

THE CONSTITUTIONAL BASIS OF LOCAL GOVERNMENT

BY

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ABSTRACT

Local government in South Africa has been through a process of major transformation, and is materially different from what it was under the apartheid regime. Under the new constitution, local government has been afforded the status of a sphere of government, along with national and provincial government. However the form and structure of local government are not provided for in the constitution. The purpose of this study is to examine the constitutional imperatives set for local government in the constitution, how local government is to function in order to achieve these, and whether local government is able to achieve these objectives. This paper has depended mainly on research through data collection. One of the main findings of this paper is that the constitutional provisions regarding local government place an obligation on the other spheres to support local government, the failure of which will lead to local government not being able to achieve its constitutional imperatives.

DECLARATION

I declare that this report is my own, unaided work. It is submitted in partial fulfillment of the requirements of the degree of Master of Management (in the field of Local Governance and Development) in the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

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DEDICATION

With thanks to Ahmed, without whose support I could not have done this paper.

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CHAPTER ONE

INTRODUCTION

Local governments are the level of government that are closest to the people. As such, they are responsible for serving the political and material needs of the people and of the communities of a specific local area (Kithakye, Challenges facing local governments in the SADC regions with regard to their role in sustainable development, paper presented at SADC Local Government Conference, July 1999).

Local government has both a political and an economic role to play. Politically, local government, due to its closeness to the people, provides a way for the citizens to have a say in how their communities are to be governed. Ideally, local government provides the forum for the democratic participation of citizens in the matters that affect them directly. Economically, local government provides basic services for the people falling within its jurisdiction.

Due to the important role that it has to fulfill, local government, despite its being the smallest government institution in any state, is yet regarded as the cornerstone of a modern democratic state (Rautenbach and Malherebe, 1997, p 263).

In South Africa, local government has been strongly influenced by the prevailing political dispensation. The apartheid government effectively created a system of local government that was engineered to achieve its segregative objectives. The challenge that we now face in a democratic South Africa is not only to transform the system of local government but also to create a system of local government in line with the vision set for it in the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Final Constitution").

Apartheid was strongest at local level, where South Africans were segregated on the basis of racism, and where white South Africans enjoyed privilege at the cost of the non-white communities. The first indications that apartheid was crumbling were at this level, in the early eighties, when the spatial ordering of different race groups broke down under social and economic pressure, and it became clear that apartheid objectives were no longer viable.

With the advent of democracy in South Africa and the birth of a new constitution, local government has been faced with mass transformation, in both structure and form. The status of local government is being fundamentally transformed. This transformation is a complex task, with the process of restructuring still underway.

Traditionally, local government was seen merely as being the level of government responsible for the delivery of services. With the changes in the constitution, there needs to be a shift in how local government is perceived, from it being service focussed to its being an autonomous level of government with entrenched legislative and executive powers. This is essentially national government's view as expressed by the then Deputy Minister of Constitutional Development, Mr. MV Moosa in his paper entitled "Local government structures: The Challenges".

Local government's core functions need to be understood as part of the functioning of the state and its three spheres of government as a whole. The constitutional definition of local government's powers and functions in relation to provincial and national government, is however ambiguous in some respects and needs clarification.

This situation is further complicated by the fact that most powers and functions have several components, not all of which are best performed by the same sphere of government. While the final constitution does make this distinction to some extent, it still needs further clarification.

This paper aims to be an exploration of the issues pertinent to local government.

Chapter two deals with the history of local government and traces the history of local government in South Africa and is an attempt to locate the transition of local government in its broader historical context.

Chapter three deals with the process that led to transformation of local government in South Africa, from the negotiations at the local level up until the interim constitution. This chapter highlights the key developments in local government that were significant in the process of transformation. In addition, it highlights the process of transformation leading up to the final constitution, indicating the relevant legislative processes that have shaped the transformation process up until this phase.

Chapter Four deals with the provisions in chapter seven of the final constitution, which is the chapter dealing with local government. This chapter gives an overview as to the rationale for the inclusion of chapter seven into the final constitution, so as to place chapter seven within the broader context of the constitution. In addition, this chapter examines the relevant provisions of chapter seven and its implications for local government.

Chapter Five deals with the issue of co-operative government as highlighted in the constitution and examines the roles of the other spheres of government in relation to local government and the achievement of the imperatives that have been set for it by the final constitution.

Chapter Six focuses on the financial matters facing local government both in terms of legislation and the financial realities facing local government and highlights the financial crisis that local government finds itself in.

Chapter Seven deals with section 139 of the constitution which allows for provincial executive to intervene in a municipality when it does not fulfill an executive obligation in terms of legislation, and examines the impact of this on the autonomy of local government as a sphere of government.

Finally Chapter Eight concludes this paper by looking at the implications of the above on local government holistically.

CHAPTER TWO

2.1. HISTORY OF LOCAL GOVT IN SA

Despite the fact that the apartheid government used local government as the level through which it perpetuated its discriminatory practices and policies, past South African Constitutions said very little about local government.

The South Africa Act of 1909, established the Union of South Africa as well as the a second tier of government in the form of the four provinces of Cape, Natal, Orange Free State and Transvaal, within the union. Section 85 (vi) of the South Africa Act enabled the four provincial councils at that time to make ordinances in relation to “municipal institutions, divisional councils and other local institutions”. As such, it was left to the provincial ccuncils to deal with the establishment of municipal structures. As a result of this, municipal councils that were subsequently established in the four provinces developed distinct similarities and variations. At that time with the exception of Divisional Councils in the Cape province, local government was essentially an urban phenomenon (Ismail and Mphaisa, 1997, p 4).

Further, in terms of section 147 of the South Africa Act, 1909, the Governor-General was vested with the power to administer all matters relating to black South Africans. As a result of this provision, black South Africans were left out of the municipal institutions from the very outset. At the same time, the Constitution of the Union granted the white minority parliamentary democracy while it subjected the black majority to an autocratic administrative rule.

The Republic of South Africa was established in terms of the Republic of South Africa Constitution Act 31 of 1961. Section 84 (1) (f) of this Act authorized provincial councils to legislate on municipal institutions.

South Africa has existed as a unitary state since 1909. In South Africa at that time, the trend was for central government to have strong management tendencies. Within this paradigm, local government was seen as an agent for implementing and enshrining apartheid policies at a local level. Local government was entrusted to the care of a provincial council, and was not seen as an independent form of local self-government.

When the national party came into power in 1948, it ensured that apartheid as an ideology now became institutionalized. The apartheid government created separate racially based local authorities for each of the 4 racial groups. White suburbs were best endowed in terms of resources, facilities, services and business and industrial areas, while living areas for the other 3 racial groups were essentially inferior, dormitory towns.

The Bantu Self-Government Act of 1959 established eight, this was later changed to ten, self-governing states for black South Africans. This had the effect of ensuring that black South Africans were excluded from representation at all levels of government outside of the homelands that were created by the Bantu Self-Government Act.

In essence, urban apartheid policy aimed to achieve three things:

1. the intensification of racial segregation;
2. the controlling of the movement and settlement of black South Africans into urban areas;
3. the reduction of the financial burden that black areas may have had on the white taxpayers.

The apartheid government sought to achieve this through a series of apartheid laws, which had the net effect of :

- undercutting the political rights of Black South Africans outside of the established “homelands”;
- reducing the legal access of black South Africans to land and restricting black South Africans to specified areas.

2.2. LEGISLATION GOVERNING APARTHEID LOCAL GOVERNMENT

In essence, it was the Group Areas Act 41 of 1950 subsequently Act 36 of 1966 (“The Group Areas Act”), which enshrined apartheid policies at local level. The Group Areas Act prescribed strict residential segregation. The Act limited specific residential / group areas as being specified for certain race groups only and insisted on the forced removals of non-white South Africans from areas that had been designated as “white” areas. The Act provided further that areas that had been designated as “African” areas were prevented from attracting industry and in this way deprived these areas from revenue and jobs that could have been gained had there been industrial development.

The Group Areas Act had the effect of ensuring geographic, social, institutional and material division in South Africa, as enshrined by apartheid. In this way the apartheid system damaged the social and economic environments in which South Africans lived.

While municipalities, were established in the former 4 provinces to oversee the needs of the white areas. The structures that were set up for the designated black areas were merely advisory.

A system of Urban Bantu Councils was set up nationally in terms of the Urban Black Councils Act 79 of 1961. These councils were merely advisory and had no power in

any way to improve the conditions of the people they served. As such, they never gained much support from the community.

The Black Affairs Administration Act 45 of 1971 established administration boards for the black areas, and in so doing removed the responsibility of the administration of black areas from white local authorities. These Administration Boards were to assume some of the local government functions for the particular areas for which they were established.

In total there were 22 Advisory Boards set up throughout the country. These advisory boards like the Urban Bantu Councils before them had no policy-making powers. The failure of this system was also due to the fact that these advisory boards were appointed and not elected by the communities. These advisory boards were subsequently renamed Development Boards in terms of the Black Communities Development Act 4 of 1984. These were subject to change once again in 1986 when, due to the drastic changes to provincial governments, the development boards were then renamed the community services divisions of provincial administration.

These development boards, however, were not the only bodies responsible for the administration of local issues in black areas. The Community Council Act 125 of 1977 established community councils, which were elected structures that were responsible for the political accommodation of black people who were living in the urban areas. These structures once again had no powers and no resources of their own, and as such, like the structures that were established before them, failed to gain any political credibility. In 1982, in terms of the Black Local Authorities Act 102 of 1982, the new black local authorities replaced these community councils.

The establishment of black local authorities was problematic from the outset, despite the fact that for the first time in South Africa there were municipal councils for blacks. These structures were politically contentious, and were rejected by the

communities, as they were seen as being racist structures. In addition, black local authorities, unlike their white counterparts were financially in dire straits and highly reliant on national and on provincial government for financial support.

2.3. FINANCIAL BASIS OF APARTHEID LOCAL GOVERNMENT

White local authorities had a financial basis for ensuring that local government in the white areas was functional. The white local authorities received as part of their own revenue rates from fixed property owned in their area of jurisdiction. They also derived income from rendering services like water, electricity and other services, as well as from income on borrowings. In addition, white local authorities also received subsidies for fire brigades, library services and disaster management.

By comparison, black local authorities were subject to firm provincial control, which rendered them highly ineffectual. Black Local Authorities' own revenue sources were supposed to come from the sale of sorghum beer. This however was privatized shortly after the establishment of black local authorities. In addition, black local authorities were to raise revenue from the sale of liquor in the townships and from taxing white employers who employed black labour in certain areas and from the payment of services. The reality was that none of these were effectual and, as such, made black local authorities highly reliant on national and provincial government for financial support.

In addition, all the property in the townships was owned by national and by local authorities. Blacks were not allowed to own property, and despite the attempts in the 1980's to introduce property ownership, these failed. As indicated earlier, the Group Areas Act prevented business and commerce from being established in townships. As a result of this, black local authorities lost out on possible revenue, which they may have gained to their benefit. This added to the legacy of preventing blacks from

owning property had immense negative implications for the revenue base of black local authorities.

Black local authorities mostly charged a flat rate for services. This meant that they were not recovering the full cost of the services that were rendered. On the whole, black local authorities were ridden with problems and the communities, which had no faith in them, questioned their legitimacy.

2.4. COLOURED AND INDIAN LOCAL AUTHORITIES

Similarly, those South Africans who were classified “Coloured” and “Indian” under apartheid laws were also affected by the apartheid policies. Up until 1960 the “Indians” and “Coloureds” in the Cape Province and in Natal enjoyed some representation on the white local councils in those provinces. This was, however, stopped due to the recommendations of the Niemand Commission in 1961.

Subsequent to this a series of Coloured Management and Indian Local Affairs committees were set up. In terms of section 28 of the Former Group Areas Act 36 of 1966, the legislative power of the former provincial councils was extended to include local legislation for the above management or consultative committees. These were known as local affairs committees. As with the structures established for the black areas prior to the advent of the black local authorities, these structures were also merely advisory and never developed as independent bodies. These structures relied totally on the white local authorities to administer services in their areas. As with the structures established in the black areas, these structures were under tremendous pressure from their communities, which questioned their legitimacy.

2.5. LOCAL GOVERNMENT IN THE 1980'S

In terms of the Republic of South Africa Constitution Act 110 of 1983, a tricameral Parliament was established. The tricameral Parliament consisted of:

- the House of Assembly for whites, (178 members) ;
- the House of Representatives for Coloureds, (85 members) ; and
- the House of Delegates for Indians, (45 members).

The 1983 Constitution was based on the following core principles:

- the three houses of Parliament were divided according to population groups, which sat jointly on general affairs and separately on own affairs;
- the concept of own and general affairs divided the functions and services of government along ethnic lines;
- blacks were not to be represented in Parliament.

To a large extent, the changes brought about by the 1983 constitution were a response by the apartheid government, as its authority was beginning to be challenged by the communities in early 1980.

With the introduction of the concept of “own affairs” in the 1983 constitution, the state also introduced 200 new black local authorities with nominal powers. The state also established Regional Services Councils in terms of the Regional Service Council Act 109 of 1985. These councils had a predominantly functional purpose. Their task was to provide optimal and cost-effective bulk services such as water, electricity and street cleaning. This was to be done through co-operation and co-ordination among local governments and communities. The aim of this process was also to supplement local authorities source of revenue and introduce multi-racial decision-making at a local level. The Regional Services Councils were never widely accepted, despite the fact that they had some measurable success in the provision and upgrading of services in the poorer areas. The communities saw the Regional Services Councils as

being structures which reinforced apartheid policies and practices as they were linked to the separate local authorities that had been established for the separate race groups.

CHAPTER THREE

3.1 PROCESS OF CHANGE

By the mid-1980's apartheid local government was facing collapse. Most of the resistance against the government of the day was focused on the structures, which had been created in the Black, Coloured and Indian areas, which the communities felt had no legitimacy to begin with.

The government attempted to reform black local authorities via the introduction of Regional Services Councils and Joint Services Boards, which were established in terms of the KwaZulu and Natal Joint Services Act 84 of 1990. These were aimed at providing additional revenue and facilitating greater consultation between racially segregated local authorities. These attempts at reform were merely cosmetic; at this stage, the damage had already been done.

The Tricameral system ushered in a period of precarious local government financing. Black local authorities were never financially viable, and their introduction lowered the payment of services from the communities (Department of Finance, *The Introduction of an Equitable Share of Nationally Raised Revenue for Local Government*, 21 April 1998).

As a result of the financial vulnerability of black local authorities, central and provincial governments were forced to make emergency grants and loans to local authorities to ensure that at least the most basic of services were maintained. However, in some cases, the systems of provisions failed, and this failure resulted in emergency provisioning from neighboring local authorities, parastatals and even the private sector. The net effect of this was that an inequitable system of transfers evolved, which then had to be reformed in terms of uniform policy principles.

By the late 1980's, most townships and homelands were ungovernable and it was clear that black local authorities would never be viable (White Paper on Local Government, p 23). Organized mass action against the Apartheid City which took the form of organized consumer boycotts, rent boycotts, service boycotts, left white municipalities experiencing the financial impact. As a result of the mass action, negotiations at local level between white municipal structures and black civic representatives began. These initial talks formed the basis for later local negotiation processes (White Paper, *ibid.*, and p 23). The critical issue of "one city, one tax base" could only be realized through national legislation and the need for critical change and for the establishment of a national forum was now imperative

3.2. TRANSFORMATION PROCESS BEGINS

By March 1993, the Local Government Negotiating Forum ("the Forum"), was set up to begin the process of negotiating a framework for guiding the transformation of local government.

By November 1993 the Forum ratified its three principal outputs (Pimstone, 1999, p 5A-3):

1. an agreement of Local Government Finances and Services;
2. the Local Government Transition Act 209 of 1993 ("Transition Act");
3. the provisions of chapter 10 of the Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution"), which dealt with local government.

Together, these 3 agreements were intended, to restructure local government in South Africa. As will be pointed out later in this paper, this was not to be the case. The transition of local government in South Africa is an ongoing process of change.

The hasty negotiations process and the effect of the broader national process, led to duplication and ambiguities in the provisions relating to local government, which resulted in difficulties at the implementation phase. These discrepancies will be highlighted in the body of the paper.

The Agreement on Local Government Finances and Services ("Agreement on Finances and Services"), 20 January 1994, was a statement of intent agreed to between the parties to the negotiations, regarding future financing and service delivery at local government level (Cloete, 1994, p 201).

In essence, the agreement identified the provision of services as a primary goal. The immediate short-term goal was to provide services to meet the individual's basic health and functional requirements. The medium-term goal was to provide services to enable sustainable economic growth in communities and the long-term goal was to provide equal and equitable services to all residents. The agreement called on all transitional local structures to resume, improve, upgrade and extend service provision.

With regard to finances, the agreement provided that all municipal finances were to be based on the principle of "one municipality, one tax base". The agreement stated that transitional authorities were not to inherit the institutional debts of black local authorities, while arrear service charges owed by individuals were to be re-evaluated. In itself the agreement was a step in the right direction and helped start the road to transition.

The Transition Act did not provide a blueprint for change. It merely sketched the process for change in Local Government. The primary role of the Transition Act was to reintegrate the previous racially-based municipal structures in local government's restructuring phases (Pimstone, *ibid*, p 5A-3).

The Transition Act mapped out three phases of transition:

1. The Pre-Interim Phase:

This was the period from the adoption of the Transition Act to the first elections for local government in terms of the Interim Constitution. This phase lasted from February 1994 until the general elections were held. It saw the creation of negotiating forums and the appointment of temporary councils until the local government elections took place. In this phase, restructuring was to occur in accordance with the Transition Act;

2. The Interim Phase:

This was the period from the local government elections in November 1995 until a new local government system was designed and ratified. This phase was governed by the principles embodied in chapter 10 of the Interim Constitution, certain provisions of the Transition Act and the Agreement on Finances and Services.

3. Final Phase:

The third and final phase was to be governed by the provisions of the final constitution.

3.3 THE LOCAL GOVERNMENT TRANSITION ACT 209 OF 1993

The Transition Act provides for the various arrangements that will apply during these different phases.

The Transition Act set out to provide for the establishment of appointed transitional councils for the pre-interim phase. Part IV of the Transition Act specifically deals

with the pre-interim phase. Section 6 provides that if the Administrator is satisfied that a forum established before or after the commencement of the Act, was established in accordance with the principles set out in Schedule 1 of the Act, then such forum shall be recognized and shall be deemed to be a forum for purposes of the Act. The principles set out in Schedule 1 relate to the area of a forum and include historical and economic bounndness, commercial and industrial linkages, service provision and commuting patterns.

One of the aims of the process was also to integrate those who had previously been excluded from being representatives in local government processes. As such, forum members were required to indicate whether they were part of a statutory component comprising representatives of existing statutory bodies or representative organizations, or a non-statutory component comprising representatives of any approved body having an interest in local government re-structuring (Pimstone, *ibid.*, P 5A-5).

Once a forum was given recognition, it was deemed to be a negotiating forum for the purposes of the Transition Act. Section 7 of the Transition Act sets out the matters on which the negotiating forum was to negotiate and what its critical functions were. Essentially, these were aimed at setting up transitional local structures that would function until before the first democratic elections.

The Transition Act set out further to provide for the delimitation of areas of jurisdiction and the election of transitional councils in the interim phase. The Interim Phase is dealt with in terms of Part V of the Transition Act. Transitional structures located in non-metropolitan areas were called Transitional Local Councils and those in metropolitan areas were called Transitional Metropolitan Councils, these were then further sub-divided into transitional metropolitan sub-structures.

The role of the Administrator was to consider representation from the relevant structure, as well as recommendations from the Local Government Demarcation Board. The Demarcation Board was an entity set up in terms of section 11 of the Transition Act. The primary role of the Demarcation Board was to investigate and make recommendations in matters of demarcation of any area affecting local government.

Having considered these representations, the Administrator was to delimit the areas of jurisdiction of these structures and determine their powers and duties. In this respect the Administrator had to provide that transitional metropolitan councils powers and duties had to encompass at least those powers and duties that were set out in Schedule 2 of the Transition Act.

The Administrator also had to determine the number of seats in council and delimit the transitional councils and sub-structures into wards. This exercise was provided for in terms of Schedule 3 of the Transition Act. This provided that where the area of jurisdiction of any transitional metropolitan structure or transitional local council included former non-black local authorities and former black local authorities, no one area was to receive less than half of the wards allocated.

After having made the delimitation and determination, the Administrator was to incorporate the provisions on these into a proclamation, and exercise the powers conferred on him in terms of the Act.

Section 9 of the Transition Act provides for the elections of transitional councils, and established the broad framework for the first set of local elections.

The Transition Act goes further to provide for transitional provisions to assist this process. These transitional provisions were contained in sections 15 and 16 of the Act. Section 16(5) deals with the issue of council resolutions. It provides that any

resolution of the transitional structure pertaining to its budget shall be taken by two thirds majority of members, while any resolutions pertaining to town planning is to be taken by the majority of the members of the transitional structure. The issue of budgets will be discussed later on in the paper. The Act provides further that should the transitional structure fail to approve or prepare a budget by the designated date, this may be reason for possible provincial intervention into the transitional structure.

Section 16(6) of the Act provides for the election of an executive committee for the transitional structure, in accordance with the system of proportional representation. It is the responsibility of the executive committee when elected to exercise the powers and functions as determined.

3.4. PROCLAMATION R 58 AND R59

The reality on the ground, however, was that the Act despite its intentions was being manipulated. In an attempt to prevent any such abuse, section 16A was inserted into the Transition Act in November 1994. The provision empowered the President to amend the Transition Act by way of proclamation. These proclamations would have to be approved by select committees responsible for constitutional affairs of the National Assembly and the then Senate. At the time of the passing of this insertion there were no objections to the inclusion.

The President issued a number of proclamations. In 1995, two further proclamations were issued, Proclamation R58 of 7 June 1995 and Proclamation R59 of 8 June 1995

The effect of these proclamations was to:

- transfer the power of appointment of provincial committee members to national government,
- negate the appointment of two new members by the Western Cape government,

- invalidate decisions taken by Provincial Committee to approve a demarcation proposal which appeared to have been politically motivated, and
- prevent the Provincial Committee from taking any decisions until such time as the national ministerial appointment had been done.

The Western Cape challenged Proclamations R58 and R59 in Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa 1995(4) SA 877 (C), 1995 (10) BCLR 1289 (CC). The court held that the Transition Act, as the legislative framework for municipal restructuring was distinguishable from the types of laws contemplated under section 235 that could be assigned to provinces to deal with. In essence, the court held that Parliament could not, via the device of section 16A, bypass the provisions of the Interim Constitution to amend the Transition Act.

3.5. THE LOCAL GOVERNMENT TRANSITION ACT SECOND AMENDMENT ACT 89 OF 1995

The first amendment to the Transition Act came with the Local Government Transition Act Second Amendment Act 89 of 1995 ("Transition Second Amendment Act, 1995"), which commenced before the holding of the first local elections. In essence, the Transition, Second Amendment Act, 1995 was to provide a basic framework for rural local government, which, up until that point, had not been provided for in the Transition Act.

Pimstone (*ibid.*, p 5 A-10) notes that this amendment reflected that the drafters of the Transition Act adopted a rather ad hoc approach, where they responded to municipal exigency rather than anticipated it. This in itself could be construed as being to the detriment of the broader developmental process of local government.

Part VA was introduced in to the Transition Act. In essence, the amendment served to define the transitional institutional types of rural municipal government. It made mention of three such types, viz. District councils, transitional representative councils and transitional rural councils.

3.6. THE LOCAL GOVERNMENT TRANSITION ACT SECOND AMENDMENT ACT 97 OF 1996

The amendments introduced by the Local Government Transition Act, Second Amendment Act 97 of 1996 ("Transition Second Amendment Act, 1996") were significant. The transitional structures were re-titled "metropolitan councils" and "metropolitan local councils". In accordance with the developmental vision of local government as set out in the White Paper process and envisaged in the draft of the final constitution, the amendment set out to insert features of municipal developmental and redistributive roles that were close to this ideology.

Section 10 (C) of the Transition Second Amendment Act, 1996 outlines three principal objects of metropolitan councils, these being:

- the promotion of integrated economic development;
- the equitable redistribution of resources;
- the equitable delivery of services.

One of the criticisms of the amendment was that meaningful expression was not given to these commitments, and as such, they come across as being mere statements of intent (Pimstone, p 5A-11).

3.7. INTERIM CONSTITUTION

The Interim Constitution came into effect after the promulgation of the Transition Act. Section 245 of the interim constitution mediated the relationship between these two pieces of legislation in that it laid down that local government was not to be restructured other than in terms of the Transition Act. This would be the case until the local elections were held in terms of the Transition Act.

The Transition Act provided further that restructuring that was to take place after the local elections, would take place in accordance with the principles set out in Chapter 10 of the Interim Constitution, which was the Chapter on Local Government and the Interim Constitution as a whole.

The Transition Act and the Interim Constitution were separate and by no means did the Interim Constitution incorporate the Transition Act. In addition, the Transition Act and the Interim Constitution were not to be interpreted in the same way. This position was clarified in Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

At the outset, it should be noted that the Interim Constitution in its constitutional principles talks about “levels” of government. By comparison, the final constitution refers to “spheres” of government. This is an important distinction, which will be elaborated on later in the paper.

Chapter 10 of the Interim Constitution lays down the policy framework for the interim phase of local government transformation. It has, however, been criticized as being unelaborative and poorly drafted (Pimstone, p 5A-16). Despite the poor drafting, chapter 10 had the effect of extending constitutional recognition to local

government and vesting local government with a range of powers. This criticism is illustrated by the following point, that while the interim constitution makes mention of autonomous local government, it does not lay out or define the limits / boundaries of that autonomy. It is worth noting that, by comparison, the final constitution, as will be indicated in the body of this paper, tends to be more detailed and provides greater clarity around the structure of local government.

In Fedsure v Greater Johannesburg Metropolitan Council 1999 (1) SA 374 (CC) the constitutional court observed that :

“under the interim constitution (and the 1996 constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative and executive powers recognized in the Constitution itself....

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

Section 174 of the Interim Constitution provided that local government was to be established for areas demarcated by law. Section 174(3) goes on to speak of local government as being “autonomous”. It mentions the power of local government to manage its own affairs, within the limits prescribed by law.

Meyer (1999, LAWSA, p 165) points out that for the first time in South African history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.

Pimstone (ibid., p 5A-16) sees the description of local government as autonomous as being as “unfortunate choice of words” , as local government is not truly autonomous.

The powers and functions of local government were to be determined by law. Section 174(3) of the Interim Constitution does, however, provide that local government, to the extent determined by any applicable law, had to make provision for community access to water, sanitation, transportation, electricity, primary health care, education, housing and security within a safe and healthy environment.

Pimstone (ibid. p 5A-17), points out that this shortlist of municipal obligations was later to be radically expanded on in the broad provision of the chapter on local government in the final constitution. This expansion of the municipal obligations was done in the context of the social and economic rights introduced in the Bill of Rights.

In terms of the structure of local government, the Interim Constitution restated section 16(5) a of the Transition Act relating to the passing of council resolution and made provision for a municipal council to elect an executive committee to perform powers and duties as determined by council.

The Interim Constitution provided further that municipal administration specifically was to be governed in terms of the principles advanced in section 178(1). These principles were later on developed, broadened and applied to all government spheres by section 195 of the Final Constitution.

Further, under section 178(2) and subject to the recommendation of the Finance and Fiscal Commission, municipalities were empowered to impose and recover rates, levies, fees, taxes and tariffs necessary to exercise powers and perform functions. This ability of municipalities to impose and recover money, was subject to the

proviso that they were based on a uniform structure for the municipal jurisdictional area.

On the financial issue, section 178(3) entitled municipalities to an equitable share of funds by provincial governments. In reality, the funds were from national government, and provincial government merely acted as a conduit through which the funds were channeled utilizing the scheme under section 158. The equitable share of funds however was found to be unsuitable and resulted in the uneven allocation of funds between the three spheres. The unfortunate experience here, was the motivation behind the transformation of the intergovernmental fiscal system in chapter 13 of the final Constitution.

In terms of the functioning of local government, section 179 very briefly addressed the issue of local government elections. It merely stated a commitment to democratic elections, at intervals of between 3 and 5 years, the inclusion of both ward and proportional representation, voting entitlements and electoral qualifications. What then happened at the time of elections drew near was that the details of the local government electoral arrangements were developed entirely through the Transition Act and via MEC and Ministerial powers exercised there under.

The first election did not mark a departure from old systems of local government, although it brought in proportional representation in that for the first time in South Africa's history there was a democratic national election process in which all South Africans participated. But the ushering of a democracy did not alter the functioning and operation of local government, which continued to function under the old systems of local government.

Even if the vision was for strong local government, the negotiations for the Interim Constitution did not achieve this. The efforts made in Chapter 10 of the Interim Constitution attempted to guarantee a vibrant local government, with autonomy.

These processes were, however, undermined by the inclusion of local government in the functional area of provincial legislative competencies. This undermined the status of local government as a sphere of government, as it remained under the functional area of the provinces and, as such, did not appear to be truly autonomous.

It would appear that the only provision in the Interim Constitution that had any real effect, was section 245 which provided that national legislation, being the Transition Act, would govern the transition process up to the end of the interim phase.

The Interim Constitution was designed as a bridge between the old and the new order. The interim constitution was intended to regulate the governance of the country until such time as the Constitutional Assembly had drafted a new constitution.

The Interim Constitution set out the transitional steps that were to be taken until the final constitution was put into place. The Constitutional Assembly had two years within which to adopt the draft constitution. The constitution had to be adopted by a majority of two-thirds of the Constitutional Assembly's members. In addition, the new draft constitution had to comply with a set of constitutional principles agreed to by the negotiating parties. The 34 constitutional principles were contained in Schedule 4 of the Interim Constitution, these set out the boundaries within which the negotiators had to operate

The Interim Constitution set out that the draft constitution would not have any legal force until such time as the Constitutional Assembly had certified that all the provisions of the new draft complied with the constitutional principles laid out.

Many of the Constitutional Principles referred to local government in conjunction with national and or provincial levels of government.

The Constitutional Principles of significance to local government are the following:

- Constitutional Principle X (“CP X”), provided that formal legislative procedures shall be adhered to by all levels of government.
- Constitutional Principle XVI (“CP XVI”), provided that Government shall be structured at national, provincial and local levels.
- Constitutional Principle XVII (“CP XVII”), provided that at each level of government there would be democratic representation.
- Constitutional Principle XXIV (“CP XXIV”), was perhaps the most important for local government. It provided that there would be a framework for local government powers, functions and structures set out in the constitution. It provided further that the powers, functions and other features of local government were to be set out in statutes or in provincial legislation.
- Constitutional Principle XXV (“CP XXV”), provided that National Government would have fiscal powers which would be defined in the Constitution. The framework for local government as set out in CP XXIV would make provision for the appropriate fiscal powers and functions for different categories of local government.

Nearly two years after the inauguration of the Government of National Unity, the final constitution was adopted. Once adopted the Constitution had to be certified the Constitutional Court.

3.8. CERTIFICATION PROCESS

Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), was the first time that the constitution was taken to the constitutional court to be certified.

The Constitutional Court found that the first draft failed to meet the requirements of CP XXIV, in that it did not provide a framework for local government. In its judgment, the court said that what the new text should do is:

- set out the different categories of local government that could be established by the provinces and a framework for their structures;
- set out an overall structural design or scheme for local government within which local government structures are to function and provinces are entitled to exercise their establishment powers;
- set out how local government executives are to be appointed;
- set out how local governments are to take decisions;
- set out the formal legislative procedures that have to be followed.

Pimstone (*ibid.*, 5A-20, footnote, 2) points out that the judgment in this regard necessitated wholesale amendments to the final text. This also led to the inclusion of the three categories of municipality in section 155 of the final text.

Pimstone (*ibid.*) is of the opinion that the court's reasoning in this regard was shallow, in that it made no attempt to give meaning to the word "structure" or "category" in the context in which it was used. In addition, Pimstone believes that the court failed to capture the distinction made by CP XXIV, which distinguished between a framework for powers, functions and structures and their comprehensive delineation, which was the essence of this issue. I agree with Pimstone in this regard and would go further to say that a thorough interrogation by the court of the issues at this early stage would have positively influenced the development in this area.

Further CP X was infringed in that CP X required that in the new text there be a strong adherence to formal legislative procedures at all levels of government.

3.9. SECOND CERTIFICATION JUDGEMENT

Based on the constitutional court's certification judgment, the original text was amended and submitted to the court for certification. The court in Ex parte Chairperson of the Constitutional Assembly : In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), held that the issues outlined below met the concerns that the court had expressed in its first certification judgment around local government issues.

The issues addressed by the court were:

- the introduction of the three categories of municipality under section 155;
- the affirmation that Parliament was to set criteria for determining where different categories applied and how the powers should be divided between categories,
- the retention of national power to determine type of municipality;
- the retention of provincial power to establish municipality; and
- the tighter outlining of internal procedures,

As stated above in its first certification judgment, the court held stated that:

“at the very least the requirement of a framework for [local government] structures necessitates the setting out in the [new constitution text] of the different categories of [local government] that can be established by the provinces and the framework for their structures” at paragraph 301.

The court held that the draft constitutional text did not comply with CP XXV in that it did not provide for the appropriate fiscal powers and functions in respect of the different categories of local government and CP X, since it did not provide for formal legislative procedures to be adhered to by legislatures at local government level.

In the second certification judgment no objections were raised with regard to CP X and CP XXV. The court expressed satisfaction that the Constitutional Assembly had ensured compliance with the principles.

The court had to decide on an objection that there had been no compliance with CP XXIV. The contention was that CP XXIV referred to “powers, functions and structures” when it deals with framework. As such it was envisaged that the principle contemplated that the structures of local government would be dealt with in more detail in the final constitution.

The court disagreed with the argument outlined above and held that the detail of local government structures is a matter for legislation. Some academics (Cowan, 1997, Annual Survey of Law, P 14, Juta & Co) are of the view that this approach of the court is commendable as it would be far too cumbersome for the constitution to include detailed descriptions of the structures and functions necessary for the transition of local government. CP XXIV had thus correctly left this as a matter for legislation.

An objection was raised to Schedule 6, section 26 (1) (a) which states that:

“Notwithstanding the provisions of ss 151, 155, 156 and 157 of the new constitution –

- (a) the provisions of the LGTA as may be amended from time to time by national legislation consistent with the new constitution, remain in force until 30 Apr. 1999 or until repealed whichever is sooner”

In essence, the contention was that this section did not comply with the CP IV. According to the court, the provisions of the LGTA were not immune from constitutional review. The court held that they remain subject to constitutional review, but not subject to the framework provisions of sections 151, 155, 156 and 157 until 30 April 1999.

The process of change began in the early 1980's and was by no means complete when the certification process had been done. The transformation of local government still had a long way to go before one could say that local government had been transformed.

Despite its poor drafting, one of the achievements reached in this process of change was the constitutional recognition in the interim constitution of local government and its powers and functions.

The Constitutional Principles formed the framework for the chapter on local government that was to follow. It appears that what the constitutional principles were aiming to achieve was a chapter that provided a broad framework for local government powers, functions and structures, but that the powers, functions and other features of local government that determined its operation would be left to national legislation to determine.

It is arguable that one of the reasons for leaving the detail regarding local government to be provided for in national legislation was that the constitution aimed to elevate the status of local government. Local government had previously been the subject of superior legislatures. The shift in the constitutional process was to protect local government in terms of the constitution. However, local government did not have the pre-established mechanisms in place that would immediately allow it to assume the role envisaged for it in the constitution. As such, the detail relating to the functioning and structuring of local government had to go through the legislative drafting process, and be discussed by all stakeholders. Once this had been done, then would the details relating to the function and structure of local government be laid out in national legislation.

Thus what the constitution does is indicate the broad framework, as part of its constitutional commitment to elevating the status of local government and leaves the detail of the functioning of local government to national legislation to determine.

CHAPTER FOUR

4.1 FINAL CONSTITUTION

Local government was to be restructured over a period of time. During that time, restructuring was to be a matter of constitutional restraint. The constitution recognized this, and therefore excluded the Transition Act from the operation of the framework provisions contained in sections 151, 155, 156 and 157 of the final Constitution. This is clear from item 26(1)(a) of Schedule 6 of the Constitution. This position was clearly stated in Eastern Metropolitan Council of the Greater Johannesburg Transitional Metropolitan Council & others v The Democratic Party and others, 1997 (8) BCLR 1039 (W).

Schedule 6 contains Transitional Arrangements, these transitional arrangements are introduced into the Constitution under section 241, which provides that “ Schedule 6 applies to the transition to the new constitutional order established by the Constitution, and any matter incidental thereto”.

In effect, this section indicates that the constitution sets out to establish a new constitutional order, but that before the new constitutional order there will be a period of transition from the existing order at the time to the point when the new order is established. That period of transition is to be governed by Schedule 6. As such Schedule 6 is intended to facilitate the process of transition.

In MEC for Development Planning and Local Government in the Provincial Government of Gauteng v the Democratic Party and others CCT, 33/97, the court pointed out that the drafters of the new constitution must have been aware that some of the measures that were to apply during the transition would differ from those envisaged for the new constitutional order.

However such a difference by itself does not warrant the assertion that the provisions applicable in the transitional phase are in conflict with the constitution. The relevant provision has to be analyzed in the context of the constitution. The new constitutional order for local government is detailed in chapter 7 of the new constitution.

In the context of the final constitution, item 26 deals specifically with the transitional period, and as such is applicable during that transitional period. Conflicting provisions set out in chapter 7 are not applicable until the transitional period has expired.

4.2 RATIONALE FOR INCLUSION OF CHAPTER ON LOCAL GOVERNMENT

Local Government is dealt with in Chapter 7 of the Constitution. Although the theory of strong local government existed, it did not truly evidence itself in the constitution writing process until the adoption of the final constitution in 1996 (Mastenbroek, 1996, p 233). Given the history of local government in South Africa it is worthwhile to examine the inclusion of local government in the constitution in the light of the prevailing political debates at the time.

The National Party who during their reign had ensured a local government that was subservient to national and provincial government and did not put strong local government as a primary demand during the negotiations. Instead, what was of importance to the National Party was strong provincial government, the underlying notion being that if local government was to be afforded an elevated status it would be at the cost of provincial government's powers.

In effect the Constitutional Court in the first certification judgment, In re Certification of the Constitution of the Republic Of South Africa 1996 (4) SA 744 (CC), pointed out that the constitution as adopted by the constitutional assembly was adopted because provincial governments influence over local government was reduced. While the Interim Constitution had provided that local government fell within the functional area of the provinces, the final constitution did away with such a provision and affirmed that local government was a sphere of government, and not subject to the control of any of the other two spheres of government.

The African National Congress ("ANC"), on the other hand, was trying to balance the need for strong central government with the need to bring the government closer to the people, a need which was of fundamental importance to the party.

Mastenbroek (1996, p. 239) traces the historical evolution of the party commitment to local government and points out that the Freedom Charter, which had been adopted by the party in 1955, set out the ANC's policy concerning the structure and functioning of a future democratic state.

The Charter stated that "all bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government".

In 1988, the ANC published its *Constitutional Guidelines for a Democratic South Africa* (ANC, 1992:15), in which it favoured a strong centralized state. The Guidelines clearly stated that South Africa should be a unitary state. It went further to state that:

"Sovereignty shall belong to the people as a whole and shall be exercised through one central legislature, executive, judiciary and administration. Provision shall be made for the delegation of the powers of the central authority to subordinate administrative units for the purposes of more efficient administration and democratic participation. "

In effect, this was saying that although there would be a unitary state, there would be devolution of power to allow for better operation and greater democratic participation.

In 1992 the ANC, in its draft discussion document on ANC Regional Policy identified two possible options for the status of local government within the broader state structure. The first option was for the law regarding local government to be in the form of a national statute. The second option was to entrench local government in the constitution, and possibly to protect the powers afforded to local government from the central state and the regions. This draft document was significant as it marked the beginning of the shift in thinking regarding the status of local government within the broader state.

This was clearly evidenced in the ANC election manifesto, which was adopted by its national conference in 1992. The manifesto stated that :

“ the ANC believes that there was a need for strong and effective local government to replace the racist, sexist, undemocratic, tribalist and corrupt structures which currently exist. As a result of large disparities between local areas and regions, a strong central government is required to address the legacy of apartheid and to ensure a more balanced form of local development.”

The ANC strived to achieve national unity and a strong central government as a primary goal. For the ANC the transformation of local government had to be viewed within the broader context of liberation, and as such to the ANC there exists no real tension between having achieving national unity and ensuring that there would be a strong national government.

It was unfortunate, however, that this commitment to strong local government did not evidence itself in *neither the interim constitution nor the Transition Act*. Interestingly, the Constitutional Principles, which formed the dictates in terms of which the final constitution was to be written, were vague and open-ended. While CP XVI stated that government had to be structured at national, provincial and local level, CP XXV left the powers, functions and other features of local government as a matter for national and or provincial legislation.

By the time the ANC came to negotiate the final constitution, it realized that it was now time to put its thinking regarding the status of local government into place. The ANC unequivocally demanded the inclusion of strong local government in the final constitution. While the ANC was prepared to agree on some level of decentralization, it would only do so provided that local government and not the provinces were the major beneficiaries of the decentralization.

Mastenbroek (1996, p 240) argues that the reasons for the evolvement of ANC thinking that led to its strong support of local government can be located in two discourses that were operative at the time:

- the first being that by the time the ANC took office, it recognized and clearly stated in the Reconstruction and Development Program White Paper, that in order to have development it was necessary to involve and empower the people so as to bring the government closer to the people;
- secondly, was the fact that “the people” had to a large extent fought the struggle against apartheid. The civic movements and participation at grass-root levels were a fundamental component of the struggle.

In effect then, for the ANC, the elevated status of local government flows from the above two.

The net effect of the negotiation process led up to the eventual inclusion of the chapter on Local Government in the Constitution.

4.3 CONSTITUTIONAL PROVISIONS

4.3.1 SECTION 151

Section 151 of the final constitution recognizes local government as a sphere of government. Chapter three of the final constitution deals with co-operative government and clearly establishes the institutions of government as being national, provincial and local spheres of government (Meyer, P 169). Unlike the interim constitution, which referred to levels of government, the final constitution entrenches the notion of autonomous spheres of government, this is to emphasize the co-operation between the three spheres.

The recognition of local government as a sphere of government needs to be explored as it has tremendous implications for local government historically in South Africa. By providing for local government as a sphere, local government is afforded constitutional protection and as such cannot be abolished by either national or provincial government. Further, it also emphasizes the non-hierarchical structure of the three spheres of government (De Villiers, 1997, p 471).

The notion of a “sphere” of government is first introduced in section 40 of the final constitution. Section 40 provides that the government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated. Section 41 (g) elaborates on this further by providing for the geographical, functional and institutional integrity of each sphere. Section 43 then goes on to accord to each sphere a legislative function, section 43 (c) specifically, vests the legislative authority of local government in the Municipal Councils, subject to the provision of section 156. Section 156 provides that a municipality may make by-laws for the effective administration of the matters which it has the right to

administer. As such, the legislative authority of municipalities is limited to the extent set out in section 156.

Chapter three then creates the backdrop for the provisions in Chapter Seven, where the concept of local government as a sphere is taken and made central to the status of local government and how it is dealt with in the Chapter.

Under the apartheid government, the notion of tiers of government was used to emphasize the hierarchical division of government power. In the new constitution, the use of the term “sphere” is used to mark the shift from the former hierarchy to a government in which each sphere is seen as having equivalent status. Some academics, for example Pimstone (*ibid.*, p 5A-27), have indicated that for local government *this is an idealized conception taking cognizance of the reality of the constitutional distribution of powers, and the present incapacitated state of most local government structures.*

Nonetheless, the implication of affording local government the status of a sphere is important and assures local government of more independence in decision-making. Along with being afforded the status of a sphere of government, local government also has to fulfill the constitutional obligations, which have now been placed on it. As a sphere of government and the level of government closest to the people local government has been tasked with fulfilling the social and economic “promises” that have been made in Chapter Two, which is the Bill of Rights, of the final Constitution.

Local government consists of municipalities, which in terms of section 151 of the final constitution will have to be established throughout the Republic. Municipalities are the entities which carry out the obligations placed on local government as a sphere of government.

Each municipality is run by Municipal Council, which in terms of section 151 is vested with the executive and legislative authority of the municipality. Further, a municipality has the right to govern on its own initiative the local government affairs of its community. This, however, is subject to national and provincial legislation, as provided for in the final constitution. In terms of the role of national and provincial government, section 151(3) states that national and provincial government may not impede the ability of a municipality or right to exercise its powers or perform its functions.

Section 151 as a whole marks a considerable shift in the status that is afforded to local government and is viewed as one of the more progressive achievements in our constitution. By comparison, most other countries, with the exclusion of India and Germany, leave local government as an issue to be dealt with at a provincial level. In South Africa, local government derives its powers through section 151 and is protected by the constitution. The combination of the notion of local government as a sphere of government and its co-existence along with the other spheres of government in the spirit of co-operative government marks the beginning of a radically new shift for local government in South Africa.

Rautenbach (Ch 12, P 264) correctly points out that, in principle, as many powers and functions as possible should be delegated to local government. This will, however, be futile if local government does not have the expertise and financial and administrative infrastructure to perform the functions and exercise the powers that have been allocated to them. One of the major challenges facing local government is being able to deliver on its constitutional mandates.

In Germany, on the other hand, the federal constitution protects the institution of local government as the third tier of government. In terms of article 28 (2) of the German constitution, local governments are guaranteed the right to regulate on their own responsibility all affairs of local community within the limits set by statute. The

federal constitution does, however, leave the detail of the organization, powers and functions of local government to the respective provincial (*Lander*) constitutions to deal with. The only condition imposed on the *lander* in terms of local government is the internal organization of their institutions – on a provincial and on a local level – must conform to the principles of a republican and democratic society (De Villiers, 1997, p 476).

Belgium (De Villiers, 1997) has for the past three decades undergone transformation from unitary to a federal form of a state. This has had an impact on local government. Previously parliament was supreme, this then formed the basis for governing process. Now under the new form of constitutionalism, there is an emphasis on communities. In Belgium the state is made up of three *geweste* [communities] organized along language lines. There are 589 local governments / *gemeentes*. The institution of local government, the boundaries of local government and the provinces, and their powers are protected by the federal constitution. As such, these cannot be altered by the legislation of the *geweste*. The Local Government Act and Provincial Act fall under the powers of the federal government. The powers and functions of local government are not explicitly defined, but all matters of interest to local government fall within their powers. Typical matters that are allocated to municipalities would include sewerage, roads, gas, water etc.

In the three constitutions examined above, local government is protected as a separate level of government but the role of provincial government in defining the actual powers and functions of local government differ. It would appear, however, that Belgium is the most centralist, because local government is a national function. In Austria and Germany, local government is left to a provincial constitution and provincial legislation to deal with (De Villiers, 1997)

It appears that our final constitution in South Africa has gone a long way to protect local government as a sphere of government. By comparison, the legal framework

afforded to local government under the South African constitution appears extremely progressive and very promising. However, the true test for the success and achievements hailed by the final constitution will be at the implementation phase, which will only be effective after the local government elections

4.3.2. SECTION 152

Section 152 of the final constitution sets out the specific objectives for local government. These have been described (Pimtone, *ibid.*, p 5A-33), as being a loose statement of the rationale of local government and in essence provide an overarching set of obligations to be fulfilled by local government.

The obligations set out are as follows:

- to provide democratic and accountable government for local communities. (This is a recognition of the fact that for democratic governance to be realized there has to be participation, and representation by the local community);
- to ensure the provision of services to communities in a sustainable manner;
- to promote social and economic development;
- to promote a safe and healthy environment; and
- to encourage the involvement of communities and community organizations in the matters of local government. (One of the motivations behind the involvement of communities is also to involve communities in the development of their own living environment).

It is clear from the above, that local government has to provide services and promote development.

The section goes further to state that municipalities must strive, within their financial and administrative capacity to achieve the objects set out above.

In essence, the constitution attempts to address the imbalances of the past and places an obligation on local government as the level of government closest to the people, to deliver on the most basic needs of citizens, and more specifically to ensure that all South Africans receive services in a sustainable manner.

4.3.3. SECTION 153

Section 153 deals with the Developmental Duties of Municipalities. Section 153 provides that “a municipality must structure and manage its administration and budgeting processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.” The section makes it clear that the development imperative must permeate all aspects of local government. In addition the section sets out how municipalities should go about fulfilling the constitutional mandates placed on them.

It may be noted at this stage that a similar provision to section 153 is contained in the Transition Act. Section 1OG(1)(d) provides that “every municipality shall structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and promote social and economic development within its area of jurisdiction.”

The Transition Second Amendment Act, 1996 further places an obligation on a municipality to compile an integrated development plan, which is a plan aimed at the integrated development and management of the area of jurisdiction of the municipality. The municipality must also prepare a financial plan in order to be able to give effect to the plan. In addition, in preparing the annual budget the municipality must ensure that the budget is in accordance with the integrated development plan.

It appears, then, that the development obligation placed on local government should be its primary aim to achieve and municipalities should ensure that they are structured in a way that makes development achievable.

Section 154 deals with municipalities in co-operative government and is dealt with in Chapter 5 of the paper.

4.3.4. SECTION 155

Section 155 deals with the establishment of municipalities. Section 155 (1) outlines that there are three categories of municipalities:

- (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area;
- (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls;
- (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

Section 155 (2) provides that National Legislation must define the different types of municipality that must be established within each category. Section 155 (3) goes further to provide that National Legislation must:

- (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and C;
- (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
- (c) subject to section 229 (which is the section dealing with municipal fiscal powers and functions), make provision for an appropriate division of powers and functions between municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

Section 155(3) goes further to provide that the legislation envisaged above must take into account the need to provide municipal services in an equitable and sustainable manner. In this way one is able to trace the point made earlier that the developmental objectives set for local government in section 152 permeates the functioning of local government and how it is envisaged in chapter seven.

The Municipal Structures Act, No. 117 of 1998 ("Structures Act") aims to do just that. The Structures Act is viewed as having given the impetus to moving towards the final phase of local government transition (Meyer, 1999, p 176).

The purpose of the Structures Act is to:

- (a) provide for the establishment of municipalities in accordance with the requirements relating to categories and types of municipality;
- (b) establish criteria for determining the category of municipality to be established in an area;
- (c) define the types of municipality that may be established within each category;
- (d) provide for an appropriate division of functions and powers between categories of municipality;
- (e) regulate the internal systems, structures and office-bearers of municipalities;
- (f) provide for appropriate electoral systems;
- (g) provide for matters in connection therewith.

Section 2 of the Act provides that all metropolitan areas must have category A municipalities. It provides that an area must have a single category A municipality if that area can reasonably be regarded as:

- (a) a conurbation featuring;
 - (i) areas of high population density;
 - (ii) an intense movement of people, goods and services;
 - (iii) extensive development; and
 - (iv) multiple business districts and industrial areas

- (b) a center of economic activity with a complex and diverse economy;
- (c) a single area for which integrated development planning is desirable; and
- (d) having strong interdependent social and economic linkages between its constituent units.

An area that does not comply with the criteria set out above must have municipalities of both category B and category C and is dealt with under section three of the Structures Act, which provides that non-metropolitan areas will have a combination of category B and C municipalities (Meyer, 1999, p 176).

The Structures Act through the sections outlined above, addresses section 155 (3) of the final constitution by establishing the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C.

Section 4 of the Structures Act then provides that the minister responsible for local government must then apply the criteria outlined above and determine whether an area must have a single category A municipality or whether it must have municipalities of both category B and category C. This however may only be done after the Minister responsible for local government has consulted with the MEC for local government in the particular province concerned, the Demarcation Board, the South African Local Government Association ("SALGA") and organized local government in the province.

It should be noted that the Municipal Structures Act has been amended by the Municipal Structures Amendment Act 58 of 1999, assented to on 14 January 2000.

The Amendment Act seeks to amend the principal Act so as to:

- vest the power to determine whether an area must have a single Category A municipality or whether it must have both category B and C in the Municipal Demarcation Board.

The amendment was brought about after the Constitutional Court challenge to the Structures Act by the Western Cape provincial executive and the Kwa-Zulu Natal provincial executive. The constitutional court found in this case that the determination of municipal boundaries and the determination of the category of municipalities are linked, as the Demarcation Board can only determine boundaries once it knows what it is determining the boundary for and what category of municipality is being dealt with. As such the amendment to the Act was made, to allow for the Demarcation Board to determine whether an area must have a single Category A municipality or whether it must have both category B and C in the Municipal Demarcation Board, and in doing so to only consult with the Minister responsible for local government.

Section five of the Structures Act provides that if the minister determines that an area must have a single category A municipality, then he must declare that area as a metropolitan area. This should be done by notice in the Government Gazette. When declaring an area a metropolitan area, the Minister is to designate the area by identifying the nodal points of the area. In terms of section 5 (2) it is left to the Demarcation Board to determine the outer boundaries of that area.

The Structures Act defines the types of municipality that may be established within each category according to executive structures, this is dealt with in section 8 – 10.

In the recent constitutional challenge to the Structures Act brought by the Western Cape and Kwa-Zulu Natal provincial executives, the constitutional court clarified the scheme of constitutional powers in relation to the establishment of new municipalities as being that :

- national government establishes the criteria for determining the categories of municipalities in terms of section 155 (3)(a) as well as the criteria for demarcation in terms of section 155 (3) (b)
- national government defines the different types of municipalities that can be established within each category of municipality, this is in terms of section 155 (2);
- the Municipal Demarcation Board, established in terms of the Municipal Demarcation Act 27 of 1998 ("Demarcation Act"), determines municipal boundaries in terms of section 155 (3) (b); and
- provincial governments determine the types of municipality that must be established in their province in terms of section 155 (5) and establish municipalities in accordance with national legislation in terms of section 155 (6).

The Constitutional court in this case found that section 13 of the Structures Act which empowers the Minister to determine guidelines, which the MEC must take into account when establishing a municipality, was inconsistent with section 155 (5) of the final constitution in that it prescribes to the provinces how they must exercise a power which falls within their own constitutional competence. In this way the constitutional court upheld the provinces assertion of autonomy with regard to choosing the types of municipalities to be established in the province.

The Structures Act in section 8-10, addresses the constitutional requirement set out in section 155 (2), which stipulates that national legislation must determine the types of municipalities which may be established within each category of municipality.

Section 7 of the Structures Act sets out the different municipal systems or combinations of the municipal systems in terms of which the different types of municipality within each category of municipality are defined.

The five systems are as follows:

- (a) section 7 (a) provides for the collective executive system, which allows for the exercise of executive authority through an executive committee in which the executive leadership of the municipality is collectively vested;
- (b) section 7 (b) provides for the mayoral executive system, which allows for the exercise of executive authority through an executive mayor in whom the executive leadership of the municipality is vested and who is assisted by a mayoral committee;
- (c) section 7 (c) provides for the plenary executive system, which system limits the exercise of executive authority to the municipal council itself;
- (d) section 7 (d) provides for the sub-council participatory system, which allows for delegated powers to be exercised by sub-councils established for parts of the municipality;
- (e) section 7 (e) provides for the ward participatory system, which allows for matters of local concern to wards to be dealt with by committees established for wards.

Section 8 of the Structures Act then expands on this by outlining the 8 types of category A municipality, which are based on the five systems outlined in section 7, or a combination thereof. The types of category A municipality outlined in section 8 are as follows:

- (a) a municipality with a collective executive system;
- (b) a municipality with a collective executive system combined with a sub-council participatory system;
- (c) a municipality with a collective executive system combined with a ward participatory system;
- (d) a municipality with a collective executive system combined with both a sub-council and a ward participatory system;
- (e) a municipality with a mayoral executive system;
- (f) a municipality with a mayoral executive system combined with a sub-council participatory system;

- (g) a municipality with a mayoral executive system combined with a ward participatory system;
- (h) a municipality with a mayoral executive system combined with both a sub-council and a ward participatory system.

Section 9 of the Structures Act then goes on to do the same for the types of category B municipality. It provides for:

- (a) a municipality with a collective executive system;
- (b) a municipality with a collective executive system combined with a ward participatory system;
- (c) a municipality with a mayoral executive system;
- (d) a municipality with a mayoral executive system combined with a ward participatory system;
- (e) a municipality with a plenary executive system; and
- (f) a municipality with a plenary executive system combined with a ward participatory system.

Similarly section 10 provides for the types of category C municipality as being:

- (a) a municipality with a collective executive system;
- (b) a municipality with a mayoral executive system;
- (c) a municipality with a plenary executive system.

The sections of the Structures Act highlighted above define the different type of municipality that can be established within each category of municipality. This is done by way of national legislation in the form of the Structures Act.

Taking cognizance of the types within each category of municipality, section 10 of the Structures Act then provides that provincial legislation is to determine for each category of municipality the different types of municipality that may be established

in that category in the province. As such it is then up to the province to determine the type of municipality to be established in their provinces.

Section 155(5) of the constitution provides that provincial legislation must determine the different types of municipality to be established in the province. Section 155 (6) elaborates on this by providing that each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of the provisions outlined above. The province must by legislative or other measures provide for 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.

From the provisions of the Structures Act examined above, it is arguable that the structure, categorisation and establishment of municipalities is left solely to national and provincial government as set out in the Structures Act, and that local government's status as a distinct sphere of government is undermined. By leaving these issues to the other spheres, the notion of local government as a sphere of government is contradicted.

In addition, it also impacts on the ability of local government to meet the objectives set for it in section 151 or to structure municipalities in a way that best suits the prevailing conditions that are faced at a local level. It is argued further that by leaving the structure of local government as a matter to be decided on by the other two spheres, the ability of local government to deliver on its constitutional obligations is being jeopardized. Further, despite the constitutional guarantees for local government, it appears that the constitution and subsequent legislation issued in terms of the constitution still perceive local government as being dependent on the other two spheres of government.

Pimstone (1999, p 5A-38) argues that while provincial governments have the power to choose for their province the type of municipality from the range on offer and have the power to establish municipalities, these powers of the provinces can be rendered non-existent by broader parliamentary authority over when and where issues.

Section 12 of the Structures Act provides for the MEC for local government in the province to establish a municipality in each municipal area, which has been demarcated by the Municipal Demarcation Board. This will be done by notice in the Provincial Gazette. The Structures Act affirms the point argued by Pimstone, that the establishment of a municipality must be consistent with the provisions of the Structures Act, and as such the provincial power to choose is restricted by legislation.

The cumulative effect of these provisions, even despite the newness of the Structures Act, leaves little room for local government as a sphere of government, to determine individualized forms of local government that would best suit the conditions at the local level.

It would appear that there would be no chance of municipalities developing innovative government models. Section 160 (5) of the constitution deals with the internal procedures of a municipal council and provides that national legislation may provide criteria to determine whether municipal councils may elect an executive committee or any other committee, as well as the size of such committee. There is thus little choice that exists at the local level for municipalities to tailor a committee system to suit their needs. It is arguable that this is a direct undermining of the independence of local government as a sphere as its internal procedures, which are essentially matters which are best left to internal mechanism and dynamic to determine, are a matter which is being determined by national legislation.

Sections 33 and 79 of the Structures Act once effective will allow municipalities the “open-ended” power to determine on their executive committees and other committees, which is an important part of the internal organization of a municipal council (Pimstone, 1999, p 5A-33). This may be seen as a progressive and positive point to the Structures Act.

In terms of the Structures Act, local government may also devise variants on the committee systems, develop advisory committee’s etc. Local Government may also devise different systems of meshing the interests of elected officials and the administration through structural forms of communication and collaboration. As outlined earlier in the paper, one of the aims of democratic governance is to consult with and involve the local communities in decision-making and program implementation. It is left to local authorities to define the boundaries of such co-operation and to establish structures to encourage and facilitate the participation of the communities.

Through the provisions of the Structures Act outlined above, one can see that the Act as the legislation as envisaged by the Constitution has set out in a detailed fashion, the different types of municipality to be defined within each category, the Structures Act in section 13 provides further that in order to assist Members of the Executive Council for local government on decide which type of municipality would be best suited for a particular area, the Minister responsible for Local Government may publish guidelines in the Government Gazette, which may be taken into account when establishing a municipality or changing its type.

Chapter five of the Structures Act provides for the distribution of powers between different categories of municipality. The relevant provisions of the Structures Act will only be put into force after the local government elections.

4.3.5. SECTION 156

Section 156 deals with the Powers and Functions of Municipalities. Section 156(1) provides that :

- “ a municipality has executive authority in respect of, and has the right to administer –
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.”

Section 156(2) provides further that a municipality may make and administer by-laws for the effective administration of the matters, which it has the right to administer.

In addition, section 156(5) provides that:

- “ a municipality has the right to exercise any power concerning a matter reasonable necessary for or incidental to the effective performance of its functions. ”

This is extremely vague and does not provide much guidance. By the use of the words “effective performance of its functions” the section seems to indicate that local government has a predominantly administrative role to play, in that its role is merely administrative. If that is in fact so, then it is at odds with the whole notion of local government as a sphere and the depiction of independence that has been portrayed by the constitution.

One of the issues that also need to be addressed is what constitutes municipal power. Pimstone (1999,p 5A-34) argues that there is potential for conflict between the

definition of municipal power together with the powers in Part B to which it relates and the powers and mode of exercise provided for local government in legislation.

The problem with the legislation regarding local government is that there is no co-ordination. As such local government finds itself affected by the Transition Act, a number of provincial ordinances and their amendments as well as supplementary ordinances and Premier's Proclamations, like the Premier's Proclamation 35 of 1999 in Gauteng, and the Structures Act. Pimstone (ibid.) is unsure whether the constitution has captured both the range of powers and the manner of expression contained and presented through this amalgamation of legislation.

Section 156 (4) provides that:

- “ The national government and provincial government must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –
- (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.”

This could lead to a situation where those municipalities that have shown that they are able to administer a broader range of matters than those that have been listed in Part B will continue to exercise such power. If in that process they have struck up collaborative relationships with other spheres of government then these will be perpetuated (Pimstone, ibid.)

Schedule 4 lists the functional areas of concurrent national and provincial legislative competence, while Schedule 5 lists the functional areas of exclusive provincial legislative competence. In both these Schedules, Part B contains those matters / areas

which are identified as falling within the ambit of local government. However if one had to compare the two, they tend to vary.

Schedule 4 Part B deals with matters over which Parliament and the provinces may legislate for in, subject to the provisions of section 146. They are, therefore those areas, that need inter-governmental co-ordination for their planning and implementation. They are air pollution, building regulations, child care facilities etc.

Schedule 5 Part B, on the other hand, deals with the typical functional areas of municipalities. These include traffic and parking, cemeteries, markets, municipal abattoirs, municipal parks etc.

If one examines these two Parts B, the terminology used seems to indicate that local government is to administer the matters set out within each schedule, and that provinces are to monitor and support local government in terms on section 155 (6) (a). Further, 155 (7) gives national and provincial government the general power to see to the effective performance by municipalities of their functions in respects of Part B matters, by regulating municipal executive authority.

Pimstone is of the view (P 5A-35) that the principle that one is able to observe emerging here is one of "relative autonomy" to administer matters in circumstances where municipalities have the capacity to administer effectively. While the legislative dimension of municipalities is merely ancillary to its administrative functioning, the principle that is being endorsed protects the functional integrity of local government in line with the principles of cooperative government set out in section 41.

But the question remains of municipal power within the broader constitutional context? It appears through the examples that follow, that municipal power is severely constrained in the constitution, as opposed to that of the other spheres.

Section 156 (3) provides that municipalities cannot legislate in conflict with national or provincial legislation. This provision however is made subject to an injunction that national and provincial government may not compromise or impede on a municipality's ability or right to exercise its powers and perform its functions.

Further, section 151 (3) provides that a municipality has the right to govern on its own initiative but subject to national and provincial legislation, thereby limiting the power of local government.

Sections 157 (1) and 157 (2) and 159 provide that it is Parliament who decides on the framework for the composition, size and election of municipal councils, and not municipalities who decide on this. In addition, section 160 (1) (c) provides that it is for Parliament to decide on what the nature of municipal committees are to be, while section 160 (5) provides that it is for parliament to decide on the size of municipal committees.

Section 161 provides that provincial legislation within the framework of national legislation may provide for privilege and immunities of Municipal Councils and their members, which is essentially a matter which could be regulated on internally.

In addition, the Organized Local Government Act 52 of 1997, has determined the mechanism for recognizing national and provincial organizations representing local government and the basic mechanism of organized local government functioning (Pimstone, p 5A-36).

In terms of section 214 national legislation must provide for the equitable division of revenue raised nationally among the national, provincial and local spheres of government. In addition section 227 provides further that Local government is entitled to an equitable share of revenue to enable it to provide basic services and render its functions.

Section 215 provides for the form and timing of municipal budgeting. While section 229 provides for the determination of additional municipal revenue sources. In addition, section 230 provides the condition for the raising of municipal loans. The specifics of the financial provisions will be elaborated on later on in the paper.

The net effect of the above is that while the constitution may afford local government the status of an autonomous sphere of government, the provisions in the constitution that deal with local government have the effect of constraining the power of local government to operate autonomously.

Section 83 of the Municipal Structures Act 117 of 1998 ("Structures Act") reinforces that a municipality has the functions and powers assigned to it in terms of section 156 and section 229 of the final constitution. In section 83 (2) it provides that these powers must, however, be divided in the case of a district municipality and the local municipalities within the area of the district municipality.

Section 83(3) of the Structures Act entrusts district municipality with the responsibility of promoting the overall development of the district area. A district municipality is defined in the Structures Act as being a municipality which has municipal executive and legislative authority in an area that includes more than one municipality, and which is described in section 155 (1) of the final constitution as a category C municipality.

Section 83 (3) provides that the district municipality is responsible for:

- (a) ensuring integrated development planning for the district as a whole;
- (b) promoting bulk infrastructure development and services for the district as a whole;
- (c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and

- (d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.

Section 84 (1) of the Structures Act then goes on to provide a list of the specific functions and powers of a district municipality. The list is quite extensive and includes the bulk supply of water and electricity, bulk sewage purification works, municipal health services, fire fighting and other such services. It appears from these provisions that district municipalities have an important role to play in the daily affairs of local municipalities.

In terms of section 84 (2), a local municipality, on the other hand, is vested with all the “general” local government functions in terms of section 156 and section 229 of the final constitution, excluding, however, the powers and functions that have been allocated to the district municipality under which it falls. A local municipality is defined in the Structures Act as being a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls, and which is described in terms of section 155 (1) of the final constitution as a category B municipality. At the same time, nothing prevents the local municipality from performing the functions and exercising the powers of the district municipality in its area, as provided for in section 84(3). Should there be any possible disputes, these would then be resolved by the MEC for local government in the province in terms of section 86.

Jaap Visser of the Local Government Law Project, University of the Western Cape (Local Government Law Bulletin, vol. 1, no 3, p 11) makes the observation that one of the most interesting provisions of chapter five of the Structures Act is section 87.

Section 87 provides that:

“ if the provision of basic services by a district or local municipality collapses or is likely to collapse because of that municipality’s lack of capacity or for any other reason, the MEC for local government in the province may, after written notice to the district or local council and with immediate effect, allocate any functions and powers necessary to restore or maintain those basic services, to a local municipality which falls within that district municipality or to the district municipality in whose area that local municipality falls, as the case may be.”

Visser is of the view that section 87 seems to serve a similar function to section 85. Section 85 provides for the adjustment of the division of functions and powers between district and local municipalities if one of them is incapable of performing a function or exercising a power as set out in the Structures Act.

By comparison, section 87 as outlined above, allows for an ad hoc intervention in the case of a collapse / likely collapse in basic service provision by a municipality. Section 85 seems more structural and long term.

Visser (ibid. p 11) is of the view that what section 87 allows for is actually a form of intervention into the affairs of a municipal council. This, he adds is, borne out by the fact that the temporary allocation in terms of section 87 can be taken on review by the affected municipalities. Section 87 falls within the ambit of section 155 (3) (c) of the final constitution, which provides that national legislation should make provision for the division of powers and functions, and allows for a temporary reallocation of division of powers and functions within the sphere of local government.

By comparison to the provincial intervention envisaged in terms of section 139 of the final constitution, (which is discussed in greater detail in chapter 7

of this paper), section 87 of the Structures Act provided that it is not used in a way that has a destabilizing effect on local government in the province, may be seen as a measure having fewer consequences for the institutional integrity of local government than section 139 of the final constitution.

The Municipal Systems Bill, 1999 (“Systems Bill”), in Chapter Four deals with Municipal Functions and Powers. This chapter of the Systems Bill, if approved as an Act, will assist in clarifying the role of the executive authority of municipalities. Section 15 of the Systems Bill provides for the manner in which a municipality exercises its executive authority. This includes developing policy, implementing legislation, promoting and undertaking social and economic development.

While the final constitution provides for the national legislative process in sections 73 – 82 and for the provincial legislative process in chapter six, it does not do the same for local government. Chapter seven provides in section 151 (3) that the legislative authority of a municipality vests in its municipal council and in section 156 (2) that a municipality may make and administer by-laws which are necessary for effective administration of the matters which it has the right to administer.

The Systems Bill in section 16 prescribes extensive provisions on municipal legislative procedures. This includes that a by-law may not be passed unless it has been published for comments by the public and all members of council must have had been given reasonable notice thereof. In addition, a by-law must be made a decision taken by a municipality, in accordance with the rules and orders of the council and with a supporting vote of a majority of its members.

The Systems Bill in section 19 also provides that a municipality must compile and maintain all its by-laws, regulations and other legislative instruments. This compilation of documents is to be known as the municipal code and is to be kept at the municipality's head office.

While the final constitution provides in section 156 the constitutional powers and functions of municipalities, the Structures Act provides for the division of powers and functions between councils, thereby establishing which entities are responsible for achieving the constitutional objectives set out in section 156. The Systems Bill is then the detail that is needed which allows for the functioning of the council to achieve the constitutional objectives set for it.

The concern in local government however is whether the sector is ready for the functional change that will be ushered in by the Systems Bill. While the bigger local authorities are capacitated in terms of infra-structure and staff and in some instances are in the process of preparing for the Structures Bill, the same cannot be said for the smaller local authorities. Specific concerns are around the preparation and adoption of Integrated Development Plans, which will rationalise the system of municipal planning into a single comprehensive five-year cycle.

These disparities need to be taken account of as they affect the ability of local government as a sector from delivering on its constitutional obligations. There is a greater role that can be played within the sector by organised local government, SALGA, and the bigger local authorities in assisting and supporting the smaller local authorities. This could include internship programs, mentoring, on site-training etc.

CHAPTER FIVE

CO-OPERATIVE GOVERNMENT

Section 154 deals with Municipalities in Co-operative Government. The section provides that 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 perform their functions. Despite the provisions outlined above, which advocate the autonomy of local government, local government still remains subject to the other levels of government and under their control.

The constitutional obligations that have been placed on national and provincial government in this section have to be read in conjunction with the principles of co-operative government as set out in Chapter Three of the Constitution, which deals with co-operative government.

Chapter three recognizes the mutual dependence of the spheres and obliges them to relate to each other with cooperation, consensus and co-ordination. Section 41 sets out the principles of co-operative government and inter-governmental relations.

Section 41 provides that all spheres of government and all organs of state within each sphere must –

- (a) preserve the peace, the national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;

- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) 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; and
- (h) co-operate with one another in mutual trust and good faith by --
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of and consulting one another on matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.

Pimstone (*ibid.*, p 5A-28) correctly observes that Chapter three is a recognition of the complexity of the modern government, the existence of concurrent powers among spheres of government and inter-governmental competition in general. Chapter Three may also be seen as a necessity to have been included by the drafters to the constitution to avoid any particular sphere dominating over the other spheres.

However, local government finds itself in a precarious position in the co-operative government arena, as its powers cannot be termed as concurrent with the other spheres. While chapter three may offer some level of protection to local government and has contributed to elevating its status as a sphere of government, it places an obligation in section 41(2) on Parliament to legislate for the establishment or provision of structures and institutions to promote and facilitate inter-governmental relations and also to provide mechanisms to settle disputes. Should Parliament fail to act soon enough on this issue, it may leave the constitutional commitment to co-

operative government without any institutional mechanism which would be able to support it, and inevitably this could run the risk of the more powerful spheres of government being more dominant.

Nonetheless, it is imperative to note the importance that the constitution has placed on inter-governmental relations. According to De Villiers, p 473, the importance given to inter-governmental relations by the constitution in section 41 (2), is unique in terms of comparative constitutions. De Villiers points out that while inter-governmental relations are commonly known in all federal and many unitary dispensations, the institutions and practices which form the basis for inter-governmental relations are normally not created or even required by the national constitution, and in this way the South African constitution is unique.

Getting back to the chapter on local government, there are a number of provisions within this chapter that compel national and provincial government to support and assist local government. Section 154(1), as indicated above, provides that national and provincial government are to support and strengthen the capacity of local government to manage its own affairs. This support function is elaborated on in section 155 (6), which provides that provincial governments are to monitor and support local governments in their province and are also to promote the development of local government capacity to enable municipalities to perform their functions and manage their affairs.

Section 155 (7) then goes further to provide that national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions.

Pimstone (*ibid.*) draws one's attention to the fact that the Transition Act in section 10M has incorporated feature of co-operative government. It recognizes, however, that the principles of co-operative government should encourage communication and

co-ordination between municipal structures themselves and not only between the spheres of government.

The Constitutional Court in the Certification judgment, has considered what the terms “support”, “strengthen”, “promote” and “monitor” mean in terms of how they are used in relation to local government. It has held that the term “support” was not insubstantial and referred to strengthening existing local government structures, powers and functions, the point really being to prevent the decline of local government.

The court held further that “promote” included a more dynamic legislative and executive role and was not purely administrative. In so far as “monitoring” was concerned, the court held that it was an underlying power from which the other supporting, strengthening and promoting powers emerged. It referred to measuring at intervals local government’s compliance with directives that have been placed on it.

The Constitutional Court in re: Certification of the Constitution of the Republic of South Africa, 1996 10 BCLR 1235 (CC) explained the nature of the relationship between national and provincial government to local government:

“What the new structure seeks hereby to realize is a structure for Local Government that, on the one hand, reveals a concern for the autonomy and integrity of Local Government and prescribes a hands-off relationship between Local Government and other levels of Government and on the other, acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.”

If one looks further on at section 154(2) there is a duty on national and provincial government to publish legislation that affects the status, institutions, powers or

functions of local government. Such legislation must be published in a manner that will allow organized local government, municipalities and other interested parties an opportunity to make representations regarding the draft legislation.

The very notion of organized local government is based on consultation. Organized local government is seen, in section 163 of the constitution, as having a role in the process of elevating the status of local government to that of a sphere of government. Section 163 provides that an Act of Parliament must:

- (a) provide for the recognition of national and provincial organizations representing municipalities; and
- (b) determine the procedures by which local government may –
 - (i) consult with the national or provincial government;
 - (ii) designate representatives to participate in the National Council of Provinces; and
 - (iii) nominate persons to the Financial and Fiscal Commission.

It appears from section 163 that Organized Local Government has a role to play in other areas as well. If one reads section 163 as outlined above with section 67, the role of Organized Local Government is further expanded on.

Section 67 allows for a maximum of ten part-time representatives nominated by organized local government to represent the different categories of municipalities. These individuals may participate in the proceedings of the National Council Of Provinces, but may however not vote. The net effect of this is that Organised Local Government will have a minute say in the determination of matters at a national legislative level where provincial and local interests intersect.

The inclusion of local government at the legislative level has been reputed to mark South Africa's model of co-operative government as being unique (Pimstone, P 5A-31).

De Villiers (ibid., p 472) is of the view that the combination of section 67 and section 163 puts organized local government in a unique capacity to participate directly in the affairs of the national parliament to represent the interests of their members.

The criticism that can be leveled against this however is that by allowing local government to sit in at the legislative level but only at level where it will have a small say, defeats the constitutional recognition of local government as a sphere of government.

Further section 163 allows for two nominees from Organized Local Government to serve on the Financial and Fiscal Commission ("FFC"). The FFC has important recommendatory powers in respect of legislation, these are set out in the constitution.

They are as follows:

- Section 214 (2) provides that an Act of Parliament must provide for the equitable share of revenue raised nationally among national, provincial and local spheres of government, the determination of each province's equitable share, and any other allocations to provinces, local government or municipalities. The section goes further in respect of local government in that it provides that consultation is to occur not only with the FFC but with organized local government and provincial governments as well;
- Section 218 (1) provides that national legislation must set out conditions under which national government, provincial government or a municipality may guarantee a loan;

- Section 228(2) provides for an Act of Parliament to be passed that deals with the power of a provincial legislature to impose taxes, levies, duties or surcharges;
- Section 229, which deals with Municipal revenue powers and functions and provides for national legislation to be passed. Hereto national legislation may only be enacted after consultation with FFC as well as Organised Local Government and the provinces has occurred;
- Section 230 which provides for national legislation to set conditions under which a municipality or province may raise loans for capital or current expenditure.

The net effect of the above provisions for local government, is that organised local government has a say in financial matters which are of relevance to it. This could further be seen as a safeguard, in that it recognizes how important these pieces of legislation are to the effective functioning of local government. Pimstone (ibid., p. 5A-31) adds that stripped of much “surplusage”, this type of legislation is one of the key-expressions of the national-municipal relationship. One is also able to gather that the importance of these provisions confirms the point that municipal financial capacity is of fundamental importance to the effective functioning of local government.

The Organized Local Government Act 52 of 1997 has been passed as required by section 163. This legislation, however, focuses primarily on the formal requirement of Organized Local Government and its participation at the National Council of Provinces and at the level of the FFC. The legislation appears to merely present a broad framework for Organised Local Government, and seems to fall short of section 163 (b)(I), which requires that the legislation should set out the procedures by which local government would consult with national and provincial government. Pimstone (ibid., p 5A-32) has suggested that Parliament could have used this opportunity to

design a more comprehensive inter-governmental plan in one piece of legislation, despite the fact that local government is still in a transitional phase.

The reality on the ground is that co-operative government at present is not working very well. Co-operative government predominantly works between national and provincial relations, to the exclusion of local government. In the main, the two forums at which organized local government participates with the representatives from the other spheres of government is at two of the Minmec, namely the Housing Minmec and the Local Government Minmec. Local government does not play a role in the workings of the Technical Intergovernmental Committee and the Intergovernmental Forum.

In a discussion with a member of one of the provincial associations, the predominant view was that there was a far greater role that could be played by both national and provincial government in developing the capacity and financial viability of local government. It was the official's impression that despite the constitutional elevation of the status of local government, the other spheres of government continued to "patronize" local government.

It would also appear that despite the constitution's elevation of the status of local government, the constitution affords local government a voice that does not have to be heeded, in that organized local government need only be consulted with. As such the advisory / consultative powers afforded to organized local government will vary per situation.

It would appear that there is a lot that could be done to enhance the existing system of co-operative government. The Constitution presents a framework within which co-operative government is to take place. That in itself is progressive. In Austria, for example, the national parliament is also under a

constitutional obligation to consult with local government, but even in that particular case the local governments are not directly represented in the national *Bundesrat* (second house) (De Villiers, *ibid.*, p 473). In Belgium, here are no formal institutions where local and provincial governments meet, the *geweste*'s do not have their own constitution. Although close links exist between organised local government, the *geweste* and the national government, there is no formal institution in which they meet. It seems that there is a trend for local government to be represented by organised local government at a national and provincial level. This may be because the individual municipalities do not have the capacity or resources to do it on represent themselves at a national and / or provincial level on their own.

In respect of local government specifically the constitution talks of the other spheres having to support, strengthen, promote and monitor local government. This support could range from the mere assessment of local government meeting the developmental objectives set out for it to its most extreme form which could include municipal functioning being taken over. It appears though, that the intention of the constitution is to ensure the enhancement of municipal integrity.

All larger European countries have secondary levels of local government, in which more than one municipality meets to co-ordinate their activities, initiate policy and administer legislation (De Villiers, *ibid.*, p 484). In Germany local governments are organised in sub-*Lander* units which are called *Kreise*, these are regulated in terms of the *Lander* legislation. The *Kreise* are part of local government. They are responsible for co-ordinating functions between local governments that cannot be managed but individual local authorities due to the nature of the functions, example water clearing operations.

In Austria, the constitution was amended in 1984 to provide for (484) the formal establishment of co-operative structures between local governments called, Local Government Associations / *gemeindeverbände*. This is not a fourth level of government, it is merely an extension of the local level.

In Belgium, the constitution provides that local government (De Villiers, *ibid.*, p485) and the provinces may create associations called *intercommunales*. These are not separate levels of government but are merely extensions of the local level. The establishment of *intercommunales* is based on a federal act of 1986, which provides that public law associations can be created between municipalities on a voluntary basis with the aim of facilitating co-operation in the field. In essence these *intercommunales* strive towards solidarity and cooperation amongst municipalities. In all three countries provision is made for local government to co-operate with each other in areas of mutual concern. One should however be cautious of creating super structures, which inevitably end up eroding the powers of primary local government structures.

An additional dimension to cooperative government will be added when the Systems Bill is passed. Chapter two, section three of the Systems Bill provides a framework for support, monitoring and intervention by other spheres of government in order to progressively build local government into an efficient agency that is able to fulfill its constitutional obligations in terms of the delivery of services. The purpose of the framework is also to avoid any possible duplication of existing support systems.

CHAPTER SIX

FINANCIAL MATTERS

Chapter thirteen of the constitution deals with Finance. Section 213 provides for a national revenue fund into which all money received by the national government must be paid. This, however, excludes money reasonably excluded by an Act of Parliament.

Section 214 deals specifically with the equitable share and allocations of revenue. It provides:

- “ An Act of Parliament must provide for –
- (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
 - (b) the determination of each provinces equitable share of the provincial share of that revenue; and
 - (c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue and any other conditions on which those allocations may be made. ”

Pimstone (*ibid.*, p. 5A-40) argues that section 214 is a provision, which is largely determinative of the capacity of the municipal sphere to engage intergovernmentally and to fulfill the social and economic responsibilities which define its governmental role.

In essence, section 214 provides for Parliament to provide for an equitable share of revenue raised nationally, among national, provincial and local spheres of government. Section 214 provides further that it is up to

parliament to determine additional allocations to local government as a whole or to specific municipalities.

Section 214 (2) elaborates further by providing that the Act envisaged in 214(1) may be enacted only after consultation with provincial governments, organized local government and the Financial and Fiscal Commission have been consulted.

Section 214(2) also makes the passing of the envisaged legislation contingent on the consideration of at least 10 stipulated criteria, which are:

- (a) the national interest;
- (b) any provision that must be made in respect of the national debt and other national obligations;
- (c) the needs and interest of the national government, determined by objective criteria;
- (d) the need to ensure that the provinces and the municipalities are able to provide basic services and perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the provinces and municipalities;
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among provinces;
- (h) obligations of the provinces and municipalities in terms of national legislation;
- (i) the desirability of stable and predictable allocations of revenue shares; and
- (j) the need for flexibility in responding to emergencies or other temporary needs and other factors based on similar objective criteria.

If one looks at the above criteria, it appears that numerically they are weighted in favour of provincial and local governments. Pimstone (*ibid.*, p. 5

A-40, footnote 2) is of the view that in all probability, the national interest as a single consideration will overwhelm consideration of either of the other two spheres.

In 1998 the Department of Finance produced a document entitled The Introduction of an Equitable Share of Nationally Raised Revenue for Local Government. The document established a process for the introduction of an equitable share of revenue and a mechanism for the division of revenue.

The rationale behind the document was:

- the constitutional obligation for there to be a vertical division of revenue between national, provincial and local government, and specifically the equitable share of revenue to which local government is entitled, and
- secondly, the fact that the existing system had had a negative impact on the financial performance of local government and this was a key contributing factor to the difficulties that municipalities found themselves in. It was therefore critical that a system for dividing transfers between municipalities be re-organised, this referred then to the horizontal division of revenue.

The reality at the time was that most transfers to local authorities were via provincial governments. However, provinces did not use the same criteria on which to base their allocations to local authorities. As such, there were numerous problems with the system, some of which are highlighted below.

Due to the apartheid policies, not all local authorities were treated equitably. In the past, only the former white local authorities enjoyed subsidies for fire brigades, library services and disaster management. This clearly represented the skewed allocation of support for local authority functions. While some provinces had attempted to allocate grants on a poverty based formulae,

these were inconsistent, and often allocated on arbitrary grounds. It appeared at the time that some provinces only allocated grants on the basis of emergency support, this then tended to reward poor financial performance of local authorities.

The grant system was neither uniform, nor was it based on a set formulae, and as such was open to manipulation, as such grant flows were often ad hoc and unpredictable. This had the effect of undermining effective budgeting and constrained municipalities borrowing capacities.

There was no uniform approach to the manner in which transfers were made from sub-structure to sub-structure within a metropolitan council, this then led to the situation where transfer if they did occur were on an ad hoc basis and were allocated on an arbitrary basis.

The basis of the restructuring of the system of central-local transfer was set by the following 4 central objectives:

1. equity, in that the transfer should promote the constitutional and governmental goal of ensuring equitable services to everyone;
2. efficiency, in that a new transfer system should promote allocative efficiency by ensuring that inter-jurisdictional fiscal competition is an effective check on fiscal performance;
3. spill-over effects, in that the new system needed to fund projects which had strong spill-over effects, which would benefit over across municipal boundaries;
4. facilitating democracy, in order for local authorities to fulfill their roles they require a minimum level of institutional and physical infrastructure. A new transfer system should enable municipalities to build or to acquire the necessary capacity to fulfill their roles.

In addition, in order for the new system of transfers to meet its goal it needed to ensure that:

- the level and distribution of the transfer were rational and well-grounded so as to promote the goals of equity;
- any unintended consequences should be limited, so as not to create any perverse incentives like in the past;
- transfers should be predictable, simple, transparent and promote accountability so as to avoid corruption or an abuse of the system;
- transfers were politically acceptable, and support institution building at the local level.

The document then sets out 4 programs with accompanying formulas, these are:

1. a Municipal Basic Services Program to ensure that poor residents in all local government areas receive access to basic municipal services;
2. a Tax Base Equalisation Transfer Program, which was intended to promote the efficient allocation of households, capital investment and labour within the major economic centers of the country;
3. a Municipal Institutions Transfer Program, was addressed at those jurisdictions which lack the administrative capacity to raise their own revenue and lack the infra structure to function as a local authority;
4. a Matching Transfer, which was intended to assist communities to provide essential infrastructure for services which create significant positive economic spill over for residents of other communities.

The equitable share for local government is a matter that was left to the Minister of Finance to define as well as the criteria on which it should be allocated, in accordance with the process laid down by the *Intergovernmental Fiscal Relations Act*.

The new system of transfer, would be where the equitable share of revenue will flow directly from national to local government. This would be done according to the objective formulae that embody the principles highlighted above. This new system is reputed to reorganize the fiscal flow of municipalities. It does not add significantly to them. It should be borne in mind, that municipalities raise 90% of their income from their own revenue sources. The system is thus not aimed at solving the financial problems faced by local government. Instead it is aimed at enabling municipalities to operate sustainably and deliver services to the communities (Circular on Equitable Share, Department of Finance).

In the 1997/1998 budget process was prepared under the authority of the Interim Constitution. This was due to the lengthy budget cycle and the fact that the final constitution was adopted in December 1996 but only took effect on 03 February 1997. In this budget process, the transfers to local government were included in the global allocation for provinces (Circular on the introduction of the equitable shares, Department of Constitutional Development). At the time, under the interim constitution, local government was a functional responsibility of provincial government. In terms of the intergovernmental fiscal relationship, transfers to local government were to be made via the provinces.

The 1998/1999 budget process was the first budget to be approved under the new constitution. In effect, the 1998 constitution marks the introduction of an equitable share of revenue for local government and gives effect to the new framework of relations between national, provincial and local government.

The reorganisation of local government since 1994 has been accompanied by major developments in the budget preparation and formulation process.

With the introduction of an equitable share in 1998/1999 both local and provincial spheres of government now receive an equitable share of nationally collected revenue. Objective formulae are used to divide these shares between provinces and municipalities to address goals of equity and redistribution. Both spheres also receive conditional and other grants from national departments to support expenditure in areas of national concern e.g. specialized health services and municipal infrastructure.

The Intergovernmental Fiscal Relations Act 97 of 1997 (*“the Fiscal Act”*) came into effect on 1 January 1998. The Fiscal Act deals with intergovernmental budget issues. The Fiscal Act aims to give effect to section 214 of the constitution, which has been highlighted above. Part Three of the Fiscal Act does this by setting out the process for revenue sharing in sections 9 and 10.

Section 9 of the Fiscal Act provides that at least 10 months before the start of each financial year, the Financial and Fiscal Commission must submit to Parliament and the provincial legislatures, for tabling in the houses and the legislatures, and also to the Minister of Finance, recommendations for that financial year regarding:

- (a) an equitable division of revenue raised nationally, among national, provincial and local spheres of government;
- (b) the determination of each province’s equitable share in the provincial share of that revenue; and
- (c) any other allocation to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations should be made.

The Fiscal Act provides further that in making these recommendations, the Commission is to take account of section 214 (2) (a) – (j) of the constitution.

Section 10 of the Fiscal Act provides that each year when the Annual Budget is introduced, the Minister of Finance must introduce in the National Assembly a Division of Revenue Bill for the financial year to which the budget relates. Section 10 (2) provides further that the Division of Revenue Bill must specify:

- (a) the share of each sphere of government of the revenue raised nationally for the relevant financial year;
- (b) each province's share of the provincial share of that revenue;
- (c) any other allocations to the provinces, local government or municipalities from the national government's share of that revenue and any conditions on which those allocations are or must be made.

It should be noted that neither the constitution nor the Fiscal Act requires that the division of the local government share between municipalities be detailed.

In addition, prior to tabling the Division of Revenue Bill, the Minister of Finance is to consult with the provincial government, local government as well as the Commission. The consultation envisaged here promotes co-operative government as set out in section 41 of the constitution.

To facilitate such consultation the Fiscal Act establishes the Budget Council in Part One of the Fiscal Act.

The Budget Council is a body in which the national government and the provincial government consult on:

- (a) any fiscal, budgetary or financial matter affecting the provincial sphere of government;
- (b) any proposed legislation or policy which has a financial implication for the provinces, or for any specific province or provinces;

- (c) any matter concerning the financial management or the monitoring of the finances of the provinces, or any specific province or provinces;
 - (d) any other matter which has been referred to it by the Minister of Finance.
- Part B, section 5 of the Fiscal Act establishes Local Government Budget Forums. The Forum consists of the Minister of Finance, the MEC Finance for each province, five representatives nominated by the national organization recognized in terms of the Organized Local Government Act, 1997 and one representative from each provincial organization recognized in the aforementioned Act. The forum is to consult on:
- (a) any fiscal, budgetary or financial matter affecting the local sphere of government;
 - (b) any proposed legislation which has a financial implication for local government;
 - (c) any matter concerning the financial management or the monitoring of the finances of local government;
 - (d) any other matter which the Minister of Finance has referred to the Forum.

The Minister of Finance in his 1998/1999 budget speech expressly points out that in order to comply with the constitution and the Fiscal Act, he tabled the Division of Revenue Bill, which set out how national revenue would be divided between the three spheres of government in 1998/1999. An explanatory memorandum accompanied the Bill. This too is in compliance with section 10 (5) of the Fiscal Act. The Minister indicated in his speech that the funds to be allocated to the three spheres are calculated only after first setting aside enough to pay the interest cost on the nation's debt and a contingency reserve.

In the 1998/1999 budget, provinces received R 79,1 billion, plus various conditional grants. This had the effect of raising the provincial grants to over R 90 billion. The Conditional grants were aimed at addressing specific purposes. The equitable share, however, was specifically to address the question of equity. Local government's equitable share in the 1998/1999 budget amounted to R 1,0 billion (1998 Budget speech delivered by Minister Trevor Manuel)

The 1999/2000 budget is the first time that the Fiscal Act was fully implemented. The Explanatory memorandum on the Division of Revenue Bill makes the significant point that the division of revenue follows the principle that funds should follow functions and is informed by the responsibilities of each sphere, their capacity to generate revenue to meet those obligations and the work of intergovernmental forums. The equitable share reflects the relative priority of and demand for the services for which each sphere is responsible.

The shares allocated to each sphere are a political judgment made by Cabinet. A consultative process generates the information on which this judgment is made. The following factors are taken into account when the judgment is made:

- the expenditure responsibilities of each sphere, as determined by the constitution;
- the ability of each sphere to fund its responsibilities by raising revenues;
- national priorities;
- recommendations and analysis of key sectors by the Medium Term Expenditure Framework review teams;
- analysis by each sphere of the implications of baseline allocations;

- the delivery implications of alternative levels of funding and policy options.

All of the above information is reviewed and discussed at intergovernmental meetings, like the Budget Council, the Budget Forum and Minmec's, before a final proposal is made to Cabinet and to Parliament (Annexure E of the 1999/2000 Budget Speech – An Explanatory Memorandum on the division of revenue). As such, in reality, the relative priorities of each of the functions performed by the three spheres are a political choice.

Local Government is viewed in the Explanatory memorandum as being responsible for the provision on municipal infrastructure and basic services such as electricity, water, sanitation and refuse removal. Local government is largely self-funded through property taxes, regional levies and user charges. As it is self-funded it receives the smallest equitable share (Explanatory memorandum on the division of revenue_ http://www.finance.co.za/budget_99/nat/review/annex_e)

The Explanatory memorandum does indicate, however, that different municipalities have different tax bases. This then affects their respective abilities to deliver services and also to raise revenue. The point of the equitable share as envisaged by national government is that it is to ensure that all municipalities are able to deliver a basic package of services to all households, equitably.

The 1999/2000 budget allocates an amount of R 1 673 million as the equitable share for local government. In addition, there are conditional grants in the amount of R 643 million for local government. The conditional grants are largely to support the provincial staff in the R293

towns, which are towns in the former homeland areas. As the personnel from the R293 towns were funded by the provinces, they needed to be transferred to municipalities. As this had not occurred in the 1998/1999, the Minister of Constitutional Development and the Budget Forum agreed that funds would have to be allocated through both the equitable share and conditional grants, so as to accommodate the transition in local government.

Of the equitable share of R1 673 million, R447 million would go to the R293 towns to fund the provision of services. The remaining R 1 226 million would be distributed between other municipalities, based on the formula, which has the following two components:

1. a municipal basic services transfer to enable all municipalities to deliver basic services to poor households, based on an average cost per person;
2. a municipal institutions transfer to provide the minimum resources necessary to maintain basic facilities for the operation of local government.

In addition to the equitable share and the conditional grants indicated above, local government will also receive allocations in the amount of R 1 965 million directly from national government and through provincial governments. This amount includes R695 million for the Consolidated Municipal Infrastructure Programme, R 136 million for urban renewal projects and R429 million for water subsidies.

While there are those in the local government and in provincial associations who are of the view that the equitable share allocated to local government is sufficient for local government to be able to deliver on its priorities, officials at a national level in the Department of Local and

Provincial Government are of the view that the money allocated to local government is sufficient, and especially since local government raised 90% of its revenue on its own. The view, it seems, is that the financial problem in local government was not that local government was not being allocated enough money to fulfill its role, but that municipalities were negligent in the handling of their financial issues, and their negligence contributed to the financial decline of local government.

In addition, at a national level, the view is that sufficient support is being rendered to local government to assist in its development. On the other hand at the grassroots levels, the view in local government is that there is a lot more that national and provincial government could do to support local government and assist in its transformation.

Section 227 provides for the municipal entitlement to an equitable share. It provides that local government:

- “ (a) 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
- (b) may receive other allocations from national government revenue, either conditionally or unconditionally”.

Section 227 (a) expressly links local government’s entitlement to an equitable share to its obligation in terms of the constitution to provide basic services and to perform the functions allocated to local government.

This is an important point, and bears out the criteria of service provision and function performance as set out in section 214 (2) (d). These criteria are fundamental and underlie many of the municipal obligations outlined in chapter seven of the constitution.

While section 227 (2) provides that any additional revenue raised by local government will not be deducted from their equitable share, it does however state that there is no obligation on national government to compensate municipalities that do not raise revenue commensurate with their fiscal capacity and tax base. Pimstone (*ibid.*, p 5A-41) argues that this provision is a constitutional expression of the need to take measures to attain fiscal self-sufficiency where possible. In addition, it may be seen as enhancing the point that national government will not bail out local government if it is financially in jeopardy, as they may have done in the past.

Section 227 (3) goes on to provide that a provinces equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216. Section 216 is the section, that provides for treasury controls. It provides further that national treasury, with the concurrence of the cabinet member responsible for financial matters, may stop the transfer of funds to any organ of state only for serious or persistent material breach of the established national treasury measures.

It is strange, however, that section 227 (3) provides only for the prompt transfer of funds to provincial government and not to local government. Pimstone (p 5A-41) is not clear as to whether the omission of an equitable share to local government is significant, for it must always be implicit that such a transfer be effected within a reasonable time. There is, nonetheless, a constitutional obligation on national government to transfer funds to local government for it to function effectively.

It is imperative to the delivery of local government's constitutional obligations of social and economic development that it be financially able to

do so. The fiscal capacitation of local government, even though it is from national government, is a confirmation of municipal integrity in that it recognizes that local government as a distinctive sphere of government has its own constitutional obligations to fulfill.

Pimstone (*ibid.*, p 5A-21) cautions, however, that the realistic considerations of municipal self-sufficiency need to be taken into account. He adds further that the inflexibility of the municipal revenue base and the enormity of municipal constitutional obligations are counter-considerations of much significance. Based on these points, Pimstone then asserts that the discrepancies highlighted between municipal capacity and the fiscal capacitation needs of municipalities will compel local government to exploit the system provided by section 214, maximally through the Finance and Fiscal Commission and through Organised Local Government.

But this point could be counter argued in that, despite the consultation opportunities afforded via organized local government and the Finance and Fiscal Commission, local government has very little influence. If one looks at the Fiscal Act, which is intended to provide for an intergovernmental fiscal framework, it does not seem to provide positively for local government.

The Fiscal Act separates the discussion over the division of revenue, by providing the budget council as a forum in which national and provincial government make contact. This is done to the exclusion of local government from participating in the council. After these deliberations have been conducted, representatives from national government and from provincial government then sit in the Local Government Budget Forum to discuss local government fiscal matters.

It should be noted that, when discussing local government fiscal matters all three spheres of government are present. Nothing prevents decisions which are made at the Budget Council from being imported into the Budget Forum and thereby being imposed on local government. This, then, brings in to question how independent local government really "is", if it has a minimal say in the decisions relating to its fiscal capacitation, which, as indicated above, is fundamental to it fulfilling its constitutional obligations.

Pimstone (*ibid.*, p 5A-42) adds to this point by illustrating that the scheme of the Fiscal Act has been repeated in the Division of Revenue Acts 28 of 1998 and 30 of 1999, which were tabled by the Minister of Finance when he delivered his budget speeches of 1998 and 1999.

In the 1998/1999 local government's equitable share allocation was R 1 024 000 000. This was comparatively lower than that of national government that was allocated R 78 456 862 000 and provincial government that was allocated R 79 117 435 000. Of the total set aside for equitable share allocation in the 1998/1999 budget only 1% of the total revenue available for equitable share was allocated to local government.

By comparison, the 1999/2000 budget allocated a higher equitable share to local government, in the amount of R 1 673 000 000 than to national government who received R 80 833 276 000 and provincial government that received R 84 201 709 000. Despite the rise in the allocation to local government, it still remained barely 1% of the revenue allocated for equitable distribution.

Even though, in each of these Division of Revenue Acts, local government was allocated large conditional allocations, the issue really is that if the equitable share is allocated on the basis of the prioritization of needs what is

being said by allocating only 1% of the total revenue set aside for equitable allocation to local government. By leaving the allocation of the equitable share as a political judgment, despite the factors that need to be taken into account when making that judgment, there is always the likelihood that the allocations of the equitable share will not be as envisaged, but rather as demanded for politically.

It appears that despite the constitution's elevation of local government to a sphere of government, the support that is expected from the other spheres in ensuring the independent status of local government is not being given as expected. In addition, then it would also seem that the issue of co-operative government as envisaged in section 41 would be under threat if the other spheres of government failed to correctly discharge their responsibilities towards local government.

CHAPTER SEVEN

SECTION 139

Despite the constitutional guarantee in section 41 that each sphere is to respect the constitutional status of the other spheres, and that each sphere should exercise its powers without encroaching on the geographical, functional or institutional integrity of the other spheres, section 100 allows for the intervention by national government into the affairs of provincial government while section 139 allows for the intervention by provincial government into the affairs of local government.

The basis of the section 139 intervention by provincial government into local government is to be found in section 155 (6), which provides that:

- “ Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted ...and by legislative or other measures, must –
- (a) provide for the monitoring and support of local government in the province”

Section 139 of the constitution provides that where a municipality cannot or does not fulfill an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation. The steps that may be taken include:

- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary –

- (i) to maintain essential national standards or meet established minimum standards for the rendering of services;
- (ii) to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole;
- (iii) to maintain economic unity.

Section 139 essentially has two components to it. These are the express process of provincial review of the actions of local government in order to measure the fulfillment of its executive obligations and the process of correction should local government fall short of its obligations.

Section 139(1) allows for provincial intervention when a municipality fails to fulfill an executive obligation. Executive obligations are obligations that are based in legislation. These would include the Constitution, Acts of Parliament, provincial legislation and municipal by-laws. Sub-ordinate legislation like national and provincial regulations, which are also legislation, would be relevant here. Excluded from this list are directives and standing orders. It would thus be implied that when a provincial executive intervenes it would have to indicate what executive obligation had not been fulfilled by the municipality.

Around March 1998, the Eastern Cape Provincial Executive intervened in the Butterworth Transitional Local Council. The intervention was based on section 139 of the constitution. The reason for the intervention as stated in the directive was that the Butterworth Local Council had failed to comply with the provisions and/or underlying values and principles of the constitution.

From the above case, and from the provisions of section 139 it is clear that it is the failure of the municipality that will lead to a section 139 intervention.

In terms of the constitution, the council is the highest authority in the municipality, hence the province would direct any wrong doings to the council, so that it can be rectified. The focus of the section 139 intervention is an inquiry into the conduct of a municipal council, whether directly or indirectly. Further in terms of a council's failure to perform, a failure to meet minimum standards may give rise to a section 139 intervention.

Before a province can intervene it needs to exercise its discretion in terms of the procedures and rules set out in section 139, and this should be done with due regard for the autonomy of local government.

Section 139 (2) provides for the procedure after intervention. It provides that if a provincial executive intervenes in a municipality in terms of section 139 by assuming responsibility for the relevant obligation then:

- (a) the intervention must end unless it is approved by the Cabinet member responsible for local government affairs within 14 days of the intervention;
- (b) notice of intervention must be tabled in the provincial legislature and in the National Council of Provinces within 14 days of their respective first sittings after the intervention;
- (c) the intervention must end unless it is approved by the council within 30 days of its first sitting after the intervention began; and
- (d) the council must review the intervention regularly and make any appropriate recommendations to the provincial legislatures.

In the case of Butterworth, the provincial executive called upon the councilors to be relieved of their functions and duties, section 139 does not authorize a province to do so. Section 139 is concerned with the non-fulfillment of an executive obligation and is not concerned with the municipality's legislative authority.

In this case, the National Council of Provinces, although it approved the intervention into Butterworth set out terms with which the intervention had to comply, and empowered the administrators to assume executive and functional responsibility in 3 specified areas:

1. Provision of basic services:
 - This included that services such as water and electricity supplies had to be restored
2. Financial management:
 - This related to the collection of rated, fees, service charges and other money due and owing to the council;
 - Ensuring that the municipality met its financial obligations;
 - Ensuring that the municipality complies with section 10 G of the Transition Act.
3. Administrative procedures
 - This was to ensure compliance with policies and procedures for the use of the assets of the municipality;
 - Ensuring use of those assets for their lawful purpose;
 - Ensuring that the municipality's affairs are conducted in an open, transparent and responsible manner.

The intervention by the Eastern Cape Provincial Executive into Butterworth had the effect of enquiring that services returned to an acceptable level and there seemed to be no serious complaints about the municipality. Had there not been an intervention in terms of section 139 into Butterworth, the chances were that the municipality could have been ruined. There are those who see the merit of the section 139 intervention as being an intervention based solely on strengthening municipalities, there are others however who believe that section 139 impedes on the autonomy of local government. For Butterworth

it seems that had there not been the section 139 intervention, the likelihood the municipality collapsing was a very real possibility.

From the Butterworth Intervention, as the first such intervention in terms of section 139, two important notes emerged. The first significant point being the assumption of responsibility for a municipality's obligations by a province cannot effect the legislative capacity of that municipality. As a sphere of government, a municipality's legislative capacity is prevented from being affected. Secondly, the role of the National Council of Provinces should be emphasized in section 139 interventions. In this case the NCOP took its responsibility to review this intervention seriously. The NCOP is mandated by the constitution to supervise, this operates at two levels, not only must the NCOP assist the province in creating workable terms for the intervention as well as clarifying the role of the province, but the NCOP must also protect local authorities from interventions that are arbitrary or beyond the reach of what the constitution sets out to achieve.

Similarly in 17 February 1999, the provincial executive of the Northern Cape Province intervened into the Warrenton municipality, which was in a financial crisis. Warrenton council had debtors at over R 9 million and outstanding creditors at over R 1,75 million, an overdraft of R 1 million had been exceeded and the council was unable to pay its staff salaries for 2 months. The council was unable to generate its own revenue and Eskom had cut off the electricity supply due to non-payment. This, for the Provincial Executive of the Northern Cape, was sufficient to warrant an intervention in terms of section 139.

The NCOP approved the intervention on the prescribed terms similar to those prescribed for Butterworth. It provided additionally, that:

- the town clerk must co-operate fully with the administrator and render all reasonable assistance to the administrator in the carrying out of his/her functions;
- the executive of the council and the administrator must meet once a week to discuss matters of mutual interest;
- the administrator and the councillors must carry out their respective duties in a co-operative manner.
- Councillors remain competent to carry out their legislative functions.

When the NCOP delegation visited the municipality, it appeared that one of the main problems there was the lack of skilled capacity. Since the intervention, the situation at the municipality appeared to have improved. A report was submitted by the administrator, Mr. Marais, approximately 5 months after the intervention (Local Government Law Bulletin, vol. 1, no.2, July 1999). The administrator appeared to be confident that since the intervention had started the municipality was able to fulfill its executive obligations and in that way the aim of the intervention was achieved. Once again, it appears that section 139 was successful in preventing the municipality from being ruined.

Section 139(3) provides that national legislation may regulate the process established by section 139 of provincial intervention into local government.

From the two case studies, the Local Government Project Community Law Center at the University of the Western Cape (Local Government Law Bulletin vol. 2, July 1999, p 12) suggests that any forthcoming legislation in terms of section 130 should be informed by the following three principles:

1. the assumption of responsibility is a measure of last resort;

2. the integrity of local government as an independent sphere protects municipalities from provincial interference with its legislative functions;
3. the aim of the intervention should be restorative and not punitive.

In essence the section 139 interventions are aimed at strengthening and supporting local government. While some might argue that section 139 interventions impede on the autonomy of local government as an independent sphere of government, others may counter argue that section 139 is an attempt to balance the autonomy of local government as a sphere with ensuring municipalities which are efficient and delivering on their obligations (good local government at a local level).

There is, however, clearly a need for the requirements for a section 139 intervention to be objectified. In addition, section 139 makes use of terms like “essential national standards” and “minimum requirements” without defining what these are. These concepts would need to be clarified in order for section 139 to be used effectively.

It could be argued that due to the current problems that local government faces, section 139 will continue to be used for those municipalities, which cannot or do not fulfill an executive obligation in terms of legislation. As local government as a sector begins to develop and take more responsibility for itself, ensures that its people are skilled and have the necessary capacity to manage local government effectively, is financially more viable, the instances of section 139 interventions will decrease. One could infer further that there is a tacit obligation on local government to assume responsibility for itself in order to ensure its autonomy. As such, as much as the responsibility of the transformation of local government is dependent on co-

operative government, it primarily requires local government to assume some level of responsibility for itself.

CHAPTER EIGHT

CONCLUSION

Local Government in South Africa is going through a fundamental transformation. It is being transformed from the hand-maiden of the apartheid government, where it was responsible for implementing apartheid at a local level, to a sphere of government whose status is protected by the constitution. Local government has been charged by the constitution with delivering on a set of constitutional imperatives which will provide democratic and accountable government for the local communities.

The process of change for local government has been a complex one, ridden with confusion and complexity. Despite the complexity, it has been evident throughout that there was a common understanding amongst all stakeholders about the fundamental transformation of local government and the elevation of its status to a sphere of government. The current system of local government is suffering from serious structural deficiencies, which need to be addressed in order to build the foundation for a developmental new system of local government.

The constitutional status of local government is materially different from what it was under the apartheid regime. In that particular era, where Parliament was supreme, the powers and the very existence of local government were left entirely to superior legislatures to determine. Local government was essentially a responsibility of the provinces. As indicated in the paper, the implication of this was that local government could have been terminated at any time. In terms of the new constitution, local government

has been afforded a space in the constitutional order of the country and is seen as an independent sphere of government.

However it should be pointed out that the constitution is merely the broad framework for local government and the powers and functions of local government have been left to national legislation to determine. This is in line with what CP XXIV aimed to achieve. There are those who argue that by leaving the powers and functions to national legislation, the autonomy of local government is severely undermined. There are others who believe that this is necessary. Unlike the other two spheres which have enjoyed constitutional recognition and status under previous South African constitution, local government did not. It is thus necessary for the structure, and functioning of local government to be set out by national legislation, to accord with the constitutional status of local government. By implication, therefore, one would expect that national legislation would reinforce and protect the autonomy of local government, through legislation. The exploration undertaken in this paper, concludes that there is a severe between the autonomous vision of local government and the subsequent provisions that deal with local government. This is to be found within the constitution as well as in national legislation, like the Structures Act and the Systems Bill.

The question that needs to be answered is, is local government truly autonomous? In light of the issues highlighted in the paper, it would appear that to say that local government is truly autonomous is a misnomer. The Structures Act, the Demarcation Act and the Systems Bill are the three pillars on which the transformation of local government in the final phase is truly dependent. In essence, these 3 pieces of legislation will complete the process of reforming the entire overall regulatory system of local government and will enable local government to repeal virtually the entire body of legislation

and provincial ordinances inherited from the apartheid era (Mettler, J, Sept 1999,p 1).

Despite the obligations that have been placed on local government in terms of section 152 and 153 of the final constitution, local government ability to deliver on these obligations is limited by section 156, as well as Schedules 4 and 5 which specifically seem to list a predominantly administrative function for local government. This administrative depiction contradicts the vision of developmental local government, and the notion of local government as a sphere. It may be argued further that by indicating a predominately administrative role for local government, the constitution not only defeats its own aim of elevating the status of local government but contradicts its notion of local government as a sphere of government as indicated in chapter three.

It appears that the constitution sets out an idealized vision for local government. Section 151 refers to local government as a sphere of government, yet the sections that follow in chapter seven cripple that very vision of local government as a sphere of government. This is done by allocating to local government functions, which are predominantly administrative. Local government in terms of section 156(1), has the right to administer those matters listed in Schedules 4 and 4, in Part B. and to make and administer by-laws for the effective administration of these matters.

In addition, chapter seven by leaving the detail of local government to be provided through national and sometimes provincial legislation, and by section 154 could be seen as still retaining local government's dependency on the other two spheres of government, and in this way undermining the independence and autonomy of local government.

This point is further borne out after having examined section 155 which leaves the typology of local government as a matter to have been decided on by Parliament. The Structures Act, is clear that provinces have the autonomy to choose the type of municipalities which can be established in their provinces. It can be argued that by leaving the structure of local government within each province to the provincial government, the autonomy of local government as a sphere of government is being undermined. As such local government despite its distinctiveness, does not enjoy the power to develop the structure of its municipalities.

It may be argued that there is a gap / void between the vision of local government as set out in the constitution and the reality of how local government issues are being dealt with by the legislature in terms of legislation like the Structures Act, by government in terms of the small equitable share allocation given to local government despite its developmental priorities and the emphasis which has been placed on the delivery of basic services.

There appears to be this dichotomy between local government as envisaged in the constitution and local government as it evolves through the provision of the constitution. This dichotomy needs to be addressed as a matter of priority. There are those who believe that after the forthcoming municipal elections, local government will have to assume a more progressive role so as to give effect to the notion of developmental local government, and that this will be done in terms of the regulatory framework set by the Systems Bill.

It is feared by others that local government is not in a position financially, in terms of its infra-structure or capacity to be able to deal with the Municipal Systems Bill or to be able to deliver in terms of the regulatory framework which is envisaged in terms of the Systems Bill.

Municipal power as indicated in section 156 (5), indicate a predominant administrative role for local government. In addition, chapter 4.3.5 has indicated the point that municipal power as set out in the constitution is severely constrained within the constitution itself. This further enhances the point that there appears to be an inconsistency in the vision that the constitution has set for local government and the subsequent provisions that are found in the constitution relating to local government.

It is however evident that the constitutional and legislative provisions on their own are not sufficient to ensure the empowerment and development of local government in South Africa. It is fundamental to the success of the transformation and development of local government that legislative and other support mechanisms be put in place that will allow for the success of local government.

It goes without saying that the ideals embodied in the constitution may fall short of what will transpire in reality. The constitutions of Germany, Austria and Belgium are not as detailed as that of South Africa's, but they have in their practice shown a high degree of tolerance towards the view of local government (De Villiers, p 473), perhaps South Africa can learn from their practical experience to the benefit of the development of local government here.

Despite the constitutional imperative of co-operative government, the reality on the ground seems to be that there is a lack of a structured relationship between provincial local government associations and the provinces. To avoid this from situation from becoming a problem in the Eastern Cape, the Eastern Cape Local Government Association (ECLGA), Executive Council of the Eastern Cape and the Provincial Legislature who on 15 April 1999,

signed a memorandum of understanding on intergovernmental relations. For the signatories to this memorandum this is the first step towards formalizing co-operation in intergovernmental relations between the provincial and local spheres by way of legislation. The initiative taken in this province is commendable, and in fact gives effect to chapter three of the final constitution. It would defeat the purpose of chapter three of the final constitution, if other provinces fail to fulfill their role of supporting and strengthening local government.

An important element of the autonomy of local government, is the ability of local government to assume responsibility for its own transformation. There is a simultaneous obligation on local government to move away from its past dependence on the other spheres. As much as the responsibility of the transformation of local government is dependent on co-operative government, it primarily requires local government to assume some level of responsibility for itself. This will also include organised local government, SALGA, the bigger local authorities supporting and strengthening the smaller / weaker local authorities.

The relative success of the new system of local government depends largely on its financial viability. Given the current financial crisis that local government finds itself in it needs in addition to the revenue it can raise locally additional financial assistance from the other spheres so that its financial resources should be commensurate with the responsibilities and obligations that have been placed on it by the constitution. There is however also an imperative placed on local government to begin to raise a greater amount of revenue locally as this will ensure that the financial independence of local government. The equitable share allocation that has been made to local government over the past two years, has been merely 1% of the total revenue set aside for equitable share allocation. This is indicative of the fact

due to local government's ability to raise 90% of its revenue on its own, it is being expected to largely be responsible for itself. The point of the equitable share allocation to local government, as envisaged by national government, is to ensure that all municipalities are able to deliver a basic package of services to all houses equitably. The criticism that has however been leveled against national government is that the 1% of the total allocation of equitable share revenue to local government is not sufficient to meet this obligation. This brings into question national government's commitment towards supporting local government.

The interrogation of section 139 of the constitution seems to indicate that despite the constitutional recognition of local government as a sphere of government, local government is not really an equal partner in government. Section 139 could potentially have severe impact on the institutional integrity of local government. It is thus imperative once again that necessary support through legislative and other measures be put in place to ensure that the integrity of local government as a sphere of government is protected from provincial interference with its legislative functions.

The South African constitution boasts that by it conferring the status of a sphere of government to local government in the final constitution, it truly reflects South Africa's democracy. Yet without the necessary support structures through legislation, financial support, support from other spheres of government local government's "elevated" status will be purely on paper. As indicated earlier, local government also has a role in assuming greater responsibility for its own transformation. This needs to be emphasised. A large part of the transformation process is about breaking the shackles of the dependence of local government on the other spheres, once this has been done, local government will be said to be autonomous.

The next round of local elections is due to take place later this year. It will mark the introduction of the final phase of local government transformation in South Africa, in which the provision of the final constitution will be effective. While the constitution has provided the framework within which the final phase of local government transformation will occur, to a large extent this phase depends on the Demarcation Act, Structures Act and Systems Bill to reform the overall regulatory system of local government.

Despite the complexity surrounding the structure and functioning of local government, it is an undisputed fact that local government has the potential to fundamentally transform South African society and ensure better quality of life for its citizens.

President Thabo Mbeki in his address to the SADC countries at the Local Government Conference held in Johannesburg on 30 July 1999 envisaged that :

“Local Government should be a dynamic system of governance whereby power resides with the people of that locality and the municipalities themselves the hands and feet of government as a whole.”

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