

Review of provinces and local governments in South Africa: Constitutional foundations and practice

EDITED BY
BERTUS DE VILLIERS

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60 Hume Road
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Republic of South Africa

P O Box 55012
Northlands 2116
Johannesburg
Republic of South Africa

Telephone: (+27 +11) 214-2900

Telefax: (+27 +11) 214-2913/4

E-mail: info@kas.org.za

www.kas.org.za

Cover design: Brian Garman

Editing, DTP and production: Tyrus Text and Design – tyrustext@gmail.com

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The authors

Fanie Cloete has an extensive legal, political and policy science background. He is a former professor of Public Policy Analysis, former director of the School of Public Management and Planning and former associate dean of Economic and Management Sciences at the University of Stellenbosch in South Africa. Cloete is currently professor in the Department of Public Governance at the University of Johannesburg. He is also an advocate of the Supreme Court of South Africa, a former member of the Presidential Review Commission on the Restructuring of the Public Service in South Africa and a policy management consultant. Cloete has accumulated wide career and research experience in the South African public sector and abroad. He currently works on technological impacts on public policy management.

Bertus de Villiers (BA Law, LL.B, LL.D University of Johannesburg) is admitted as legal practitioner in Australia and South Africa. His professional background includes constitutional advisor during the 1990-96 transition period in South Africa, principal legal officer for South African National Parks (1996-99) during which time he was lead negotiator for the settlement of the Makuleke claim, and principal legal officer (1999-2005) Goldfields Land and Sea Council in Kalgoorlie, Australia where he represented Aboriginal people to claim their ancestral lands and in other social justice issues. De Villiers is currently a member of the State Administrative Tribunal of Western Australia which deals, among others, with the review of decisions by the state and local governments. He is also a visiting fellow of the Law Faculty of the University of Western Australia. De Villiers has published widely on constitutional and land reform topics.

Heinrich Hoffschulte (PhD) is currently Commissioner for European Questions of the Association for Communal Policy, and in this capacity member of the Federal Committee for Foreign, European and Security Policy of the Christian Democratic Union in Germany. Hoffschulte was chair of the United Nations Expert Group for a World Charter of Local Autonomy from 1998-2002 and has held numerous posts in prominent European organisations. He held the position of first vice-president of the European International Union of Local Authorities (IULA)/Council of European Municipalities and Regions (CEMR) from 1998-2004, and vice-president of the German Council of European Municipalities and Regions (CEMR) from 1995-1999. He is also a member of the United Nations Advisory Committee on Local Authorities (UNACLA) and of the United Nations Advisory Group of Experts on Decentralisation, as well as a member of the Konrad-Adenauer-Stiftung's Local Policy working group. Hoffschulte's career has included stints as deputy executive, chief executive and mayor of a German town, and chief executive of Kreis, a county of Stenfurt. He has lectured for the Council of Europe on decentralisation and local and regional self-government in numerous countries in Middle and Eastern Europe, Latin America, Asia and Africa.

Lindisizwe Magi is professor emeritus and research fellow at the University of Zululand. A geographer by training, Magi holds a PhD in that field and presently specialises in recreation and tourism, and conducts postgraduate studies therein. He is vice president of the International Geographical Union (IGU) and chairs the South African National Committee for the IGU.

Rassie Malherbe is professor of Public Law at the University of Johannesburg and does research in constitutional law, human rights, education law and legislative law. He is the author and co-author of numerous textbooks, articles and case notes in the fields of constitutional law (including issues affecting national and provincial government), human rights and education law. Malherbe is an executive member of the South African Education Law and Policy Association and a member of the editorial board of the *Journal of South African Law*. He served as an adviser during the South African constitution-making process in the early 1990s and still advises public bodies on constitutional issues.

Rama Naidu is executive director of the Democracy Development Programme and chairperson of the KwaZulu-Natal Democracy and Election Forum. He holds a PhD from the University of Durban Westville and is an ex-fellow of Northwestern University in Chicago. Naidu is an active member of the Good Governance Learning Network and serves as a steering committee member on the Global Network for Local Governance. He has been involved extensively in the debate on public participation and has worked within the local government sphere for the past ten years, focusing on issues of public participation, good governance and citizenship.

Christopher Thornhill is Professor Emeritus at the University of Pretoria and part-time lecturer at this university and at the University of Johannesburg. He holds a DPhil (Public Administration) from the University of Pretoria. Thornhill has 14 years' public service experience which included the position of deputy director-general. He was appointed professor in 1976 and served as head of the Department of Public Administration at the University of Port Elizabeth and the University of Pretoria. He also served as dean of the Faculty of Economic and Management Sciences before his retirement in 2001. Thornhill has published more than 55 articles, contributed to 18 books and delivered more than 176 papers.

Foreword

ESTABLISHING AN EFFECTIVE AND EFFICIENT DECENTRALISED POLITICAL SYSTEM IS a challenge in any country that is structured by a multi-tiered system of government. Difficulties arise in making day-to-day decisions and in defining a clear separation of responsibilities *vis-à-vis* intergovernmental financial relations. This must be understood by government as an ongoing process that needs to be fine-tuned over the years.

Following on from South Africa's constitutional development process which took place in the early 1990s, the country's constitution established a three-sphere system of government comprising local, provincial and national levels of government. This system was viewed by experts and politicians at the time as the most appropriate for South Africa, which is a large, multi-ethnic country featuring important regional differences. The Konrad-Adenauer-Stiftung (KAS) was very engaged in the 'Kempton Park' process and offered special advice on experiences with decentralised systems in several countries throughout the world.

The local level of government is correctly understood as the pillar of democracy where politics meets people. Political plans and decisions should be the result of a participative process that includes the cultural context and specificities of the locality. However, municipalities and districts are heavily reliant on subsidies and capacity support from the higher spheres.

From the perspective of the local level, the national administration is far removed from their specific problems and finds it difficult to support the communities adequately. This fact has been borne out in various peer review and evaluation processes. As the tier much closer to the local area, the provinces should assume this responsibility. But if the provincial tier is to fulfil its obligations properly it must have its own parliamentary-based

authority and a degree of financial independence from the national level with its own tax income feeding the provincial budget.

Legal regulations on these issues seem a challenge ahead. The basic determination is laid down in the South African Constitution, where paragraph 125(3) obliges the national government to ‘... assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions ...’.

There are many examples throughout the world where governments have adopted centralised systems because decentralisation was not able to deliver properly. These countries preferred the seemingly easy solution of centralisation instead of thoroughly reviewing the previous system to identify and deal with any failures and defects. A problematic consequence of centralisation, however, is a lack of ownership of and responsibility for decisions especially at the lower levels, or the advent of separation movements.

In South Africa, the Department of Provincial and Local Government has introduced a provincial review process. This coincides with the ongoing political debate on poor service delivery and the alleged mismanagement that is affecting the relationship between the three spheres of government.

KAS put together a group of recognised experts in the field, which has over the past year worked on a response to the review process based on questions and guidelines specified by the ministry. The results were submitted to the Department of Provincial and Local Government. We publish the submission with this occasional paper to make it available to stakeholders for broader debate.

Dr Werner Böhler
KAS resident representative
Johannesburg

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List of abbreviations

AGRED	Advisory Group of Experts on Decentralization
ANC	African National Congress
CEMR	Council of European Municipalities and Regions
CLRAE	Congress of Local and Regional Authorities of Europe
DPLG	Department of Provincial and Local Government
EU	European Union
GC	Governing Council
GOLD	Global Observatory of Local Government
IDP	Integrated development plan
IFP	Inkatha Freedom Party
IMF	International Monetary Fund
IULA	International Union of Local Authorities
KAS	Konrad-Adenauer-Stiftung
MEC	Member of the executive council
NATO	North Atlantic Treaty Organisation
NCOP	National Council of Provinces
NGO	Non-governmental organisation
SALGA	South African Local Government Association
UCLG	United Cities and Local Governments
UN	United Nations
UNACLA	United Nations Advisory Committee of Local Authorities
UNCHS	United Nations Human Settlements Programme
US	United States
UTO	United Towns Organisation
WACLAC	World Associations of Cities and Local Authorities Coordination
WUF	World Urban Forum
WUK	<i>Weltunion der Kommunen</i> (UCLG)

Introduction

BERTUS DE VILLIERS

THE CREATION OF NINE PROVINCES WITHIN A FEDERAL CONSTITUTIONAL framework has been a cause for celebration and frustration since the enactment of the interim Constitution of 1993. Some view the provinces as essential elements for the deepening and widening of South Africa's democracy and the improvement of service delivery, while others see them in a far less favourable light as costly and fraught with duplication of services.

In the debates leading up to the new constitution few, if any, topics were as hotly debated as the creation of provinces with constitutionally guaranteed powers. The concept 'federation' was loathed by the African National Congress (ANC) and propagated by the Inkatha Freedom Party (IFP). Even today, use of the word 'federation' to describe the 1996 Constitution remains sensitive to many in government. No wonder that the birth of the nine provinces in 1993 was at the time lauded as a miracle. It is incontestable that without the provincial compromise at the time, the 1993 and 1996 constitutions would not have come about in the peaceful way they did.

But the provinces have remained in the pressure cooker of political debate. The arguments for and against the provinces in 2008/9 are not dissimilar to those which were raised during the constitutional debates of the early 1990s. Sceptics highlight the alleged failures of the provinces, while proponents focus on the purported successes and potential of the provinces. Some view provinces as laboratories of local decision-making and experimentation, while others see them as a risk to national unity and integration. Some view provinces as an unnecessary 'layer' between the

national and local governments, while others see them as an essential element to direct and coordinate regional decision-making and service delivery.

The fact is that provinces, as is the case with local governments, have since 1993 become an integral part of the South African constitutional milieu. Provinces and local governments are practical examples of how 'self-rule' and 'shared rule' can be combined and harmonised in a single system of government with common objectives. The Constitution sets out the framework within which all three spheres of government must exercise their powers and, most importantly, how they must respect, care for, support and cooperate with each other. With Chapter 3 of the Constitution and the Intergovernmental Relations Act 2005, South Africa arguably has the most advanced legal arrangements of any constitution to set out the spirit of national unity, provincial and local autonomy, and the importance of intergovernmental cooperation.

After 15 years' experience with this federal-type dispensation, it is now fair to ask whether the three-sphere system is functioning in practice. Is there room to make adjustments, to improve the system and to strengthen it?

Unlike many of the classic federations such as the United States (US), Germany and Australia, South Africa does not have a long history of federal government. The country had to create provinces, demarcate powers, devise institutions of shared rule and joint rule and develop intergovernmental institutions. It is therefore appropriate to revisit those institutions and the way they operate to assess how we are doing.

The Department of Provincial and Local Government (DPLG) initiated a policy review process in August 2007 with the aim of developing a White Paper to set out the future of provincial and local governments. It is envisaged that a White Paper for consideration by cabinet and parliament will be launched in 2009. (See Appendix 1 for an excerpt of the Policy Review and the invitation for public comment.)

However, it appears as if the Policy Review is being given a low profile with very little public attention or debate. In comparison to the lively public debates in the early 1990s which led to the creation of the provinces and local governments, the Policy Review is for all practical purposes invisible. Little, if any, reference has been made to it in the media, parliament or by political parties. The seriousness of the review seems to be lost in the maze of other important challenges facing South Africa.

The rationale for the Policy Review is summarised as follows by the DPLG:

This task of assessing whether existing forms of governance remain appropriate to meeting changing demands has become routine in developed and developing countries alike. This process will draw on the lessons of a decade or more of practice, wide public consultation and comprehensive research, geared towards making proposals (DPLG 2007:3).

The Policy Review unfortunately reflects a bias against the current provincial arrangements. The ongoing unease in senior government ranks with provincial governments is reflected in the following statements in the Policy Review:

The Constitution created provincial government, but it did not specify distinct objects for provincial government within the overall system. There is currently no policy or legislative framework for provinces (ibid:4).

The absence of a definite policy on provincial government has generated uncertainty about the role of this sphere in reconstruction and development. (ibid:6).

In the light of the limited public consultation about the review process, there is a risk that fundamental changes could be brought about to the system of provincial and local government without the public being properly informed, without a proper public debate and consultative process, and without the necessary empirical evidence to justify large-scale changes.

Shortly after the launch of the Policy Review, the Konrad-Adenauer-Stiftung (KAS) published a policy paper entitled *The Future of the Provinces – The Debate Continues*. In order to provide further interdisciplinary input to the policy review process, I suggested to KAS that a discussion paper be undertaken to allow experts in their respective fields to comment on a wide range of issues raised by the Policy Review.

As editor of this publication and with the support of KAS I invited a panel of experts in provincial and local government to comment on the Policy

Review. The panel met twice for one-day working sessions to discuss various aspects of the review, to settle principles of departure for the team and to comment on aspects of the Policy Review. The authors were at liberty to comment on any aspects of the review that fall within their field of expertise.

In order to respect the authors' freedom of expression, no specific editorial guidance was given to them regarding the content of their papers. As a result there may in some instances be a slight overlap between the respective chapters, but I believe that such overlap only enhances the opinions expressed.

The authors agreed on a few basic points of departure which ground their respective chapters and which they believe should also guide the Policy Review. Those points can be summarised as follows:

- The Policy Review must accept the current Constitution and the way in which it sets out the powers and functions of provincial and local governments as the basic framework for its analysis. Some of the remarks made in the Policy Review – for example, that provinces do not have 'objects' – reflect a poor understanding of the Constitution and the powers and functions of provinces.
- The South African Constitution must represent a balance between legal certainty and flexibility. It must provide consistency but also be a living document that can withstand new challenges and be adjusted to changing circumstances. The interpretation of the Constitution is aimed to bring flexibility to it. But the flexibility is within the framework of the Constitution. If it is shown to be necessary, fine-tuning and refinements of legal and policy arrangements should be considered, but radical constitutional amendments are, in our view, not required or justified.
- There is no case for (a) a radical review of provincial boundaries, (b) a reduction in the number of provinces or (c) a radical review of provincial powers and functions. Administrative arrangements, improved fiscal arrangements and capacity development, rather than boundary adjustments, should be used to address concerns of service delivery and other practical issues.
- Some refinement in the allocation of powers and functions of provincial

and local governments may be justified; however, any adjustment must be based on sound research, evidence and public consultation. There are various ways in which such research can occur but it must have a public component to ensure that any amendments are grounded in legitimacy.

- The composition and functions of the National Council of Provinces (NCOP) are unique and a thorough review of the institution is justified to establish if it is meeting the challenges for which it was established and to identify ways to improve its functioning.
- There is urgent need to enhance and expand the administrative and management capacity of the provinces and local governments to fulfil their constitutional duties. Most, if not all, perceived failures of provincial and local governments can be attributed to capacity problems rather than to the constitutional allocation of powers. The mere amendment of functions will not be a panacea to address capacity shortfalls.
- Before any drastic changes are made to provincial and local governments, the process of public consultation should be broadened and deepened to ensure maximum participation, transparency, credibility and legitimacy of outcome. We note with concern that very little time was given for the public to respond to the initial questionnaire that was launched by the Policy Review in August 2007, and since then the entire process has moved away from the public domain to become a behind-the-scenes exercise.
- We believe that the way in which the Constitution is implemented and administered can be drastically improved. For example: there is scope to better coordinate uniform standards without eroding provincial powers; framework legislation could set national norms but with liberty for provinces to add detail; resource pooling and training of bureaucrats can be improved; specific functional areas may require fine-tuning or even amendments; and intergovernmental relations must be a working engine for more effective government.

This occasional paper does not aim to be a detailed analysis of the functioning of the Constitution. The publication is a short response to the

Policy Review, and since the occasional paper was completed within the very limited time available, further inputs may be justified as the process unfolds. It is anticipated that as the Policy Review evolves into a White Paper and draft legislation, further comments will be made.

In Chapter 1 Bertus de Villiers discusses the balance between constitutional rigidity and flexibility. He comments on the importance of the majority, even a two-thirds majority, to respect and honour the Constitution and not to embark on any changes without proper consideration, consultation and research. De Villiers stresses that many of the challenges that face the provinces and local governments cannot be fixed by radical amendments to the Constitution. The problems arising from service delivery must be addressed through better training, coordination and resource use.

In Chapter 2 Rassie Malherbe outlines the constitutional demarcation of powers and the oversight of the Constitutional Court. He comments on the importance of cooperative government and intergovernmental relations to make a multi-tiered system function effectively. Malherbe finally makes observations in respect of the responsibility of the national government to render assistance to the provinces and local governments, to share resources in an equitable manner and to respect the constitutional powers of the provincial and local governments.

In Chapter 3 Lindisizwe Magi and Bertus de Villiers discuss various issues with regard to the demarcation of local and provincial governments. Magi considers the demarcation of local governments, the interaction between demography and demarcation and the process to be followed prior to demarcation, while De Villiers gives an overview of the events leading up to the creation of the nine provinces and makes recommendations as to how re-demarcation should be conducted if any adjustments to provincial boundaries were indeed considered.

In Chapter 4 Rassie Malherbe comments on how the legal arrangements provided for in the Constitution differ from the practice that has developed in day to day governance. While the provincial and local spheres of government are intended to be 'governments' in their own right, political reality and one-party dominance have made them subservient to the national government and the national leadership of the ANC. This trend has been exacerbated by the way in which the concurrent powers of the national and provincial spheres have been interpreted.

In Chapter 5 Chris Thornhill gives an overview of the current system of local government, the background to it and the main elements thereof. He also comments on some of the challenges that are experienced in service delivery, areas of capacity building and utilisation of human and other resources.

In Chapter 6 Rama Naidu continues the discussion on local government, focusing particularly on the functioning of ward committees and the involvement of local communities in decision-making. He shows how in many instances the lofty ideals of community involvement and consultation have come to nought.

In Chapter 7 Fanie Cloete analyses key aspects of the civil service and the ability of the respective spheres of government to discharge their duties. He highlights the shortfalls that exist in the fields of training and capacity building. Cloete cautions against amendments to the powers of provinces and local governments as if that in itself would address capacity shortfalls and poor service delivery.

In the final chapter Heinrich Hoffschulte provides a very useful international perspective on the importance of local and regional governments in the world's functioning democracies. He reflects on the importance of decentralisation to regional and local governments as a mechanism for good governance, better development and sound democracy. He discusses at length recent developments in the United Nations to consolidate the position of local and regional governments by giving them legal certainty to exercise their powers and functions freely, as well as the importance of financial autonomy to ensure effective decentralisation and local decision-making.

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CHAPTER 1

Constitutional change: Adapting without losing the roots

BERTUS DE VILLIERS

INTRODUCTION

Two fundamental truths set the limits for constitutional change. On the one hand a constitution is a growing document that must be flexible and capable of being amended from time to time. The interpretation of the South African Constitution is aimed to bring flexibility to it, but the flexibility is within the framework of the Constitution. It is, however, not uncommon for written, entrenched constitutions to be amended. In fact none of the great federal, democratic constitutions of the world continues to exist in their original form; they have altered to better accommodate changing circumstances and new challenges.

On the other hand the stability of a constitution is often found in its roots and history, in the way the constitutional drafters crafted it and how the courts have interpreted and given new life to it. ‘Rigidity’ of a constitution must therefore not be confused with ‘stagnation’.

Both these truths must be recognised by the provincial review process.

If the South African Constitution is treated as an ordinary piece of legislation that can be amended by the majority whenever they wish, it will lose its link to its roots and will drift along in a sea of uncertainty, buffeted by the winds of political turmoil. The historical roots of South Africa’s Constitution must be treated with respect so as to ensure that the document remains the guiding light and the spirit of the nation it was intended to be. The way in which the South African Constitution is implemented and

administered may change from time to time, but great care must be exercised before the essential characteristics of it are amended.

One only needs to reflect on the many debates in the US over the past two centuries as to the 'original intent' of the constitutional fathers, to comprehend the importance of tracing the interpretation of the constitution back to those who drafted it. Although American federalism has gone through many phases, the basic distribution of powers as set out in the US Constitution remains untouched. Although many factors impact upon the interpretation of the American Constitution, the basic legal framework has remained stable.

The same can be said for Australia, India, Switzerland, Germany and many other federations. In Germany, where major constitutional reviews have been undertaken in recent times, the process of review was conducted by a special committee of the federal parliament and extensive effort was made not to upset the balance between the federal and *länder* governments. In Australia the current way in which powers are exercised in some instances bear little resemblance to the text of the Constitution, but there has nevertheless been a reluctance to amend the distribution of powers as set out in the Constitution.

GROWTH AND IMPROVEMENT

The South African Constitution must be allowed to grow; it must be interpreted by the courts, new customs and conventions must be developed to ensure it functions properly, and creative policies and procedures must be implemented to ensure it functions optimally.

Mechanisms in the South African Constitution can be used to improve the functioning of provincial and local government. Institutions created by the Constitution can assist to better distribute grants between provinces in an equitable manner. For example, the Financial and Fiscal Commission could be more proactive in the equitable sharing of resources between provinces.

Legal mechanisms exist whereby provinces could render assistance to local governments in the performance of their duties. There is also an obligation on the national government to provide resources to provincial and local governments to enable them to discharge their duties. If the constitutional duty to support is used more effectively, many of the concerns regarding the functioning of provinces and local government

would be addressed. It is only as a very last resort that large-scale amendments to the Constitution, the powers of provinces and local governments, and provincial boundaries should be considered.

It is especially in young democracies, such as South Africa, where the constitution must be treated with the utmost respect. It must be seen as *the* foundation document upon which the nation is based. And change to it, if any, must be kept to a minimum and only when absolutely necessary.

The provincial review process cannot ignore the origins of the South African Constitution and the events that gave rise to it. The agreement that was reached on the establishment of three spheres, with provinces having guaranteed powers and functions, was arguably the most important single breakthrough that made the new Constitution possible.

The reasons for the breakthrough were found in the sound experience of international democracies with multitiered-type systems, the common use of federalism in countries with similar challenges to those facing South Africa, and the political settlement that was reached between all parties.

Those conditions have not changed and must continue to guide the review process. Politically the ANC has expanded its position of dominance, but the underlying characteristics of South Africa have not changed. Although political support for parties may have changed, and may again change in the future, one must guard against amending the Constitution for reasons of political expediency.

This chapter does not argue against constitutional amendments for the sake of being resistant to change. The concern is that arguments put forward in the Policy Review for change seem to be driven by ideological and dogmatic considerations and not informed by fact.

The South African constitution-makers succeeded in striking a balance between providing written guarantees to the provinces of their powers and functions, while also allowing for amendments to the Constitution to take place if the required majority is obtained. Large-scale amendments to the Constitution, and in particular to the national–provincial–local government arrangements, are not necessary. The constitutional framework must be used as the point of departure for the review.

There is merit to conduct a general review of the functioning of the three spheres of government to establish ways and means to improve it. However, the impression has been created by the Policy Review that provinces are a problem child that must be dealt with. There are many

mechanisms in the South African Constitution that remain unutilised. It does not make sense to amend the Constitution before all reasonable efforts are made to improve the way in which it operates in its present form. Any large-scale amendment will bring with it new challenges and service issues. There may be scope to adjust some of the allocations of powers in order to improve the functioning of the Constitution, but such adjustments must be shown to be justified on merit.

There are many positive lessons to be learned from the provinces. In fact, provinces could become a keystone of our democracy, which is how the constitution-drafters intended it.

It is acknowledged that the way in which the powers and functions of provinces and local governments are exercised in practice can be quite different from the constitutional arrangements. The same applies to other multitiered-type dispensations. In a recent scathing criticism of Australia's federation, Minister of Finance Lindsay Tanner commented that:

across Australia there is recognition that our federation is a mess ... Overlapping responsibilities create incentives for cost-shifting, blame-game politics and interference in the affairs of other governments ... The Productivity Commission's best estimate is that this maze of regulatory regimes costs Australia up to 4 percent of annual gross domestic product or \$40 billion this year (Central control, local delivery, *The Australian*, 10 June 2008).

These remarks clearly call for a revision of the practical functioning of the division of powers and functions between the federal and state governments in Australia.

A review of how the allocation of powers works in practice in the South African context is justified. When the negotiators settled on the list of powers of the respective governments they had no previous experience to rely on. It is therefore apt to review each of the functions to determine if they are properly allocated. So far, however, the Policy Review does not offer such an analysis. Its points of departure are too subjective, ideological and void of a clear brief to constitute a fair and objective assessment of the South African federation.

It is only when the constitutional arrangements and financial, practical, policy and administrative measures are taken into account that an accurate

picture can be obtained of what the system really looks like and how it functions.

Many adjustments and improvements can be made to the functioning of the provinces and local governments without the actual constitutional arrangements being altered. In fact if the 1996 Constitution is amended, that would no doubt give rise to new policies, procedures and challenges. It is therefore preferred to refine the constitutional allocation of powers and functions within the framework of the current Constitution, to improve intergovernmental relations, expand support that is available to provincial and local governments, and expand the ability and capacity of provincial and local governments to fulfil their constitutional mandate.

It must be acknowledged that problems with capacity, training, resources and service delivery are not limited to provincial and local governments. In fact many national departments have been characterised by inefficiency, poor accounting and lack of transparency. Centralisation of powers to national departments would not solve the delivery challenges facing South Africa.

The functioning of provincial and local governments may be impacted on by:

- the way in which the Constitution and the exercise of powers by the respective spheres are interpreted by the judiciary;
- financial and fiscal resources, and intergovernmental transfers;
- the use of grants in aid by the national government to influence the provincial and local legislative and policy programme;
- intergovernmental relations and agreements;
- international legal developments and treaties;
- organisation of the civil service;
- the electoral system and the organisation and strength of political parties;
- delegation of powers between the spheres;
- representation in the NCOP and the functioning of the NCOP; and
- resources, training, willingness to experiment, cooperation between spheres of government and support for political parties.

As a result any assessment of the South African provinces and local governments that focuses solely on the Constitution will inevitably produce

an inaccurate and incomplete picture of the status of federation in general, and the actual powers and functions of provinces and intergovernmental relations in particular. The Policy Review must be conducted with an open mind so as to reflect on the positive and negative experiences of provinces and local governments, taking into account what works and what does not work, and drawing lessons from 15 years of democracy.

RECOMMENDATIONS

In practical terms we recommend the following for consideration by the Policy Review group:

THE CONSTITUTION AS POINT OF DEPARTURE

The main point of departure for the Policy Review must be the Constitution. The current constitutional arrangements were agreed to after extensive negotiations during the years leading up to the acceptance of the Constitution. Although the process may be criticised, the outcome has been widely accepted by the South African electorate. The results of those negotiations have formed the basis for a stable, democratic transition and tradition, and it is essential that the core principles on which the Constitution is based be respected.

We therefore urge the review panel to respect as a point of departure the current constitutional arrangements with regard to provincial and local governments and the background that gave rise thereto.

THE CONSTITUTION AS A LIVING DOCUMENT

We recognise that any Constitution must be a living document in order to withstand new challenges and to adjust to changing circumstances. There are many examples of how modern day constitutions have been amended from time to time. However, international experience also shows that nations must be slow to amend constitutions unless very good reasons exist. It is especially in the case of young democracies where respect for the constitution as *the* founding document should be encouraged and enhanced. The rule of law as evident in the South African Constitution must be the guiding light for the entire nation.

A constitution could easily lose its status as the basic document on which a nation is based. It is especially in times when a single party or coalition of parties has the necessary power to amend a constitution to suit their will that caution and prudence must be employed.

We would therefore recommend that the review panel be extremely cautious in making recommendations that depart from the current constitutional arrangements. If it is necessary, fine-tuning and refinements of legal and policy arrangements should be considered but radical constitutional amendments are, in our view, not required.

PROVINCIAL BOUNDARIES

The provincial boundaries were demarcated after a lengthy process of public consultation. With the exception of a few problematic areas, the general demarcation has been well received and has become part of the public mind and political culture. We do not believe there is a case for (a) a radical review of provincial boundaries or (b) a reduction in the number of provinces.

In some instances, local communities that straddle provincial boundaries may require special assistance and measures to ensure that their services are not affected by their proximity to a provincial boundary. This is not dissimilar to many communities in the world that live close to or straddle a provincial boundary, and more research may be necessary to investigate how such communities are served. Administrative arrangements and agreement rather than boundary adjustments should be used to address these concerns. If consideration is given to a reduction in the number of provinces or the amalgamation of some provinces, extensive and wide-ranging consultations should take place on the basis of a set of objective criteria before any changes are made.

PROVINCIAL POWERS AND FUNCTIONS

The drafters of the South African Constitution had little practical information to rely on when the powers and functions of the provinces were agreed to. It is possible that some refinement in the allocation of powers and functions can be made; however, any such adjustment must be based on sound research, evidence and submissions. It must be borne in

mind that the mere alteration of a power or function in a legal sense would not necessarily improve the way in which a service is delivered.

Changes to powers and functions would inevitably give rise to new demands and challenges. It must also be acknowledged that the functioning of provinces may in some instances be enhanced by expanding and strengthening their powers, especially in the area of taxation. The assumption of the Policy Review must therefore not be that powers and functions can only be reduced.

COMPOSITION AND FUNCTIONS OF THE NCOP

The composition and functions of the NCOP are unique and a thorough review of the body is justified to establish if it is meeting the challenges for which it was established. We are concerned that the current review's brief is too limited to deal effectively with this issue.

There are many ways in which the functioning of the NCOP can be improved, but time and wide consultation is required before any findings and recommendations are made. If provinces are expected to participate effectively in the national legislative process, mechanisms must be put in place that would enhance their ability to participate. International experience shows that if provinces are part of the decision-making process they are more effective when it comes to implementing legislation.

ADMINISTRATIVE CAPACITY

The one area where we believe there is the most urgent need for attention and reform is with expanding and enhancing the administrative and management capacity of the provinces. Provinces are suffering from the same shortages as other spheres of government and the private sector. Provinces as a sphere of government should therefore not be criticised for a shortage of skills that affects the entire country.

There is a real risk that in order to improve the delivery capacity of provinces, the Policy Review will embark on constitutional amendments rather than on capacity-building initiatives. We believe the review should focus on very practical situations where delivery problems are experienced and then focus on possible options to address such problems.

It is only in exceptional circumstances where a constitutional amendment

as such would improve weaknesses in service delivery. We urge the review to consider a wide range of options to address problems in service delivery. Possible solutions could include the sharing of resources, assistance from the private sector, joint training of civil servants, secondments, agency arrangements and so on.

PUBLIC CONSULTATION

The process of public consultation before any drastic changes are made to provincial and local governments should be broadened and deepened to ensure maximum participation, transparency, credibility and legitimacy of outcome. We note with concern that minimal time was allocated for public responses to the initial questionnaire that was put out by the Policy Review in August 2007. So far there has been little, if any, public discussion or debate on the entire review process. This is apparent especially in the absence of comprehensive media interest in the review.

The relatively few submissions received by the panel so far is a further indication that the necessary public interest in the matter has not been cultivated and encouraged. Interest groups would require time to consult with their constituencies before technical responses of the nature required can be made. A review of this type should ideally include written and oral submissions taken from different parts of the country, as well as lessons from the international community. Many of the people and communities who have an interest in the outcome may not have the means to respond to a questionnaire in such a short time frame.

It is only when the views of the South African people have been thoroughly canvassed that technical recommendations could be made for further public comment. It is foreseen that the review process may eventually lead to constitutional or legislative amendments. If that is the case, it is even more important to ensure wide consultation from the earliest stages of the review. We therefore urge the review panel to engage in an entirely new consultation process prior to making any firm recommendations regarding the future of provinces and local governments.

IMPROVE IMPLEMENTATION AND GOVERNANCE

We believe that the way in which the South African Constitution is

implemented and administered can be drastically improved. This would require a better understanding of the provisions of the Constitution, extensive training programmes, refinement of intergovernmental processes, and improved communication and coordination between government departments within the respective spheres of government.

Many of the serious service delivery problems that South Africans experience are not attributable to the constitutional and legislative arrangements but rather to poor understanding of the Constitution, lack of training and coordination, and inadequate sharing of resources. We also note that there are many examples where provinces and local governments have been able to address effectively the needs of their people. Attention should also be directed at those successes and the reasons for them so as to build on positive experiences.

We therefore recommend that the review panel takes a wide approach to the analysis of the provinces and local governments by not restricting its investigation to constitutional and legislative concerns. Attention should be paid to the identification of practical solutions to service delivery and also to success stories from which lessons can be learned.

CHAPTER 2

The constitutional distribution of powers

RASSIE MALHERBE

INTRODUCTION

Three interrelated topics are discussed in this chapter, namely:

- the constitutional distribution of powers between the national and provincial governments;
- the application of the principle of cooperative government; and
- the development of intergovernmental relations and structures to support the constitutional arrangement

THE CONSTITUTIONAL ARRANGEMENT

OVERVIEW

In terms of section 2 of the Constitution of the Republic of South Africa, 1996, the Constitution is the supreme law of the republic. Any law or conduct inconsistent with the Constitution is invalid, and every duty imposed by the Constitution must be fulfilled. The Constitution provides that South Africa is a so-called composite state with at least three particular federal features, namely the constitutionally entrenched distribution of powers between the national and provincial spheres, along with the power of the judiciary, specifically the Constitutional Court, to adjudicate

jurisdictional disputes between these spheres and the right of the provinces to enact their own constitutions.

Section 40(1) of the Constitution provides that government in the Republic of South Africa is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated. Chapter 6 creates nine provinces, replacing all previous regional arrangements, and deals extensively with their governmental structures, powers and functioning. Chapter 7 makes similar provision for local government as a constitutionally entrenched sphere of government. Chapter 3 deals with the principle of cooperative government, which governs the relationship between the spheres of government. Each province may adopt its own provincial constitution or may choose to function solely in terms of Chapter 6 of the national Constitution. (The Western Cape is the only province functioning under its own constitution, while KwaZulu-Natal had a failed attempt to enact a provincial constitution.)

A significant implication of constitutional supremacy is that in the exercise of their powers and the performance of their functions, the respective governments must observe and give effect to the provisions of the Constitution. For the purposes of this chapter this means, first, that the supremacy of the Constitution must be respected when considering adjustments to the system and, second, that the governments in all spheres must observe the provisions of the Constitution in respect of the distribution of powers. If the relevant provisions do need adjustment because of changing needs and circumstances, the Constitution has to be amended according to the requirements of section 74 thereof.

THE DISTRIBUTION OF POWERS

The constitutional distribution of powers between the national and provincial governments can be summarised as follows:

- The national parliament has legislative authority over any matter, including the concurrent functional areas mentioned in Schedule 4 to the Constitution, but excluding the functional areas in Schedule 5 over which the provinces have exclusive legislative authority. Parliament may delegate its legislative powers, except the power to amend the Constitution, to governments in the other spheres.

- Parliament may through legislative and other means intervene in an exclusive provincial matter when it is necessary to maintain national security, economic unity or essential national standards, or to prevent unreasonable action by a province which is prejudicial to the interests of another province or the country as a whole. The Constitutional Court held that this power of intervention should be exercised only in exceptional circumstances (*Certification* case). The Constitutional Court also held that only when the main substance in respect of its purpose and effect of a law made by parliament intrudes on an exclusive matter would the law be constitutionally problematic, and not when it affects an exclusive matter incidentally (*Liquor Bill* case).
- The provinces have exclusive legislative authority in respect of the functional areas mentioned in Schedule 5 to the Constitution, and share concurrent legislative authority with parliament in respect of the functional areas mentioned in Schedule 4. These are real powers that they may exercise on their own initiative, but subject to the Constitution.
- Whenever spheres of government share concurrent powers, an arrangement for resolving possible conflicts of competence is indispensable. The 1996 Constitution provides that if national and provincial legislation on a concurrent matter are inconsistent, the national legislation that applies uniformly in South Africa as a whole prevails over the provincial legislation if it complies with any of a number of conditions. If it does not so comply, the provincial legislation prevails. The conditions are as follows (section 146):
 - If the national legislation deals with a matter that cannot be dealt with effectively by the provinces separately.
 - If the national legislation deals with a matter that to be dealt with effectively requires uniformity across the nation, and the national legislation provides such uniformity by establishing norms and standards, frameworks or national policies. Note that this condition refers to legislation providing only such nationally applicable norms, standards, frameworks or policies, and not to

legislation regulating a particular matter in full. The implication is that if national legislation should regulate a matter in full, such legislation cannot expect to override conflicting provincial legislation to the extent that it provides for more than mere norms, standards, frameworks or policies.

- If the national legislation is necessary for the maintenance of national security or economic unity, the protection of the common market in respect of the mobility of goods, services, capital and labour, the promotion of economic activities across provincial boundaries, the promotion of equal opportunities or equal access to government services, or the protection of the environment.
 - If the national legislation is aimed at the prevention of unreasonable action by a province which is prejudicial to the economic, health or security interests of another province or the country as a whole, or which impedes the implementation of national economic policies. In this case the national legislation is obviously aimed at the actions of a particular province, and the requirement that the national legislation must apply uniformly across the country as a whole does not apply here.
- The provinces may automatically exercise their legislative and executive authority in respect of exclusive and concurrent matters, but according to the Constitution they must have the administrative capacity to assume responsibility effectively. However, the same provision also requires the national government to assist provinces in developing the capacity required for the effective exercise of their powers and performance of their functions (section 125(3)). The legislative authority of the provinces implies that they may amend and repeal legislation in respect of a matter under their jurisdiction (*DVB Behuising* case). The Constitution provides, though, that laws that were administered by the provinces when the Constitution took effect, even on concurrent matters, became provincial laws. By implication such laws may accordingly not be amended or repealed by parliament, although the latter may still make a law overriding a particular provincial law.

- Concurrency under the South African Constitution and the above provisions relating to the preeminence of legislation in the case of inconsistency impose no conditions or impediments on the legislative authority of parliament or the provinces. Both spheres may freely legislate on any concurrent matter and their legislation can and should exist alongside each other. The preeminence provisions only determine which legislation prevails in the case of inconsistency. This is important because it means that the Constitution does not leave scope for the ‘field preemption’ doctrine to apply in South Africa. According to the doctrine, national legislation may preempt or exhaust a concurrent field to such an extent that it leaves no scope for the provinces to legislate in that field, rendering invalid any provincial legislation that may be made in that field. By contrast, in South Africa, national legislation on a particular matter does not exclude the provinces from legislating on that same matter. This is confirmed by section 149 of the Constitution, which provides that when in the case of an inconsistency a particular piece of legislation prevails, the other legislation is not invalid but is inoperative as long as the inconsistency remains. Such legislation thus remains in force and must be applied to the extent that it is not inconsistent with the law that prevails over it. It will also revive without further ado when the inconsistency falls away – for example, when the prevailing law is repealed or invalidated on unrelated grounds.
- This provision, and its implications, are important because it shows clearly, first, that the intention of the South African Constitution is for the provinces to be fully-fledged governments with effective and substantial legislative powers, and not to be mere administrative agents of the national government. Second, it shows that the national parliament is not supposed to regulate concurrent matters in detail, and that it should leave the detail for the provinces to fill in by way of provincially specific legislation. Third, it shows that the way in which the Constitution distributes powers does not mean that legislative powers are vested in the national parliament and that the provinces only have executive powers over parliament’s legislation, as presently applied in many cases.
- It is sometimes difficult for a court to determine whether legislation is

necessary, as required by section 146, and in some jurisdictions this is regarded as a political question to be dealt with through the political structures and not the judicial process. The South African Constitution solves this problem by providing that in a dispute over the question whether national legislation is necessary, the court must have due regard to the approval or rejection of the legislation by the NCOP (section 146(4)) – the second house of parliament representing the provinces in the national law-making process.

DIVISION OF REVENUE

An important aspect in understanding the South African system is that the provinces have limited financial resources of their own and that they mainly have an equitable share in the national revenue (section 214). This follows from the traditional South African approach that the national revenue is indivisible – the country has a so-called single revenue system. In addition, the limited taxing powers that the provinces do have in terms of the Constitution must be regulated by an act of the national parliament (section 228).

Each province's share in the national revenue is calculated in accordance with a formula annually determined in a special division of revenue act of parliament, after consideration of certain factors set out in the Constitution. In other words, the provinces are to a large extent dependent for the financial resources they need to fulfil their duties in respect of their concurrent powers on the national government, with which they share powers on those matters.

Despite the provisions of the Constitution on factors that need to be taken into account in calculating the provincial allocations – and mechanisms such as the Statutory Budget Council, which has to deliberate beforehand on those allocations – this means that the national government through parliament determines the funds it makes available to the provinces for exercising their authority over concurrent matters (see the Intergovernmental Fiscal Relations Act 97 of 1997). The national government simply has all the cards to play with. Apart from the temptation to turn off the tap if it considers the provinces to be incapable, or if it does not approve of the way the provinces handle a particular concurrent matter, it has also happened that responsibilities are being assigned to the provinces

by the national government without the accompanying financial resources to deal with those responsibilities effectively – the so-called unfunded mandate problem.

Finally, the national treasury exercises control over provincial finances (section 216), which further emphasises the approach followed in South Africa towards the indivisibility of revenue. The revenue challenges faced by the provinces can therefore not be assessed in isolation of the way in which the national government exercises its fiscal dominance.

COOPERATIVE GOVERNMENT

The relationship between the national and provincial governments is governed by the principle of cooperative government set out in Chapter 3 of the South African Constitution. According to the principle, the relationship between the spheres of government is one of close cooperation within a larger framework that recognises the distinctiveness of every component as well as their interrelatedness and interdependence. The relationship should further be characterised by consultation, coordination and mutual support (*National Education Policy Bill case*).

Again, the principle of cooperative government is clearly intended to regulate the relations between fully-fledged governments and not between a government and its provincial and local administrative agencies. Consultation, cooperation and coordination are not necessary between a government and its agencies – the latter simply have to follow orders.

In particular, the Constitution requires the spheres of government to preserve the unity and indivisibility of South Africa, provide effective government, and cooperate in mutual trust and good faith by fostering friendly relations, assisting, supporting and informing one another, consulting on mutual interests, coordinating their actions and legislation, and adhering to agreed procedures (section 41).

They must respect one another's constitutional status and powers, and may not encroach on one another's geographical, institutional or functional integrity. They may not assume powers not conferred on them by the Constitution. Organs of state involved in an intergovernmental dispute are obliged to exhaust other remedies before they turn to the courts for its resolution.

Parliament must adopt legislation for the establishment of structures and

institutions to promote and facilitate intergovernmental relations. Specific legislation has been adopted in terms of which certain single-purpose statutory mechanisms have been created (for example, the Intergovernmental Fiscal Relations Act 97 of 1997), and numerous informal structures have sprung up in which governments and administrative agencies cooperate on a bilateral and multilateral basis. The Intergovernmental Relations Framework Act 13 of 1005 has also been adopted to regulate this matter comprehensively.

The South African Constitution gives effect to the principle of cooperative government in four specific ways.

- *Governments participate in limited ways in decision-making in other spheres.* The best example is the NCOP whose main purpose is to represent the provinces in national legislative decision-making. The provincial legislatures consider and comment to parliament on national legislation not directly affecting the provinces, and they confer mandates on their delegates in the NCOP on how to vote on legislation that in terms of the constitutional definition affects the provinces. Permanent members of the NCOP may attend meetings of their respective provincial legislatures. Representatives of organised local government are entitled to attend the NCOP as observers. Extensive structures have been developed at the executive level between national ministries and state departments and their provincial counterparts to facilitate participation in policy-making and the coordination of their actions. The way in which these intergovernmental structures have been used to ensure national dominance in concurrent affairs is dealt with elsewhere.
- *Governments in the different spheres are obliged to assist one another.* As mentioned, the provinces and local governments are entitled to an equitable share of national revenue. The national government must assist the provinces to develop the administrative capacity that is required for the effective exercise of their powers and performance of their functions. Unfortunately, as explained below, this does not happen on a significant scale. The national and provincial governments have a similar obligation towards local governments.
- *Governments may delegate powers to governments in another sphere.*

The power to delegate facilitates interaction and cooperation. There is a general authorisation to delegate executive functions and to perform agency services for other governments (section 238). Parliament may also delegate any legislative power, except the power to amend the Constitution, to a legislature in another sphere, and in turn a provincial legislature may assign any legislative power to a local government (sections 44 and 104). These provisions allow room for flexibility and encourage the decentralisation of powers; however, so far the possibilities created have not been explored to any significant degree.

- *Under certain narrowly defined circumstances, the national government may intervene in provincial affairs, and provinces may intervene in local affairs.* These powers are intended to be exercised only when necessary; in other words in exceptional circumstances. The Constitution accordingly provides for the circumstances and procedures under which parliament may adopt legislation on an exclusive provincial matter (section 44), how the national government may intervene in a provincial matter at the executive level (section 100) and under which circumstances the transfer of funds to a province may be stopped (section 216). The provinces have similar powers of intervention in local affairs (section 139).

CONCLUSION

This brief overview of the constitutional distribution of powers and the principle of cooperative government informs the contributions included in the publication. The following general conclusions can be drawn from this overview:

- The Constitution provides for three distinct spheres of *government*, and not for a national government with regional and local *administrative agencies*. The intention is clearly to distribute powers meaningfully for democratic as well as practical purposes. The provincial and local governments are elected government bodies and have real and meaningful legislative and executive powers conferred on them by the Constitution. Accordingly, there is a real distribution of powers between the spheres of government which must be respected by all concerned.

- The powers of the national government to guide, support or intervene are not intended to dominate the other spheres and centralise all powers, or even to take over the powers of the other spheres completely. Rather, they are mechanisms to assist the other spheres to acquire and develop the capacity they need for exercising their constitutionally conferred powers.
- The provincial and local governments have a particular purpose to establish and strengthen democracy. In a democracy powers should be decentralised in order to promote voter participation, bring government closer to the people, and prevent the centralisation of powers which may lead to abuse.

Viewed thus, the relevant provisions of the Constitution should be respected to the full, should be given effect to achieve the purposes of the Constitution, and should be deviated from only if at all necessary to promote democracy in South Africa.

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CHAPTER 3

Principles underlying demarcation: Implications for provincial boundaries¹

LINDISIZWE MAGI AND BERTUS DE VILLIERS

1. THE MEANING AND UNDERSTANDING OF THE CONCEPT OF DEMARCATION IN A DEMOCRATIC GOVERNMENT

The notion of demarcation of spatial and non-spatial features is a practice as old as human society. From time immemorial humans have competed for space and resources, which competition has developed into all sorts of contestation and open conflict. The increase in population numbers has exacerbated the search for space, which has led to more skirmishes, battles and wars. With the advent of the new democratic order in South Africa, issues of land occupancy and demarcation have become extremely important and sensitive. In this regard understanding the meaning of demarcation as a concept and practice, in the context of democracy, is essential. This chapter therefore seeks to express some views on how understanding the notion of demarcation could assist to improve the application of spatial and non-spatial demarcation in a democratic environment in South Africa.

DEFINITION AND EXPLANATION

The first South African democratic election held in 1994 ushered in the need for a well thought through re-demarcation of the South African voting and residential landscape. Voting demarcation tends to lay down the authority that is likely to wield power in a particular communal or

municipal area. For example, during the democratic elections in South Africa it was necessary to demarcate the country into national, provincial and local areas of operation and authority.

For the purposes of this chapter, demarcation may be defined as the process of categorising spatial features and action spaces into smaller units that work together as an integrated whole, and that these areas are accepted as places of influence by the local community. Similarly, spatial demarcation relates to a process (Johnston 1995) whereby an individual or group tries to influence or establish control over a specific area which is made distinctive and partially exclusive to those individuals who live in it, who may be seen as a community. In this respect a community does not merely occupy a space that is controlled by a national government but a space that represents local values and cultural heritage.

The community is also a vehicle through which government tests or carries out its policies. It has become the new locus of collective action replacing the notion of 'society' in our times.² Some communities may consume more social capital than they produce and therefore become reliant on the state for subvention. In fact, communities are created by needs, wants and shared interests of the people, which all tiers of government should not only be conversant with but use as rallying points for service provision. The government as an overarching political entity superintends over communities, thus enabling them to practice their rights and freedoms as a *quid pro quo* for allegiance and support during elections. This notion of community as spatial solidarity or unity signifying harmony may be regarded as the first order characteristics of a community.

The origins of spatial demarcation in South Africa at the national level may be linked to the work of the Independent Electoral Commission, which was responsible for determining the number of voting units allocated to each constituency in the national and provincial elections. The nine provinces were areas of operation categorised to function as constituencies for regional entities.

The Municipal Demarcation Board has been responsible for the delimitation of local authorities, where a variety of groups – be they political, cultural, economic and sociological – have sought to influence or establish control over a specific municipal area. This board or authority has the responsibility of drafting laws, bylaws and regulations which would facilitate harmony and understanding in areas of conflict.

There are 282 municipal authorities in South Africa, which attempt to satisfy the needs, wants and wishes of the broad population. It may be argued that these 282 municipal demarcated areas are important indicators of democratic consolidation and the deepening of democratic values and procedures in South Africa. Any democratically demarcated area can also be an access to power and control for the local community, which could be a sufficiently viable launching pad for national government. When the local people identify with their demarcated area as a sovereign area, they are indirectly accepting knowledge of the area as well as asserting their existence therein. The hope is that they would, in this manner, gain the right to determine the future of the area and of their socio-economic well-being.

DEMOCRACY AND DEMARCATION

It is a generally accepted notion that democracy is broadly defined as government of the people, for the people and by the people. In other words, democracy is seen as the method through which individuals and groups in an area express their wishes as to who should be responsible for governing their area and how this area should relate administratively to the broader community at both provincial and national level.

The exposure of many South Africans to the recent history and culture of democracy has tended to influence several individuals in municipal demarcated areas to do as they wish, and particularly instructed by existing socio-economic imperatives. For example, the people of Khutsong, a township in Merafong Municipality in Carletonville, have engaged in protest against the local authorities for demarcating their township into the North West Province, an authority they are totally against. Through submissions and petitions to the Demarcation Board the residents of Khutsong have clearly indicated that they are in favour of remaining in Gauteng Province. This notwithstanding, the national authorities have gone ahead and ignored the wishes of the people of Khutsong.

It is a generally accepted principle that democracy works well in smaller spatial entities. The question of scale is crucial because the fewer the number of people, the greater the number of relationship arrangements per individual as a necessary burden to experience democracy. There is a contrasting view that economies of scale do not work too well with smaller

communities, hence negating the principle of the efficacy of democracy in small communities. In this case reliance would be on larger municipalities, and that is where national government subvention or support could come in. Furthermore, it is worth examining whether the reconstitution of governance units for the same area and population can introduce new policy choices, new ways of implementing policy and reduce the cost of governance for the same efficiency and equity. The division of authority and responsibility in demarcated spatial communities is instrumental to good community values.

The recent history of local government in South Africa has been dominated by two interwoven strands: the creation of a strong legacy of municipal administration alongside the painful process of transition from racially structured institutions to non-racial municipalities (Buhlungu & Atkinson 2007). These processes have achieved substantial progress in the past few years, which may be interpreted as successful from the local government side, and not so successful from the community side.

If local municipal demarcation processes were to be anchored in a more democratic practice, then the local community would benefit most from the exercise and would pay allegiance to the higher authorities. It can be argued that a democratically demarcated area exists to perform four tasks which are necessary to bolster the community as a whole or interest groups within the area. These tasks are to:

- maintain internal order;
- sustain spatial security, defence and forestall aggression;
- maintain communication in all its regimes; and
- achieve economic sustainability and redistribution (Mann 1984).

These are some of the attributes that the people of Khutsong or Mzinkhulu were hoping for when selecting a particular demarcation structure for their area.

A spatially demarcated area within a municipality or provincial area that does not fulfil the democratic ideals and wishes of the local community may not only erode the community's trust in the government but may also compromise the human rights culture that this fledgling democracy is trying to establish. A case in point is that the South African government has ignored the outcome of commissions and the protestations of local

communities in the unfolding demarcation conflicts in Khutsong and Matatiele. In such situations communities become frustrated by poor service delivery. These may be legitimate problems which ultimately grind down South Africa's human rights culture and belief in the Constitution.

Since this human rights culture is based on the Constitution we may argue that deviation from it infringes on human justice, which actually assures respect for the inherent dignity of individuals and communities. When people are reluctant to criticise the demarcation policies of the government, that marks the beginning of a spineless democracy where the minority dictate the affairs for the majority.

ATTRIBUTES OF A DEMARCATION PROCESS

Since the advent of the democratic order in South Africa there have been numerous challenges to the spatially demarcated municipalities and the communities therein. These difficulties have been partly due to the institutional uncertainties caused by the demarcation process in some area.

The auditor-general cautioned in 2003 that the demarcation process had impacted negatively on the audit function. Management ineptitude has increased as a result of the demarcation, split-offs and the creation of new municipalities, especially where none had existed before. He further argued that the impact of the re-demarcation of spatial entities would be felt for years to come (Atkinson 2005).

If local communities are to understand and derive benefits from the attributes associated with the demarcation processes, then they must be well-informed about the powers and responsibilities of the related authorities. For instance, it should be understood that the function of the Municipal Demarcation Board is to determine municipal boundaries in accordance with the Municipal Demarcation Act of 1998 and other appropriate legislation enacted in terms of Chapter 7 of the Constitution. In this regard some of the pertinent questions that need to be asked revolve around:

- the rights of particular groups of people regarding a spatially demarcated area;
- the existence of problems associated with resources and the environment; and

- the understanding and interpretation of this ‘allocated’ space on the earth’s surface (Allan & Massey 1995).

Documentation pertaining to the demarcation of provincial and municipal areas has argued that this process is governed by certain procedures (see www.demarcationboard.com). These are that:

- there must be public notification before any demarcation process begins for any particular area;
- there must be thorough discussion and consideration by an established demarcation board or authority;
- public hearing/s must be organised, thus giving ample opportunity to the local community and other stakeholders to participate effectively in and influence the outcome of the demarcation process;
- after the public hearing there ought to be formal investigations of issues that emerge from the hearing and which are unresolved;
- ideally, a draft demarcation report should be submitted for a final round of public comment; and
- there must be concluding documentation that leads and informs the actual carrying out of the demarcation of the area which would advisedly be accepted by those who live in the area.

This procedure prescribed in the Demarcation Act (1998) is obviously intended to facilitate the smooth running, legitimisation and acceptance of the whole demarcation process, with a view to soliciting stakeholder buy-in. Owing to the significance and sensitivity of the nature of demarcation issues, community involvement is paramount. The most sensitive matter to be decided upon includes the acquisition or disposal of any rights in or to property, considering that ownership of immovable property may be acquired or disposed of only with the consent of those in authority. Such decisions are taken with a view to executing the authority’s constitutional obligations and the community’s constitutional rights. Furthermore, any

concerned party or person aggrieved by the demarcation of a spatial boundary has the leeway to lodge an objection with the authority within a prescribed timeframe.

The demarcation authority shall also facilitate the provision of: democratic and accountable governance of the area; services to the communities in an equitable and sustainable manner; and the promotion of social and economic development as well as a safe and healthy environment.

While there are many other important responsibilities of the demarcation authority not mentioned in this short discussion, the cornerstone of a well-managed spatial demarcation process depends on a well-ordered and efficiently working demarcation authority.

The director general of the Department of Provincial and Local Government argues that South Africa is on the verge of remodelling the form and content of its demarcation landscape in preparation for municipal elections. As such it needs more efficient practical ideas on demarcation implementation policies.

Alternative strategies towards enhancing a functional demarcation process include:

- focusing on more public participation;
- assessing and improving the capacity of provincial and national authorities;
- introducing well-defined criteria for instituting an equitable demarcation process, such as maintaining internal order, spatial security, communication and economic viability and integration;
- observance of constitutional requirements; and
- internal cohesion and diversity of the community in terms of culture, language, citizenship, and appropriating inherent spatial or geographical features for demarcation.

CONCLUSION

According to President Thabo Mbeki, ‘the challenge we all face as South

Africans is to put our shoulders to the wheel to accelerate the pace of change' (Msengana-Ndlela, 2003). This comment, made in a State of the Nation address, relates to the capacity and sustainability of the local government system and its need to function efficiently and effectively with regard to the management of municipalities in South Africa. The system would serve the people of South Africa more beneficially and responsively than is the case at present if it were to pay more attention to matters related to municipal powers and functions, planning and boundaries, and information and knowledge management.

2. REVISITING THE NUMBER AND BOUNDARIES OF THE PROVINCES

The Policy Review and public statements by senior politicians have suggested that the number of provinces may be reduced and that some provinces may be amalgamated. The second part of this chapter reflects on the way in which the current provincial boundaries came into being and the processes that should be followed if any alterations are to be considered.

WHY WERE PROVINCES CREATED?

The current debate on the future of provinces cannot be isolated from the negotiations which led to the creation of the provinces in the early 1990s. The decision to create provinces was not taken lightly. It was preceded by intense political debate and compromise as well as by extensive research and consultation at local and international levels. It was arguably the most contentious part of the negotiation process.

The fact that some of the provinces which are now facing the most development and service challenges (such as the Eastern Cape and Limpopo) were also worst effected by the homelands, adds weight to the arguments of those who contend that provinces should never have been created.

It must, however, also be acknowledged that in any federal-type dispensation there will always be some regions that are better off than others. Fiscal arrangements, transfers, support programmes and intergovernmental cooperation must therefore be utilised to assist lesser developed regions.

At the conclusion of the provincial demarcation debates in 1993, the constitution-drafters recognised the importance of breakthrough and

agreed that the provincial boundaries in the ‘final’ Constitution would not deviate from those in the interim Constitution. The 1993 interim Constitution therefore contained the following constitutional principle which was binding on the drafters of the 1996 Constitution:

Principle 18(3): The boundaries of the provinces shall be the same as those established in terms of this [interim] Constitution.

HOW DID DEMARCATION OF THE PROVINCES TAKE PLACE?

In contrast to many other federal-type dispensations, South Africa did not have widely accepted historic provinces upon which the new constitutional dispensation could be built. The only way forward was therefore to demarcate provinces. As such, the Commission for the Demarcation and Delimitation of Provinces was established to make recommendations on and to report to the main negotiators, the Negotiating Forum. The commission commenced its work in April 1993 and submitted its final report³ and recommendations in August 1993.⁴ The commission’s recommendations were accepted, with minor adaptations, by the main negotiating parties and continue to form the basis of demarcation for the current provinces.

The process of provincial demarcation did not occur in a vacuum. The commission was instructed to take into account a wide range of criteria before making recommendations. The public was also invited to motivate their submissions by using the criteria as a point of departure and to demonstrate how their respective proposals satisfy the different criteria.

The Negotiating Forum provided the commission with ten criteria to take into account when coming up with its recommendations for the demarcation. These were:

- historical boundaries, such as the existing four provinces, homelands, local governments and development regions;
- administrative considerations, including nodal points for the delivery of services to ensure that each province would be properly served;
- rationalisation of existing structures such as homelands, provinces and regional governments;

- limit financial costs as far as possible;
- the need to minimise inconvenience to people as much as possible;
- the need to minimise the dislocation of services;
- demographic considerations;
- development potential and possible economic growth points; and
- cultural and language realities.

The commission was required to take all these criteria into account and to assess the proposals submitted by the public on the basis of the criteria. It was also requested to demonstrate in its final proposals how the criteria were applied.

The commission's inquiry was extensive and it held public hearings in various parts of the country. It received more than 300 written submissions and more than 80 oral presentations were heard. After publication of its recommendations in the form of a draft report, the commission received a further 400 submissions. The commission took oral submissions in various parts of the country and after the publication of its draft report visited potential problematic areas to receive further submissions. Regardless of its deficiencies, the consultation process was the most extensive of any of the working groups involved in the negotiation process.

The outcome of the consultation process was the demarcation of the nine provinces as we know them today. The vast majority of the submissions supported a type of demarcation that coincided to a greater or lesser extent with the recommended nine provinces. The nine provinces demonstrated, at least in some respects, similarities to the previous economic development regions. Although some submissions supported a four provincial demarcation and others proposed many more provinces based on the then more than 40 regional services councils, the overwhelming majority oscillated towards an arrangement akin to the current nine provinces.

The commission acknowledged at the time that some of the proposed provinces would be less well-off than others. This was particularly the case

with the proposed Eastern Cape Province and Northern Province (now Limpopo). The commission realised that these provinces might suffer a lack of resources and skilled administrators in comparison with some of the other provinces. The commission pointed out that in a multilevel system all the provinces would not be exactly equal in terms of their economic and other resources. Arrangements for transfers between the provinces should therefore be made to ensure equity by way of the Constitution, statutes and agreements.

The commission repeatedly used the term 'soft' boundaries to indicate that provinces would have an obligation to support and assist one another. By using the concept soft boundaries, the commission acknowledged the importance of constitutional guarantees to ensure the free flow of persons, goods and services across the entire nation.

All federal-type dispensations have various forms of interprovincial support programmes to ensure that lesser developed provinces are assisted, for example through fiscal and financial arrangements, industrial development subsidies, training of civil servants, secondment of staff, exchange of expertise, special development grants and so on. Most, if not all, federal- or regional-type dispensations require some form of fiscal equalisation to support lesser developed provinces.

THE CURRENT SITUATION

In general, provincial identities have been developing in the past 15 years and there is no widespread public outcry for the demarcation of provinces to be undone or completely redone. There may be criticism against the quality of governance in some provinces, but the actual provincial boundaries have, in general, not been subject to popular challenge. With the exception of a few local problem areas, one could contend that the general demarcation outcome has been legitimised through wide acceptance by the public.

The general acceptance of the provincial boundaries does not mean that alterations to boundaries should not be considered from time to time. It is quite possible – as has been experienced in some other federal-type dispensations – that changes to boundaries may be required. At the same time, however, this does not mean that provincial boundaries should be changed at a whim. If alterations of provincial boundaries are abused for

political gain, the system would invariably suffer credibility problems and continuous demands for more changes to boundaries would flourish.

Presently there is little credible or empirical evidence to support a radical change of provincial boundaries. In an international comparative sense, it is worthwhile to note that one of the most stable factors in democratic federations has been the consistency of the provincial boundaries. In fact, radical changes of provincial boundaries often go hand in hand with political upheaval, instability and sometimes authoritarian conditions. It is rare for boundaries to be adjusted on the premise of 'improved service delivery'. This is usually done through special government programmes and cooperation between national, provincial and local governments. In most instances boundary adjustments are done to better accommodate cultural and linguistic concentrations.

Views are expressed from time to time that the nine provinces are too many and too expensive, that they do not have a historic base, and that the standard of services available within the respective provinces differs too much. It is said that as a result of the many provinces, some provinces such as the Eastern Cape and Limpopo are locked in a poverty cycle, while others such as the Western Cape and Gauteng are experiencing boom times. Proposals for a review of provincial boundaries argue that it may be better to amalgamate some of the poorer provinces with some of the richer ones to ensure more efficiency and equitable access to and distribution of resources.

The question for the Policy Review is as follows: is any re-demarcation of the provinces justified through the practical experiences of the past 15 years and, if so, on what grounds?

The demarcation process of the provinces in 1993 took place against the background of an absence of generally accepted historic boundaries that could form the basis for provincial demarcation. Provinces therefore had to be 'created' artificially.

It is not unique for provinces to be created. For example, in the US 35 of the 50 states were created and yet they have survived the test of time. The experience of other federal-type dispensations where provinces had to be created (for example, India and Nigeria) show that amendments to provincial boundaries may be required from time to time. Alterations to provincial boundaries have been undertaken even in the case of long-established federations such as Switzerland and Germany. It is therefore not uncommon for provincial boundaries to be adjusted in order to deal with

new challenges and realities; however, there must be sound reasons for this and an acceptance that there is no other option but to amend a boundary.

An analysis of the media and scientific literature in South Africa shows little public resistance or upheaval against the current provincial demarcation – save for a few localised areas such as Matatiele, Umzimkulu and Khutsong (Merafong), where communities may prefer to be in one rather than another province, or where local communities have been split in two by a provincial boundary. In general, the 1993 demarcation has been ratified by wide public acceptance.

Any radical change of provincial boundaries would have to go through a consultative process to ensure that the rationale for change is clear and that the new arrangement works more effectively than the previous one.

RECOMMENDATIONS

If provincial boundaries are to be revisited, the following should be considered:

- The forum that is responsible for the re-demarcation must be credible, scientific and supported by the necessary technical expertise. The forum must also be guided by clearly defined criteria for demarcation. Regardless of any criticism against the 1993 commission, its recommendations were well received by the public and have gained legitimacy. Some of the questions that remain today, for example the establishment of a separate Eastern Cape Province, were discussed and addressed in detail by the 1993 commission. This is not to say that with new information, a new commission might not come up with different recommendations. Any new demarcation commission must, however, stand the test of public acceptance and guard against potential criticism of political gerrymandering and expediency.
- The current Policy Review does not provide an adequate basis for demarcation of provinces to be revisited. The review is poorly motivated, uses generalisations and does not contain any useful criteria upon which re-demarcation could be based. The best result that could arise from the review is the appointment of a demarcation commission to undertake a thorough review.

- In order to ensure wide public debate and transparency, a demarcation commission must invite public submissions and take evidence in various parts of the country – especially in areas that are regarded as potential flash points or affected by re-demarcation. The Constitutional Court emphasised in the *Matatiele* case the importance of public consultation in good faith prior to demarcation. Public consultation should not merely be window dressing but an earnest attempt to establish the views of those affected. Territorial reorganisation is a costly exercise which inevitably brings some new uncertainty, adjustments, costs and relocation of staff. It is therefore essential that a cost-benefit analysis be made of the arguments for and against alterations to provincial boundaries. International experience shows that well considered boundary adjustments may improve the functioning of a federation, but hasty adjustments may give rise to strife, uncertainty and demands for further boundary changes.
- A demarcation commission must work in accordance with a very clear brief, which must include specific criteria for demarcation. The public at large, and the commission in particular, must therefore know on what basis any possible re-demarcation would be undertaken. The recommendations of the commission must also be open for assessment against the criteria. The way in which consultation is undertaken must be consistent with the principles set out by the Constitutional Court in the matter of *Doctors for Life International* (CCT 12/05, 17 August 2006) and the so-called *Matatiele* case (CCT 73/05, 18 August 2006). In these cases the Constitutional Court emphasised that consultation has a quantitative and qualitative meaning. First, government must establish a process to ensure wide and deep public participation in any re-demarcation process, and second, government must seriously take into account and show due regard to the comments and inputs it receives. The Policy Review document so far falls far short of this benchmark.
- The following criteria for provincial demarcation may be considered:
 - Existing local, provincial and traditional authority boundaries.
 - Administrative considerations, including nodal points for the

delivery of services to ensure that the people of each province would be properly served.

- Rationalisation of existing provincial structures if it appears that the number of provinces leads to inefficiencies that can only be addressed through boundary adjustments.
 - Limit financial costs as far as possible.
 - The need to minimise inconvenience to people as much as possible.
 - The need to minimise the dislocation of services if provinces are amalgamated.
 - Demographic considerations.
 - Development and administrative potential of each province and possible economic growth points.
 - Cultural and language realities.
 - Geographical factors such as rivers and mountains.
 - Infrastructural factors such as roads, railways and airports.
 - Other relevant factors.
- The mere fact that a political party, even if it is the governing party, is of the view that there are ‘too many’ provinces should not be enough to justify an amalgamation of all or some provinces. A proper scientific analysis must be undertaken by government or a credible research institution to provide basic data as to the performance of the respective provinces. Unless a decision to amalgamate provinces is supported by objectively verifiable data and wide public support, the process will be criticised as being a political exercise. The vague notion of ‘improved service delivery’ is in itself not sufficient rationale for a radical review of

provincial boundaries. There are ample constitutional, legal, administrative and political mechanisms to improve service delivery without radically altering provincial boundaries.

ENDNOTES

- 1 This chapter is a combination of inputs provided by the authors. Part 1 is authored by Lindisizwe Magi and Part 2 by Bertus de Villiers.
- 2 The coexistence of community with the state in the context of spatial demarcation is explained in Mathur 2005.
- 3 'Report of the Commission on the Demarcation/Delimitation of SPRs', Multi-party Negotiation Process, Word Trade Centre, Kempton Park, 1993. 'SPR' referred to states, provinces and regions since at that stage there was no agreement as to what the new regional entities would be called.
- 4 For an excellent and unique overview of the working of the commission refer to De Coning 1994:189 in De Villiers B, *Birth of a Constitution*, Juta, 1994.

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The future of the provinces: Constitutional and structural aspects

RASSIE MALHERBE

INTRODUCTION

The thrust of this chapter is to comment, against the background of the *de jure* constitutional position, on the *de facto* situation that has developed over the past decade, and to make some suggestions as to possible steps that may be taken to improve the effectiveness of provincial governments within the basic framework provided by the Constitution.

First, a few brief comments are necessary on the Department of Provincial and Local Government's (DPLG) Policy Review document:

- The Policy Review document gives little recognition to or mention of the South African Constitution. This is disturbing coming from a state institution because the provisions of the supreme constitution should be the obvious point of departure for every review of governmental spheres, institutions and processes.
- The document approaches the review process almost exclusively from a developmental perspective and there is little appreciation of the democratic principles, values and foundations entrenched in the Constitution. Development is obviously a major duty of governments, but equally important is their democratic duty to represent the electorate and to provide effective and accountable democratic

government. Due to the emphasis on development, the document is only concerned with the role and abilities of government structures as development agents, and does not seem to take into consideration the extent to which provincial and local governments enhance democratic values, reduce conflict and resolve tension, for example to prevent the over-concentration of powers which may lead to abuse.

- In the event, the document does not appreciate the fact that the provinces are a distinct sphere of government with original, constitutionally conferred powers. Several times the document makes the astonishing statement that the provinces do not have ‘distinct objects’, and that there is ‘no policy and legislative framework’ for provinces. Once again the document fails to recognise the clear provisions of the Constitution as the proper starting point for the review.
- It becomes rather difficult to avoid the inference that there is an ideological bias underlying the review process in terms of which provincial and local government structures are regarded as mere development agents for the national government. This approach seems not to be supported by the clear and unequivocal democratic provisions of the Constitution.

THE *DE JURE* AND *DE FACTO* SITUATIONS

The South African Constitution provides for a constitutionally entrenched distribution of powers between the national and provincial governments, and appoints the Constitutional Court to enforce the arrangement. Each province, which may adopt its own provincial constitution not inconsistent with the national Constitution, has exclusive powers in respect of a limited list of functional areas, whereas the national and provincial governments share powers in respect of a more extensive list of concurrent matters. In cases of conflict between national and provincial legislation on a concurrent matter, the national legislation prevails if it complies with any of several conditions.

The threshold for a national override is fairly low and not dissimilar to that found in other federal systems. The relationship between the spheres

of government is determined by the principle of cooperative government and given effect by a range of statutory and other intergovernmental structures and processes.

South Africa has a single revenue system and, having very limited revenue sources of their own, each province is entitled to an equitable share of the national revenue.

Formally, and notwithstanding certain unique features, the constitutional arrangement is of a federal nature, although in terms of the extent of their powers, political realities, interpretations given by the Constitutional Court and the financial dependency on the national government, the provinces do not enjoy an extensive degree of autonomy. (The constitutional arrangements are explained in more detail in Chapter 2.)

The *de facto* position differs significantly from the formal constitutional arrangement. In fact a distinct centralist tendency has become evident in South Africa over the past decade. This tendency has been fuelled mainly by political and ideological reasons. For example, the way in which the relationship between the spheres of government has been structured, the emphasis in the Constitution on concurrency and the financial dependency of the provinces has created the space for the national government to monopolise virtually all legislative initiative.

In national government circles the popular interpretation of the constitutional arrangement is that legislative authority over concurrent matters is vested in the national parliament and the executive authority over those matters in the provinces. Parliament accordingly adopts all legislation on concurrent matters, after which its implementation is assigned to the provinces.

Moreover, through the extensive intergovernmental structures established, *inter alia*, in terms of the Intergovernmental Relations Framework Act 13 of 2005, the provinces are being taken on board in the initiation or planning stage already, which prevents later provincial opposition and facilitates a smooth legislative process. This inhibits provincial initiatives and renders redundant later provincial inputs in the legislative process when channelled through the National Council of Provinces (NCOP). This approach also impacts negatively on the usefulness of the NCOP, which is supposed to represent provincial views in the law-making process.¹

In short, parliament – assisted by the intergovernmental structures run by

the national executive – usurped legislative powers over concurrent matters and manoeuvred the provinces into a subordinate position. Steytler (2001) comments metaphorically about this development: ‘It is a case of overgrowth by the national (federal) tree, smothering the young provincial saplings.’

Several additional observations may be made about this *de facto* state of affairs.

- The principle of cooperative government and one-party dominance have been exploited to promote national dominance instead of facilitating a true cooperative relationship between the national and provincial governments. In pursuance of the German *Bundestruke* principle, cooperative government provides that governments in all spheres must promote national unity, respect one another’s status and powers, refrain from encroaching on one another’s integrity and from assuming powers not conferred on them in the constitution, and cooperate in mutual trust and good faith. They must support and consult one another, coordinate their actions and in case of conflict exhaust all remedies before turning to the courts. In addition, governments participate in decision-making in other spheres (for example, through the NCOP), may delegate their powers to other spheres, and may intervene in the affairs of another sphere under circumstances that may threaten good governance in South Africa. However, the top-down decision-making process described above has distorted the principle of cooperative government into yet another instrument for national domination.
- Certain umbrella mechanisms have been put in place to facilitate the centralisation of powers. First, the Civil Service Act 103 of 1994, as amended by Act 86 of 1998, provides for a single public service that includes both the national and provincial public administrations. The Single Public Service Bill now under consideration seeks to include municipal administrations and staff in the public service as well. This will have further serious implications for the autonomy of local governments without necessarily improving the effectiveness of such governments. Second, in terms of a new Public Finance Management Bill presently under consideration, the national treasury’s control over the finances of governments in all three spheres will be reinforced and expanded.

- The structures and processes established in terms of the Intergovernmental Relations Framework Act of 2005 and other legislation to promote intergovernmental relations and resolve conflicts between the spheres of government have developed into another instrument to consolidate the national government's grip on decision-making in all spheres of government.
- The NCOP – which according to the Constitution is supposed to represent provincial interests in the national decision-making process – has largely been reduced to a rubber stamp by the process described above, even to the extent that questions have been raised about its usefulness as the second house of parliament (see below).
- Clearly, the national government has more capabilities and resources than the provinces for the development and implementation of policy initiatives, which naturally puts the former in a leadership position in respect of concurrent matters. At the same time, several provinces struggle with limited political, financial and administrative capacity, which further encourages the national government to take charge. Section 125(3) of the Constitution anticipated this problem and accordingly imposes a duty on the national government to 'assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions'. 'Administrative capacity' is obviously a comprehensive term that includes administrative resources and structures, human resources in terms of sufficient, qualified and skilled staff, as well as financial resources. Unfortunately, the national government has not complied with this duty to any significant degree, hence the administrative incapacity of several provinces. It is to be noted that a similar duty is imposed on the national and provincial governments in respect of local government (sections 154(1) and 155(6)(b)). And again, taking into account the recent finding that more than half of local authorities are not performing competently, this duty has evidently not been complied with.
- It seems as if the powers of intervention by the national government in provincial affairs (sections 44(2), 100 and 216(2)), and by the provinces

in local government affairs (section 139) are increasingly utilised for the purposes of centralisation. The problem is that national departments are not necessarily more effective than provincial departments. The emphasis should rather be on building capacity than on usurping functions. Within the constitutional framework – in particular the principle of cooperative government – governments in the various spheres are supposed to assist one another. These powers of intervention are intended for this purpose, and thus for temporary relief and not for taking over completely and permanently the powers or a single function of a government in another sphere. Extending the reach of sections 100 and 139 to provide for such a complete take-over would be inconsistent with the overall constitutional arrangement and relationship between the spheres of government.

- In its enforcement of the constitutional distribution of powers the Constitutional Court has done little to restrain national dominance. In the most recent case on concurrency, the *Mashavha* case, the court held as a general finding that the provinces do not have the capacity to legislate on social grants, implying that the concurrent functional area of welfare services must be interpreted narrowly to exclude social grants. This generalisation is inconsistent with previous decisions in which a broad interpretation of the functional areas was preferred, and is a further nail in the coffin of the efforts of at least some provinces to exercise their constitutional powers effectively.
- Ideological and political realities also impact on the *de facto* situation. Not only has the African National Congress (ANC) as government always been uncomfortable with the notion of strong regional government on ideological grounds, but since the 2004 elections it dominates the national as well as all nine provincial governments and most of the local governments. This political reality contributes to the present centralist tendencies and seems not to be conducive to the development of robust and effective provincial government. Moreover, the ANC appoints its leaders in the national and provincial governments in terms of a centralist party structure, and accordingly no ambitious provincial politician will readily challenge the national government on behalf of the provinces.

THE NATIONAL COUNCIL OF PROVINCES

A few specific remarks may be made about the NCOP: the purpose of the NCOP is to represent provincial interests in the national sphere, and it does this by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. The NCOP thus forms a link, or bridge, between the national and provincial spheres. It could be regarded as the single most important institution to give expression to the principle of cooperative government. The NCOP is in many ways subject to the National Assembly, but in respect of matters affecting the provinces it wields significant influence according to the Constitution. It must, for example, adopt constitutional amendments affecting the provinces, and when it disagrees with ordinary legislation affecting the provinces, it can even pressure the National Assembly into adopting it with a two-thirds majority.

However, the NCOP is not an effective voice on behalf of the provinces – a state of affairs created by various factors beyond the control of the NCOP. First, as explained, the way in which intergovernmental structures and processes are utilised to restrain the provinces before legislation is introduced in parliament emasculates the NCOP to a large extent. The role of the NCOP to reflect the provincial view in the legislative process has simply been usurped by this prior process, causing some observers to question its existence. Second, the composition of the NCOP handicaps its performance.

The NCOP is too small (90 members) to consider all matters before parliament thoroughly, especially to ensure full consideration of the provincial perspective. Moreover, provincial executive membership of the NCOP, although a useful idea borrowed from the German *Bundesrat*, is not a practical one given South Africa's geographical and other circumstances. Third, the ANC's dominant position both in the national and provincial governments, coupled with its centralist party organisation, inhibits creative and innovative inputs from members and provincial legislatures which the NCOP can promote in the national process. Moreover, it forces the council to succumb to the National Assembly's pressure, even to the point where it acted unconstitutionally in rushing through legislation which should have been submitted to public hearings (see the *Doctors for Life* case).²

The role of the NCOP is intimately connected to most of the other considerations discussed in this chapter. A few suggestions on how the poor performance of the NCOP may be addressed are mentioned below.

COMMENTS AND SUGGESTIONS

The underlying theme of this chapter is that there is a marked discrepancy between the *de jure* and *de facto* position of provincial government in South Africa. The provinces have been put in an unwarranted inferior position in relation to the national government.

Concurrency *à la* the South African Constitution has not levelled the legislative playing field between the provinces and the national government, and has proved to be no more than a recipe for national domination. In short, the national government deals the cards, and the provinces have been relegated to become its delivery agents.

To argue now, as some do, in favour of the abolition of the provincial legislatures, or at least the reduction of the number of provinces, is akin to a self-fulfilling prophecy.

Should something be done about this development and, if so, what?

The answer lies in the Constitution. The Constitution does not authorise the degree of centralisation we now experience. Centralisation of power increases the risk of abuse and that is the reason why the founders of the Constitution devised a system which would confer sufficient autonomy and initiative on the provinces to counter the unhealthy concentration of power at any sphere. This was after all one of the primary compromises reached at the negotiating table. Centralising all power and forcing the provinces into a political straight-jacket is therefore inconsistent with the letter, spirit and purpose of the Constitution.

The justification that the centralisation of power is due to the fact that the provinces do not have the capacity to govern effectively, is unconvincing. First, why then continue to assign the implementation of national legislation to the provinces? If the provinces do not have the capacity to legislate on concurrent matters they certainly also do not have the capacity to implement that legislation. Second, there is enough evidence to refute the assumption that the national government is necessarily able to perform more effectively than the provinces.

In considering possible ways to address the situation, there is no doubt that all stakeholders need to come together in a process of consultation and negotiation. Ideology, bias and prejudice are not going to solve the problem; the issue needs to be tackled with an open mind and in a spirit of goodwill. What is mainly needed is a change of heart. As long as the Constitution is viewed in government circles through an ideological lens,

power will continue to be centralised and regional and local government will continue to suffer. And such ideological considerations will continue to impede the establishment of a truly democratic system.

In view of the fact that the Constitution is clearly being misinterpreted or even abused, there is a need to revisit the basic provisions of the Constitution relating to the three spheres of government and the distribution of powers among them.

Clarity is needed on what exactly these provisions require, how they can be revived, and what form of adjustment, if any, they require. A clearer and more nuanced interpretation of the relevant provisions is called for. For example, upon closer inspection it would seem that section 146 of the Constitution (resolution of conflicts on concurrent legislation), presupposes that the national government would mainly adopt legislation that provides norms, standards, frameworks and policies, whereas the provinces would be responsible for fleshing out those frameworks and policies in their own provincial-specific legislation.

The national parliament is in other words not supposed to provide the detail in its legislation, but should leave the particulars to the provinces to fill in.

The national government will have to take its constitutional duty in section 125(3) much more seriously to develop the political, administrative and financial capacity of the provinces to govern effectively, and to give them back some of the initiative that was monopolised by the national government. There is no evidence so far that national departments are as a rule more effective than provincial departments. Centralisation for the sake of 'effective delivery of services' is not supported by empirical evidence. (As mentioned, the same principle applies to local government – sections 154(1) and 155(6)(b).)

The purpose of the provisions mentioned is to build the capacity of the provinces and local governments to the level that their constitutional powers and functions require. For the national government to neglect this duty and instead taking over those functions that actually vest in the provinces, runs counter to the clear provisions and intention of the Constitution. This requires a profound change of heart among all stakeholders, especially in the national government, but without it there is little hope that the provinces will be able to bounce back from the position of inferiority into which they have been manoeuvred.

National dominance in intergovernmental relations should be severely restricted. Intergovernmental structures should not be used as a mere clearing house for national legislative initiatives and should not be allowed to become a one-way traffic system for the single purpose of obtaining the consent of the provinces for these national initiatives. Instead, these structures should be used for true administrative consultation, coordination and cooperation among the formally equal spheres of government.

The legislative authority of the provinces can largely be restored if the concurrent legislation agreed upon in intergovernmental consultations and processes is not necessarily adopted by the national parliament, as at present, but is referred to the provinces instead to adopt their own provincial-specific versions of it. This will facilitate the accommodation of provincial circumstances, needs and preferences without deviating from the agreed principles.

Many federations have consistent legislation at state level on the basis of terms agreed at the national level but with the scope for provinces to fine-tune it to suit local circumstances.

Insofar as concurrent legislation still needs to be enacted by the national parliament, the process should be rearranged to allow provincial inputs to enrich and influence parliamentary deliberations in a more meaningful way. One way to ensure more emphasis on the provincial perspective is to introduce all section 76 bills first in the NCOP and not in the National Assembly.

This minor adjustment will ensure that the focus in respect of section 76 bills will turn to the NCOP and to the views of the provinces, and that through amendment these bills will reflect those views before the NCOP finalises it for consideration by the National Assembly.

The financial resources of the provinces is a complicated issue, but provinces' reliance on the national government for their revenue requirements needs to be curtailed if at all possible. The provinces will struggle to become strong, vibrant and creative centres of regional government as long as they remain dependent to the extent that they presently are on the national government for their revenue and if their own sources of revenue are not increased and exploited. Some viable form of tax base needs to be developed by the provinces themselves. This may also require that the principle of a single revenue system be revisited in order to effect some form and degree of fiscal decentralisation to the provinces.

CONCLUSION

A strong argument can be lodged in favour of the retention of the provincial system and indeed in strengthening the capacity of the provinces to govern effectively within the framework of the current constitutional arrangements. In an emerging democratic system, any representative sphere or institution contributing to the distribution of government authority – and thus preventing the over-concentration of power – should be cherished and enhanced.

The provinces are democratic institutions and their abolition or even their continued crippling would weaken the democratic foundations of South Africa. Moreover, relatively strong provincial government was one of the solutions provided by the constitution-makers to the question of how best to govern the vast and diverse South African landscape. No convincing evidence has so far been produced to show that reasonably strong provincial government in whatever form does not, and will never, contribute to good governance and the well-being of the South African nation. Provincial government has come to stay and the only question should be how best to structure and develop it to ensure effective government.

Finally, undermining the Constitution – as has happened over the past decade in the case of the provincial system – is a dangerous undertaking. The provisions of the Constitution represent enforceable rules of law and neither the state nor anybody else is free to decide which of them to observe and which not to. Such an approach jeopardises the status and legitimacy of the Constitution and the future well-being of South Africa's emerging democracy.

The way forward is to ensure compliance with the Constitution and to adjust instead of ignore the Constitution if it is deemed desirable. My hope is that the deliberative process regarding the future of the provincial system will be conducted along these lines.

ENDNOTES

- 1 Taking on board the provinces so early in the legislative process seriously undermines the legislative process to follow. During the parliamentary process the provinces will hardly depart from the consent already given to the relevant minister during the planning stage. The problem is that provinces are often not in a position to participate effectively in discussions at such an early stage. As a result, the fresh and creative provincial perspective that should have been brought to the parliamentary process by the NCOP has lost its edge, and even its relevance, by the time the legislation reaches the NCOP.
- 2 *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC).

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CHAPTER 5

Local government after 15 years: Issues and challenges

CHRIS THORNHILL

INTRODUCTION

South Africa was one of the last African states to obtain a fully democratic government with its first general election in April 1994. Democratising the system of government required a total transformation of all public institutions and the services provided by the state. Local government as government closest to the people demanded particular attention as the services they are expected to provide affect the daily lives of most inhabitants of the state.

During the apartheid regime South Africa consisted of racially based local authorities responsible for a limited number of municipal services (called the pre-interim phase). The first stage of the transformation commenced with transitional arrangements in 1993 which involved the scrapping of racially based local authorities and the creation of non-racial transitional municipal structures (interim phase). The major transformation of local government commenced in 1998 with the demarcation of fully integrated municipalities with extensive functions covering the total geographic area of the country (the final phase).

This chapter gives a brief overview of the transformation processes to identify the crucial stages that preceded the current system. These transformational processes posed a number of challenges as efficient and effective services had to be maintained or introduced in cases where services were non-existent or sub-standard. The issue of the political and

administrative interface is just one of the complex issues in any newly democratised state requiring attention and will be addressed in the discussion.

PRE-INTERIM PHASE

In the period before the unbanning of political organisations on 2 February 1992 approximately 1,100 local authorities existed in South Africa. These authorities comprised municipalities for whites, assigned to the regional structures (called provinces), and performed their functions under delegated legislation emanating from ordinances passed by the provinces. Municipal matters concerning the Indian population and those of people of mixed origin (termed coloureds) were dealt with by management committees and local affairs committees respectively. These committees had limited powers and operated within the policy and legal frameworks of so-called white municipalities.

In 1983 the affairs of urbanised black people were removed from the authority of white municipalities and black local authorities were established. These local structures were not accepted by the black urban communities as they lacked a proper financial base, were understaffed, did not possess any significant industrial or commercial areas to generate funds, and were not credible in view of the communities concerned. Although the National Party government at the time did much to keep these municipalities operational, the municipalities' ability to take policy decisions slowly declined. The urban communities also started campaigns to boycott the payment of rates and taxes, hastening the demise of the structures to a point where it became obvious that racially based municipalities could not continue to function and could no longer provide municipal services in a sustainable manner.

The reform of local government commenced with the introduction of an interim phase.

INTERIM PHASE TRANSFORMATION

A fragmented and incoherent range of local authorities cannot be transformed in one process as the negotiators for a democratic system of government wanted to ensure continuity in service provision. This is also

the justification for the decision by the negotiators to retain all existing legislation until abolished or amended. In the case of local government the interim phase commenced with the adoption of the Interim Measures for Local Government Act, 1991 (Act 128 of 1991). This Act allowed the former government to review the existing (pre-interim) system of local government. It also enabled local authorities to enter into agreements with the racially based management committees and local affairs committees.

The next important phase in the interim period required major legal amendments to formalise the negotiated agreements. These negotiating forums also provided for the extra-parliamentary representation – that is, interested groups which could indicate their direct interest in a particular area but did not form part of existing municipal structures. These amendments (sections 28 and 29 of the Provincial and Local Authority Affairs Amendment Act, 1992 (Act 134 of 1992)) provided for, *inter alia*: the demarcation of municipal areas for joint administrative purposes; the introduction of a grant system to assist in the improvement of conditions in disadvantaged areas; and the re-apportionment of revenue among participating local authorities.

The transitional phases provided for: the repeal of discriminatory legislation; the drafting of guidelines for negotiations; financial and human resource issues; broad participation by stakeholders; policy options; and the finalisation of *de jure* local government structures.

The abovementioned Act provided the vehicle to abolish racially based local authorities and replaced them with appointed joint structures representing all the inhabitants of a particular urban area. No democratic elections could be conducted at that stage since the new constitutional dispensation for South Africa had not been concluded. The interim phase consisted of appointed municipal councils established on a negotiated basis and lasted until the constitutional arrangements for the country had been finalised.

The conditions which applied to the final stage in the transformation of local government in South Africa was contained in the interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). The contents of this Act are not discussed in detail as they provided only for the period from the first national elections of 1994 until the final Constitution was passed by the Constitutional Assembly. The principles contained in schedules 4 and 5 (relating to local government) of the interim Constitution, however, had

to be adhered to in the final Constitution. In this way it was ensured that the matters agreed to by the negotiating parties on the democratising of the country would be acknowledged in the final Constitution.

The Constitution of the Republic of South Africa, 1996, provides in Chapter 7 for the constitutional preconditions for the new system of local government. Provision is made, *inter alia*, for (section 151):

- the local sphere of government to consist of municipalities which must be established for the whole territory of South Africa;
- the legislative and executive authority of a municipality to be vested in its municipal council;
- 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; and
- the national or provincial spheres may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The objects of local government were clearly entrenched in section 152 of the Constitution. These include, *inter alia*, that:

- democratic and accountable government be provided for local communities;
- services be provided in a sustainable manner;
- social and economic development be promoted;
- a safe and healthy environment be promoted; and
- the involvement of communities and community organisations be encouraged in all matters concerning local government.

The full constitutional requirements are not discussed in this chapter. The

most significant characteristics of the system of local government are that it is constitutionally entrenched, it now enjoys original powers derived from the Constitution and it has to be democratically based. With these characteristics in mind, the current system can be considered.

The whole system of municipal government and administration was restructured and replaced with a totally new system.

For example:

- municipalities have been demarcated in such a way that they cover the total geographical area of South Africa, not only the urban areas;
- municipal councils are representative of the South African electorate registered to vote for the national and provincial legislatures (with limited exceptions);
- communities have a constitutional right to demand to be consulted in decisions concerning the municipal area in which they reside to ensure that their needs are satisfied; and
- municipalities provide an extensive range of services over and above basic services such as electricity, water and sanitation.

The different characteristics of the current system will be discussed and the challenges identified to evaluate the capacity of municipalities to achieve their constitutional objectives. It should be emphasised that the system is continuously reconsidered and currently the assignment of functions to two categories of municipality (category B and C municipalities) as well as the continuation of the three levels of municipality are under review.

POLICY GUIDELINES

After consultation with interested parties, the Ministry of Provincial Affairs and Constitutional Development published government's policy guidelines in the White Paper on Local Government, 1998. The policy guidelines include the following:

- Local government should be developmental. This implies that local

government should exercise its powers and perform its functions in a manner maximising their impact on social development and economic growth, aligning the roles of the members of the public and each sphere of government, and democratising development, meaning that each municipal community should be afforded the opportunity to be involved in development.

- Local government is accepted as a sphere of government in its own right. Thus local government is no longer viewed as subordinate to provincial and national government. This also acknowledges the constitutional requirement that: 'In the Republic government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated' (section 40(1)). The Constitution also requires spheres of government to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another sphere (section 41(1)(g)).
- The White Paper recognised the existence of metropolitan municipalities (as already instituted in the interim phase). Two other categories of municipality are identified to cater for citizens living outside the metropolitan areas. These are category B or local municipalities, which are municipalities to render services in urbanised areas, and category C municipalities as district municipalities. This latter category of municipality would also include category B municipalities in its geographical area.
- The policy addressed the political structure of the new system of local government. Provision is made for dynamic leadership in the political structure. Furthermore, powers could be delegated to provide for wider participation in political processes. The policy guidelines also provide for a mixed electoral system, implying that a council should partly consist of ward representatives and partly of proportional representatives elected on a party list system.
- The White Paper attended to the core of the *raison d'être* of municipal government and administration in relation to service delivery. In this regard provision is made for municipalities to utilise the full spectrum of

service delivery options including contracting out, public-private partnerships and related mechanisms.

- As expected the policy document addressed the vexing issue of financing local government services. The White Paper acknowledged the extensive services required to redress the injustices of the past, but also noted the need for sustainable municipalities. Thus it was proposed that municipalities should be assigned revenue sources, but that provision should also be made for intergovernmental transfers to supplement their revenue and enable them to provide the extensive services now entrusted to the newly designed sphere of local government. Specific provision also had to be made for budgeting, accounting, financial reporting and the introduction of Generally Accepted Accounting Practices.

Various legislative measures had to be passed to give effect to the policy guidelines contained in the White Paper. These acts are not discussed in detail, but will be alluded to in an effort to illustrate the extent to which the policy guidelines contained in the White Paper had been accommodated in the new system.

MUNICIPAL DEMARCATION

The Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998) provides for criteria and procedures for the determination of municipal boundaries. This stage in the introduction of a new system of local government preceded the establishment of the new municipalities. In this Act provision is made for the establishment of a Demarcation Board (section 3) that is a juristic person and which is independent and impartial in exercising its functions. The Demarcation Board is required to demarcate the boundaries of municipalities for the whole geographical area of South Africa in accordance with the conditions set out in the 1996 Constitution (section 155).

When determining the boundary of a municipality the board has to take into consideration, *inter alia*: the interdependence of people, communities and economies; the need for cohesiveness, integrated and unfragmented areas; the financial viability and administrative capacity of the municipality; the need to share and redistribute financial and administrative resources; provincial boundaries; areas of traditional rural communities; existing and

proposed functional boundaries; existing and expected land use; topographical, environmental and physical characteristics; administrative consequences of its boundary determination; and the need to rationalise the total number of municipalities.

The original determination of the boundaries of municipalities created a number of challenges. Some municipalities extended across existing provincial boundaries. The result was that legislation had to be passed to regulate the administrative consequences of such municipalities (see *Local Government: Cross-boundaries Municipalities Act, 2000 (Act 29 of 2000)*). These cross-boundary municipalities did not prove to be successful as a result of divergent policies in adjacent provinces concerning particular municipal competencies, for example health. Therefore, the *Cross-boundary Municipalities Repeal and Related Matters Act, 2005 (Act 23 of 2005)* as well as an amendment to the 1996 Constitution had to be passed to redefine the boundaries of provinces to ensure that a municipality would fall in only one province.

It is important to note the significance of boundary determination as it had dire consequences. In some cases local communities were totally opposed to being part of a particular province (e.g. Matatiele and Kutsong). This opposition even resulted in damage to property and boycotting of service payments. The situation required that the Twelfth Amendment to the Constitution, 1996 be referred back by the Constitutional Court, requiring parliament to revise its amendment after consulting with the affected communities. This ultimately resulted in the Thirteenth Amendment to the Constitution, 2007.

The demarcation of municipalities succeeded in rationalising the number of municipalities from 1,100 racially segregated municipalities in the pre-interim phase to 843 in the interim phase (1995). With the demarcation of 1998 the number was reduced even further to 284, and was later amended to 283. Further decreases are on the cards as the number of district municipalities (46) will be reduced to about 22 as a result of inefficiencies in some district municipalities.

The demarcating municipalities indicate that the communities should be consulted prior to any decision affecting them, irrespective of whether it concerns the possible improvement of service delivery, but also their perceptions concerning the capacity of a provincial government to administer their affairs. Furthermore, cognisance should be taken of

historical boundaries that applied. Even in an unacceptable governmental system people become accustomed to their location for administrative purposes and any change should take note of this factor. In this regard some traditional authorities complained that their traditional jurisdictional areas had been affected negatively.

STRUCTURES OF MUNICIPALITIES

The second legislative measure to be adopted to create the new system of local government and administration was the adoption of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998). This Act mainly provides for the establishment of municipalities in accordance with the requirements relating: to the categories and types of municipalities; to establish criteria for determining the category of municipality for an area; to define the types of municipality for each category; to provide for an appropriate division of functions and powers among categories of municipality; to regulate the internal structures of political office bearers and senior officials; and to provide for appropriate electoral systems.

Municipal councils consist of two kinds of councillors:

- Fifty percent of the councillors are elected on a ward basis where the ward system has been introduced. This implies that a municipality (except a district municipality and some metropolitan municipalities) is divided into wards and the electorate in each ward elects a councillor to represent them.
- The remaining 50% of the councillors are elected on a proportional basis through the party list system according to the number of votes a party obtains in an election. The reasoning behind this system is that ward councillors should promote matters concerning the ward they represent. The proportionately elected members should consider the matters concerning the whole municipality.

A serious problem exists regarding the membership of municipal councils. Section 158(1)(b) of the 1996 Constitution disqualifies a citizen from being elected as a councillor if such a person ‘... is appointed by or in service of the state and receives remuneration for that appointment or service, *and*

(my emphasis) who has been disqualified from membership of a Municipal Council in terms of national legislation’.

Use of the ‘and’ creates legal uncertainty. Some provinces consider the section to exclude teachers from being councillors. Some provinces interpret the section to imply that teachers could only be excluded if they have been disqualified as a result of other reasons contemplated in national legislation. Thus an inconsistency exists and should be addressed in any revision of legislation pertaining to membership of councils.

CATEGORIES

The Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) provides, *inter alia*, for the categories of municipality already alluded to, that is: category A – metropolitan municipalities (currently six metropolitan municipalities); category B – local municipalities (currently 231); and category C – district municipalities (currently 46). The criteria for being classified in a category are stipulated in the Act.

TYPES

The Act makes provision for the *type* of executive available to each category. Although the council possesses both the legislative and executive authority, executive actions can be performed on behalf of council, for example, by a collective executive system, a mayoral executive system, a plenary executive system, a subcouncil participatory system and a ward participatory system. The different types will not be discussed in detail; however, the two most significant types will be referred to as they represent the major challenges in the relationship between the council as the legislature and the councillors serving in an executive capacity. It should be emphasised that the final executive authority of a municipality is vested in council. It may delegate functions and responsibilities to the executive arm of council, but accountability for executive actions vests in council.

EXECUTIVE COMMITTEE

Municipalities that are authorised by the relevant Act (Act 117 of 1998, section 42) may appoint an executive committee. The composition of an

executive committee must be composed in such a way ‘... that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in council’. A council may determine its own procedures to elect an executive committee.

Considering the wording of the Act reproduced verbatim, it could be deduced that members should not necessarily represent the parties and interests exactly proportionally, but merely *substantially* proportionately. This may be the reason why the member of the executive committee (MEC) for local government in the Western Cape aborted his attempt to abolish the executive mayoral system and compel the City of Cape Town to establish an executive committee. However, when it was realised that the ANC would not necessarily be proportionally represented in the executive committee, the proposal was aborted.

The executive committee is the principal committee of council. It receives reports from other committees, may dispose of matters delegated to it and performs functions comparable to a cabinet in the national sphere of government.

The municipal council may, by resolution, remove an MEC or all the members from office. The relationship between the council and the executive committee is clearly stipulated in the authorising Act (Act 117 of 1998, section 44(4)) by requiring that an executive committee must report to the council on all decisions taken by the committee. No distinction is made between powers assigned to the executive committee and the duties delegated to it. Thus it could be deduced that the final executive authority is vested in council and may thus also review the decisions of the committee.

Municipalities making use of the executive committee system elect a mayor from its members (Act 117 of 1998, section 48). The mayor acts as the chairperson of the executive committee. The mayor may also perform any ceremonial duties and exercise the powers delegated by the council or the executive committee.

EXECUTIVE MAYOR

The introduction of the executive mayor is a novel concept in the South African local government sector. This *type* may be utilised by municipalities authorised to institute such type (system) (Act 117 of 1998, section 54). The

functions and powers of the executive mayor are not repeated as they are substantially the same as those entrusted to the executive committee. There are two major exceptions: first, the executive mayor is not the principal committee of council as is the case with the executive committee, but also receives reports from other committees as is the case with the executive committee and may dispose of a matter if delegated to the executive mayor. Second, the executive mayor may perform ceremonial duties as the council may determine, which function an executive committee cannot perform. Thus it could be argued that from a functional point of view the two types are largely comparable.

The most significant distinction between the executive committee and the executive mayoral system is to be found in the composition of the mayoral committee appointed by the executive mayor from members of the council. A major difference between the executive committee and the mayoral committee is that the executive committee's members are elected by the council, but the mayoral committee's members are appointed by the executive mayor. The second major difference is that the executive committee serves for the term of the council, unless the type of the municipality changes. In the case of the mayoral committee, the members serve for the term of the executive mayor and are thus directly dependent on the mayor for the period they serve on the committee. However, the executive mayor may also dismiss a member at any time. It could thus be argued that the mayoral committee system is comparable to the cabinet system, but with the main difference that the executive committee must report on all its decisions to council (as is the case with the executive committee).

The executive mayoral type illustrates the challenges faced when trying to distinguish clearly between the political role of the executive mayor and the administrative role of the municipal manager. This particular issue will be dealt with in more detail under a separate heading. Suffice it to say at this juncture that it appears as though some executive mayors assume administrative powers and actually endeavour to manage the municipality's affairs. Although the functions and powers appear to be defined clearly, the practice proves differently.

One of the reasons may be ascribed to the executive mayor being identified by the ruling ANC alliance. Thus party protocol requires that the executive mayor's decisions (or requests) be honoured. The second reason

may be that municipal managers are appointed on the advice of the ruling political party and would thus be politically committed to comply with the political directives or sentiments expressed by the executive mayor. A third reason, to be discussed further on, could be because municipal managers often lack the administrative capacity and knowledge to contradict the executive mayor's wishes based on legal grounds. This may also be the reason why councils so often lose court cases instituted against them.

EXTENDING DEMOCRACY

One of the major reasons for the liberation movement's opposition to the former system of government was the absence of democracy in the state's machinery. Therefore, it could be expected that the new system would make particular provision for the introduction and strengthening of democracy in all governmental processes and actions. Some of the most significant democratisation innovations in the local government sphere will be referred to next.

COMMUNITY PARTICIPATION

One of the requirements that the new system of local government had to meet was to promote democracy at the local sphere. It is therefore understandable that the enabling legislation would make provision for the extension of citizen participation in the governing of a municipality. Particular provision has thus been made in the enabling legislation concerning local government. The Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) requires municipalities to develop a culture of municipal government that complements formal representative government. This is achieved with the requirement that local communities must be encouraged to participate in the affairs of the municipality (section 16).

Community participation takes place through political structures, through mechanisms such as *izimbizo* (informal gatherings with councillors where questions can be asked on any issue related to municipal matters), public meetings, consultative sessions and report back sessions with the local community. In devising such mechanisms it is a legal requirement (Act 32 of 2000, section 17(3)) that attention be given to people who cannot read or write, people with disability, women and other disadvantaged

groups. It is also required that meetings of council and its committees (with particular exceptions) must be open to the public. With the compilation of the integrated development plan for the municipality, the community must also be involved (Act 32 of 2000, section 29).

It should be obvious that the new approach to democratising local government goes far beyond the normal practice of only elected representatives acting on behalf of a community. Communities are no longer excluded from the governing function and do not only play a role at elections and are then sidelined. They can (in theory at least) actively participate in a variety of governmental initiatives through formal structures.

WARD COMMITTEES

Metropolitan and local municipalities, as authorised in the enabling legislation (Act 117 of 1998, section 73) may establish ward committees. A ward committee consists of a ward councillor, acting as the chairperson and not more than ten other persons from the ward concerned. These committees must specifically take into account that women are equitably represented and that the diversity of interests in the ward are also represented. Thus the ward committee offers ordinary inhabitants who may not be interested in campaigning or being fully involved in council matters to contribute to their communities by way of representation on ward committees.

No formal elections are normally held to select the ward committee members. In most cases the different interest groups are requested to put forward names of prominent members of movements or associations active in the particular area. From these, ten are then selected.

Ward committees are supported by the council through, for example, the provision of secretarial support, monetary assistance, transport to meeting venues or cell phones. They do not receive an allowance like elected councillors.

A ward committee is assigned specific duties including making recommendations to the ward councillor or through this councillor to the council on any matter affecting the ward. The council may also delegate powers and duties to a ward committee. The rate of success depends on the initiative of the committee members and the support and guidance of the councillor.

This democratising concept proves that democracy can be extended beyond normal elected representatives. It also serves as a training stage for inhabitants who become exposed to public representation. These members may even become councillors in future municipal elections. A challenge facing the system is that in some wards the councillor concerned manipulates the members to promote his/her own political agenda and does not allow community representatives to serve as members if they do not support the policies of the party in power. A mechanism is therefore required to ensure that a ward committee represents the interests of a ward and not the political aspirations of a particular councillor.

Once communities have been afforded the right to participate, they will demand that this right be honoured. Violent protests have erupted in some cases where communities have not been consulted or their views have been ignored. Thus a council would be well advised to honour its commitments concerning democratising decision making.

FUNCTIONS AND POWERS

As alluded to earlier, municipalities have been assigned extensive functions and powers in re-engineering the system. A municipality is assigned powers and functions in the Constitution (sections 156 and 229). These include, *inter alia*:

- the right to administer the local government matters entrusted to it in schedules 4(B) and 5(B) of the Constitution;
- the authority to make and administer by-laws for the effective administration of the matters assigned to it, and to impose rates, taxes and surcharges for the services provided by or on behalf of the municipality;
- the right to develop and adopt policies, plans and strategies, promote development and implement national and provincial legislation as assigned to it (Act 32 of 2000, section 11); and
- the right to do anything else within its legislative and executive competence.

In general it could be stated that a municipality remains responsible for the traditional core services such as water provision, electricity distribution, refuse removal and sanitation. However, major responsibilities have been assigned in terms of the Constitution, for example, aspects of health services and housing. However, the Constitution states that these functions can only be assigned if the matter could most effectively be administered locally and the municipality has the capacity to administer it.

The full extent of the administrative implications has not been fully considered. Thus newly created municipalities often lack the administrative capacity to perform the assigned duties due to a lack of properly trained and experienced managers and functional employees with the required commitment to succeed. The second challenge in this regard is the lack of financial capacity to implement the extensive policies passed by the democratically elected government since 1994 and in some cases imposed on municipalities by provincial governments through so-called fiscal dumping.

ADMINISTRATION AND MANAGEMENT

The administrative and managerial matters of municipalities received particular attention in the development of the new system. The most significant matters covered include the following:

- Human resources are addressed by the requirement that a municipal council *must* appoint a municipal manager as head of administration and also as accounting officer. The person appointed to this position must have the relevant skills and expertise to perform the duties associated with the post (Act 117 of 1998, section 82). Although guidelines exist, councils often appoint municipal managers who have no knowledge of municipal affairs. It was reported by the Demarcation Board that the average experience of municipal managers was two years. This lack of managerial skills and inexperience may be contributing to the current lack of efficiency at municipalities. As head of administration the municipal manager has to ensure that:
 - policies are developed;
 - proper organisational structures exist;

- financial arrangements are made to prevent financial misconduct and to promote sound financial management;
 - work methods and procedures are determined to obtain efficient and effective service delivery;
 - the human resource management will contribute to sound service delivery through effective managerial practices;
 - proper control is exercised to enable council to account for all its actions or inactions; and
 - all municipal human resource policies and practices are consistent with applicable labour legislation.
- The Local Government: Municipal Finance Management Act, 2003 requires every municipality to have a budget and treasury office consisting of a chief financial officer and other persons contracted by the municipality for the work of the office. This officer is administratively in charge of the budget and treasury office and has to advise the municipal manager on the exercise of powers and duties assigned to the accounting officer in terms of financial matters. It could thus be stated that the chief financial officer is the financial expert in the municipality and assists the municipal manager as accounting officer to perform his/her duties effectively.
 - The new system provides for performance management by requiring a municipality to:
 - facilitate a culture of public service and accountability among its staff;
 - perform its functions through operationally effective administrative units;
 - assign clear responsibilities for the management of the administrative units and mechanisms;

- be responsive to the needs of the local community;
 - delegate responsibilities to the most effective level within the administration;
 - establish a performance management system and to set key performance indicators to measure performance;
 - submit annual performance reports (Act 44 of 2003, section 6 substituting section 46 of Act 32 of 2000).
- Municipalities as public institutions are required to operate according to strictly defined financial processes and practices. The Local Government: Municipal Finance Management Act, 2003 was passed to regulate the financial affairs of municipalities. The Act provides, *inter alia*, for securing the financial and sustainable financial affairs of municipalities and to establish treasury norms and standards. The Act promotes sound financial administration by, for example:
 - requiring arrangements regarding supervision over local government financial matters by national treasury;
 - requiring every municipality to open a bank account for revenue received and from which payments can be made;
 - requiring a budget to be approved for every financial year before the commencement of the financial year to which it applies;
 - outlining the responsibilities of the political office bearers such as the mayor/executive mayor;
 - outlining responsibilities of officials such as the municipal manager as accounting officer, top management and chief financial officer;
 - requiring supply chain management; and
 - requiring financial reporting and auditing.

- Control over the local sphere of government is exercised, *inter alia*, by the provincial sphere of government through the 1996 Constitution. Section 139 of the Constitution assigns an interventionist role to the provincial sphere of government. Thus a provincial government may intervene in local government in a province if a municipality cannot or does not fulfil an executive obligation in terms of legislation. In such a case a provincial executive may even issue a directive describing the extent of the failure and the steps required to meet its obligations or even assuming responsibility for the relevant obligation. From recent rulings by some MECs for local government it appears as though they are reluctant to intervene in ANC-aligned councils and are more inclined to intervene in municipalities run by opposition controlled councils.
- The political-administrative interface perhaps poses the most complex challenges in local government. The legislative measures seem to be clear on the relationship. Section 52 of the Municipal Systems Act, 2000 stipulates that the respective roles and responsibilities of each political structure and political office bearer and the municipal manager must be defined in precise terms in writing and be acknowledged and given effect to in the rules, procedures and instructions and policy statements. The Act further states that in defining the areas of responsibility, the manner in which they must interact must be determined, appropriate lines of communication and reporting must be determined, and mechanisms, processes and procedures for interaction between the political structures and the municipal manager and other staff have to be clearly established. However, practice has shown that political power often prevails and municipal managers capitulate in the face of political initiatives. As stated earlier, municipal managers are quite often appointed in an acting capacity, for example on a year to year basis, making them more prone to political whims and possible cancellation of the 'acting' capacity. In such cases municipal managers may prefer to accept the political decision and so avert the possibility of demotion. New policy is thus urgently required to obviate this inconsistency.

CAPACITY

Capacity is specifically addressed in municipal enabling legislation (see Act

32 of 2000, section 68). The importance of capacity is dealt with under a separate heading as a result of the challenges posed in this regard. A municipality is required to develop its human resource capacity to a level that enables it to perform its functions and exercise its powers effectively, efficiently and economically. Measures also exist to finance training programmes for municipal officials.

The system currently in existence only became fully operational in 2006. The result is that local government is faced with a serious lack of human resources with the required capacity to administer the new municipalities and to render the wide range of services in a newly demarcated area, including formerly disadvantaged communities. The challenges regarding capacity have been highlighted in the Municipal Demarcation Board's 2007/2008 report. The challenges include matters such as municipalities' poor performance – that is, they manage less than 25% of their assigned functions.

The Demarcation Board also found that in some cases the poor performance could be attributed to non-viable areas (particularly in the former *bantustans*). This is a clear illustration that the original demarcation of these municipalities should be reconsidered. The board further reported on managerial incapacity due to, *inter alia*: the extent of the service backlog in former disadvantaged areas; lack of financial reserves and dependence on grants by national government; household indigency; managerial inexperience and incapacity; and community expectations exceeding the capacity of the municipality.

POLITICAL–ADMINISTRATIVE INTERFACE

It can be argued that council is the major authority to determine municipal policy. This approach negates the politics–administration dichotomy according to which policy-making is the task of the legislator, while the execution of the policy is the task of the executive government institutions (the so-called administration).

Although council is responsible for passing by-laws and resolutions (which could be regarded as written statements of policy), the municipal manager and other managers in the municipal departments as well as civil society contribute to the formulation of policy within the framework of their respective spheres of operation and within the parameters of policies

passed by council. (See section 16(1)(a) of the Municipal Systems Act, 2000 regarding the obligation of council to encourage communities to participate in the preparation, implementation and review of its integrated development plan).

The participation of the municipal manager in the formulation of public policy does not imply the involvement in but rather the acknowledgment of politics. When an official proposes policy options through the municipal manager in the course of the execution of his/her duties, he/she performs a political function (in the sense of attaching an administrative value judgment to facts within the current political framework and interpreting societal requirements) and operates within the realm of politics. As soon as the two terms are brought into relation to each other, the 'separation' fades away.

Politics and administration are two sides of the same coin: an absolute separation is impossible. The legislation pertaining to local government is quite clear in this regard. By assigning functions and powers to municipalities it implies the duty to formulate policies and to perform the assigned functions to deliver services.

In practice, municipal managers should be able to distinguish when the decisions to be made fall outside their administrative sphere of authority and within the political domain of council or a political office bearer. The implication is not that managers should leave the important qualitative decisions to the political office bearers, concerning themselves with making only unimportant (or less important) quantitative decisions. In fact their decisions regarding the practical steps necessary to give effect to the political office bearers' decisions are no less important than the decisions made by the latter.

It is, however, necessary for managers to be able to distinguish between political activities – i.e. allocating political value considerations (to be performed by the political office bearers) and administrative as well as managerial activities to be performed by the officials, consciously recognising the values and needs of the community they serve. Even though these activities are performed respectively by politicians and managers they have to be integrated to achieve the municipality's goals.

The political-administrative interface is the gray area within which politics has to be distinguished from administration and management. If there is lack of trust or lack of clarity regarding the respective

responsibilities, the executive institution cannot provide the services required. In a number of cases the executive mayor (mayor) and the municipal manager belong to the same political party and serve in the same party structures. Party political decisions taken by the party structure then crop up in the formal meetings and must be dealt with administratively in the municipality by the manager. Should the municipal manager then find that it would not be administratively permissible and could not be publicly accounted for, the political structures may view it as obstruction. Thus the municipal manager may feel obliged to concur with the party's decision. This situation clearly calls for a revision of the requirements for the appointment of a municipal manager and even for the professionalisation of the post, as is required in the case of the chief financial officer.

A number of lessons can be learned from the political-administrative interface, namely that:

- role clarification is imperative;
- politicians should not become involved in the administration of a municipality;
- the municipal manager should not become involved in council's politics although he/she should be fully aware of the political motives driving the council and then devise the necessary administrative system to maintain accountable administration;
- council should only appoint a head of administration that is competent to perform the administrative and managerial responsibilities associated with the post; and
- mutual trust should exist between the executive mayor/council on the one hand and the head of administration on the other if the objectives of the municipality are to be realised effectively and efficiently.

CONCLUSION

Under apartheid, local government was the level/sphere of government that was the clearest example of racial segregation and unequal access to

services. After democratisation, local government thus required the most extensive transformation, accomplished by way of reengineering the total system. This was characterised by a total change whereby attention was given to every significant detail. The change was vigorously backed by the governing parties in all spheres of government and was supported by powerful international and internal forces making it inevitable.

The lessons from South Africa indicate that transformation of a system is possible and feasible. However a number of critical factors have to be taken into account to ensure that the new system has both the political and administrative capacity to achieve the lofty ideals of democracy.

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CHAPTER 6

Deepening local democracy and participation: Experience from practice

RAMA NAIDU

INTRODUCTION

South Africa has one of the most progressive constitutions in the world and public participation is one of the fundamental principles enshrined in virtually all aspects of it. The intention of the drafters was therefore clear: to ensure that South Africa is a people-driven democracy that creates spaces for the voices of ordinary people, especially the marginalised, to be heard and acted upon in ways that can be seen and felt as improvements in the lives of many. It would be a tragedy for our democracy if this principle were to remain nothing more than words on paper and does not translate into concrete and tangible participation that actually affects policy at all levels, starting in the communities where people live and where what is at stake is their everyday lives and livelihoods.

This chapter and the recommendations presented herein are based on the Democracy Development Programme's experiences of working in largely rural municipalities and communities in KwaZulu-Natal over the past ten years. It examines the present challenges and suggests possible ways in which the democratic processes could be strengthened and sustained.

The political instruments and administrative instruments are in place, so what issues need to be dealt with to deepen democracy at local level?

Before we proceed we need to understand what democracy is. In its purest form, and according to *Encarta World Dictionary*, democracy means 'the free and equal right of each and every citizen to participate in a system of

government and/or in decision-making processes'. Through this system the citizen has a say in matters of interest to the nation and to his/her own life.

First and foremost, a deepening of democracy at local level requires the necessary political resolve to create a 'people-driven' development agenda. Such an agenda has to be driven both by those who wield the power and influence as well as by those who are affected by it. But instruments providing for local democracy and political 'resolve' are not enough. A deepening of democracy will not occur unless resolve also includes the attitude of each and every person in power to listen.

The foundation for real democracy begins to solidify only when the desire to listen is combined with the attitude and desire of those who are affected by the power to participate, an increased awareness of the existing mechanisms and how they function, and the belief that their participation may have some tangible results.

The challenge for South Africa is not to create new institutions to promote public participation, but instead to question this concept critically in order to determine its true nature and intent as well as to examine the reality of the implementation of public participation. Only then will we understand the true intentions and how they are translated into reality for the majority of South Africans today.

We need to ask four key questions (Cornwall & Coelho 2006:7-8) when dealing with the issue of formalised spaces for public participation. The questions are as follows:

- Why are civil society groupings, including the poor and otherwise excluded, invited to participate in these formalised spaces for public participation?
- On what basis do people enter these spaces and what is the nature of their representation?
- How do they become meaningfully involved in these formalised spaces?
- What does it take for these groups to have any real influence over decision-making?

These four critical questions form the cornerstone of understanding the

nature of formalised invited spaces and may help us to consider what other alternatives could be possible in the South African context. These alternatives relate both to the eventual reorientation of existing invited spaces as well as to the potential for creating the space for new ones to emerge.

PUBLIC PARTICIPATION LEGISLATION

The local government White Paper was formulated with the goal of empowering citizens to be part of the development agenda. As such, it remains a visionary and idealistic document that was meant to map the way forward for service delivery to local communities. More importantly it also made it a legal requirement for the public to be consulted in order to:

- ensure that developmental plans and services are more relevant to local needs and conditions;
- create a sense of ownership and sustainability around development projects; and
- encourage and empower communities to have control over their own lives and livelihoods.

The Municipal Systems Act of 2000 states in section 16(1) that a municipality must develop a culture of municipal government that complements formal representative government with a system of participatory governance, and must for this purpose:

- (a) Encourage, and create conditions for, the local community to participate in the affairs of the municipality ... [and]
- (b) Contribute to building the capacity of –
 - (i) The local community to enable it to participate in the affairs of the municipality; and
 - (ii) Councillors and staff to foster community participation.

The mechanisms to ensure that this takes place are the ward committee system, and linked to this the integrated development planning (IDP) and budget review process. Ward committees are defined as important channels

of communication for informing municipalities about the needs, wants and problems of their communities. They are mandated to facilitate substantive grassroots participation in the development processes of municipalities, including the IDP, budgeting and municipal performance management processes. They are meant to be non-partisan and to advance the interests of the ward collectively.

Effective public participation involves the true devolution of power to the grassroots citizens and this brings with it a series of challenges for both municipalities and political representatives. There will always be excuses for a lack of cooperative community planning unless elected officials and public employees are committed to seeking out the opinions of, and listening to, their constituents – and this must be combined with mechanisms to facilitate and ensure that this happens. Over the past few years we have seen the expression of this lack of engagement with marginalised communities around the country through protests and marches. Far from being sporadic and insignificant in the greater context of service delivery, these uprisings are an indication of a groundswell of disappointment with political representatives and a lack of responsiveness to the concerns of these citizens.

In South Africa the ward committee system was meant to empower communities to be a part of their own developmental needs. However, in practice the ward committees are, in their present form, dysfunctional. One can argue that having ward committees (in their present form) as the formal mechanism through which communities communicate with municipalities has weakened public participation.

Without delving too much into the causes of the present dysfunctionality of the majority of ward committees we can identify three broad issues (Steyn 2008).

- Participation in ward committees is predicated on a formal, legalistic understanding of participation, which sees those who participate as beneficiaries or clients of government's development interventions. It is based on a technical approach to participation which fails to engage sufficiently with issues of power and politics – people are not part of the actual decision-making processes as decision-making power resides somewhere else.
- Ward committee participation mainly benefits organised and well-

resourced social groupings and local party political actors who do not need any recourse to access local power-holders, excluding a large sector of unorganised, mainly poor, voices.

- In this way, power relations in ward communities are shaped by powerful interests, including party political actors, organised groupings and ward councillors/power-holders. For example, ward councillors together with local party political actors determine the agendas and outcomes of ward committee participatory processes.

There are also a number of other problems with this system of representation as it is presently constituted. In respect of ward committees these are as follows:

- Ward committees lack clear focus and show a lack of clarity around roles and responsibilities.
- Ward committees have no real power and are therefore not taken seriously by the community or by the decision-makers in the municipalities.
- In many instances ward committees have become nothing more than extensions of political parties and are easily subjected to manipulation.
- Ward committee members have insufficient training to carry out mandated activities.
- Ward committees lack both administrative and infrastructural support.
- Ward committees have displaced many vibrant community initiatives such as ratepayers' associations, residents' associations, cultural groupings, etc. The ward committee system has become a convenient vehicle through which municipalities can say that they have satisfied the public participation compliance that is demanded in the Act.

In sum, local participatory mechanisms have failed to provide the space for citizens to raise their issues and influence policy in respect of their needs in

any meaningful way. The lack of responsiveness to the needs of communities has developed into a vicious circle of apathy among citizens on the one hand and mass action by some communities on the other.

ENTRY POINTS FOR REALISING TRANSFORMATIVE PARTICIPATION

The failure of the ward committee system to deepen local democracy does not mean that the system as originally conceived is flawed, but instead that it has been manipulated to represent the different power dynamics at play within the socio-political arena.

Recognising this as a point of departure there are several possibilities to reengineer the present system in order to encourage true public participation. This is of course totally dependent on the existence of the understanding of the political obligations we are under as elected officials, public servants and citizens. In addition there is need for a positive attitude towards seeking forums where citizens can meet their representatives and public servants in an atmosphere that is conducive to true communication. Such possibilities would include the following:

- Recognising existing community structures and spaces that could feed into the invited spaces provided by government. Such structures could include, among others, school governing bodies, community policing forums, ratepayers' associations, traditional institutions, citizen assemblies and religious bodies. There are numerous examples of alternative spaces created by citizens themselves.
- Educating citizens in order to claim their right to participate actively in achieving their own development needs. A multi-media approach to civic education (especially around rights and responsibilities) should be adopted. Community radio stations could be used as a powerful medium to get these messages across to communities. Community tabloids are another significant medium that could be utilised at a fraction of the cost of the bigger newspapers. The Department of Provincial and Local Government (DPLG) has to allocate resources for capacity-building workshops with all stakeholders in order both to develop a deeper understanding of their roles in promoting democracy at grassroots level and to work together towards a common goal. The department should

take cognisance of non-governmental organisations (NGOs) that have been working in local municipalities on similar issues.

- The DPLG should ensure that there are effective monitoring structures to guarantee accountability and effectiveness from government. Such monitoring structures should make use of invited and community-created spaces to disseminate information about performance.

Additional recommendations relevant to deepening local democracy are the following:

- As an integral part of public participation it should be mandatory for public representatives to call at least two public meetings a year. Such meetings should relate directly to the IDP review process and specifically to service delivery issues. These meetings should be well publicised and open to all residents within a ward, and should serve to keep ward councillors accountable to their constituencies for what they have promised and what they have actually done. The agenda for these meetings should be determined in consultation with community leaders and related to community concerns.
- Ward councillors should be assessed by community representatives in terms of identified key deliverables, and political parties should be held accountable if they fail to deliver. This could be concretised through a mandatory annual review process where the ward councillor and the council is called to account to the communities whom they purport to represent.
- The election of ward committees should be overseen by the Independent Electoral Commission in conjunction with relevant NGOs to ensure both the inclusivity of all stakeholders and the legitimacy of the process. Such elections should be widely publicised, together with the criteria for eligibility. NGOs and the DPLG should play an active part in this exercise.
- Government should seriously consider an electoral review process in order to look specifically at the benefits of a constituency-based electoral

system as opposed to a proportional representation model, particularly at the local government level. Such a model would increase direct accountability to communities.

- New tools of effective public participation such as citizen assemblies, residents' associations, public forums, people's juries, etc. should be encouraged and funded in order to foster a spirit of cooperative governance within municipalities. Traditional councils need to be re-looked at as an instrument to listen to the voices of rural communities. The role of traditional leaders has to go beyond simply being responsible for largely cultural matters.
- Governments should encourage participation by demonstrating that citizen action actually influences important government decisions. This might be time consuming but ultimately allows a buy-in that is more sustainable – that is, it contributes to the real goal of true citizen participation. Indeed, it takes time to listen to people and to find out what they really think, desire and need – and to make decisions based on the findings. But this is what democracy is about; it is based on the supposition that this is the job of government and elected officials.
- Educating citizens about their rights and responsibilities has to be a funded mandate for all local councils, and a proper monitoring and evaluation strategy must be put in place.
- Educating elected officials and public servants about their rights and responsibilities has to be a funded mandate for all local councils, and a proper monitoring and evaluation strategy must be put in place.

INTEGRATED DEVELOPMENT PLANNING REVIEW PROCESS AS PART OF THE DEMOCRATIC PROCESS

Although the principle of an IDP is sound in that it is meant to provide strategic direction, it has become encumbered with so much unnecessary bureaucracy and jargon that it has been rendered largely ineffective as a mechanism for good governance and accountability. Some of the weaknesses of the IDP are as follows:

- The IDP is not the result of a process based on developmental principles – on community development – whereby the content grows out of an analysis of local conditions made in close collaboration/communication with local citizens.
- Knowing the process did not start at the grassroots, we must also comment on the inability of the IDP process to filter down to the community. Instead it has remained largely in the realm of experts and bureaucrats.
- The quality of most IDP documents reflects the lack of in-depth analysis of local conditions.
- Most IDPs are based on an old model of strategic planning that assumes a fairly static future. As a consequence IDP documents have been plagued with overly bureaucratic approaches and have become far too comprehensive to be useful as a planning tool.
- Public consultation is often an issue of compliance with the Act rather than the genuine desire for the plans to be developed by or with the local community, or even to invite input and to seriously consider it.

RECOMMENDATIONS

- ‘Integration’ should refer not just to a document that covers the different aspects of development but more importantly how interdepartmental and interorganisational relationships and processes should be shaped to achieve this end. Alignment and integration flows from such a collaborative process, and this alignment will result in services that meet the local needs in addition to bringing about more effective service delivery.
- Municipalities should formulate IDPs in such a way as to make them understandable to all stakeholders. Key elements should be specified so that they allow for effective monitoring and accountability in relation to the plan. A clear service delivery plan should be the bottom line for all IDPs. It is this plan as well as the monitoring of the implementation of the plan which will ensure that municipalities remain accountable to their constituencies.

- An annual report that relates directly to the service delivery plan should be made public. This report should set out the objectives, what has been achieved and what has not. These reports could also be oral and could utilise a variety of formal and informal communication channels.
- Municipalities should encourage input from different sectors operating within a municipality and should not restrict input to those structures created by the state. This would ensure wider representation of views.

CONCLUSION

South Africa has one of the most progressive constitutions in the world and public participation is a fundamental principle enshrined into virtually all aspects of it. The constitution-drafters clearly wanted to ensure a people-driven democracy that creates spaces for the voices of the marginalised to be heard and acted upon in tangible ways. It would be a tragedy for our democracy if this principle were to remain nothing more than words on paper, which do not translate into concrete and tangible participation that affects policy at all levels, but mainly at the local government level.

This chapter presents some options that should be considered in the review process to advance the cause of citizen empowerment. These options assume that people want to be involved in their own destiny, and that for this to happen a partnership based on mutual respect has to be nurtured and sustained. Government has recognised this in its ideals and basic documents, ensuring that guiding principles and mechanisms exist. However, these ideals need to be put into practice in the everyday lives of elected officials, public servants and by the citizens of each and every community. Effective public participation requires time and effort for it to be truly empowering. But it is well worth the effort if it leads to a stronger democracy built on the notion of active citizenship.

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CHAPTER 7

Service delivery: Conceptual and practical issues and challenges

FANIE CLOETE

INTRODUCTION

Public service delivery is frequently regarded as the main task of government. Although the provision of what can be regarded as ‘public’ services is an important outcome that governments worldwide have to aspire to achieve, it is by no means the main reason for the existence of government in society. The prevailing international perspective on the role of government in society sees appropriate public service delivery as only one of the desired outcomes of what is called ‘good governance’.

ATTRIBUTES OF GOOD GOVERNANCE

Governance means more than government. It has to do with the exercise of political, economic and administrative authority in the management of a nation’s affairs (World Bank 1994). It finds expression in the search for new ways to improve the relationship between the state and its people. Governance is equally about the quality and performance of government and public administration (Batley & Larbi 2004) and affects every aspect of individual citizens’ lives. Governance is the style of interaction between a government and the society that it governs, and has to do with the internal processes within the state through which resource inputs are converted into government outputs and outcomes.

Olowu and Sako (2002:37) unpack this concept of governance as,

a system of values, policies and institutions by which a society manages its economic, political and social affairs through interaction within and among the state, civil society and private sector.

The authors also summarise a number of criteria against which the elements of governance can be measured in the political, economic, social, environmental and moral dimensions of society.

Styles of governance are frequently judged as good or bad. Four criteria can be used to assess the style of governance in a society, namely:

- the degree of trust in government;
- the degree of responsiveness in the relationship between government and civil society;
- the government's degree of accountability to its voters; and
- the nature of the authority that the government exercises over its society (Hyden & Braton 1993:7).

Good governance is thus conceptualised here as the achievement by a democratic government of the most appropriate developmental policy objectives to develop its society in a sustainable manner. It is widely accepted that good governance includes attributes like:

- representivity and equity in resource control and allocation;
- developmental and growth focus;
- participatory, responsive, people-centered strategies;
- democratic rights;
- stability, legitimacy and transparency of processes;
- political and financial accountability;

- professionalism and ethical behaviour;
- flexible, effective, efficient and affordable processes;
- coordination, integration and holism of services;
- creative, competitive and entrepreneurial practices;
- literate, educated, participating and empowered citizens; and
- sustainable outcomes (Graham, Amos & Plumpre 2003; Saner & Wilson 2003:5; Cloete 2000).

There is a general expectation that governments have to fulfil a number of distinctly different types of functions in modern democratic society. One useful fourfold typology of such functions is the following:

- the general *protection* of all its citizens;
- *regulation* of the interaction among those citizens to maintain an orderly society;
- the *development and growth* of its society to enable its citizens to live their lives to the fullest potential in the long term; and
- *caring* for those weak or less empowered members and sectors of society that cannot take care of themselves and might be subject to potential exploitation by stronger or more empowered members of society.

Public services and facilities can cut across these four categories. All shades of government have the responsibility to provide these different categories of functions. Different types of government only change the emphasis on one or more of these functions above the rest. Governments that are more free-market orientated tend to emphasise competitive growth and development while governments that are more redistributive orientated tend to emphasise regulatory functions and caring for the poor.

Any attempt to change the structure and function of government in

South Africa at the current three governmental levels has to be undertaken to improve good governance outcomes. This implies an improvement in the attributes of good governance summarised above. These attributes of good governance are explicitly normative and also frequently contradictory. If one for the moment ignores the more normative elements of good governance (for example, democratic processes and the level of intervention of government in society that differ significantly among states), the provision of appropriate, efficient and effective public services and facilities also differ dramatically from lesser developed countries to more developed countries.

There are many potential social, economic, cultural, political and institutional reasons for this difference in outcome. These services and facilities not only include the provision of sectoral education, housing or health services, but also efficient and effective general administrative support services by governmental agencies, such as the quantity, quality and user-friendliness of services in those agencies (e.g. the so-called Batho Pele principles of good service delivery in South Africa).

One useful approach to assess systematically how public service delivery can be improved is to distinguish between the contents of government policies (that is, what government intends to do to transform its society into a better place) from the processes employed to implement those policies (how governments go about trying to achieve their policy goals). Any restructuring therefore has to result in improved problem identification, policy programme designs, policy implementation strategies and policy outcomes that achieve the envisaged policy design goals.

TRANSFORMATION AND GOOD GOVERNANCE IN SOUTH AFRICA

In its 2003 report on the state of democracy in South Africa after ten years, the Presidency (SA-PCAS 2003:9) concluded that:

... the formal institutions of state are significantly influenced by the persistence of informal social modes of interaction which operate with logics that are often autonomous to those of the State. The totality of social networks can only be harnessed to the developmental effort if the State manages to provide the central co-ordination and leadership that will ensure that externalities of many

separate activities become complementary to the development project. In other words, the State can ensure that the economies of scale beyond the scope of individual actors can be achieved through the better integration of their activities. Therefore, the Government needs to make use of and participate within the social networks but not as an equal partner. Government, representing the collective will of a nation, should give leadership to such interactions especially through its ability to ‘pre-commit’. Pre-commitment is the ability to articulate long-term but conditional public development objectives that enable a nation to achieve economies of scale from the coordinated effort of many individual actors.

This quote conveys the message that government believes that transformation has succeeded only in those sectors that are directly under the control of government, and that those sectors that are currently not under direct governmental control need to be brought under such central governmental ‘guidance’ in order to succeed with transformation.

This is a serious political risk in any single dominant political party system like South Africa. The question is whether the lack of transformation in South Africa is the result of a bad constitutional structure that needs radical transformation, or perhaps the result of an appropriate and adequate constitutional structure that has not been implemented optimally to achieve the goals of societal transformation.

In reply to the core issues raised by the review, the following can be said: any change in the number of provinces and local authorities, the powers and functions allocated to those agencies and the revenue and staff provided for the execution of those functions in South Africa has to have the potential for improvement of all the attributes of and criteria for good governance. Constitutional and other changes to the regulatory framework of government can be justified only if they have the potential for such improvement.

THE CURRENT CONSTITUTIONAL STRUCTURE AND PROVINCIAL AND MUNICIPAL SERVICE DELIVERY

For the purposes of this paper, the most important constitutional provisions relating to provincial and municipal service delivery are the following:

- *Section 40(1)*: Government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- *Section 41(1)*: All spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution, and exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.
- *Section 125(3)*: ... The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions.
- *Section 126*: A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council.
- *Section 139(1)*: When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.
- *Section 151(1)*: The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
- *Section 151(2) and (3)*: The executive and legislative authority of a municipality is vested in its Municipal Council, which 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.
- *Section 151(4)*: 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.

- *Section 154(1)*: The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- *Section 155(4)*: National legislation must take into account the need to provide municipal services in an equitable and sustainable manner.
- *Section 155(6)*: Each provincial government must establish municipalities in its province, provide for the monitoring and support of local government in the province, and promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
- *Section 156(4)*: The national government and provincial governments must assign to a municipality, by agreement and possibly subject to certain conditions, the administration of any of their own responsibilities listed in Schedule 4 or 5 of the Constitution which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it.
- *Section 156(5)*: A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.
- *Section 195(5)*: Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
- *Section 195(6)*: The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.
- *Section 197(1)*: Within public administration there is a public service for

the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

- *Section 214(1) and (2)*: An Act of Parliament must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted and must take into account the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them, the fiscal capacity and efficiency of the provinces and municipalities, and developmental and other needs of provinces, local government and municipalities.
- *Section 227(1) and (2)*: Local government and each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and may receive other allocations from national government revenue, either conditionally or unconditionally. Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

The above constitutional provisions provide explicit prescriptions about the role of national government to build administrative and developmental capacity in its public sector and to ensure that provincial and local governments are capable to do what they are supposed to do in terms of the Constitution. If these provisions are appropriately and fully implemented, they have the potential to achieve all the transformation goals of government.

There is sufficient evidence that the current lack of appropriate service delivery at all governmental levels can be attributed to inadequate implementation of the current constitutional structure rather than to the inadequacy of the contents of these constitutional provisions and the current structure itself.

Together with the above constitutional provisions, the current Municipal Structures Act (Act 117 of 1998), Municipal Systems Act (Act 32 of 2000), Municipal Demarcation Act (Act 27 of 1998), Municipal Finance Management Act (Act 56 of 2003) and other supplementary local government legislation have created a comprehensive framework for the demarcation, functioning, staffing and financing of the autonomous local government sphere in South Africa.

These provisions are, however, not fully and appropriately implemented, resulting in the inability of local government institutions to execute their constitutional obligations. For example, revenues collected nationally are not shared equitably with local government and the phenomenon of ‘unfunded mandates’ to local government abound. This happens because national and provincial government departments for various reasons find it impossible to fulfil their own mandates. They then use the easy option to delegate or devolve those functions they cannot execute to local government, without the accompanying staff and finances to implement these new mandates effectively. This phenomenon can only be the result of a lack of knowledge about the requirements for successful governance or a cynical bureaucratic strategy at higher governmental levels to maximise their own bureaucratic interests, ignoring the overall national interest.

A contributing factor to bad service delivery is the weak quality of municipal councillors and general political leadership and management at local government level. Additional factors are the party political turf battles that frequently result in incompetent municipal councils especially in rural areas, and too frequent regime changes as political parties compete to take over control of municipal councils. This combination of too frequent regime changes and bad leadership and management in municipal councils has a devastating negative impact on good governance outputs and outcomes in those councils.

Whatever the core reason for this situation, the consequence is that local government in South Africa is set up to fail through the actions of higher spheres of government and by inappropriate selection of municipal councillors by the dominant political parties, resulting in bad decisions by municipal management, bad staff appointments, a lack of resources and the inability to do what they are supposed to do in terms of the legislative framework for local government service delivery. Past interventions by

higher spheres of government to improve this situation by assisting local government in the better execution of its responsibilities, providing additional resources, training staff and developing in general the capacities of local government institutions to perform their mandates better have been half-hearted and largely unsuccessful, leading to an increasing number of municipalities that are mismanaged and which find themselves technically bankrupt.

This outcome is not the consequence of a bad constitutional system but rather the bad implementation of an appropriate existing system.

THE ENVISAGED SINGLE PUBLIC SERVICE BILL

Against this background, it is necessary to assess the recent attempt by government to restructure the current constitutional structure in South Africa in order to improve public service delivery.

The most important initiative in this regard is the envisaged so-called Single Public Service Bill that has recently been published for comment. This bill is formally titled the Public Administration Management Bill (B 47-2008). It intends to replace the current Public Service Act, 1994, by creating a new, expanded public 'service', adding the current 230,000 local government employees (DPLG 2006:7) for the first time in the country's history by default into the existing South African Public Service of approximately 1.4 million employees (comprising about 350,000 national government post and 1.05 million provincial government posts) (PSC 2008:80). The size of the public service will therefore be increased overnight by approximately 14%.

Given the serious managerial problems in the current public service that have resulted in unfunded mandates placed on local government to provide services that the national and provincial governments cannot provide, it is difficult to imagine how the new expanded public service will be more efficient and effective after its expansion. The Bill further does not use the term *public service* but talks about the South African *public administration* because the Constitution reserves the term public service for national and provincial government. This new approach is controversial and possibly unconstitutional.

According to the explanatory memorandum accompanying the draft bill, it will create a new constitutional framework called the public

administration that will apply to all government institutions, namely departments in the national and provincial spheres of government, municipalities and government components within all three spheres. The bill envisages an expanded role for the Public Service Commission. It is proposed that the oversight mandate of the Public Service Commission include national, provincial and local spheres of government.

The Minister of Public Service and Administration is empowered to create a framework of generally applicable norms and standards within which government institutions in the national, provincial and local spheres may determine their own policies and practices. At the same time, however, efforts will be made to harmonise systems, structures and conditions of service in order to reduce unjustifiable disparities, duplication and lack of interoperability between institutions, as well as to promote integration and coordination for improved service delivery.

The Minister of Public Service and Administration is mandated by the Bill to establish one-stop shop service centres across government spheres to provide integrated services of a better quality than currently exists (clause 5). This provision is useful and could achieve its important aim if implemented appropriately. The Bill, however, also contains provisions to enable secondments and transfers of staff linked to a transfer of functions (clauses 25 and 26). Transfers may be made without the consent of the employee concerned provided that the transfer satisfies an operational requirement of the recipient department and is fair to the employee. In the case of transfers or secondments to or from a provincial department or municipality, the sending and recipient provincial and municipal institutions must consent to the transfer or secondment of staff.

Like other public administration employers, local government employers may not conclude collective agreements concerning certain prescribed matters without the prior authorisation of the minister, which authorisation may only be refused if the minister believes that the agreement maintains or introduces unjustifiable disparities (Memorandum on the Objects of Public Administration Management Bill, [Explanatory Memo], clause 4.4). If no agreement is reached, the minister may make a determination. Such a determination would require the consent of the South African Local Government Association (SALGA), the organisation currently recognised in terms of the Organised Local Government Act, 1997 as representing the majority of provincial organisations contemplated

in that Act. The explanatory memorandum alleges that the legal consequence of SALGA's consent is that the minister's intervention does not intrude on municipal autonomy (ibid: section 5). This is clearly incorrect.

The Single Public Service Bill is contrary to the spirit of the Constitution. In terms of the Bill the current Municipal Finance Management Act will also be abolished and the scope of the Public Finance Management Act will be extended to the municipal management sphere. The current regulatory framework for municipal human resources in the Municipal Systems Act will also be abolished and the Public Service Act will be amended and expanded to include municipal human resources requirements. These developments will negate the autonomy of the existing municipal sphere of government in South Africa.

More dedicated and effective implementation of the current provincial and local government intervention clauses in the Constitution and supplementary legislation and more equitable revenue sharing between the three governmental levels as envisaged in the Constitution will result in improved provincial and local government outcomes that would be much cheaper than a radical restructuring of intergovernmental cooperation in South Africa.

As motivated above, the biggest challenge faced by local governments is bad management and implementation rather than a bad constitutional structure and bad policy content.

The primary purpose of the Single Public Service Bill seems to be to bring the autonomous local government sector under direct governmental control in order to speed up transformation of South African society, as is evident in the above quote from the Presidency's 2003 Ten Year Review Report. It is difficult to see how the envisaged legislative, structural and functional changes that the Bill would bring about will create improved capacity for policy implementation that does not currently exist.

The current public sector financial and human resources capacity is insufficient to be distributed even wider across public sector levels and agencies without lowering that capacity below a critical minimum level. The impact of the envisaged Single Public Service Bill is therefore potentially going to be a redistribution of existing incapacity, because the capacity to improve municipal services delivery does not exist now. Additional capacity for successful policy implementation needs to be created through smarter and more pragmatic policy implementation and more effective and efficient

training of staff (Cloete 2002). This can and should be achieved by measures other than a radical restructuring of the governance system in South Africa.

CONCLUSION

The envisaged restructuring of the public sector seems to have more potential to aggravate existing bad governance outcomes further as a result of spending more resources on inefficient, ineffective and badly managed implementation strategies that are largely politically motivated, than to improve good governance outcomes.

Experience has proved that better quality municipal decision-making and management practices, equitable sharing of national resources, and alternative service delivery strategies like outsourcing, joint ventures and public-community-private partnerships aimed at providing small-scale service delivery results have better potential for improving public service delivery in South Africa than a radical restructuring of the current composition and operations of the central public service.

A greater emphasis on more effective implementation of political and managerial recruitment strategies, training and accountability strategies are potentially highly successful alternative or supplementary strategies for this purpose. These are the most optimal strategies to improve good governance outcomes at all levels in South Africa.

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The UN Guidelines on Decentralization and the Strengthening of Local Authorities

HEINRICH HOFFSCHULTE

THE GLOBAL CHALLENGE OF THE URBAN MILLENNIUM

All nations independent of their current political systems subscribed to the three goals of decentralisation, strengthening of local units and strengthening of local democracy in the United Nations (UN) in 1996. This provides a thorough basis for a ‘globalisation of democracy’ despite the historic, social and political differences each nation may contribute on the way forward towards these goals. Although I refer in this chapter to ‘local’ government it should not be read as ignoring the importance of regional/provincial government. The principle of subsidiarity entails decentralisation to regional/provincial and local governments. Reference to ‘local’ must therefore be read to include ‘provincial’ government.

It was the Latin American diplomat and Nobel laureate novelist Mario Vargas Llosa who in the face of lacking democratic control and support for globalisation made the following statement years ago in a paper entitled ‘We should not give up globalization but globalize democracy’: ‘The ... lesson to be drawn is the imperative need to globalize democracy rather than to abandon globalisation.’¹

But local and regional authorities face a major global challenge for another reason. In 2001 the UN proclaimed the new millennium characterised by a worldwide urbanisation trend as the ‘urban millennium’. The number of people living in urban areas in developing countries is expected to double within the next 30 years. Translated into practice, this challenge means

having to implement the planning, financing and general services for a whole city with one million inhabitants each week in the next few years to come. On the other hand, the opportunities for change and worldwide cooperation have never been greater or provided better perspectives for the international family of local authorities than in the past few years.

The American political scientist Benjamin R. Barber² gives an appropriate description of the starting situation: 'The citizen no longer [carries] weight in the circles of the International Monetary Fund, the international entertainment industry, NATO or the European Commission.'³

Since 'participation of citizens remains limited to the local level, while power is exercised more and more centrally', he wants to '... gradually familiarise the participants in local initiatives with democratic decision-making processes.' And Barber adds: the further aloof from the grassroots level political decisions get, the worse the state of democracy.⁴ Here, he takes up Jean Jacques Rousseau, according to whom the citizen lost all the more money and influence the further aloof from him taxes and charges were administered and afterwards redistributed with high losses; the more dissatisfied the citizens would also be with the state. Why should the situation be different in the globalising and increasingly anonymous world economy?

'Our response to growing globalisation in the economy and international financial policy is the globalisation of local democracy.' This core sentence dominated the discussions as well as the final reports of the congress preparing the merger of the two biggest international associations of local governments in Rio de Janeiro (3-6 May 2001). As early as at the 1999 International Union of Local Authorities (IULA) World Congress in Barcelona, the United Cities and Local Governments had countered globalisation and the resultant concern of a world order without democracy with the aim of global localisation, i.e. the aim to bring all issues and tasks affecting the daily lives of local citizens as close as possible to the decentralised and local level, also in the sense of a 'globalisation of (local) democracy'.

THE LONG PATH TO A WORLDWIDE STRENGTHENING OF LOCAL DEMOCRACY AND SELF-GOVERNMENT

The UN has increasingly dealt with the role of cities and local authorities in

all its debates on economic and social development over the past 11 years. The starting point for the UN was first and foremost the growing urbanisation trend; a phenomenon experienced not only by newly industrialised and developing countries. The development of a new partnership between the UN and the international family of cities and municipalities is clearly reflected in the following brief list of the most important events in the past 30 years, and especially since the Istanbul Habitat II congress in 1996.

Initially, the bodies of the UN negotiated without consulting or even considering local authorities, which they failed to accept as equal partners. The implementation of the noble aims of the UN seemed to be only a matter of the member states' central governments. In how far the latter involved 'their' local authorities or commissioned them with the implementation of these goals seemed to be their own internal affair where nobody had the right to interfere. And local authorities for their part had – not only in the shadow of the East–West conflict and the Cold War – failed to build the common organisational structures required for a firm representation of local interests in the international dialogue.

Though the World Congress of cities and municipalities held in Vancouver in 1976 had called for the involvement and participation of local authorities, the call remained a signal – nothing more, but also nothing less. Twenty years later, the debates in the run-up to and during the 1996 UN Habitat II congress in Istanbul centred around the response of cities and municipalities worldwide to the fact that governments and their diplomats talked again – like in the 1992 'Agenda 21' debates in Rio – *about* local authorities and their tasks in the framework of the Habitat Agenda without allowing these main actors to participate in the debates.

When local authorities were finally – though reluctantly and in a separate meeting – involved in the UN Habitat II summit in Istanbul, a breakthrough was achieved: local authorities were not only recognised as the 'strongest partner close to the citizens', but they were also treated as levels of government. This was a clear breakthrough compared to their previous disregard and treatment as non-governmental organisations (NGOs). Most importantly, all member states participating in the Istanbul Habitat II conference adopted the Habitat Agenda and the Istanbul Declaration, in which they undertook to promote decentralisation by democratic local governments and to work towards the strengthening of

their financial and institutional capacities.⁵ At the same time, the world organisations of local authorities were called upon to come to a united approach in dealing with the UN. To this end, a loose cooperation structure – the World Associations of Cities and Local Authorities Coordination (WACLAC) – was initially formed, leading, as mentioned above, to the merger of the biggest associations in 2004.

Since then the promotion of efficient decentralisation has been both a core concern in the UN debate and a major element of the good governance strategy during the past ten years. Especially the UN Habitat Department (located at the UN headquarters in Nairobi) has worked in active partnership with ‘national and local governments’ – to use the UN terminology – to strengthen local authorities simply with the aim of implementing UN goals, and in particular the Habitat Agenda of 1996. This fundamental text outlining the ‘goals and principles, commitments and the global plan of action’⁶ dedicates a whole chapter to issues of ‘Decentralization and the strengthening of local authorities and their associations/networks’.⁷

In Istanbul the associations or representatives of the world organisations of local authorities were finally admitted as negotiation partners, though – as mentioned above – initially rather reluctantly and not without a relapse into classical defence mechanisms in Nairobi in February 2001. This was illustrated by the attitude taken by some governments which considered the debate on local and municipal issues an ‘interference into their internal affairs’ (see below).⁸ The Istanbul Habitat Declaration issued by the governments of UN member states in 1996, however, ‘recognizes municipalities as their closest partner’ and demands a ‘permanent dialogue’ with local governments and their international associations (Article 12). At long last, local government representatives were *included* in the discussions.

The UN responded to the insistence of numerous international organisations and associations representing local authorities by requesting the world family of local authorities to act as much as possible in a united way. The IULA, then the biggest world organisation of local authorities, and the United Towns Organisation (UTO) seized this new opportunity. With a view to strengthening their role in a ‘continuous dialogue’ with the UN, major international organisations of local authorities started to act together in a coordination group in 1996. This group, called WACLAC, became the

official contact of the UN. But the IULA increasingly took over the leadership.

Finally, the World Congress of IULA, UTO and Metropolis (the association of major metropolises) succeeded in May 2004 to establish a new world association which adopted in English and French the somewhat tautologic name of United Cities and Local Governments (UCLG) (out of consideration for metropolises on the one hand and the many other local governments on the other), as if cities were not part of local governments. In Germany where there were no historical reasons for such a tautology, the association was called *Weltunion der Kommunen* (WUK). Given its large membership on all continents, the UCLG meanwhile holds a majority in the United Nations Advisory Committee on Local Authorities (UNACLA).

Negotiations started immediately after the Istanbul Conference resulted in a Memorandum of Understanding, which was signed between the United Nations Human Settlements Programme (UNCHS) (Habitat) and WACLAC⁹ on 29 July 1997. Both partners started the preparation of a draft World Charter on the basis of this Memorandum. Vargas Llosa aptly described the tasks of the WACLAC coordination group as follows: Local democracy forms the basis of all national approaches to democracy.¹⁰

The whole process actually started at the IULA World Congress in Barcelona in 1999 where a forum entitled 'Towards a World Charter of Local Self-Government' was set up on 22 March 1999. I had the honour of presenting the progress made by then in preparing a more efficient representation of local governments worldwide in the UN. Once again, the aim was a World Charter on Local Autonomy. In addition, I presented two other requests: the establishment of a steady consultative body of local authorities and their international associations within the UN structures, and a kind of mutual monitoring procedure of local governments of all nations adjusted to UN structures and modelled on the system then introduced at the European level, that is, the Standing Conference of Local Authorities which is now the Chamber of Local Authorities¹¹ of the Council of Europe.

This development was preceded by strong and sometimes completely new challenges posed to local authorities mainly by the UN. There was a growing understanding worldwide – and especially in the bodies of the UN – that development policy, environmental protection, global strategies for regional and urban developments and later the Millennium Development

Goals of the UN were and could no longer remain issues tackled only by intergovernmental organisations such as the UN, World Bank, International Monetary Fund (IMF), etc. If these aims and programmes were to be shaped and implemented in an efficient way, the participation of local authorities was required. 'Agenda 21' without local governments?

Though the UN had understood the impossibility of such an attempt already when adopting the programme at the 1992 World Summit in Rio de Janeiro, it had nevertheless failed to involve local governments. And even when the UN, or the UN Department for Settlements, Urban and Regional Planning, met in Istanbul in June 1996 (Habitat II), it was initially rather reluctant to accept that successes on these issues could only be achieved with the involvement of practitioners from local governments of all continents. Against this backdrop, the European Congress of the Council of European Municipalities and Regions (CEMR) held a few days before the Habitat II Conference Thessaloniki¹² had categorically demanded the involvement of local government representatives from all over the world.

An institutionalised representation of the worldwide family of local authorities opened for the first time at the UN in March 1999. This representation was achieved thanks to the efforts of the former German minister for urban planning and environmental protection in the Helmut Kohl government, Professor Dr. Klaus Töpfer, who in his capacity as executive director of the UNCHS/Habitat department of the UN in Nairobi set up an advisory committee¹³ composed of representatives of big cities from all continents and of international organisations of local authorities called the United Nations Advisory Committee of Local Authorities (UNACLA). Initially, the advisory committee was active only within the habitat structures of the UN. Since 5 June 2001, however, it is to be involved in all UN debates of relevance to local authorities in accordance with a clear declaration of intent by former UN Secretary General Kofi Annan.¹⁴ The mayor of Barcelona, Juan Clos, was the chairman of the advisory committee for many years until he stepped down from office. Clos had been one of the driving forces behind the growing significance of the UN Advisory Committee.

Such a body was initially nothing more than a logical consequence of the subsidiarity principle according to which 'the guideline for decentralization policies is to bring decisions and services to the most local level of government in accordance with the respective type of tasks and services and

the legislation of each country'.¹⁵ It was the first recognisable breakthrough of the principle of subsidiarity¹⁶ in the UN debate¹⁷ in Istanbul 1996 (Habitat II). This is reflected in the UN draft guidelines on decentralisation and the strengthening of local authorities which now include a separate chapter on the principle and goal of subsidiarity.¹⁸

In the Rio Community Agenda WACLAC and IULA renewed, updated and repeated these aims towards the UN in New York on 5 June 2001 when former UN Secretary General Kofi Annan for the first time in the UN's history attended a Local Government Day to face the demands of local authorities for a greater say and stronger partnership. Furthermore, the agenda included an extension of the Advisory Committee of Local Governments and their international organisations from the Habitat structures to the UN organisation in general, a detailed wording of the above-mentioned objectives of the 1996 Istanbul Declaration and the preparation of a World Charter of Local Government, an aim unanimously set by the IULA World Congresses in Rio (1985), Toronto (1993) and Mauritius (1997) and reconfirmed by the unification congress in Rio in May 2001.

One of the first follow-up projects of the cooperation between UN Habitat and WACLAC is the draft of a World Charter of Local Self-Government prepared as early as 1998 and discussed worldwide with representatives from over 100 nations. Following debates on all continents in early 2000,¹⁹ it was once again revised before it became the subject of intergovernmental debates in 2001. The former German minister and later UN executive director, Professor Dr. Klaus Töpfer had wholeheartedly supported the aim of such a charter. His successor in the UNCHS (Habitat), Anna Tibajuka, continued his efforts in a targeted way.

The draft of a World Charter was based on the positive and politically significant experience made by Europe with such a charter. The Convention of the Council of Europe, adopted only in 1985 after years of reluctance by the then 21 member states, came 'just in time' – to borrow a phrase from the business sector. The European Charter of Local Self-Government²⁰ entered into international law on 1 September 1988 after the text had been ratified by the then required minimum number of only four nations.²¹ The process had been preceded by demands of local authorities from a growing number of member states; demands formulated for the first time by representatives from cities and local governments of 16 European nations

in the Charter of Versailles at the European Local Government Day in Versailles in October 1953, and persistently pursued ever since.²² Some national governments had stubbornly rejected an international discussion about the position and rights of 'their' local authorities, often hiding behind the traditional insistence on 'non-interference into their internal affairs'. Even in the free part of Europe, it took as much as 32 years before the charter was signed by the first six nations in 1985 and no less than 35 years before it entered into force in the first four member states.

Following the collapse of Soviet centralism and the change towards democratisation also in the (old and new) states of Central and Eastern Europe in the late 1980s, the brand new convention of the Council of Europe became of fundamental significance for the reform process in these states. Today, the Convention has been ratified by 43²³ of the 47 member states of the Council of Europe.²⁴

Despite the possibility to pick and choose and to limit oneself to some core provisions of the Charter, most states ratified practically the whole Charter without limitations. This positive experience had a strong impact on the debate on a European constitution and the negotiations on a World Charter and the Guidelines on Decentralization and the Strengthening of Local Authorities.²⁵

Since 1989 the Convention of the Council of Europe has become the basic text underlying the democratic reforms and new constitutions of all nations intending to join the Council of Europe. Those states wanting to join the European Union (EU) used the Charter and their transposition into national law to overcome the centralism of old inherited power structures and to build their democracies 'bottom-up' by decentralisation and the strengthening the local and regional levels. Local self-government as a 'school of democracy' – this post-war phrase coined by the first German president, Professor Dr. Theodor Heuss, during the reconstruction of Germany – gained a completely new ring with the Charter of the Council of Europe.

After returning from exile, the Russian Nobel laureate, Alexandr Solzhenitsyn, stated in 1994:

We do not have democracy [in Russia] for the simple fact that no functioning self-government has [yet] been established. Local party bosses continue to call the tune at the lower administration level.²⁶

This was a sad, almost resigned, message in 1994. Now Russia too has a federal constitution and has ratified the Charter of Local Self-Government. Russia has thus embarked on a way towards democracy. To quote his fellow Nobel laureate, Mario Vargas Llosa, once again: '[But] democracy finds it very difficult to feel at home in recalcitrant countries ...'.²⁷

Based on these successes in Europe, the committee of ministers of the Council of Europe recommended to the governments of its (meanwhile) 43 member states to support the project of a UN World Charter. Resistance mainly from the United States (US) and – initially not surprisingly – China prevented the Habitat negotiations in Nairobi (May 2000 and February 2001) to put the Charter formally on the agenda of a special meeting of the UN General Assembly scheduled to be held in New York in June 2001. The Council of Europe thereupon invited representatives of China and the US for discussions in order to convince these two dominating nations to show at least some benevolent tolerance in the further negotiation process. It was, however, a harsh set-back to the project aimed at making the World Charter a UN Convention, i.e. a binding treaty for all the nations that would sign and ratify it.

The same 2001 session succeeded in making all the (presently) 192 national governments of UN member states agree on a continuation of the dialogue launched in Istanbul independently of the aim of a binding convention.²⁸ So it was only logical for the UN to organise the World Urban Forum I in Nairobi in early May 2002 in order to lead new discussions on decentralisation and the strengthening of local authorities with the governments and local authority representatives of member states. Large dialogue groups discussed issues such as cities without slums, the global campaign for good urban governance, safe dwelling and monitoring urban conditions.

In response to a request by the UN Governing Council to the Habitat section (Resolution 19/12 of 9 May 2003) and in close coordination with the UN Administration, an international group of experts – the Advisory Group of Experts on Decentralization (AGRED) – prepared two important policy papers: first, the ideas of the draft World Charter were integrated into a much broader 'Framework of Guidelines for Decentralization and the Strengthening of Local Authorities'. Since this document was to lead 'only' to a resolution or joint declaration, it was able to make much more detailed and concrete proposals and recommendations thanks to its non-binding

character. In the final analysis, it was nothing else but a continuation of the aims originally set up in the form of a draft World Charter. The UCLG therefore continues to pursue the objective of a UN convention, an objective expressly desired by the Council of Europe.²⁹

In parallel, work started to prepare a *Compendium of Best Practice* which would be continuously updated and supplemented to form the basis of a growing network. A first edition comprising contributions about developments in over 30 nations was made available in 2004.

A somewhat open question is the issue of how and in what way to organise international *monitoring* of the goals of the Charter, or initially of the framework of guidelines, with a view to strengthening local self-government and democracy. Most governments are still expected to object to such monitoring. The chances improve considerably – as can be seen from the experience made in the Council of Europe – when monitoring is first started at a local level among municipalities of different nations, taking the form of a qualified exchange of best practices or inter-municipal benchmarking. One idea in this respect is the establishment of GOLD (Global Observatory of Local Government, see UN GC resolution 20/18 of 2005) either in the framework of UN structures or – in order to become more independent from the sometimes heavy diplomatic restraints of the UN – under the leadership of the UCLG.

The UCLG submitted a comprehensive and important report on the issue of GOLD to the Second UCLG Congress in Jeju/Korea in October 2007.³⁰ It intends to submit and publish a first intermediate review of the application and implementation of the UN guidelines at the Third World Congress in 2010. One of the aims of this review is to encourage nations and governments to start the implementation and application of these guidelines early on to achieve the aims set in the UN Governing Council Habitat resolution of 20 April 2007.

THE UN GUIDELINES ON DECENTRALIZATION AND THE STRENGTHENING OF LOCAL AUTHORITIES

We will refrain from an attempt to present, let alone interpret, the whole content of the guidelines. It does, however, make sense to give a brief outline in order to show the broad range of requirements and proposed best practices, and to give a few examples illustrating the fact that the guidelines

take sufficient account of the diverse historical, social, political and public law conditions of the peoples and nations. The guidelines are divided into four chapters:

- A. Governance and democracy at local level
 1. Representative and participatory democracy
 2. Local officials and the exercise of their office

- B. Powers and responsibilities of local authorities
 1. The principle of subsidiarity
 2. Incremental action

- C. Administrative relations between local authorities and other spheres of government
 1. Legislative action
 2. Empowerment
 3. Supervision and oversight

- D. Financial resources and capacities of local authorities
 1. Capacities and human resources of local authorities
 2. Financial resources of local authorities

CHAPTER A: GOVERNANCE AND DEMOCRACY AT LOCAL LEVEL

The first chapter deals with the principles and recommended best practices in the field of representative democracy and the direct involvement of citizens, a process increasingly discussed or even implemented worldwide. The chapter starts with the statement that political decentralisation to the local level is an essential component of democratisation. This is a reference to the experience made with the Charter of the Council of Europe, which was still rather new at the time (see above), when with the collapse of Soviet centralism all states that had been subject to this system of centralism and which now searched for (more) democratic structures recognised decentralisation as the most important precondition for getting closer to their citizens, for participation and for democratic state building. The chapter therefore puts the focus on partnership and cooperation between local authorities and the different constituencies and organisations of the

civil society. It also underlines the fact that *good governance* at the national level is not really conceivable without ‘division of labour’ based on decentralisation. ‘Participation of citizens in the policy-making process on local affairs should be reinforced in status at all stages, wherever practicable’ seems to be one of the fundamental ideas that remains a challenge even in heavily decentralised states.

The main points standing out in the second section of the first chapter dealing with local officials and the exercise of their office are demands for transparency, accountable responsibility towards citizens and constituencies and a ‘code of good conduct’ that should be made public in order to enable citizens to claim its implementation.

CHAPTER B: POWERS AND RESPONSIBILITIES OF LOCAL AUTHORITIES

Politically most surprising is arguably the second chapter dealing with the powers and responsibilities of local authorities. The first section contains six guidelines regarding the principle of subsidiarity which became a core EU law principle only with the Maastricht Treaty. Though also an underlying principle of the Charter of the Council of Europe of 1985/1988, subsidiarity is not expressly mentioned in this Charter. Support for the principle of subsidiarity in the guidelines is therefore rather remarkable, all the more so given the fact that subsidiarity is recognised to go far beyond mere decentralisation.

Unlike decentralisation which (even notionally) emanates from the centre of the state and devolves tasks ‘down’, the principle of subsidiarity emanates from the individual (and his/her inviolable dignity)³¹ and from the principle to generally tackle and decide all matters concerning the citizen at a local level and to involve a second, or if necessary third or fourth, level only if the local community is overtaxed. While the fathers of the German Constitution of 1949 avoided the term ‘subsidiarity’ – a term not (yet) widely known at the time – they confirmed the principle itself when they wrote in Art. 28, para. 2 GG: ‘Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws.’

Given the profound nature of the reforms and changes indicated, the authors of the guidelines paid special attention to a gradual and cautious approach, as the second section of this chapter explains in detail. Training

and ‘measures to build up their capacity to exercise those functions’ are one example of special importance in all decentralisation processes.

CHAPTER C: ADMINISTRATIVE RELATIONS BETWEEN LOCAL AUTHORITIES AND OTHER SPHERES OF GOVERNMENT

The third chapter is dedicated to the administrative relations between local authorities and other spheres of government. Many (national) governments still have to travel a bit of a learning curve to fully understand what the UN has recognised since the Habitat Agenda of June 1996 – namely, that the local level is an independent local government. Since that time, the UN speaks of ‘governments at all (appropriate) levels, including local authorities ...’.³² Other priorities of this section include demands to involve local governments and their associations early on in legislative actions regarding local matters and to clearly articulate their roles vis-à-vis other spheres of competence or government.

A second section demands, for example, that ‘local authorities should freely exercise their powers, including those bestowed upon them by national or regional authorities, within the limits defined by legislation’. The elimination of mixed or double competencies and reservations of permission must – for the sake of clarity – be achieved and, if necessary, fought for not only in centralistic but also in federal states; a clarity that all too often leaves something to be desired.

Statements like ‘the supervision of local authorities by the state should principally be restricted to the lawfulness of local actions’ or ‘there need to be clear legal preconditions and rules of procedure in place for each intervention of the state’ may sound like platitudes. All too often, they are however maxims that are insufficiently fulfilled and not always subject to court control even in states ruled by law. This is the topic of the fourth section in the chapter dealing with relations between local authorities and other spheres of government.

CHAPTER D: FINANCIAL RESOURCES AND CAPACITIES OF LOCAL AUTHORITIES

The field that is probably least developed worldwide is the decentralisation of financial structures and local financial and personnel resources. Chapter D is therefore particularly comprehensive, also against the background of

the rather weak implementation of the principle of local financial autonomy laid down in the 1985 European Charter of Local Self-Government of the Council of Europe. The Guidelines define very clearly and in great detail those aspects that (European) governments lacked the courage to define in 1985.

The very first sentence states: 'Effective decentralization and local autonomy require appropriate financial autonomy.' The demands and debates surrounding the implementation of the Guidelines in the 192 UN member states – that is, in Third World countries and developed countries alike – are likely to focus, among other core issues, on the study of the 13 guidelines dedicated alone to the issue of financial prerequisites required for local autonomy.

A comparison of these Guidelines with the much shorter text of the earlier draft World Charter of Local Self-Government shows that the Guidelines offer a detailed bunch of recommendations and best practice issues for *all* nations to pick and choose those they can gradually implement at a given time taking into account their national historical, social and political diversity. The monitoring report of the world family of local authorities will regularly document the progress made in this respect, adding new recommendations and best practices, if required.

MANIFOLD SUPPORT FOR THE UN GUIDELINES ADOPTED IN APRIL 2007

A next challenge will come up in 2007 when the framework guidelines are to be finally adopted in the 21st session in Nairobi. The Governing Council (GC), i.e. the representation of the UN member state governments in the Habitat structure, had decided in its resolution 20/18 of the 20th session in 2005 to continue work on the framework of guidelines, a draft of which had already been broadly discussed and met with much approval. Governments should have the opportunity to submit opinions and suggest modifications by the end of 2005.

Habitat executive director Anna Tibaijuka was asked to prepare a final version in coordination with the group of experts and the advisory committee in 2006. This final version should then be submitted to the 21st session of the GC in April 2007. An important signal came from the US: while the US had objected to a World Charter as a binding contract (see above), Washington had made a general announcement in late 2005 stating

that the administration had no objections against the draft framework of guidelines and would support the initiative.

At its European Congress in Innsbruck in May 2006, the CEMR had unanimously passed a resolution expressing the expectation that all governments of the region (46 in the Council of Europe and currently 25 in the EU) supported the UN in putting into practice the ideas they had made the basis of their policies in the EU and the Council of Europe. At the same time the EU Committee of the Regions had launched a similar appeal to the governments of EU member states from Innsbruck. A delegation of the Council of Europe submitted a similar message to the UN Secretary General in New York. Under his new (Norwegian) chairman the Congress of Local and Regional Authorities of Europe (CLRAE) had also appealed to the governments of European UN member states in late May 2006 to support the adoption of the framework of guidelines.

The 11,418 local representatives from some 100 nations – that is, literally from all over the world – who met for the Third World Urban Forum on invitation of the UN in Vancouver, Canada, in mid June 2006 were clear proof of the considerable progress made in the dialogue between local authorities, their international organisations and the UN. Compared to the beginning in Nairobi in 2002 (World Urban Forum/WUF I) and the 4,400 local representatives registered at the 2004 WUF II in Barcelona, local representation had seen astonishing growth rates. The development experienced in the meantime was also reflected by the composition of local representatives. More than half of them were not civil servants or employees from local authorities but representatives from various business sector groupings with relevance for local communities and especially from civil society and its NGOs.

AGRED and the UN ACLA seized the opportunity provided by the Congress to analyse and integrate in the best possible way into the draft guidelines all recommendations and supplements that had been submitted to the UN. Vancouver provided a first opportunity for intermediate stock-taking. The results were encouraging: there had hardly been critical voices, let alone criticism of a fundamental nature.

The Council of Europe joined the appeals on 14 November 2006. In a resolution³³ unanimously adopted by the CLRAE, the Council:

- confirmed that the draft framework of guidelines was a major step

forward for safeguarding peace, democratisation and social and economic progress (item 4);

- expressed the opinion that the decentralisation reforms of the member states in the Council of Europe had contributed to a more democratic, equal and prosperous society in Europe (item 6);
- fully supported the draft guidelines (of the UN) (item 9); but
- repeated the wish to continue as soon as possible with the preparation of a World Charter of Local Self-Government (item 10).

The same CLRAE session unanimously adopted a recommendation calling on the committee of ministers and the governments of the member states of the Council of Europe to give the draft guidelines their full support, and recommended to the member states to adopt the draft guidelines at the next session of the Governing Council of UN Habitat.³⁴

The German government was under a special responsibility in Nairobi in April 2007: holding the presidency of the EU in the first half of 2007, the German government was traditionally also the speaker and coordinator of the representatives of European governments in the Governing Council of the UN Habitat Conference when the draft guidelines were put to the vote. The prospects were good. Almost all European nations had meanwhile ratified the Charter of the Council of Europe and its principles and thus subscribed to the aims of the upcoming resolution. Meanwhile, the big bloc of developing and newly industrialised countries (Group of Seventy with currently over 100 member states) had also signalled its support.

The decisive day came on 20 April 2007 when the Governing Council approved the draft resolution in the form published below. In accordance with the usances of the UN, the resolution formed part of the minutes of the Governing Council's session. These minutes were submitted to the UN General Assembly at its meeting in New York in autumn 2007.

Theoretically, the text could again become the subject of new discussions, but the General Assembly accepted the minutes without debate. The text will thus form the basis of the UN's future activities and the cooperation between member states including local governments and their national and international associations.

GUIDELINES STRENGTHEN REFORM FORCES IN THE UN: DECENTRALISATION IS ON THE CARDS

Cities and local authorities have never before been so much in the focus of the UN. This is mainly the result of the tireless efforts of local politicians in international associations. The CEMR as the European section of the largest international organisation, the UCLG, performed pioneering work in this respect. The examples of the implementation of Agenda 21 and the Millennium Goals – the broad and hopeful goals set by the UN – make it increasingly clear to many governments of UN member states that decentralisation and the strengthening of local authorities will be of vital importance also in other fields now and then addressed by UN resolutions. Sustainable successes cannot be achieved by sidelining local authorities, but only in cooperation with them.

The difficult negotiations in Nairobi in February 2001 (Habitat) demonstrated the need for a two-track strategy in the past and the future, namely:

- continuation of the dialogue with those countries that currently still refuse a binding charter though they almost exclusively subscribe to the principles laid down in the charter; and
- simultaneous firm and targeted actions to push ahead with the aim of a World Charter. This is all the more important since a not insignificant and growing number of nations welcome a binding convention and even consider it an important tool for the political, administrative and in particular economic development of their countries.

The real benefit of the Guidelines is the high resilience of the sometimes very detailed proposals and recommendations. This resilience reflects the manifold experiences made with the European Charter, which would probably turn out more precise today than European governments were willing to concede in 1985 (after 32 years of hesitation). With a view to the worldwide diversity of traditions, social and political customs, the ‘pick and choose’ element is deliberately stronger than in a binding treaty. The clear disadvantage of the guidelines’ non-binding character may even turn out to be an opportunity when it comes to reaching a quicker consensus on matters of content.

There is growing recognition that the Guidelines as a development and democratisation tool may also enhance the preparedness of more and more nations to increase their binding character; initially perhaps only for the political debate of the good governance strategy or as a criterion to assess financial soundness in the framework of international development aid.

ENDNOTES

- 1 See Vargas Llosa M, Nieder mit dem Gesetz der Schwerkraft, *Frankfurter Allgemeine Zeitung*, 1 March 2001.
- 2 Benjamin R. Barber was an advisor to US President Bill Clinton for many years.
- 3 See *Focus* 19, 10 May 1999.
- 4 It should be noted that Barber, according to *Focus* (ibid) 'entertained good contacts to the German President Roman Herzog' who as representative of Germany had presided over the EU Convention that prepared the draft Charter of Basic Rights from autumn 1999 to the end of 2000. The Charter which was 'solemnly approved' at the EU Nice Summit is to serve as the basis for a future EU constitution.
- 5 See Article 12 of the Istanbul Habitat Declaration.
- 6 The Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action, here quoted from a copy of the conference results published by the UN, Nairobi (first publication in 1997), 3rd edition, 2001, The Istanbul Declaration and The Habitat Agenda with subject index (Istanbul, 3-14 June 1996).
- 7 Chapter 2 section D (Capacity building and institutional development), with article 180 and 16 detailed aims (items a to p).
- 8 In particular the declaration distributed by the People's Republic of China in the Preparatory Committee of the UN General Assembly. Representatives of other governments later resorted to similar formulations.
- 9 The author had the honour of chairing this working group.
- 10 Article 1 of the Municipality Code of the state of North-Rhine/Westphalia provides a more programmatic description: 'Municipalities form the basis of a democratic state structure. They promote the well-being of their inhabitants in free self-governance of the bodies elected by the citizens.'
- 11 Together with the Chamber of Regional Authorities, the Chamber of Local Authorities forms the Congress of Local and Regional Authorities.
- 12 CEMR Congress in Thessaloniki from 22-25 May 1996.
- 13 CEMR representatives had succeeded in winning over Prof. Dr. Töpfer to the idea of an advisory committee on the occasion of an IULA Congress in Barcelona. While Prof. Dr. Töpfer did not expect the governments of the (then) 190 UN member states to take such a decision. He followed the good example set by the (EU) EC Commission President Jacques Delors, who in the face of a situation where 10 out

- of the then 12 EC governments had rejected an advisory committee, could be convinced himself to set up such a body in his capacity as head of the Commission, i.e. as an instrument of the EC Commission. The Maastricht Treaty later transformed this body into the Committee of the Regions. Prof. Dr. Töpfer had initially set up the UN advisory committee also as an advisory committee of the Habitat department.
- 14 See Hoffschulte H, *Der Beirat der Kommunen bei den Vereinten Nationen, Europa kommunal 5*, 2001, pp 194-5.
 - 15 As early as 1996, the Habitat Agenda stated in art. 45(c): ‘We further commit ourselves to the objectives of ... decentralising authority and resources, as appropriate, as well as functions and responsibilities to the level most effective in addressing the needs of people in their settlements.’
 - 16 See the development of the theory of the subsidiarity principle from the Catholic code of social ethics to the Italian policy in the constitutional debate of the European Union – Hoffschulte H, *Kommunale und regionale Selbstverwaltung im Europa der Regionen*. In Knemeyer F-L (ed), *Europa der Regionen – Europa der Kommunen, Wissenschaftliche und politische Bestandsaufnahme and Perspektive*. Baden-Baden: Nomos, 1994, p 135 et seq., 150-155.
 - 17 In this context it is interesting to see how Pope John XXIII’s *Pacem in Terris* encyclical dated 11 April 1963 extends the subsidiarity principle to the ‘relations ... between the authority of the universal political power and the state authorities of individual nations’. In this respect *Pacem in Terris* further elaborates the *Quadragesimo anno* encyclical (Pope Pius XI, 1931) where the subsidiarity principle had already been clearly formulated with regard to the role of local communities (item 79): ‘Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.’
 - 18 Section B.1 of the draft guidelines.
 - 19 See, revised UNCHS (Habitat) progress report HS/C/PC.1/CRP. 7 of 20 April 2000, ‘Progress Report on the Preparation of the Proposed World Charter of Local Self-Government’.
 - 20 Convention dated 15 October 1985, ratified in Germany by law dated 22 January 1987. In the two official languages of the Council of Europe, i.e. French and English, the Convention is entitled *Charte européenne de l’autonomie locale* and European Charter of Local Self-Government, respectively.
 - 21 Bert Schaffarzik published a comprehensive manual on the European Charter of Local Self-Government in Volume 14 of *Schriften zum deutschen und europäischen Kommunalrecht*, a publication issued by Deutsche Landkreistag that deals with issues of German and European local laws. The annex of the manual synoptically documents the convention text in English and French, i.e. its original languages,

- together with the German version translated for the German legislator (Schaffarzik B, *Handbuch der europäischen Charta der kommunalen Selbstverwaltung*. Stuttgart et al.: Boorberg, 2002, and doctoral thesis at the University of Kiel. *Schriften zum deutschen und europäischen Kommunalrecht*; 14).
- 22 See also Hoffschulte H, *50 Jahre der Gemeindefreiheiten und ihre Folgen: Es ist eine Erfolgsgeschichte*, *Europa kommunal* 2, 2004, p 67 et seq.
 - 23 Status as at 18 May 2008. The only country missing is the new member state of Montenegro, while there is obviously no need for such a Charter in the small states of Andorra, Monaco and San Marino. Thus the Charter is part of the *acquis communautaire* of the Council of Europe and was recognised as such in the debates about the future constitution of the EU in the Convention on the Future of Europe.
 - 24 France was late to ratify the convention in 2006. Though one of the first six countries to sign the convention on 15 October 1985, France – which had embarked (with the decentralisation laws of 1982/83, ‘Deferre Acts’) on a course out of the centralism of the ‘État unitaire’ – had long hesitated to ratify the convention. In the run-up, the French Constitution (of the 5th Republic) had been expressly modified, i.e. the comment about the centralised state was supplemented by a reference to a (future) decentralised administration. Since then Article 1 of the French Constitution reads: ‘La France est une République indivisible, laïque, démocratique et sociale. ... Son organisation est décentralisée.’ (Constitutional Act No. 2003-276 of 28 March 2003). Regarding the difficult background see Hoffschulte H, *Die europäische Charta der kommunalen Selbstverwaltung in Frankreich: Frage wieder auf dem Tisch*, *Europa kommunal* 6, 2001, p. 236 et seq.
 - 25 See also Hoffschulte H, *50 Jahre, Charta der Gemeindefreiheiten’ und ihre Folgen: eine Erfolgsgeschichte*, *Kommunal* (official journal of the Austrian association of local authorities) 2, 2004, p. 30 et seq. and in *Europa kommunal* 2, 2004, p. 67 et seq.
 - 26 Solzhenitsyn A, *Die russische Frage am Ende des 20. Jahrhunderts*. München, Zürich: Piper, 1994.
 - 27 Vargas Llosa, op cit.
 - 28 According to resolution 18/11 of the UN GC dated 16 February 2001 that formed the basis of continued efforts to arrive at such guidelines, a draft of which became available in 2005.
 - 29 Resolutions to this end were passed by the unification congress to establish the UCLG in May 2004, and reconfirmed by the World Assembly in Beijing 2005; by the CLRAE of the Council of Europe when it expressly called for complete and comprehensive support of the Guidelines at its Moscow session on 14 November 2006, but also repeated the ‘wish to continue the preparation of a World Charter of Local Self-Government as quickly as possible’ (CG resolution (13)31 RES dated 14 November 2006).
 - 30 ‘Decentralization and Local Democracy in the World – First Global Report 2007’, Barcelona, October 2007, coordinated by the Research Network on Local Government in Europe (GRALE). Executive summaries were simultaneously

published under the same title in English and French, while a Spanish edition was published in 2008.

- 31 Article 1 of the German Constitution states: 'Human dignity shall be inviolable.' The Charter of Basic Rights prepared by the first EU Convention of 2 October 2000 took over this sentence. The Charter was formally proclaimed at the EU intergovernmental conference in Nice in December 2000 and is now to become EU primary law with the Lisbon Treaty (EU Reform Treaty, see part 2 of the draft EU constitutional treaty submitted by the 2nd EU Convention).
- 32 See, for example, item 32 of the Habitat Agenda of 1996, Istanbul, Turkey.
- 33 CG Resolution (13) 31 RES of the Standing Committee of the Congress. The resolution was passed in Moscow on 14 November 2006 (Rapporteur: Ian Micallef, Malta).
- 34 CG Recommendation (13) 31 REC, also passed in Moscow on 14 November 2006 on the basis of a unanimous recommendation made on 16 October 2006 by the Institutional Committee of the Congress.

APPENDIX 1

Excerpt of the Policy Process on the System of Provincial and Local Government*

BACKGROUND: POLICY QUESTIONS, PROCESS AND PARTICIPATION

CONTENTS

Executive summary

1. Introduction
2. A brief history of our system of government
3. Why review provincial and local government?
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Annexures:

- A: Useful references
- B: Table of powers and functions
- C: Glossary and Definitions

* The following is an excerpt of the Policy Review. The rationale for this Review and the key points of departure are endorsed. A copy of the entire Policy Review can be obtained from the Department of Provincial and Local Government on telephone: +27 +12 334 0600.

EXECUTIVE SUMMARY

This background document sets out the policy process on the review of provincial and local government. It is a guide to the background of the process, the key questions about the process and the way in which the public can get involved. This process has begun because the DPLG was mandated by Cabinet to undertake the review of the work of provinces and of local government. The first section provides a brief overview of the history of our system of government. It highlights the transformation and delivery challenges faced by provincial and local government over the past 13 years.

In response to the many challenges identified, government decided to review the system of provincial and local government. Many lessons have been learned during the last decade and these have demonstrated the complexity of the co-operative governance system and its functionality at each sphere.

The forthcoming White Paper on Provinces and the revision of the Local Government White Paper therefore, will be the result of an extensive research and consultative process during 2007 and 2008. The final section describes how the consultative process will be undertaken and how the public may get involved.

INTRODUCTION

The Extended Cabinet Lekgotla in January 2007 mandated the Ministry and Department of Provincial and Local Government (the DPLG) to initiate a process to develop a White Paper on Provincial Government and to review the existing White Paper on Local Government. The DPLG mandate is derived from Chapters 3 and 7 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

This task of assessing whether existing forms of governance remain appropriate to meeting the changing demands has become routine in developed and developing countries alike. This process will draw on the lessons of a decade or more of practice, wide public consultation and comprehensive research, geared towards making proposals.

The issues at stake in this process are important for all citizens of the country, every sector of society, and the public institutions of our country. This process must provide a platform for a rational, open and responsible national debate. Together with thorough empirical research, this national debate will inform Government to make the appropriate policy decisions about the institutional framework for provincial and local government in our country.

In addition to research consultation, lessons learned from the implementation of government programmes will also be reviewed. For example Project Consolidate was operationalised through the deployment of service delivery facilitators, and the Presidential and Ministerial Izimbizo. Some of the lessons learned from the Project Consolidate case studies include the critical importance of communication between different stakeholders on basic service delivery issues, and the need to strengthen mechanisms to promote financial viability.

To assist the public debate and engagement, the Ministry and the DPLG have issued a set of questions about the lessons of provincial and local government. In this regard, the Ministry and the DPLG is calling on the public at large, civil formations, universities, organized civil society, and various public institutions to contribute to the questions set out in this background document, as well as identify other areas that impact on the provincial and local systems of government.

A BRIEF HISTORY OF OUR SYSTEM OF GOVERNMENT

The institutional framework for government in South Africa was established in 1996 when the country adopted its first democratic Constitution. This was the culmination of a negotiation process to end apartheid and introduce democracy to South Africa.

National government, provincial government and local government were established as three elected spheres of government, each with distinctive functional responsibilities. The Constitution requires the three spheres of government to function as a single system of co-operative government for the country as a whole.

The structures and institutions of all three spheres of government were established and transformed over many years. Provincial administrations were amalgamated to become a single public service with national departments. Local government went through a long process of transition that eventually saw the establishment of 283 municipalities and the first democratic local government elections in 2000. Transformation thus followed different paths for provinces and local government.

The Constitution created provincial government, but did not specify distinct objects for provincial government within the overall system. There is currently no policy and legislative framework for provinces. Local government, by contrast, was a product of conscious policy and institutional design by the new democratic government to give effects to the precise objects for this sphere as specified by the Constitution.

The process to reconstruct and develop the country since 1994 has consistently placed the previously excluded, the poor, women and youth in particular at the centre of our country's development. As a result millions of South Africans who were excluded from participating in the political, social and economic life of the country under apartheid now benefit directly from democratic government.

Indeed, government in all spheres has achieved remarkable success over the past decade in ensuring access to basic services such as water, electricity and sanitation, housing, social grants, healthcare and education on a scale unprecedented in this country.

The progress that has been made with access to basic services since 1994 is directly attributable to the critical role that our democratic municipalities have played. For example:

- i. Universal access to water supply increased from 5% of total households in 1994 to 86% by April 2007.
- ii. Universal access to sanitation increased from 48% in 1994 to 73% by April 2007.

- iii. In 1994, 30% of houses in South Africa had access to electricity and by 2006/7 this figure had increased to 73%.
- iv. From 1994 to 2006 a total of 2,243 million houses were delivered, at an average of 249 290 units per annum.

While national government has set policy objectives, norms and standards for these services, the actual delivery programmes and budget are directly managed by municipalities.

Transformation of society will continue to call on our public sector capacity to respond to the service delivery and development challenges of our country more coherently and with greater efficiency and effectiveness. In order to reach our common national goal to halve poverty and unemployment by 2014, government must, therefore, pay close attention to its own institutional capacity, organisation and efficiency.

WHY REVIEW PROVINCIAL AND LOCAL GOVERNMENT?

There are very practical and good reasons for doing a review of provincial and local government at this point in our history.

- a. A body of practical experience about governance and development exists today, after years of democratic practice. This experience did not exist when the system was designed in 1993–1996. Today the country can draw on experience about what to do differently to achieve better development outcomes.
- b. South Africans, like other citizens of any other country, expect and have the right to expect more responsive, accountable, efficient, equitable and affordable government and better quality of service. The pursuit of national targets for social services has produced many lessons of good practice, and in the process identified opportunities missed as a result of the complex way in which government institutions function.
- c. Local government came into being much later than the other two spheres of government. Incorporating local government into the system

of co-operative governance has proved complex even as it has generated new opportunities for more responsive and efficient governance.

- d. The absence of a definite policy on provincial government has generated uncertainty about the role of this sphere in reconstruction and development. This is of particular importance as the advent of local democracy has presented new opportunities for state organisation and efficiency.
- e. The lessons of Project Consolidate show that providing hands-on support to municipalities has had a direct benefit to local delivery in a very short space of time. However, the long-term capacity requirements of this sphere, mirroring the scarcity of key skills in the country, will require an institutional response.

THE WHITE PAPER AND REVIEW PROCESS

The end result of the reviews on provincial and local government will be policy papers. These are papers that set out what government and the people believe to be the best vision, purpose and structure for a particular activity or organisation. In this case the government is looking at policy to possibly re-organise some aspects of the current system of provincial and local government.

The first policy paper released for comment during a government policy-making process is called a Green Paper. This paper is put in the *Government Gazette* for comment. The *Gazette* is published by the government printer and is available from their offices.

For this process, a Green Paper on Provincial Government and a Discussion Document on Local Government will be published by December 2007. After the Green Paper has been commented on and inputs received from the public, work will commence on the final policy paper, called a White Paper.

The local government policy paper is a revision because there is already a White Paper on Local Government, which was published in 1998. By the end of 2008, there will be a new White Paper on Provinces and a Review Report on Local Government, which will be considered by Parliament and Cabinet.

CONTEXT: HOW GOVERNMENT WORKS

The government in South Africa consists of the national government, the nine provinces and 283 municipalities. It is divided into three spheres of government that are ‘distinctive, independent and inter-related’ (section 40 of the Constitution).

- **Distinctive:** meaning that each sphere has its own unique area of operation.
- **Interdependent:** meaning that the three spheres are required to co-operate and acknowledge respective areas of jurisdiction.
- **Interrelated:** meaning that there should be a system of co-operative governance and intergovernmental relations among the three spheres.

But, even though the three spheres are independent, they have to work together when deciding on budgets, policies and activities, particularly in areas that cut across all spheres. All the spheres of government are responsible for providing for the development of communities and delivery of services in different ways.

NATIONAL GOVERNMENT

National Government is responsible for policy formulation and making, developing national standards and norms, and rules and regulations.

PROVINCIAL GOVERNMENT

The 9 provincial governments deal with matters that affect their own provinces. Schedule 5 of the Constitution lists the issues that provincial government is responsible for. Provincial legislatures make their own laws.

LOCAL GOVERNMENT

Local government is regarded as a sphere of government in its own right and is no longer a function of just one of the arms of provincial or national government.

Annexure B: Table of powers and functions across the three spheres of government

National	Provincial	Local
Administration of indigenous forest	Administration of indigenous forest	
Agriculture	Agriculture	
Airports	Airports other than international and national airports	Municipal Airport
Animal control and diseases	Animal control and diseases	Facilities for the accommodation, care and burial of animals
Casinos, racing, gambling & wagering	Casinos, racing, gambling & wagering	
Lotteries and sport pools		
Consumer protection	Consumer protection	
Cultural matters	Cultural matters	
Disaster management	Disaster management	Fire fighting management
Education incl. tertiary	Education excl. tertiary	
Environment	Environment	Promote safe and healthy environment (object of LG)
Health services	Health services	Municipal health services
Housing	Housing	Building regulations
Indigenous and customary law	Indigenous and customary law	
Industrial promotion	Industrial promotion	Local economic development
Language policy	Language policy	
Media services	Media services	
Nature conservation	Nature conservation excluding national parks, national botanical gardens and marine resources	Local amenities and public places
Police	Police	
Pollution control	Pollution control	Air pollution and noise pollution; control of nuisances

National	Provincial	Local
Population development	Population development	
Property transfer fees	Property transfer fees	Property rates
Public enterprises	Provincial public enterprises	Markets and Municipal abattoirs
Public transport	Public transport	Municipal public transport
Public works	Public works	Municipal public works
Regional planning and development	Regional planning and development	Municipal planning
Road traffic regulations	Road traffic regulations	Municipal roads, traffic and parking
Soil conservation	Soil conservation	
Tourism	Tourism	Local tourism
Trade	Trade	Street trading; trading regulations; Licensing and control of undertaking that sells food to the public
Traditional leaders	Traditional leaders	
Urban and rural development	Urban and rural development	
Vehicle licensing	Vehicle licensing	Traffic and parking
Welfare services	Welfare services	Child care facilities
	Abattoirs	Municipal abattoirs
	Ambulance services	Municipal health services
National Archives	Archives other than national archives	
National libraries	Libraries other than national libraries	
	Liquor licenses	Control of undertaking that sell liquor to the public
National Museums	Museum other than national museums	
	Provincial planning	Municipal planning

National	Provincial	Local
	Recreation and amenities	Beaches and amusement facilities; local amenities; municipal parks and recreation; public places
Sport	Provincial sport	Local sport facilities
	Provincial roads and traffic	Traffic and parking
	Veterinary services, excluding regulation of the profession	Licensing of dogs; cleansing;
Electricity		Electricity and gas reticulation
International and national shipping and matters related thereto		Potoons, ferries, jetties and harbours
		Stormwater management systems in build-up areas
Water		Water and sanitation
		Billboards and the display of advertisement in public places
		Cemeteries, funeral parlours and crematoria
		Fencing and fences
		Pounds
		Refuse removals, refuse dumps and solid waste disposal
Forestry		
Defence		
Civic affairs		
Foreign affairs		
Labour		

APPENDIX 2

Excerpts of the UN Guidelines on Decentralization and the Strengthening of Local Authorities and Habitat Agenda

UN GUIDELINES ON DECENTRALIZATION AND THE STRENGTHENING OF LOCAL AUTHORITIES¹

A. GOVERNANCE AND DEMOCRACY AT THE LOCAL LEVEL

1. Representative and participatory democracy

1. Political decentralization to the local level is an essential component of democratization, good governance and citizen engagement; it should involve an appropriate combination of representative and participatory democracy.
2. Participation through inclusiveness and empowerment of citizens shall be an underlying principle in decisionmaking, implementation and follow-up at the local level.
3. Local authorities should recognize the different constituencies within civil society and should strive to ensure that all are involved in the progressive development of their communities and neighbourhoods. Local authorities should have the right to establish and develop partnerships with all actors of civil society, particularly non-governmental organizations and community-based organizations, and with the private sector and other interested stake-holders.

4. Local authorities should be entitled, either through the constitution or in national legislation, to define appropriate forms of popular participation and civic engagement in decision-making and in fulfilment of their function of community leadership. This may include special provisions for the representation of the socially and economically weaker sections of society, ethnic and gender groups and other minorities.
5. The principle of non-discrimination should apply to all partners and to the collaboration between national and regional governments, local authorities and civil society organizations.
6. Participation of citizens in the policy-making process on local affairs should be reinforced in status, at all stages, wherever practicable.
7. With a view to consolidating civil engagement, local authorities should strive to adopt new forms of participation such as neighbourhood councils, community councils, e-democracy, participatory budgeting, civil initiatives and referendums in as far as they are applicable in their specific context.
8. The participation of women and the consideration of their needs should be a cardinal principle embedded in all local initiatives.
9. The participation of young people should be encouraged in all local initiatives: develop the school as an important common arena for young people's participation and for the democratic learning process and encourage youth associations; promote 'children's council' and 'youth council' type experiments at local level, as genuinely useful means of education in local citizenship, in addition to opportunities for dialogue with the youngest members of society.

2. Local officials and the exercise of their office

10. Politicians and officials in local authorities should discharge their tasks with a sense of responsibility and accountability to the citizens. At all times they should maintain a high degree of transparency.

11. While local political office should be viewed as a commitment to the common good of society, the material and remunerative conditions of local politicians should guarantee security and good governance in the free exercise of their functions.
12. There should be a code of good conduct that requires politicians and public civil servants to act with integrity and avoid any situation that may lead to a conflict of interests. Such a code should be made public when available.
13. Mechanisms should be put in place to allow citizens to reinforce the code.
14. Records and information should be maintained and in principle made publicly available not only to increase the efficiency of local authorities but also to make it possible for citizens to enjoy their full rights and to ensure their participation in local decision-making.

B. POWERS AND RESPONSIBILITIES OF LOCAL AUTHORITIES

1. The Principle of Subsidiarity

1. The principle of subsidiarity constitutes the rationale underlying the process of decentralization. According to that principle, public responsibilities should be exercised by those elected authorities, which are closest to the citizens.²
2. It is recognized that, in many countries, local authorities are dependent on other spheres of government, such as regional or national governments, to carry out important tasks related to social, political and economic development.
3. In many areas powers should be shared or exercised concurrently among different spheres of government. These should not lead to a diminution of local autonomy or prevent the development of local authorities as full partners.

4. Local autonomy aims to allow local authorities to develop to a point where they can be effective partners with other spheres of government and thus contribute fully in development processes.
5. Decisions should be taken at the level appropriate to the type of decision - international, national, regional or local.
6. National, regional and local responsibilities should be differentiated by the constitution or by legislation, in order to clarify the respective powers and to guarantee access to the resources necessary for the decentralized institutions to carry out the functions allocated to them.

2. Incremental action

7. An increase in the functions allocated to local authorities should be accompanied by measures to build up their capacity to exercise those functions.
8. The policy of effective decentralization may be applied in an incremental manner in order to allow for adequate capacity-building.
9. Where decentralization is a new policy, it may be implemented on an experimental basis and the lessons learned may be applied to enshrine this policy in national legislation.
10. National principles relating to decentralization should ensure that the national or regional government may intervene in local government affairs only when the local government fails to fulfil the defined functions.
11. The burden of justifying an intervention should rest with the national or regional government. An independent institution should assess the validity of such intervention.
12. As far as possible, nationally determined standards of local service provision should take into account the principle of subsidiarity when they are being drawn up and should involve consultation with local authorities and their associations.

13. The participation of local authorities in decision-making processes at the regional and national levels should be promoted. Mechanisms for combining bottom up and top down approaches in the provision of national and local services should be established.

C. ADMINISTRATIVE RELATIONS BETWEEN LOCAL AUTHORITIES AND OTHER SPHERES OF GOVERNMENT

1. Legislative action

1. Local authorities should be acknowledged in national legislation, and, if possible, in the constitution, as legally autonomous sub-national entities with a positive potential to contribute to national planning and development.
2. The constitution and national legislation should determine the manner in which the local authorities are constituted, the nature of their powers, the scope of their authority, responsibilities, duties and functions.
3. Constitutional and legislative provisions for local government organizations may vary depending on whether a State is federal, regionalized or unitary.
4. Legislative provisions and legal texts should clearly articulate the roles and responsibilities of local authorities vis-à-vis higher spheres of government, providing that only those roles and responsibilities beyond their scope and competence should be assigned to another authority.
5. Local authorities should have full responsibility in spheres involving interests of local citizens except in those areas specified by national legislation, which should state what lies outside their competence.

2. Empowerment

6. Local authorities should freely exercise their powers, including those

bestowed upon them by national or regional authorities, within the limits defined by legislation. These powers should be full and exclusive, and should not be undermined, limited or impeded by another authority except as provided by law.

7. Other spheres of government should consult local authorities and their associations when preparing, or amending, legislation affecting local authorities.
8. Local authorities and their institutions should be assisted by other spheres of government to determine local policy and strategic frameworks within the parameters set by national policies.
9. Other spheres of government should support initiatives to develop responsive, transparent and accountable instruments necessary for efficient and effective management at a local level.

3. Supervision and oversight

10. The supervision of local authorities should only be exercised in accordance with such procedures and in such cases as provided for by the constitution or by law.
11. That supervision should be confined to *a posteriori* verification of the legality of local authority acts, and should respect the autonomy of the local authority.
12. The law should specify the conditions (if any) for the suspension of local authorities. In the event that there is a need to suspend or dissolve a local council or to suspend or dismiss local executives, the exercise shall be carried out with due process of law.
13. Following the suspension or dissolution of local councils, or the suspension or dismissal of local executives, the prescription of the law should determine the resumption of their duties in as short a period of time as possible.

14. There should be independent bodies, such as administrative courts, to oversee such suspensions or dissolutions by higher spheres of government, and to which appeal may be made.

D. FINANCIAL RESOURCES AND CAPACITIES OF LOCAL AUTHORITIES

1. Capacities and human resources of local authorities

1. Local authorities should be supported by other spheres of government in the development of their administrative, technical and managerial capacities, and of structures, which are responsive, transparent and accountable.
2. Local authorities should be allowed to determine as far as possible their own internal administrative structures, to adapt them to local needs and to ensure effective management.
3. Local authorities should have full responsibility for their own personnel. There should be common standards of qualification and status in the management of such personnel.
4. The service conditions of local government employees, as defined by national legislation, should be such as to permit the recruitment and retention of high-quality staff on the basis of best performance, professional competence and experience and of gender equality, and should exclude any type of discrimination based on religion, language or ethnicity.
5. Adequate training opportunities, remuneration and career prospects should be provided to local government employees in order to enable local authorities to reach a high quality performance in the provision of services to the citizens.
6. Training opportunities should be provided or supported by Governments, in collaboration with local authorities and their associations.

2. Financial resources of local authorities

7. Effective decentralization and local autonomy require appropriate financial autonomy.
8. Local authorities' financial resources should be commensurate with their tasks and responsibilities and ensure financial sustainability and self-reliance. Any transfer or delegation of tasks or responsibilities by the State shall be accompanied by corresponding and adequate financial resources, preferably guaranteed by the constitution or national legislation, and decided upon after consultations between concerned spheres of government on the basis of objective cost assessments.
9. Where central or regional governments delegate powers to them, local authorities should be guaranteed the resources necessary to exercise these powers as well as discretion in adapting the execution of their tasks to local conditions and priorities.
10. Local authorities should have access to a broad variety of financial resources to carry out their tasks and responsibilities. They should be entitled, preferably on the basis of constitutional and/or national legislative guarantees, to adequate resources or transfers, which they may freely use within the framework of their powers.
11. A significant proportion of the financial resources of local authorities should derive from local taxes, fees and charges to cover the costs of services provided by them and for which they have the power to determine the rate, notwithstanding their possible framing (tax brackets) or coordination by legislation.
12. Taxes which local authorities should be entitled to levy, or of which they receive a guaranteed share, should be proportional to their tasks and needs and of a sufficiently general, dynamic and flexible nature to enable them to keep pace with their responsibilities.
13. Local taxes, such as land-based taxes, should preferably be collected by

local authorities themselves, provided that they have appropriate capacities and oversight mechanisms in place.

14. Financial sustainability should be ensured through a system of financial equalization, both vertical (between State and local authorities) and horizontal (among local authorities). This should happen especially where the local tax base is weak or non-existent.
15. Legislation should guarantee the participation of local authorities in framing the rules governing the general apportionment of redistributed resources, including both vertical and horizontal equalizations.
16. As far as possible, financial allocations to local authorities from Governments should respect their priorities and shall not be earmarked for specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.
17. Earmarked allocations shall be restricted to cases where there is a need to stimulate the local implementation of national policies, in areas such as environmental protection, social development, health and education.
18. For the purpose of borrowing for capital investment, local authorities should, within guidelines and rules established by Governments and the legislation, have access to national and international capital markets. State supervision and monitoring may however be necessary in countries affected by volatile macro-economic situations.
19. Local authority borrowing should not endanger the fiscal policies designed to ensure financial stability of national Governments.

THE HABITAT AGENDA. ISTANBUL DECLARATION ON HUMAN SETTLEMENTS³

‘12. We adopt the enabling strategy and the principles of partnership and participation as the most democratic and effective approach for the realization of our commitments. Recognizing local authorities as our closest partners, and as essential, in the implementation of the Habitat Agenda, we must, within the legal framework of each country, promote decentralization through democratic local authorities and work to strengthen their financial and institutional capacities in accordance with the conditions of countries, while ensuring their transparency, accountability and responsiveness to the needs of people, which are key requirements for Governments at all levels. We shall also increase our cooperation with parliamentarians, the private sector, labour unions and non-governmental and other civil society organizations with due respect for their autonomy. We shall also enhance the role of women and encourage socially and environmentally responsible corporate investment by the private sector. Local action should be guided and stimulated through local programmes based on Agenda 21, the Habitat Agenda, or any other equivalent programme, as well as drawing upon the experience of worldwide cooperation initiated in Istanbul by the World Assembly of Cities and Local Authorities, without prejudice to national policies, objectives, priorities and programmes. The enabling strategy includes a responsibility for Governments to implement special measures for members of disadvantaged and vulnerable groups when appropriate.’

THE HABITAT AGENDA⁴

SECTION IV D. CAPACITY-BUILDING AND INSTITUTIONAL DEVELOPMENT

2. Decentralization and strengthening of local authorities and their associations/networks

‘180. To ensure effective decentralization and strengthening of local authorities and their associations/networks, Governments at the appropriate levels should:

- (a) Examine and adopt, as appropriate, policies and legal frameworks from other States that are implementing decentralization effectively;
- (b) Review and revise, as appropriate, legislation to increase local autonomy and participation in decision-making, implementation, and resource mobilization and use, especially with respect to human, technical and financial resources and local enterprise development, within the overall framework of a national, social, economic and environmental strategy, and encourage the participation of the inhabitants in decision-making regarding their cities, neighbourhoods or dwellings;
- (c) Develop education in citizenship to emphasize the role of individuals as actors in their communities;
- (d) Support local authorities reviewing revenue-generating mechanisms; The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action;
- (e) Strengthen, as necessary, the capacity of educational, research and training institutions to provide continuous training to local elected officials, managers and professionals on urban-related issues, such as planning, land and resource management techniques, and municipal finance;
- (f) Facilitate the exchange of technology, experience and management expertise vertically and horizontally between government and local authorities in the delivery of services, expenditure control, resource mobilization, partnership-building and local enterprise development, *inter alia*, through technical twinning and exchange of experience programmes;

- (g) Enhance the performance of local authorities by undertaking data collection, disaggregated by gender, age and income, and comparative analyses of, and by disseminating information on innovative practices in, the delivery, operation and maintenance of public goods and services, in providing for the needs of their populations and in exploiting the fiscal and other potential of their cities;
- (h) Encourage institutionalization of broad-based participation, including consultative mechanisms, in decision-making and management processes at the local level;
- (i) Strengthen the capacity of local authorities to engage the local private and community sectors in goal-setting and in establishing local priorities and environmentally sound standards for infrastructure development, services delivery and local economic development;
- (j) Promote policy dialogue among all levels of government and the private and community sectors and other representatives of civil society to improve planning and implementation;
- (k) Within the framework of governance, establish public-private citizens' partnerships for urban innovation, and analyse, evaluate and disseminate information on successful partnerships;
- (l) Collect, analyse and disseminate, as appropriate, comparative data, disaggregated by gender, age and income, on the performance of local authorities in providing for the needs of their populations;
- (m) Reinforce measures to eradicate corruption and ensure greater transparency, efficiency, accountability, responsiveness and community participation in the management of local resources;
- (n) Enable local authorities and their associations/networks to take initiatives in national and international cooperation and, in particular, to share good practices and innovative approaches to sustainable human settlements management;
- (o) Strengthen the capacities of both central and local government through training courses on urban finance and management for elected government officials and managers;
- (p) Develop and/or strengthen, as appropriate, in cooperation with relevant United Nations bodies, within their respective mandates, as well as associations/networks of local authorities and other The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action international associations and organizations, global

and easily accessible information networks to facilitate the exchange of experience, knowhow and expertise.’

ENDNOTES

- 1 http://www.unhabitat.org:80/downloads/docs/5181_19348_Resolution_21-3.pdf; http://www.cities-localgovernments.org/uclg/upload/news/newsdocs/Guidelines_Decentralisation_JANV07.pdf. Der hier wiedergegebene Entwurf im Englischen Original entspricht dem Stand der Entschließung vom 20.04.2007 im Governing Council der UN-Habitat, hat also die Anregungen der Regierungen aus 2005 und 2006 sowie die Ergebnisse der darauf basierenden Beratungen des Expertengremiums (AGRED = Entwurfsverfasser) und die Entschließung des UN-Beirates der Kommunen (UN-ACLA) anlässlich des World Urban Forum II in Vancouver integriert. Offizielle Übersetzungen der UNO wird es grundsätzlich nur in den sechs Amtssprachen geben (Englisch, Französisch, Spanisch Russisch, Chinesisch und Arabisch), nicht also in deutscher Sprache. Für die hier abgedruckte Übersetzung ist also der Autor allein verantwortlich.
- 2 Vgl. Die Resolution 19/12 vom 09.05.2003. See Governing Council resolution 19/12 of 9 May 2003.
- 3 The Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action, hier zitiert aus der von der UNO selbst herausgegebenen Fassung der Konferenzergebnisse, Nairobi (erstmalig 1997), 3. Aufl. 2001, ‘The Istanbul Declaration and The Habitat Agenda with subject index (Istanbul, 3.-14. Juni 1996)’; <http://ww2.unhabitat.org/Istanbul+5/declaration.htm>.
- 4 The Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action, hier zitiert aus der von der UNO selbst herausgegebenen Fassung der Konferenzergebnisse, Nairobi (erstmalig 1997), 3. Aufl. 2001, The Istanbul Declaration and The Habitat Agenda with subject index (Istanbul, 3.-14. Juni 1996); http://ww2.unhabitat.org/declarations/habitat_agenda.asp.

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