds mentioned in FC s 44(2).

374 See, for example, Jaap de Visser 'Demarcating Provincial and Local Powers regarding Liquor Retail' (2004) 19(2) *SA Public Law* 376.

375 *First Certification Judgment* (supra) at para 371.

376 *First Certification Judgment* (supra) at para 371. See also Pimstone (supra) at 5A-30.

377 Emphasis added.

The next question is whether the Final Constitution prevents Parliament from extending its legislative efforts concerning schedule 5B to the 'details' of these local government matters. There appears to be no textual indication in the Final Constitution that could justify this conclusion. The heading of schedule 5B is of no use because it does not envisage national legislation on schedule 5B. On a purposeful reading of FC s 44(2), it must be concluded that such constraints have not been built into the constitutional scheme for national laws on schedule 5B matters.³⁷⁸ In view of the fact that FC s 44(2) affords Parliament the power of legislative intervention, it should be able to extend its legislation to the particular details as well. In summary: if national legislation on a Schedule 5B matter passes the test outlined in the FC s 44(2), it is valid with respect to all aspects of the functional area.³⁷⁹

The example of 'traffic and parking' may be instructive. 'Traffic and parking' are local government matters on account of their location in schedule 5B. The power to pass framework legislation for the municipal exercise of lawmaking on these matters is reserved for provinces. However, Parliament can intervene if necessary for one of the reasons mentioned in FC s 44(2). The National Road Traffic Amendment Act enables, through s 80A(1)(c), municipalities to make by-laws, with the concurrence of the Premier of the relevant province, on the appointment and licensing of parking attendants.³⁸⁰ Local government's lawmaking

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power concerning parking attendants is thus made subject to the concurrence of the Premier. The constitutionality of this requirement must be gauged by its necessity for and satisfaction of one of the grounds listed in FC s 44(2) (because, as outlined earlier, national legislation on Schedule 5B in terms of FC s 44(2) can extend to the detail of local government matters). It would defy common sense to maintain that the licensing of parking attendants requires national intervention in order to achieve national security or economic unity, to maintain national standards or to establish minimum standards. On the contrary, local government's developmental mandate provides a strong argument for the issue of parking attendants to be left to the municipality's discretion without requiring provincial approval. The maximization of the developmental impact of such policies whilst ensuring order and safety on municipal roads requires localized solutions. Thus, sound reasons exist to entrust municipalities with the authority to arrive at innovative approaches that are tailored to local circumstances. Section 80A(1)(c) of the National Road Traffic Amendment Act thus goes beyond what is constitutionally permitted.³⁸¹

The limits imposed on national and provincial legislation in respect of the local government matters discussed above must be understood in light of the principle established in FC s 151(4). The protection of local government powers afforded by FC s 151(4) extends beyond the mere question as to whether or not authority to deal

378 This argument runs counter to what was previously argued by one of the authors. See Jaap de Visser 'Local Government Powers' (2002) 17 *SA Public Law* 232.

379 See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 5-25.

380 Act 21 of 1999. Section 80A(1)(c) of the National Road Traffic Amendment Act enables municipalities to undue by-laws.

381 See Steytler & De Visser (supra) at 5-26.

with a particular matter exists; it also deals with the manner in which the power is exercised.³⁸² This distinction is derived from the Constitutional Court's holding in *Premier of the Province of the Western Cape v President of the RSA*³⁸³. The Constitutional Court emphasized that FC s 41(1)(g), which contains the same message, is concerned with the way power is exercised, not with whether or not a power exists. The competency requirement deals with the question of whether or not the national or provincial government has the power to make laws on schedule 4B or Schedule 5B matters. Once it has been determined that national or provincial authority indeed extends to the subject matter at hand, FC s 151(4) protects local government against the use of that authority in a way that unduly interferes with a municipality's ability or right to exercise its powers or perform its functions.

If, for example, a provincial government enacts legislation containing a monitoring regime regarding the manner in which municipalities perform their function in relation to child care facilities (a schedule 4B matter), it is within the province's constitutional powers to do so. However, if this monitoring regime

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is unduly burdensome — and compromises or impedes a municipality's ability to perform its functions — it falls foul of FC s 151(4)³⁸⁴

(c) Division of powers and functions within local government

The powers and functions discussed above are vested in local government as a sphere of government. Metropolitan municipalities have exclusive authority over these powers and functions.³⁸⁵ However, the Final Constitution provides that a local municipality 'shares municipal executive and legislative authority in its area with a [district] municipality within whose area it falls'.³⁸⁶ The Final Constitution requires that national legislation must make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both categories B and C.³⁸⁷ The division does not have to be symmetrical; a division between one local municipality and a district municipality may differ from the

382 Bekink argues that FC s 151(4) represents the only protection for municipal law-making when he argues that it is 'the only protection given to municipalities regarding a total domination by national or provincial laws'. Bernard Bekink *Principles of South African Local Government Law* (2006) 220. The foregoing discussion on the limits to national and provincial law-making imposed by the headings to schedules 4B and 5B in conjunction with FC ss 155(6) and (7) point towards a broader protection than the one found by Bekink.

383 *Premier of the Province of the Western Cape v President of the RSA & Others* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) at para 29.

384 Cf Bekink (supra) at 220. Bekink contends that FC s 151(4) is triggered in the context of conflicting laws 'when national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions'. To the extent that this interpretation underwrites the survival of legislation that compromises or impedes the authority and the autonomy municipalities, Bekink's reading cannot be supported.

385 FC s 155(1)(a).

386 FC s 155(1)(b) and (c).

387 FC s 155(3)(c).

division between another local municipality and the same district municipality. However, despite such differences, the legislation must take into account the need to provide municipal services in an equitable and sustainable manner.³⁸⁸

(d) Additional powers and functions³⁸⁹

The 'local government affairs of [a] community' embraces both original and assigned functions. That is, the Final Constitution envisages that additional powers and functions may be transferred to local government. Two modes of transferring powers and functions to local government need to be distinguished: namely assignment and delegation.³⁹⁰ Assignment is the most important instrument for transferring additional functions to local government that national and provincial governments may employ. FC s 156(1)(b) provides that a municipality has authority over matters assigned to it by national or provincial legislation. Matters may be assigned to local government, in general, and individual municipalities, in particular. The legal regime for assignment is regulated in the Final Constitution and in the Municipal Systems Act.³⁹¹ Delegation is provided for in FC s 238(a). FC s 238(a) provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state.

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An assigning agent may set the parameters for the exercise of the assigned authority in the legislative act of assignment. However, these parameters may not be set in a manner that contravenes FC s 151(4). Conditions such as prior approval of municipal decisions or the imposition of national or provincial overrides of municipal decisions are not in keeping with FC s 151(4) — they conflict directly with the intention in the Final Constitution to separate assignment from delegation. As Gideon Pimstone notes: 'Sight should not be lost of the significance of the word 'assign', which contemplates not a delegation of the power but a taking over'.³⁹² The assignment is intended to be a complete transfer of the function: and it entails the final decision-making power in individual matters. The instrument of assignment is unsuitable for a transfer of power that leaves the final say in individual matters with the national government or the provincial government.

In terms of FC ss 44(1)(a)(iii) and 104(1)(c), the national legislature or provincial legislatures can assign any of their legislative powers to specific municipal councils.³⁹³ Parliament may assign any matter listed in schedule 4A, or any matter that falls within its residual competence. For example, Parliament could assign the

388 FC s 155(4). Parliament has provided for this legislation in Chapter 5 of the Municipal Structures Act. See further Steytler & De Visser (supra) at ch 5 para 4.

389 See Steytler & De Visser (supra) at ch 5 para 5.

390 Contractual agreements, such as agency, may also be utilized as a means of transferring certain operational elements of a national or provincial function.

391 Act 32 of 2000 ss 9 and 10.

392 Pimstone (supra) at 5A-27.

393 For Parliament, this power to assign excludes the power to amend the Final Constitution.

power to regulate 'animal control' (a schedule 4A matter) to a municipality. This would give that municipality the right to regulate those matters within its area of jurisdiction. Provincial legislatures may assign any matters listed in schedules 4A or 5A.³⁹⁴

The question arises whether Parliament or a provincial legislature can assign powers and functions to local government in general. The abovementioned provisions refer to assignments to individual municipal councils. It would, however, be unduly rigid to hold that there is no constitutional basis for assignment of legislative powers to local government in general.³⁹⁵ An Act of Parliament could assign a matter that falls outside schedules 4B or 5B to the entire local government sphere or to a category of municipalities. A provincial legislature can do the same and assign a matter to local governments in the province.³⁹⁶

For as long as the assigning Act is in force, a municipal council would possess the relevant legislative powers. The repeal of an assigning Act does not affect the validity of a municipal by-law that has already been passed.³⁹⁷ A legislative power, whether original or assigned, is always discretionary. The municipality 'on the

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receiving end' of the assignment is therefore not compelled to legislate. The assignment Act may, of course, circumscribe the scope of the municipality's legislative power.³⁹⁸

FC ss 99 and 126 allow Cabinet members and provincial MECs to assign executive powers to specific municipal councils. The assignment must be consistent with the Act in terms of which the relevant power or function is exercised or performed.³⁹⁹ It takes effect upon a proclamation by the President or the Premier.⁴⁰⁰ This mode of assignment differs from the aforementioned assignments. Firstly, it concerns executive powers only. Secondly, it entails compulsion; the relevant sections speak of the assignment of a matter 'that is to be exercised'. Therefore, whereas the assignment of legislative power allocates discretionary powers, the assignment of executive power allocates a duty to undertake a particular action. FC ss 99 and 126

394 See Steytler & De Visser (supra) at 5-40.

395 See Steytler & De Visser (supra) at 5-40.

396 See also 'Guidelines on Allocation of Additional Powers and Functions to Municipalities' GN 490, *Government Gazette* 29844 (26 April 2007) ('Assignment and Delegation Guidelines') item 1. The item defines a 'legislative assignment' as an assignment in a national or provincial Act to local government in general or to a category of municipalities.

397 Tshepo Madlingozi & Stu Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, Matthew Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19, 19-14.

398 See Steytler & De Visser (supra) at 5-40.

399 FC ss 99(b) and 126(b).

400 FC ss 99(c) and 126(b).

executive assignments must be concluded by means of an agreement with a specific municipality.⁴⁰¹

The requirement of an agreement means that the national government or a provincial government cannot be compelled to assign the relevant powers and functions to a municipality. Similarly, without consensus, a municipality cannot be compelled to accept the assignment of such powers and functions.⁴⁰² The requirement of an agreement also means that the assignment is terminated when either of the parties withdraws from the agreement.⁴⁰³

The discretionary nature of the assignment of powers and functions by the executive is curtailed by FC s 156(4). FC s 156(4) is a manifestation of the principle of subsidiarity. Generally, the principle of subsidiarity requires that the exercise of public power takes place at a level as close as possible to the citizenry. National government and provincial governments must, in terms of FC s 156(4), assign the administration of a matter listed in schedules 4A or 5A to a municipal council if four conditions are met:

- (a) The matter in question 'necessarily relates' to local government;
- (b) the matter would most effectively be administered locally;
- (c) the municipality has the capacity to administer it; and
- (d) the municipal council agrees to the assignment.

The subsidiarity principle applies only to the functional areas of schedule 4A and schedule 5A. Residual matters that fall within the sole domain of national competency⁴⁰⁴ are not the proper subject of the subsidiarity principle.⁴⁰⁵

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A number of questions arise surrounding the intersection of FC s 156(4) and the above modes of assignment. The difficulties in harmonising FC s 156(4) and the other provisions on assignment may be solved by viewing FC s 156(4) as a principle or standard, rather than the articulation of a specific set of procedures. Does FC s 156(4) permit, for example, the assignment of legislative power? The provision itself deals with the assignment of the 'administration' of a matter. It does not refer to the assignment of legislative powers. However, this appears to be of little consequence as FC s 156(2) states that a municipality can make by-laws for the effective administration of the matters which it has the right to administer. The right to make by-laws flows from the right to administer a matter assigned in terms of FC s 156(4). Others contend that the act of an 'agreement' through which power is transferred points towards a limitation of FC s 156(4) to executive powers. Yet again, FC s 156(4)

401 FC ss 99(a) and 126(a). See Steytler & De Visser (supra) at 5-40 ff.

402 See Assignment and Delegation Guidelines (supra) items 9(2), 10(3) and 11(2). See also Bekink (supra) at 218 n 16.

403 See Assignment and Delegation Guidelines (supra) item 9(4).

404 See FC s 44(1).

405 See Steytler & De Visser (supra) at 5-41.

is directed at national and provincial 'governments': governments are generally understood to include their legislatures. Is FC s 156(4) then a basis for assignment that exists in addition to the legal basis offered by FC ss 44, 99, 104 and 126? We suggest that it is not. It refers to the assignment, by agreement, of the administration of a schedule 4A or 5A matter to a specific municipality. All of these ingredients point towards the assignments that have their basis in FC ss 99 and 126. Again, FC s 156(4) is not an additional procedure or basis for assignment, but is rather a principle or a set of standards that sets out the circumstances under which assignment in terms of FC ss 99 or 126 becomes compulsory.

Another important question is whether, as a principle, FC s 156(4) is justiciable. In principle, the provision is, as any other provision in the Final Constitution, justiciable. However, the arguments we offer below point out that, due to the phraseology and nature of this provision, as well as its position within the intergovernmental context, the level of scrutiny applied by the courts may be so low as to make the provision unenforceable. Firstly, the fact that an assessment of effective governance is central to the application of the principle renders it less open to judicial interpretation.⁴⁰⁶ The courts may be reluctant to be drawn into debates on the technical merits of locating a function at municipal level. Such reluctance turns on the technical nature of such issues such as the efficiencies generated by municipal performance of the function, intergovernmental fiscal ramifications of the transfer, economic imperatives such as spill-over effects and intergovernmental efficacy and capacity assessments of municipalities. Secondly, FC s 156(4) requires assignment 'by agreement'; the impact of this proviso on judicial enforceability is unclear. It is common for a court to order parties to return to the negotiating table and work towards a settlement. However, it is not possible for a court to determine and to impose upon the parties the content of an agreement. Judicial enforceability of FC s 156(4) suggests that after a court order requires 'assignment', it must be left up to the parties to formulate an agreement. Thirdly, whose obligation is it to assign schedule 4A matters?

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Schedule 4 matters are concurrent national and provincial matters. Both national and provincial executives thus have the authority to assign a schedule 4A matter to a municipality within their jurisdiction. Arguably, a municipal claim for assignment can be exercised against both national and provincial executives — but which one of the two must be compelled to do so under the operation of FC s 156(4)? For example, can a provincial government, when confronted with a legal challenge on the basis of FC s 156(4), escape liability by arguing that national government must assign the power in question? Fourthly, a calculated, programmatic approach to devolution that is managed through intergovernmental relations fits in better with a functional approach to the division of powers and functions adopted by the court. Thus far the jurisprudence condemns an automatic bias or a presumption in favour of any sphere of government.⁴⁰⁷ This approach fits the dictates of our scheme of co-operative government — in which courts are always a last resort for the resolution of disputes — better than a 'rights-based' approach that enables courts to determine decidedly political issues. A rights-based approach creates the spectre of 'slapstick asymmetry'. FC s 156(4) would be used by individual municipalities in a manner that

406 Dawid Van Wyk 'Subsidiariteit as Waarde wat die Oop en Demokratiese Suid-Afrikaanse Gemeenskap ten Grondslag lê' in Gretchen Carpenter (ed) *Suprema Lex: Opstelle oor die Grondwet aangebied aan Marinus Wiechers* (1998) 257.

407 See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 5-18.

had functions and powers 'tumbling up and down'. It would leave — as FC Chapter 3 says it should not — courts in the unenviable task of mediating the endless intricacies of governance. The Constitutional Court has made it clear, in the context of national/provincial relations, that cooperative government, rather than 'competitive federalism' is the guiding principle.⁴⁰⁸ A competition for competencies, refereed by the courts, does not accord with this trend in our jurisprudence. That said, as a guiding principle it should play a role in the adjudication of disputes over competencies if they do reach the courts. David Van Wyk, for example, argues that the Final Constitution leaves room for 'a competency bias in favour of the smaller sphere', especially where there is uncertainty about the interpretation of the scope of competencies.⁴⁰⁹

FC s 238(a) provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state. The Final Constitution does not offer a definition of delegation. However, it is possible to highlight a number of features that distinguish delegation from assignment. Firstly, the fact that FC s 238 is located under the heading 'Other matters' in FC Chapter 14, which is the very last chapter of the Final Constitution and is entitled 'General Provisions' suggests that it is not meant to be a basis for devolution of powers across spheres. Any provision that intends to be the basis for fundamental alterations to a constitutional division of powers between spheres would have been given a more prominent location in an earlier chapter.⁴¹⁰ Secondly, assignments transfer the individual responsibility and accountability to the

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municipality, and the municipality acts in its own name when it exercises powers or performs functions in terms of an assigned power.⁴¹¹ Thirdly, the assignment of a function also transfers the financial risk to the municipality. The corollary is that the municipality attracts financial streams in terms of the annual appropriation of funds from national government to local government. If a function is delegated, then the risk and funding obligations remain with the delegating agency. Fourthly, after a function has been assigned, it is no longer possible to issue individual instructions. In contrast, a delegating agency can issue instructions at any given time after a function has been delegated.⁴¹² It is clearly permissible for national government or a provincial government to ensure the success of an assignment through legislating a regulatory framework consisting of minimum norms and standards. This is, however, different from the issuing of individual instructions. After a function has been delegated, however, the delegating authority remains competent to issue individual instructions. Finally, the assigning agency can no longer perform the function — barring the event of intervention in terms of FC s 139. If the assigning agency were still able to perform the function, then it would subvert the transferring of authority.

408 *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 287.

409 See Van Wyk (supra) at 268.

410 See Steytler & De Visser (supra) at 5-47.

411 Assignment and Delegation Guidelines (supra) at item 2(a)(i)-(ii) and (b)(ii)-(iii).

412 Ibid item 12(3)(a).

It would in essence mean that individual instructions can be given. Once a function has been assigned, the assigning agency is responsible only to the extent that it has regulatory and supervisory powers. Its supervisory powers are limited to intervention in terms of FC s 139. By contrast, delegating a function does not absolve the delegating agency of the responsibility for the entire function⁴¹³ and, if need be, the delegating agency may revoke the delegation and resume performing the function.

Must the municipality agree to the delegation for it to be valid? FC s 238 does not mention agreement as a requirement. Surely a delegation of authority must be able to ensure that a local government performs certain tasks. FC ss 99 and 126, which deal with the assignment of executive powers, speak directly to this issue of compulsion and suggest that delegation requires agreement by the municipality. In our view, FC s 238 must be interpreted harmoniously with FC ss 99 and 126 and be read to require the agreement of the municipality.⁴¹⁴

22.4 Municipal services

The provision of services by a municipality is not merely a matter of defining competences. Rather it is an issue that defines and constitutes the very nature of

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this state institution. Of all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government. Not only is the role of the municipality that of service provider, but also, very distinctively that of developer of the community. The notion of developmental local government should therefore be the *leitmotif* in interpreting the constitutional mandate with regard to municipal services. In addition, local government provides the best opportunity for citizens to assist government in the shaping of solutions to problems of local concern.

The developmental mandate raises a number of important questions: first, what is the scope for providing services that make sense within a developmental paradigm? second, what are the duties to provide such services? The obligation to provide services to the community also highlights the relationship of the municipality with the residents as recipients of services. The municipality's provision of 'sustainable' services is inevitably bound up with the consumers' duty to pay for such services.

(a) Scope of municipal services

A municipal service is usefully defined in the Municipal Systems Act ('Systems Act') as 'a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether . . . fees, charges or tariffs are levied in respect of such a service or not.'⁴¹⁵ The definition

413 Ibid item 12(3)(b).

414 Ibid schedule 1, item 12(5) suggests 'that agreement should, as a matter of principle, always be sought before powers and functions are delegated to municipalities'. Item 33 provides that 'delegations should be effected by agreement and that a municipality cannot be obliged to accept a delegation'. See also Assignment and Delegation Guidelines (supra) at item 13. See Steytler & De Visser (supra) at 5-49.

415 Act 32 of 2000 s 1(1).

correctly indicates that municipal services are primarily determined by the general powers of a municipality as demarcated and protected in FC schedules 4B and 5B.⁴¹⁶ The scope of services is thus confined to what a municipality may legally do. Second, the activity is directed to or for the benefit of the local community. Municipal services are thereby distinguished from those activities that are aimed at the internal functioning of the municipality. Third, municipal services include both services for which fees are charged to identifiable consumers and those services provided for the benefit of the community in general.

Schedules 4B and 5B contain a list of 38 functional areas: some important and others trivial. Central to any municipality are the services delivered directly to residents on a daily basis that meet the necessities of life, such as water, sanitation, electricity and refuse removal. A key focus of the schedules is the management of the built environment, including municipal planning, the building and maintenance of roads and stormwater systems, fences, public places and street lighting. Complementing the physical side of the built environment is the management of its use. Functional areas in this regard include traffic and parking, the control of public nuisances, the control of selling of liquor and food to the public and street trading. The responsibility for the built environment speaks to the object of social and economic development, e.g., tourism and trade regulations. In order to realize

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the object of promoting a safe and healthy environment, municipal functional areas encompass municipal health services, air pollution, noise pollution, the burial of animals, fire fighting and cleansing.

Some functions and powers are located outside the schedules. The primary example is municipal police services.⁴¹⁷ As required by FC s 206(7), the South African Police Services Amendment Act sets out the legal framework for the establishment of municipal police services.⁴¹⁸ The Act identifies the functions of a municipal police service as follows: traffic policing; the policing of municipal by-laws and regulations; and the prevention of crime. The first two provisions — traffic policing, policing municipal by-laws and regulations — are not new. Those powers would be implicit in the functional areas of road traffic and any of the other functional areas. Crime prevention is, however, a significant new area of municipal policing.⁴¹⁹

The key question that has surfaced in assessing the functional areas is whether they indeed enable municipalities to execute their developmental mandate.⁴²⁰ The central theme in the White Paper on Local Government of 1998 was that

416 The power to provide local policing is less secure. FC s 206(7) provides that national legislation may provide a framework for the establishment, powers, functions and control of municipal police services.

417 See Okeyrebea Ampofo-Anti, Kim Robinson & Stu Woolman 'Security Forces' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.

418 Act 83 of 1998.

419 See further Nico Steytler 'Municipal Police Services: Towards a Safer Environment' (1999) 1(2)

420 See Jaap de Visser & Annette Christmas 'Review of Schedules 4B and 5B' (2007), Community Law Centre, UWC, available at www.communitylaawcentre.org.za.

developmental local government should work for and through citizens.⁴²¹ Municipalities should exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities. Local government should also become the vehicle through which citizens work to achieve their vision of the kind of place in which they wish to live. Consequently, municipalities should build social capital, stimulate the finding of local solutions for increased sustainability, and stimulate local political leadership.

The functional competences of local government should reflect the constitutional vision of developmental local government. The decentralized developmental strategy can only bear fruit if the institutional framework for local government gives expression thereto. Part of this expression must be the allocation of powers and functions that are relevant to the developmental mandate of local government.

Before the Final Constitution, a wide variety of functions were performed by municipalities. A municipality's functions depended on, *inter alia*, the institutional framework of the various local government ordinances, the administration's capacity and which racial group it was supposed to serve. FC schedules 4B and 5B list functions that the majority of municipalities were already performing (with some additions, such as child care facilities and air pollution). Some functions were

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removed from local government. For example, prior to the Final Constitution, municipalities in a number of provinces were responsible for libraries, a competence the Final Constitution allocated to provinces.⁴²² The result has been that the listed local government functional areas do not enable municipalities to maximise the social and economic impact envisaged by the Final Constitution and the White Paper on Local Government. There has been a growing concern in government about this mismatch between the goal of developmental local government and the allocated powers of local government. The President's Coordinating Council (PCC) resolved on 14 December 2001 that FC schedules 4 and 5 should be reappraised. In July 2007, the Department of Provincial and Local Government (DPLG) embarked on a White Paper process for provincial government and a review of the White Paper on Local Government. This process envisages a review of the two schedules.⁴²³

Two key functional areas that have been at the core of the debate about equipping local government with the necessary competencies to give effect to its developmental mandates have been housing and transport. Given the primary concern of local government with the built environment, housing should be a primary municipal competency. In *State of the Cities Report 2006*, this link was formulated as follows: 'Local government is . . . responsible for livelihoods contextualized within the framework of built environment functions: municipalities are responsible for basic service provision and the creation of an enabling environment for the growth of business enterprises.'⁴²⁴ In urban South Africa, a critical connection exists between housing and transport. These two competencies

421 Ibid at 17-20.

422 FC Schedule 5A.

423 See Nico Steytler 'President's Coordinating Council Sets Agenda for Local Government' (2002) 4(1) *Local Government Law Bulletin* 1, 2.

424 South African Cities Network *State of the Cities Report 2006* (2006) 5-23.

are located at the provincial level.⁴²⁵ A further area of contention is that despite the fact that 'local economic development' is one of the objects of local government,⁴²⁶ there is considerable confusion about local government's role in economic development.

(b) Obligation to provide basic services

FC s 156(1) bestows on a municipality the authority and the right to administer the matters listed in schedules 4B and 5B. The use of the terms 'authority' and 'right' immediately suggests that a municipality may exercise its powers in the demarcated functional areas, but that a municipality has no obligation to do so. On its 'own initiative'⁴²⁷ a municipality may decide to provide a sport facility or a public park. But what of the basic needs of its citizens? When it comes to the

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questions of the provision of potable water and municipal health services, these functional areas invoke the obligation of local government to 'respect, protect, promote and fulfil the rights in the Bill of Rights',⁴²⁸ including, say, the rights of access to 'sufficient water'⁴²⁹ and 'health care services'.⁴³⁰ Some socio-economic rights clearly intersect with local government competencies. And in some instances, the full realization — or at least the ultimate administration — of programmes designed to make good the promise of these rights rests on municipalities.⁴³¹ However, these rights are limited, and given the uncertainty of their reach, a limited number of municipal services can be reinforced through socio-economic rights. The basis for a wider range of services, such as electricity, paved roads and recreational facilities, lies in the broad development objects and duties of a municipality to prioritise the basic needs of the community.⁴³²

Both the Final Constitution and dicta from the Constitutional Court suggest that there is an obligation to provide basic municipal services, an obligation that is broader than the focus and application of socio-economic rights. First, one of the objects of local government is 'to ensure the provision of services to communities in a sustainable manner'.⁴³³ While this is an 'object' and not a function or obligation,

425 See Peter Wilkinson 'Reframing Urban Passenger Transport as a Strategic Priority for Developmental Local Government' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Panell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 203.

426 FC s 152(1)(c).

427 FC s 151(3).

428 FC s 7(2).

429 FC s 27(1)(b).

430 FC s 27(1)(a).

431 See Steytler & De Visser (supra) at 9-8ff.

432 The statutory duty to provide a service, such as referred to in s 73(1) of the Municipal Systems Act

433 FC s 152(1)(b).

the developmental duty of a municipality includes 'giving priority to the basic needs of the community' by structuring and managing 'its administration and budgeting planning processes' to this end.⁴³⁴ The language in which local government's entitlement to an equitable share of the revenue raised nationally is couched is a bit more forthright. The very purpose of local government's entitlement to the equitable share is, in terms of FC s 227(1)(a), 'to enable it to provide basic services and perform the functions allocated to it.' If the provision of basic services is discretionary, then the claim to an equitable share becomes a function of a municipality's decision to provide a particular service or not. Such a reading runs counter to FC s 227(1)(a)'s logic for determining the equitable share.⁴³⁵ Importantly, the entitlement to an equitable share is linked to the notion of providing 'basic' services.

The direct reference to *an obligation* to provide basic services is the result of an amendment to FC s 139 in 2003. One of the grounds for a provincial intervention in a municipality, including the dissolution of its council, is when a municipality, 'as result of a crisis in its financial affairs, is in serious or persistent material breach of *its obligations to provide basic services*'.⁴³⁶ A provincial executive must then

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impose a recovery plan 'aimed at securing the municipality's ability to meet its obligations to provide basic services'. The underlying assumption of FC s 139(5) is that there is an obligation to provide basic services and the failure to do so because of a financial crisis provides a basis for an intervention.

Some of the dicta in *Mkontwana v Nelson Mandela Metropolitan Municipality & Another, & Other Cases* proceed from the premise that there is indeed a constitutional duty to provide basic services.⁴³⁷ O'Regan J placed this duty in a historical context. With reference to the constitutional objects of local government,⁴³⁸ she wrote:

Local government thus bears the important responsibility of providing services in a sustainable manner to their communities. This task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved roads. The ability of local government to carry out its constitutional mandate depends on its financial stability.⁴³⁹

In the same case, Yacoob J said that municipalities were obliged to provide water and electricity to the residents in their areas 'as a matter of public duty'.⁴⁴⁰ As authority for this 'public duty', Yacoob J refers⁴⁴¹ to the right of access to sufficient food and water,⁴⁴² the service objects of local government listed in FC s 152(1), the

434 FC s 153(a).

435 See § 22.5(j)(i) *infra*.

436 FC s 139(5) (emphasis added).

437 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) ('*Mkontwana*').

438 FC s 152(1).

development duties of local government in FC s 153 and s 73(1) of the Municipal Systems Act.⁴⁴³

While using socio-economic rights as the basis for the provision of some basic municipal services is useful, thus far the relief any applicant can secure is rather

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limited. Moreover, only some services are regarded as basic: water and health services.⁴⁴⁴ Finally, if the right of access to water is conceptualized as a claim by those who cannot afford to pay for this commodity, then the claims of the business community for the supply of water to their factories and enterprises are bound to flounder. The objects of local government in FC s 152 are by themselves a weak basis for an enforceable duty. As they provide no authority upon which to base a plenary municipal power or function, they can *a fortiori* not sustain a claim for an obligation to act. While FC s 153 uses the term developmental duties in the title to the section, it deals with priorities rather than duties. Section 73(1)(c) of the Structures Act would also appear to beg the question of what duties are enforceable: it creates a statutory duty that a municipality must 'ensure that all members of the local community have access to at least the minimum level of basic municipal services'?

439 *Mkontwana* (supra) at para 105. See also *Beck v Kopanong Local Municipality* Case No 3772/2002 (Unreported, Orange Free State). Having listed a number of well-known municipal functions (from water services to recreational parks service) Rampai J wrote: 'It is the constitutional imperative of the local municipality to provide these various community services and many more to its own community, and to ensure that these services are provided in an effective and systematic and sustainable manner.' Ibid at para 19.

440 *Mkontwana* (supra) at para 38. See also *Mkontwana* (supra) at para 52.

441 Ibid at para 38, fn 49.

442 FC s 27(1)(b).

443 Act 32 of 2000 s 73(1) reads: 'A municipality must give effect to the provisions of the Constitution and (a) give priority to the basic needs of the local; (b) promote the development of the local community; and (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.' In *Occupiers of 15 Olivia Rd, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) at para 16 Yacoob J, for the Constitutional Court, reiterated this broad brush approach. In dealing with an eviction matter, he wrote as follows:

The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, [FC s 152(1)(b)] provide social and economic development, [FC s 152(1)(c)] and encourage the involvement of communities and community organisations in matters of local government [FC s 152(1)(e)]. It has an obligation to fulfil the objectives mentioned in the preamble to the Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person". Most importantly, it must respect, promote and fulfil the rights in the Bill of Rights.

444 Key services such as road building and maintenance and streetlighting in a dangerous area would, at first blush, appear to fall outside their ambit of basic services underwritten by a duty to fulfil fundamental rights. However, the FC s 12(1)(c) right not to be subjected to public or private violence might imply a duty to provide streetlighting. There is no reason, in principle, why only the traditional socio-economic rights can impose positive duties to provide service delivery on municipalities.

While neither FC ss 152(1)(b) or 153 by themselves provide a sufficient constitutional basis for an enforceable duty, the language of FC ss 139(5) and 227(1)(a) is much clearer and to the point. Both sections work on the assumption that there is a duty to provide services, but that such services are limited to those that can be labeled as basic. This view reflects the very purpose of a municipality standing in the service of its community; it runs counter to any notion of a municipality being able to claim that the provision of water, electricity, refuse removal or road maintenance is a matter of discretion. This reading also has important consequences for the implementation of FC s 139. A provincial executive's power of intervention is premised on the failure of a municipality to fulfil a constitutional obligation.⁴⁴⁵

The obligation to provide services does not make a municipality liable for the provision of services in all 38 functional areas. Both FC ss 139(5) and 227(1)(a) limit such claims to services that are 'basic'.

The notion of a basic municipal service is a recurrent theme in local government legislation.⁴⁴⁶ As yet, a precise and concrete definition has not been offered by our courts. The White Paper on Local Government, however, views the provision of 'good basic services' as follows:

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Local government is responsible for the provision of household infrastructure and services, an essential component of social and economic development. This includes services such as water, sanitation, local roads, storm water drainage, refuse collection and electricity. Good basic services, apart from being a constitutional right, are essential to enable people to support family life, find employment, develop their skills or establish their own small business. The provision of household infrastructure can particularly make a difference to the lives of women, who usually play the major role in reproductive (domestic) work which sustains the family and the local society.⁴⁴⁷

What this description indicates is that a basic service entails more than a service that provides a resident with a consumable commodity. Household infrastructure such as refuse removal, roads, and stormwater drainage are required for a secure and healthy environment. When the White Paper was translated into law, 'basic services' were given a more generic definition. The Systems Act defines the concept of 'basic municipal services' as a service that is 'necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'.⁴⁴⁸ The Municipal Finance Management Act ('MFMA') gives an identical definition.⁴⁴⁹

445 FC s 139(1).

446 In terms of the Municipal Finance Management Act 56 of 2000 s 14(1) a municipality may not transfer ownership as result of a sale or other transaction or in any way permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

447 *White Paper on Local Government* (1998) 23.

448 Systems Act s 1(1) 'basic municipal service'.

449 Act 56 of 2000 s 1(1).

While the criterion of 'acceptable and reasonable quality of life' may be too vague to be of much value, the second part of the definition provides more promising possibilities. The quality of life that relates to the health or safety of communities narrows the scope. The first element of the definition is that the measuring rod is not the individual but the public. The reference is to *public* health and safety, not that of an individual. Second, the quality of life must relate to public health and safety. Refuse removal and the control of air pollution are essential components of a healthy environment, while they could not be easily fit within the currently narrow definition of the socio-economic right of access to health services. On this account, some services would also by definition not accrue to individuals. An individual would hardly be entitled to a stormwater drainage system; a community may well be entitled to such a system where its absence would place the physical security of the community in danger.

However, as we noted above, some constitutional benefits might well accrue to individuals. The provision of 'streetlighting', for example, speaks directly to an individual's FC s 12 right to be free from public and private forms of violence.

Where the focus is no longer on the physical security of the individual, additional constitutional obligations might still be said to flow to the community. FC s 24(b) sets out the right 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources

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while promoting justifiable economic and social development.⁴⁵⁰ Such environmental duties would fall within such functional areas as 'municipal planning', 'refuse dumps and solid waste disposal', 'municipal parks', 'fences and fencing', 'domestic wastewater and sewage disposal systems'.

We have demonstrated, in the above passages, that both individual claims and communal claims can be made for the provision of a basic service and that such claims are justiciable. If a province can intervene by imposing a financial recovery plan and, if need be, dismiss a municipal council that fails to provide basic municipal services,⁴⁵¹ then perhaps less drastic measures such as a court action should first be entertained. What should the test for judicial intervention be? Given that the required relief would be the provision of a particular service, the similarities with enforcing socio-economic rights are obvious. In interpreting the obligation to fulfil the socio-economic rights, as qualified with reference to reasonable measures, progressive realization and available resources, the Constitutional Court has crystallized a number of principles that delineate their reach.⁴⁵² First and foremost, there is no minimum core obligation that would entail the provision of a commodity.⁴⁵³ In both *Grootboom*⁴⁵⁴ and *Treatment Action Campaign*,⁴⁵⁵ the Court rejected arguments that an individual can claim a commodity such as shelter or

450 See Morne van der Linde & Ernst Basson 'Environment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 50.

451 FC s 139(5).

452 See Sandra Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6(2) *Law, Democracy and Development* 159, 189.

medical treatment. While it rejected the core content argument, the Court is willing to review the reasonableness of policies, legislation and other measures that are said to reflect the state's commitment to the discharge of socio-economic rights. Reasonableness review itself will be guided by the following criteria:⁴⁵⁶

- (a) There must be a comprehensive, coherent and coordinated programme to give effect to a right;
- (b) The programme must be capable of facilitating the realization of the right in the long run;
- (c) The programme must be reasonable in conception and implementation;
- (d) The programme must be able meet both short-, medium-, and long-term needs; and

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- (e) The programme must be able to provide relief for those in desperate circumstances, although not for individual relief.⁴⁵⁷

Given the Court's current approach, the reasonableness review of a municipal programme will likely be guided by similar criteria. Residents can expect from their municipality a programme to deliver a particular service that is comprehensive, coherent and coordinated. However, no one can claim relief in the form of an order of immediate implementation. A plaintiff can ask that the programme must be capable of facilitating the provision of the claimed service and that it would meet the short-, medium- and long-term needs of the community. Most importantly perhaps, and as close to a minimum core requirement as the Court has come, an applicant could ask a court to order a municipality to conceive of a programme that responds to members of a community in urgent need or in desperate circumstances.

(c) Realising socio-economic rights through service provision

453 But see *Mazibuko & Others v The City of Johannesburg & Others* [2008] ZAGPHC 128 (30 April 2008).

454 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

455 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721(CC), 2002 (10) BCLR 1033 (CC).

456 See Sandra Liebenberg 'Evolving Jurisprudence' (supra) at 171; Danie Brand 'Between Availability and Entitlement: The Constitution, *Grootboom* and the Right to Food' (2003) 7(1) *Law, Democracy and Development* 7, 7-10. See also David Bichitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A; Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; Anton Kok & Malcolm Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B.

457 This duty has been described by Brand as follows: 'On paper, a policy *may not leave out of account*, and must make *at least some* provision for those who, for what ever reason, whether temporarily or permanently, find themselves in dire straights regarding access to housing, food, water and health care services.' Brand (supra) at 8 (emphasis in the original).

A municipality's duties in relation to the realization of socio-economic rights are circumscribed by its defined areas of competence.⁴⁵⁸ The critical question for municipalities is whether there is an intersection between the socio-economic right and the particular functional area of a municipality. Two types of intersection can be identified. The first is a direct intersection where the realization of the right falls foursquare within a municipality's functional areas. In the second, the functional area does not cover the right directly but a municipality nevertheless plays an important contributory or supportive role in its realization.

In the first type of intersection the nature and the scope of a socio-economic right corresponds with a municipality's functional area or areas. The schedule 4B functional area of 'water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal system' intersects directly with the right of access to sufficient water. Local government is then responsible for the full spectrum of responsibilities to implement this right.⁴⁵⁹

In the second type of intersection, a socio-economic right does not directly overlap with a local government functional area, but the fulfillment of that right is dependent on local government playing a supportive role. For example, the right of access to housing does not directly intersect with any municipal functional area, but the Constitutional Court emphasized in *Grootboom* that all spheres of government 'must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions of the Constitution.'⁴⁶⁰

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The *Grootboom* Court noted, that '[e]ach sphere of government must accept responsibility for the implementation of particular parts of the [national housing] programme.'⁴⁶¹ The right to housing entails more than 'bricks and mortar' and includes 'appropriate services such as the provision of water and the removal of sewage'.⁴⁶² The particular parts of a national housing programme that a municipality must perform are thus the provision of water and sanitation.

(d) Method of providing services

The Final Constitution does not describe how municipal services should be delivered, but there is an indirect reference that the municipality need not be the actual provider. FC s 229(1)(a) authorizes a municipality to impose 'surcharge on fees for services provided *by or on behalf of the municipality*'. This phrase suggests that a municipality need not be the only institution or organ of state that is authorized to provide a service; some other institution or body may do so on its behalf. In the White Paper on Local Government one of the strategies for addressing the backlog in services was the use of the private sector to provide services on behalf of a

458 See Jaap de Visser, Edward Cottle & Johann Mettler 'Realising the Right of Access to Water: Pipe Dream or Watershed?' (2003) 7(1) *Law, Democracy and Development* 27, 29.

459 Ibid at 29.

460 *Grootboom* (supra) at para 82.

461 *Grootboom* (supra) at para 40.

462 Ibid at para 35.

municipality.⁴⁶³ This service provision could occur through partnerships with non-governmental organizations or contracting out to the private sector. The White Paper adopted, however, a neutral position. The paper favoured neither inhouse service provision nor externalising the services. Instead it presented a range of options from which a municipality could choose.⁴⁶⁴

The Systems Act has established an elaborate system for choosing a service provider, be it an inhouse service or an external provider.⁴⁶⁵ However, the details of the system have made the option of outsourcing services difficult to exercise. In addition, the MFMA has added further provisions and regulations where the use of an external service provider entails a public-private partnership.⁴⁶⁶ The inevitable conclusion is that the current system demonstrates a clear bias in favour of continuing to provide services through internal mechanisms; this result does not offend the policy position taken in the White Paper.⁴⁶⁷

(e) Reciprocal nature of providing services: duty to pay for consumption

(i) The power to charge fees

One of the objects of local government is 'to ensure the provision of services to communities in a *sustainable* manner'.⁴⁶⁸ Although the charging of fees for the

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so-called trading services (services where there is an identifiable consumer) is one of the long standing methods of generating municipal income,⁴⁶⁹ it has not been given the imprimatur of direct constitutional approval. However, the constitutionally entrenched right to impose a surcharge on fees for services provided by or on behalf to the municipality⁴⁷⁰ necessarily implies the constitutional power to charge fees for those services.⁴⁷¹ The basis of this power is best conceived as flowing from the

463 White Paper on Local Government (supra) at 97ff.

464 Ibid at 92, 101. See Victoria Johnson *Outsourcing Basic Municipal Services: Policy, Legislation and Contracts* (2005) (Unpublished LLM thesis, University of the Western Cape), 15.

465 See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 9-23-9-35.

466 Ibid at 9-35-9-42.

467 Johnson (supra) at 62.

468 FC s 152(1)(b) (emphasis added).

469 See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27, 27-10.

470 FC s 229(1)(a).

471 *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 71.

incidental power with regard to matters reasonably necessary for or incidental to the effective exercise of a schedule 4B or 5B competence.⁴⁷² This power is now forthrightly expressed in s 4(1)(c) of the Systems Act: a council has the right to 'finance the affairs of the municipality by (i) charging fees for services; and (ii) imposing surcharges'. In a 2002 amendment to the Systems Act this power has been made more explicit: a municipality has the power to levy and recover fees, charges or tariffs in respect of any function or service it provides.⁴⁷³

As the power to charge fees does not arise from FC s 229(1)(a) (the right to levy rates on property or a surcharge on fees) or FC s 229(1)(b) (any other tax authorized by national legislation), it does not fall under the regulatory regime envisaged in that section.⁴⁷⁴ The tariff set for the fees charged for services then falls to the discretion of the municipality. However, on the basis that the charging of fees is an incidental power flowing from the right to administer and to legislate on matters listed in schedules 4B and 5B, the national and provincial governments may regulate the exercise of such powers in terms of FC s 155(7).⁴⁷⁵ Such regulation is effected by the Systems Act which structures the setting of tariffs for service fees.⁴⁷⁶ The MFMA also assumes that the capping of tariffs is possible; a national or provincial organ of state may impose such measures in terms of national or provincial legislation.⁴⁷⁷ The question that follows is how is this proposition to be squared with the ability of a municipality to agree to a tariff increase with an external service provider which exceeds the cap?⁴⁷⁸ The MFMA's answer to the question is to provide that the capping of a tariff may not interfere with a municipality's long term contractual or debt obligations.⁴⁷⁹ If such obligations provide for an annual or periodic escalation of payments by the municipality, then the capping of the tariff does not apply. The imposition of an upper limit

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would impair the municipality's ability to meet the escalation of its payment under the contract.⁴⁸⁰ This is, of course, the only constitutional way out of the conundrum. Where a capping of a tariff would have infringed on a municipality's contractual obligations, it would be a prime example of a national organ of state falling foul of

472 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 438. See also Kriel & Monadjem (*supra*) at 27-10.

473 Systems Act s 75A(1)(a). See *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA) at para 15.

474 See § 22.5(d)(i) *infra*.

475 On the ambit of FC s 155(7) see § 22.3 *supra*.

476 Systems Act ss 74-75A.

477 MFMA s 43(1).

478 See Kriel & Monadjem (*supra*) at 27-11.

479 MFMA s 43(3).

480 MFMA s 43(3).

the basic principle of local autonomy. The national organ of state would be compromising or impeding the municipality's ability to exercise its powers.⁴⁸¹

(ii) The nature of the tariff setting

In *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Metropolitan Council & Others*, the Constitutional Court held that when a government, be it national, provincial or local,

exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power under our Constitution which is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation.⁴⁸²

Thus when the legislature raises revenue through the imposition of taxes and determines how such income is to be spent, it engages in a legislative act. Consequently, not being an administrative act, the levying of rates or the appropriation of revenue is not subject to administrative review. As the decision in *Fedsure* dealt with the narrow question of levying rates and the imposition of levies, the question of whether the determination of tariffs is also a legislative act is not answered. Kriel and Monadjem simply assume, on the basis of *Fedsure*, that 'tariff setting is a legislative act'.⁴⁸³ The underlying argument is that in as much as appropriations out of the revenue fund of a municipality are legislative acts, so must be all revenue-raising measures done in terms of legislation. A number of contradictions exist to this reading of *Fedsure*. First, *Fedsure* dealt with the Interim Constitution — where all revenue-raising powers (property rates, levies, fees, taxes and tariffs) were lumped together.⁴⁸⁴ The Final Constitution has made a clear distinction between the taxing powers and the power to charge fees. FC s 229 makes no mention of fees.⁴⁸⁵ Second, when the Constitutional Court asserted in the *First Certification Judgment* that provinces had the power to charge user fees in terms of an implied power, this power was described as the power 'to enact legislation authorising the imposition of user charges'.⁴⁸⁶ One might conclude that such legislation authorizes the setting of tariffs, and not the tariffs themselves. Third, FC s 160(2) requires only that the approval of the budget and the imposition of rates and other taxes, levies and duties must be determined by the council. It makes no reference to fees and tariffs. FC s 160(2) indicates that this decision may be delegated to another body.

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The question turns, it would seem, on whether there is any fundamental difference between raising revenue by fees and charges in terms of a tariff and levying rates, duties and levies. In our view there is a difference. The difference is that fees and tariffs relate to a business transaction where the intention is to recoup

481 FC s 151(4).

482 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*') at para 45.

483 Kriel & Monadjem (*supra*) at 27-12.

484 IC s 178(2).

485 See Kriel & Monadjem (*supra*) at 27-10.

486 *First Certification Judgment* (*supra*) at para 438 (emphasis added).

the cost of the service provided. For a municipality to function, tariffs must relate to the actual costs of providing a particular service.⁴⁸⁷ Rates and other taxes are fundamentally different. They are policy driven and not designed to fund a particular service. As long as there is legislation authorising the imposition of a service fee and a tariff policy that guides the determination of the tariffs, the actual tariff setting can be an administrative act undertaken on the basis of projected input costs. The Systems Act prescribes just such an arrangement. After adopting a policy on tariffs,⁴⁸⁸ the policy must be captured in a by-law.⁴⁸⁹ On the basis of such a by-law, then, the actual amounts of the tariffs are set by resolution passed by the supporting vote of a majority of the councillors.⁴⁹⁰ That tariff resolution, then, unlike that of a resolution setting rates,⁴⁹¹ is an administrative act.

(iii) The duty to charge fees?

The power to levy fees and tariffs for services rendered falls within the discretion of the municipality and gives effect to the constitutional principle that a municipality may govern on its 'own initiative'.⁴⁹² In *Rates Action Group v City of Cape Town* the applicants argued that where the cost of consumption of a service can be attributed to individual ratepayers, such costs should be recovered not through the imposition of property rates but through individualized service charges.⁴⁹³ Consequently, it was argued that the City's policy of charging for sewage and refuse removal in terms of both a consumption charge and a property rate was invalid. The High Court rejected the claim and made it clear that nothing in the Final Constitution or the Systems Act supported this contention.⁴⁹⁴ The Systems Act made it clear in the definition of a 'municipal service'⁴⁹⁵ that there is no obligation on a municipality to levy fees, charges or tariffs in respect of all the services it provides.⁴⁹⁶ The High Court concluded that the City was 'entitled to impose property rates to recover its costs in relation to services which it provides and it is also entitled to impose user charges. There is no reason why it may not do both.'⁴⁹⁷ The Supreme Court of Appeal likewise confirmed this approach.⁴⁹⁸ In sum, the Systems Act does not preclude the levying of a property rate as a general 'charge' for services.

487 Systems Act s 74(2)(d).

488 Systems Act s 74(1).

489 Systems Act s 75(1); Local Government: Municipal Property Rates Act 6 of 2004 s 6.

490 Systems Act s 75A(2).

491 See § 22.5(e)(iii) *infra*.

492 FC s 151(3).

493 *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) ('*Rates Action Group HC*').

494 *Ibid* at para 56.

495 Systems Act s 1(1).

496 *Rates Action Group HC* (*supra*) at para 58.

497 *Ibid* at para 76.

(iv) Duty to pay fees

The duty of residents to pay for the services they receive corresponds to the right of communities to basic services.⁴⁹⁹ While the Final Constitution is silent on the imposition of any such duty, the Systems Act has made it explicit. In as much as members of the local community have a right 'to have access to municipal services', there is also the corresponding duty of payment for such services.⁵⁰⁰ The Systems Act thus provides that members of the local community have a duty, where applicable, 'to pay promptly services fees [and] surcharges on fees' that the municipality may impose.⁵⁰¹ Such a duty is, however, subject to the municipality's credit control and debt collection policy: that policy must make provision for indigent debtors.⁵⁰²

The Constitutional Court has taken a dim view of residents who fail to pay for services as a political stratagem out of protest against poor service delivery. The 'culture of non-payment' that existed before 1994 the Constitutional Court has explained as 'political protest against discriminatory policies under apartheid and an expression of dissatisfaction regarding the low standard of services which were provided.'⁵⁰³ After 1994 whites, the main beneficiaries of apartheid, also sought to ventilate grievances about services through the withholding of payment for services.⁵⁰⁴ For Langa DP, as he then was, non-payment was a practice that had 'no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights.'⁵⁰⁵ Langa DP nudges the Court towards articulating a reciprocal duty between the resident and the municipality in the following terms:

Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a government structure were to take the law into their own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the

498 *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA).

499 See further Steytler & De Visser (supra) at 9-45ff.

500 Systems Act s (1)(g) with reference to Act s 5(2)(b).

501 Systems Act s 5(2)(b).

502 Systems Act s 5(2)(b) read with s 97(1)(c).

503 *City of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) ('Walker') at para 92.

504 See, for example, *Walker* (supra); *Senekal Inwonersvereniging en 'n Ander v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O).

505 *Walker* (supra) at para 92.

systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable.⁵⁰⁶

Where a council charges a fee for a service, the question that inevitably comes to the fore in a country with massive income disparities is how to provide services to millions of people living in poverty. From a constitutional perspective, the

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question is whether there is a principle that instructs municipalities to accommodate the indigent by providing services even when they cannot pay for them. This principle is recognized in our statutes. The obligatory tariff policy must reflect the principle that 'poor households must have access to at least basic services'.⁵⁰⁷ This policy can be achieved by setting tariffs that cover only operating and maintenance costs, 'life line tariffs for low level of use or consumption of services or for basic level of services', or other direct or indirect methods of subsidization for poor households.⁵⁰⁸ The focus is again on 'basic services' and the constitutional basis can be twofold: a socio-economic rights basis or a community right basis.

(v) Duty to collect debts and the constitutionality of enforcement mechanisms

In order to provide 'sustainable service', a municipality is under an obligation to collect fees that are due. This obligation, which is implicit in the Final Constitution, has been expressly articulated by the Constitutional Court. Given the ever rising debt burden of municipalities, Yacoob J emphasized in *Mkontwana* that it is 'imperative for municipalities to do everything reasonable to reduce the amounts owing, [o]therwise, the sustainability of the delivery of municipal services is likely to be in real jeopardy'.⁵⁰⁹ In a similar vein, O'Regan J said that 'municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt'.⁵¹⁰

The Systems Act equips municipalities with a range of measures to enforce payment of fees due, including the termination or restriction of the provision of services.⁵¹¹ These measures, the Constitutional Court said, should be used by municipalities to guard against an unreasonable accumulation of outstanding consumption charges: 'The municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps for the collection of amounts

506 Ibid at para 93.

507 Systems Act s 74(2)(c).

508 Systems Act s 74(2)(c).

509 *Mkontwana v Nelson Mandela Metropolitan Municipality & Another, & Other Cases* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) ('*Mkontwana*') at para 62.

510 Ibid at para 124.

511 Systems Act s 102(1)(c) read with s 97(1)(g).

due.⁵¹² A further measure is a temporary delay in the transfer of property where there are unpaid service charges.⁵¹³

Where the municipal service that is to be terminated or restricted has a socio-economic rights dimension, constitutional issues come to the fore.⁵¹⁴ In *Residents of Bon Vista v Southern Metropolitan Local Municipality*,⁵¹⁵ the applicants challenged the

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threatened termination of their water supply by the municipality as a violation of the right of access to adequate water. The question was whether the municipality was in breach of its duty to respect the applicants' rights of access to water by disconnecting their existing water supply. Budlender AJ held that the act of disconnection was *prima facie* in breach of the council's constitutional duty to respect the community's existing right of access to water.⁵¹⁶ However, such a deprivation may be justified in terms of FC s 36 — assuming that the deprivation occurred in terms of a law of general application. The onus then falls on the council to justify the deprivation. The Water Services Act provides that a service provider must set the conditions in terms of which water services may be provided: including the circumstances and procedures for limiting or discontinuing them.⁵¹⁷ However, this procedure must be 'fair and equitable' and provide for reasonable notice of the intention to limit or to discontinue the water services and for an opportunity to make representation.⁵¹⁸ Furthermore, the procedure may 'not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.'⁵¹⁹ Because of the latter requirement, a genuine opportunity to make representations must be afforded before a person is denied access to water because of the inability to pay for such services.⁵²⁰

A mandatory enforcement mechanism of many years standing has been the preferential claim for outstanding rates, taxes and fees when property ownership is sought to be transferred.⁵²¹ Section 118(1) of the Systems Act places a temporary

512 *Mkontwana* (supra) at para 47 (Yacoob J). The Court also wrote: 'The municipality must comply with its duties and take reasonable steps to collect amounts that are due.' Ibid at 49.

513 Systems Act s 118(1).

514 See Steytler & De Visser (supra) at 9-53.

515 2002 (6) BCLR 625 (W) ('*Bona Vista*').

516 *Bona Vista* (supra) at para 20

517 Act 108 of 1997.

518 Water Services Act s 4(3)(a) and (b). These procedural requirements do not apply where other consumers would be prejudiced, there is an emergency situation, or the consumer has interfered

519 Water Services Act s 4(3)(c).

520 *Bona Vista* (supra) at para 26.

521 See Steytler & De Visser (supra) at 9-54.

restriction on the ability of an owner of property to alienate that property if there are outstanding charges owed to the municipality. A registrar of deeds may not register the transfer of property unless the municipality issues a certificate stating that 'all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies, and duties during the two years preceding the date of the application for the certificate have been fully paid.'⁵²²

In *Mkontwana*, the Constitutional Court held that the charges 'in connection with' the property are not confined to those incurred by the owner only, but apply also to the charges of all occupiers of the property.⁵²³ The effect of the provision is that where the owner of a property wants to transfer the property to another

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person, all outstanding charges on the property for the two-year period must be paid before transfer can take place, including those charges incurred by occupiers other than the owner. The constitutionality of s 118(1) was thus contested as being a violation of the right to property as enshrined in FC s 25(1). The South Eastern Cape Local Division of the High Court declared the provision inconsistent with FC s 25(1) because the section permitted an arbitrary deprivation of property.⁵²⁴ This view was not shared by the Natal High Court.⁵²⁵

Having found that the requirement of a certificate as a precondition for transfer constituted a deprivation, albeit it temporary, of property within the meaning of FC s 25(1), the Constitutional Court addressed the question as to whether the deprivation contained in s 118(1) was arbitrary. A law is arbitrary when it fails to provide 'sufficient reason' for the deprivation or is procedurally unfair. The sufficiency of the reason for a permitted deprivation entails the evaluation of the relationship between the purpose of the law and the deprivation effected by that law.⁵²⁶ If the purpose bears no relationship to the property or owner, then the law is arbitrary.⁵²⁷ There must be a relationship between the means and the end; the more invasive the deprivation, the closer the relationship between the means and the end must be.⁵²⁸

For the *Mkontwana* Court, the object of s 118(1) was the furnishing of a form of security to municipalities for the payment of amounts due in respect of consumption

522 Systems Act s 118(1)(b).

523 *Mkontwana* (supra) at paras 30-31.

524 *Mkontwana* (supra) at para 3.

525 *Geyser & Another v Msunduzi Municipality & Others* 2003 (5) SA 18 (N), 2003 (3) BCLR 235 (N).

526 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 100; *Mkontwana* (supra) at para 34. See, generally, Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46, § 46.5.

527 *Mkontwana* (supra) at para 34.

528 *Ibid* at para 34.

charges.⁵²⁹ It effectively places the risk — when non-owner occupiers fail to pay consumption charges — on the owner rather than on the municipality. The Court found that this purpose was 'important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge of municipalities of their constitutional mandated functions.'⁵³⁰ In addition, the measure had 'the potential to encourage owners of property to discharge their civic responsibility by doing what they can to ensure that money payable to a government organ for the delivery of services is timeously paid.'⁵³¹

Because the consumption of electricity and water on the property is part and parcel of the enjoyment of the occupation of the property, a close relationship exists between deprivation of the property and the consumption charges.⁵³² This relationship applies irrespective of the status of the occupiers, be they tenants,

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persons exercising rights of usufruct, or *fideicommissum*, squatters or other unlawful occupiers. Even in the case of unlawful occupiers, the Court said that it is the duty of owners to safeguard their property by taking reasonable steps to ensure that it is not unlawfully occupied,⁵³³ and given the available measures of evictions, the owner should bear the risk of the unpaid consumer charges by such occupiers.

However, the assertion that s 118(1) entailed an unfair procedure — because there was no obligation on the municipality to keep property owners informed of the amounts owing by occupiers at reasonable intervals when this is requested by owners in writing — met with some success. The Court held that '[f]airness requires that a municipality provide an owner of property with copies of all accounts if the owner requests them.'⁵³⁴

Having s 118(1) as a lever for extracting charges from owners, the Court stressed, did not relieve a municipality from its duty to collect consumption charges. A failure to do so, the Court warned, could lead to the municipality's liability for the delictual damages if its inefficiency to collect charges amounted to negligence that occasioned damage to property owners.⁵³⁵

22.5 Municipal revenue raising powers

(a) Introduction

529 Ibid at para 38.

530 Ibid at para 38.

531 Ibid at para 38.

532 Ibid at para 39.

533 *Mkontwana* (supra) at para 59.

534 Ibid at para 67.

535 Ibid at para 62. O'Regan J noted: 'Should a municipality not perform its statutory or constitutional obligations [of recovering debt], appropriate relief should be sought.' Ibid at para 124.

A major component of local government's ability to govern on its own initiative is that municipalities have significant original revenue-raising powers entrenched in the Final Constitution.⁵³⁶ Unlike provincial governments, which are almost exclusively dependent on national transfers to fund their functioning,⁵³⁷ municipalities are by and large self-sustainable. They raise, on average, 76 percent of their revenue.⁵³⁸ That said, local government is also dependent to varying degrees on national transfers to sustain their activities.⁵³⁹

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The principal sources of revenue for municipalities are service fees, rates on property, surcharges on service fees, other taxes and duties and transfers. Service fees — mainly for electricity and water — make up 38 percent of income on average, property rates 18 percent, other charges, taxes, duties and levies 30 percent and transfers 14 percent. Of the transfers, two thirds was contributed by local government's equitable share of revenue raised nationally and a third from conditional grants.⁵⁴⁰ An additional source of income — mainly for the large metropolitan municipalities — is borrowing in the open market.⁵⁴¹

The source of local government's fiscal prowess lies in FC s 229. FC s 229 entitles municipalities to impose rates on property and surcharges on fees for services, and, if authorized by national legislation, other taxes, levies and duties 'appropriate to local government'. Excluded from the latter category are income tax, value-added tax, general sales tax and customs duty.⁵⁴² The power to levy property rates and user surcharges is subject to the general limitation that it may not be exercised 'in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour' and may be regulated by national legislation.⁵⁴³ Local government is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.⁵⁴⁴

536 See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27.

537 National Treasury *Provincial Budgets and Expenditure Review 2003/04-2009/10* (2007) 4.

538 National Treasury *Local Government Budgets and Expenditure Review 2001/02-2007/08* (2006) tables 2.1 and 2.2.

539 Philip van Ryneveld 'The Development of Policy on the Financing of Municipalities' in Udesch Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 157, 160; Dave Savage 'Key Themes and Trends in Municipal Finance in South Africa' in Mirjam van Donk, Mark Swilling, Edgar Pieterse & Susan Parnell (eds) *Consolidating Local Government: Lessons from the South African Experience* (2008) 285, 297-299.

540 National Treasury *Local Government Budgets* (supra) at 8.

541 Ibid at 17. See further Savage (supra) at 306.

542 FC s 229(1).

543 FC s 229(2).

Municipalities may also receive conditional grants from the national government.⁵⁴⁵ Finally, a municipality's borrowing powers are governed by FC s 230A.

(b) Fiscal powers and responsibility for financial health

What is distinctive about local government's revenue streams is that most of the income is derived from municipalities' own efforts of charging and collecting fees and taxes. The entitlement to an equitable share of revenue-raised nationally serves only as a supplementary income (although in the poorer municipalities it constitutes the bulk of income). One leitmotif of the Final Constitution is that a municipality's access to significant sources of revenue is accompanied by the responsibility for its own financial health.⁵⁴⁶ Municipalities must exploit the direct access given to significant revenue streams of rates and surcharges on fees. The comfortable situation of relying on the national government to provide the necessary funding, while their own taxing sources lie fallow, is not to be tolerated. FC s 227(2) provides that there is no obligation on national government 'to compensate . . . municipalities that do not raise revenue commensurate with their fiscal

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capacity and tax base'. This provision enforces the notion of local accountability: residents taxed by their own municipality are more likely to demand from their civic leaders to account for spending of their taxes. Conversely, municipalities receiving transfers from the national government for the bulk of their income may fail to be accountable to their residents and place the responsibility for a lack of services on national government.⁵⁴⁷

Having access to a variety of revenue streams should enable municipalities to balance their books. In this endeavour the constitutional principle is that revenue must be real, rather than borrowed. Kriel and Monadjem argue convincingly that the limitation on short-term borrowing only for bridging purposes and long-term debt only for capital projects⁵⁴⁸ means that a municipality cannot borrow to cover a deficit in its current expenditure.⁵⁴⁹ This limitation sets many municipalities up for financial failure: they will not be able to pay accounts due if funds do not come from sources other than debt. Moreover, the national or provincial governments are not standing in as guarantors for municipal debt. If municipal 'insolvency' does occur, FC s 139

544 FC s 227(1).

545 FC s 227(1)(b).

546 See Robert Cameron 'Central-local Financial Relations in South Africa' (2002) 28 *Local Government Studies* 113, 122.

547 Savage observes that the growth of municipal reliance on intergovernmental grants 'increasingly blur lines of accountability to citizens as "the point of origin and destination of funds do not match", which can create ambiguities about the actual expenditure preferences of residents.' Savage (*supra*) at 295 (reference omitted).

548 FC s 230A.

549 Ross Kriel & Mona Monadjem 'Public Finance' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27, 27-35.

provides the out: the mandatory intervention by the provincial executive where a municipality either fails to approve the necessary revenue-raising measures to give effect to its budget,⁵⁵⁰ or where the municipality fails to meet its financial commitments.⁵⁵¹ The MFMA, in turn, states that where a municipality fails to meet its financial commitments, a provincial intervention must take place and the municipality may approach a court to terminate its financial obligations to its creditors.⁵⁵²

The constitutional principle of financial responsibility has also been enforced by the courts. First, the Supreme Court of Appeal has ruled that there is no implicit guarantee that the national or provincial government will step in as guarantor of a local debt.⁵⁵³ In *MEC for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union (IMATU)*, a municipality was not able to meet its salary commitments to employees due to its dire financial position.⁵⁵⁴ Acting on

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the knowledge that the municipality could not meet any claim, IMATU, the trade union acting on behalf of its members, sought an order against the provincial government to effect payment of the amounts due. Their claim was based on FC ss 139 and 154. The Court found that FC s 139 (as it then read)⁵⁵⁵ was not applicable: a province's decision to intervene in a municipality lay within the province's discretion. FC s 154, imposing a duty on national and provincial government to support and strengthen the capacity of municipalities,⁵⁵⁶ was also not of assistance. Assuming a court could order a province to support and strengthen a municipality, the Court held that the duty to support does not entail providing security for unpaid debts. The MFMA confirms this approach. MFMA s 51 explicitly provides that the national or provincial government guarantees a debt of any municipality only to the extent provided in chapter 8 of the Public Finance Management Act.

Failure to meet its financial commitment may further lead to the eventual attachment of municipal property to satisfy creditors' claims. Where judgment is given against a municipality, a private party may execute the judgment by means of the usual civil remedies, including the attachment and the sale in execution of municipal assets. In *Mateis v Plaaslike Munisipaliteit Ngwathe & Andere*⁵⁵⁷ the

550 FC s 139(4).

551 FC s 139(5).

552 See Steytler & De Visser (supra) at 15-51.

553 See Public Finance Management Act ss 66 and 77 on the issuing of guarantees by the national and provincial governments.

554 2002 (1) SA 76 (SCA).

555 See § 22.6(a)(i) infra.

556 See § 22.6(b)(ii) infra.

557 2003 (4) SA 361 (SCA).

Supreme Court of Appeal held that a municipality was not covered by the State Liability Act, because the Act only gives the national or provincial government immunity from attachment.⁵⁵⁸ While the Supreme Court of Appeal is correct that the Act, dating from 1957, makes no mention of municipalities, the elevation of local government to a sphere of government in the Final Constitution places the Act at odds with the new constitutional dispensation. The *Mateis* Court could have read the Act so that local government is, for the purposes of the Act, to be regarded as forming part of the state.

No correction of the State Liability Act followed. Instead the MFMA, adopted after *Mateis*, sought a compromise — only non-core assets are subject to liquidation. As it is not a viable option to liquidate municipalities which must continue to deliver basic municipal services, there should be a limit to the extent that a monetary claim can be recovered by liquidating municipal assets. The MFMA establishes the general principle that where a municipality cannot meet its financial commitments, assets not necessary for the delivery of basic services may be liquidated in order to pay creditors. Where a municipality seeks debt relief in terms of the MFMA, it may only liquidate non-core assets.⁵⁵⁹ Non-core assets

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are defined as assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services. Given this limitation on a municipality's power to meet its financial obligations, a creditor should have no greater powers of liquidating municipal assets through attachment and sale in execution.

(c) Constitutional nature of the revenue-raising powers

(i) Original powers⁵⁶⁰

The power of a municipality to impose a rate on property or a surcharge on user fees stems from the Constitution⁵⁶¹ and can thus be described in terms of the Constitutional Court's jurisprudence as an 'original' power.⁵⁶² In contrast, before the Interim Constitution, all municipal powers, including the rating power, were 'delegated' powers conferred on a local authority by another organ of state.⁵⁶³ The new status of local government, first recognized by the Constitutional Court in

558 State Liability Act 20 of 1957 s 3. After the writing of this chapter, the Constitutional Court declared s 3 of the State Liability Act unconstitutional. *Nyathi v MEC for Department of Health, Gauteng & Another* [2008] ZACC 8 (2 June 2008).

559 MFMA s 154.

560 See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 13-6; Kriel & Monadjem (supra).

561 *City of Cape Town v Robertson* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) ('*Robertson*') at para 62; *CDA Boerdery (Edms) Bpk & 'n ander v Nelson Mandela Metropolitaanse Munisipaliteit en andere* [2005] JOL 14785 (SE) ('*CDA Boerdery SE*') at para 6.

562 *Robertson* (supra) at para 56.

563 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*') at para 39.

Fedsure in terms of the Interim Constitution, has thus been strengthened by the revenue raising powers found in the Final Constitution.

As an original power, a municipality's power to levy rates or impose a surcharge is not dependent on enabling national legislation. This power sets it apart from a province's comparable power which, in terms of FC s 228(2)(b), must be regulated in terms of an Act of Parliament. In the absence of national legislation, a municipality may, on the basis of FC 229(1)(a) alone, levy rates and impose surcharges. The Constitutional Court thus stated: 'Now the conduct of a municipality is not always invalid only for the reason that no legislation authorizes it. Its power may derive from the Constitution or from legislation or a competent authority [national government] or from its own laws.'⁵⁶⁴

(ii) Legislative powers⁵⁶⁵

The exercise of the power to impose rates and taxes, the Constitutional Court held in *Fedsure*,⁵⁶⁶ constituted a legislative act:

It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds,

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it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation.⁵⁶⁷

The fact that the setting of rates is a legislative act does not imply, however, that such act is unbounded. The Constitutional Court emphasized in *Fedsure* that a council is still bound by the principle of legality, a core element of the foundational constitutional commitment to the rule of law.⁵⁶⁸ The principle of legality requires that a council functions in terms of the Final Constitution and the constraints it imposes on the local government, and that any legislation is legitimately adopted in terms of the Final Constitution. To the extent that a local government acts 'in breach of one of the direct and mandatory provisions of chapter 10 [of the Interim Constitution relating to local government] it is clear that that infringement will be in breach of the Constitution and subject to constitutional challenge.'⁵⁶⁹ The same principle applies to relevant regulatory provisions imposed constitutionally by the national legislature or provincial legislatures.⁵⁷⁰ In addition, any legislative act of a council, including the setting of rates, must be consistent with the Bill of Rights.⁵⁷¹

564 *Robertson* (supra) at para 60.

565 See *Steytler & De Visser* (supra) at 13-7.

566 *Fedsure* (supra) at para 53-59. See also *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at para 17. See also § 22.3(a) supra.

567 *Fedsure* (supra) at para 45.

568 *Ibid* at para 56. See also *CDA Boerdery SE* (supra) at para 6.

569 *Fedsure* (supra) at para 53.

The proposition that the imposition of taxes is a legislative act also necessitated changes to the rules for the supervision of municipalities. In its initial form, FC s 139 confined provincial intervention in a municipality only to the non-fulfilment of an *executive* obligation.⁵⁷² The statutory failure to impose a budget and taxes to meet the budget thus fell outside the scope of provincial intervention. To meet this failure in municipal governance, the Final Constitution was amended to mandate an intervention where a municipality fails to pass a budget or to impose sufficient revenue-raising measures.⁵⁷³

As the legislative acts of approving a budget and imposing revenue-raising measures lies at the heart of municipal governance, they are functions that only the municipal council may perform. FC s 160(2) thus determines that such functions as approving a budget, imposing rates and other taxes, levies and duties and raising loans may not be delegated by a municipal council. Moreover, given the importance of the function, these decisions must be taken by a municipal council with the supporting vote of a majority of council members.⁵⁷⁴

(iii) Division of powers between district and local municipalities

Because jurisdiction is shared by district and local municipalities in non-metropolitan areas, the fiscal powers and functions must also be divided among the

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two. The Final Constitution thus requires that 'an appropriate division' of these powers be made in terms of national legislation.⁵⁷⁵ This division may be made after Parliament has taken into account at least the following criteria:⁵⁷⁶

- (a) the need to comply with sound principles of taxation;
- (b) the powers and functions performed by each municipality;
- (c) the fiscal capacity of each municipality;
- (d) the effectiveness and efficiency of raising taxes, levies and duties; and
- (e) equity.

The first criterion deals with general principles of sound taxation that should include the avoidance of double taxation. In the case of property rates, the Local Government: Municipal Property Rates Act has allocated this power to local

570 Ibid at para 53

571 Ibid at para 54.

572 See further § 22.6(d) *infra*.

573 See further § 22.6(e) *infra*.

574 FC s 160(3). See § 22.2(c) *infra*.

575 FC s 229(3).

576 FC s 229(3).

municipalities, allowing districts to impose rates only on those areas falling outside the jurisdiction of local municipalities, namely district management areas.⁵⁷⁷ The second criterion follows on the division of functions; where a district municipality is the direct service provider to end-users, such as water and sanitation, the power to impose a surcharge should flow from the power to charge fees for services rendered. The third criterion introduces a measure of flexibility; the legislation should be flexible enough to allow for differentiation between municipalities. Such flexibility suggests a certain degree of executive discretion in accommodating fiscal capacity. Whereas fiscal capacity relates to the available revenue base, the next criterion seeks to accommodate the skill and the capacity of a municipality to collect taxes. Again, this criterion promotes individualized assessment. The last criterion is a broad all-encompassing consideration. The term 'equity' is used in the Final Constitution to denote fairness in the allocation of resources as judged from the perspective of need.⁵⁷⁸ However, a strict division of powers is not necessary. The Final Constitution explicitly provides that '[n]othing in this section precludes the sharing of revenue raised in terms of [FC s 229] between municipalities that have fiscal power and functions in the same area.'⁵⁷⁹ This provision allowed the district municipalities to share the RSC levies they collected in the district with the local municipalities. In terms of the Municipal Fiscal Powers and Functions Act, the Minister of Finance may make regulations regarding an appropriate division of fiscal powers and functions between district and local municipalities having the same fiscal powers and functions with regard to the same area.⁵⁸⁰

(iv) Discretionary powers

As we have noted, the power to impose taxes is an 'original power': it grants a municipality the authority to decide how and when to exercise the power. The

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decision not to impose taxes is constrained by the need to raise sufficient income to balance the budget. A failure to balance the budget may lead to a provincial intervention in terms of FC s 139. Where a municipality does not fulfil an obligation in terms of the Constitution or legislation to approve any 'revenue-raising measures necessary to give effect to the budget', the provincial executive is obliged to intervene, including taking the necessary steps to ensure that those revenue-raising measures are taken.⁵⁸¹

How the municipality balances its books through the use of its revenue-raising powers falls to the discretion of the municipality. Budlender AJ's view is that there is no principle of law that a property rate could not be charged to cover the cost of services where the costs of consumption of the service can be attributed to

577 Act 6 of 2004 s 2(2)(a).

578 See Nico Steytler 'Public Funding of Represented Political Parties Act 103 of 1997 and the Implementation of section 236 of the 1996 Constitution' (1998) 2 *Law, Democracy and Development* 243.

579 FC s 229(4).

580 Act 12 of 2007 s 10(1)(b).

581 FC s 139(4). See further § 22.6(e) *infra*.

individual ratepayers.⁵⁸² This assumption is given further expression in the Systems Act. The definition of a municipal service makes it clear that a municipality is not obliged to levy fees, charges or tariffs in respect of the services it provides.⁵⁸³ A municipality therefore has a choice as to whether to recover costs of a service through levying rates or charging service fees.

(v) Authorization of further taxing powers

In terms of FC s 229(1)(b) a municipality's access to other taxes may be authorized by national legislation. However, such a tax falls within in the discretion of the national government; there is no constitutional claim that the national government must give such authorization. This position is apparent when contrasted with the taxing powers of provinces. In terms of FC s 228(1), a province may impose taxes, levies and duties (excluding some taxes and duties) and a flat-rate surcharge on some national taxes. This power cannot be exercised in the absence of some regulatory national legislation.⁵⁸⁴ However, one could argue that the national government is under a constitutional obligation to provide such regulatory legislation. It cannot deny a province its constitutional taxing power by simply failing to adopt such legislation. In contrast, a municipality cannot claim that it is entitled to any additional taxing powers. The language of the Final Constitution is clear: only 'if authorized' does the taxing power arise.

It may be further argued that the national government must exercise its discretion in a rational way. Where local government is starved of resources with ever increasing obligations to provide basic services (and especially free basic services to the indigent⁵⁸⁵), a blanket refusal to authorize further taxes may be tested against the criterion of rationality. Where authority for a new tax is given in national legislation, the detail of such taxing powers may be further regulated in that legislation.⁵⁸⁶ As we will argue below, such regulations should allow some

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scope for municipalities to determine the contours of such taxes. The national government does not have the authority to grant additional taxing powers to local government (e.g., to charge income tax, value-added tax, general sale's tax or customs duty.)⁵⁸⁷

582 *Ratepayers Action Group v City of Cape Town* 2004 (12) BLCR 1328 (C) at para 56.

583 Systems Act s 1(1) 'municipal service'.

584 FC s 228(2)(b).

585 On the government policy of free basic services, see Tim Mosdell 'Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa' in Udesch Pillay, Richard Tomlinson & Jacques de Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 283.

586 FC s 229(2)(b).

587 FC s 229(1)(b). The broad rubric of 'income tax' encompasses both personal income tax and corporate income tax. The reference to value-added tax and general sale's tax deals with consumer taxes at the point of sale or production. Customs duties refer to the levying of a tax or duty on the importation or exportation of goods or services.

(d) Supervision of the exercise of a municipality's revenue-raising powers

The exercise by a municipality of its revenue-raising powers is subject to supervision by both the national government and provincial governments. At the national level, a regulatory framework may be provided for the exercise of 'original' taxing powers. Such a framework should, however, be informed by intergovernmental relations. However, national or provincial intervention may still occur when the manner in which the power exercised falls foul of the normative framework provided in the Final Constitution.

(i) Regulatory framework

The supervisory power of the national government is restricted to regulating the power to impose rates on property, surcharges or any other authorized tax, levy or duty. The Constitutional Court has accepted that the ordinary meaning of the word 'regulate' connotes 'a broad managing or controlling rather than direct authorization function.'⁵⁸⁸ In exercising its regulatory function, Parliament is not at liberty to impose any type of limit or restriction on municipal powers to levy rates. Any prescription that compromises or impedes a municipality's ability to discharge its powers or to perform its functions is inconsistent with FC s 151(4) and thus open to constitutional challenge.

The regulatory framework for property rates is provided by the Local Government: Municipal Property Rates Act of 2004 ('Rates Act').⁵⁸⁹ The surcharges and other authorized taxes, levies and duties are now governed by the Municipal Fiscal Powers and Functions Act of 2007 (MFPFA).⁵⁹⁰ Given that most aspects of municipal revenue raising are now governed by new order national legislation, the relevance of old order provincial ordinances has largely become moot. It has been argued that in terms of FC Chapter 13, provincial legislatures are no longer competent to deal with the regulation of municipal finances and thus provincial ordinances regulating the area were impliedly repealed.⁵⁹¹ Such a view of the constitutionality of provincial ordinances has not been supported by our courts. The

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courts generally ask not whether an entire old ordinance or new ordinance is invalid, but rather whether specific aspects of the ordinance in question undermine the Final Constitution's treatment of local government as an autonomous sphere of government.⁵⁹²

588 *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 377. For a discussion on the regulatory framework of FC s 155(7), see § 22.3(d) supra.

589 Act 6 of 2004.

590 Act 12 of 2007.

591 Kriel & Monadjem (supra) at 27-46.

592 Provincial ordinances could exist side by side with the LGTA and were not repealed by implication by the LGTA. *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) at paras 44-48; *Howick v uMngeni Municipality* [2005] JOL 13714 (N) 7. See also *CDA Boerdery SE* (supra) at para 11.

In *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality & Others*,⁵⁹³ the High Court was confronted with a provision in the Cape Provincial Ordinance⁵⁹⁴ that required the permission of the provincial administrator (now premier) before a rate over two cents in the Rand could be imposed. Froneman J found that requiring the premier of a province to give such approval was inimical to the new constitutional dispensation: the Final Constitution clearly grants a municipality power to impose a rate.⁵⁹⁵ The Supreme Court of Appeal agreed.⁵⁹⁶ In the majority judgment,⁵⁹⁷ Cameron JA held that, in view of the new status of local government in terms of the Final Constitution, the requirement of obtaining the Premier's permission was impliedly repealed when s 10G of the Local Government Transition Act ('LGTA')⁵⁹⁸ was enacted after the IC took effect and when s 10G was re-enacted after the FC took effect.⁵⁹⁹ The approval requirement was a product of the pre-1994 dispensation, 'tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them.'⁶⁰⁰ Under the Final Constitution, the judge continued, the Premier enjoys no 'special supervisory powers over the exercise of local government functions, or special duties in relation to the determination of rates.'⁶⁰¹

As the phasing in of the new order legislation is completed, old order provincial ordinances are either explicitly or by implication repealed. The focus of attention has shifted to the nature and the approach of the new order national legislation. Courts will ask whether the manner in which municipal finances are regulated overreaches constitutionally mandated parameters. We will return to questions of regulatory overreach when dealing with rates, surcharges and other taxes below.

(ii) Procedure for adoption

Before national legislation is enacted authorizing additional taxing powers or providing a regulatory framework, the Financial and Fiscal Commission (FFC)⁶⁰²

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593 *CDA Boerdery SE* (supra).

594 Ordinance 20 of 1974 (Cape) s 82(1).

595 *CDA Boerdery SE* (supra) at para 11.

596 *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007

597 Conradie JA, in his minority judgment, argued that during the transition period no untrammelled rating powers were conferred on municipalities, thus retaining the premier's power to grant

598 Act 209 of 1993.

599 *CDA Boerdery* (supra) at para 44.

600 *Ibid* at para 35.

601 *Ibid* at para 40.

602 See generally Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27, 27-51ff.

and organized local government must have been consulted and any recommendations of the Commission must have been considered.⁶⁰³ The object of consultation with the FFC is to obtain objective expert advice from a body that is concerned with intergovernmental fiscal relations. The duty to consult organized local government flows from the principle of co-operative government that when legislation affecting local government is considered, the latter's view on the matter must be sought.⁶⁰⁴

The duty to consult defines the form and the process of the legislative process and failure to comply with this duty may lead to the invalidation of the legislation. In *Robertson v City of Cape Town & Another; Truman-Baker v City of Cape Town*, the applicants argued that the Structures Amendment Act,⁶⁰⁵ containing a provision dealing with a municipality's fiscal powers, was invalid because there was no consultation with the FFC.⁶⁰⁶ The Cape High Court agreed. It held that since the amended section of the Structures Act was legislation envisaged by FC s 229(5),⁶⁰⁷ consultation was required. Parliament did not request the FFC's comment on the draft provision in question, and the FCC could not, as required, formulate a response. Because consultation is a bi-lateral process, no consultation took place.⁶⁰⁸ The High Court concluded that the law was not passed in a manner consistent with the Final Constitution and was thus invalid. In the confirmation hearing, the Constitutional Court held that the impugned legislation served only to clarify the law and thus did not invoke the consultation requirement of FC s 229(5). It thus declined to consider the constitutionality of the legislation with regard to the manner and the form of its adoption.⁶⁰⁹

The consultation process raises a number of questions. First, what bodies must consult with the FFC and organized local government? In *Robertson*, the challenge was based on Parliament's failure to consult with the FFC. Would it have mattered if the National Treasury had consulted with the FFC before the bill was tabled in Parliament? We would argue that the body consulting with the FFC is not outcome determinative. The answer to the question of whether proper consultation has occurred should, as the Constitutional Court noted, turn on the substance of the legislation. The general consultation duty in FC 154(2) suggests that legislation that affects the status, the institutions, the powers or the functions of local government must be published — as draft legislation — for public comment *before* it is introduced in Parliament. FC 154(2) contemplates a process that affords organized local government and the FCC, among other interested

603 FC s 229(5).

604 See FC s 154(1) and § 22.7(d) *infra*.

605 Act 51 of 2002, amending s 93 of the Structures Act by adding a number of subsections dealing with provisions of LGTA s 10G(6) pertaining to the imposition of property rates.

606 2004 (5) SA 412 (C), 2004 (9) BCLR 950 (C) ('*Robertson HC*').

607 *Robertson HC* (*supra*) at para 93.

608 *Ibid* at para 109.

609 *City of Cape Town & Another v Robertson & Another* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) at paras 76-77.

parties, the opportunity to make representations regarding the substance of the bill. If substantive provisions of the bill are changed in Parliament after the consultation process (and not as a result of the consultation), then a further round of consultation should follow. FC 154(2)'s object is to ensure that these two stakeholders — amongst others — can comment on the substantive provisions of the bill.

The duty of consultation required by FC s 229(5) is more onerous than the general consultation process demanded by FC s 154(2). While the latter provision merely requires that stakeholders be afforded the opportunity to make representations (which they may or may not avail themselves of), consultation in terms of FC 229(5) entails an approach that requires the views of the stakeholders to be actively sought out. The definition of consultation in the Intergovernmental Relations Framework Act (IGRFA) is instructive in this regard: consultation 'means a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.'⁶¹⁰ The emphasis falls on the positive act of 'soliciting' comments and not waiting passively for representations.⁶¹¹

What are the implications of the requirement that 'recommendations of the Commission [must] have been considered'?⁶¹² The omission of any reference to the need to consider recommendations of organized local government certainly does not mean that Parliament or the National Treasury may simply ignore any views that the South African Local Government Association (SALGA) may offer. The IGRFA definition, quoted above, correctly embraces a definition of consultation in which the solicited views of a party must be 'considered'. Thus the National Treasury can only demonstrate that the views of the FFC have been considered by giving reasons as to why the FCC's recommendations have or have not been accepted. In fact, the National Treasury does employ such a process: when introducing the annual Division of Revenue Bill, the National Treasury provides a detailed set of comments on the FFC's recommendations.

(iii) Material impact of the exercise of revenue-raising powers⁶¹³

FC s 229(2)(a) provides that a municipality may not exercise its power to levy rates, surcharges or taxes in a way that 'materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour.' The provision reflects the view that the economy of the country functions as an integrated system and that actions taken at local level could have a spillover effect that could harm the national economy. The tax regime of large metropolitan municipalities, if poorly conceived, could easily have a negative impact on the national economy. National

610 Act 13 of 2005 s 1(1) 'consultation'.

611 See further § 22.7(d)(ii) *infra*.

612 A similar requirement is included in the consultation process with regard to the enactment of the annual Division of Revenue Act (FC s 214(2)).

613 See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 13-23.

interests are captured, in the Final Constitution and in relevant statutes, by such terms expressed as 'national economic policies' and the 'national mobility' of goods, services, capital and labour.⁶¹⁴ Municipal tax policies could also be deemed constitutionally suspect if they have a much more localized detrimental effect. The exercise of taxing powers that prejudices 'economic activities across municipal boundaries' is also proscribed. The proscribed conduct in both cases should be both material and unreasonable. For example, if a small municipality with an insignificant impact on the national economy increases its rates above the national government's inflation targets, it may be deemed unreasonable (in so far as it formally appears to prejudice national economic policy). However, given the insignificance of the tax, the court may find that the requirement of materiality has not been met.

The prohibition applies to the exercise of original and authorized taxing powers and deals with the manner in which they are exercised. Two issues have emerged in this context. First, can the courts give effect to the principles of good tax behavior? Second, how can the national government police tax behaviour proactively and reactively?

The first question was addressed in *CDA Boerdery v Nelson Mandela Metro*.⁶¹⁵ The applicants claimed that the drastic increase in rates on agricultural land would prejudice national economic policy. While not giving a final answer to the question, Froneman J suggested two reasons why courts should be cautious when approaching this question. First, a matter of national economic policy (or any of the matters listed in FC s 229(2)(a)) must be set within the context of cooperative government set out in FC Chapter 3. With reference to the duty to avoid litigation in settling intergovernmental disputes, the judge noted that courts have a limited role to play in the settlement of such disputes. Because the dispute before court centred around 'national economic policies', the matter could not be resolved without identifying the relevant national organs of state in the different spheres as parties. Second, given the nature of the matters listed in FC s 229(2)(a), the courts are not well equipped to judge when a rates policy materially and unreasonably prejudices national economic policies or activities. In as much as courts generally do not want to pronounce on the merits of policies decisions that raise complex questions and create polycentric conflicts, the separation of powers doctrine grants courts the space to avoid difficult problems raised by disputes over the matters listed in FC s 229(2)(a).⁶¹⁶ Appropriate remedies regarding such policies tend to lie outside the courts: in our democratically accountable institutions, in the commitment to cooperative government and, finally, in regularly held democratic elections. With no national organs of state joined in the proceedings,

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the High Court concluded that a judgment could thus not be made since there was no evidence of what the national economic policies were. On appeal, Cameron JA shared Froneman J's reservations about the justiciability of FC s 229(2)(a). He refrained, however, from expressing a final view on the issue.⁶¹⁷ He also agreed that

614 In the MFPFA 'national economic policy' is defined as including 'the tax policy for the Republic as determined by the national government' (s 1(1)).

615 [2005] JOL 14785 (SE) at para 12.

616 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 46.

it would be wrong for the SCA to decide on the matter without first hearing the national government's view on the subject.⁶¹⁸

Two conclusions can be drawn from *CDA Boedery*. First, the courts are naturally reluctant to become parties to disputes over macro-economic policy. Second, since the primary actors in the matter are the national government and the municipality, FC Chapter 3 requires that a political solution should first be sought before the courts are approached.⁶¹⁹

Can the national legislation prescribe beforehand what should be regarded as taxing behaviour falling foul of FC s 229(2)(a)? In the legislation on municipal finance, the constitutional restrictions on the imposition of taxes are repeated in the Rates Act⁶²⁰ and the MFPFA.⁶²¹ The details of the enforcement mechanisms are discussed under rates⁶²² and taxes.⁶²³ In seeking to enforce the prescripts of sound taxing practice, the national government can preemptively prescribe what behaviour would fall foul of FC 229(2)(a) by using its regulatory powers in terms of FC s 229(2)(b). To deal with national economic policy concerns, such as inflation targeting, it should be permissible to set maximum increases in rates and taxes. It is thus constitutionally permissible to state that one of the objects of the MFPFA is to ensure that municipal fiscal powers and functions are exercised in a manner that accords with FC s 229(2)(a).⁶²⁴ In seeking to regulate the potentially deleterious consequences of surcharges, the MFPFA focuses on setting an upper limit for all municipalities (or a class of municipalities). However, as argued below, such regulatory prescriptions should not impede the ability of a municipality to perform its functions. A further question is whether, given the regulatory nature of supervision, the Minister of Finance can intervene with respect to an individual municipality to assert the principle and interests articulated in FC s 229(2)(a)? This question is addressed in the discussion of capping rates of a specified municipality.⁶²⁵

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617 *CDA Boedery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) at para 46.

618 *Ibid.*

619 See *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC). See, generally, Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14, 14-8.

620 See also Rates Act s 16(1).

621 See MFPFA s 2(b).

622 See § 22.5(e)(ii) *infra*.

623 See § 22.5(g) *infra*.

624 MFPFA s 2(b).

625 See § 22.5(e)(ii) *infra*.

(e) Rates

(i) Defining property rates

Property rates have historically been associated with local government in most countries.⁶²⁶ It has developed a standard meaning overtime, a meaning that the Supreme Court of Appeal has endorsed.⁶²⁷ The Supreme Court of Appeal accepted the dictionary and ordinary meaning of rates as 'the assessment levied by local authorities at so much per pound of assessed value of buildings or land owned'.⁶²⁸ There are thus two elements to rates: the property must be valued and a rate in a money unit (so many cents in the Rand) is set. The rates due are then the value of property multiplied by the rate. This meaning of rates, the *Gerber* Court found, was not changed by the new constitutional dispensation.⁶²⁹ However, the constitutional power of levying property rates has acquired an independent meaning. For example, a service 'charge' based not on consumption but as a rate against the value of the property, is a property rate, whatever it may otherwise be called.⁶³⁰

(ii) Municipal powers over the setting and collection of rates

The Rates Act sets out in detail how a municipality ought to proceed to set and to collect property rates. A municipality must first adopt a rates policy which is then translated into a by-law. Each year the council must adopt a resolution that sets the rates for the next financial year. However, this chapter limits its analysis to the constitutional dimensions of this process.

In setting a rates policy, the municipality makes choices with regard to properties that may be excluded from being rated, that may differentially rated with respect to different categories of property and categories of residents that may receive rebates on the rates due. While the Rates Act gives considerable scope for local policy choices, it structures a council's discretion to a limited degree. Firstly, a rates policy must allow the municipality to promote the objects of local government, namely local, social and economic development.⁶³¹ In pursuing these objects, the Constitutional Court said in *Fedsure* that 'it is a legitimate aim and function for local government to eliminate the disparities and disadvantages that are a consequence of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas so that equal services will be provided to all residents.'⁶³²

626 Richard Bird & Enid Slack 'Introduction and Overview' in Richard Bird & Enid Slack (eds) *International Handbook of Land and Property Taxation* (2004) 10.

627 *Gerber & Others v MEC for Development Planning and Local Government, Gauteng, & Another* 2003 (2) SA 344 (SCA) ('*Gerber*'). See also *Ratepayers Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) ('*Ratepayers Action Group*') at para 52.

628 *Gerber* (supra) at para 23.

629 *Ibid* at para 24.

630 *Ratepayers Action Group* (supra) at para 68.

631 Rates Act s 3(3)(i).

The second broad requirement is that the policy must treat ratepayers 'equitably'.⁶³³ In contrast to the right to equal treatment of persons in the same position, 'equity' refers to the broad concept of fairness. Fairness possesses at least three connotations. The first connotation, as used in the Final Constitution⁶³⁴ and by the Constitutional Court,⁶³⁵ refers to acting in the interest of those in need. Owners of valuable properties cannot complain that they must pay a form of wealth tax that will be used to cover the costs of services for the poor. The second connotation relates to the differential treatment of different categories of ratepayers. How should the proper balance be struck between promoting industrial development — by offering businesses low rates on industrial properties — and residential property owners who are often asked to carry the bulk of the overall rates charged? The third connotation engages the exchange relationship between the ratepayer and the municipality: is it fair that agricultural land, which receives hardly any services, is rated in the same manner as urban properties that receive extensive municipal services? While this elusive concept of 'equity' is justiciable,⁶³⁶ a court will be reluctant to interfere in a council's view of what is equitable. Rate policies entail, by definition, policy choices which lie at the core of municipal autonomy.

While the Rates Act provides an open structure for the development of local policy, it also permits the Minister to prescribe, by regulation, a framework that may deal with such important features as exemptions, rebates and reductions.⁶³⁷ The Minister may also determine that the rate on non-residential properties may not exceed a prescribed ratio to the rate on residential properties.⁶³⁸ However, such a national framework should not have the effect of compromising or impeding a municipality's ability or right to exercise its powers.⁶³⁹ It follows then that the

632 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('Fedsure') at para 80.

633 Rates Act s 3(3)(a).

634 See FC ss 155(4), 214 and 236.

635 *Fedsure* (supra) at para 80.

636 See also *Howick District Landowners Association v uMgeni Municipality* [2005] JOL 13714 (N) 19.

637 Rates Act s 3(5).

638 Rates Act s 19(1)(b).

639 An example of regulation that may fall foul of the constitutional parameters are draft regulations (Local Government: Municipal Property Rates Act (6/2004) *Government Gazette* 30584, GN 1172 (19 December 2007)) proposing rate ratios between residential and non-residential categories of properties, including that rates on state-owned properties may not be more than 25% of the rate on residential properties. Apart from questions about the rationality of the ratios proposed, in imposing a very low maximum on the rate for state-owned properties, the national government may be compromising or impeding a municipality's ability or right to exercise its powers or to perform its functions within the meaning of FC s 151(4). A municipality is entitled to impose rates as long as it does not unreasonably prejudice national economic policies; economic activities across boundaries; or the national mobility of goods, services, capital or labour. None of these goals is served by the proposed ratio for state-owned property. The regulations have the effect of depriving municipalities who service substantial state properties from legitimate and much needed revenue collection. While it may be argued that the rates bills for national, provincial and other

framework should not have the effect of removing policy choices from a council and determining all rate-making outcomes. Should the national legislation have such an effect, it will not be regarded as merely regulating the rating power of a municipality in terms of FC s 229(2)(b) and should be found constitutionally infirm.

In terms of the Rates Act, the annual rates resolution may also be structured by national intervention. The Minister for Local Government may, with the concurrence of the Minister of Finance, set an upper limit on the percentage by which rates in general or on a specific category of property may be increased. The Minister has a wide discretion and may set different levels for different kinds of municipalities. These different levels may reflect the different categories of municipalities or take some other consideration into account.⁶⁴⁰ In individual cases, the Minister may also exempt a municipality that has, in writing, shown good cause why it should be exempted from the upper limit set.⁶⁴¹ Again, the key question is whether an imposed maximum allows a sufficient discretion for the municipality to exercise its constitutionally recognized powers. If the maximum in effects predetermines the outcome of the municipality's choice, by allowing little or no discretion, the bounds of permissible regulation may well be overstepped.⁶⁴²

The Rates Act also empowers the Minister for Local Government to intervene in an individual municipality when he or she deems that the rate does not comply with FC s 229(2)(a).⁶⁴³ The process may be initiated by complaints from the private sector or the Minister may initiate the process. Where the Minister is convinced that the rate on a specific category of property materially and unreasonably prejudices any of the matters listed in FC s 229(2)(a), the municipality must be given notice that the

state-owned properties are settled from the same national revenue fund from which local government grants are apportioned, such settlements can not eclipse the obvious violation of FC s 151(4).

640 Rates Act s 20(2)(a).

641 Rates Act s 20(3).

642 Another good example of regulatory overreach are the recent draft regulations: 'Local Government: Municipal Property Rates Act (6/2004)' *Government Gazette* 30583, GN 1171 (19 December 2007). These regulations prescribe an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. The upper limit, proposed in the draft regulations, is the Consumer Price Index (excluding interest rate on mortgage bonds) as published by Statistics South Africa. Where the actual upper limit that is prescribed provides insufficient scope for municipalities to set their rates in a manner that allows them to meet their expenditure, a municipality's ability or right to exercise its powers is compromised and the upper limit falls foul of FC s 151(4). We would argue that the determination of a generic ceiling, linked to a standard inflation benchmark, such as the Consumer Price Index, deprives municipalities of any flexibility in effecting policy choices through rates increases. A municipality that, for example, wishes to differentiate rates increases among categories of property will be prevented from doing so as a result of this regulation. Increasing property rates on a specific class of properties to finance special infrastructure projects is not possible under this new configuration.

643 Rates Act s 16(2)(a).

rate will be limited as specified in the notice.⁶⁴⁴ The notice must give reasons why the rate is in conflict with FC s 229(2)(a)'s criteria.⁶⁴⁵

Is the ministerial power consistent with the Final Constitution? That is, given that the determination of a rate is a legislative act, can the minister intervene in a

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municipality's legislative domain? In *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others*,⁶⁴⁶ the Supreme Court of Appeal held that the requirement in the Cape Provincial Ordinance⁶⁴⁷ requiring that the premier of a province had to approve municipal rates was impliedly repealed by the LGTA because it was inconsistent with the new status of local government. The *CDA Boerdery* court quite consciously expressed no opinion as to whether legislation enacted in terms of FC s 229(2)(b) can allow the premier to approve — or reject — municipal rates.⁶⁴⁸ The *CDA Boerdery* court also expressed no opinion on the curbs on municipalities' rating powers in terms of the Property Rates Act. It does, however describe s 16 of the Property Rates Act as conferring 'limited and carefully defined powers of supervision and limitation regarding rates on the Cabinet member responsible for local government.'⁶⁴⁹

In our view, the constitutionality of this power is questionable. This power does not constitute regulation, as permitted by FC s 229(2)(b). It does not set a framework in terms of which all municipalities must operate. It is exercised in respect of a single municipality in the form of a directive with which a municipality must comply. Such regulatory interference by the Minister flies in the face of the Constitutional Court's clear attempt in *Fedsure* to protect the integrity of the council's legislative authority.

(iii) The process of determining market value of properties

A key element of property rates is the value of the rated property. The rated value is the market value of the property and any improvements.⁶⁵⁰ As the market value is a highly contested issue, the Rates Act has provided for an elaborate system of determining such value. The valuation is done by a municipal valuer who is appointed by the municipality. After the compilation of the valuation roll, it is opened for objections by the public and the municipality. If a complaint is not upheld by the valuer, then an appeal lies with a valuation appeal board. The decision of the board

644 Rates Act s 16(2)(a) and (3)(b).

645 Rates Act s 16(4).

646 *CDA Boerdery (Edms) Bpk & Others v The Nelson Mandela Metropolitan Municipality & Others* 2007 (4) SA 276 (SCA) ('*CDA Boerdery*').

647 Ordinance 20 of 1974 s 82(1).

648 *CDA Boerdery* (supra) at para 41.

649 *Ibid* at para 42 fn 27.

650 Rates Act s 11(1)(a).

is final and binding on the municipality. The composition of this body, charged with giving an independent and impartial reassessment of the valuer's decision, raises constitutional questions regarding municipal autonomy. Under the current scheme, the provincial government plays an important role in the creation of the appeals boards.

The MEC for Local Government establishes a number of valuation appeal boards required for the needs of the municipalities. He or she appoints between two and four members to each board as well as its chairperson. All serve for a

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renewable period of four years.⁶⁵¹, ⁶⁵² The MEC, in addition, may remove a member on the ground of misconduct, incapacity or incompetence.⁶⁵³ The boards have the same investigative powers as a municipal valuer, and its hearings are not merely appeals on the record of the lower tribunal. They are full rehearings of the entire matter. All costs incurred in the adjudicatory forum, including review in a High Court,⁶⁵⁴ are borne by the municipality.⁶⁵⁵

This framework raises two questions. First, what is the justification for the provincial intervention? The appointment of valuation appeal boards creates provincially appointed structures that take a final decision on municipal actions. The presumable rationale for this method of appointment is that a body other than the municipality must ensure that an independent and impartial body is the final decision-maker on valuations. The underlying assumption is that a municipality could not be trusted to make such appointments because it has a vested interest in the outcome of any appeal. In the past, under the various provincial ordinances, this task was given to a valuation court presided over by a judicial officer.⁶⁵⁶

Second, what is the constitutional basis for the provincial entry into the valuation process? Whatever merit this 'independence' rationale may have, there does not appear to be a sound constitutional basis for provincially appointed appeal boards. The constitutional scheme of local autonomy places a large amount of discretion in the hands of the municipalities to make decisions on a wide range of issues. Yet, no right of appeal to the provincial government (or bodies appointed by the provincial or national government) is afforded residents on other matters. For example, no right to appeal to provincial government exists with respect to municipal planning or zoning matters. As we have already noted, the national government and provincial governments have limited powers of supervision: namely regulation, monitoring, support and intervention. The appointment of appeal boards exceeds the accepted

651 Rates Act ss 58(1) and 60.

652 Rates Act s 51. The Minister for local government provides a regulatory framework for the conditions of appointment of the members.

653 Rates Act s 63(1)(c) and (2).

654 Rates Act s 76(2).

655 Rates Act s 76(2).

656 See, for example, Natal Local Authorities Ordinance 25 of 1974 s 160.

understanding of regulation — and it constitutes neither monitoring nor support. Finally, it is also not an intervention in terms of FC s 139. Does it matter that it is not the MEC that makes the decision but a body independent from the MEC that is entrusted with the task of making a final determination? Does the fact that the boards do not fall under the control of the provinces make a difference? We think not because final decisions on local government matters are made by institutions falling outside the domain of local government. Furthermore, if independence and impartiality are the objectives, the national framework could easily have provided for appeal tribunals appointed by the municipalities themselves. In the absence of a clear constitutional basis for the boards, the provincially appointed appeal boards are certainly constitutional suspect.

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(f) Surcharges

The second original taxing source is 'surcharges on fees for services provided by or on behalf of the municipality'.⁶⁵⁷ A surcharge is defined in the Municipal Fiscal Powers and Functions Act ('MFPFA') as 'a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by or on behalf of a municipality'.⁶⁵⁸ A municipal base tariff is defined, in turn, as 'the fees necessary to cover the actual cost associated with the rendering of a municipal service'.⁶⁵⁹ This tax is a charge not in return for a service and, consequently, can be used for a purpose not necessarily related to the service for which it has been collected.

The imposition of surcharges is now regulated by the MFPFA. Recognizing that the competence of a municipality to impose a surcharge flows from the Final Constitution, the object of the Act, on its face, is merely to regulate the exercise of this power. The Act thus provides that the Minister of Finance may prescribe 'national norms and standards' for imposing municipal surcharges. Such surcharges may include maximum surcharges.⁶⁶⁰ The norms and standards relating to maxima on surcharges may also provide bands or ranges within which municipal surcharges may be imposed.⁶⁶¹ This statutory authorization for further regulation by the Minister of Finance provides a very loose structure. As we have argued above, the essential aspect of the regulation is that it must provide for a framework within which municipalities can determine outcomes. The reference to national norms and standards appears to meet this criterion. It does not prescribe outcomes. However, the actual determination of such maxima or bands or ranges in which surcharges may be set will determine whether the municipal surcharges are permissible. If they leave little or no discretion, the rate of municipal surcharges has effectively been

657 FC s 229(1).

658 Act 12 of 2007 s 1(1).

659 MFPFA s 1(1). 'Actual costs' include the following: '(a) bulk purchasing costs in respect of water and electricity reticulation services and other municipal services; (b) overhead, operation and maintenance costs; (c) capital costs; (d) a reasonable rate of return, if authorised by a regulator of or the Minister responsible for that municipal service.' MFPFA s 1(1).

660 MFPFA s 8(1). The maximum may be expressed as a ratio, a percentage of the municipal base tariff or a Rand value. MFPFA s 8(2)(a)(i).

661 MFPFA s 8(2)(a)(ii).

set. Such a result would appear to be beyond the constitutionally permissible regulatory competence of the national government.

(g) Other taxes, levies and duties

The MFPFA follows an even more restrictive approach to the imposition of other taxes, duties and levies. This approach may likewise exceed constitutionally permitted regulation of municipal affairs.

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As we have argued above, the granting of additional taxing powers falls within the discretionary competence of the national government. The MFPFA s 4(1) enables the Minister of Finance, on his or her own initiative or at the request of a municipality, a group of municipalities or organized local government, to authorize a municipal tax. The Act further prescribes a consultative and timely process that the Minister must follow before he or she authorizes a municipal tax by prescribing it in regulations. Where the process is initiated by local government, the Act prescribes an extensive list of requirements the application must meet. These desiderata require the municipality to demonstrate that the proposed tax complies with FC s 229(2)(a) and does not amount to a tax prohibited by FC s 229(1)(b).⁶⁶² Where the Minister rejects an application, reasons must be provided for such a decision.⁶⁶³ The Minister's decision must, however, be framed by a number of constitutionally-relevant considerations. Principles of co-operative government, in terms of FC s 154(1), require that the national government must by legislative measures support and strengthen the capacity of municipalities to manage their own affairs and exercise their powers and functions. Where the additional revenue is important to this end, it becomes a compelling reason for ministerial approval. On the other hand, the taxation principles of FC s 229(2)(a) could weigh against the further imposition of taxes. Unless the Minister can show that the proposed tax would prejudice any of the stated tax objectives of FC s 229(2)(a), the Minister may be bound — by the Final Constitution — to grant the application.

Where the Minister approves an application, the new tax is extensively regulated. It is in the extent of this tax regulation that the contrast with the regulation of a surcharge is apparent. Not only must the regulations determine the tax base on which the tax is to be levied but also the rate at which the tax may be levied.⁶⁶⁴ The only exception is where the tax is not a specific purpose tax or a tax levied on the same tax base as that of national taxes. In such cases, the Minister may determine the bands or ranges within which the tax may be imposed.⁶⁶⁵ As the Minister determines the most important outcome of the tax by setting the rate, it is no longer regulation but amounts to determination. As we have argued above, original and authorized taxing powers are subject only to regulation.⁶⁶⁶ Statutory powers which

662 MFPFA s 5(1)(c) and (d).

663 MFPFA s 5(3).

664 MFPFA s 6(c)(i) and (ii).

665 MFPFA s 6(c)(ii)(bb).

666 FC s 229(2)(b).

exceed the express constitutional parameters of regulation ought to be found constitutionally infirm.

(h) Borrowing⁶⁶⁷

FC s 230 initially provided a similar framework for provincial and local government borrowing. In a constitutional amendment in 2001, municipal borrowing

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was removed from the section and placed in FC s 230A. The amendment effected a number of important changes.⁶⁶⁸ First, whereas the old FC s 230 provided that national legislation could only impose 'reasonable conditions' for the raising of loans for capital or current expenditure, FC s 230A omits any reference to 'reasonable conditions'. This omission may give Parliament a freer hand to impose conditions as it pleases. Second, in a new paragraph, a municipal council may 'bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality'.⁶⁶⁹ The object of this provision is to provide greater security for long-term loans.

The constitutional framework for municipal loans entails, first, that the council's power to raise loans must be exercised in accordance with national legislation.⁶⁷⁰ Second, loans may be raised for current expenditure,⁶⁷¹ but only when necessary for bridging purposes during a financial year. Third, loans for capital expenditure are permissible. In such a case, a council may bind itself and a future council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.⁶⁷² Fourth, before enacting any authorising national legislation, any recommendation of the Finance and Fiscal Commission must be considered.⁶⁷³ Fifth, listed among the functions that a municipal council may not delegate to any other body or person is 'the raising of loans'.⁶⁷⁴

(i) Short-term debt

667 See Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 12-27.

668 Constitution of the Republic of South Africa Amendment Act 34 of 2001 s 17.

669 FC s 230A(1)(b).

670 FC s 230A(1).

671 See Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27, 27-35 (Current expenditure is defined by the authors as salaries, wages, goods and services utilised by government and transfers and subsidies.)

672 FC s 230A(1)(b).

673 FC s 230A(2). See *Robertson v City of Cape Town & Another; Truman-Baker v City of Cape Town* 2004 (9) BCLR 950 (C)(On the meaning and significance of the consultation duty).

674 FC s 160(2)(d).

In giving effect to the Final Constitution, the Municipal Finance Management Act ('MFMA') provides that a municipality may incur short-term debt only when necessary to bridge shortfalls within a financial year and in expectation of specific and realistic anticipated income to be received within that financial year.⁶⁷⁵ A short-term loan may also be incurred for capital needs within a financial year when they will be repaid from specific funds to be received from an enforceable transfer⁶⁷⁶ by another organ of state or long-term debt commitment.⁶⁷⁷

(ii) Long-term debt

The primary purpose of a long-term loan, defined as a debt 'repayable over a period exceeding a year',⁶⁷⁸ is for capital expenditure on property, plant or equipment that will be used in pursuit of achieving the constitutional objects of local government.⁶⁷⁹ A secondary purpose may be to re-finance existing long-term debt.⁶⁸⁰ Capital expenditure may include financing costs,⁶⁸¹ costs of professional services directly related to the capital expenditure and such other costs as the National Treasury may prescribe.⁶⁸² An elaborate process must be followed before a municipality binds itself to long-term debt: this process allows for public input and input from the National Treasury.⁶⁸³

The import of the provision that a council has the authority to 'bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality' is not clear.⁶⁸⁴ The redemption of many, if not most, long-term loans would extend beyond the five year term of the council. All loans taken out in the last year of a council's term would burden the next elected

675 Act 56 of 2000 s 45(1)(a).

676 A transfer or an allocation refers to a municipality's equitable share, a conditional grant from the national government, a grant in the provincial budget or an allocation from another municipality or organ of state which is not in terms of a commercial or business transaction (MFMA s 1(1) 'allocation').

677 MFMA s 45(1)(b).

678 MFMA s 1(1).

679 MFMA s 46(1)(a).

680 MFMA s 46(1)(b).

681 Such finance costs include capitalised interest for a reasonable initial period, costs associated with security arrangements, discounts and fees in connection with the financing, fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing. MFMA s 46(4)(a).

682 MFMA s 46(4).

683 MFMA s 46(3).

684 FC s 230A(1)(b).

council. Where a council concludes a long-term loan contract, the municipality is bound by such contract beyond the life of the council that passed the resolution. If the successor council fails to honour its predecessor's contractual obligations, then it would be legally liable. If a successor council reneges on the loan by passing a legislative act to cancel the contract, then it could still be liable for a constitutional claim for the deprivation of property. The failure to meet its financial commitments may also lead to a provincial intervention.⁶⁸⁵ The impetus for this constitutional provision most likely lies in the desire of the drafters of the Final Constitution to enable a municipality to maintain a pre-determined tariff policy in order to repay a loan.⁶⁸⁶

A municipality may provide security for any of its debt obligations, any debt obligation of a municipal entity under its sole control, or contractual obligations of the municipality undertaken in connection with the outsourcing of municipal services.⁶⁸⁷ Security may be provided for through a wide variety of measures.⁶⁸⁸ Any security commitment must be approved by a resolution of the council.⁶⁸⁹ The

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council bears the obligation to ensure that any security given does not impede its constitutional mandate of providing basic municipal services. The council resolution must state whether the asset, or right subject to the security, is necessary for providing the minimum level of basic municipal services.⁶⁹⁰ If it is, then the resolution must indicate the manner in which the availability of the asset or right for the provision of basic services will be protected.⁶⁹¹ The use of the secured asset or right by the lender or investor is also restricted. Where the resolution reflects a determination that the secured asset or right is necessary for providing the minimum level of basic services, the security holder may not deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of service provision.⁶⁹² Where the council resolution reflects no such determination, the council remains bound to pay the secured debt in full.⁶⁹³

(i) Transfers

685 FC s 139(5).

686 See Kriel & Monadjem (*supra*) at 27-12.

687 MFMA s 48(1). See further Steytler & De Visser (*supra*) at 12-30.

688 MFMA s 48(2).

689 MFMA s 48(1).

690 MFMA s 48(3)(a). See s 1(1) MFMA for the definition of 'basic municipal service'.

691 MFMA s 48(3)(a).

692 MFMA s 48(4).

693 MFMA s 48(5).

The Final Constitution provides for two forms of transfers: (1) an entitlement to an equitable share of the revenue raised nationally and (2) other grants (either conditional or not) from the national government's share of the revenue raised nationally. Provinces may also provide grants to municipalities.

(j) Equitable share

Local government is entitled to an 'equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it'.⁶⁹⁴

(i) Nature of entitlement

The use of the term 'entitlement' to an equitable share suggests an enforceable claim on the revenue raised nationally. It would appear that the standard employed to determine whether such a claim is enforceable is the rather vague principle of equity elaborated in FC s 214. However vague this principle may be, local government's claim to an equitable share is justiciable. At least that was the conclusion reached by the Natal High Court in *Uthukela District Municipality & Others v President of the Republic of South Africa & Others*.⁶⁹⁵ In the first Division of Revenue Act (DORA)⁶⁹⁶ after the December 2000 local government elections and the establishment of local and district municipalities, no allocations were made with respect to district municipalities. This omission was challenged by a number of district municipalities in KwaZulu-Natal. The High Court held that FC s 214

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did not allow an entire category of municipality to be deprived of an equitable share where the clear intention of FC s 214 was that an entitlement accrued to local government as a whole.⁶⁹⁷ District municipalities, forming part of the local sphere of government, are thus entitled to their equitable share because without such a share these municipalities would not be able to discharge the duties they have to their community. Moreover, the High Court concluded, a denial of an equitable share would likely threaten the very existence of many municipalities.⁶⁹⁸ The High Court declared s 5(1) of the DORA 2001 invalid. When the confirmation hearing before the Constitutional Court took place, the 2001 DORA had already been repealed and the 2002 DORA did not exclude district municipalities in the equitable share division. The Constitutional Court declined to exercise its discretion to consider the invalidity of the repealed provision because, among other factors, the applicants did not seek to resolve the dispute by other means before approaching the High Court.⁶⁹⁹

694 FC s 227(1). See further Steytler & De Visser (supra) at 12-7.

695 2002 (5) BCLR 479 (N) ('*Uthukela HC*').

696 Act 1 of 2001.

697 *Uthukela HC* (supra) at 491E.

698 Ibid at 492D.

699 *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC) ('*Uthukela*') at para 14.

The High Court's decision is certainly correct. Apart from the general proposition that virtually all of the provisions of the Final Constitution are justiciable, an enforceable claim to revenue raised nationally gives effect to the overall constitutional scheme of decentralized government. If the principal recipient of income tax is the national government, and the national government controls the conditions of additional sources of revenue, the only means of securing access of adequate funding to enable local government to 'perform basic services',⁷⁰⁰ is to have a claim to a portion of the money in the national fiscus. This argument is a *fortiori* most compelling for provinces. The provinces are almost entirely dependent on national transfers. It is equally compelling for those municipalities without an adequate tax base.

In contrast to the entitlement of each province, FC s 227(2) refers only to 'local government' in general. In *Uthekela*, a category of municipalities, the districts, successfully argued that local government includes all the categories of municipalities. The question is, now, whether the entitlement can be enforced by individual municipalities for their own individual benefit. Could it be argued that when a municipality turns a surplus on its budget, that, as long as transfers are made to all categories of municipalities, individually well-resources municipalities could be omitted? We submit that such an argument cannot stand. FC s 227(2) clearly indicates that an equitable share is an individual entitlement: additional revenue raised by 'municipalities may not be deducted from their share of the revenue raised nationally'. Individual effort and industry may thus not lead to a loss of the slice of the national pie. The size of that slice is determined by a constitutionally prescribed process.

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(ii) Prescribed process

In terms of FC s 214(1), the vertical allocation of the equitable shares between the three spheres of government must be done in terms of an Act of Parliament, the annual DORA.⁷⁰¹ While the horizontal split between the nine provinces of the provincial share must be included in the Act,⁷⁰² the horizontal split among the 283 municipalities is not explicitly required. The Act must also provide for any other allocation to provinces, local government or municipalities from the national share.⁷⁰³ The horizontal split of local government share may take a variety of forms.

The national legislative process that must precede the adoption of the Act first requires an intergovernmental consultative process and, then, requires the consideration of a list of specified factors. This Act may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted.⁷⁰⁴ The FFC is an independent institution providing

700 FC s 227(1)(a).

701 FC s 214(1)(a).

702 FC s 214(1)(b).

703 FC s 214(1)(c).

704 FC s 214(2).

advice to government and Parliament on, among other things, the allocation of the equitable shares.⁷⁰⁵ Organised local government is represented in the FCC.⁷⁰⁶ Again, because of the centrality of the FCC to fiscal decentralization, the duty to consult requires consideration of the FCC's proposals.⁷⁰⁷

(iii) Substantive principles

The substantive principles underpinning the entitlement to an equitable share are set out in the factors listed in FC s 214(2). Of the ten factors listed, four refer directly to local government. The first is 'the need to ensure that provinces and municipalities are able to provide basic services and perform the functions allocated to them.'⁷⁰⁸ Of relevance in this context would be the provision of basic municipal services and the obligations imposed by socio-economic rights.

The second factor is 'the fiscal capacity and efficiency of the provinces and municipalities'.⁷⁰⁹ While the Act is primarily concerned with the division of revenue between the three spheres of government and the horizontal split between provinces, this factor underscores the basic law's legitimate concern about the individual fiscal capacities of municipalities. While FC s 214(2)(e) states the factor in a

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neutral manner, FC s 227(2) fleshes out the basic principles relating to fiscal capacity and efficiency. Any additional revenue raised by municipalities 'may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue.'⁷¹⁰ The Natal High Court has thus noted: 'The clear intention is that local government structures should not be penalized for showing industry and initiative in revenue gathering.'⁷¹¹ The reverse applies equally. Because municipalities are entitled to raise their own revenue through property rates and surcharges, 'there is no obligation on the national government to compensate . . . municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.'⁷¹² Even if the Act does not make allocation to individual municipalities, the objectively determined overall

705 FC s 220.

706 FC s 221(1)(c).

707 See § 22.5(d)(ii) supra. The constitutional process has been elaborated upon by the Intergovernmental Fiscal Relations Act 97 of 1997. The Act establishes a Budget Forum in which the Minister of Finance consults with the MECs for finance and organized local government. Intergovernmental Fiscal Relations Act s 5.

708 FC s 214(2)(d).

709 FC s 214(2)(e).

710 FC s 227(2).

711 *Uthukela HC* (supra) at 487G.

712 FC s 227(2).

capacity to raise their own income with the required measure of efficiency is a relevant factor.

The third factor is the 'developmental and other needs of provinces, local government and municipalities'.⁷¹³ It should be noted that, as with the previous factor, the needs of individual municipalities are relevant. The abstract notion of the developmental needs of 'local government' is only sensible when those needs are the sum of the needs of individual municipalities.

The fourth factor is: 'obligations of the provinces and municipalities in terms of national legislation'.^{714, 715} This factor implicitly recognizes the practice of unfunded mandates. Unfunded mandates occur when the national government or provincial governments delegate functions to municipalities through legislative assignment without providing them with funding necessary for the execution of the mandate.⁷¹⁶ Although the inclusion of the factor is necessary, it provides a weak form of protection from unfunded mandates. It does not expressly establish the constitutional principle that no obligation can exist without corresponding financing. The statutory rules in the Municipal Systems Act⁷¹⁷ pertaining to assignment, where the cost implications of any assignment to local government must be determined and met, are more robust.⁷¹⁸

Each municipality's equitable share is calculated according to a formula. Currently, the formula consists of five components:⁷¹⁹ (i) a basic service component to enable municipalities to provide water, sanitation, electricity, refuse removal and other basic services; (ii) an institutional support component to enable particularly poor municipalities to fund the basic costs of administration and governance;

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(iii) a development component; (iv) a revenue-raising capacity correction; and (v) a correction and stabilization factor to ensure that municipalities are given what they are promised in the two year budget projections.

Given the broad factors that bind the DORA, the question arises as to whether a court will be willing to entertain an argument that Parliament (or the National Treasury with regard to the horizontal split) have not taken into account all the factors or have not done so adequately. While a demonstrable failure to consider a

713 FC s 214(2)(f).

714 FC s 214(2)(h).

715 As delegation of functions is effected and removed by the executive, the delegation of such functions falls outside this factor. On the assignment and delegation of functions, see § 22.3(f) supra.

716 See Kriel & Monadjem (supra) at 27-22.

717 Act 32 of 2000.

718 See § 22.3(f) supra.

719 National Treasury *Local Government Budgets and Expenditure Review 2001/02-2007/08* (2006) 232.

listed factor should invite judicial review of the legislative process, the courts will try to avoid cases that would require them to determine the appropriate division of the national fiscus.

(iv) Payment and withholding of equitable share

A clear distinction is drawn in the Final Constitution between provinces and local government when it comes to the transfer of the equitable share. First, a province's equitable share is 'a direct charge against the National Revenue Fund.'⁷²⁰ A 'direct charge' is defined by the National Treasury as a statutory or standing appropriation entailing funds earmarked, by prior legislation, for specific purposes and which may not be used for other regular annual expenditure.⁷²¹ A direct charge 'must be paid regardless of whether or not [it has] been budgeted for in the national budget.'⁷²² The object is to give provinces 'a measure of financial autonomy *vis à vis* the national budget process'.⁷²³ The fact that local government's equitable share is not a direct charge to the National Revenue Fund implies that it does not possess the same level of autonomy and the same degree of insulation from the national budget process.

FC s 227(3) reinforces the distinction between the payment of provinces' equitable share and payment of municipalities's equitable share. FC s 227(3) refers only to provinces when it determines that the equitable share 'must be transferred promptly and without deduction, except when the transfer has been stopped in terms of section 216.' No such constitutional obligation applies to municipalities. Although municipalities receive less constitutional protection with respect to the vicissitudes of national government budget priorities, the national government is still under the overall constitutional obligation not 'to compromise or impede the ability or right of a municipality to exercise its powers or perform its functions.'⁷²⁴ Any tardiness in transfers or unnecessary delays could fall foul of this obligation. While the payment schedule may be manipulated by the National Treasury, it may not have the effect of depriving a municipality of its equitable share.

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As the entitlement to an equitable share flows from the Final Constitution, any withholding of such revenue can only be undertaken in terms of constitutionally-sanctioned grounds. FC s 216 provides for the stopping of the transfer of funds to all organs of state that 'commit [] a serious or persistent material breach' of the measures prescribed by the National Treasury to ensure both 'transparency and expenditure control'.⁷²⁵ While FC s 216 imposes specific safeguards when the

720 FC s 213(3).

721 National Treasury *Budget Review 2001* (2001) 46, quoted in Ross Kriel & Mona Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27, 27-32.

722 Kriel & Monadjem (*supra*) at 27-32.

723 *Ibid* at 27-33.

724 FC s 151(4).

725 FC s 216(1).

National Treasury stops the transfer of the equitable share to provinces,⁷²⁶ no such safeguard is provided to local governments.

However, as the law currently stands, the safeguards enjoyed by the provinces also apply to errant municipalities. First, a stopping is only a temporary measure; a provincial share cannot be stopped for longer than 120 days at a time;⁷²⁷ a stopping cannot have the effect of depriving a province permanently of its equitable share. Second, some form of review of the decision should take place; the national Treasury's decision is reviewed by Parliament following the procedure for FC s 76 legislation (which gives the NCOP a significant participatory role).⁷²⁸ Third, this rational process of decision-making must reflect the input of the Auditor-General and the affected province.⁷²⁹ The MFMA reflects Parliament's decision to make a stop of transfer to a municipality subject to the same constitutional safeguards enjoyed by the provinces.⁷³⁰ The National Treasury's decision must be submitted to Parliament for review. Unless Parliament approves the decision within 30 days of the Treasury's decision to stop the transfer, the stopping lapses. If the National Treasury enforces its decision immediately, as it may, the stopping lapses retrospectively if Parliament fails to approve the decision.⁷³¹ If Parliament approves of the decision, the stopping may last for only 120 days.⁷³² In reviewing the decision, Parliament must follow a process substantially the same as that established in terms of FC s 76: both the National Assembly and the NCOP must approve the decision. In the NCOP, provinces vote in their delegations and in a case of conflict between the two houses, the conflict settlement process must first be followed, failing which the National Assembly may override the decision of the NCOP by a two-thirds majority. Parliament may renew the decision for 120 days at a time, following the same procedure.⁷³³ In deciding whether to approve or renew a decision, Parliament may request that the Auditor-General issues a report, and, must give the affected municipality the opportunity to answer the allegations against it.⁷³⁴

726 FC s 216(3)-(5).

727 FC s 216(3)-(4).

728 FC s 216(3).

729 FC s 216(5).

730 FC s 216(3) and (5).

731 MFMA s 39(1)(b).

732 MFMA s 39(1)(a).

733 MFMA s 39(2).

734 MFMA s 39(3).

As the stopping of funds may undercut the objects of local government, the provincial executive must monitor the continuation of the services.⁷³⁵ If as a result of the stopping of a transfer, the municipality cannot or does not fulfil its obligations with respect to the provision of those services, the provincial executive may intervene in terms of FC s 139.

(v) Usage of equitable share

While the equitable share is an entitlement to cover the costs of providing services, the actual use of the funds falls to the discretion of the municipality.⁷³⁶ DORA cannot prescribe conditions for municipal spending.

(k) Conditional grants

In contrast to the equitable share transfer, additional grants, whether conditional or not, run contrary to the financial autonomy of municipalities. These grants are used by the national government to incorporate national priorities into the municipal budgets. These priorities include the promoting of national norms and standards, addressing service delivery backlogs and eliminating regional disparities in municipal infrastructure.⁷³⁷

FC s 227(1)(b) provides that local government (and each province) 'may receive other allocations from national government revenue, either conditionally or unconditionally.' In addition to providing for 'the equitable division of revenue raised nationally', an Act of Parliament must also provide for 'any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.'⁷³⁸ This Act may be enacted only after the provincial governments, organized local government and the Financial and Fiscal Commission have been consulted.⁷³⁹ The conditional allocations to local government are set out in the annual DORA. The horizontal division of the allocated amounts for the grants is done administratively by the National Treasury through a notice in a government gazette. The notice indicates the share of each municipality as well as the framework for each allocation.⁷⁴⁰ The framework refers to the conditions for and other information about each grant.⁷⁴¹

While stopping the transfer or the equitable share is linked to the supervisory conditions of FC s 216(1) and subject to external safeguards, in the case of

735 MFMA s 38(3).

736 Kriel & Monadjem (supra) at 27-18.

737 National Treasury *Local Government Budgets* (supra) at 237.

738 FC s 214(1)(c).

739 FC s 214(2).

740 DORA 2006 s 8(3) read with s 15(1)(b).

741 DORA 2006 s 1(1) 'framework'.

discretionary national grants, stopping is linked to the proper compliance with the conditions of the grants. The stopping can either be temporary or permanent.

The transferring department may withhold a transfer for a period not exceeding 30 days if (i) a municipality does not comply with conditions of the DORA or any conditions attached to the grant; or (ii) expenditure on previous transfers during the same financial year 'reflects significant under-spending, for which no satisfactory explanation is given.'⁷⁴² The permanent stopping of a transfer by the National Treasury may take place on two grounds. The first ground is persistent and material non-compliance with the DORA or a condition of the grant.⁷⁴³ The second is the likely under-utilization of the grant where the National Treasury anticipates that the municipality will substantially under-spend on the allocation in that financial year.⁷⁴⁴ In both cases there is only post-hoc parliamentary scrutiny. The national department which stopped the transfer must reflect the stopping, together with reasons, in the annual financial statements of the department.⁷⁴⁵

(I) Provincial transfers

The scheme of FC Chapter 13 suggests that the main function of provinces is the transmission of funds from the national government to municipalities. FC s 226(3) provides that revenue allocated through a province to local government in that province in terms of FC s 214(1) is a direct charge against the province's Revenue Fund. As outlined above, a direct charge to a provincial Revenue Fund means that the transfer is protected from the provincial budgetary process. While it would be possible to transmit a municipality's equitable share through a province, practice indicates that only some conditional grants follow this route. In a 2001 constitutional amendment, a fourth subsection was added to section 226 which provides, among other things, that national legislation may determine a framework within which revenue allocated through a province to local government must be paid to municipalities.⁷⁴⁶ The amendment was designed, it has been suggested,⁷⁴⁷ to maintain national regulatory control over direct charges at provincial level. No such legislation has yet been passed.

22.6 Supervision of municipalities

(a) Introduction

742 DORA 2006 s 18(1).

743 DORA 2006 s 19(1)(a). MFMA s 38(1)(b) adds the general ground of the serious and persistent breach of sound financial management encapsulated in FC s 216(1).

744 DORA 2006 s 19(1)(b).

745 MFMA s 40.

746 FC s 226(4) added by Act 61 of 2001 s 8.

747 Kriel & Monadjem (supra) at 27-33.

The radical innovation of elevating local government to a sphere of government with its own distinctive powers and functions, including considerable original revenue-raising powers, is countered by a system of supervision in terms of which both the national government and the provincial governments exercise

limited but nevertheless significant control over municipalities.⁷⁴⁸ On the balance struck between municipal autonomy and supervision by 'higher' levels of government, the Constitutional Court in the *First Certification Judgment* commented as follows:

What the [New Text] seeks hereby to realise is a structure for [Local Government] that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.⁷⁴⁹

The power of supervision, defined as 'the power of one level of government to intrude on the functional terrain of another',⁷⁵⁰ the Constitutional Court further contended, 'may be particularly important in the field of LG, where administrative and executive structures are likely to be in need of greater support than are comparable structures in higher spheres of government.'⁷⁵¹

That there was indeed need for supervision was evidenced by the number of municipalities running into trouble with respect to the management of their finances and the satisfaction of their constitutional obligations. Such basic obligations as the passing of an annual budget and the necessary revenue-raising measures to cover the budget have, at times, simply not been undertaken in newly established municipalities. Given the central role envisaged by the Final Constitution for municipalities in service delivery, these failures undercut a core strut of the developmental state. Given these repeated failures — as documented by the Auditor-General⁷⁵²— pressure has steadily increased on both the national government and the provincial governments to intervene in the governance of municipalities.

(i) Increasing of supervisory powers

748 See Christina Murray & Okyerebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20, 20-29.

749 *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 373.

750 *Ibid* at para 370.

751 *Ibid*.

752 See Stu Woolman & Yolandi Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B.

The mainstay of supervision has been FC s 139. In its original form FC s 139 was almost identical to the limited powers of the national government to intervene in a province in terms of FC s 100; it only permitted a provincial executive to

intervene in a municipality when the latter failed to comply with an executive obligation. This provision excluded the possibility of corrective measures when a municipality failed to pass a budget and revenue-raising measures: both are legislative acts.⁷⁵³ Moreover, an intervention was confined to an assumption of responsibility by a province for the execution of the obligation. Two constitutional amendments increased the scope for interventions.

In a 1998 amendment of FC s 159 dealing with the terms of municipal councils,⁷⁵⁴ the new provision provided for dissolution of councils contemplated by FC s 139. Without expressly empowering a province to do so, FC s 159(2) simply requires that in the event that a council 'is dissolved in terms of national legislation', an election must be held within 90 days. FC s 159(3) assumes that such dissolution takes place in terms of FC s 139. Accordingly, on this rather weak basis, the Structures Act provided that an MEC could dissolve a council if 'an intervention in terms of section 139 of the Constitution has not resulted in the council being able to fulfil its obligations in terms of legislation.'⁷⁵⁵ In 2003, FC s 139 was significantly amended to enable provinces (and the national government) to intervene in municipalities that are experiencing financial problems. The amendment possesses three important features. First, as with FC s 100, the supervisory role of the NCOP is limited. Second, the power to dissolve a council is explicit. Third, two additional grounds for intervention now exist: both impose mandatory action from the provinces.⁷⁵⁶

(ii) Supervision as a single process

Supervision is broadly defined as the power of national and provincial governments to exercise hierarchical control over municipalities. At a foundational level, the national government establishes the broad legislative framework in terms of which local government functions are exercised. Likewise, provinces have powers of establishment of municipalities. Both spheres of government also have regulatory powers over the exercise by municipalities of their executive powers.⁷⁵⁷ With respect to individual municipalities, supervision entails, first, the monitoring of their performance, second, support if required to exercise their functions and powers, and third, entering the autonomous domain of a municipality through acts of intervention when there is a failure in governance.

753 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See also Jaap de Visser *Developmental Local Government* (2005) 129.

754 Constitution of the Republic of South Africa Amendment Act 65 of 1998 s 1.

755 Structures Act s 34(3)(b). Section 34(4) added the procedural requirements that such dissolution may only occur with the permission of the Minister for local government and the approval of the NCOP.

756 See Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 15-17.

757 FC s 155(7).

At first the Final Constitution equated intervention with supervision. The headings of FC ss 100 and 139 authorizing intervention in provinces and municipalities respectively, referred to the 'National supervision of provincial administrations' and 'Provincial supervision of local government'. The Constitutional Court thus appropriately viewed 'supervision' as a concept distinct from 'monitoring' and 'support'.⁷⁵⁸ In the constitutional amendment of 2003, the word 'supervision' in the headings of FC ss 100 and 139 was replaced by the narrower, but correct, concept of 'intervention'.

Supervision encompasses the practice of monitoring. The Constitutional Court describes monitoring as follows: 'The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise LG emerges.'⁷⁵⁹ Monitoring reveals whether the legislative regulation is complied with, whether support is needed and, if need be, whether an intervention is required.

(iii) Dual responsibility for supervision

From the foregoing it is apparent that the supervision of local government is not neatly divided between national government and provincial governments. Supervision is, in effect, a concurrent power.⁷⁶⁰ Where a division of supervisory labour exists, the hierarchy between the national government and provincial governments becomes rather evident. The national government is the dominant actor in establishing frameworks for local government. The provinces are generally confined to the establishment of municipalities in their jurisdictions.⁷⁶¹ However, provinces must monitor and support municipalities at the same time as they promote the development of local government capacity to manage their own affairs.⁷⁶²

Reflecting the traditional hierarchical model of municipalities falling under the auspices of provinces, the intervention powers of FC s 139 are almost exclusively reserved for provinces. The clear hierarchical lines have somewhat been blurred by the 2003 amendments; the national government has reserved the right to intervene in a municipality should a province fail to exercise its duty to do so. In contrast, the supervisory measure of controlling municipal financial management, the temporary stopping of transfers, falls solely under the control of the National Treasury.

The dual nature of supervision has made for a complex system. The system has not been simplified by statutory elaboration. The MFMA, for example, requires overlapping reporting duties to both the National Treasury and provincial treasuries. At provincial level, separate reporting lines exist to the MEC for finance and to the

758 See, for example, *First Certification Judgment* (supra) at paras 367, 370.

759 Ibid at para 372.

760 See Murray & Ampofo-Anti (supra) at 20-29.

761 FC s 155(5) and (6).

762 FC s 155(6).

MEC responsible for local government. The end result is a complex and at times confused supervisory framework.

(b) Supervision process: monitoring and support

(i) Monitoring

Unlike the reference in FC s 155(6)(a) to the provinces' duty to monitor municipalities, the Final Constitution places no such duty on the national government. Such a duty is, however, implicit in the National Treasury's responsibility to enforce financial measures that ensure both transparency and expenditure control in all spheres of government;⁷⁶³ without a system of monitoring, breaches of the measures would not be detected. Does the absence of an explicit reference to a general monitoring power preclude the national government from doing so in non-financial terrain? The strongest basis for a general monitoring power is FC s 155(7).⁷⁶⁴ The national government has the legislative and executive authority 'to see to the effective performance by municipalities' of their functions, but then only 'by *regulating* the exercise by municipalities of their executive authority'.⁷⁶⁵ As FC s 155(7) authorizes only regulatory measures, it would only provide a basis for a general system of monitoring: it imposes routine duties of reporting, rather than allowing for individualized monitoring actions. This approach is also followed in the Systems Act. The Minister for local government may require municipalities to submit information concerning their affairs to a specified national organ of state. This instruction must be done by notice in the *Government Gazette*. The Minister can make distinctions in the notice between municipal categories, municipal types or any other kind described in the notice. The notice can require municipalities to submit the information at certain intervals or within a specified period.⁷⁶⁶ No power is conferred on the Minister to monitor individual municipalities.

The Systems Act gives full effect to the provinces' mandate of monitoring as provided for in FC s 155(6)(a). The MEC for local government must establish mechanisms, processes and procedures to monitor municipalities. The Act refers specifically to the need for monitoring the ability of municipalities to manage their

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own affairs,⁷⁶⁷ the need for monitoring municipal capacity⁷⁶⁸ and the need for assessing the support requirements of municipalities.⁷⁶⁹

763 FC s 216(2).

764 See De Visser *Developmental Local Government* (supra) at 180.

765 Emphasis added.

766 Systems Act s 107.

767 Systems Act s 105(1)(a).

768 Systems Act s 105(1)(b).

769 Systems Act s 105(1)(c).

(ii) Support

While the duty to support local government falls on both the national government and the provincial governments, a distinction should be drawn between support that takes place in terms of co-operative government and support that occurs within the framework of supervision.⁷⁷⁰ The duty of support in terms of FC s 41(1)(h)(ii) is reciprocal. The support contemplated by FC s 154(1) reflects the guardianship that the higher levels of government have over local government. While both forms of support would require the participation of the receiving municipality, different consequences could follow a failure to fully participating in the planned supervision. For example, if a municipality does not implement a financial recovery plan suggested by a province, then the province may impose it on the municipality and take further steps including the dissolution of the council. The Constitutional Court in the *First Certification Judgment* also placed support firmly within a supervisory framework:

The legislative and executive powers to support [local government] are, again, not insubstantial. Such powers can be employed by provincial governments to strengthen existing LG structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions. This support power is to be read in conjunction with the more dynamic legislative and executive role granted provincial government. . . . In terms hereof, the provinces must assert legislative and executive power to promote the development of LG capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed LG matters. Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of . . . schs 4 and 5.⁷⁷¹

The duty of support that seeks to 'to prevent a decline or degeneration' of local government 'structures, powers and functions',⁷⁷² flows from the overall supervisory relationship that both the national government and provincial governments have with local government. This relationship is very different from the mutual duty to assist one another: with respect to co-operative government, where the

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starting premise is the equality of the spheres. The obligation to render supervisory support may also be justiciable and a court may review the reasonableness of steps that the national government or a provincial government has taken in executing their duty of support.⁷⁷³

The Municipal Finance Management Act ('MFMA') in chapter 5 on cooperative government expands on the duty of support.⁷⁷⁴ The national government must assist municipalities by agreement in building their capacity for efficient, effective and

770 Steytler & De Visser (supra) at 15-15.

771 *First Certification Judgment* (supra) at para 371.

772 Ibid.

773 See *IMATU v MEC Local Government, Mpumalanga* 2002 (1) SA 76 (SCA).

774 Act 56 of 2000.

transparent financial management.⁷⁷⁵ Support must also be given to a municipality's efforts to identify and to resolve its financial problems.⁷⁷⁶ The failure to give effect to these duties does not, however, affect the responsibility of the municipality to comply with the demanding duties of the MFMA.⁷⁷⁷

In light of their significant intervention powers, provincial governments shoulder the principal obligation of support. Like the national government, the provincial government must assist municipalities by agreement in building their capacity for efficient, effective and transparent financial management.⁷⁷⁸ Likewise, support must be given to a municipality's efforts to identify and to resolve its financial problems.⁷⁷⁹

Practice has shown that provinces have not been very successful in discharging their financial obligations. The national government has had to step into the breach. In the main the provincial Departments of Local Government (DLG) have the responsibility to oversee the institutional health of the municipalities. However, serious question marks hang over their capacity to do so effectively. They have limited financial resources: the lack of resources leaves little room to develop programmes on monitoring and intervention. Their incapacity is also apparent from their lack of adequate human resources. Most DLGs are carrying a staff complement that does not match their mandate of high level support and oversight of local government. The limitations of provincial supervision has resulted in a gradual displacement of provincial supervision by national initiatives (eg, DPLGs's Project Consolidate). It has thus been suggested that Project Consolidate permits the national government to do what provinces should do in terms of FC s 139.⁷⁸⁰ This assessment seems accurate. In 2004 and 2005 provincial interventions in municipalities became more frequent. However, that trend came to a halt with the introduction of Project Consolidate.⁷⁸¹ This intrusion has been a sore point for DLGs. They perceive national government intervention in municipal affairs as marginalizing the role of provinces.

(c) Interventions

The most powerful form of supervision is intervention. Three modes of intervention are now provided for in FC s 139. FC s 139(1) authorizes such drastic measures of assumption of responsibility for a municipal executive obligation and the dissolution of a council. The 2003 constitutional amendments provided a further two forms of

775 MFMA s 34(1).

776 MFMA s 34(2).

777 MFMA s 34(4).

778 MFMA s 34(1).

779 MFMA s 34(2).

780 See Christina Murray & Yonina Hoffman-Wanderer 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) *Stell LR* 28.

781 *Ibid* at 18.

intervention. The first relates to the failure of a municipality to adopt a budget or impose revenue-raising measures — two legislative instruments without which the municipality cannot properly function. As the source of the problem is the council's failure to adopt these legislative instruments, the mandatory intervention is the dismissal of the council. The second refers to a crisis in a municipality's financial affairs. As such problems tend to be deep-seated, the solution is a directive to implement a financial rescue plan and, depending on causes of the crisis, measures that may include the dissolution of the council. Given this constitutional basis, the MFMA has regulated the application of the latter two forms of intervention.⁷⁸²

(d) Regular intervention in terms of FC s 139(1)

A provincial executive may intervene in a municipality if it cannot or does not fulfil an executive obligation in terms of the Final Constitution or legislation. The intervention can consist of 'any appropriate' step, including —

- (a) the issuing of a directive to the municipality that describes the extent of the failure and the steps to be taken;⁷⁸³
- (b) the assumption of responsibility for the relevant obligation;⁷⁸⁴ and
- (c) the dissolution of the municipal council.⁷⁸⁵

The importance of this intervention is that it is confined to failures to comply with executive obligations. True to preserving the distinctiveness of a municipality, intervention in the legislative domain of a council is not tolerated. Only in very exceptional circumstances may a council be dissolved and its legislative function taken over by the province.

(i) Substantive requirement

The crucial requirement is the failure to fulfil an executive obligation in terms of the Final Constitution or legislation. The reference to constitutional obligations should

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include the duty to provide basic municipal services.⁷⁸⁶ Legislation refers to an Act of Parliament, a provincial Act, a national and provincial regulation,⁷⁸⁷ or any of the

782 MFMA s 137 provides for a third mode of intervention, which combines elements of FC s 139(1) with the latter two. This intervention refers to general financial problems, mainly relating to the inability of a municipality to meet its financial commitments. This is a discretionary intervention which may commence with a directive to the municipality to implement a financial recovery plan, failing which the council may be dissolved. See further Steytler & De Visser (supra) at 15-29-15-38.

783 FC s 139(1)(a).

784 FC s 139(1)(b).

785 FC s 139(1)(c).

786 See § 22.4(b) supra.

787 FC s 239 'national legislation' and 'provincial legislation'.

municipality's own by-laws. Whether a statutory obligation is executive or not is not always apparent: the council performs both executive and legislative functions. Rather than attempting to carefully define the term 'executive obligation', it is more useful to define the legislative function and conclude that anything that does not fall within that definition is executive in nature and therefore falls within the ambit of FC s 139(1).⁷⁸⁸ The legislative functions of a municipal council are threefold: approving by-laws; approving a budget; and imposing rates, taxes, levies, duties and surcharges on fees.⁷⁸⁹ Any other function or activity of the municipal council is not legislative in nature and the failure to fulfil obligations in that regard could therefore trigger an intervention in terms of FC s 139(1).

Whether a statutory provision creates an obligation is not always apparent from the statutory text as the use of the word 'must' may not necessarily imply an enforceable obligation. In *Weenen Transitional Local Council v Van Dyk*⁷⁹⁰ the Supreme Court of Appeal held that the use of the word 'must' or 'shall' was not determinative of the matter and instead adopted a much more contextual approach.⁷⁹¹

(ii) Measures of intervention

FC s 139(1) empowers a provincial executive to take any 'appropriate' measure. For the Constitutional Court such measures, or 'steps', must be authorised by the Constitution or by constitutionally compatible legislation.⁷⁹² FC s 139(1), mentions three steps: the issuing of a directive, the assumption of responsibility and the dissolution of the municipal council. The *Second Certification Judgment* Court, commenting on the original version of FC s 139(1), has indicated that a provincial executive cannot freely choose from these steps. The steps are a process whereby the first step is the issuing of the directive. When the Constitutional Court considered FC s 100, it held that the assumption of responsibility is not possible without first issuing a directive.⁷⁹³

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A further measure is judicial relief. The Constitutional Court held that court proceedings could possibly constitute an appropriate step towards securing fulfilment of such obligations.⁷⁹⁴ For example, where a directive is not followed and

788 See Steytler & De Visser (supra) at 15-19.

789 See § 22.3(a), 22.4(e)(ii) and 22.5(c)(ii) supra.

790 2002 (4) SA 653 (SCA).

791 See Steytler & De Visser (supra) at 13-21.

792 *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) ('*Second Certification Judgment*') at para 124. Although paragraph 124 of the judgment deals with FC s 100, the equivalent of FC s 139 for national intervention into provincial government, the Court's remarks are apposite with respect to the meaning of FC s 139.

793 Ibid at para 120; Steytler & De Visser (supra) at 15-20.

794 *Second Certification Judgment* (supra) at para 124 fn 116.

the other substantive requirements for the assumption of responsibility or the dissolution of the council are not met, judicial relief could be the only viable measure.⁷⁹⁵

(iii) Issuing a directive

The issuing of a directive imposes a legally binding obligation on the municipality to fulfil an identified executive obligation. The directive plays a key function in any later intervention measures: it defines the scope of the intervention. Moreover, given the Court's view of the progressive approach to intervention, starting with the least intrusive measures and ending, if need be, with the most intrusive measures, the directive is the usual starting measure. However, it is not necessarily a *sine qua non* for an assumption of responsibility. Where the issuing of a directive would be futile, for example if there is no quorum in the council to lawfully implement the directive, the provincial executive may immediately proceed to the next level of intervention.⁷⁹⁶

(iv) Assumption of responsibility

Where a municipality fails to fulfil an identified executive obligation at the direction of the province, the latter may proceed to fulfil that obligation itself by assuming responsibility for that obligation. The municipality's powers in that regard are thus ousted to the extent of the assumption of responsibility. Because this is such a drastic measure, one of three threshold requirements listed in FC s 139(1)(b) must be met. First, the assumption of responsibility must be necessary to maintain essential national standards or to meet established minimum standards for the rendering of a service. Second, it must be necessary to prevent a municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole. Third, the assumption of responsibility must be necessary to maintain economic unity.⁷⁹⁷ The requirements of FC s 139(1)(b) have consequences for both the aim and the scope of the assumption of responsibility. The aim of the assumption of responsibility is to lift the municipality to the required minimum standards, to prevent it from harming the interests of other municipalities or the province or to maintain economic unity in the province. The provincial executive can only assume responsibility to

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the extent necessary to achieve the above goals. In commenting on FC s 100, which provides for a similar national intervention measure in provinces, the Constitutional Court has stressed that a high threshold would apply. This high threshold requires that the intervention must be 'necessary' and that one of a closed list of circumstances must prevail.⁷⁹⁸

Given the fact that the functional integrity of a municipality is ruptured, a review process is automatically triggered comprising of two components — a review by the national executive and a peer review by the NCOP. In line with the underlying

795 See Steytler & De Visser (supra) at 15-20.

796 Ibid at 15-21.

797 Ibid.

798 *Second Certification Judgment* (supra) at paras 111-127.

hierarchical structure of the Final Constitution, the national minister responsible for local government reviews the decision of a provincial executive and makes a binding decision. Even if such approval is obtained, a second review by the provincial executive's peers ensues. The NCOP, representing all the provinces (including the intervening province), must review the conduct of one of its members. A built-in bias may be inevitable; a very strict interpretation of the circumstances justifying an intervention would eventually bind all the provinces, while a more accommodating approach would stand all of them in good stead when they venture to intervene in the future.⁷⁹⁹

In its original form, the review mechanisms were extremely strict.⁸⁰⁰ However, the amendments to FC s 139 in 2003 considerably watered down the tight time frames of the review mechanisms. Within 14 days after the notice of assumption of responsibility has been issued, the provincial executive must notify the Minister for local government of the intervention and request him or her to approve the intervention.⁸⁰¹ The intervention will end automatically if the Minister does not approve the intervention within 28 days or has explicitly disapproved the intervention within 28 days.⁸⁰²

The NCOP must also be notified within 14 days after the assumption of responsibility.⁸⁰³ Even if the Minister has approved the intervention, the intervention ends automatically if the NCOP does not approve or explicitly disapprove the intervention within 180.⁸⁰⁴ The NCOP must also 'review the intervention regularly' and can make appropriate recommendations to the provincial executive.⁸⁰⁵

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The provincial executive assumes responsibility only for the identified executive obligations. It cannot perform legislative acts, that is, the passing of by-laws, the approval of budgets or the imposition of rates, taxes or other levies. If the provincial executive needs the municipal council to perform a certain legislative act — for example, the approval of an adjustments budget — it requires the cooperation of the municipal council. However, the fact that the provincial executive has the power to

799 This structural bias is diametrically opposite the 'bias' that occurs when the NCOP reviews an intervention by the national government in one of the provinces; a strict reading of the Constitution would then be in all provinces' interest.

800 The Minister responsible for local government had to approve the intervention within 14 days, failing which it ended. Even if such approval was obtained, a second hurdle had to be cleared: Notice had to be given to the NCOP and the intervention had to end unless the NCOP approved it within 30 days of its first sitting after the intervention began.

801 FC s 139(2)(a)(i).

802 FC s 139(2)(b)(i).

803 FC s 139(2)(a)(ii).

804 FC s 139(2)(b)(ii).

805 FC s 139(2)(c).

dissolve the municipal council in exceptional circumstances provides an additional incentive for the municipal council to cooperate.⁸⁰⁶

The question has been raised whether in terms of FC s 139(1)(b) the provincial executive can also suspend the council. The constitutional difficulty with this proposition is that the suspension is then based on the non-fulfilment of an *executive* obligation but encroaches on both the executive and legislative function of the council. The justification for such overreach is that in order to facilitate an executive intervention the provincial executive may need to prevent the council from obstructing provincial intervention through legislative action. Thus, while the province has no power to assume the legislative role, proponents argue the provinces possess a power to suspend the municipality's legislative function.⁸⁰⁷ The problem with this argument is that, in the end, the removal of legislative power is not materially different from the assumption of legislative power. Both constitute an inroad into the legislative powers of the council for which FC s 139(1)(b) offers no basis.⁸⁰⁸

(v) Dissolution of council

The provincial executive can dissolve a municipal council 'if exceptional circumstances warrant such a step'.⁸⁰⁹ While the jurisdictional fact of 'exceptional circumstances' is not defined, the Structures Act gives an indication of its reach. In a provision pre-dating the 2003 constitutional amendment, a dissolution was possible when 'an intervention in terms of FC s 139 has not resulted in the council being able to fulfil its obligations'.⁸¹⁰ The import is clear; if the failure of the intervention is due to the council's unwillingness to comply with its obligations and resolve its problems, 'exceptional circumstances' exist and the dissolution is warranted. The general principle should be that dissolution is an instrument to deal with the situation where the municipal council's conduct is the cause of the continued failure to comply with an executive obligation. This reflects the general principle that intervention comprises a set of successive steps, each more intrusive than the one before. It should be only in rare cases that a council is dissolved where no other steps have been taken prior to the dissolution.⁸¹¹

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Given the drastic nature of the intervention, some significant procedural safeguards are provided. The process commences with the provincial executive serving a notice on the municipality, the Minister for local government, the NCOP and the provincial legislature. The dissolution takes effect unless the NCOP or the

806 See further Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2007) 15-24.

807 See Yonina Hoffman-Wanderer & Christina Murray 'Suspension and Dissolution of Municipal Councils under s 129 of the Constitution' (2007) *TSAR* 141.

808 See Steytler & De Visser (*supra*) at 15-25.

809 FC s 139(1)(c).

810 Structures Act s 34(3)(b).

811 Steytler & De Visser (*supra*) at 15-26 ff.

Minister sets it aside within 14 days from the date of receipt of the notice.⁸¹² The Final Constitution thus provides for a 14 day window period within which the Minister and the NCOP have the opportunity to set aside the dissolution. Importantly, both the Minister and the NCOP can set aside the dissolution, independently from one another.⁸¹³ If no decision is made by either body, then the dissolution becomes effective.

After dissolution, the provincial executive must appoint an administrator.⁸¹⁴ His or her task will be to ensure the continued functioning of the municipality until a new municipal council has been declared elected.⁸¹⁵ The powers and functions of the administrator are determined by a combination of two legal instruments, (a) the provisions in the Final Constitution and the Structures Act and (b) a notice published by the MEC in the *Provincial Gazette*. In terms of the Structures Act, the MEC determines the scope of the administrator's functions and powers in the *Provincial Gazette*.⁸¹⁶ Considering that the municipal council has been 'replaced' by the administrator, the latter is thus vested with all legislative and executive powers that were previously exercised by the municipal council. The provincial executive, could, however, also decide to limit the administrator's powers in the notice.⁸¹⁷

(e) Dissolution of council after failure to pass a budget or revenue-raising measures in terms of FC s 139(4)⁸¹⁸

Because the approval of a budget or the raising of rates and taxes are legislative acts,⁸¹⁹ provincial executives were, before the 2003 constitutional amendment,

812 FC s 139(3)(b).

813 Structures Act s 34(3)(b), providing for the dissolution of a council, conflicts with FC s 139(3) in a number of respects. The Final Constitution provides that the dissolution takes effect unless the Minister or the NCOP sets it aside. The Structures Act, on the other hand, provides that the provincial executive first needs the Minister's and the NCOP's positive approval. FC s 139(3) states that the dissolution is effective 14 days after the NCOP received the notice while the Structures Act suggests that the day of publication of the notice is decisive. These days do not necessarily coincide: it may not be possible to publish the notice on the same day as the municipal council received the notice. These differences emerged because s 34(3)(b) of the Structures Act has been overtaken by the new provisions of FC s 139(3). FC s 139(3) has rendered section 34(3)(b) of the Structures Act invalid to the extent of these inconsistencies. See Steytler & De Visser (supra) at 15-27ff.

814 FC s 139(1)(c).

815 FC s 139(1)(c) and Structures Act s 35(1).

816 Structures Act s 35(2). In terms of the Final Constitution, the provincial executive, and not the MEC for local government, is vested with the power to appoint the administrator FC 139(4)(a). Section 35(2) of the Structures Act must be interpreted accordingly.

817 Steytler & De Visser (supra) at 15-28.

818 Ibid at 15-38ff.

819 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See further § 22.5(c)(ii) supra.

constrained from intervening in legislative matter even when a council was so dysfunctional that it could not agree upon a budget. The amendment of FC s 139 has made it possible for provinces to intervene in the legislative authority of a municipality for a limited purpose. Since the council, in exercising the legislative authority of the municipality, is the source of the financial crisis (a municipality cannot properly function without an approved budget), the solution proffered is the appointment of an administrator — until a new council is elected — and the approval of a temporary budget which operates until the new council approves a final one.

This form of intervention is premised on a municipality's failure to comply with the statutory obligation to adopt an annual budget and the necessary revenue-raising measures to cover it before the commencement of the financial year.⁸²⁰ The adoption of an annual budget is central to the entire functioning of a municipality. Municipal expenditure may be incurred only in terms of an approved budget.⁸²¹

Where a municipality has failed to adopt a budget or revenue-raising measures, the provincial executive must take 'any appropriate steps' to ensure that the budget or revenue-raising measures are approved, including dissolving the council.⁸²² Are there any other 'appropriate steps' apart from dissolution? The steps mentioned in FC s 139 are directives and the assumption of responsibility. Neither may be appropriate. After the commencement of the new financial year, there is no legal basis for the municipality to adopt a budget: a directive regarding the budget would therefore be invalid.⁸²³ The only appropriate step in the absence of a budget is, then, the dismissal of the council.

Unlike FC s 139(3), which makes specific provision for the automatic review of a dissolution of a council by senior bodies (the Minister for local government and the NCOP), FC s 139(6) puts only a notification procedure in place. The provincial executive must submit within seven days of the dissolution a written notice of the intervention to the Minister for local government, the relevant provincial legislature, and the NCOP. Why the absence of procedural safeguards? Some might argue that the trigger for a dissolution in terms of FC s 139(3) is 'exceptional circumstances' and that such circumstances require an automatic review procedure to control broad discretion. But the basic law reads otherwise. Dissolution in terms of FC s 139(4) is very specific — the council has failed to approve a budget or revenue-raising measures and the MEC must intervene through the dissolution. If the MEC is obliged to dissolve the council, then the Minister or the NCOP lack any grounds for review.

On dissolution of the council, the provincial executive must fill the vacuum by appointing a caretaker administrator and approving a temporary budget. The administrator assumes the executive authority of the council. After the dissolution of a council, the notification duties play an important function. The Minister is informed

820 MFMA ss 16(1) and 24(2)(a).

821 MFMA s 15(a).

822 FC s 139(4).

823 This may, however, be an option where the only problem is the imposition of inadequate tariffs, as the determination of fees and tariffs could be done, as argued above, administratively.

of the intervention because the national government must monitor the province's performance. If the provincial executive does not perform its supervisory role adequately, then the national government may intervene in its stead.⁸²⁴ The provincial legislature must be informed as it performs its usual oversight function over the provincial executive. Although the NCOP is not called upon to review the dissolution, the institution should be kept informed of the intervention as part of its overall oversight role with regard to monitoring of and intervention in municipalities.

(f) Imposition of a financial recovery plan after a financial crisis in terms of FC s 139(5)⁸²⁵

The second financial intervention involves a financial recovery plan. The plan structures the financial conduct of the municipality and is imposed by the provincial executive. If the municipality is unable to implement the plan, the more intrusive measures may follow, including the dissolution of the council.

For an intervention in terms of FC s 139(5) to take place, the municipality must be, as a result of a crisis in its financial affairs, in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments. FC s 139(5) further provides that the admission by the municipality that it is unable to meet its service obligations or financial commitments will suffice.⁸²⁶ In determining whether these conditions are present, the MFMA gives some guidance by providing a non-exhaustive list of factors, which singly or in combination, may indicate whether the conditions for intervention are met.⁸²⁷

Once the jurisdictional facts are present, the provincial executive must act in terms of FC s 139(5). FC s 139(5) envisages a two stage process. The first stage entails the imposition of a financial recovery plan prepared in terms of national legislation.⁸²⁸ The second stage follows if the municipality cannot or does not implement the plan. The intervention then constitutes a dissolution of the council or the assumption of responsibilities by the provincial executive — depending on whether or not the plan entails both legislative and executive directives. The central component of this process is the recovery plan. In terms of the MFMA, the National Treasury through the Municipal Financial Recovery Service prepares the plan for the province.⁸²⁹

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When FC s 139(5) has been invoked, FC s 139(6) imposes certain notification requirements. The provincial executive must submit within seven days a written notice of the intervention to the Minister for local government, the provincial

824 FC s 139(7).

825 See Steytler & De Visser (supra) at 15-43ff.

826 FC s 139(5).

827 MFMA s 140(2).

828 FC s 139(5)(a)(i).

829 MFMA s 139(1).

legislature, and the NCOP. As with budgetary intervention, the Minister must be informed of the intervention because the national government must monitor the province's performance. If the provincial executive does not perform adequately, then the national government may intervene in its stead.⁸³⁰

Should the municipality fail to implement the plan for whatever reason, the province must proceed to the second stage of the intervention: the dissolution of the council or the assumption of the responsibility for the implementation. In both cases an administrator is appointed. The provincial executive must dissolve the council if the latter does not implement the legislative aspects of the plan within the time frames set in the plan.⁸³¹ This act of intervention becomes necessary only because, short of a dissolution of the council, the provincial executive cannot, in terms of FC s 139, impose its will on the legislative authority of a municipality.

The substantive requirement reflects a failure on the part of the council to implement the budgetary and revenue-raising measures contained in the recovery plan. The assumption is that there is a budget in place with some revenue-raising measures but both are inadequate to solve the municipality's financial crisis. If there were no budget, then the appropriate route would be an intervention in terms of FC s 139(4).

Because the problem at hand is the unwillingness of the council to amend its budget and revenue-raising measures (and the existing budget is part of the financial problems of the municipality), the provincial executive must set aside the existing budget by approving a temporary budget and revenue-raising measures.⁸³² The new council must then adopt a new budget upon its election. The Final Constitution further empowers the provincial executive to take any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality.⁸³³

If the problem flows not from legislative measures (the council has approved the proposed budget or revenue-raising measures), but from the ability or the capacity to implement the plan, then the provincial executive may assume responsibility for the implementation of the executive aspects of the plan.

22.7 Co-operative government

(a) Constitutional framework

(i) Local government as a sphere of government

In FC Chapter 3 on Co-operative Government, government in the Republic is described as being constituted 'as national, provincial and local spheres of

830 FC s 139(7).

831 MFMA s 136(3)(a).

832 MFMA s 146(3)(a)(ii).

833 FC s 139(5)(b)(ii).

government which are distinctive, interdependent and interrelated'.⁸³⁴ In sharp contrast to the Interim Constitution, where local government was a competence of provincial government, the radical innovation of the Final Constitution was to make local government 'equal partners' of national government and provincial government. However, as has been shown above, the relationship between local government and the other spheres is complex. It simultaneously exhibits elements of autonomy and hierarchy. In attributing meanings to the words 'distinctive, interdependent and interrelated',⁸³⁵ it can be said that 'distinctiveness' refers to the elements of local autonomy, 'interrelatedness' to the supervisory role of national and provincial government over local government, and 'interdependence' to connote the cooperative relationship that must be pursued when the other two characteristics are being played out in practice. Co-operative government thus serves as a constraining principle on all three spheres of government when they exercise their distinctive powers and functions.

In FC s 41, the principles of co-operative government and intergovernmental relations are sketched in broad brush strokes. Given this minimalist approach to co-operative government, the Final Constitution mandates national legislation to '(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.' After limited sectoral interventions,⁸³⁶ the Intergovernmental Relations Framework Act⁸³⁷ was eventually passed in 2005 in response to this constitutional mandate.

In constructing a cooperative system of decentralized government, three additional elements complement FC Chapter 3. First, given the need to draw local government into national governance, and the inevitable large numbers of municipalities, the organization of municipalities into a collective is required. Second, organized local government is given participatory rights in the National Council of Provinces (NCOP) and a representative on the Finance and Fiscal Commission (FFC). Third, the supportive and consultative duties of the national government and provincial governments towards local government are regularly invoked in various constitutional provisions and statutes.

(ii) Organised local government

For a large number of municipalities to participate effectively in the system of co-operative government, they must act as a collective to make the voice of local government heard. The Final Constitution thus recognizes and entrenches the

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need for organized local government to represent municipalities. FC s 163 requires an Act of Parliament to provide for the recognition of national and provincial

834 FC s 40(1). See Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14, 14-8.

835 See Steytler & De Visser (supra) at 16-3.

836 Intergovernmental Fiscal Relations Act 97 of 1997.

837 Act 13 of 2005.

organizations representing municipalities.⁸³⁸ The Act must also create procedures through which local government may consult with the national or provincial government, designate representatives to participate in the NCOP, and nominate persons to the FFC.⁸³⁹

The Organised Local Government Act⁸⁴⁰ authorizes the Minister responsible for local government to recognize a national organization representing the majority of provincial associations.⁸⁴¹ The Minister must also recognize the provincial association representing the majority of municipalities in each province, with the concurrence of the relevant MEC for local government, provided that all the different categories of municipalities are represented.⁸⁴²

The South African Local Government Association (SALGA), a voluntary body representing all nine provincial local government associations, was established in 1996. It was recognized, along with its nine constituent provincial members, by the Minister as the body representing local government on 30 January 1998.⁸⁴³ SALGA is not a statutory body, but has official status through the executive act of recognition. It has a number of statutory and constitutional consultation duties which it executes with varying degrees of success.⁸⁴⁴

(iii) National Council of Provinces

The primary function of the NCOP is to serve as the intergovernmental forum for the provincial legislatures in Parliament. This constitutional object is articulated as follows: 'The National Council of Provinces represents the provinces by ensuring that provincial interests are taken into account in the national sphere of government.'⁸⁴⁵ The 'lobbying' of provincial interests, FC s 42(4) suggests, takes two distinct forms. The first is a narrow legislative form: the NCOP enables the provinces to participate 'in the national legislative process on matters affecting provinces'.⁸⁴⁶ The second is a

838 FC s 163(a). The legislation must be enacted in accordance with the procedure established by FC s 76.

839 FC s 163(b) read with FC s 221(1)(c).

840 Act 52 of 1997.

841 Organised Local Government Act s 2(1)(a).

842 Organized Local Government Act s 2(1)(b). The Minister may also withdraw recognition of an organisation if it ceases to meet the recognition criteria. Organised Local Government Act s 2(2)(a).

843 *Government Gazette* 18645, Regulation Gazette 6087, GN R175 (30 January 1998).

844 See Robert Cameron 'The Upliftment of South African Local Government' (2001) 27 *Local Government Studies* 97, 108; Mirjam Van Donk & Edgar Pieterse 'Reflections on the Design of a Post-Apartheid system of (Urban) Local Government' in Udesch Pillay, Richard Tomlinson & Jacques Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 107, 124.

845 FC s 42(4).

846 FC s 42(4).

more general function: it provides 'a national forum for public consideration of issues affecting provinces.'⁸⁴⁷ In the elaboration of the

functions of the NCOP, additional powers are given to the NCOP. First, it co-determines the ratification of international treaties.⁸⁴⁸ Second, it serves as a brake on intervention by the national government in provincial affairs.⁸⁴⁹ It also reviews provincial interventions in municipalities.⁸⁵⁰ Overall, the NCOP integrates provinces into the national legislative process and some executive processes. Not only do provinces bring their perspective to bear on national legislation that affects their interests, but by being part of the national legislative process, they are also drawn into and made to understand the national agenda that extends beyond parochial provincial interests.

Given the strong provincial focus of the functions of the NCOP, local government's participation in this body would appear to have been an afterthought. FC s 67 perfunctorily provides that '[n]ot more than ten part-time representatives designated by organised local government in terms of section 163 to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.' In terms of the Organised Local Government Act, each provincial organization may nominate up to six councillors as representatives.⁸⁵¹ SALGA must, then, in terms of criteria determined by it, designate not more than ten persons from the nominees as its representatives.⁸⁵²

What is striking about FC s 67 is that it does not articulate the intention behind organized local government participation in national government affairs. The logic behind its inclusion lies in FC s 40(1): recall that FC s 40(1) emphasizes the interrelatedness and the interdependence of the three spheres of government. If there is a need for provinces to articulate and present their interest for consideration in a national public forum,⁸⁵³ then local government, as a sphere of government, should also be accorded such an opportunity. The hierarchical nature of the spheres does, however, surface and prevail. Local government is not an equal partner of the provinces and their participation in the legislative process is merely consultative. They may make their views known to their provincial colleagues and trust that these NCOP colleagues take local government concerns on board when they interact directly with the National Assembly. It is therefore not surprising that SALGA has put little effort into participating in the NCOP. Direct consultation processes with the

847 FC s 42(4).

848 FC s 231(2).

849 FC s 100.

850 FC s 139.

851 Organised Local Government Act s 3(1).

852 Organised Local Government Act s 3(2)(a).

853 FC s 42(4).

national executive or using the public participation opportunities granted by the National Assembly are generally more productive.⁸⁵⁴

Nevertheless, some value could be gained by mingling in the corridors of power in Parliament. Organized local government's entitlement to participate in the NCOP turns on the phrase 'when necessary'. However, 'when necessary' should be generously interpreted to allow SALGA to take its seat whenever a matter that affects, or may affect, the interest of local government is before the NCOP — either when the NCOP sits alone or jointly with the National Assembly. In the first place, any legislation that affects local government triggers the participation right. Second, when the NCOP reviews a provincial intervention in a municipality,⁸⁵⁵ organized local government has a palpable interest. Finally, when the NCOP exercises its oversight function over intergovernmental relations, the involvement of local government in the system co-operative government should also trigger the need to participate.

(iv) Financial and Fiscal Commission

In contrast to local government's ambiguous participation in the NCOP, the constitutional mandate for its participation in the FFC is more forthright. The NCOP is a political institution designed to represent the provincial legislatures and to articulate political positions. The FFC is an advisory body. It consists of experts who ensure the protection of both provincial interests and local government interest in the area of intergovernmental fiscal relations and the national division of annual revenue.⁸⁵⁶

The FFC consists of the following persons appointed by the President:

- (a) a chairperson and deputy chairperson,
- (b) three persons appointed after consultation with the Premiers,
- (c) two persons selected, after consultation with organised local government, from a list compiled by organised local government; and
- (d) a further two persons.⁸⁵⁷

Participation in the FCC is not premised on having a mandate from the nominating constituency. Its representatives need not be councilors. SALGA's two nominees must bring an independent local government perspective to the FCC.⁸⁵⁸ The FFC is

854 Nico Steytler 'National, Provincial, and Local Relations: An Uncomfortable *Ménage à Trois*' in Harvey Lazar & Christian Leuprecht (eds) *Sphere of Government: Comparative Studies of Cities in Multilevel Governance Systems* (2007) 239.

855 FC s 139.

856 FC s 220. In terms of the Municipal Systems Act 32 of 2000 s 9(1)(a) and (2)(a) the FFC must also play an advisory role when a national minister (or MEC) initiates legislation assigning a function or a power to municipalities.

857 FC s 221 as amended by Seventh Constitutional Amendment Act 61 of 2001 s 7.

858 See Finance and Fiscal Commission Act 99 of 1997 s 2: the FFC is 'independent and subject only to the Constitution, this Act and the law'.

not an intergovernmental relations structure on par with the Budget Forum. It is not a meeting of executives but is an independent expert body advising government on the conduct of intergovernmental relations in the field of finance.

(b) Principles and statutory provisions of cooperative government

In addition to the general principle of intergovernmental relations and cooperative government listed in FC s 41(1),⁸⁵⁹ the Final Constitution imposes two specific co-operative government duties related to local government. Under the heading of 'Municipalities in co-operative government', FC 154(1) places a duty of support on the national government and provincial governments in respect of local government. FC s 154(2) affords local government the opportunity to make representation on any national or provincial draft legislation affecting local government. These principles have been developed in a number of laws over the past decade.

The Intergovernmental Fiscal Relations Act⁸⁶⁰ created the Local Government Budget Forum for consultation by organized local government with the Minister of Finance and the MECs for finance on the allocation of revenue raised nationally. The Municipal Systems Act of 2000 refers to co-operative government by merely repeating the general principles of FC Chapter 3. Section 3(1) asserts that municipalities 'must exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution.' Conversely, national and provincial governments must exercise their executive and legislative authority 'in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.'⁸⁶¹

In the chapter devoted to 'Co-operative Government', the MFMA confuses supervision with the mandate of cooperative government. The MFMA correctly views as cooperative government the national government's and provincial governments' duty of support and capacity building,⁸⁶² the timely transfers of funds to local

859 FC s 41(1)(h) instructs all spheres of government and all organs of state within each sphere to 'cooperate 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 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 proceedings against one another.'

860 Act 97 of 1997.

861 Municipal Systems Act 32 of 2000 s 3(2).

862 MFMA s 34.

government, the sharing of information,⁸⁶³ the predictable allocation of resources to municipalities⁸⁶⁴ and municipalities' reciprocal duties in these matters.⁸⁶⁵ However, the chapter incorrectly contains provisions relating to the stopping of transfers of funds, including the equitable share, to municipalities due to non-compliance with Treasury norms and standards.⁸⁶⁶ The stopping of transfers is a

hierarchical measure that punishes (and seeks to correct) errant municipal conduct — the antithesis of co-operation premised on a relationship of equality. Likewise, national powers and provincial powers of capping municipalities' taxes and tariffs⁸⁶⁷ are the epitome of top-down regulation, a key aspect of supervision.

The Intergovernmental Relations Framework Act of 2005 ('IGRFA' or 'IGR Framework Act')⁸⁶⁸ contains many provisions pertinent to local government. However, the IGRFA provides a default position only. If a provision of another Act regulating intergovernmental relations conflicts with IGRFA, then the former prevails.⁸⁶⁹ Thus, the provisions of the Intergovernmental Fiscal Relations Act⁸⁷⁰ will trump the IGRFA. However, the Act prevails over any by-law,⁸⁷¹ a provision clearly inconsistent with FC s 156(3). This section provides that a by-law is invalidated by conflicting national legislation or provincial legislation. This provision is subject to FC s 151(4)'s proviso that prohibits national government or provincial government from compromising or impeding a municipality's right to exercise its powers or perform its functions.⁸⁷² The IGRFA is concerned only with executive intergovernmental relations. It excludes the national legislatures and provincial legislatures from its reach.⁸⁷³ In the case of local councils, where no institutional division is made between legislative and executive actions, both are subject to the Act. The Act further institutionalizes a number of intergovernmental forums at national, provincial and district levels and determines local government's participation therein.⁸⁷⁴

863 MFMA s 35.

864 MFMA s 36.

865 MFMA s 37.

866 MFMA ss 38-40.

867 MFMA s 43.

868 Act 13 of 2005, coming into operation on 15 August 2005.

869 IGR Framework Act s 3(1).

870 Act 97 of 1997.

871 IGR Framework Act 3(2)(a).

872 See further § 22.3(e) supra.

873 IGR Framework Act s 2(2)(a)-(b).

(c) Duty of support

FC s 41(1)(h)(ii) instructs all spheres of government to 'co-operate with one another in mutual trust and good faith, by . . . assisting and supporting each other.' Under the heading 'Municipalities in co-operative government' FC s 154(1) imposes a specific duty on 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.' Both the section heading and coupling the duty of support in FC s 154(1) with local government's entitlement in FC s 154(2) to make its views known on national legislation and provincial legislation affecting its interests, confuse the conceptual distinction between co-operation and supervision.

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FC s 41(1)(h)(ii) is a general provision. It indicates no hierarchical duty of support. It could be cited as a ground for a metropolitan municipality supporting a province on a specific matter. It could even be used to sustain a claim that one municipality has a duty to assist a neighbour. For example, one municipality should be under an obligation to make available its fire fighting services in the case of a major fire. Any such assistance occurs with the consent and cooperation of the recipient municipality. Thus, the co-operative duty to assist and to support also applies on a horizontal level. Municipalities must be mutually supportive of one another and may also assist provinces and national government should the need arise.

FC s 154(1), on the other hand, is based upon a different premise. The duty of support flows from the hierarchical position that both the national government and provincial governments occupy in relation to local government, and not because they are equal partners in the great endeavour of providing coherent government to the country as whole. Moreover, unlike FC s 41(1)(h)(ii), there is no mutual obligation of support. The national government owes a duty of support because it sets the frameworks and benchmarks within which municipalities must operate. The provincial support is reflected in both the establishment powers of FC s 155 and the intervention powers of FC s 139. Appropriately, then, the other provision imposing on provinces the duty to support municipalities forms part of FC s 155. This section is devoted to the establishment by the national government of the broad framework for municipalities, the provinces establishing municipalities, and the overall regulatory power of both the national and provincial government over municipalities.⁸⁷⁵ In the case of provincial governments, the establishment power is linked to the duty to get and keep municipalities on their feet. Furthermore, the duty of support is coupled with monitoring. As shown above,⁸⁷⁶ the Constitutional Court has placed the duty of support firmly in the context of supervision. We would contend that FC s 154(1) reflects a supervisory hierarchical relationship rather than the more egalitarian co-operative government contemplated by FC s 41(1)(h).

There are, however, similarities between 'supervisory support' and 'cooperative support'. Common to both is the notion that support is a bi-lateral enterprise: the active participation of the recipient is required. In as much as communities cannot be developed as objects and the success of development projects is more assured when such communities are part of the decision-making process, the municipality

874 See § 22.7(d)(v) *infra*.

875 FC s 155(7). See § 22.3(e) *supra*.

876 See § 22.6(a)(ii) *supra*, on supervision.

must actively engage in the support measures. In the case of 'supervisory support', the choice of the municipality is constrained; as shown above, if the proffered assistance is not taken, then an intervention may follow.

(d) Duty to consult

The *grundnorm* of cooperative government is probably the duty in FC s 41(1)(h)(iii) of 'informing one another of, and consulting one another on matters of

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common interest.' FC s 154(2) has concretized this duty for local government as follows:

Draft national or provincial legislation that affects the status, institutions or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Both provisions establish the obligation to consider the views of the other party before a decision is taken. The two sections indicate that there are differences in the manner in which the views of the other party may be sought.

(i) Information sharing

The duty of informing other spheres of government or organs of state, serves a very different function than that of consultation. In the case of consultation, the organ consulting seeks views or information from another party to inform its own decision-making. Such consultation should lead to better decision-making. With information-sharing the direction of influence is the other way. The organ disseminating the information does not seek a response. Rather, the receiving organ of state may take such information into consideration if and when it makes a decision on a related matter.

(ii) Consultation⁸⁷⁷

'Consultation' has been defined in IGRFA as 'a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.'⁸⁷⁸ This definition reflects the common-law understanding of the concept. In *Robertson & Another v City of Cape Town; Truman-Baker v City of Cape Town*,⁸⁷⁹ the Cape High Court favourably referred to the following definition: 'The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice . . .'⁸⁸⁰ While there is no prescription on the form of consultation, the High Court in *Hayes & Another v Minister of Housing, Planning and Administration, Western Cape & Others*⁸⁸¹ stated that 'as long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of such consultation will usually not be of

877 See Nico Steytler & Jaap De Visser *Local Government Law in South Africa* (2007) 16-12.

878 IGR Framework Act s 1(1) 'consultation'.

879 2004 (9) BLCR 950 (C) ('*Robertson HC*') at para 108.

880 With reference to *Maqoma v Sebe NO & Another* 1987 (1) SA 483, 491E (Ck).

great import.' These dicta suggest three basic elements: (1) an invitation to hear the views of a particular party (or public in general) on a specified matter; (2) an adequate opportunity to submit considered views; and (3) the party inviting views must consider those views in good faith.

The invitation to hear the views of other parties can take one of two forms. In its passive form, the party consulting extends a general invitation to interested parties or the public in general. By setting a closing date for responses, it leaves the addressees to decide whether or not to respond. The more active approach is to solicit actively the views of particular parties.

(iii) Providing opportunities for representation

The duty to consult in terms of FC s 154(2) is of the passive kind. It requires only the issuing of a general invitation to comment. It is also limited in a number of respects. First, it deals only with national legislation and provincial legislation passed by Parliament or a provincial legislature. Although 'legislation' is defined in FC s 239 as including both legislation passed by Parliament and a provincial legislature and subordinate legislation made in terms of a national or provincial act, the reference in FC s 154(2) to legislation introduced in Parliament or a provincial legislature excludes subordinate legislation. Second, although the substance of the draft legislation is ostensibly concerned only with 'the status, institutions or functions of local government', most aspects of local government would be covered by the broad term 'functions'. Third, draft legislation must be published for public comment before it is introduced in Parliament or a provincial legislature. Any changes affected during the legislative process would not elicit a further opportunity to make representations. However, we might argue that a fundamental change to the legislation during the legislative process should trigger a duty to call for further comments. Fourth, a call for comments is an open invitation to all and sundry, including organised local government and municipalities. Fifth, the duty is to facilitate the participation of local government. Where the deadline for submitting representations is too short for meaningful participation, the legislative process may be invalidated.⁸⁸² Sixth, while there is a duty to consider any representations in good faith, the failure to use the opportunity to make representations is no bar to proceed with the introduction of the draft legislation in the legislatures.

(iv) Consultation — seeking out the views of other parties

The active form of consultation entails more effort to secure the views of stakeholders. For example, FC s 229(5) requires that national legislation that regulates the powers of municipalities to impose revenue-raising measures may be enacted only after organised local government has been consulted. In *Robertson v City of Cape Town; Truman-Baker v City of Cape Town*,⁸⁸³ the High Court, after defining

881 1999 (4) SA 1229, 1242J-1243A (C).

882 For more on the requirements of public participation in the legislative process, see *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC) and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10.

883 *Robertson HC* (supra) at para 108.

consultation, noted that consultation was a 'bi-lateral process' that required the engagement with the other party whose advice is sought. In the instant case, the High Court found that there was no consultation on amendments to the Structures Act because neither the Minister for local government nor Parliament 'sought to engage the FFC in consultation'.⁸⁸⁴ No formal request was sent to the FFC and the latter's attitude was that it would only engage in consultation if Parliament requested it to do so. This case supports the proposition that when there is a duty to consult with a particular body, there must be conscious effort, directed to that party to achieve that end. Second, it could also be argued that, while the consultant's decision-making cannot unreasonably be delayed by dilatory conduct by the party whose views are being sought, 'an engagement to consult' should amount to more than a simple invitation to submit views.

Where a province considers legislation affecting municipalities (or a particular municipality), the IGFRA has sought to structure both the consultation and the way in which received information must be considered.⁸⁸⁵ The consultation must 'be appropriately focused and include a consideration of the impact that such policy or legislation might have on the functional, institutional or financial integrity and coherence of government in the local sphere of government in the province.'⁸⁸⁶ Such in-depth consultation suggests more than merely an invitation to comment. It requires bi-lateral engagement.

Given the large number of municipalities, active consultation by the national government or provincial government is usually restricted to organised local government. A wide variety of laws thus require that organised local government be consulted before legislation affecting local government is adopted.⁸⁸⁷

(v) Use of consultative forums

In giving effect to the constitutional mandate of establishing structures to promote and facilitate intergovernmental relations, the IGRFA has created a number of forums for the purposes of consultation and discussion. The Act provides specifically that where there is any statutory obligation to consult with organised local government, the consultation may be conducted through an appropriate intergovernmental forum or support structure.⁸⁸⁸ An appropriate forum or structure would be one where organised local government is a member. However, where organised local government is not represented on such a forum, the Act provides that it is entitled to participate through a representative with full speaking rights when the relevant matter is discussed.⁸⁸⁹

884 *Robertson HC* (supra) at para 109.

885 IGR Framework Act s 36(1)(c).

886 IGR Framework Act s 36(2).

887 See Steytler & De Visser (supra) at 16-15ff.

888 IGR Framework Act s 31(1) read with IGR Framework Act s s 1(1) 'intergovernmental structure'.

889 IGR Framework Act s 31(2).

From 1994 onwards, a large number of forums have sprung up, all aimed at promoting co-operative government. They were mostly informal and primarily linked the provinces up with the national government. Local government's participation was *ad hoc* and by invitation only in the President's Coordinating Council and the various sector forums called MinMECs. At provincial level there was a wide variety of forums where the premiers met with organised local government in the province. At district level there was the uneven and sporadic establishment of intergovernmental forums bringing the mayors of the district and local municipalities together.⁸⁹⁰ The only statutory body with mandatory representation from organised local government was the Budget Forum. The Budget Forum was established in terms of the Intergovernmental Fiscal Relations Act of 1997.⁸⁹¹

With the passing of the IGRFA, the intergovernmental forums were grounded by statute. At the pinnacle is the President's Co-ordinating Council ('PPC'), consisting of the President, the deputy president and four additional ministers, the nine premiers and a representative of organised local government.⁸⁹² At the national level, any cabinet minister may establish a forum with his or her counterparts in the provinces, the so-called MinMECs, and a representative of organised local government, if the subject so requires.⁸⁹³ At provincial level, every premier must establish a Premier's Intergovernmental Forum, consisting of the premier, a number of MECs, the mayors of metropolitan and district municipalities, and a representative of organised local government in the province.⁸⁹⁴ Finally, at the district level, there must be a district intergovernmental forum comprising the mayors of the district and local municipalities.⁸⁹⁵

The national IGR forums are hierarchical structures that affirm the command of the national government.⁸⁹⁶ The PCC is conceived as a consultative forum 'for the President'⁸⁹⁷ and not a forum where the President, premiers and organized local government operate as equals. The President determines the agenda for the meetings of the PPC.⁸⁹⁸ The premiers and SALGA are, however, not totally passive recipients; they may submit suggestions for inclusion on the agenda, but then only

890 See Coel Kirkby, Nico Steytler & Janis Jordan 'Towards a More Cooperative Local Government: The Challenge of District Intergovernmental Forums' (2007) 22(1) *SA Public Law* 143.

891 See § 22.7(a)(i) *supra*.

892 IGR Framework Act s 6.

893 IGR Framework Act s 9.

894 IGR Framework Act s 16.

895 IGR Framework Act s 24.

896 See Christina Murray & Okyerebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20, 20-21.

897 IGR Framework Act s 6.

through the Minister responsible for provincial and local government and only in terms of a framework determined by the President.⁸⁹⁹ The PCC also

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aims to perform a monitoring function with respect to the implementation of policy and legislation and the realisation of national priorities.⁹⁰⁰ In addition to the PPC being a forum for consultation with the provinces and organised local government on matters of national interest, the President may use the forum 'to discuss performance in the provision of services in order to detect failures and to initiate preventive and corrective action when necessary'.⁹⁰¹ To this end, the President may use the forum to consider reports 'dealing with the performance of provinces and municipalities'.⁹⁰² Instead of focusing on common issues, the focus is on the performance of provinces and local government and their problems.

The same approach is followed with regard to MinMECs. Their role is described as 'a consultative forum *for* the Cabinet member responsible for the functional area'.⁹⁰³ Again, the national cabinet minister determines the agenda, with the proviso that an MEC may suggest agenda items in terms of a framework determined by the minister.⁹⁰⁴ As a forum of consultation for the minister, the MinMEC is to be used for co-ordination and alignment within the sector for strategic and performance plans as well as to discuss performance in the provision of services in the sector.⁹⁰⁵

The role of the Premier's Intergovernmental Forum is 'a consultative forum for the Premier of a province *and* the mayors of metropolitan and district municipalities in the province'.⁹⁰⁶ The same inclusive and egalitarian approach is followed with district intergovernmental forums: 'The role of a district intergovernmental forum is to serve as a consultative forum for the district municipality *and* the local municipalities in the district to discuss and consult each other on matters of mutual interest'.⁹⁰⁷

898 IGR Framework Act s 8(1)(a).

899 IGR Framework Act s 8(2).

900 IGR Framework Act s 4.

901 IGR Framework Act s 7(c).

902 IGR Framework Act s 7(d)(ii).

903 IGR Framework Act s 11 (emphasis added).

904 IGR Framework Act s 13(1)(b).

905 IGR Framework Act s 11(b)-(c).

906 IGR Framework Act s 18 (emphasis added).

907 IGR Framework Act s 24(1) (emphasis added).

